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Carla Bender
4th District Appellate
Court, IL

2019 IL App (4th) 180719-U

NO. 4-18-0719

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

In re K.S., a Minor	)	Appeal from the
	)	Circuit Court of
(The People of the State of Illinois,	)	McLean County
Petitioner-Appellee,	)	No. 17JD93
v.	)	
K.S.,	)	Honorable
Respondent-Appellant).	)	J. Brian Goldrick,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Presiding Justice Holder White and Justice Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court reversed, concluding the State failed to prove beyond a reasonable doubt respondent committed the alleged offenses as it did not present sufficient evidence to show respondent was under 17 years of age at the time the misconduct occurred.

¶ 2 The State filed a petition for adjudication of wardship alleging respondent, K.S., was a delinquent minor because he committed the offenses of aggravated criminal sexual assault (720 ILCS 5/11-1.30(b)(i) (West 2012)) and aggravated criminal sexual abuse (720 ILCS 5/11-1.60(c)(2)(i) (West 2012)). The petition specifically alleged respondent committed the misconduct when he was under 17 years of age.

¶ 3 During the adjudicatory hearing, the State did not present any evidence of respondent's age. The trial court found respondent committed acts of sexual penetration and

sexual conduct against a minor who was under nine years of age but "there [was] insufficient evidence to establish [respondent's] age." The court stated, however, it would reserve its "final ruling" to allow counsel to review the evidence presented and point to any evidence of respondent's age or to provide case law refuting the court's analysis. The State later filed a written motion to reopen its case to present evidence of respondent's age. Over respondent's objection, the court granted the State's motion.

¶ 4 Upon reopening its case, the State requested the trial court take judicial notice of its petition for adjudication of wardship and noted to the court the birth date of respondent was alleged therein. The court took judicial notice of the petition and made a finding of fact as to respondent's date of birth. Based on its prior findings and the new evidence presented, the court found the State proved beyond a reasonable doubt respondent committed the alleged offenses. The court adjudicated respondent delinquent, made him a ward of the court, and placed him on probation until his 21st birthday, with certain terms and conditions.

¶ 5 Respondent appeals, arguing (1) the trial court violated his constitutional right to be protected from double jeopardy by allowing the State to reopen its case after the court found the State had not proven an element of each alleged offense beyond a reasonable doubt, (2) the State failed to prove beyond a reasonable doubt he committed the alleged offenses as it did not present sufficient evidence to show he was under 17 years of age at the time the misconduct occurred, and (3) one of the conditions of his probation is unconstitutional as written. We find respondent's second argument persuasive and reverse.

¶ 6 I. BACKGROUND

¶ 7 A. Petition for Adjudication of Wardship

¶ 8 On May 8, 2017, the State filed a petition for adjudication of wardship alleging respondent was a delinquent minor because he committed the offenses of aggravated criminal sexual assault (720 ILCS 5/11-1.30(b)(i) (West 2012)) and aggravated criminal sexual abuse (720 ILCS 5/11-1.60(c)(2)(i) (West 2012)). Specifically, the State alleged respondent was a delinquent minor based on the following:

> "A. That on or about 04/09/2014 – 03/17/2015, *** the respondent MINOR, WHO WAS UNDER 17 YEARS OF AGE, COMMITTED AN ACT OF SEXUAL PENETRATION WITH M.H., WHO WAS UNDER 9 YEARS OF AGE, IN THAT SAID MINOR PLACED HIS PENIS IN THE VAGINA OF M.H. ***
>
> B. That on or about 04/09/2014 – 03/17/2015, *** the respondent MINOR, WHO WAS UNDER 17 YEARS OF AGE, COMMITTED AN ACT OF SEXUAL CONDUCT WITH M.H., WHO WAS UNDER 9 YEARS OF AGE, IN THAT THE MINOR KNOWINGLY TOUCHED THE VAGINA OF M.H. FOR THE PURPOSE OF SEXUAL GRATIFICATION OF THE MINOR ***."

The State alleged in its petition respondent was born on July 13, 2000.

¶ 9 B. Adjudicatory Hearing

¶ 10 On May 8, 2018, the trial court held an adjudicatory hearing. The court heard testimony from (1) M.H.; (2) Tammy Murrell, a therapist who treated M.H.; (3) Molly Hofmann, a qualified expert in child abuse pediatrics; (4) Stephanie Apple, the mother to one of M.H.'s

friends; and (5) Mary Whitaker, a forensic interviewer who interviewed M.H. in March and May 2015. The court was also presented with audio and video recordings of the two 2015 interviews of M.H. by Whitaker. Neither the testimony nor the audio and video recordings addressed respondent's age.

¶ 11 After the State and the defense rested their cases, the trial court allowed argument. The parties focused their arguments on whether the evidence showed respondent committed acts of sexual penetration and sexual contact against M.H. The State's only mention of respondent's age was as follows:

> "In regards to the first offense, that requiring penetration, I think what's before the [c]ourt today includes the court file which has the minor's date of birth which indicates at the time of the offense he would have been under 17 years of age. Also being in this courtroom he—well, I guess would have to be under 18."

The defense did not respond to the State's comments or otherwise address respondent's age. The court reserved ruling and took the matter under advisement.

¶ 12 C. June 4, 2018, Hearing

¶ 13 At a June 4, 2018, hearing, the trial court noted the "[c]ause comes on today for court ruling." The court began by giving a detailed review of the procedural history of the case and the evidence presented at the adjudicatory hearing. The court found the evidence presented at the adjudicatory hearing showed beyond a reasonable doubt respondent committed acts of sexual penetration and sexual conduct against M.H. when M.H. was under nine years of age. After making these findings, the court addressed respondent's age, stating as follows:

"The court has the obligation to look at all of the evidence. And the State has the burden of establishing all of the elements in this case. And one of those elements is to establish that [respondent] is under the age of 17. That can be established based upon case law in many ways. It can be established by providing the court with a certified copy of the minor's birth certificate, something that's self-authenticating. It can be established by having someone testify as to the minor's *** date of birth. For example, his mother being called to testify or relatives close to him who can testify as to the date of birth. Or, for example, [a] police officer who conducts an interview and establishes the respondent minor's date of birth. Or it can be done by the court being asked to take judicial notice of the minor's date of birth. All of that has to be done before the proofs are closed.

The court will not *sua sponte* simply state that a minor is—meets the elements as set forth in a petition simply because they are in juvenile court. Those are allegations that are alleged to have occurred prior to the minor attaining his 18th birthday. Many sit in juvenile court beyond their 18th birthday for—I shouldn't say many. Some do for purposes of hearing they've reached their 18th birthday. But the allegations are set forth in the petition occurred prior to them reaching the age of 18. So, to simply *sua sponte* say

we're in juvenile court and the minor is in juvenile court, they must be under 18 is something that the court cannot do. Again, it's an element that has to be established, and it has to be established by proof beyond a reasonable doubt.

The allegations in the petition allege that [respondent] is under the age of 17. And it has to be under the age of 17 at the time that the offense was alleged to have been committed, which is a range of April 9, 2014[,] to March 17[,] 2015. [The] [c]ourt would note that in its review of testimony, its review of the interviews, other documents, there is nothing that establishes what [respondent's] age was at the time of the commission of these acts or offenses. I know that it was referenced in argument that the court can take judicial notice of such age, and I think that is an appropriate manner by which the court can take and recognize someone's age in a case. But simple judicial notice in this case would be an issue by simply looking at the date of birth of the minor without reference to specific timeframes as to when this incident, these allegations or these incidents occurred. By process of deduction or elimination, I might be able to arrive at an age that put the respondent minor being 17 years of age. And I think I could do so fairly easily based upon [M.H.'s] testimony. Again, her interviews occurred prior to March and May of 2015 and do the

math based upon taking notice of the minor's age. But, again, I was not asked to take notice of the minor's age in the context of the trial before proofs were closed.

Now, what the court is going to do—because of that and my analysis and my review of portions of the transcript of which I reviewed of [M.H.] and my notes, that's what the court believes the evidence shows. And it does not show [respondent's] age sufficiently based upon the evidence that was presented. But what the court is going to do, because of that finding, I will give counsel, [the State] and [the defense], the opportunity to do two things. To review their notes to point me to a portion of the transcript that would show something establishes [respondent's] age during the context of the trial, or to provide me with case law that would refute the court's analysis of this situation that was not argued at the time [of trial]. We focused more on the facts and incident itself as opposed to what we would call the technical elements of the offense.

So, that's my finding today. Again, in summary, I find there are acts of sexual penetration, acts of sexual conduct for purposes of sexual gratification by [respondent]. I believe the evidence clearly establishes at the time that those acts occurred that [M.H.] was under the age of [nine]. But, again, there is—court's

> review of the evidence, there is insufficient evidence to establish the [respondent's] age at the time of the allegations as set forth in the petition.
>
> Before making, again, my final ruling, I want to give counsel *** the opportunity to address that age issue either through case law or by pointing me to something in the evidence that would establish—that would show that that was established. So, I'm going to reserve that final decision."

¶ 14 After setting the matter for another hearing, the trial court stated:

> "So, again, reserve final ruling until that date to give counsel the opportunity to, again, review their notes and information or to provide me with any case law contrary to what the court believes is required for these types of offenses."

¶ 15 D. Motion to Reopen

¶ 16 On June 14, 2018, the State filed a motion to reopen its case to present evidence of respondent's age. In its motion, the State conceded respondent's age "was an essential element to be proven" and asserted its failure to present such evidence was inadvertent. The State noted it did not seek to reopen its case to call a witness but rather to simply ask the court "to take judicial notice of [respondent's] date of birth."

¶ 17 E. June 18, 2018, Hearing

¶ 18 At a June 18, 2018, hearing, the trial court noted the "[c]ause comes on today for the court's ruling." The court began by briefly reviewing the last hearing:

> "We were in court two weeks ago on June 4th. The court had issued its ruling at that point in time providing a summation of the evidence. The court had indicated that based upon the—in its ruling there was an issue with respect to proof of the allegations, that being the age of [respondent], which the court believes is a required element to be established to be proved beyond a reasonable doubt based upon the nature of the allegations. The court allowed counsel a couple of weeks to research that issue, provided me with any authority on that issue."

The court then allowed the State an opportunity to present argument in support of its motion to reopen its case and the defense an opportunity to respond. In part, the State maintained, "Obviously [respondent's age] is an essential [element] that has to be proven." It asserted respondent would not be surprised or unfairly prejudiced by the introduction of new evidence as to his age because "it was alleged in the petition that it be an element that the minor be under 17 years of age." The State contended it was "asking to reopen for the sole purpose of taking judicial notice of the file that's before the court today, that file including the minor's date of birth." The defense requested the court deny the State's motion and grant an acquittal.

¶ 19 The trial court granted the State's motion to reopen its case. In part, the court found respondent's age was an element of the alleged offenses that had to be proven beyond a reasonable doubt. The court also reiterated the ways respondent's age could be proven. The court specifically noted one way is "the court to take judicial notice of the age in the petition."

¶ 20 After reopening its case, the State sought to prove respondent's age through

judicial notice. Specifically, the following discussion occurred between the trial court and the State:

> "[THE COURT]: *** [B]ased upon your comments, you were going to be asking me to take judicial notice of the petition. Is that correct?
>
> [STATE]: That is correct, Your Honor. I would ask the court to take judicial notice of the petition that was filed May 8[], 2017, and point out specifically on that petition the minor's birth date is listed as [July 13, 2000].
>
> [THE COURT]: All right. The court will take judicial notice of the petition. The minor's date of birth is [July 13, 2000]."

¶ 21 Based on its prior findings and the new evidence presented, the trial court found the State proved beyond a reasonable doubt respondent committed the alleged offenses. As it related to whether respondent was under 17 years of age at the time the misconduct occurred, the court stated: "Based upon taking judicial notice of the petition, that shows that the minor's date of birth was [July 13, 2000]." The court then concluded, because the misconduct occurred prior to M.H.'s March 2015 interview, respondent was under 17 years of age at the time the misconduct occurred. The court entered a written order adjudicating respondent delinquent.

¶ 22 F. Disposition

¶ 23 Following an October 15, 2018, dispositional hearing, the trial court made respondent a ward of the court and placed him on probation until his twenty-first birthday, with certain terms and conditions. One of the conditions of his probation was as follows:

> "You shall truthfully and completely answer all questions asked by the court [o]fficer or this [c]ourt, report to the [c]ourt, [c]ourt [o]fficer[,] or any other person as directed and shall consent to search of your person, residence, automobile[,] or belongings at the request of the [c]ourt [o]fficer or police officer."

¶ 24 This appeal followed.

¶ 25 II. ANALYSIS

¶ 26 On appeal, respondent argues (1) the trial court violated his constitutional right to be protected from double jeopardy by allowing the State to reopen its case after the court found the State had not proven an element of each alleged offense beyond a reasonable doubt; (2) the State failed to prove beyond a reasonable doubt he committed the alleged offenses as it did not present sufficient evidence to show he was under 17 years of age at the time the misconduct occurred; and (3) the condition of his probation requiring him to "consent to search of your person, residence, automobile[,] or belongings at the request of the [c]ourt [o]fficer or police officer" is unconstitutional as written because it does not require reasonable suspicion prior to a search. The State disagrees with each of respondent's arguments.

¶ 27 Respondent argues the State failed to prove beyond a reasonable doubt he committed the alleged offenses as it did not present sufficient evidence to show he was under 17 years of age at the time the misconduct occurred. Specifically, respondent contends the trial court's judicial notice of the petition for adjudication of wardship did not sufficiently establish his age. The State disagrees, contending an accused's age is not an element of the alleged offenses when a victim is under nine years of age and, regardless, the court's judicial notice of

respondent's date of birth along with its finding M.H. reported respondent's misconduct prior to her March 2015 interview was sufficient evidence to prove respondent was under 17 years of age at the time the misconduct occurred.

¶ 28 "The due process clause of the fourteenth amendment to the United States Constitution requires that a person may not be convicted in state court except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (Internal quotation marks omitted.) *People v. Carpenter*, 228 Ill. 2d 250, 264, 888 N.E.2d 105, 114 (2008). The same requirement applies to juvenile-delinquency proceedings. *In re Q.P.*, 2015 IL 118569, ¶ 24, 40 N.E.3d 9. When reviewing a respondent's challenge to the sufficiency of the evidence, we "must decide whether, [after] viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Internal quotation marks omitted.) *Id.*

¶ 29 The trial court found the State proved beyond a reasonable doubt respondent committed the offenses of aggravated criminal sexual assault (720 ILCS 5/11-1.30(b)(i) (West 2012)) and aggravated criminal sexual abuse (720 ILCS 5/11-1.60(c)(2)(i) (West 2012)). Specifically, the court found the State proved beyond a reasonable doubt respondent committed acts of sexual penetration and sexual conduct against M.H. when M.H. was under nine years of age and respondent was under 17 years of age. Section 11-1.30(b)(i) of the Criminal Code of 2012 (Criminal Code) (720 ILCS 5/11-1.30(b)(i) (West 2012)) provides: "A person commits aggravated criminal sexual assault if that person is under 17 years of age and *** commits an act of sexual penetration with a victim who is under 9 years of age." Section 11-1.60(c)(2)(i) of the Criminal Code (720 ILCS 5/11-1.60(c)(2)(i) (West 2012)) provides: "A person commits

aggravated criminal sexual abuse if *** that person is under 17 years of age and *** commits an act of sexual conduct with a victim who is under 9 years of age." Respondent only disputes whether the State proved beyond a reasonable doubt he was under 17 years of age when the misconduct occurred.

¶ 30 The State contends for the first time on appeal an accused's age is not an element for the offenses of aggravated criminal sexual assault (720 ILCS 5/11-1.30(b)(i) (West 2012)) and aggravated criminal sexual abuse (720 ILCS 5/11-1.60(c)(2)(i) (West 2012)) when a victim is under nine years of age. In support of this argument, the State points to the legislature's 1984 revisions to the sex crimes statutes in Public Act 83-1067 (eff. July 1, 1984) and asserts those revisions show the legislature did not intend to make an accused's age into an element for the offenses when the victim was under nine years of age. The State further asserts requiring it to prove an accused's age when a victim is under nine years of age would lead to an absurd result because "[r]eliable birth records might not be available to prosecutors in every case, particularly when an accused was born in a foreign nation" and "[a]n accused who engages in sexual misconduct that is criminal for anyone of any age to commit might prevail at a trial simply by disputing his own age and successfully arguing that he was brought to trial for the wrong crime." We decline to entertain the State's argument.

¶ 31 "[W]hile a prevailing party may defend its judgment on any basis appearing in the record, it may not advance a theory or argument on appeal that is inconsistent with the position taken below." *People v. Denson*, 2014 IL 116231, ¶ 17, 21 N.E.3d 398; see also *People v. Henderson*, 2013 IL 114040, ¶ 23, 989 N.E.2d 192 ("Although the State could, as the prevailing party below, raise any reason or theory appearing in the record in support of the judgment, the

State cannot assert a new theory inconsistent with the position it adopted in the appellate court."). In the proceedings below, the State alleged respondent committed the offenses when he was under 17 years of age, conceded respondent's age was an element of the alleged offenses and moved to reopen its case to present evidence of respondent's age. To entertain the State's argument on appeal would be to allow the State to advance an argument inconsistent with its position taken below. The State is estopped from arguing on appeal it was not required to prove respondent was under 17 years of age at the time the misconduct occurred.

¶ 32 A person's age may be established beyond a reasonable doubt in several ways. As the trial court noted in this case, the State can (1) introduce a certified birth record, (2) offer testimony from a close relative who could testify to the offender's or victim's date of birth, or (3) offer testimony from an officer who could testify to an offender's response to inquiries from law enforcement officers concerning his age. See *In re S.M.*, 2015 IL App (3d) 140687, ¶ 16, 26 N.E.3d 956 (listing the same ways to establish a person's age beyond a reasonable doubt). Upon reopening its case, the State did not attempt to establish respondent's age through the admission of a certified birth record or presentation of testimony.

¶ 33 When commenting on the ways a person's age may be established beyond a reasonable doubt, the trial court in this case also suggested the State could ask the court to take judicial notice of an offender's date of birth. Upon reopening its case, the State sought to establish respondent's age by requesting the court take judicial notice of its petition for adjudication of wardship and noted to the court the birth date of respondent was alleged therein. Respondent does not dispute the trial court could properly take judicial notice of the State's petition for adjudication of wardship. Instead, he argues judicial notice of that petition did not

establish beyond a reasonable doubt he was under 17 years of age at the time the misconduct occurred.

¶ 34 The State suggests the trial court in fact took judicial notice of the date of birth contained in the petition for adjudication of wardship, which it asserts conclusively establishes respondent's date of birth regardless of the correctness of that notice. We disagree with the State's characterization of the record. After the State requested the court to take judicial notice of its petition for adjudication of wardship and noted to the court the birth date of respondent was alleged therein, the court stated: "The court will take judicial notice of the petition. The minor's date of birth is [July 13, 2000]." Shortly thereafter, the court made clear it took "judicial notice of the petition," and based on that notice, it made a finding of fact "the minor's date of birth is [July 13, 2000]." Based upon that finding of fact and its prior finding the misconduct occurred prior to M.H.'s March 2015 interview, the court found the State proved beyond a reasonable doubt respondent was under 17 years of age at the time the misconduct occurred.

¶ 35 In *In re S.M.*, 2015 IL App (3d) 140687, ¶¶ 4-6, 14, 18, the trial court took judicial notice of its court file—which included a juvenile petition alleging the respondent was less than 18 years of age—and then made a finding of fact the respondent was "under 18, otherwise he'd been in adult court." Based on its notice and finding of fact, the court found the State proved beyond a reasonable doubt the respondent was under 18 years of age. *Id.* ¶ 6. The Third District reversed, concluding, while the trial court could take judicial notice of its records, those records did not support a finding the State proved beyond a reasonable doubt the respondent was under 18 years of age. *Id.* ¶¶ 20-23. The Third District rejected the trial court's suggestion the respondent's silence with respect to juvenile jurisdiction equated to an admission

of being under 18 years of age, stating "procedural silence with respect to the allegations contained in a charging instrument stating the violation of a criminal offense cannot be construed as a judicial admission by the accused concerning an element of the offense." *Id.* ¶ 21. The Third District also cited *People v. Moton*, 277 Ill. App. 3d 1010, 1013, 661 N.E.2d 1176, 1178 (1996), for the proposition the failure to contest specific information alleged in a charging instrument does not absolve the State of its duty to prove the elements of the offense beyond a reasonable doubt.

¶ 36 We find *In re S.M.* persuasive. While the trial court in this case could take judicial notice of the State's petition for adjudication of wardship, its notice of that petition did not sufficiently establish respondent was born on July 13, 2000. The date of birth in the petition for adjudication of wardship was an allegation. Neither a juvenile respondent nor a criminal defendant is required to contest information in a charging instrument, and the failure to do so does not absolve the State of its duty to prove every element of an offense beyond a reasonable doubt. We find judicial notice of the petition was not sufficient to establish respondent's date of birth or his age. Absent the presentation of sufficient evidence to allow the trial court to establish respondent's date of birth or age, the State failed to prove beyond a reasonable doubt respondent was under 17 years of age when the misconduct occurred.

¶ 37 The State failed to prove beyond a reasonable doubt all of the elements of the alleged offenses. We reverse the trial court's judgment adjudicating respondent delinquent. We need not address respondent's other arguments.

¶ 38 III. CONCLUSION

¶ 39 We reverse the trial court's judgment adjudicating respondent delinquent.

¶ 40 Reversed.