COURT OF APPEALS
DECISION
DATED AND FILED

November 21, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2637-CR **Cir. Ct. No. 2005CF362**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER E. TOWNSEND,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Anderson, P.J., Nettesheim and Snyder, JJ.

¶1 PER CURIAM. We granted Christopher Townsend leave to appeal an order denying his motion to dismiss seven of eight counts of an amended criminal complaint charging him with making visual representations depicting

nudity and invasion of privacy. He argues that the complaint is inadequate because it does not allege any act committed after the effective date of the statute under which he is charged, WIS. STAT. § 942.09 (2005-06),[1] the charging periods are overly broad, and it intentionally omits critical information about the victims' uncertainty of the dates of the offenses. He also contends that the complaint fails to allege sufficient facts that he "installed" video recording equipment to establish the misdemeanor crimes of invasion of privacy under WIS. STAT. § 942.08(2)(a). We conclude that three of the felony charges must be dismissed because the complaint alleges the offenses occurred at a time when the statute under which Townsend is charged was not then in effect. We affirm the denial of the motion to dismiss the invasion of privacy charges.

¶2 The complaint alleges that Townsend videotaped four women without their knowledge while the women were either at Townsend's apartment or in their own apartments. The criminal complaint contains the following counts for making representations depicting nudity, all in violation of WIS. STAT. § 942.09(2)(a): Count one, between December 1 and December 31, 2002, Townsend videotaped K.C.B. naked and without her permission; count three, between November 1 and December 31, 2001, Townsend videotaped C.J.T. naked and without her permission; count five, between September 1, 2001, and July 31, 2002, Townsend videotaped K.J.W. naked and without her permission; count six, between September 1, 2001, and July 31, 2002, Townsend videotaped S.B. naked and without her permission. Counts two, four, seven and eight of the complaint charge a violation of WIS. STAT. § 942.08(2), a misdemeanor offense of invasion

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

of privacy by knowingly installing a surveillance device in a private place with intent to observe nudity without consent of the person observed.

¶3 Townsend moved to dismiss counts three, five and six[2] of the criminal complaint and information on the ground that the charging period was too vague and included the time before the effective date of WIS. STAT. § 942.09. He sought a ***Franks/Mann*** hearing[3] to explore intentional omissions in the complaint as to the victims' uncertainty of when the offenses occurred. He also moved to dismiss the misdemeanor charges.

¶4 We first address the issue on which we reverse. "Whether a criminal complaint sets forth probable cause to justify a criminal charge is a legal determination this court reviews de novo." ***State v. Reed***, 2005 WI 53, ¶11, 280

[2] Townsend's motion was directed at counts as three, five and seven but count seven is a misdemeanor charge. The parties and the circuit court understood the motion to apply to counts three, five and six.

[3] In ***Franks v. Delaware***, 438 U.S. 154, 155-56 (1978), the Supreme Court stated:

> [W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

The Franks rule was extended in ***State v. Mann***, 123 Wis. 2d 375, 388-89, 367 N.W.2d 209 (1985), to include omissions from a warrant affidavit if the omission is the equivalent of a deliberate falsehood or reckless disregard for the truth.

Wis. 2d 68, 695 N.W.2d 315. One of the questions that the complaint must answer is what is the person charged with. ***Id.***, ¶12.

¶5 Townsend is charged with violating WIS. STAT. § 942.09(2)(a). The predecessor to that statute, WIS. STAT. § 944.205(2)(a) (1997-98),[4] was found to be unconstitutional in ***State v. Stevenson***, 2000 WI 71, 236 Wis. 2d 86, 613 N.W.2d 90. In response to ***Stevenson***, § 944.205(2)(a) was amended by 2001 Wis. Act 16, § 3956, to provide:

> Whoever does any of the following is guilty of a Class E felony:
>
> Records an image of nudity without the knowledge and consent of the person who is depicted nude while that person is nude in a place and circumstance in which he or she has a reasonable expectation of privacy, if the person recording the image knows or has reason to know that the person who is depicted nude does not know of and consent to the recording.

¶6 The main purpose of the amendment was to insert the phrase "while that person is nude in a place and circumstance in which he or she has a reasonable expectation of privacy" in order to narrow the breadth of the statute. *See* ***State v. Nelson***, 2006 WI App 124, ¶¶29-30, 294 Wis. 2d 578, 718 N.W.2d 168, *review*

[4] WISCONSIN STAT. § 944.205(2)(a) (1997-98), provides:

> Whoever does any of the following is guilty of a Class E felony:
>
> (a) Takes a photograph or makes a motion picture, videotape or other visual representation or reproduction that depicts nudity without the knowledge or consent of the person who is depicted nude, if the person knows or has reason to know that the person who is depicted nude does not know of and consent to the taking or making of the photograph, motion picture, videotape or other visual representation or reproduction.

denied, 2006 WI 113, 296 Wis. 2d 63, 721 N.W.2d 486. This amendment was effective September 1, 2001. 2001 Wis. Act 16, §§ 9359, 9400.

¶7 2001 Wis. Act 33 amended the statute a second time. Act 33 renumbered the statute "moving it out of the chapter on 'Crimes Against Morality' and into WIS. STAT. ch. 942, 'Crimes Against Reputation, Privacy and Civil Liberties.'" ***Nelson***, 294 Wis. 2d 578, ¶29. The statutory language was amended to provide that a person is guilty of a crime when the person:

> Captures a representation that depicts nudity without the knowledge and consent of the person who is depicted nude while that person is nude in a circumstance in which he or she has a reasonable expectation of privacy, if the person knows or has reason to know that the person who is depicted nude does not know of and consent to the capture of the representation.

WIS. STAT. § 942.09(2)(a).[5] The effective date of § 942.09(2)(a), is December 18, 2001. *See* WIS. STAT. § 991.11 (where there is no specific provision for an effective date every act of the legislature takes effect the day after its date of publication).

¶8 The crimes charged in counts three, five and six allege the crimes occurred between September 1, 2001, and July 31, 2002, thus including a period of time prior to the effective date of WIS. STAT. § 942.09(2)(a), the only statute under which Townsend is charged. If the crimes occurred before December 18, 2001, they are not crimes under § 942.09(2)(a). In this respect the complaint fails to answer the question of what the defendant is charged with because it does not recite the statute in effect before December 18, 2001.

[5] 2001 Wisconsin Act 109, § 701 reclassified the crime as a Class I felony. That change is not relevant to the issue on appeal.

¶9 We reject the State's argument that it is simply a matter for the jury to determine when the crimes occurred and what statute Townsend violated. That flies in the face of the requirement that the defendant be apprised of the crime that he or she is charged with in order to be able to prepare a defense. The State also argues that because Townsend concedes probable cause on count one, the three other felony counts are properly included in the information as transactionally related and the defect in the complaint is of no consequence. We cannot ignore that the complaint, the initial charging document, is inadequate. *Cf.* ***State v. Powers***, 2004 WI App 156, ¶20, 276 Wis. 2d 107, 687 N.W.2d 50 (criminal count must be dismissed even though there is bindover on a transactionally related crime). Moreover, once the allegations in the complaint are removed, there is nothing to suggest a transactional relationship. Counts three, five and six of the criminal complaint must be dismissed.[6]

¶10 Townsend is charged with four misdemeanor offenses of invasion of privacy under WIS. STAT. § 942.08(2). Section 942.08(2)(a) defines the offense as: "Knowingly installs a surveillance device in any private place, or uses a surveillance device that has been installed in a private place, with the intent to observe any nude or partially nude person without the consent of the person observed." Townsend argues the statute's requirement that the surveillance device be installed requires some showing in the complaint that a device, a video recorder in this instance, was affixed someplace in the room.

[6] We need not address Townsend's additional argument attacking counts three, five and six. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (holding that a Wisconsin appellate court need not decide an issue if the resolution of another issue is dispositive).

¶11 We are required to construe the term "installs" as used in WIS. STAT. § 942.08(2). On appeal statutory construction is a question of law subject to de novo review. ***State v. Cole***, 2000 WI App 52, ¶3, 233 Wis. 2d 577, 608 N.W.2d 432. Statutory language is to be given its common, ordinary, and accepted meaning within the context in which it is used. ***State ex rel. Kalal v. Circuit Court for Dane County***, 2004 WI 58, ¶¶45, 46, 271 Wis. 2d 633, 681 N.W.2d 110.

¶12 The term "install" is not defined in WIS. STAT. § 942.08. A "surveillance device" means any "device, instrument, apparatus, implement, mechanism or contrivance" used to observe the activities of a person. § 942.08(1)(c). The statute addresses the nonconsensual and secret viewing of others in the nude. "Install" is commonly defined as "place or fix." THE NEW OXFORD AMERICAN DICTIONARY 873 (2nd ed. 2005). Although a surveillance device includes a peephole, § 942.08(1)(c), and may typically be a camera or device permanently affixed to a location, the statute is not so limited. Many portable recording devices, including cell phones, can be placed to observe a person surreptitiously. To require the camera or device to be permanently affixed is an unreasonable interpretation as it eliminates a vast majority of methods a person may employ to observe a person surreptitiously. Statutes must be read to avoid absurd or unreasonable results. ***Kalal***, 271 Wis. 2d 633, ¶46. A reasonable inference from the complaint is that Townsend placed a video camera in a room to surreptitiously record the victims.

¶13 We affirm the denial of the motion to dismiss the misdemeanor charges. We reverse that part of the order denying Townsend's motion to dismiss

the three felony counts and remand with directions that the trial court shall dismiss count counts three, five and six of the criminal complaint.[7]

By the Court.—Order affirmed in part; reversed in part and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[7] We take no position on whether the prosecution can cure the defect by an amended complaint.