COURT OF APPEALS
DECISION
DATED AND FILED

March 15, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2010AP2581-CR **Cir. Ct. No. 2008CF3774**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JUSTIN SCOTT HAMILTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. *Affirmed*.

Before Lundsten, P.J., Higginbotham and Blanchard, JJ.

¶1 PER CURIAM. Justin Scott Hamilton appeals a judgment convicting him of one count of using a computerized communication system to

facilitate a child sex crime, contrary to WIS. STAT. § 948.075(1r) (2009-10).[1] Hamilton contends that § 948.075(1r) is unconstitutionally vague. We conclude that § 948.075(1r) is not unconstitutionally vague. Accordingly, we affirm.

Background

¶2 Hamilton was charged with one count of violating WIS. STAT. § 948.075(1r), which prohibits the use of "a computerized communication system" to facilitate a child sex crime. According to the criminal complaint, an undercover police officer sent a group message through a cellular phone chat network called UPOC, to a subgroup called Wisconsin Lounge, adopting the persona of a fourteen-year-old girl. Hamilton responded via text message on his cellular phone and arranged to meet the purported fourteen-year-old girl for purposes of engaging in sexual activity. Hamilton was arrested at the proposed meeting location.

¶3 Hamilton moved to dismiss the charge, arguing the statute is unconstitutionally vague. The circuit court denied the motion.

¶4 At trial, Hamilton stipulated to all of the elements of the offense except that he had used "a computerized communication system." Hamilton contended that sending text messages on a cellular phone did not amount to such use. Following a bench trial, the circuit court found that Hamilton had violated the statute, and thus found Hamilton guilty of the charged offense. Hamilton appeals.

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

Standard of Review

¶5 This appeal challenges the constitutionality of WIS. STAT. § 948.075(1r) and the application of "a computerized communication system" to the facts of this case, which are questions of law subject to de novo review. *See* ***State v. Smith***, 2009 WI App 16, ¶4, 316 Wis. 2d 165, 762 N.W.2d 856, *aff'd*, 2010 WI 16, 323 Wis. 2d 377, 780 N.W.2d 90 (we review the constitutionality of a statute de novo); ***City of Muskego v. Godec***, 167 Wis. 2d 536, 545, 482 N.W.2d 79 (1992) (statutory interpretation and application to facts is a question of law subject to de novo review).

Discussion

¶6 A statute is unconstitutionally vague if it does not "set forth fair notice of the conduct prohibited or required and proper standards for enforcement of the law and adjudication." ***State v. Popanz***, 112 Wis. 2d 166, 172, 332 N.W.2d 750 (1983). Thus, in order to declare a statute unconstitutional on vagueness grounds, we must determine "that one bent on obedience may not discern when the region of proscribed conduct is neared, or … that the trier of fact in ascertaining guilt or innocence is relegated to creating and applying its own standards of culpability rather than applying standards prescribed in the statute or rule." ***Id.*** at 172-73 (citation omitted). We look to whether a person of ordinary intelligence would have fair notice of the conduct prohibited by the statute. ***Id.*** at 173.

¶7 The following standards are relevant here:

> A statute is not unconstitutional because it fails to define all of its terms, the meaning of which may be determined by common usage ascertained by reference to a recognized dictionary. A statute is not unconstitutional merely because

> the boundaries of the prohibited conduct are somewhat hazy. It is neither necessary nor possible to define the boundaries of prohibited conduct with mathematical precision, and a fair degree of definiteness is all that is required in criminal statutes.

State v. Wickstrom, 118 Wis. 2d 339, 352, 348 N.W.2d 183 (Ct. App. 1984) (citations omitted).

¶8 Hamilton carries the burden of refuting the presumption that this statute is constitutional.[2] We are to sustain the statute against challenge if there is any reasonable basis for the exercise of legislative power. ***Mack v. State***, 93 Wis. 2d 287, 297, 286 N.W.2d 563 (1980).

¶9 Hamilton argues that WIS. STAT. § 948.075(1r) is unconstitutionally vague because the phrase "a computerized communication system" is not defined in the statutes. Hamilton contends that a person of ordinary intelligence would not understand that "a computerized communication system" includes sending and receiving text messages on a cellular phone.[3] *See* ***Popanz***, 112 Wis. 2d at 172-73.

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[2] Hamilton contends that WIS. STAT. § 948.075(1r) implicates First Amendment free speech rights, and thus the burden is on the State to prove its constitutionality beyond a reasonable doubt. *See* ***State v. Stevenson***, 2000 WI 71, ¶10, 236 Wis. 2d 86, 613 N.W.2d 90 ("When [a] statute implicates the exercise of First Amendment rights … the burden shifts to the government to prove beyond a reasonable doubt that the statute passes constitutional muster."). However, the supreme court has held that First Amendment protection does not "extend[] to speech that is incidental to or part of a course of criminal conduct" in rejecting the same argument as to the child enticement statute. ***State v. Robins***, 2002 WI 65, ¶¶41, 43, 253 Wis. 2d 298, 646 N.W.2d 287 ("That an act of child enticement is initiated or carried out in part by means of language does not make the child enticement statute susceptible of First Amendment scrutiny." (citation omitted)). Hamilton has not argued that there is any reason to distinguish § 948.075(1r), use of a computer to facilitate a child sex crime, as implicating First Amendment concerns the supreme court determined did not apply to WIS. STAT. § 948.07, child enticement. Accordingly, the burden remains on Hamilton to refute the presumption that the statute is constitutional. *See* ***Stevenson***, 236 Wis. 2d 86, ¶10.

[3] Although Hamilton does not specify whether he is raising a facial or as-applied challenge, it appears from his brief that he is asserting the statute is unconstitutional both on its face and as applied to him. Hamilton argues that the term "a computerized communication (continued)

He also contends that the undefined term impermissibly delegates the responsibility of defining the standards of compliance with the law to those enforcing the statute, and thus the statute is subject to arbitrary application. *See* ***id.***

¶10 We conclude that a person of ordinary intelligence would be apprised that the conduct alleged in this case constituted use of a computerized communication system under WIS. STAT. § 948.075(1r), and that the language of the statute provides sufficient guidance for its enforcement. There is no dispute regarding the conduct at issue. At trial, the undercover officer involved in Hamilton's arrest testified that she communicated with Hamilton through the UPOC network, which she described as an "online chat community." The officer explained that an individual creates a profile on UPOC on the internet, and subscribes to social groups. The user then receives online group or individual messages from other members in the group. Accounts may be set to forward online messages as text messages to cellular phone numbers. The officer also testified that the cellular phone Hamilton used in this case could access the internet.

¶11 A store manager from AT&T testified that he was very familiar with the phone Hamilton used in this case, and explained that it operated on a GSM network. He further testified that the GSM network is a computerized system. He

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system" does not provide notice as to what conduct is prohibited, and did not provide him notice that using a cellular phone to send text messages was included in the prohibited conduct. For the reasons explained below, we conclude that WIS. STAT. § 948.075(1r) is not unconstitutionally vague as applied to Hamilton, and thus we do not reach Hamilton's facial challenge. *See* ***State v. Wood***, 2010 WI 17, ¶44 n.15, 323 Wis. 2d 321, 780 N.W.2d 63 ("We note that generally, when a court reviews a facial vagueness challenge, … a court upholds 'the challenge only if the enactment is impermissibly vague in all of its applications.' Courts therefore look to the application of the challenged law or action to the challenger before considering hypothetical applications." (citations omitted)).

also explained that the UPOC network allows users to send messages from a personal computer, which then go through UPOC, and then are forwarded to a cellular phone.

¶12 We conclude that the phrase "a computerized communication system" clearly encompasses Hamilton's use of his cellular phone to transmit and receive text messages through an internet-based chat community. A person of ordinary intelligence would understand that such conduct falls within the scope of the statute, and those charged with enforcing the law need not create their own standards to enforce the law on these facts.

¶13 The statutes define "computer" as "an electronic device that performs logical, arithmetic and memory functions by manipulating electronic or magnetic impulses, and includes all input, output, processing, storage, computer software and communication facilities that are connected or related to a computer in a computer system or computer network." WIS. STAT. § 943.70(1)(am). The words "communication" and "system" have common definitions readily ascertainable from a dictionary. *See* ***State v. Hahn***, 221 Wis. 2d 670, 678, 586 N.W.2d 5 (Ct. App. 1998). The dictionary definitions for "communicate," which is the root of "communication," include "to send information or messages[,] sometimes back and forth." *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 460 (unabr. ed. 1993). The definitions for "system" include "an organization or network for the collection and distribution of information, news, or entertainment." ***Id.*** at 2322.

¶14 It is clear from these terms that Hamilton's use of his cellular phone in this case meets the definition of use of a computer under the statutes. Hamilton's use of his phone in this case to receive and send text messages through

an internet-based chat community that transmits messages between computers and cellular phones via a computerized network was plainly use of a computerized communication system in multiple respects. To cite only one readily evident way of using these terms, Hamilton used an "electronic device," namely his phone, and specifically its "storage" ability, to retain "memory" of text messages, and to send this "information back and forth" to a "network," namely UPOC online, that was obviously used "for the collection of information." A person of ordinary intelligence would be aware that registering for an internet-based chat community and then receiving and sending text messages through that network on a cellular phone—which itself operates on a computerized network—is within the range of prohibited conduct. Additionally, those with the responsibility of enforcing the law are not required to create their own legal standards to enforce it, as the law plainly covers the conduct in this case. The statute prohibits facilitating a child sex crime by use of a computerized communication system; that is, by use of an organization or network of computers that is used to send messages back and forth. That is what occurred in this case.

¶15 For the reasons explained above, we conclude that WIS. STAT. § 948.075(1r) is not unconstitutionally vague as applied to Hamilton. We note that Hamilton argues as his second issue on appeal that even if the statute is not unconstitutionally vague, his conduct in this case did not violate the statute. For the reasons explained above, we conclude that Hamilton's conduct in this case violated the statute. Accordingly, we affirm.

By the Court.—Judgment affirmed.

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