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SUPREME COURT OF ARKANSAS

No. CV-18-264

DERECK PELLETIER APPELLANT V. WENDY KELLEY, DIRECTOR OF THE ARKANSAS DEPARTMENT OF CORRECTION; AND GREG HARMON, WARDEN OF THE EAST ARKANSAS REGIONAL UNIT APPELLEES	**Opinion Delivered:** December 6, 2018 APPEAL FROM THE LEE COUNTY CIRCUIT COURT [NO. 39CV-17-139] HONORABLE CHRISTOPHER W. MORLEDGE, JUDGE AFFIRMED.

ROBIN F. WYNNE, Associate Justice

Dereck Pelletier appeals from an order of the Lee County Circuit Court denying his petition for writ of habeas corpus. He argues on appeal that the circuit court erred in denying the petition because his convictions on thirty counts of distributing, possessing, or viewing matter depicting sexually explicit conduct involving a child violate the prohibition against double jeopardy. We affirm.

On August 14, 2012, appellant, who lived in Texas, sent an email with an attachment containing thirty photographs depicting child pornography to an undercover police officer in Faulkner County, Arkansas.[1] He was charged in the Faulkner County Circuit Court with thirty counts of distributing, possessing, or viewing matter depicting sexually explicit conduct involving a child, in violation of Arkansas Code Annotated section 5-27-602 (Repl. 2013).

[1] There is no indication in the record that any of the images were duplicates.

Appellant and the State subsequently negotiated a plea agreement under which appellant would plead guilty to all thirty counts of violating section 5-27-602. In exchange, he would be sentenced to ten years' imprisonment on six of the counts to be served consecutively, with the sentences on the remaining counts to run concurrently, for a total of sixty years' imprisonment.[2] Appellant pled guilty, and he was sentenced in accordance with the negotiated plea agreement.

Appellant filed a petition for writ of error coram nobis in the Faulkner County Circuit Court in June 2014. In the petition, he alleged that he had been illegally sentenced because he had committed only one illegal act. The circuit court denied the petition. On appeal, this court held that appellant's claim was not cognizable in a petition for writ of error coram nobis. *Pelletier v. State*, 2015 Ark. 432, 474 S.W.3d 500. Appellant then filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Arkansas. A federal magistrate determined that appellant's habeas petition was untimely. The magistrate's findings were adopted by the federal district court.

Appellant then filed a petition for writ of habeas corpus in the Lee County Circuit Court on October 23, 2017. In the petition, he alleges that his convictions on twenty-nine of the thirty counts violate double jeopardy because he sent only one email with one attachment. In an order entered on January 8, 2018, the circuit court found that there was not probable cause to issue a writ based on the face of the pleadings. This appeal followed.

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[2] Pursuant to Arkansas Code Annotated section 5-27-602(b)(1), a first offense is classified as a C felony. The sentencing range for a class C felony is not less than three years' imprisonment nor more than ten years' imprisonment. Ark. Code Ann. § 5-4-401(a)(4) (Repl. 2013).

A writ of habeas corpus is proper when a judgment of conviction is invalid on its face or when a circuit court lacks jurisdiction over the cause. *See Noble v. Norris*, 368 Ark. 69, 243 S.W.3d 260 (2006). Unless a petitioner can show that the trial court lacked jurisdiction or that the commitment was invalid on its face, there is no basis for a finding that a writ of habeas corpus should issue. *See id.* The petitioner must plead either the facial invalidity or the lack of jurisdiction and make a "showing, by affidavit or other evidence, [of] probable cause to believe" that he or she is being illegally detained. Ark. Code Ann. § 16-112-103(a)(l) (Repl. 2016). Moreover, a habeas proceeding does not afford a prisoner an opportunity to retry his or her case, and it is not a substitute for direct appeal or postconviction relief. *See Noble*, 368 Ark. 69, 243 S.W.3d 260. A hearing is not required if the petition does not allege either of the bases of relief proper in a habeas proceeding, and even if a cognizable claim is made, the writ does not have to be issued unless probable cause is shown. *See id.* A circuit court's decision on a petition for writ of habeas corpus will be upheld unless it is clearly erroneous. *Hobbs v. Gordon*, 2014 Ark. 225, 434 S.W.3d 364. A decision is clearly erroneous when, although there is evidence to support it, the appellate court, after reviewing the entire evidence, is left with the definite and firm conviction that a mistake has been made. *Id.*

The State contends that appellant's claim is not one that is recognized in a habeas proceeding. We disagree. This court has recognized that some claims of double jeopardy are cognizable in a habeas proceeding, as detention for an illegal period of time is precisely what a writ of habeas corpus is designed to correct. *See Quezada v. Hobbs*, 2014 Ark. 396, 441 S.W.3d 910 (per curiam). Appellant argues that his sixty-year sentence is illegal because he could only

have been found guilty of one count of violating section 5-27-602. A meritorious claim of an illegal sentence falls within the purview of the habeas remedy. *Morgan v. State*, 2017 Ark. 57, 510 S.W.3d 253 (reviewing whether a defendant was illegally sentenced as a habitual offender). This court views an allegation of a void or illegal sentence as being an issue of subject-matter jurisdiction. *Id.* We hold that appellant's claim falls within the bounds of a habeas action, and the issue before this court is whether the claim has merit.

Appellant argues on appeal that the circuit court erred by denying his petition because his sentence violates the double-jeopardy clauses of the Arkansas Constitution and the United States Constitution, as well as Arkansas Code Annotated section 5-1-110, which sets out conduct constituting more than one offense. The Supreme Court of the United States has stated that "the question under the Double Jeopardy Clause whether punishments are multiple is essentially one of legislative intent." *Ohio v. Johnson*, 467 U.S. 493, 499 (1984). That Court has also stated that "[w]ith respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Missouri v. Hunter*, 459 U.S. 359, 366 (1983). Both the Supreme Court of the United States and this court have made it clear that it is the legislature that determines crimes, fixes punishments, and has the authority to impose cumulative punishments for the same conduct. *Rowbottom v. State*, 341 Ark. 33, 38–39, 13 S.W.3d 904, 907 (2007).

Arkansas Code Annotated section 5-27-602 (Repl. 2013) states, in pertinent part, as follows:

(a) A person commits distributing, possessing, or viewing of matter depicting sexually explicit conduct involving a child if the person knowingly:

(1) Receives for the purpose of selling or knowingly sells, procures, manufactures, gives, provides, lends, trades, mails, delivers, transfers, publishes, distributes, circulates, disseminates, presents, exhibits, advertises, offers, or agrees to offer through any means, including the Internet, any photograph, film, videotape, computer program or file, video game, or any other reproduction or reconstruction that depicts a child or incorporates the image of a child engaging in sexually explicit conduct; or

(2) Possesses or views through any means, including on the Internet, any photograph, film, videotape, computer program or file, computer-generated image, video game, or any other reproduction that depicts a child or incorporates the image of a child engaging in sexually explicit conduct.

In *Rea v. State*, 2015 Ark. 431, 474 S.W.3d 493, the defendant was charged with twenty counts of violating section 5-27-602(a)(2) based on photographs found on his laptop and a computer hard drive. On appeal, the defendant argued that, under double jeopardy, the twenty counts were required to be reduced to one. This court rejected his argument, holding that because the legislature used the word "any" prior to listing the items covered under the statute and the items listed were singular, each photograph that the defendant possessed could support an individual charge.

In his brief, appellant recognizes the holding in *Rea*, but argues that he was charged with distributing matter under section 5-27-602(a)(1), while the defendant in *Rea* was charged with possession under section 5-27-602(a)(2), and that there is a distinction with a difference between possessing matter and distributing matter. According to appellant, the distinction lies in the fact that in distributing the matter he sent one email and hit the send button one time, as opposed to possessing multiple photographs, as in *Rea*. The operative term "any" is

contained in subsection (a)(1) just as it is in subsection (a)(2). The media in subsection (a)(1) are listed singularly, as they are in subsection (a)(2). Further, there is nothing in the *Rea* opinion to indicate that the analysis or result was predicated on possession as distinct from the prohibited activities in subsection (a)(1). Instead, the analysis focuses on language that is shared between the two subsections. Appellant focuses on the means of distribution when our decision in *Rea* sets out that the legislature intended the number of offenses to be based on the number of photographs, not the activity undertaken with the photographs.

Accordingly, for double-jeopardy purposes, there is no distinction between possession under section 5-27-602(a)(2) and the prohibited activities listed in section 5-27-602(a)(1). Each photograph that is distributed in violation of section 5-27-602(a)(1) can support a separate charge. Appellant does not dispute that the email he sent contained thirty separate photographs depicting children engaging in sexually explicit conduct. We reject appellant's argument that *Rea* is distinguishable on the basis that appellant was convicted of a violation of section 5-27-602(a)(1).

Appellant also argues that twenty-nine of the thirty charges violate double jeopardy because he sent a single computer file in a single email. Although "computer file" is included in the list of media in section 5-27-602(a)(1), the fact that the thirty photographs were attached to the email in a single file is not relevant in this case. Appellant does not dispute that the email contained thirty separate photographs depicting children engaged in sexually explicit conduct. Consistent with the above interpretation of the statute, it is the number of photographs distributed, not the manner of distribution, that gives rise to the number of permissible charges under section 5-27-602(a)(1).

Here, a conviction for each photograph sent by appellant does not violate double jeopardy, as the number of charges brought against appellant was authorized by the legislature. Accordingly, the circuit court did not err by denying appellant's petition for writ of habeas corpus.

Affirmed.

HART, J., dissents.

JOSEPHINE LINKER HART, Justice, dissenting. I dissent. Obviously, child pornography is condemnable, and while I agree with the majority's holding that a double-jeopardy violation is a cognizable claim in state habeas proceedings, I disagree with its holding that Pelletier's claim is without merit. The ugliness of a given criminal act cannot supersede the most basic and fundamental tenets of our criminal justice system. Based on the facts of this case, the State of Arkansas could only lawfully convict Pelletier of, at most, one count of violating Ark. Code Ann. § 5-27-602 (Repl. 2013).

Double jeopardy has long been a fundamental principle in American criminal law. "The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304 (1932). Pleading guilty does not waive the right to claim a double-jeopardy violation. *Haring v. Prosise*, 462 U.S. 306 (1983).

The principle of double jeopardy is no less applicable under the law of Arkansas. Arkansas Code Annotated section 5-1-110 (Repl. 2013) provides in relevant part:

> (a) When the same conduct of a defendant may establish the commission of more than one (1) offense, the defendant may be prosecuted for each such offense. However, the defendant may not be convicted of more than one (1) offense if:
>
> (1) One (1) offense is included in the other offense, as defined in subsection (b) of this section;
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> (2) One (1) offense consists only of a conspiracy, solicitation, or attempt to commit the other offense;
>
> (3) Inconsistent findings of fact are required to establish the commission of the offenses;
>
> (4) The offenses differ only in that one (1) offense is defined to prohibit a designated kind of conduct generally and the other offense to prohibit a specific instance of that conduct; or
>
> (5) The conduct constitutes an offense defined as a continuing course of conduct and the defendant's course of conduct was uninterrupted, unless the law provides that a specific period of the course of conduct constitutes a separate offense.

For example, in *Watson v. State*, a case in which the defendant was charged and convicted of three counts of theft by receiving where all of the stolen property had been acquired in a single transaction, this court held as follows:

> The basis of the crime, therefore, is receiving the stolen property. The petitioner did that during *one transaction*. *See Gilmore v. State*, 710 S.W.2d 355 (Mo. App. 1986). In *Rowe v. State*, 271 Ark. 20, 607 S.W.2d 657 (1980), we said that a continuing offense must be a continuous act or series of acts set on foot by a single impulse and operated by an unintermittent force. In this case the petitioner received the stolen property only once, not on several occasions. Under these circumstances we hold that only one conviction for theft by receiving should lie. *See Yarbrough v. State*, 257 Ark. 732, 520 S.W.2d 227 (1975). Although this issue was not raised at trial, it involves a question of double jeopardy which if meritorious is *sufficient to void the judgment*.

295 Ark. 616, 618, 752 S.W.2d 240, 241 (1988) (emphases added).

The penal statute Pelletier was charged under provides in relevant part as follows:

> (a) A person commits distributing, possessing, or viewing of matter depicting sexually explicit conduct involving a child if the person knowingly:
>
> > (1) Receives for the purpose of selling or knowingly sells, procures, manufactures, gives, provides, lends, trades, *mails, delivers, transfers,* publishes, distributes, circulates, disseminates, presents, exhibits, advertises, offers, or agrees to offer through any means, including the Internet, any photograph, film, videotape, computer program or file, video game, or any other reproduction or reconstruction that depicts a child or incorporates the image of a child engaging in sexually explicit conduct; or
> >
> > (2) *Possesses* or views through any means, including on the Internet, any photograph, film, videotape, computer program or file, computer-generated image, video game, or any other reproduction that depicts a child or incorporates the image of a child engaging in sexually explicit conduct.

Ark. Code Ann. § 5-27-602 (Repl. 2013) (emphases added). Penal statutes are subject to the rule of lenity, "which requires not only that a criminal statute be strictly construed in favor of one accused, but that nothing may be left to intendment and all doubts must be resolved in favor of the defendant in construing such statutes." *Austin v. State*, 259 Ark. 802, 804, 536 S.W.2d 699, 700 (1976); *see also Bell v. United States*, 349 U.S. 81 (1955).

Finally, it is well settled that an "illegal" sentence may be challenged at any time. *Donaldson v. State*, 370 Ark. 3, 257 S.W.3d 74 (2007). An "illegal" sentence is defined as "one which the trial court lacks the authority to impose, even if on its face the sentence is within the statutory range." *Id.*

Turning to the merits of Pelletier's claim, based on the facts of this case, I cannot agree with the majority's conclusion:

> [F]or double-jeopardy purposes, there is no distinction between possession under section 5-27-602(a)(2) and the prohibited activities listed in 5-27-

> 602(a)(1). Each photograph that is distributed in violation of section 5-27-602(a)(1) can support a separate charge. Appellant does not dispute that the email he sent contained thirty separate photographs depicting children engaging in sexually explicit conduct. We reject appellant's argument that *Rea* is distinguishable on the basis that appellant was convicted of a violation of section 5-27-602(a)(1).

The most important aspect of Pelletier's claim, which the majority fails to address in its analysis and only nominally acknowledges at the beginning of its opinion, is that Pelletier was living in Texas when he executed the single click of the "send" button on his computer, which sent a single e-mail with a single attached file containing thirty images of child pornography to a single undercover police officer in Faulkner County, Arkansas. There is one single *actus reus* at issue here. This fact is significant because Pelletier was charged with thirty counts of violating Ark. Code Ann. § 5-27-602(a)(1), the "transfer" provision of the statute, and not thirty counts of violating Ark. Code Ann. § 5-27-602(a)(2), the "possession" provision of the statute.

Indeed, the prosecutor could not charge and convict Pelletier under the "possession" provision of the statute because Pelletier never "possessed" anything within the boundaries of the State of Arkansas. *Rea* is not distinguishable just because the defendant there was charged under the "possession" provision of the statute, but also because the defendant there "possessed" all the images on his computer inside the boundaries of Arkansas. *See generally Rea v. State*, 2015 Ark. 431, 474 S.W.3d 493. Here, the question was not whether any explicit material was "possessed," but whether it was "transferred" within the meaning of the prohibited activities listed in Ark. Code Ann. § 5-27-602(a)(1) (Repl. 2013), and the only act that could even potentially constitute such a "transfer" directed to the State of Arkansas was

Pelletier's single click of the "send" button on August 14, 2012. Even though we are addressing Ark. Code Ann. § 5-27-602, the "possession" provision of which was at issue in *Rea* (and not the "transfer" provision at issue in this case), this case is far closer to *Watson*, as it addresses a single transfer of multiple items of contraband. Proving that Pelletier engaged in thirty individual violations of Ark. Code Ann. § 5-27-602(a)(1) on these facts would have involved the presentation of the exact same proof at trial for each separately alleged violation.

Accordingly, the State of Arkansas could only convict Pelletier of, at most, one count of violating Ark. Code Ann. § 5-27-602(a)(1). Pelletier's additional twenty-nine convictions and sentences under the exact same statutory provision on the exact same facts violate double jeopardy. The majority's decision to the contrary is at odds with the conclusions reached by our sister states when addressing similar situations. *See, e.g.*, *Washington v. Sutherby*, 204 P. 3d 916 (Wash. 2009) (en banc) (10 images); *Commonwealth v. Rollins*, 18 N.E.3d 670 (Mass. 2014) (100 images); *Washington v. Furseth*, 233 P. 3d 902 (Wash. 2010) (multiple images); *Castenada v. Nevada*, 373 P. 3d 108 (Nev. 2016) (15 images); *People v. Hertzig*, 67 Cal. Rptr. 3d 312 (Cal. Ct. App. 2007) (30 images); *State v. Liberty*, 370 S.W.3d 537 (Mo. 2012) (8 images); *State v. Olsson*, 324 P.3d 1230 (N.M. 2014) (60 images); *State v. Pickett*, 211 S.W.3d 696 (Tenn. 2007) (11 images); *People v. McSwain*, 964 N.E. 2d 1174 (Ill. App. Ct. 2012) (one e-mail with 5 images); *People v. Manfredi*, 86 Cal. Rptr. 3d 810 (Cal. Ct. App. 2008) (46 images).

For these reasons, I would reverse.

Cortinez Law Firm, by: *Robert R. Cortinez, Sr.*, for appellant.

Leslie Rutledge, Att'y Gen., by: *Adam Jackson*, Ass't Att'y Gen., for appellee.