Superior court of the State of Delaware

FRED S. SILVERMAN JUDGE

NEW CASTLE COUNTY COURTHOUSE 500 North King Street, Suite 10400 Wilmington, DE 19801-3733 Telephone (302) 255-0669

September 7, 2012

Annemarie Hayes, Esquire Deputy Attorney General Carvel State Office Building 820 North French Street Wilmington, DE 19801

Thomas A. Foley, Esquire 1905 Delaware Avenue Wilmington, DE 19806

RE: *State v. Eli Rodriguez ID # 1202022354*

Upon Defendant's Motion to Dismiss – DENIED.

Dear Counsel:

Defendant allegedly was in his thirties when he had sexual intercourse with the fourteen-year-old prosecutrix. Accordingly, the State indicted Defendant for second degree rape, alleging the intercourse was "without her consent." Defendant now draws a distinction between the statutory phrases "unable to consent to a sexual act," and "without consent." Defendant contends that besides the female's youth and the age difference, the State must also prove Defendant compelled the child to submit by an act of coercion, force, gesture, threat, etc., or, Defendant acted in a way

¹ 11 *Del.C.* § 772 (a)(1).

² 11 *Del.C.* § 761 (K).

³ 11 *Del.C.* § 761 (j).

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that satisfies 11 Del. C. § 761 (i)(1)-(5)'s conditions.

Specifically, Defendant contends:

Common sense and simple logic would dictate that the General Assembly, in imposing a minimum 10 year level V sentence for Rape 2nd, did NOT intend to include the Statutory Rape scenarios, typically charged as Rape Fourth Degree or Rape Third Degree.

The law does not tolerate parsing a child's mind set. When it comes to sex between a fourteen-year-old and an adult, it cannot be said the victim was willing. The age difference is inherently coercive. Otherwise, the fact that the law gives the State discretion to charge a less serious offense is not a logical imperative for reading an additional element into a prosecution under 11 Del. C. § 772 (a)(1).⁴

For the foregoing reasons, Defendant's motion to dismiss - **DENIED**.

IT IS SO ORDERED.

Very truly yours,

/s/ Fred S. Silverman

FSS: mes

oc: Prothonotary (Criminal)

⁴ State v. Waters, 2008 WL 4382801, (Del. Super. May 30, 2008)(Silverman, J.)(citing, Johnson v. State, 925 A.2d 504 (Del.2007)(TABLE)).