ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-298

SEPTEMBER TERM, 2017

State of Vermont v. Dylan Boulet*	}	APPEALED FROM:
	}	
	}	Superior Court, Bennington Unit
	}	Criminal Division
	}	
	}	DOCKET NO. 238-3-17 Bncr & 295-3-17 Bncr

In the above-entitled cause, the Clerk will enter:

The State moves to dismiss defendant's interlocutory appeal as moot. We agree that there is no longer a live controversy for this Court to decide, and thus grant the motion to dismiss.

The procedural history is as follows. Defendant was charged with aggravated sexual assault of a child in violation of 13 V.S.A. § 3253a(a)(8). Under this section, a person commits aggravated sexual assault of a child if the actor is at least eighteen years of age, the victim is under sixteen years of age, and the victim is subjected by the actor to repeated nonconsensual sexual acts. Defendant filed a motion to dismiss the charges, which the superior court denied on June 15, 2017. On June 21, 2017, defendant moved for permission to take an interlocutory appeal. The superior court granted permission on July 5, 2017 and this Court accepted the interlocutory appeal on August 28, 2017 to consider the question: "Does the term 'nonconsensual' under § 3253a(a)(8) include 'non-consensual' by law due to age set out in 13 V.S.A. § 3252(c)."

On September 8, 2017, the State amended defendant's charges to aggravated sexual assault in violation of 13 V.S.A. § 3253(a)(9). Under this section, a person commits aggravated sexual assault if the victim is subjected by the actor to repeated nonconsensual sexual acts, without consideration of the ages of the parties. In State v. Deyo, 2006 VT 120, 181 Vt. 89, we held that sexual acts are nonconsensual as a matter of law under § 3253(a)(9) if the victim is under sixteen years old. We explained "that a minor is legally incapable of consenting to sexual intercourse with an adult, except in the very narrow circumstances in which the Legislature has explicitly stated that a minor's consent will be effective." 2006 VT 120, ¶ 16 (emphasis added). We went on to state that "[w]here a statute includes both children and adults in its potential class of complainants, as does aggravated sexual assault based on repeated nonconsensual acts, the legal principle that children cannot consent to sex with adults does not change." Id. ¶ 17.

Subsequently, in State v. Hazelton, 2006 VT 121, 181 Vt. 118, we applied the same reasoning to the sexual assault statute, 13 V.S.A. § 3252. At issue was whether the State could charge the defendant with two counts of sexual assault under § 3252 for a single act of sexual intercourse with a minor. Count I alleged that the defendant violated § 3252(a)(3) by engaging in sexual intercourse with a person under the age of sixteen to whom he was not married. Count II

charged that the defendant violated § 3252(a)(1) by compelling a person to participate in a sexual act "without consent," an apparent violation of subsection (a)(1)(A). We held that the two crimes were the same, because a minor under sixteen cannot give consent, and therefore the defendant could only be charged once. Id. ¶ 24. We noted that the recently added exception in § 3252(c)(2) for persons between fifteen and nineteen years old did not make consent to sex any less impossible for children outside of the specified age bracket. Id. ¶ 36. We held that "[t]he amendment simply roll[ed] back the statutory age of consent, by one year, for actors within the age bracket of fifteen to nineteen years old." Id. However, we emphasized that the "exception to the common law, expressly carved out by the Legislature, still does not make consent to sex any less impossible for children outside of the specified age bracket who remain, as before, statutorily under the age of consent." Id. (emphasis added).

The State argues that, because defendant is no longer charged under § 3253a(a)(8) and is instead charged under § 3253(a)(9), the question on interlocutory appeal is moot. Further, because the caselaw defining "nonconsensual" in the context of § 3253(a)(9) is well established through Deyo and Hazelton, and because the Legislature has not expressly amended or revoked § 3253(a)(9), there is no question remaining to sustain defendant's interlocutory appeal.

"In general, a case is moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." Houston v. Town of Waitsfield, 2007 VT 135, ¶ 5, 183 Vt. 543 (mem.) (quotations omitted). "The mootness doctrine derives its force from the Vermont Constitution, which, like its federal counterpart, limits the authority of the courts to the determination of actual, live controversies between adverse litigants." Id. (quotations omitted); see Wood v. Wood, 135 Vt. 119, 120 (1977) (noting that most basic constitutional limitation on this Court "is the prohibition against advisory opinions"). "Even if a case originally presented an actual controversy in the trial court, the case must remain live throughout the appellate process for us to examine the issues." Houston, 2007 VT 135, ¶ 5. "Thus, a change in facts or circumstances can render a case moot if this Court can no longer grant effective relief." Id. (quotations omitted).

Defendant argues that, despite the change in charges, the legal issue pending before this Court—the meaning of "nonconsensual"—still remains. Defendant argues that the Legislature's enactment of § 3253a effectively overruled this Court's prior rulings in Deyo and Hazelton, making both cases nonapplicable to even charges brought under § 3253.

First, the Legislature may change the common law through statute "only if the statute overturns the common law in clear and unambiguous language, or if the statute is clearly inconsistent with the common law." Hazelton, 2006 VT 121, ¶ 29 (quotation omitted). However, defendant is no longer facing charges under § 3253a, and thus any opinion considering it would be advisory.

Defendant has failed to show that any of the exceptions to the mootness doctrine apply.

Therefore, because defendant is now charged under § 3253, the law established through Deyo and Hazelton is controlling and the question of if and how Deyo and Hazelton apply to § 3253a is no longer a live controversy.

For the above reasons, we grant the State's motion to dismiss this appeal as moot.

BY THE COURT:

Paul L. Reiber, Chief Justice

Marilyn S. Skoglund, Associate Justice

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice