

JUDGE THROWS OUT ONLINE SOLICITATION INDICTMENT

Posted on October 29 2014, 6:20 pm by **Scott Engle**

An accused child predator will not be tried on a September 9 grand jury indictment for online Solicitation of a Minor, thanks to 9th District Judge Kelly Case. On Wednesday afternoon, Prosecutors faced off with defense attorney Gilbert Garcia after he filed a motion to quash the indictment of 45-year-old Michael Burl Massingill of Alvin. He subpoenaed everyone from District Attorney Brett Ligon and First-Assistant District Attorney Phil Grant to County Attorney J.D. Lambright. In the end, the decision came down to a technicality.

The Montgomery County Precinct 4 Constable's Office arrested Massingill May 10 when he arrived at a location where they say Massingill believed he was meeting a 15-year-old girl for sex. His arrest was the result of a sting by the Internet Crimes Against Children, or ICAC, task force, devoted to catching and prosecuting child predators. Precinct 4 ICAC Investigator Cory Arnold testified Massingill sent images of his penis and of himself masturbating to the person he believed to be a minor and a virgin, and arranged a meeting based on the belief the girl's parents were out of town and they would go to her residence and have sex.

Garcia argued that Arnold had violated the terms of the social media site used in the communication, by pretending to be another person, thereby "stealing" the use of their software and access to their computer, making all evidence obtained inadmissible. Prosecutor Cindy Pulcher said if the investigator violated terms of service, or committed offenses against the social media site as Garcia contended, Massingill would not have a legal right to make an issue of it, only the social media site.

Garcia hammered Arnold for his role in the sting, repeatedly calling it a "bait and switch," because the terms of service say only those 18 and older can use the site, and the persona was listed as 18 in the profile. However, according to testimony, the discussions of sex and alleged transmission of graphic images and the meeting, occurred only after the investigator told Massingill he was 15. Arnold also testified the persona was contacted by a multitude of other men, who backed away after they were told the persona was only 15, meaning even though Garcia's so-called "bait" worked, once the "switch" was made, everyone else backed away. Garcia was relentless with his use of the term, no matter the responses from witnesses.

Judge Case, however, did not base his decision on Garcia's "bait and switch" theme, or any of the other issues raised during questioning of investigators. He never addressed investigators using a persona or a younger age in conversation than was listed in their persona's profile, as Garcia hoped. Case instead took issue with the prosecution. Case said the only point he saw as an issue in the motion to quash the indictment was the lack of specificity in regard to whether the case would be prosecuted based on the investigator representing himself as someone under 17 years of age, or based on the defendant believing he was speaking to someone under 17.

Pulcher first said no evidence had been presented, and there was no reason that choice should be made. The veteran prosecutor seemed surprised the discussion was occurring at all at a hearing before the trial began. Case disagreed, so Pulcher said the state elected both.

"So you're not going to elect, you're going to put all your eggs in every basket," Case said. Judge Case said the state could not choose both, and granted the motion to quash the indictment.

First Assistant District Attorney Phil Grant said the state plans to appeal Case's decision and he believes the state will prevail.