

NO. 2001-CR-0000

STATE OF TEXAS)	IN THE DISTRICT COURT
)	
VS.)	187TH JUDICIAL DISTRICT
)	
JOE SMITH)	BEXAR COUNTY, TEXAS

MOTION TO RECONSIDER SENTENCE

TO THE HONORABLE PAT PRIEST, SPECIAL JUDGE FOR THE 187TH JUDICIAL DISTRICT COURT, BEXAR COUNTY, TEXAS:

Joe Smith respectfully requests that this Court reconsider its sentence of November 8, 2002, in light of the following information:

I.
MR. SMITH’S PUNISHMENT WAS SUBSTANTIALLY MORE SEVERE
THAN THE OTHER DEFENDANTS WHO OFFENDED AGAINST
THE COMPLAINANT

The complainant in this case told the police that she had had sex with six males she met while chatting on the Internet. She was able to identify five of these persons: Mark Ruiz; Tom Oliva; Timothy Sapp; Mike Rome; and Joe Smith. Each of these men were subsequently charged with sexual offenses against the complainant, and ultimately, all of their cases were resolved by plea bargains. On November 8, 2002, this Court sentenced Joe Smith to 10 years imprisonment. The other four men received much less severe sentences, ranging from seven years deferred adjudication to six years imprisonment. We submit that, considering the totality of circumstances, Mr. Smith should not be punished more severely than the others. Accordingly, we request that this Court reconsider his sentence and reduce it to no more than six years imprisonment.

II.
MARK RUIZ
(7 Years Deferred Adjudication)

On April 30, 2001, in the 25th Judicial District Court of Guadalupe County, Texas, Mark Ruiz pleaded nolo contendere to an indictment in cause number 00-1000-CR which alleged in five counts that he committed aggravated sexual assault against Robbie Post on two different dates – January 30, 2000 and April 30, 2000. In a voluntary statement to Sergeant James Scoggins, Mr. Ruiz admitted that he met Ms. Post in a Yahoo chat room in the summer of 1999, and that afterwards, they had had sexual intercourse on two different dates. Mr. Ruiz was represented by John Hampton and Ernie Galm. The state was represented by Robert Brown, who recommended a "cap" of 15 years imprisonment. On September 27, 2001, the Honorable Gus Strauss granted Mr. Ruiz's application for deferred adjudication for a period of seven years, and assessed a \$5,000.00 fine and 180 days in jail as a condition of deferred adjudication. Mr. Ruiz was 20 years old at the time of his offenses.

Certified copies of the indictment and the deferral of adjudication in cause number 00-1000-CR, and Mr. Ruiz's voluntary statement to Sergeant James Scoggins, are attached as Exhibit 1.

III.
TOM OLIVA
(2 Years Imprisonment)

Tom Oliva was charged in a four count indictment in cause number 2000-CR-6000 which alleged that he committed the offenses of aggravated sexual assault and indecency with a child against Tobbie Post on April 9, 2000. On November 27, 2001, in the 187th Judicial District Court of Bexar County, Texas, Mr. Oliva pleaded guilty to the lesser included offense of indecency with a child, as charged in count IV of the indictment. The state recommended a "cap" of six years imprisonment, a fine of \$1,000.00, and agreed to make no recommendation on defendant's application for deferred adjudication. On February 25, 2002, the Honorable Raymond Angelini

found Mr. Oliva guilty and assessed his punishment at two years imprisonment. Mr. Oliva was 19 years old at the time of his offense.

Certified copies of the indictment and the judgment in cause number 2000-CR-6000, and Mr. Oliva's voluntary statements to Sergeant Mark Schott, are attached as Exhibit 2.

IV.
TIMOTHY SAPP
(6 Years Imprisonment)

On December 15, 2000, in the 226th Judicial District Court of Bexar County, Timothy Sapp pleaded guilty to all counts of a six count information in cause number 2000- CR-6009-W that alleged he committed aggravated sexual assault and indecency with a child against Ms. Post on two different occasions – December 30, 1999 and January 24, 2000. The state recommended a "cap" of 10 years imprisonment, a fine of \$1,000.00, and agreed to make no recommendation on defendant's application for deferred adjudication. On January 30, 2001, the Honorable Sid Harle found Mr. Sapp guilty and assessed his punishment at six years imprisonment on counts I, II, IV, and V, and five years imprisonment on counts III and VI, with the sentences to run concurrently. Mr. Sapp was 25 years old at the time of his offenses.

An indictment alleging that Mr. Sapp committed aggravated sexual assault and indecency with a child against Ms. Post on December 30, 1999 in Guadalupe County, Texas, was dismissed on February 2, 2001.

Copies of the information and the judgments in cause number 2000-CR-6009-W are attached as Exhibit 3.

V.
MIKE ROME
(6 Years Imprisonment)

Mike Rome was charged in a three count indictment in cause number 2000-CR-6100 which alleged that he committed the offenses of aggravated sexual assault and indecency with a child against Ms. Post on January 31, 2000. Mr. Rome made a written statement to Sergeant Mark Schott in which he admitted meeting Ms. Post in a Yahoo chat room, and having sex with her on at least two occasions. On February 5, 2001, in the 226th Judicial District Court of Bexar County, Texas, Mr. Rome pleaded guilty to the lesser included offense of indecency with a child, as charged in count III, paragraph B of the indictment. The state recommended a "cap" of 12 years imprisonment and agreed to make no recommendation on defendant's application for deferred adjudication. On June 23, 2001, the Honorable Sid Harle found Mr. Rome guilty and assessed his punishment at eight years imprisonment. Mr. Rome filed a Motion to Reconsider his sentence, and on August 22, 2001, Judge Harle granted the motion, and decreased his sentence to six years imprisonment, noting that this was "a sentence equivalent to co-defendant Timothy Sapp (not indicted as companions)." Mr. Rome was 19 years old at the time of his offense.

Copies of the indictment and the judgment in cause number 2000-CR-6100, Mr. Rome's Motion To Reconsider, and Mr. Rome's voluntary statement to Sergeant Schott, are attached as Exhibit 4.

VI.
THE RELEVANT FACTS IN MR. SMITH'S CASE, WHEN CONSIDERED IN THEIR TOTALITY,
ARE NO MORE AGGRAVATED THAN THE FACTS IN THE OTHER CASES

We know that the Court read the letters of character reference and listened carefully to the mitigating testimony presented at the sentencing hearing, and we will not belabor that evidence now.

Suffice it to say that Mr. Smith is a well educated young man with no criminal record who comes from an excellent family. When arrested in June, 2000, he immediately confessed his guilt to the police and took full responsibility for his offense. Within weeks of his arrest he began counseling with a registered sex offender treatment provider, and he dutifully pursued treatment on a regular basis for the next two years. He continued his education, he lived with his family, and worked in their business. Now, Mr. Smith is a convicted felon, who will never go to medical school, and who will register as a sex offender for the rest of his life. He knows this, and he also knows that he will spend years in prison for his crime.

Mr. Smith is similar to most of the other persons who became involved with the complainant in this case. These men were all between the ages of 19 and 25, who met Ms. Post over the internet, and eventually had sexual relationships with her. Most of these young men were college -educated , or pursuing college educations, at the time of their offenses. All confessed their guilt and were punished pursuant to plea bargains. No one was punished as severely as Mr. Smith, though.

To be sure, Mr. Smith was in possession of pornography -- both child and adult -- when arrested. He admitted this to the police in a voluntary statement taken upon his arrest. There is no evidence that any of the others possessed pornography. We respectfully submit, however, that the pornography does not justify Mr. Smith's substantially more severe sentence, for at least three reasons.

First, the state dismissed this offense as a part of the plea bargain. If the state believed this offense was so significant, it could have pursued this prosecution, rather than dismissed it. Although this Court was entitled to consider this evidence at punishment, it is also proper to consider that the offense was dismissed by the state.

Second, Mr. Smith was not the only one of the several persons involved with the complainant who had committed multiple offenses. Mr. Ruiz, who was indicted for and admitted to two incidences of sexual intercourse with the complainant on two different dates, was sentenced to seven years deferred adjudication. Mr. Sapp was indicted for assaulting the complainant on two different occasions in Bexar County, and once in Guadalupe County. He pleaded guilty to *six* counts of sexual misconduct and his largest sentence was six years imprisonment. Mr. Rome admitted to having sex with the complainant on two different occasions, and was sentenced to six years imprisonment. It bears noting that Mr. Rome was originally sentenced to eight years imprisonment, but Judge Harle reconsidered and reduced the sentence to six years, to make his sentence "equivalent" to Mr. Sapp's. If these other three offenders merit no more than six years imprisonment, even though the evidence shows them guilty of at least two first degree felonies, then Mr. Smith does not deserve 10 years for an additional offense, which, of course, before it was dismissed, was less than a first degree felony. *See* TEX. PENAL CODE ANN. § 43.26.

Third, Mr. Smith's single face-to-face encounter with the complainant was on April 18, 2000. Thus, he was the last of all the young men to begin his relationship -- both on the computer and in person -- with the complainant. We submit that when considering how to appropriately punish an adult for having sex with a child, it is not insignificant that the adult was the last of five persons to do so.

VII.
MR. SMITH SHOULD BE RESENTENCED
TO NO MORE THAN SIX YEARS IMPRISONMENT

Counsel are mindful that the Court strongly believes in the importance of sending a message

to the community about offenses like the one Mr. Smith was convicted of. We submit, though, that even before Mr. Smith was sentenced, this message had been conveyed in the cases of Mr. Ruiz, Mr. Oliva, Mr. Sapp, and Mr. Rome. The message was that these cases will be vigorously prosecuted and severely punished, and that young men who choose to commit these offenses will be ruined for life, with criminal records, incarceration, and the burden of registering as sex offenders. We also submit that the message has been sent in four other very comparable cases that the punishment for similarly-situated offenders should be six years imprisonment or less. We respectfully request that Mr. Smith's punishment be reduced to fall within this range.

WHEREFORE PREMISES CONSIDERED, defendant moves that this Court reconsider its sentence of 10 years imprisonment, and sentence Joe Smith to no more than six years imprisonment.

Respectfully submitted:

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Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a copy of Motion To Reconsider Sentence has been delivered to the District Attorney's Office; Justice Center; 300 Dolorosa; San Antonio, Texas, on this the 27th day of November, 2002.

PATRICK L. HANCOCK

ORDER

On this the _____ day of _____, 2002, came to be considered Defendant's Motion To Reconsider Sentence, and said motion is hereby

(GRANTED)

(DENIED)

JUDGE PRESIDING

STATE OF TEXAS)
COUNTY OF BEXAR)

AFFIDAVIT

BEFORE ME, the undersigned authority, on this day personally appeared Joe Smith, who after being duly sworn stated:

I am the defendant in the above entitled and numbered cause. I have read the foregoing Motion To Reconsider Sentence and swear that all the allegations of fact contained therein are true and correct.

Joe Smith

SUBSCRIBED AND SWORN TO BEFORE ME on the 27^h day of November, 2002.

Notary Public in and for
Bexar County, Texas

My commission expires: _____