

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

THE STATE OF OKLAHOMA,)
)
 Appellant,)
)
 v.)
)
 STEPHEN LEE TERRY,)
)
 Appellee.)

NOT FOR PUBLICATION

Case No. SR-2003-276

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

MAR 8 0 2004

MICHAEL S. RICHIE
CLERK

OPINION

LILE, VICE PRESIDING JUDGE:

Stephen Lee Terry was charged with one count of Indecent or Lewd Acts with a Child Under Sixteen, 21 O.S.Supp.1999, § 1123, in the District Court of Oklahoma County Case No. CF-2000-1727. Terry filed a motion to quash and dismiss the Information alleging, generally, that his acts did not constitute a crime under § 1123.

The Honorable Virgil C. Black, District Judge, at a pre-trial hearing, ruled in favor of Terry and ordered that the Information be dismissed. The State, taking exception to the Trial Court's ruling, announced its intent to appeal the ruling pursuant to 22 O.S.1991, §§ 1053 (1) & (4).

The State's proposition is that the trial court erred in ruling that defendant's acts did not constitute a crime under Section 1123, and consequently dismissing the Information. The State claims that the trial court

erred in relying on an unpublished opinion wherein this Court stated that these types of crimes should be reviewed on a case by case basis.¹

In appeals prosecuted pursuant to 22 O.S.1991, § 1053, this Court reviews the trial court's decision to determine if the trial court abused its discretion. . . . An abuse of discretion has been defined as a conclusion or judgment that is clearly against the logic and effect of the facts presented. . . .

State v. Love, 1998 OK CR 32, 960 P.2d 368, 369 [internal citations omitted]

We find that the trial court did not abuse its discretion in granting the motion to quash and dismiss in this case. The facts are that Appellee was caught secretly video taping young girls, between the ages of eight and twelve years old, at Celebration Station in Oklahoma City. He admitted that he watched the video tapes for sexual gratification. The video tape contained only images of fully clothed girls. The tape was preserved for this Court's review.

The elements necessary to prove Appellant guilty of violating 21 O.S.Supp.1999, § 1123 are: (1) the defendant was at least three years older than the victim; (2) who knowingly and intentionally; (3) looked upon, touched, mauled or felt; (4) the body or private parts; (5) of any child under sixteen years of age; and (6) in a lewd or lascivious manner. In this case the issue is whether element number four is present.

¹ Unpublished opinion *Robinson v. State*, Court of Criminal Appeals Case No. F-98-724.

To be criminal under § 1123 a defendant must have looked upon the child's body or private parts. We believe the pairing of the word "body" with the term "private parts" indicates the legislature intended something more than the act of filming clothed girls in a public location. Even though Appellee may have had lascivious intent and his actions may offend common decency, the actions are not a crime under this statute.

We, therefore, AFFIRM the decision of the trial court in this case.

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OPINION BY: LILE, V.P.J.

JOHNSON, P.J.: CONCURS
LUMPKIN, J.: CONCURS
CHAPEL, J.: CONCURS
STRUBHAR, J.: CONCURS

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