

State of Wisconsin,

Plaintiff,

v.

Case No. 2009CF001355

Timothy Shavers,

Defendant.

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**Defendant's Motion to Dismiss the Complaint/Information**

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Now comes the above-named defendant, by his attorney, Jeffrey W. Jensen, and hereby moves the court to dismiss the complaint/information for the reason that the complaint/information fails to allege the date of offense with sufficient specificity to permit the defendant to prepare a defense. As such, this prosecution of Shavers violates his due process right to fair notice. *Holesome v. State*, 40 Wis. 2d 95, 102, 161 N.W.2d 283 (1968). The state has either failed to make a diligent inquiry into the exact date of offense or that date simply cannot be discerned. *State v. R.A.R.*, 148 Wis. 2d 408, 411, 435 N.W.2d 315 (Ct. App. 1988)

This motion is further based upon the attached Memorandum of Law.

Dated at Milwaukee, Wisconsin, this \_\_\_\_\_ day of \_\_\_\_\_, 2009:

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By: \_\_\_\_\_

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State of Wisconsin,

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**Memorandum in Support of Defendant's Motion to Dismiss the Complaint**

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**Introduction**

The criminal complaint, which was filed on March 19, 2009, charges the defendant, Timothy Shavers ("Shavers") with two counts of sexual assault of a child under the age of 13 without great bodily harm contrary to Sec. 948.02(1)(b), Stats.

Count One alleges that "between July 14, 2006 and July 14, 2007" , Shavers had sexual intercourse with JR (dob 7/14/1995), who was eleven years old during the period alleged. Further, the complaint alleges that the incident occurred at her "Aunt Lillie's sister's house. Aunt Lillie is actually the girlfriend of her uncle Sean William."

Count Two alleges that between January 30, 2006 and January 30, 2007, at "Aunt Lillie's house, believed to be on 13th Street, 3-4 houses away from Concordia, in the City of Milwaukee" did have sexual intercourse with DR, who was twelve years old for most of the period alleged; however, DR turned thirteen years old on January 30, 2007 (and, therefore, it that is the actual date of offense, DR was not under the age of thirteen).

## Argument

### **I. The information fails to allege the date of offense with sufficient certainty to permit Shavers to prepare and defense and, therefore, Shavers' due process rights are violated.**

Count one and count two each allege a one period span within which the offense could have occurred. Under certain circumstances, this could be sufficient to satisfy due process; however, such is not the case here. Firstly, not only is the date of the incident indefinite, so is the location, and so is the purpose of the gathering<sup>1</sup> (and the identity of the people who attended); and, when the totality of the circumstances is considered, it is patently unreasonable to suggest that Shavers could prepare a defense.

A defendant is entitled to be informed of the charges against him or her, including the time frame in which the assault allegedly occurred. *State v. Fawcett*, 145 Wis. 2d 244, 253, 426 N.W.2d 91 (Ct. App. 1988). Whether a period of time alleged in a complaint and information is too expansive to allow the defendant to prepare an adequate defense is an issue of constitutional fact which the court must determine. *Id.* at 249. The factors to be considered in determining if the complaint states an offense to which the defendant is able to plead and prepare a defense are:

(1) the age and intelligence of the victim and other witnesses; (2) the surrounding circumstances; (3) the nature of the offense, including whether it is likely to occur at a specific time or is likely to have been discovered immediately; (4) the length of the alleged period of time in relation to the number of individual criminal acts alleged; (5) the passage of time between the alleged period for the crime and the defendant's arrest; (6) the duration between the date of the indictment and the alleged offense; and (7) the ability of the victim or complaining witness to particularize the date and time of the alleged transaction or offense.

*Id.* at 251, 253.

Where, as here, the defendant contends that the charging period is unreasonable on its face, the last four factors are the most relevant inquiry. *Id.* at 251 In a case

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<sup>1</sup> We know it was a birthday party; but whose birthday party?

involving a child victim, a more flexible application of notice requirements is required because numerous circumstances cause the exactness as to time of events to fade in the memory of a child. See *id.* at 249, 254. However, those factors should be considered "when the defendant claims that the state could have obtained a more definite date through diligent efforts," *State v. R.A.R.*, 148 Wis. 2d 408, 411, 435 N.W.2d 315 (Ct. App. 1988).

#### **A. Count One (JR)**

Count one alleges that the victim was eleven years old (almost twelve years old) if the incident happened on July 14, 2007. The complaint does not allege that JR is anything other than a normal child. By the age of eleven, a child is in the early stages of adolescence. Whereas a five year-old child may not be expected to recall dates; one would expect an eleven year-old to at least be able to recall the months, or season, in which an important event occurred. Thus, since JR was eleven years old, the one-year period alleged by the state is suspect. The court should carefully consider the remaining factors.

Count one is alleged to have occurred at a "birthday party". One would think, if this incident truly occurred, it would be a simple matter to deduce- almost to the day- the date on which the incident occurred. Surely, Aunt Lillie's sister could not have had more than a handful of birthday parties at her house during the course of that year. Nonetheless, the complaint fails to allege whose birthday party this was.

Perhaps, though, this is due to the fact that the true identity of Aunt Lillie's sister cannot even be discerned. Whose Aunt is Lillie? What is Lillie's full name?<sup>2</sup> Which of Lillie's sisters does the complaint refer to?

Even if Shavers were inclined to do the state's work, and attempt to determine who this person is that had the birthday party, with the facts alleged it would be nearly impossible to accomplish.

This is especially true since the criminal complaint was filed two years after the

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<sup>2</sup> The factual allegation as to Count Two alleges that Lillie is "Lillian Pates"; however, the complaint does not allege that this is the same "Aunt Lillie" referred to in Count One.

alleged incident. This, of course, raises the additional question: Which of Aunt Lillie's sister's houses are we talking about? The complaint does not allege that the woman lived in only one residence during this period of time and that she continues to live there now.

Either the state has made no effort to particularize the date and the location that this incident allegedly occurred; or the state has made the attempt, and it cannot be done. Either way, it violates Shavers' due process rights to expect him to prepare a defense to a claim of sexual assault when both the date, the location, and the identity of the persons present are unknown.

### **B. Count 2 (DR)**

The allegations of count two are somewhat more definite. Apparently, DR was able to identify "Aunt Lillie" as Lillian Pates. The question remains, though, whether this is the same "Aunt Lillie" alleged in count one. This is a fair question since the location of Aunt Lillie's house is not alleged in count one; however, in count two it is alleged to be three to four houses away from Concordia.

Curiously, the sexual assault of DR is also alleged to have occurred at a "birthday party." It could have been the same birthday party alleged in count one because the period alleged in count one overlaps with the period alleged in count two from July 14, 2006 until January 30, 2007. The complaint does not allege, though, that this was the same birthday party.

Thus, there is some additional detail as to count two. A strong countervailing consideration, though, is that DR could have been thirteen years old at the time of the incident. Twelve and thirteen year-olds are permitted to babysit. They may have paper routes. Obviously, children of that age are able to keep a schedule- and to remember important dates.

## Conclusion

The periods alleged in each of these counts plainly violates Shavers' due process right to prepare a defense. Suppose that neither of these allegations are true. There is a strong likelihood, then, that Shavers' defense will be alibi- at least as to the exact location that the assault occurred (if Shavers were at the party). However, if Shavers produces witnesses to testify that he was not at the birthday party in question; or that he never went out into the garage; or that he did not sleep over at the house; the state and its witnesses will merely claim that the incident must have occurred at some other birthday party during that year-long span. The same is true of other witnesses. If Shavers is not told with any certainty when or where this incident occurred, how can he possibly begin to find and to interview witnesses to the alleged incident?

For these reasons, the court must dismiss the information.

Dated at Milwaukee, Wisconsin, this \_\_\_\_\_ day of \_\_\_\_\_, 2009:

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