EFiled: Dec 29 2024 02:13PM EST
Filing ID 75329301
Case Number 268,2024

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DWAYNE L. PEARSON, Defendant-Below, Appellant v. STATE OF DELAWARE Plaintiff-Below, Appellee.	)	No. 268, 2024

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

APPELLANT'S REPLY BRIEF

NICOLE M. WALKER [#4012]
Office of Public Defender
Carvel State Office Building
820 N. French Street
Wilmington, Delaware 19801
(302) 577-5121

Attorney for Appellant

DATED: December 29, 2024

TABLE OF CONTENTS

Page

TABLE OF CITATIONS ii

ARGUMENT

I. **NO RATIONAL TRIER OF FACT COULD FIND DWAYNE GUILTY BEYOND REASONABLE DOUBT OF SEXUAL ABUSE OF A CHILD BY A PERSON IN A POSITION OF TRUST, AUTHORITY OR SUPERVISION AS THE STATE FAILED TO PROVIDE SUFFICIENT EVIDENCE THAT HE WAS A PERSON IN A POSITION OF TRUST, AUTHORITY OR SUPERVISION PURSUANT TO 11 DEL. C. §761 (e).**.....1

II. **THE PHRASE "PERSON IN A POSITION OF TRUST" DID NOT GIVE DWAYNE, A MAN OF ORDINARY INTELLEGENCE, A FAIR WARNING FOR PURPOSES OF CONVICTION OF SEX ABUSE OFFENSES ENHANCING HIS PENALTIES. THUS, SECTION 761 IS UNCONSTITUTIONALLY VAGUE AS APPLIED TO HIM AND HIS RIGHT TO DUE PROCESS WAS VIOLATED.** 7

Conclusion.....9

TABLE OF AUTHORITIES

Cases:

Grace v. State, 658 A.2d 1011 (Del.1995).....7

Kolender v. Lawson, 461 U.S. 352 (1983).....7

PharmAthene, Inc. v. SIGA Techs., Inc., 2011 WL 6392906,
(Del. Ch. Dec. 16, 2011) 2

State v. Baker, 720 A.2d 1139 (Del. 1998) 7

Zaman v. Amedeo Holdings, Inc., 2008 WL 2168397,
(Del. Ch. May 23, 2008) 2

Statutes:

11 Del. C. §761 (6) (e) (2).....passim
11 Del. C. §761 (6) (e) (7).....passim

I. NO RATIONAL TRIER OF FACT COULD FIND DWAYNE GUILTY BEYOND REASONABLE DOUBT OF SEXUAL ABUSE OF A CHILD BY A PERSON IN A POSITION OF TRUST, AUTHORITY OR SUPERVISION AS THE STATE FAILED TO PROVIDE SUFFICIENT EVIDENCE THAT HE WAS A PERSON IN A POSITION OF TRUST, AUTHORITY OR SUPERVISION PURSUANT TO 11 DEL. C. §761 (e).

The State accurately recites the trial court's decision that made no finding with respect to §761 (6) (e) (2), made no finding under §761 (6) (e) (7) that Dwayne "*assume[d] responsibility*, whether temporarily or permanently, *for the care or supervision of a child or* children;" and made no finding that Dwayne was in a position of trust based on some other criteria.[1] The State is wrong, however, in its assertion that Dwayne "fundamentally misapprehends" that §761 (6) (e) is "exemplary and not exclusive." [2]

While the State is not required to set forth in the indictment the specific subsection upon which it relies, failure to do so contributes to the uncertainty with which the jury is left. Thus, one must look to the jury instructions and the State's closing argument to determine the basis of the State's allegation that Dwayne was in a "position of trust." The State agrees that the prosecutor argued Dwayne's guilt under §761 (6) (e) (2) and §761 (6) (e) (7), as well as some unlisted basis pursuant to the phrase, "included but not limited to."[3]

---

[1] State's Ans. Br. at pp. 13-14.
[2] *Compare* State's Ans. Br. at p. 18 *with* Op. Br. at 14, 24.
[3] State's Ans. Br. at p. 19.

There Was Insufficient Evidence That Dwayne Was A Person In A Position Of Trust, Authority Or Supervision Over A Child As Defined By §761 (6) (e) (2).

As an initial matter, the State is wrong in its contention that it did not waive this issue simply because the prosecutor mentioned the subsection in response to Dwayne's oral motion. It failed to respond to the thorough written motion on this issue submitted following trial.[4] It was that set of pleadings upon which the trial court based its decision. Fundamental fairness requires a finding of waiver here as Dwayne was entitled to sufficient notice of the State's argument.[5] The State's response most assuredly guided the trial court's decision. And, the trial court did not make a finding with respect to §761 (6) (e) (2).

Now, on appeal, the State spills 5 ½ pages of ink making a legal argument it had the opportunity to, but failed to, make below.[6] Accordingly, it cannot make any such argument now.

---

[4] *Zaman v. Amedeo Holdings, Inc.*, 2008 WL 2168397, at *32 (Del. Ch. May 23, 2008) (finding a party's failure to respond to an argument or raise it in any post-trial briefing to be a waiver).

[5] *PharmAthene, Inc. v. SIGA Techs., Inc.*, 2011 WL 6392906, at *2 (Del. Ch. Dec. 16, 2011) ("[T]hat a party waives any argument it fails properly to raise shows deference to fundamental fairness and the common sense notion that, to defend a claim or oppose a defense, the adverse party deserves sufficient notice of the claim or defense in the first instance.").

[6] State's Resp. Br. at pp. 20-25.

Assuming, *arguendo*, this Court does choose to consider whether Dwayne was in a position of trust as defined in §761 (6) (e) (2), it must conclude that there was insufficient evidence in the record to support a finding of guilt under this subsection.

On appeal, the State claims that Dwayne "provid[ed] instruction and educational services to [M.M.] on firefighting." The record simply does not support that claim. While he "invited M.M. to accompany him into a burning building during training," nothing indicates that he provided her with instruction or training at that time. There is no evidence whether others, including a trainer, were in the building as well. In fact, her mentor and the chief of the Belvedere fire department were present.

The record also fails to support any claim that Dwayne provided M.M. with instruction or training on the day he provided coverage at the Mill Creek fire department. Nothing points to the role he played that day other than to cover for other firefighters. But, more significantly, there is no evidence that he interacted with M.M. in any way other than socially.

The State erroneously claims that Dwayne was M.M.'s mentor because she admired him, he made her feel special and she thought of him as a potential mentor. This claim rests on the rationale that subjective beliefs, rather than actual facts, establish that an adult is in a position of trust.

The State also claims that Dwayne could be found guilty as an "invitee or designee of a person who stands in a position of trust…" While the jury instructions defined "a person in a position of trust," the judge did not define "invitee or designee." While that is not dispositive, no direction for making a finding on this fact was available to the jury. And, finally, there is no evidence that Garone or anyone in M.M.'s chain of command abdicated any supervision of M.M. to Dwayne.

Therefore, to the extent Dwayne's sex abuse convictions are based on a finding that he was in a position of trust, authority or supervision pursuant to §761 (6) (e) (2), they must be vacated.

There Was Insufficient Evidence That Dwayne Was A Person In A Position Of Trust, Authority Or Supervision Over A Child As Defined By §761 (6) (e) (7).

The State presented no evidence that, *because of* his volunteer service, Dwayne "ha[d] regular direct contact" with M.M. and "*assume[d] responsibility*, whether temporarily or permanently, *for [her] care or supervision"* as required to satisfy §761 (6) (e) (7). The State is simply wrong in its assertion that Dwayne "assumed responsibility for M.M. due to his profession, avocation, and volunteer service."[7] The State erroneously presumes that Dwayne "took responsibility for her care and supervision at the

[7] State's Resp. Br. at p.26.

joint training when they went in the burning building and, again, when he was at the Mill Creek fire house. There is no evidence to support this claim. The evidence reveals only that their interactions were social in nature.[8]

That Dwayne was acting in his official capacity when interacting with M.M. is not dispositive of whether he was in a "position of trust" for purposes of §761 (6) (e). While that fact may be dispositive in an employment claim, it is not dispositive here absent a showing that he "assume[d] responsibility, whether temporarily or permanently, for the care or supervision of M.M."[9] Here, the State failed to make that additional showing under §761 (6) (e) (7).

With respect to the trial court's decision, the State is correct that it set out the proper definition of a "position of trust" pursuant to §761 (6) (e) (7). However, it did not include the key phrase "for the care of supervision of a child or children" in its analysis and made no finding with regard to whether Dwayne was responsible for such care or supervision.[10] Therefore, to the extent Dwayne's sex abuse convictions are based on a finding that he was in a position of trust, authority or supervision pursuant to §761 (6) (e) (7), they must be vacated.

---

[8] A60-64, A66-67.
[9] A173.
[10] *Id.*

There Was Insufficient Evidence That Dwayne Was A Person In A Position Of Trust, Authority Or Supervision Over A Child Under Any Definition Not Expressly Listed In §761 (6) (e).

The State quibbles with Dwayne's characterization of the "included, but not limited to" language as a "catch all" phrase. This argument is of no consequence. Dwayne acknowledges that a jury could find that a defendant is in a position of trust based on circumstances not specifically set forth in §761 (6) (e) (1) – (7). However, as Dwayne explains in his opening brief, in this case, the jury was allowed to conjure up any irrational basis to find that he was in a position of trust because there are no guidelines as to what circumstances it should consider in making its decision. And, it is unknown what basis the jury did rely upon.

Therefore, to the extent Dwayne's sex abuse convictions are based on a finding that he was in a position of trust, authority or supervision pursuant to any definition of a position of trust pursuant to the catch all phrase in §761 (6) (e), they must be vacated.

II. THE PHRASE "PERSON IN A POSITION OF TRUST" DID NOT GIVE DWAYNE, A MAN OF ORDINARY INTELLEGENCE, A FAIR WARNING FOR PURPOSES OF CONVICTION OF SEX ABUSE OFFENSES ENHANCING HIS PENALTIES . THUS, SECTION 761 UNCONSTITUTIONALLY VAGUE AND HIS RIGHT TO DUE PROCESS WAS VIOLATED.

The State erroneously characterizes Dwayne's argument as requiring that a "statute where all possible classes of people who could possibly be in a position of trust, authority or supervision must be listed."[11]His actual argument is that when the statute provides "including, but not limited to," it must also provide "minimal guidelines" that can be said to prevent arbitrary and discriminatory enforcement of the law.[12] Here, no such guidelines exist.

The State's claim that the jury received guidance through "two examples" listed in the instruction is off base.[13] Sections 761 (e) (2) and (e)(7) were alternative means for finding that Dwayne was in a position of trust, not as examples of additional means by which it could find him guilty. There was no guidance as to the circumstances the jury must consider in determining whether he was in a position of trust beyond the two alternatives listed. In

---

[11] State's Resp. Br. at p. 37.

[12]*State v. Baker*, 720 A.2d 1139, 1148 (Del. 1998). *Grace v. State,* 658 A.2d 1011, 1015 (Del.1995) (quoting *Kolender v. Lawson,* 461 U.S. 352, 357 (1983)) (internal quotations omitted). See *Baker*, 720 A.2d at 1148.

[13] State's Resp. Br. at p. 37.

that context, the catch all phrase, "includes but is not limited to," creates a dangerously large net for law enforcement.[14]

In our case, there is no way to know how large the net was cast. The State did not allege in the indictment the nature of the purported trust relationship between Dwayne and M.M. And, because the jury's finding is undisclosed, there is no way to know how the jury reached its decision.

Here, because the jury was permitted to come up with its own category of person of trust, without direction, it was compelled to create a definition of which Dwayne had never been given fair notice as constitutionally required. Thus, there can be no confidence that the State proved Dwayne guilty of the sex abuse offenses beyond reasonable doubt.

Accordingly, to the extent any of Dwayne's sex abuse convictions are based on a finding that he was person in a position of trust not specifically listed within § 761, those convictions are void for vagueness and must be vacated.

---

[14] *Id*.

CONCLUSION

For the reasons and upon the authorities cited herein, Pearson's conviction of one count of sexual abuse of a child by a person in a position of trust, authority or supervision, second degree and two counts of sexual abuse of a child by a person in a position of trust, authority or supervision, first degree must be vacated.

Respectfully submitted,

/s/ Nicole M. Walker
Nicole M. Walker [#4012]
Carvel State Building
820 North French Street
Wilmington, DE 19801

DATED: December 29, 2024