

[J-117-2005]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 34 MAP 2005
	:	
Appellee	:	
	:	Appeal from the Order of the Superior
	:	Court, entered October 14, 2004, at
v.	:	Docket Number 779 EDA 2003, affirming
	:	the order of the Court of Common Pleas of
	:	Delaware County, entered February 25,
JOSEPH HENRY PAUL DAVIDSON,	:	2003, at Criminal No. 1109-02.
	:	
Appellant	:	860 A.2d 575 (Pa. Super. 2004)
	:	
	:	ARGUED: October 19, 2005

CONCURRING AND DISSENTING OPINION

MR. CHIEF JUSTICE CAPPY

DECIDED: November 20, 2007

I join the majority opinion in its holding that 18 Pa.C.S. §6312 is not void for vagueness, because the plain language of the statute provides fair warning of what conduct is prohibited. I write separately because I disagree with the majority that the trial court applied the correct interpretation of the statute when it evaluated whether certain images were, in fact, pornographic. As the plain language of the statute criminalizes the possession of an image based upon the intent of the depicter to titillate the viewer, an image of a nude child is either pornographic at the moment of its creation, or it is not. Therefore, absent independent knowledge of the depicter's intent, the context in which a third-party possessor stores an image is irrelevant to an inquiry of whether or not the image

is pornographic. Rather, each image itself must indicate the intent of the depicter so that future viewers will be on notice that the image is illegal to possess. As I believe this standard may not have been properly applied by the factfinder, and for the reasons stated below, I would issue a limited remand. Thus, I dissent to the ultimate disposition of this case.

To come to this conclusion, I look to the words of the statute which are the key to ascertaining the intent of the Legislature. 1 Pa.C.S. §1921. The words here are clear: Section 6312 criminalizes, *inter alia*, the knowing possession of images of a minor engaged in a “prohibited sexual act.” Included in the definition of “prohibited sexual act” is “sexual intercourse ... lewd exhibition of the genitals or nudity if such nudity is depicted for the purpose of sexual stimulation or gratification of any person who might view such depiction.” In ascertaining the intent of the Legislature, this Court can presume that the Legislature intended that this statute be constitutional. 1 Pa.C.S. § 1922(3). We can thus assume that Section 6312 comports with the First Amendment and Due Process requirements of both the state and federal constitutions.

As to free speech guarantees, the United States Supreme Court stated in New York v. Ferber, 458 U.S. 747, 765 n.18 (1982), that depictions of children in a state of nudity, without more, constitute protected expression under the First Amendment. On the other hand, the Court found that images of minors involved in lewd sexual conduct had “exceedingly modest, if not de minimis” value that is outweighed by the state’s compelling interest in protecting children from sexual exploitation and abuse. See Ferber 458 U.S. at 762-64. Section 6312 comports with that mandate because a nude image of a child is not banned *per se*, but rather becomes illegal only when the child is engaged in a prohibited sexual act which includes images where the depicter of the image intended to titillate a subsequent viewer. Thus, once an image of a nude child is overtly sexualized or lewd, it

steps outside the bounds of First Amendment protection, and the Commonwealth is free to criminalize it.

The next constitutional tenet to consider is the Due Process requirement of notice. In order to avoid a facial void-for-vagueness challenge, the statute must give fair warning of what conduct it criminalizes. Commonwealth v. Mack, 359 A.2d 770, 771 (Pa. 1976). To provide proper warning, the statute must provide a standard of conduct which is both ascertainable and objective. Id. at 772. Section 6312 provides an ascertainable and objective standard when it criminalizes images of children engaged in a prohibited **sexual** act when (1) the child is nude; and (2) the nudity is depicted in a sexually titillating manner, because the subjective intent of the depicter to sexually gratify the viewer will be manifest in the image itself.¹ The Legislature has clearly forbidden the knowing possession of images of nude children which are overtly sexualized or lascivious. As the majority stated, the content, focus and setting of the image itself will give fair notice to the viewer if the depicter had a prurient purpose. In other words, Section 6312 puts a viewer on notice that lewd or lascivious images of nude children are illegal.

It is notable that this construction of Section 6312 is comparable to the federal counterpart to Pennsylvania's law concerning the abuse of children. 18 U.S.C. §§2252 and 2256 prohibit certain images that do not otherwise feature children engaged in actual

¹ There may be cases where the prurient intent of the depicter is not manifest in a particular image, but the possessor nonetheless has actual notice of the depicter's intent. For example, the possessor has control of a series of photographs clearly depicting the same child and in some of the series the child is engaged in a prohibited sexual act while in others the child is simply nude. The fact that the third-party possessor has the entire series would put him or her on notice of the depicter's intent to cause sexual stimulation, which is criminal under Section 6312. This is one of the rare cases in which circumstantial evidence beyond any particular image itself would be relevant in the case of the prosecution of a third-party possessor. Where the depicter is being prosecuted, circumstantial evidence surrounding the depicter's intent is obviously relevant. See Lesoine, infra.

sexual acts by criminalizing “lascivious exhibition of the genitals.” In construing this statute in United States v. Knox, 32 F.3d 733, 746 (3d Cir. 1994), the Third Circuit Court of Appeals looked to the dictionary definition of “lascivious” which is defined as “tending to excite lust” or “lewd”. Under both the federal and Pennsylvania statutes, images of children which tend to excite lust are identifiable and give notice to the viewer that the image is prohibited.

Clarifying the objective standard in Section 6312 is especially important in a case such as this one in which the depicter’s identity is unknown, and when the possessor acquired the images through an intermediary on the internet. Previous precedent construing Section 6312 has involved prosecution of the depicter as opposed to a third-party possessor. See Commonwealth v. Savich, 716 A.2d 1251 (Pa. 1998). Circumstantial evidence related to the depicter is always germane when it is the depicter who is charged with the crime, because the statute criminalizes behavior based on the depicter’s intent. In the case of a third-party possessor, circumstantial evidence must be carefully vetted to insure that it meets the standard set forth in the statute which makes clear that child pornography only includes images created with prurient intent. For example, if a pedophile were to acquire a photograph of a child playing in the nude that had been taken by the child’s parents as a family memento, and the pedophile were to add that photograph to his or her collection of child pornography, the fact that the pedophile uses the image for the purposes of sexual stimulation would not make that otherwise innocent image into pornography, because the intent of the depicter was not for the purposes of sexual titillation. Objectively, that image does not tend to excite lust, and therefore, it is not criminal to possess.

This objective standard further honors the First Amendment which protects artistic images of nude children. The case of Lesoine v. County of Lackawanna, No. 3CV980764, 2000 WL 1839140 at *1 (M.D. Pa. 2000), provides a compelling example. In that case an

amateur photographer took pictures of her stepdaughter and two friends, ages 15, 16 and 16, standing nude under an outdoor shower on the beach. Id. The United States District Court of the Middle District of Pennsylvania noted that there was no suggestion that the photographs were taken for the purpose of sexual stimulation or gratification as the children in the images had not been posed nor did the plaintiff (depicter) possess a pornography collection or any other indicator of a prurient motive when she took the pictures.² Id. at *3. This means that these images of nude children were protected by the First Amendment. Further, a third-party possessor of those images would be on notice that the images were legal because the children were not depicted in a lewd or sexualized manner.

Eleven of the images for which the defendant in this case was convicted must be remanded to the factfinder for consideration under the standard as explained above. This is because these images are of nude children not engaged in overt sexual acts, and therefore, a determination must be made with respect to whether each image was depicted with the purpose of sexually stimulating the viewer. As these images were in the hands of a third-party possessor who did not have knowledge of the actual intent of the depicter, the images must be evaluated to insure that each image, on its face, gives notice of its criminality, irrespective of the fact that the defendant in this case chose to store these images with his pornography collection. I would remand Exhibits C-7, C-9, C-11, C-12, C-15, C-16, C-17, C-18, C-19, C-38 and C-45 for reconsideration of Counts III, V, VII, VIII, XI, XII, XIII, XIV, XV, XXXIV and XLI to consider if each image is a depiction of a child or children who are merely nude, which is First Amendment protected expression, or if the intent of the depicter was to titillate the viewer.³ Because of the nature of the sentencing

² As this case is related to the prosecution of the depicter, the notice requirement did not narrow the field of relevant circumstantial evidence, as it would have if it was a prosecution of a third-party possessor.

³ To make this determination about C-45, the factfinder from the bench trial will also have to consider all exhibits from C-42 through C-53, because C-45 was one of a series, and if the (continued...)

scheme imposed, I would vacate the sentence of the trial court, remand for reconsideration of the counts delineated above and for imposition of new sentence, if necessary. Otherwise, I join the majority opinion.

(...continued)

defendant saw the other images in the series, it would inform a decision of whether or not he was on notice of the depicter's intent in C-45.