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State of Nebraska v. Kibbee

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Supreme Court Of Nebraska Holds That New Evidentiary Rule Regarding Admission Of Prior Bad Acts In Sexual Assault Cases Is Not An Ex Post Facto Law

In *State v. Kibbee*, 284 Neb. 72, 815 N.W.2d 872 (2012), the defendant was charged with one count of first degree sexual assault against a 16 year old female. The crime allegedly occurred in 2009. The trial court allowed the prosecutor to introduce evidence under Neb. Rev. State. § 27-414 of prior bad acts committed by the defendant against other minor female victims. The defendant argued that the admission of such evidence under § 27-414 was an ex post facto violation because the statute was not in effect at the time of the sexual contact with the victim. The statute was adopted by the Nebraska Legislature in 2009, but did not become effective until 2010.

The Nebraska Supreme Court disagreed. The Court noted that “[w]hen a Nebraska Evidence Rule is substantially similar to a corresponding federal rule of evidence, Nebraska courts will look to federal decisions interpreting the corresponding federal rule for guidance in construing the Nebraska rule.” 284 Neb. at 94. In interpreting the new code section, the Court found as follows:

Section 27-414 does not violate the Ex Post Facto Clauses of the federal and state Constitutions. The statute does not affect the sufficiency of the evidence and does not change the quantum of evidence needed for conviction. It is an ordinary rule of evidence which relates to admissibility and simply provides that evidence of prior sexual misconduct may be admitted to prove propensity. The statute does not suggest that the admissible propensity evidence would be sufficient, by itself, to convict a person of any crime. The trial court did not err in finding that § 27-414 does not violate the Ex Post Facto Clauses of the federal and state Constitutions.

Id., at 90.

Cobb County ADA Mike Carlson, co-author of *Carlson on Evidence* (2013-2014 Ed.) notes that recently, there has been academic resistance to retroactive application of evidentiary rules, particularly with regard to provisions regarding sex crimes. Since there is now a presumption of admissibility for prior bad acts and evidence of criminal propensity in sex crime cases under our new evidence code, see O.C.G.A. § 24-4-414, this academic resistance could be problematic for prosecutors seeking to admit such evidence. Mike further notes that while *Kibbee* is not controlling authority, prosecutors may wish to use it as persuasive authority should this issue arise in a case.