

FILED

MAY 31 1983

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

169

STATE OF IOWA,

)

Filed May 31, 1983

Plaintiff-Appellee,

)

vs.

)

3-40

JOE CLINT REED,

)

68265

Defendant-Appellant.

)

Appeal from Black Hawk District Court, L. D. Lybbert and Peter Van Metre,
Judges.

Defendant appeals from his conviction for sexual abuse in the third degree, a violation of Iowa Code section 709.4(5)(1983), claiming that the statutory term "15 years of age" does not include a person under 16 who has passed the 15th birthday. **AFFIRMED.**

Douglas F. Staskal and Patrick R. Grady, Assistant Appellate Defenders, for
the defendant-appellant.

Thomas J. Miller, Attorney General, and Mary Jane Blink, Assistant
Attorney General, for plaintiff-appellee.

Considered by Oxberger, C.J., and Danielson, Snell, and Schlegel, JJ.

Hayden, J., takes no part.

PER CURIAM

Defendant appeals from his conviction for sexual abuse in the third degree, a violation of Iowa Code section 709.4(5)(1983). That statute penalizes sexual conduct by a person who is six or more years older than the other participant, if the "other participant is fourteen or fifteen years of age."

In the present case the other participant was fifteen years and five months old; the defendant contends she was not "fifteen years of age" within the meaning of section 709.4(5) but rather was over fifteen years of age and therefore was not subject to the protection of section 709.4(5). He contends the trial court should have granted his motion for judgment of acquittal on the ground the crime stated in section 709.4(5) did not occur. In the alternative, the defendant argues that section 709.4(5) is unconstitutionally vague if it is interpreted to penalize sexual activity with anyone who is between the fourteenth birthday and the sixteenth birthday. Finally, the defendant contends he was denied his right to a speedy trial since he was not brought to trial within the ninety-day limit after indictment prescribed by Iowa Rule of Criminal Procedure 27 (2)(b).

Defendant urges us to adopt a novel but distorted and unworkable interpretation of section 709.4(5), one which would lead to anomalous results. The evidence presented at trial established that defendant was twenty-five years old at the time of the offense and that the victim was fifteen years, five months, and two days old. The plain meaning of the statute, see State v. Suncilades, 305 N.W.2d 491, 494 (Iowa 1981), and our analysis of the legislative intent, see State v. Whetstone, 315 N.W.2d 758, 760, dictate that a person who has completed his fifteenth, but not his sixteenth birthday, be considered "fifteen years of age" within the meaning of section 709.4(5).

Case law from other jurisdictions substantiates this interpretation. See Covell v. State, 143 Tenn. 571, 572-73, 227 S.W. 41, 44 (1921) ("having attained the designated birthday, one's age, as ordinarily alluded to, continues as of the latter

birthday until the succeeding one... the year, and not the day, being the unit of measurement"); People v. Cooper, 207 Misc. 845, 846, 143 N.Y.S. 2d 855, 857 (1955)("[w]ords in penal statutes are to be given their commonly accepted meaning. A child becomes ten years old upon reaching his tenth birthday and remains a child of the age of ten until he reaches his eleventh birthday"). The case cited by defendant, Knott v. Rawlings, 250 Iowa 892, 96 N.W.2d 900 (1959), involved the construction of the phrase "a child of the age of sixteen years, or under," and is therefore inapplicable to the issue of construction before us.

The standard for reviewing an attack that a statute is unconstitutionally vague is well established. The challenger must bear the "heavy burden to rebut a strong presumption of constitutionality." State v. Sullivan, 298 N.W.2d 267, 270 (Iowa 1980). If a reasonable construction can make the statute constitutionally definite, this court must so construe it. Id. We believe the construction mentioned heretofore to be a reasonable and tenable one which would "give a person of ordinary intelligence fair warning of what is prohibited." State v. Wehde, 258 N.W.2d 347, 350 (Iowa 1977).

Finally, we find defendant's argument that he was denied his right to a speedy trial to be without merit. The Iowa Supreme Court interpreted the speedy trial requirement, set forth in Iowa Rule of Criminal Procedure 27(2)(b), in State v. Petersen, 288 N.W.2d 332 (Iowa 1980):

If trial is not commenced within the 90-day period the case must be dismissed unless one of three things has occurred:
(1) the defendant has waived his right to a speedy trial,
(2) the delay is attributable to the defendant, or (3) there is "good cause" for the delay.

Id. at 335. Defendant acknowledges that he waived speedy trial at one point and that he filed several motions which contributed to the 42-day delay beyond the 90-day period prescribed by rule 27(2)(b). Additionally, defendant acquiesced in the

setting of a trial date beyond the 90-day limit, and he did not file his motion to dismiss based on the right to a speedy trial until the day trial began. Under these circumstances, we conclude that the determination of the trial court was supported by substantial evidence in the record, and affirm. See State v. Brandt, 253 N.W.2d 253, 256 (Iowa 1977); State v. Reynolds, 250 N.W.2d 434, 437 (Iowa 1977). Having considered and rejected each of defendant's assertions on appeal, we affirm the trial court's decision.

AFFIRMED.