

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-228

Filed: 15 January 2019

Forsyth County, Nos. 16 CRS 3823, 50851

STATE OF NORTH CAROLINA

v.

FLORA RIANO GONZALEZ

Appeal by defendant from judgments entered 27 April 2017 by Judge Richard S. Gottlieb in Forsyth County Superior Court. Heard in the Court of Appeals 30 October 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Anne M. Middleton, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katherine Jane Allen, for defendant.

DIETZ, Judge.

Defendant Flora Riano Gonzalez appeals her conviction for felony child abuse, arguing that the trial court committed plain error by improperly instructing the jury on the definition of the term “sexual act.” This argument is squarely precluded by our decision in *State v. McClamb*, 234 N.C. App. 753, 760 S.E.2d 337 (2014). But our review of this case became more difficult when, several months ago, this Court issued its opinion in *State v. Alonzo*, __ N.C. App. __, __, 819 S.E.2d 584, 587 (2018).

Alonzo effectively overruled *McClamb* after concluding that *McClamb* had effectively overruled another, earlier decision. We ordered supplemental briefing from the parties to address *Alonzo* and, specifically, to address the growing trend among panels of our Court to overrule or refuse to follow precedent based on principles arising from our Supreme Court's decision in *In re Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989).

As explained below, *In re Civil Penalty* does not permit panels of this Court to disregard existing precedent because the panel believes that precedent improperly narrowed or distinguished other, earlier precedent. Thus, because the Supreme Court stayed the mandate in *Alonzo*—meaning it does not yet have any precedential effect—and because *McClamb* is controlling precedent that this Court must follow, we reject Gonzalez's arguments and find no error in the trial court's judgments.

Facts and Procedural History

Beginning in 2012, Flora Riano Gonzalez arranged for her twelve-year-old daughter to work as a prostitute, meeting men and having sexual intercourse in exchange for money. This continued for several years. Many men who had sex with Gonzalez's daughter used a condom but some did not. Gonzalez's daughter later became pregnant. Gonzalez reported her daughter's pregnancy to the police and claimed that she had been abducted and raped by four men. Law enforcement took

STATE V. GONZALEZ

Opinion of the Court

Gonzalez's daughter to a health clinic where she was treated for chlamydia and underwent an abortion.

Gonzalez's daughter later began a steady relationship with a man when she was around sixteen years old. She became pregnant with her boyfriend's child. At that point, Gonzalez's daughter became concerned that Gonzalez would begin prostituting another of her children, who was now twelve years old. Gonzalez's daughter confided in a friend, who helped her meet with law enforcement to tell her story. The State arrested Gonzalez and charged her with felony child abuse by prostitution, felony child abuse by sexual act, human trafficking, and sexual servitude of a child. The case went to trial.

The jury acquitted Gonzalez of human trafficking, but found her guilty of both counts of felony child abuse and of sexual servitude of a child. The trial court sentenced her to consecutive terms of 25 to 39 months in prison for each of the child abuse convictions, and to another consecutive term of 92 to 120 months in prison for the sexual servitude conviction. Gonzalez timely appealed.

Analysis

Gonzalez argues that the trial court committed plain error when it instructed the jury that the phrase "sexual act" in the felony child abuse statute meant "an inducement by the defendant of an immoral or indecent touching by the child for the purpose of arousing or gratifying sexual desire." Gonzalez contends that the court

STATE V. GONZALEZ

Opinion of the Court

should have used a much narrower definition of “sexual act” that does not include vaginal intercourse. Gonzalez did not object to the court’s instruction at trial and concedes that we review this issue for plain error.

The statute under which Gonzalez was charged, N.C. Gen. Stat. § 14-318.4(a2), is found in a portion of the criminal code addressing “Protection of Minors.” The statute, titled “Child abuse a felony” provides as follows: “Any parent or legal guardian of a child less than 16 years of age who commits or allows the commission of any sexual act upon the child is guilty of a Class D felony.” N.C. Gen. Stat. § 14-318.4(a2). Importantly, the statute does not define the term “sexual act” and that phrase is not defined anywhere else in the subchapter.

In a separate subchapter of the General Statutes, in an article titled “Rape and Other Sex Offenses,” there is a definition of the phrase “sexual act” that applies “[a]s used in this Article.” N.C. Gen. Stat. § 14-27.20(4). That definition includes various forms of sexual activity but expressly excludes “vaginal intercourse”:

“Sexual act” means cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person’s body: provided, that it shall be an affirmative defense that the penetration was for accepted medical purposes.

Id.

The distinction between vaginal intercourse and other sexual acts exists in this section of our criminal statutes because the crime of rape, which involves vaginal

intercourse, is treated differently from other sex offense crimes. *Compare* N.C. Gen. Stat. § 14-27.21 (First-degree forcible rape) *with* N.C. Gen. Stat. § 14-27.26 (First-degree forcible sex offense).

In two earlier cases, this Court applied the definition of “sexual act” found in N.C. Gen. Stat. § 14-27.20(4) to the felony child abuse statute, without conducting an analysis of *why* that definition should apply.¹ First, in *State v. Lark*, 198 N.C. App. 82, 678 S.E.2d 693 (2009), the Court addressed a case involving a defendant who engaged in fellatio and anal intercourse with his juvenile son. The defendant argued that the trial court included sexual acts in the jury instructions that were not supported by the evidence. *Id.* at 87, 678 S.E.2d at 698. In its analysis, this Court cited the definition of “sexual act” in N.C. Gen. Stat. § 14-27.20(4) in its determination that both fellatio and anal intercourse were “sexual acts.” *Id.* at 88, 678 S.E.2d at 698.

Next, in *State v. Stokes*, 216 N.C. App. 529, 718 S.E.2d 174 (2011), the Court addressed a case in which a defendant challenged the sufficiency of the evidence that he digitally penetrated his juvenile daughter’s vagina. The Court again cited the definition of “sexual act” in N.C. Gen. Stat. § 14-27.20(4) to conclude that digital penetration of a vagina is a sexual act. *Stokes*, 216 N.C. App. at 532, 718 S.E.2d at 177–78. *Stokes* also involved allegations of vaginal intercourse but, in its analysis of the issue, the *Stokes* court discussed only the digital penetration. *Id.*

¹ The General Assembly recodified these statutes, so their statutory citations vary in these opinions, but the statutory language remains the same.

Then, in *State v. McClamb*, 234 N.C. App. 753, 760 S.E.2d 337 (2014), this Court squarely addressed the question of whether the phrase “sexual act” in the felony child abuse statute included vaginal intercourse. In a detailed analysis, the Court distinguished *Stokes*, explaining that “*Stokes* is controlling with respect to the meaning of the term ‘sexual act’ . . . only in light of the narrow factual circumstances and legal issue raised therein.” *McClamb*, 234 N.C. App. at 758, 760 S.E.2d at 341. The Court concluded that *Stokes* only addressed the issue of digital penetration and “did not hold” that the definition of sexual act in the felony child abuse statute “exclude[s] vaginal intercourse as a sexual act.” *Id.* The Court also distinguished *Lark* in a footnote, explaining that it “is similarly limited to an analysis of fellatio as a sexual act.” *Id.* at 758 n.2, 760 S.E.2d at 341 n.2.

Finally, several months ago, this Court addressed this issue again in *State v. Alonzo*, __ N.C. App. __, __, 819 S.E.2d 584, 587 (2018). In *Alonzo*, the Court held that “there is a conflict between our precedent” in *McClamb*, *Stokes*, and *Lark*. *Id.* Applying principles that stem from our Supreme Court’s decision in *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989), a breakthrough case that governs this Court’s review of its own precedent, *Alonzo* declined to follow *McClamb*, concluding “we are bound by our earlier decision in *Lark*.” *Alonzo*, __ N.C. App. at __, 819 S.E.2d at 587.

Our Supreme Court later stayed this Court’s mandate in *Alonzo* and thus *Alonzo* does not yet have any precedential effect. *State v. Alonzo*, __ N.C. __, 817 S.E.2d 733 (2018). But Gonzalez urges us to adopt the same reasoning applied in *Alonzo*, and to hold that *McClamb* is not good law.

As explained below, we decline to do so because *In re Civil Penalty* does not empower us to overrule precedent in this way. What occurred in *Lark*, *Stokes*, and *McClamb* is the same sequence of events that gave us *In re Civil Penalty*. In 1968, the Supreme Court decided a case that limited the power of state agencies to impose civil penalties under Article IV, Section 3 of the North Carolina Constitution. *State ex rel. Lanier v. Vines*, 274 N.C. 486, 497, 164 S.E.2d 161, 167–68 (1968). Later, this Court distinguished *Lanier* in a case upholding the power of a state agency to impose civil penalties under our Constitution. *N.C. Private Protective Servs. Bd. v. Gray, Inc.*, 87 N.C. App. 143, 146–47, 360 S.E.2d 135, 137–38 (1987). When the issue came before this Court again a few years later, we declined to follow *Gray*, holding that *Gray* “contradicts the express language, rationale and result of *Lanier*.” *In re Civil Penalty*, 92 N.C. App. 1, 13, 373 S.E.2d 572, 579, *rev’d*, 324 N.C. 373, 379 S.E.2d 30 (1989).

The Supreme Court reversed this Court, holding that “the effect of the majority’s decision here was to overrule *Gray*. This it may not do. Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a

subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.” *In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37.

Thus, *In re Civil Penalty* stands for the proposition that, where a panel of this Court has decided a legal issue, future panels are bound to follow that precedent. This is so even if the previous panel’s decision involved narrowing or distinguishing an earlier controlling precedent—even one from the Supreme Court—as was the case in *In re Civil Penalty*. Importantly, *In re Civil Penalty* does not authorize panels to overrule existing precedent on the basis that it is inconsistent with earlier decisions of this Court.

To be sure, our Supreme Court has authorized us to disregard our own precedent in certain rare situations. *See In re R.T.W.*, 359 N.C. 539, 542 n.3, 614 S.E.2d 489, 491 n.3 (2005). These arise when two lines of irreconcilable precedent develop independently—meaning the cases never acknowledge each other or their conflict, as if ships passing in the night. This typically occurs because the panel that decided the second case was unaware of the holding of the first. Ideally, this would never happen, but, given the size and complexity of our case law, it does. In that circumstance, the Supreme Court has authorized us to “follow[] . . . the older of the two cases” and reject the more recent precedent. *Id.*

This case is governed by *In re Civil Penalty*, not *In re R.T.W.* As explained above, the second of the conflicting decisions at issue here (*McClamb*) acknowledged

and distinguished the first (*Lark* and *Stokes*). *McClamb*, 234 N.C. App. at 758 n.2, 760 S.E.2d at 341 n.2. This means *In re R.T.W.* does not apply. Instead, under *In re Civil Penalty*, we must follow *McClamb* because it is the most recent, controlling case addressing the question. This, in turn, leads us to conclude that the trial court's instructions to the jury in this case were not erroneous, and certainly did not rise to the level of plain error.

Conclusion

We find no error in the trial court's judgments.

NO ERROR.

Judges BRYANT and INMAN concur.