THE STATE OF NEW HAMPSHIRE

STRAFFORD COUNTY SUPERIOR COURT

The State of New Hampshire

v.

David Cobb

Docket Nos.: 95-S-535-F,
96-S-026-F – 96-S-182-F

ORDER ON DEFENDANT'S MOTION FOR NEW TRIAL AND PETITION FOR HABEAS CORPUS

The defendant was convicted on May 6, 1996 of one count of attempted felonious sexual assault, fifty-three counts of exhibiting or displaying child pornography, and 267 counts of possessing child pornography. He now moves for a new trial or, in the alternative, petitions for habeas corpus on the grounds of 1) ineffective assistance of his trial counsel; 2) violation of his First Amendment rights; 3) "failure of the Trial Judge and prosecutor to disclose a close personal and professional relationship;" and 4) prosecutorial misconduct and unfair prejudice which may have affected the jury. The New Hampshire Supreme Court previously upheld the defendant's convictions. See State v. Cobb, 143 N.H. 638 (1999). As a result, the defendant acknowledges that his petition is a collateral attack on his convictions and concedes that he can only raise the issues in his motion in the context of an attack on the effectiveness of counsel.

The above-numbered charges arose from two incidents that occurred during the summer of 1995. On August 17, 1995, the defendant met thirteen-year-old Bobby K.

("Bobby") at a Rochester, New Hampshire pool. The defendant was carrying a black knapsack which contained a brown paper bag. The defendant showed Bobby a number of photos from a stack within the paper bag. The photos depicted naked adults and naked children.

On August 21, 1995, the defendant approached twelve-year-old Jeffrey W. ("Jeffrey") in downtown Farmington, New Hampshire, identified himself as a camp counselor, and asked Jeffrey if he knew anyone who would want to earn $20 dollars by helping to change two retarded children out of their wet bathing suits. Jeffrey agreed to help, and the defendant led Jeffrey toward Fernald Park. The defendant was wearing a T-shirt bearing the phrase "Camp KYO For Retarded Children" and a camp hat, and was carrying a black knapsack. Three Farmington police officers, recognizing the defendant from a description given in a report to police the previous day of a man engaging in similar activity, stopped the defendant. At the time he was stopped, the defendant had 515 photographs in his knapsack. A number of the photographs depicted children and adults engaged in various sexual activities.

Ineffective Assistance of Counsel

Both at trial and on appeal, the defendant argued, *inter alia*, that the photographs at issue did not meet the definitions of proscribed material under RSA 649-A, New Hampshire's child pornography statute. The Supreme Court noted that "because the defendant ha[d] only raised an issue of statutory interpretation," the Court limited its analysis accordingly. The defendant now asserts, however, that his trial counsel was ineffective in failing to also raise arguments regarding the constitutionality of his convictions under the First Amendment of the United States Constitution.

The New Hampshire Constitution entitles criminal defendants to "reasonably competent assistance of counsel." State v. Henderson, 141 N.H. 615, 618 (1997) (quoting State v. Matiyosus, 134 N.H. 686, 687 (1991)). In order to prevail on a claim of ineffective assistance of counsel, a defendant must:

> show first, that counsel's performance was deficient, and second, that counsel's performance resulted in actual prejudice to the outcome of the defendant's case. With regard to the second element, the defendant must demonstrate that there is reasonable probability that the result of the proceeding would have been different had he received competent legal representation. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the case.

Id. (quotations and citations omitted).

RSA 562:1 provides, "[a] new trial may be granted in any case where through accident, mistake or misfortune justice has not been done and a further hearing would be equitable." A motion for new trial will not be granted, however, unless it is probable that a different result will be reached upon another trial. See Clark v. Wheeler, 81 N.H. 34, 39-40 (1923). Whether or not justice requires a new trial is a question of fact for the trial court. See State v. Belkner, 117 N.H. 462, 472 (1977).

In considering an ineffectiveness claim, the court "start[s] with the strong presumption that counsel's conduct falls within the limits of reasonable practice . . . bearing in mind the limitless variety of strategic and tactical decisions that counsel must make." State v. Chase, 135 N.H. 209, 212 (1991) (citation omitted). Tactical judgments of defense counsel will not be second-guessed by the court. See State v. Glidden, 127 N.H. 359, 362 (1985) (citing State v. Perron, 122 N.H. 941, 947 (1982)). Further, "success in criminal trials and perfection in trial tactics are not guaranteed by the Constitution." Glidden, 127 N.H. at 363 (quoting State v. Fleury, 111 N.H. 294, 299 (1971)).

The defendant asserts that “trial counsel’s failure to challenge the constitutional sufficiency of the evidence in light of the defendant’s First Amendment rights caused actual prejudice [to him].” Specifically, he contends that the testimony of an expert in his trial “would have established that the ‘photographs’ relied upon by the State were not in fact photographs and were protected by the defendant’s freedom of expression.”

The defendant’s trial counsel, Attorney Cathy Green, testified at the hearing on this matter that the charged photographs were Polaroids of “collages” made with cut-outs from books, magazines, and catalogues. Some of the pictures were of actual, naked children from black market child pornography books, while others were cut-outs from sources like Sears’ catalogues which were enhanced by various means. The New Hampshire Supreme Court described the photographs in the following manner:

> [t]he items at issue are Polaroid photographs. The photographs generally fall into the following categories: adult nude bodies juxtaposed with fully clothed children; composite images containing the sexually immature bodies or body parts of children either depicted by themselves, with or without a face, or juxtaposed with the faces of adults or other children, some altered by the addition of hand-drawn pubic hair; and nude bodies that have been altered by the addition of children’s heads.

Cobb, at 642.

Attorney Green stated that she and her co-counsel, Attorney Phillip Utter, thought about and analyzed whether the collages could be considered art or otherwise protected speech. She explained, however, that a number of the photographs included pictures of live, naked children and, therefore, she and her co-counsel made a tactical decision not to draw focus to the content of particular photographs. Specifically, Attorney Green was concerned that arguing that some of the photographs were not of live, naked children

would guarantee conviction on the charges related to photos that were of live, naked children.

Attorney Green stated that, in addition to the above, the defense believed that the high number of photographs in contention was to its tactical advantage. Specifically, the defense believed it could undermine Bobby's credibility during cross-examination with regard to the charges for exhibiting or displaying child pornography by confusing him with the high volume of photographs. Indeed, Bobby was unable to recall numerous photographs he had previously identified as having been displayed to him by the defendant.

Attorney Green testified that this analysis led to defense counsel's decision not to engage an expert to testify that the photographs were artwork. Furthermore, Attorney Green testified that she spoke to the defendant about the problem caused by the fact that some pictures included actual naked children and that she believed the defendant understood and agreed with the tactics the defense employed at trial.

For the above reasons, the court finds Attorney Green's assistance was not ineffective. The court will not second-guess the tactical decision of the defense not to attack the photographs on First Amendment "artistic" grounds. Attorney Green testified that the defendant prepared a list of photographs that "might be construed as non-collages . . . [of naked] children – or close calls." Hearing on Motion for New Trial, Def's ex. B. As discussed in more detail below, the defendant's admission that many of the pictures included images of actual naked children would have hampered the defense he now proposes. Defense counsel's decision to focus instead on attacking the photographs on the grounds that they did not meet the statutory definition of "visual representations" was a reasonable one.

Not only did trial counsel appropriately consider and address the specific area the defendant now claims was deficient, counsel in general discussed trial strategy and tactics with the defendant throughout his representation. In addition, trial counsel testified that the defendant was aware of and agreed with the trial strategy. None of the alleged deficiencies the defendant now raises about trial counsel's performance undermine the persuasiveness of the defense theory advanced at trial. That the jury was not convinced of its merit is insufficient to support an attack of trial counsel's performance.

First Amendment Claim

Next, the court considers the defendant's claim that his First Amendment rights were violated by his charges and convictions. The defendant asserts that his collages were "First Amendment freedom of expression artistic renderings and not 'pornography' as established by the United States Supreme Court." The defendant relies, in part, on the United States Supreme Court's recent holding in Ashcroft v. Free Speech Coalition, 535 U.S. ___, slip op. (April 16, 2002) to support this proposition.

The defendant asserts that the holding of Ashcroft should apply retroactively to his case. The State disagrees, contending that because Ashcroft announced a substantive change in constitutional law and not a new law of criminal procedure, it should not apply retroactively. Because substantive changes in constitutional law are not applied retroactively on collateral review of cases in which the conviction became final before the constitutional principle was announced, see Bousley v. United States, 523 U.S. 614, 620 (1998); Teague v. Lane, 489 U.S. 288 (1989), the court finds Ashcroft inapplicable to the defendant's case. Even if Ashcroft applied retroactively, however, the court finds it would not have changed the outcome of the defendant's case.

In Ashcroft, the Court considered the constitutionality of a statute prohibiting as child pornography not only pornographic images made using actual children, but also "any visual depiction" that "is, or appears to be, of a minor engaging in sexually explicit conduct." See Ashcroft, at 2-3. The Court noted that these depictions are sometimes called "virtual child pornography" because, using various technologies, they can be generated without using actual children. In addition, the statute prohibited "any sexually explicit image that is "advertised, promoted, presented, described or distributed in such a manner that it conveys the impression" that it depicts "a minor engaging in sexually explicit conduct." See id. at 3. A third section of the statute prohibited what the Court described as

> a more common and lower tech means of creating visual images, known as computer morphing. Rather than creating original images, pornographers can alter innocent pictures of real children so that the children appear to be engaged in sexual activity. Although morphed images may fall within the definition of virtual child pornography, they implicate the interests of real children and are in that sense closer to the images in [New York v. Ferber, 458 U.S. 747 (1982)].

Ashcroft, at 4. The Court specifically noted that the parties in Ashcroft did not challenge this third section of the statute, and as a result, the Court did not consider it. See id. The Court instead confined its analysis to the first two sections of the statute as described above.

In Ferber, the United States Supreme Court considered the following question:

> To prevent the abuse of children who are made to engage in sexual conduct for commercial purposes, could the New York State Legislature, consistent with the First Amendment, prohibit the dissemination of material which shows children engaged in sexual conduct, regardless or whether such material is obscene?

Ferber, at 753. The Court answered the question in the affirmative, distinguishing child pornography from other sexually explicit speech because of the State's interest in protecting the children exploited by the production process. See id., at 758. Although

generally pornography can be banned only if it is obscene, under Ferber, pornography showing minors can be proscribed whether or not the images are obscene under the definition set forth in Miller v. California, 413 U.S. 15 (1973). The Ferber Court noted that, "[t]he Miller standard, like all general definitions of what may be banned as obscene, does not reflect the State's particular and more compelling interest in prosecuting those who promote the sexual exploitation of children." Id. at 761.

In Ashcroft, the defendants, including a trade association for the adult entertainment industry, alleged that the "appears to be" and "conveys the impression" provisions were overbroad and vague, chilling them from producing works protected by the First Amendment. The Court held that in proscribing materials that are neither obscene under Miller nor produced by the exploitation of real children, as in Ferber, the two sections of the statute considered in Ashcroft were overbroad and unconstitutional.

As discussed at the hearing on this matter, however, the defendant admitted that numerous of the photographs included images of actual naked children. As such, these photographs fall directly under the ambit of properly proscribed material as defined in Ferber. In Ferber, the Court's primary concern was the exploitation of actual children whose sexual abuse was memorialized in the form of child pornography; as in Ferber, the defendant in this case employed images of actual children that were memorialized in his collages depicting actual children engaged in sexual activity.

In addition, the photographs including so-called "morphed" images are not protected by the United State's Supreme Court's decision in Ashcroft. The Ashcroft Court specifically declined to consider the federal statute dealing with "morphing" and noted that "although morphed images may fall within the definition of virtual child pornography, they implicate the interests of real children and are in that sense closer to the images in

Ferber." Ashcroft, at 4. An analysis of a few of the photographs at issue illustrates this logic.

Among the charged photographs are Polaroids which include facial images from old childhood photos of well-known film actresses, see e.g., State's exs. 38, 49, 101,187, 229, 259, 389, 459, that have been edited in a sexually explicit manner. Although these photographs were not produced by means of the sexual exploitation of these easily identifiable women, they come closer to the materials prohibited by Ferber than virtual child pornography, which is generated solely by computer graphics and does not involve the use of identifiable images of real children or real persons. As the Ashcroft Court explained,

> Ferber upheld a prohibition on the distribution and sale of child pornography, as well as its production, because these acts were "intrinsically related" to the sexual abuse of children in two ways. First, as a permanent record of a child's abuse, the continued circulation itself would harm the child who had participated. Like a defamatory statement, each new publication of the speech would cause injury to the child's reputation and emotional well-being. Second, because the traffic in child pornography was an economic motive for its production, the State had an interest in closing the distribution network . . . . Under either rationale, the speech had what the Court in effect later held was a proximate link to the crime from which it came.

Ashcroft, at 11-12 (citations omitted). The Ashcroft Court held that virtual child pornography, by contrast, was not "intrinsically related" to the sexual abuse of children. Although the Government contended that the images of virtual child pornography could lead to actual instances of sexual abuse, the Court held that "the causal link is contingent and indirect." Id. at 12. The Court noted, however, "[t]he Government, of course, may punish adults who provide unsuitable materials to children, see Ginsberg v. New York, 390 U.S. 629 (1968), and it may enforce criminal penalties for unlawful solicitation. Ashcroft, at 14.

In this case, the defendant was convicted of attempted felonious sexual assault and exhibiting or displaying child pornography, in addition to possessing child pornography. The circumstances of this case demonstrate a causal connection between child pornography and child sexual abuse that is not at all contingent and indirect, in that the defendant used the photographs in an apparent attempt to facilitate sexual assaults of children. The concerns the Ashcroft Court articulated with respect to virtual child pornography when it noted that virtual child pornography "records no crime and creates no victims by its production," id. at 12, are of diminished significance in a case like this. Although the people whose photographs have been "morphed" were not made to engage in the behavior displayed in the photographs, they are nonetheless victimized each time photographs containing their image are displayed or exhibited.

Whereas the United States Supreme Court considered the mere possession of virtual child pornography a "victimless" crime, the same cannot be said of the defendant's possession of the charged photographs in this case. Although in the pictures being contested by the defendant live naked children were not made to engage in the particular activities displayed in the photographs, the images of real children were edited to appear as though the children were engaged in sexual conduct. While the children in the morphed photographs may belong to a different class of victims than children made to actually engage in sexual behavior in the production process of child pornography, the children in the morphed photographs are nonetheless actual identifiable human victims, rather than computer-generated virtual images. In other words, morphed photographs create direct and identifiable child victims of sexual exploitation, whereas purely computer-generated virtual child pornography does not, absent additional criminal conduct, directly victimize any particular children. The underlying concerns which informed the Ferber

decision, therefore, are implicated by the facts of this case in a manner they were not in Ashcroft.

For the above reasons, the court finds the defendant's conduct is not protected by Ashcroft; rather, his conduct falls within the confines of properly proscribed conduct as defined in Ferber. Accordingly, the court finds the defendant's First Amendment rights have not been violated by his convictions.

Recusal Issue

The defendant asserts that he "should have been informed of the long-standing personal and professional relationship between [the trial judge] and the prosecutor, Lincoln T. Soldati, or the judge should have recused himself *sua sponte*." The court disagrees. Attorney Soldati testified at the hearing that he worked as an associate in Judge Joseph Nadeau's law firm for approximately one year fifteen years before the defendant's trial. In addition, as Strafford County Attorney for approximately thirteen years prior to the defendant's case, Attorney Soldati tried hundreds of cases before Judge Nadeau. Canon 3C(1) of the Code of Judicial Conduct provides, "[a] judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned . . ." The Rule lists particular instances in which a judge should recuse himself, but notes that the list is not an exclusive one. In State v. Linsky, the New Hampshire Supreme Court stated,

> [w]e are of the opinion that the . . . bases for recusal have a generally common test [:] [t]here must exist a bias, or such likelihood of bias, or an appearance of bias that the judge is unable to hold the balance between vindicating the interests of the court and the interests of the accused.

117 N.H. 866, 882 (1977) (citations omitted).

The court finds there was no basis for recusal of Judge Nadeau in the defendant's case.

Prosecutorial Misconduct

The defendant contends that the prosecutor engaged in misconduct by appearing before the jury wearing "a highly inflammatory red hat which tended to incriminate the defendant." He asserts that defense counsel should have objected to the prosecutor's conduct and moved for a mistrial and that this failure constituted "plain error."

Attorney Soldati testified that he did wear a red hat bearing the phrase "Cobb Office Products, Inc." in the lobby of the court and perhaps between the doors leading to the courtroom in which the trial was held, but that he did not wear it in the courtroom. He stated that he wore the hat as a "tongue-in-cheek" reference to the case in an attempt to amuse Attorney Green. Attorney Green testified that she did not see Attorney Soldati wearing the hat. At no point does it appear that the jury was aware of the incident or that there is any evidence that the jury may have been affected by the prosecutor's conduct.

For the above reasons, the defendant's motion is **DENIED**.

So Ordered.

August 15, 2002
Date

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Bruce E. Mohl
Presiding Justice