

SUPREME COURT OF KANSAS

State v. Sellers, 292 Kan. 117

253 P.3d 20 (2011) · No. No. 101,208 · Decided June 22, 2011

SUMMARY

The Kansas Supreme Court reviewed Jerry D. Sellers, Jr.'s convictions for two counts of aggravated indecent liberties with a child. The court upheld the denial of a psychological evaluation of the victim and concluded that the convictions were not multiplicitous because the charged touchings were separated by a break and a fresh impulse. The court declined to reach the constitutional challenge to lifetime postrelease supervision because it was not preserved in the district court, and it addressed the trial court's authority to correct the postrelease supervision term.

CASE DETAILS

COURT	Supreme Court of Kansas
WRITING FOR THE COURT	Beier, J.; Johnson, J.
JURISDICTION	Kansas
DECIDED	June 22, 2011
DOCKET	No. 101,208
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Direct appeal from jury convictions for two counts of aggravated indecent liberties with a child and the resulting sentences.
STANDARD OF REVIEW	Abuse of discretion for denial of a psychological evaluation; unlimited review for multiplicity, statutory interpretation, and jurisdictional questions; constitutional claims ordinarily receive unlimited review, but unpreserved claims were not reached.
PRECEDENTIAL VALUE	Published Kansas Supreme Court opinion
PARTIES	Jerry D. Sellers, Jr. v. State of Kansas

TOPICS

criminal procedure sentencing appellate procedure statutory interpretation evidence

PRACTICE AREAS

criminal law criminal procedure sentencing appellate law

QUESTIONS PRESENTED

1. Whether the district court abused its discretion by denying Sellers's motion for a psychological evaluation of M.R.C.
2. Whether the convictions for touching M.R.C.'s breast and pubic area were multiplicitous because they arose from unitary conduct.
3. Whether the constitutional challenge to lifetime postrelease supervision was preserved for appellate review.
4. Whether the district court could impose or correct the postrelease-supervision term after initially pronouncing a 36-month term.
5. Whether lifetime postrelease supervision was authorized when the State did not prove that Sellers was at least 18 years old at the time of the offenses.
6. Whether the district court could impose lifetime electronic monitoring as part of the sentence.

HOLDINGS

1. The district court did not abuse its discretion in denying Sellers's motion for a psychological evaluation because he failed to demonstrate a compelling need for the evaluation under the totality of the circumstances.
2. The convictions for touching M.R.C.'s breast and pubic area were not multiplicitous because the two acts did not arise from unitary conduct.
3. The court did not reach Sellers's constitutional challenge to lifetime postrelease supervision because that specific challenge was not preserved in the district court.
4. Lifetime postrelease supervision was illegal because the State failed to prove Sellers's age at the time of the offenses, so Sellers was subject only to the grid form of aggravated indecent liberties and a 36-month postrelease term.
5. The lifetime electronic-monitoring portion of Sellers's sentence had to be vacated and the case remanded for resentencing.

KEY QUOTATIONS

“Having fully reviewed and considered Sellers’ arguments on the three factors relevant to this issue, we hold that the district judge did not abuse his discretion in denying the motion for a psychological evaluation of M.R.C. Sellers did not meet his burden to demonstrate a compelling need for such an evaluation, under the totality of circumstances present in this case.” (127)

“The district judge ultimately determined that Sellers had to make a second conscious decision to touch M.R.C., and, acknowledging the difficulty of this call, we agree. The conduct underlying Counts 1 and 2 was not unitary, and our multiplicity analysis ends here.” (131)

“An illegal sentence may be challenged at any time, and his lifetime postrelease term is illegal.” (134)

“The lifetime postrelease and lifetime electronic monitoring portions of his sentence are vacated, and the case remanded for further proceedings consistent with this opinion.” (135)

FACTUAL BACKGROUND

Sellers lived with C.M. and C.M.'s 13-year-old daughter, M.R.C. M.R.C. reported that Sellers touched her breast and pubic area while they were lying on her mother's bed, with a brief interruption when Sellers left the room to check on the family dog. The jury convicted Sellers on separate counts for those two acts and acquitted him on a third count involving an alleged Halloween touching.

PROCEDURAL HISTORY

Sellers was charged with three counts of aggravated indecent liberties with a child. The district court denied his motion for a psychological evaluation of the victim, rejected his multiplicity and constitutional challenges, and the jury convicted him on two counts while acquitting him on a third. The district court imposed consecutive sentences, lifetime postrelease supervision, and lifetime electronic monitoring. The Kansas Supreme Court affirmed the convictions, vacated the lifetime postrelease and electronic-monitoring portions of the sentence, and remanded for resentencing with a 36-month postrelease term.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

Vacate the lifetime postrelease-supervision and lifetime electronic-monitoring portions of the sentence and remand for resentencing consistent with the opinion, including replacement of lifetime postrelease supervision with a 36-month term and consideration of the authority governing electronic monitoring.

CASES CITED

- State v. Gregg, 226 Kan. 481, 602 P.2d 85 (1979)
- State v. Price, 275 Kan. 78, 61 P.3d 676 (2003)
- State v. Rucker, 267 Kan. 816, 987 P.2d 1080 (1999)
- State v. Saiz, 269 Kan. 657, 7 P.3d 1214 (2000)
- State v. Berriozabal, 291 Kan. 568, 243 P.3d 352 (2010)
- State v. Appleby, 289 Kan. 1017, 221 P.3d 525 (2009)
- State v. Thompson, 287 Kan. 238, 200 P.3d 22 (2009)
- State v. McCarley, 287 Kan. 167, 195 P.3d 230 (2008)
- State v. Harris, 284 Kan. 560, 162 P.3d 28 (2007)
- State v. Post, 279 Kan. 664, 112 P.3d 116 (2005)
- State v. Robinson, 281 Kan. 538, 132 P.3d 934 (2006)
- State v. Schoonover, 281 Kan. 453, 133 P.3d 48 (2006)
- State v. Dorsey, 224 Kan. 152, 578 P.2d 261 (1978)
- State v. Richmond, 250 Kan. 375, 827 P.2d 743 (1992)
- State v. Zamora, 247 Kan. 684, 803 P.2d 568 (1990)

- State v. Howard, 243 Kan. 699, 763 P.2d 607 (1988)
- State v. Wood, 235 Kan. 915, 686 P.2d 128 (1984)
- State v. Potts, 281 Kan. 863, 135 P.3d 1054 (2006)
- State v. Seward, 289 Kan. 715, 217 P.3d 443 (2009)
- State v. Thomas, 288 Kan. 157, 199 P.3d 1265 (2008)
- State v. Ortega-Cadelan, 287 Kan. 157, 194 P.3d 1195 (2008)
- State v. Spencer, 291 Kan. 796, 248 P.3d 256 (2011)
- State v. Ballard, 289 Kan. 1000, 218 P.3d 432 (2009)
- State v. Bello, 289 Kan. 191, 211 P.3d 139 (2009)
- State v. Reyna, 290 Kan. 666, 234 P.3d 761 (2010)
- State v. Colston, 290 Kan. 952, 235 P.3d 1234 (2010)
- State v. Morningstar, 289 Kan. 488, 213 P.3d 1045 (2009)
- State v. Gonzales, 289 Kan. 351, 212 P.3d 215 (2009)
- State v. Miller, 260 Kan. 892, 926 P.2d 652 (1996)
- State v. Storey, 286 Kan. 7, 179 P.3d 1137 (2008)
- State v. Jolly, 291 Kan. 842, 249 P.3d 421 (2011)