
TOUCHING TENNIS TALES
STATE V. MILLER
NEGOTIATION
[CRIMINAL PLEA BARGAINING]

Confidential information for Defense Counsel

You are a criminal defense attorney. After graduating from the best law school in the state, you worked for three years in the Public Defender's office and then joined a small general practice law firm. You were hired to start its private criminal defense practice, though you also work in family law and small business litigation.

You were initially contacted by the frantic parents of Matt Miller, a 24-year-old recently charged with Attempted Sexual Battery against 17-year-old Jane Dowd. Matt and his parents came to see you and Matt formally retained you as counsel for the matter. Matt is a personable and handsome young man but also seems unsophisticated, frightened, and somewhat immature. He seems comfortable having his parents accompany him at most of your meetings.

At the initial meeting, you learned that Matt taught Spanish and coached tennis at the high school for a few years. He quit teaching to work in software at a local company. A tennis enthusiast, he continued to coach the school tennis team. It became clear that a number of the female students found him attractive, and the feelings were sometimes mutual.

Matt was well aware that state law prohibits a teacher from engaging in sexual conduct with a student, whether or not that student is in one of their classes, and even if that student is past the legal age of consent of 16. That is why he never pursued a relationship with a student while teaching at the school. He had been attracted to one of the tennis team players a few years before but did not ask her out until the year after she graduated. They did then begin a real relationship (sex included) but broke up a few months before the incident with Jane Dowd.

However, the state law also specifically applies to school team coaches as well as teachers. Matt claims he had no idea that it applied to him when he was only coaching, and not also teaching.

Your further meetings with Matt and eventual review of police investigative reports provided the following information:

At the start of the tennis season, Matt told some female team members it was okay to text with him because he was no longer their teacher. That's when the flirting, texting, snapchatting, and twit began in earnest.

Tennis team member Jane Dowd, age 17, rather obviously developed a strong crush on Matt. She and Matt began flirting with each other during and after tennis team practices and exchanging messages and snap chats. Matt showed you the text messages. [They are included later in this document.] The snap chats do not remain present on Matt's phone. Either you or the prosecutor could subpoena them from Snap Chat, but it always takes a while to get these.



At some point, Matt let it be known that he offered private lessons for any team member seeking to improve performance. Matt is adamant that his goal was to earn extra income and he made the offer to all players.

Jane asked her parents if she could take private lessons with Matt and they agreed, provided the price was reasonable. Jane and Matt set the date for the first lesson the following Saturday morning.

During the lesson, Matt touched Jane, rubbing the back of her neck after moving her arm in a tennis swing, "correcting" her posture, and so on. Afterward, he offered to drive her home and she accepted.

When they drove up to her house, Jane asked if Matt would like to have soda or a beer and "hang out." Jane explained that her mother was working a Saturday shift, and her Dad was traveling. Matt accepted. They started with friendly banter in the kitchen. Eventually, the conversation turned to the idea of "fooling around." They went up to Jane's bedroom, turned on some music, and began to kiss. Sitting on the bed, Matt off his shirt and placed his hand on Jane's thigh but they were otherwise still clothed when they heard the garage door open! Jane's mother had come home from work early. Shirt in hand, Matt ran past Mrs. Dowd and drove away.

That evening, the Dowd parents contacted Matt and demanded an explanation. Matt and his parents came to the Dowd house immediately. After an unconvincing attempt to concoct a story (some juice spilled on my shirt), Matt eventually admitted to being in Jane's bedroom. Matt said he was very sorry and embarrassed and asked them not to tell anyone else. Matt's mother pleaded with the Dowds, asking them not to ruin her son's life and asking: "What it would take to let it go?" and "How could we help your daughter?" The Dowds interpreted this as an offer of compensation, which the police later called an attempted bribe. Matt's parents say they just wanted to help the Dowds get counseling for Jane.

In fact, the Dowds did contact the police, who charged Matt with one count of Attempted Sexual Battery, a third-degree felony under state statute.

Even though Jane Dowd rather clearly consented, if there had been "sexual conduct" (involving penetration), that conduct would constitute a crime under the statute because Matt was a coach at her school. Because the "fooling around" hadn't gone very far before Jane's mother came home (or that couldn't be proven), the police charged it as an attempt, rather than an actual Sexual Battery. [More detail as to these statutes under Ohio Law is contained in the Appendix.]

Though he didn't talk about this with the police or with Jane's parents: Matt is adamant that he didn't necessarily think or intend that "fooling around" meant they would have "gone all the way" that day. Yes, they might have. From Matt's perspective, that would have depended on how natural it felt and, frankly, whether Jane Dowd had any "protection" against pregnancy. Matt hadn't brought a condom with him. Since he definitely wouldn't have wanted to get Jane pregnant, he would have asked her whether she was on the pill or had any birth control options handy. However, they hadn't even talked about that yet.

Evidentiary/witness issues

- Jane Dowd readily acknowledges that everything was entirely consensual She was interested in a sexual relationship with Matt. She allegedly told the police she would testify because "my parents are making me." However, Matt has heard from her friends that Jane

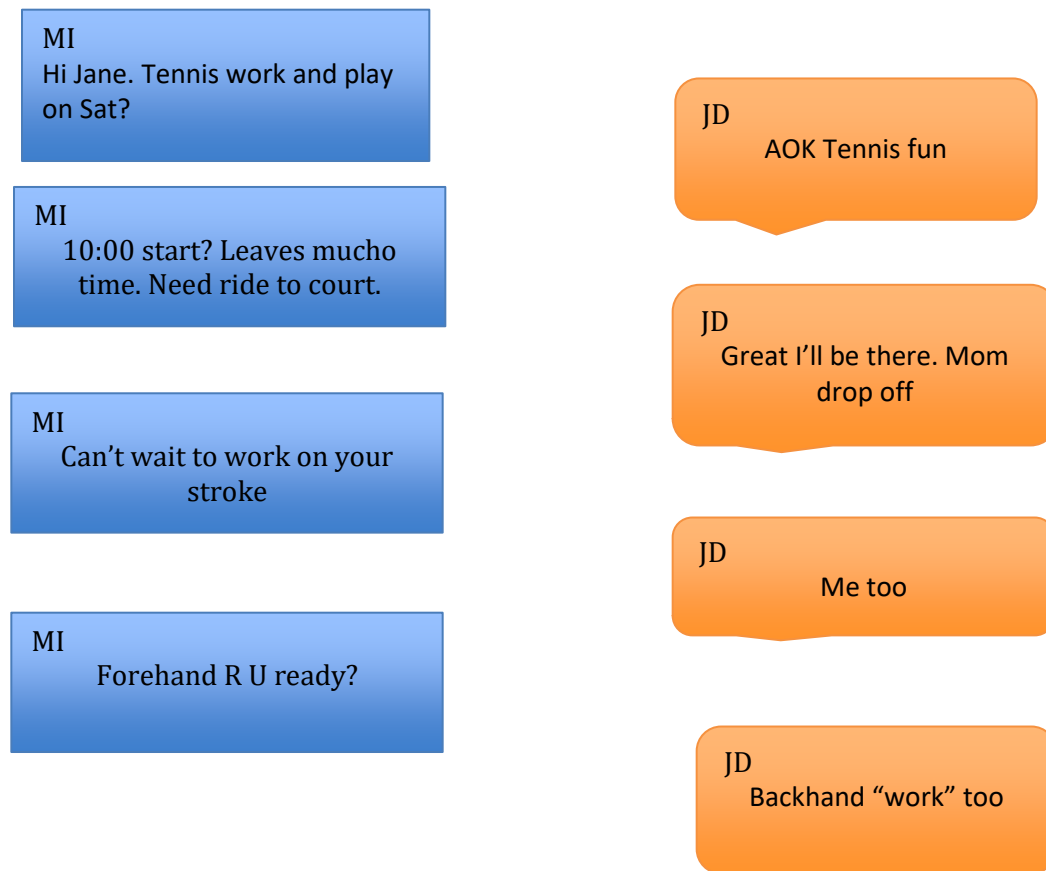
cries whenever she thinks about it; she feels guilty, and a public trial would be humiliating. Your experience suggests that Jane’s feelings for Matt may win out; she may decide not to testify once she realizes how that would impact him. Even if she does show up, her testimony might not hold up.

- Mr. Miller appears to have “confessed” to the parents, but it is not clear that what he said is specific enough to support the charge of Attempted Sexual Battery, especially if jurors felt sympathetic toward him. Mr. Miller doesn’t present like a sexual predator. He’s a handsome, likable, young-looking 24-year-old with no criminal record. Ms. Dowd also seems to be a normal teenager, unsophisticated, but she obviously had a crush on Mr. Miller and was interested in a relationship.

Text Messages and Snap Chats

The text messages exchanged between Mr. Miller and Ms. Dowd are below. In your view, they are not too bad. Yes, they can be read as suggestive, but at least the words used are legitimate tennis terms.

Text messages found on Jane Dowd’s phone
(would also be on Matt Miller’s phone)



MI

Gotcha and getcha

JD

Soon!!! Cant' wait!!

You have no idea what might be in their snap chats, before or after the Saturday lesson, as snap chats are designed to disappear. Matt said some of these were “racier”, both between him and Jane, and between Jane and other female players: lots of comments about strong legs, muscle arms, and cute butts in tennis shorts, that sort of thing. It might not look good if a jury were to see these, depending on whose comments were more obviously sexualized.

Fortunately, you have reason to believe – to hope - the ADA hasn’t obtained the snap chats. You know it’s a lot of paperwork to subpoena them from the company, and there’s often a long delay. The ADA’s caseload is large, and most cases plead, so he may not have the snap chats to use against you in negotiations or at trial.

Concerns and Constituencies

Your only obligation is to your client (and the ethics of practice, of course). You will no doubt interact with this ADA, this DA’s office, and this police department on behalf of other criminal defense clients.

You hope that at least one of the police officers has a son in his mid-twenties. After all, at 17, Jane was “of legal age” for consent. This whole affair led to a criminal charge only because Matt happened to meet Jane initially through high school team tennis coaching. If he coached elsewhere (particularly over the state line) and met Jane for private lessons at a tennis club, there would be no crime at all.

Unfortunately, you know this case has garnered some local press attention, in part because it follows other instances of teacher misconduct in the district. In a recent case, a junior high school history teacher impregnated a 15-year-old, who then refused to testify. Shortly after that, a gym teacher was charged with unlawful touching of female students going back a decade. The parents and press stories suggest that the school was involved in a cover-up. All of this has heightened awareness and concern about teachers’ sexual misconduct with female students.

Statutory Constraints and Plea Negotiations

Normally plea negotiations revolve around the crime(s) charged, the terms of the sentence, and the facts that will be stipulated.

With respect to the charge(s)

There are several possible charges, including:

- Attempted Sexual Battery (the current charge), which carries a penalty of 6 to 18 months in prison and up to a \$5,000 fine, up to 5 years probation, and registration as a sex offender.



- Sexual Battery is a more serious offense that carries 1 to 5 years in prison and up to a \$10,000 fine, up to 5 years probation, and registration as a sex offender.
- For either of these offenses, “battery” includes “any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person.”
- Conviction of either offense would require Matt to register as a “sexual offender.” Sexual Battery requires registration for life; it is a public record, and the offender must renew his registration annually. People living within 1200 feet of the offender are notified by mail of his presence in the neighborhood.
- Attempted Sexual Battery also requires lifetime registration that is a public record, but neighbors are not given notice that an offender is living nearby.
- Penalties for either crime are increased if the victim is below the age of 16.
- To avoid registering as a sex offender, Matt would have to plead to something that is not a sexual offense. This would probably require agreeing to a description of the incident that omits some facts. Possibilities include:
 - Trespass: being in the house without permission from the parents.
 - Burglary: being in the house without permission from the parents, for the purpose of committing a criminal offense.

With respect to the terms of the sentence

The parties can negotiate about the length of a sentence and probation time, subject to any statutory minimum/maximum limits. More important than the length of a sentence is how much will be served in prison versus suspended. If a defendant is sentenced to longer probation, he has to report and is at risk of being charged with a probation violation for a longer time period.

The judge is not obligated to accept a prosecutor’s or joint plea recommendation. While you and the ADA are respected in the court, the judge is elected and may care about public perception and apply the law harshly. On the other hand, he may be as sympathetic to your young client Matt as to Jane. Without a plea deal, it’s possible that he would dismiss the case after hearing the full story. It’s hard to predict what Jane will testify to, or whether she will testify at all.

Stated positions and Interests for Negotiation

- Matt has heard from Jane’s friends that she is upset and tearful, feels terribly guilty about what happened, and is confused about what she can or should do.
- Mr. and Mrs. Dowd want Matt to be forced to register as a sex offender so he can never coach youth again. They don’t seem as adamant about prison time but want a long period of probation and for people to be “warned” about him. They might also like help paying for counseling for Jane. Some in the community and a local radio personality have pushed the idea that “predators like this should spend some time in a prison cell.”
- Matt wants to avoid prison at all costs and does not want to register as a sex offender.
- Matt thinks it’s completely unfair that he would be charged at all or be stuck with a criminal felony record when he didn’t know he was doing anything wrong. He knew that Jane Dowd was 17; he was no longer her teacher; he was interested in a relationship with her. That shouldn’t be a crime! If he had known that such a relationship was still illegal for coaches,



he never would have done it. There was no coercion involved at all. The flirting was entirely mutual. Jane contacted him about the private lesson and invited him into the house. Matt was the only one shirtless when her mother came home. Matt apologized. No harm was done.

- Matt is very worried that, on future job applications, he'll have to reveal a criminal felony conviction. It would be much better for him to plead to a misdemeanor, such as trespassing.
- Matt REALLY doesn't want to register as a Sex Offender, because he knows that will restrict where he lives, etc. And he is certain that would carry enough stigma to prevent him from getting future work; it may even get him fired from his current job.
- Matt is willing to do anything "creative" that will enable him to avoid a criminal record or registering as a Sex Offender.
- Matt (likely with help from his parents) is willing to pay for any psychological counseling Jane needs because of this. How much could that cost? Imagine 20 sessions at \$250 each; that would only be \$5000. The Millers would gladly pay that much, maybe more. Matt is employed; he can or will soon be able to afford it.
- Only if absolutely necessary, Matt has authorized you to say he is willing to plead guilty to the Attempt, be on probation, and agree not to coach through any school. (If possible, however, Matt would like to continue to build a side business in private tennis coaching at the local tennis club. If necessary, he would be willing to restrict his tennis clients to post-high school graduates, at least for a while.)
- You know that some bloggers, parents, and local radio personalities have pushed the idea that "predators like Mr. Miller should spend some time in a prison cell."

Appendix

Relevant Ohio Laws for Sex Offences

The referenced and potentially relevant statutes from the Ohio Revised Code relating to "Sex Offences" are attached to this document and merit careful review.

This section attempts to simplify and clarify how these might apply in this case.

Ohio Revised Code, O.R.C. §2907.01 contains general definitions and elements of "Sex Offences." Relevant to this case are:

- 2907.01 (A)'s definition of "sexual conduct" as vaginal intercourse between a male and a female, without privilege, and a statement that any penetration is sufficient to constitute intercourse.
- 2907.01 (B)'s definition of "Sexual contact" as "any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person."
- 2007 (C)'s definition of "Sexual activity" is "sexual conduct or sexual contact, or both."

O.R.C. §2907.03 generally sets out the elements of Sexual Battery as unlawful sexual conduct (which must include penetration) and makes consent *irrelevant when the offender and the other person are of certain ages and in certain types of relationships with each other.*

Important for this case O.R.C. §2907(8), which includes under Sexual Battery, sexual conduct where: "The other person is a minor, the offender is a teacher, administrator, coach, or other person in authority employed by or serving in an institution of higher education, and the other person is enrolled in or attends that institution."

[Note that if the "other person" is younger than 16, the classification of the crime is more serious, and penalties harsher if there is more than a 4-year age difference between the offender and the victim, or if the victim is younger than 13 years old. In this case, Matt Miller is 7 years older than Jane Dowd, but she was already 17. Thus, even if there had been a penetration, they are just outside of the boundaries for harsher punishment.]

SEXUAL BATTERY IS CLASSIFIED AS A THIRD-DEGREE FELONY AND, UNDER THESE CIRCUMSTANCES WOULD CARRY A SENTENCE OF A MINIMUM OF ONE YEAR AND UP FIVE YEARS AND UP TO A \$10,000 FINE.

Also important, a plea or conviction for Sexual Battery would require Tier III lifetime sexual offender registration (described more fully on the next page).

Attempted Sexual Battery

The police apparently decided to charge Matt with "Attempted Sexual Battery" because there is no evidence of penetration. Their theory seems to be that was Matt's intent, thwarted by the arrival of



Jane Dowd's mother. Attempted Sexual Battery carries a prison term of 6-18 months and up to a \$5,000 fine and is presumptively and usually punished with probation instead of prison time.¹

A plea or conviction of Attempted Sexual Battery would still make Matt a Tier III sexual offender (described more fully on the next page).

Sexual Imposition O.R.C. §2907.06

Ohio's statute on Sexual Imposition does not require penetration. It prohibits a wider range of non-consensual sexual activity and makes consent irrelevant only if the sexual activity involves someone younger than 16. However, it does not contain a blanket prohibition against coaches' or teachers' sexual activity with students, if consensual.

Sexual imposition is classified as a 3rd-degree misdemeanor, punishable by up to 60 days in jail and up to a \$500 fine.

Attempted Sexual Imposition is classified as a 4th-degree misdemeanor, punishable by up to 30 days in jail, and up to a \$250 fine.

[Unfortunately, both Sexual Imposition and Attempted Sexual Imposition require Sex Offender registration. At the Tier I level, Matt would have to renew that registration annually for 15 years. However, he could petition to have the registration requirement removed after 10 years. [See the next section for a somewhat more complete description of Sex Offender registration in Ohio.]

Megan's Law – Sex Offender Registration

Under O.R.C. §2950 [et. seq.]: SEXUAL PREDATORS, HABITUAL SEX OFFENDERS, SEXUALLY ORIENTED OFFENDERS, known as Megan's Law, conviction or plea to various types of Sex Offences requires registration as a sex offender. The law creates three "Tiers" of sexual offenders, with different consequences and duration.

Adult sex offender registries are public records, accessible to the public through local sheriff's offices and online through Ohio's ESORN (Electronic Sex Offender Registration and Notification) Internet database.

Conviction of or plea to Sexual Battery under O.R.C. §2907.03 is categorized as a Tier III offender.

- Tier III offenders must register their address with the local sheriff and renew that registration every 90 days. People living within 1200 feet of that address receive a "community notice card" by mail that includes the offender's photo, address, and other identifying information, as well as instructions on safety and how to report suspicious activity.

¹ Under Ohio law, for most categorized felonies, an unsuccessful attempt downgrades the felony degree by one stop. Since sexual battery is a third-degree felony, attempted sexual battery becomes a fourth-degree felony. See O.R.C. §2903.



- Tier II offenders must register their address and renew every 180 days for 25 years.
- Tier I offenders must register their address and renew annually for 15 years. After 10 years, Tier I offenders may petition to be removed from the registry.
- “Community notice” cards are not sent for Tier II and I offenders.

Other Potentially Relevant Statutory Offenses

Simple Assault

Under O.R.C. §2903.13, simple assault is classified as a first-degree misdemeanor and carries a sentence of up to 6 months in jail and a \$1000 fine. Simple assault involves *recklessly* causing a serious physical injury or *knowingly* causing or attempting to cause physical harm to another or another unborn child.

A negligent assault charge under O.R.C. §2903.14 involves a dangerous weapon or “ordnance” and negligently causing serious harm. It is a third-degree misdemeanor, which carries a sentence of up to 60 days in jail and up to a \$500 fine.

Criminal Trespassing, O.R.C. §2911.21.

In relevant part, Ohio’s criminal trespassing statute provides that “No person, without privilege to do so, shall ...(1) Knowingly enter or remain on the land or premises of another; or (2) Knowingly enter or remain on the land or premises of another, the use of which is lawfully restricted to certain persons, purposes, modes, or hours, when the offender knows the offender is in violation of any such restriction or is reckless in that regard.”

[Note, while it might be creative lawyering, one could argue that Matt was merely trespassing. He knew that Jane Dowd didn’t own the house and knew or should have known her parents (the owners) wouldn’t have given him permission to be there with her.]

Violation of §2911.21 is a fourth-degree misdemeanor, carrying a maximum sentence of 30 days in jail and a fine of not more than \$250 (unless certain types of vehicles were involved, not applicable here). It’s highly unusual for a first-time criminal trespassing offense to result in prison time.

Aggravated Trespass O.R.C. §2911.211

Similar, but perhaps more appealing to the ADA (or Jane Dowd’s parents) might be a charge of to “Aggravated Trespass.” The statute provides under subpart A:

“No person shall enter or remain on the land or premises of another with purpose to commit on that land or those premises a misdemeanor, the elements of which involve causing physical harm to another person or causing another person to believe that the offender will cause physical harm to him.”

It’s also a first-degree misdemeanor, but the potential sentence is 180 days in jail and a fine of up to \$1,000.

Burglary O.R.C. §2911.12

As defined in Ohio, and relevant to this case, burglary involves trespassing by “force stealth or deception” in the home of “any person” (“habitation”) with the purpose of committing a crime there or when “any person” is present or likely to be present. Depending on the particulars, it is categorized as a third or fourth-degree felony.