

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001093-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE HENRY M. GRIFFIN III, JUDGE
ACTION NOS. 01-CR-00148 & 01-CR-00190

MARTHA FAYE PORTER

APPELLEE

OPINION

REVERSING and REMANDING

** ** * * *

BEFORE: EMBERTON, CHIEF JUDGE; BARBER AND DYCHE, JUDGES.

EMBERTON, CHIEF JUDGE. Martha Faye Porter was indicted with a total of eight counts of complicity to use a minor in a sexual performance after she allegedly posed nude in photographs with a fifteen-year-old girl, B. M. After the Commonwealth and Porter entered into a stipulation of fact, the trial court dismissed all counts. The Commonwealth appeals.

The trial court properly summarized the stipulation as follows:

1. The defendant did not take the photographs. "The photographs were taken by Mark Fantini. Mr. Fantini provided the camera, film, operated and controlled the camera, and told Martha Porter, [the Defendant], and B. M., [the minor], how to pose for the photographs." Fantini pled guilty and received a sentence of thirty-five (35) years in prison on related charges.
2. "Martha Porter did not solicit or encourage, or make any attempt to assist Mark Fantini in taking photographs of B. M. or in gaining her consent to pose in any photographs.
3. Martha Porter did not provide alcohol to B. M.
4. "Martha Porter never touched B. M. and B. M. never touched Martha Porter."
5. B. M. states that the inducement to pose for the photographs was "all Mark [Fantini]."

The trial court found that, as a matter of law, KRS¹ 531.310 requires an overt act that encourages the use of a minor in a sexual performance and that merely posing nude is insufficient to establish the offense. In light of the stipulated facts, the court held that Porter did not commit the crimes for which she was indicted and dismissed the charges.

The Commonwealth initially argues that the trial court had no authority to dismiss the charges. We disagree. A summary judgment procedure is not authorized in a criminal

¹ Kentucky Revised Statutes.

procedure.² However, if the Commonwealth stipulates facts which, as a matter of law, exonerate a defendant, a motion to dismiss the charges is proper. Under such circumstances, delaying dismissal until the commencement of trial and a proper motion for directed verdict would be a waste of the public's resources as well as an expensive and time consuming event for the innocent defendant.

We agree with the Commonwealth, however, that the stipulated facts did not completely exonerate Porter. While it is stipulated that she did not solicit, encourage, or assist in the actual taking of the photographs, it is undeniable from the photographs that she posed nude with the minor. KRS 531.310(1) does not require that the accused take some affirmative action. As explained in Holbrook v. Commonwealth:³

We are in agreement with appellee that "consent to" or "authorize" as used in the statute does not require an affirmative act to cause Diaz [the minor child] to participate in the movie. To employ or to induce a minor to engage in the performance of sexual acts would necessitate such an affirmative act; however, the definition of the offense is not limited to such affirmative acts. The fact that appellant was an actor in the movie and engaged in the sexual acts with the minor is evidence of consent, and his direction of the movie and control of the film apparatus is abundant evidence of authorization.

² Commonwealth v. Hayden, Ky., 489 S.W.2d 513 (1972).

³ Ky. App., 662 S.W.2d 484, 488 (1984).

KRS 502.020(1) provides a person is guilty of complicity when he:

- (a) Solicits, commands, or engages in a conspiracy with such other person to commit the offense; or
- (b) Aids, counsels, or attempts to aid such person in planning or committing the offense; or
- (c) Having a legal duty to prevent the commission of the offense, fails to make a proper effort to do so.

The stipulation does not state that Porter did not consent to the use of the minor in the photograph or to the child's exploitation. Although the Commonwealth may be limited to establishing at trial that Porter either consented to or authorized the use of the minor in the photographs, such proof would be sufficient to support a conviction.⁴

Porter contends that the term "consent" requires that she be legally authorized to consent to the use in the photographs of the specific minor involved. We do not believe that under Holbrook, the statute can be so narrowly construed. Although unclear in that case whether the accused had any legal authority over the minor involved, the court focused not on the accused legal status in relation to the child, but on the accused's consent to the use of a minor in a sexual performance.

⁴ Id.

Specifically, when referring to the issue of consent, the court held the accused's participation in the movie and performance of sexual acts is evidence of the accused's consent. Although in this case the photographs do not depict Porter engaged in an explicit sexual act with the minor, the poses are graphic and display, in a vivid manner, sexual parts of her body and those of the child. A reasonable jury could find that Porter consented to the use of the minor child in the photographs.

We find that the stipulation alone does not, as a matter of law, require dismissal of the charges. Although bound by its own stipulation of fact, the Commonwealth is entitled to present its case after which, if the trial court finds there is insufficient evidence to support a guilty verdict, a directed verdict would be proper.⁵

Finally, we make no comment as to whether the photographs are obscene because the trial court, basing its decision on the stipulated facts, declined to address the issue. Without graphically detailing the pictures' contents, we are convinced, however, that they present a factual issue to be presented to the jury.

The order is reversed and the case remanded for trial.

⁵ Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991).

ALL CONCUR.

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