IN THE COURT OF APPEALS OF IOWA

No. 8-971 / 07-1988
Filed January 22, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ANTHONY LEE COOPER,
Defendant-Appellant.

Appeal from the Iowa District Court for Woodbury County, John Nelson, District Associate Judge.

Defendant appeals his conviction and sentence for exploitation of a minor, claiming insufficient evidence to support his conviction and that he was not given the opportunity to exercise his right of allocution prior to sentencing. **CONVICTION AFFIRMED, SENTENCE VACATED AND REMANDED FOR RESENTENCING.**

Mark C. Smith, State Appellate Defender, and Shellie Knipfer, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, Patrick Jennings, County Attorney, and Marti Sleister, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Vaitheswaran and Potterfield, JJ.

VAITHESWARAN, J.

Anthony Cooper appeals his conviction and sentence for exploitation of a minor. He contends there was insufficient evidence to establish that he knew his computer hard drive contained child pornography. He also asserts that he was not given the opportunity to exercise his right of allocution prior to sentencing.

I. Background Facts and Proceedings

Anthony and Gina Cooper owned two computer hard drives, one of which contained three files of children engaged in sexual conduct. After the couple separated, Gina advised a Department of Human Services employee that she had observed Anthony viewing pornographic materials, including materials possibly involving young girls. In the wake of this disclosure, a Sioux City detective executed a search warrant for two computer hard drives. The drives were found in a bedroom Anthony Cooper was using. A review of the hard drive by a Des Moines detective experienced in these matters disclosed three video files depicting children engaged in various sex acts.

The State charged Anthony Cooper with sexual exploitation of a minor. *See* Iowa Code § 728.12(3) (2005). Following a bench trial, the district court found him guilty as charged. At the sentencing hearing, the court did not directly ask Cooper any questions about the sentence and Cooper did not address the court prior to receiving his sentence. The court denied defense counsel's new trial motion and imposed sentence. This appeal followed.

II. Analysis

A. Sufficiency of the Evidence

Cooper challenges the sufficiency of the evidence supporting the district court's finding of guilt. We will uphold that finding if there is substantial evidence in the record to support it. *State v. Bass*, 349 N.W.2d 498, 500 (Iowa 1984).

The State was required to prove that Cooper violated the following statute:

> It shall be unlawful to knowingly purchase or possess a negative, slide, book, magazine, computer, computer disk, or other print or visual medium, or an electronic, magnetic, or optical storage system, or any other type of storage system which depicts a minor engaging in a prohibited sexual act or the simulation of a prohibited sexual act.

Iowa Code § 728.12(3). This crime is not defined as possession of a pornographic image of a child, but is the knowing "possession of a 'computer' or 'other print or visual medium' that contains such an image." *State v. Muhlenbruch*, 728 N.W.2d 212, 214 (Iowa 2007).

On appeal, Cooper contends there was insufficient evidence to establish that he knew the prohibited images were on his hard drive. He urges us to apply the standard articulated in constructive drug possession cases. *See, e.g.*, *State v. Cashen*, 666 N.W.2d 566, 571 (Iowa 2003) ("[C]onstructive possession is 'knowledge of the presence of the controlled substances on the premises and the ability to maintain control over them.'" (quoting *State v. Webb*, 648 N.W.2d 72, 81 (Iowa 2002))). As the State points out, however, it is sufficient under the statute to simply prove that Cooper knew the child pornography was on his computer hard drive.

A reasonable fact-finder could have found the following facts. Three child pornography files were affirmatively downloaded to the Coopers' computer; they were not accidentally saved to the hard drive. The three files were created within six minutes of each other on December 19, 2005, and were modified at 2:15 a.m., 2:17 a.m., and 5:36 a.m. on January 11, 2006. The files were last opened at 6:17 a.m. and 7:18 a.m. on the same morning. Although friends of Anthony Cooper also had access to the computer, the district court found that the friends who "came over and used the computer with the Defendant did so only with the Defendant and there has been no credible evidence presented to suggest that any of them had unmonitored use of the computer." The court had the exclusive power to make this type of credibility finding. *State v. Lopez*, 633 N.W.2d 774, 785–86 (Iowa 2001). Notably, one of the friends testified that Cooper told him he ran internet searches for the term "child porn" on several occasions.[1] These facts amount to substantial evidentiary support for the finding that Cooper knew about the child pornography on one of the hard drives. Accordingly, the district court did not err in finding him guilty of exploiting a minor.

B. Right of Allocution

Iowa Rule of Criminal Procedure 2.23(3)(*a*) requires that the court ask the defendant whether he or she "has any legal cause to show why judgment should not be pronounced against" him or her. Additionally, the rules require that prior to rendition of judgment, "counsel for the defendant, and the defendant personally, shall be allowed to address the court where either wishes to make a

[1] The friend conceded that Cooper did not explicitly admit he gained access to such material.

statement in mitigation of punishment." Iowa R. Crim. P. 2.23(3)(*d*). These requirements comprise what is referred to as a defendant's right of allocution. *State v. Nosa*, 738 N.W.2d 658, 660 (Iowa 2007).

Cooper contends he was not afforded this right. The State agrees. Accordingly, we vacate Cooper's sentence and remand to the district court for resentencing. *Id.*

CONVICTION AFFIRMED, SENTENCE VACATED AND REMANDED FOR RESENTENCING.