**[Cite as *State v. Robinson*, 2009-Ohio-3673.]**

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

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|---|---|---|
| STATE OF OHIO, | : | |
| Plaintiff-Appellee, | : | CASE NO. CA2008-08-102 |
| | : | O P I N I O N |
| - vs - | | 7/27/2009 |
| | : | |
| AARON M. ROBINSON, | : | |
| Defendant-Appellant. | : | |

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 07CR24677

Rachel A. Hutzel, Warren County Prosecuting Attorney, Mary K. Martin, 500 Justice Drive, Lebanon, Ohio 45036, for plaintiff-appellee

Timothy A. Smith, 810 Sycamore Street, 5th Floor, Cincinnati, Ohio 45202, for defendant-appellant

**BRESSLER, P.J.**

**{¶1}** Defendant-appellant, Aaron M. Robinson, appeals his convictions in the Warren County Court of Common Pleas for importuning and sexual imposition.

**{¶2}** From August through October 2007, appellant, who was 19 years old at the time, used his computer to communicate with a 13-year-old girl. During this time, appellant solicited the girl to engage in sexual activity with him, sent digital photographs of his genitalia to her, and grabbed her buttocks and breasts when he met her.

**{¶3}** Appellant was indicted on one count of importuning in violation of R.C.

2907.07(D)(1) and one count of sexual imposition in violation of R.C. 2907.06(A)(4). Appellant moved to dismiss the importuning charge, alleging R.C. 2907.07(D)(1) is facially unconstitutional, and the trial court denied the motion. Appellant then entered no contest pleas to both charges.

**{¶4}** Appellant appeals, raising the following assignment of error:

**{¶5}** "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN DENYING APPELLANT'S MOTION TO DISMISS THE CHARGE OF IMPORTUNING."

**{¶6}** In his first assignment of error, appellant argues that R.C. 2907.07(D)(1) is unconstitutional on its face. Specifically, appellant maintains R.C. 2907.07(D)(1) violates the Due Process, Equal Protection, and Free Speech Clauses of the First, Fifth, and Fourteenth Amendments to the United States Constitution. Further, appellant argues R.C. 2907.07(D)(1) is irrational because he was convicted of a felony crime for soliciting sexual activity from a minor using a telecommunications device, but if he had actually engaged in sexual activity with a minor he alleges he would have been charged with a misdemeanor crime.

**{¶7}** This court's inquiry begins with the fundamental understanding that a statute enacted in Ohio is presumed to be constitutional. *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, ¶12. "[B]efore a court may declare [an enactment of the General Assembly] unconstitutional it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible." *State v. Cook*, 83 Ohio St.3d 404, 409, 1998-Ohio-291. Because legislative enactments enjoy a presumption of constitutionality, "the courts must apply all presumptions and pertinent rules of construction so as to uphold, if at all possible, a statute or ordinance assailed as unconstitutional." *State v. Dorso* (1983), 4 Ohio St.3d 60, 61.

**{¶8}** Appellant argues that R.C. 2907.07(D)(1) is facially unconstitutional. A

statute or ordinance is invalid "on its face" when it is "unconstitutional in every conceivable application" or when "it seeks to prohibit such a broad range of protected conduct that it is unconstitutionally 'overbroad.'" *Members of City Council v. Taxpayers for Vincent* (1984), 466 U.S. 789, 796, 104 S.Ct. 2118, 2124.

**{¶9}** R.C. 2907.07(D) provides:

**{¶10}** "No person shall solicit another by means of a telecommunications device, as defined in section 2913.01 of the Revised Code, to engage in sexual activity with the offender when the offender is eighteen years of age or older and either of the following applies:

**{¶11}** "(1) The other person is thirteen years of age or older but less than sixteen years of age, the offender knows that the other person is thirteen years of age or older but less than sixteen years of age or is reckless in that regard, and the offender is four or more years older than the other person."

**{¶12}** Appellant cites *Ashcroft v. The Free Speech Coalition* (2002), 535 U.S. 234, 122 S.Ct. 1389, to support his argument that R.C. 2907.07(D)(1) is not narrowly tailored to meet the purported compelling state interest and that it prohibits the dissemination of protected speech. This court, and several others, have rejected this argument with respect to R.C. 2907.07(D)(2). See, e.g., *State v. Worst*, Butler App. No. CA2004-10-270, 2005-Ohio-6550; *State v. Graham*, Medina App. No. 04CA0048-M, 2005-Ohio-594; *State v. Tarbay*, Hamilton App. No. C-030619, 2004-Ohio-2721. We apply the same reasoning in finding that R.C. 2907.07(D)(1) is likewise narrowly tailored to serve a compelling state interest and does not prohibit the dissemination of protected speech.

**{¶13}** As the First Appellate District stated in *Tarbay* at ¶13-14:

**{¶14}** "*Ashcroft* is distinguishable from the case at bar. In *Ashcroft*, the court

based its opinion on its view that certain provisions of the [Child Pornography Prevention Act of 1996] violated the First Amendment because they prohibited the dissemination of protected speech, i.e., the expression of ideas. Essentially, the court held that some 'virtual child pornography' could be protected speech. Thus, unlike the provisions in *Ashcroft*, the importuning statute here is aimed not at preventing the expression of ideas but at 'prohibiting adults from taking advantage of minors and the anonymity and ease of communicating through telecommunications devices, especially the Internet and instant messaging devices, by soliciting minors to engage in sexual activity.' [2907.07(D)] regulates conduct—soliciting a child to engage in sex acts—that is not protected by the First Amendment. It does not regulate any type of protected speech as the CPPA attempted to do.

**{¶15}** "Second, the rationale set forth by the government in *Ashcroft*, that there was the attenuated potential at some unspecified time in the future that a hypothetical pedophile might use the material considered protected speech to arouse himself or to improve his chances of engaging in sexual activity with a child, is not present in the case at bar. Here, the immediate potential for a person to use the anonymity of the Internet and unprotected speech to directly solicit a minor to engage in illegal sexual activity is very significant. * * *" (Footnotes and internal citations omitted.)

**{¶16}** Further, the court stated in *Tarbay* at ¶15-17:

**{¶17}** "Tarbay also seems to argue that the importuning statute is not narrowly tailored to serve the state's interest, because it applies only to an adult offender who is four years older than the age assumed by the officer posing as a minor. We believe that it is reasonable for the state to find that the impact of a direct solicitation for sex on an adolescent from a much older adult is more damaging than such a solicitation from a person closer in age. The older adult is more likely to be more sophisticated and better

able to coerce or overcome the resistance of a minor.

**{¶18}** "Because [2907.07(D)] is narrowly tailored to serve the government's compelling interest, we hold that it is constitutional on its face and as applied to Tarbay. We note that our holding is in line with United States Supreme Court precedent [*Giboney v. Empire Storage* (1949), 336 U.S. 490, 498, 69 S.Ct. 684], which has rejected the contention that the First Amendment extends to speech that is incidental to or part of a course of criminal conduct, i.e., soliciting a minor child for sex.

**{¶19}** "Finally, Tarbay raises the argument that [R.C. 2907.07(D)] punishes mere thought. But, as noted above, the importuning statute does not prohibit an adult and child from communicating about sex, nor does it prevent two people, regardless of their age, from talking about sexual activity between a child and an adult. [R.C. 2907.07(D)] criminalizes only the solicitation of a minor, or someone the offender believes to be a minor, to engage in illegal sexual activity with an adult. Tarbay was not convicted of importuning because he was thinking about having sex with a minor; he was convicted for his intent to solicit a person he believed to be a minor to engage in sex acts with him. '[T]he harm is in the asking,' not the discussion of it. In sum, we reiterate that there is simply '[no] First Amendment right to attempt to persuade minors to engage in illegal sex acts.'" (Footnotes and internal citations omitted.)

**{¶20}** In applying the reasoning of *Tarbay* to this case, we hold that R.C. 2907.07(D)(1) is constitutional on its face. R.C. 2907.07(D)(1) is narrowly tailored to serve the compelling state interest of protecting minors from being solicited to engage in illegal sex acts by adults using a telecommunications device. Accordingly, we hold that R.C. 2907.07(D)(1) does not violate the principles of *Ashcroft* or the First, Fifth, or Fourteenth Amendments to the United States Constitution. R.C. 2907.07(D)(1) properly prohibits adults from taking advantage of minors using the anonymity and ease of

Internet and instant messaging communication. Further, we reject appellant's argument that R.C. 2907.07(D)(1) violates the Equal Protection Clause, as the application of this statute does not treat people differently on an arbitrary basis, nor does it require the application of a strict scrutiny test.

**{¶21}** Appellant's assignment of error is overruled.

**{¶22}** Judgment affirmed.

YOUNG and RINGLAND, JJ., concur.