NO. 39274-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

FREDRICK K. HAACK,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR LEWIS COUNTY

The Honorable James W. Lawler, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred by entering a judgment and sentence for the class C felony offense of communicating with a minor for immoral purposes.

Issue Pertaining to Assignment of Error

On the dates the state alleged in the information, as well as on those contained in the "to-convict" instructions, communicating with a minor for immoral purposes was a gross misdemeanor. Did the trial court err by entering a judgment and sentence as if the offense was a class C felony?

B. STATEMENT OF THE CASE

The state filed an information charging the appellant, Frederick K. Haack, with six counts of communicating with a minor for immoral purposes between December 25, 2005 and December 27, 2005. CP 95-97. The state alleged the offenses were class C felonies because Haack sent electronic communications (email messages) to a minor. CP 95-97.

A Lewis County jury found Haack guilty as charged. CP 50-55. The trial judge imposed statutory maximum concurrent terms of 60 months per count, along with community custody for a time "equal to the amount of earned early release time." CP 17-27.

C. ARGUMENT

BECAUSE COMMUNICATING WITH A MINOR FOR IMMORAL PURPOSES WAS CLASSIFIED AS A GROSS MISDEMEANOR ON THE DATES CHARGED, THE TRIAL COURT ERRED BY SENTENCING HAACK AS A CLASS C FELON.

The state charged Haack with communicating with the 16-year old B.G. for immoral purposes on December 25, 2005 through 27, 2005. CP 95-97. Each of the "to-convict" instructions included those offense dates. CP 67-72. Based on the jury's guilty verdicts, the trial court imposed concurrent sentences for class C felonies. But on the dates alleged, communicating with a minor for immoral purposes was a gross misdemeanor, not a felony. Resentencing is required.

The statute in effect in December 2005 provided:

> (1) Except as provided in subsection (2) of this section, a person who communicates with a minor for immoral purposes, or a person who communicates with someone the person believes to be a minor for immoral purposes, is guilty of a gross misdemeanor.
>
> (2) A person who communicates with a minor for immoral purposes is guilty of a class C felony punishable according to chapter 9A.20 RCW if the person has previously been convicted under this section or of a felony sexual offense under chapter 9.68A, 9A.44, or 9A.64 RCW or of any other felony sexual offense in this or any other state.

Former RCW 9.68A.090.

The 2006 Legislature amended subsection two by making it a class C felony if the communication is of an electronic nature:

> A person who communicates with a minor for immoral purposes is guilty of a class C felony punishable according to chapter 9A.20 RCW if the person has previously been convicted under this section or of a felony sexual offense under chapter 9.68A, 9A.44, or 9A.64 RCW or of any other felony sexual offense in this or any other state *or if the person communicates with a minor or with someone the person believes to be a minor for immoral purposes through the sending of an electronic communication.*

Laws of 2006, ch. 139, §1 (emphasis added).

This amendment became effective July 7, 2006. Communicating with a minor for immoral purposes was thus a gross misdemeanor when Haack purportedly committed the offenses. The trial court erred by sentencing him as a Class C felon.

The proper remedy for the court's error is remand for entry of a judgment recasting the conviction as a gross misdemeanor and a corresponding sentence. The court instructed the jury it could find Haack guilty only if it found beyond a reasonable doubt that Haack communicated with B.G. for immoral purposes. CP 67-72. The court also correctly defined "immoral purposes" as "immoral purposes of sexual misconduct." CP 65; State v. McNallie, 120 Wn.2d 925, 932-933, 846 P.2d 1358 (1993); State v. Gladden, 116 Wn. App. 561, 566, 66 P.3d 1095

(2003). The instructions included all the elements of the gross misdemeanor offense of communicating with a minor for immoral purposes. Former RCW 9A.68.090(1). The jury thus necessarily found Haack committed a gross misdemeanor. See State v. Garcia, 146 Wn. App. 821, 830, 193 P.3d 181 (2008), review denied, 166 Wn.2d 1009 (2009) ("when an appellate court finds the evidence insufficient to support a conviction for the charged offense, it will direct a trial court to enter judgment on a lesser degree of the offense charged when the lesser degree was necessarily proven at trial."); State v. Gilbert, 68 Wn. App. 379, 842 P.2d 1029 (1993) (remand for entry of judgment for residential burglary proper remedy because, in finding Gilbert guilty of first degree burglary, "trial court necessarily found all the facts beyond a reasonable doubt making him guilty of residential burglary.").

Finally, Haack may raise the issue for the first time on appeal. A trial court may only impose a sentence authorized by statute. In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). An offender may challenge the procedure by which a sentence was imposed for the first time on appeal. State v. Grayson, 154 Wn.2d 333, 338, 111 P.3d 1183 (2005). Moreover, a defendant may challenge an

illegal sentence for the first time on appeal. State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). Haack's sentence is illegal.

D. CONCLUSION

The trial court exceeded its statutory sentencing authority by imposing a class C felony sentence because, at the time Haack committed the offense, communicating with a minor for immoral purposes was a gross misdemeanor. This court should vacate Haack's felony sentence and remand for resentencing for a gross misdemeanor.

DATED this 28 day of October, 2009.

Respectfully submitted,

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STATE OF WASHINGTON	)	
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Respondent,	)	
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FREDERICK K. HAACK,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 28TH DAY OF OCTOBER 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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