

Criminal Law—Sentences—Suspension—Statutory Rape.

The court may grant a suspended sentence in cases of statutory rape.

Mr. R. C. Dillavou,
County Attorney,
Billings, Montana.

December 16, 1930.

My dear Mr. Dillavou:

You have sent me a copy of the proceedings in the case of State vs. Rodriguez relative to a suspended sentence and in which you ask if the court has authority to grant a suspended sentence where there is a conviction of statutory rape.

The court may grant a suspended sentence in all cases except those mentioned in section 12079, R. C. M. 1921, among which exceptions is the offense of "rape without consent." Upon the legal hypothesis that a female under the age of eighteen cannot legally consent it might be said that this statute would prevent the imposition of a suspended sentence in all cases where the offense was committed upon a female under the age of eighteen years, but if that interpretation is to be given this statute then the words "without consent" would be meaningless because the prohibition would extend to rape of all classes for there can be no rape of a female above eighteen years of age with her consent.

As the purpose of the statute apparently was not to prohibit the imposition of a suspended sentence in all classes of rape but only as to those accomplished by actual force, it is my opinion that wherever the offense was committed by the use of actual force, whether upon a female under or above the age of eighteen years, the court is without jurisdiction to suspend the sentence imposed but that in those cases where the offense is committed upon a female under the age of eighteen years and in the perpetration of which offense no actual force was used, the court may suspend the sentence.

Very truly yours,
L. A. FOOT,
Attorney General.