

RENDERED: OCTOBER 16, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-001785-MR

WILLIAM ERIC PITTMAN

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE ERNESTO SCORSONE, JUDGE
ACTION NO. 07-CR-01380

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, CLAYTON, AND DIXON, JUDGES.

CLAYTON, JUDGE: William Eric Pittman entered a guilty plea to one count of unlawful use of electronic means to induce a minor to engage in sexual activities or other prohibited activities. In exchange for the plea, he received a sentence for five years imprisonment, to serve sixty days, with the remainder of the sentence probated for five years. On appeal, Pittman argues that Kentucky Revised Statute(s) (KRS) 510.155 is unconstitutional. We affirm.

The charges against Pittman arose from his conversations with a Kentucky State Police detective posing as a fourteen-year-old girl in a Yahoo chat room. Pittman's Yahoo identity was titled "female_playmate_wanted," and he falsely listed his name as "Rob Johnson." These conversations occurred between May 7, 2007, and July 11, 2007. Even though Pittman believed the "girl" was only fourteen years old, he initiated graphic sexual conversation, offered to send her "naughty" pictures, requested pictures of her in panties or a bikini, suggested that he take nude pictures of her when they met, and arranged to meet the girl for sex.

On March 19, 2007, Pittman filed a motion to dismiss his indictment alleging that KRS 510.155 was unconstitutional. The Fayette Circuit Court entered its findings of fact, conclusion of law, and order on June 2, 2008, overruling Pittman's motion to dismiss. Subsequently, on August 1, 2008, Pittman entered a conditional plea, pursuant to Kentucky Rules of Criminal Procedure (RCr) 8.09, for violating KRS 510.155. On September 17, 2008, the trial court entered final judgment and sentenced Pittman. This appeal follows.

Pittman argues that the peace officer provision KRS 510.155 violates the First Amendment of the U.S. Constitution, both on its face and as applied to him, because no actual child was involved in his communication and the statute punishes mere belief.

Although KRS 510.155¹ was amended by the 2009 Legislature, the statute in effect at the time of this criminal behavior stated:

¹ See 2009 Kentucky Laws Ch. 100 (HB 315).

(1) It shall be unlawful for any person to knowingly use a communications system, including computers, computer networks, computer bulletin boards, cellular telephones, or any other electronic means, for the purpose of procuring or promoting the use of a minor, or a peace officer posing as a minor if the person believes that the peace officer is a minor or is wanton or reckless in that belief, for any activity in violation of KRS 510.040, 510.050, 510.060, 510.070, 510.080, 510.090, 529.100 where that offense involves commercial sexual activity, or 530.064(1)(a), or KRS Chapter 531.

(2) No person shall be convicted of this offense and an offense specified in KRS 506.010, 506.030, 506.040, or 506.080 for a single course of conduct intended to consummate in the commission of the same offense with the same minor or peace officer.

(3) A violation of this section is punishable as a Class D felony.

Notwithstanding Pittman's recital of the jurisprudence about First Amendment protection of speech, it cannot be ignored that it has long been held that "[o]ffers to engage in illegal transactions are categorically excluded from First Amendment protection." *U.S. v. Williams*, ___ U.S. ___, 128 S.Ct. 1830, 1841, 170 L.Ed.2d 650, 76 USLW 4275 (2008). In *Williams*, the Supreme Court held that a federal statute prohibiting the pandering and solicitation of child pornography did not violate the First Amendment. *Id.*

Contrary to Pittman's belief that his action was protected by the holding in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002), the Supreme Court in *Williams* explained that the statute in

question for their situation did not violate the First Amendment protection of virtual child pornography found in *Ashcroft* because:

A crime is committed only when the speaker believes or intends the listener to believe that the subject of the proposed transaction depicts real children.

Williams, 128 S.Ct. at 1844. In addition, Pittman's contentions that the statute impermissibly captures his legal behavior with another adult are specious. The statute itself expressly states that it applies to those with a manifested intent to knowingly target children. Pittman specifically acted to procure sexual activity with a child. And courts have long recognized that the government has a compelling interest in protecting children, including the need to protect children from sexual exploitation. *See, e.g., New York v. Ferber*, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982). And the statute is narrowly tailored to serve this interest because it includes only behavior that manifests a clear intent to solicit children for a proscribed activity, which is undoubtedly harmful to children and odious to adults.

Moreover, in a recent decision designated for publication, *Filzek v. Com*, ___ S.W.3d ___, 2009 WL 414462 (Ky. App. 2009)(2008-CA-000536-MR), the Court relied on *Williams*. Our Court succinctly and correctly delineated the reasons that offers to engage in illegal transactions are excluded from First Amendment protection, and further held that KRS 510.155 was not unconstitutional on its face or as applied to that defendant:

KRS 510.155 merely prohibits the use of electronic means to engage in or solicit already otherwise prohibited activities. As such, the First Amendment protections are not implicated. Under *Williams*, a defendant could be convicted for pandering or soliciting virtual pornography if the defendant believed that the pornography involved actual children. The same reasoning applies by analogy to the peace officer provision of KRS 510.155. It is not material that the child turned out to be a police officer. It is the defendant's belief that he was soliciting an actual child to engage in sexual activities which is at issue. "There is no First Amendment exception from the general principle of criminal law that a person attempting to commit a crime need not be exonerated because he has a mistaken view of the facts." *Williams*, 128 S.Ct. at 1845. KRS 510.155 is not unconstitutional on its face or as applied to Filzek.

Filzek, 2009 WL 414462. We concur in the reasoning of the *Filzek* court, and likewise hold that KRS 510.155 is not unconstitutional on its face or as applied to Pittman. No constitutionally protected right exists to solicit sexual conduct from minors, and as such, this statute and like statutes may punish actions that include speech made for the sole purpose of procuring activities that are validly prohibited. In the statute it is action, *not thought*, that is validly prohibited.

Accordingly, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

R. Tucker Richardson, III
Brandi Lewis
Lexington, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Heather M. Fryman
Assistant Attorney General
Frankfort, Kentucky