[Cite as *Cleveland v. Cieslak*, 2009-Ohio-4035.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92017

CITY OF CLEVELAND

PLAINTIFF-APPELLEE

vs.

DENNIS CIESLAK

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cleveland Municipal Court
Case No. 2008 CRB 026673

BEFORE: McMonagle, J., Cooney, A.J., and Blackmon, J.

RELEASED: August 13, 2009

JOURNALIZED:

ATTORNEYS FOR APPELLANT

Robert L. Tobik
Chief Cuyahoga County Public Defender
Cullen Sweeney
Scott Roger Hurley
Assistant Public Defenders
310 Lakeside Avenue, Suite 200
Cleveland, OH 44113

ATTORNEYS FOR APPELLEE

Victor R. Perez
Chief City Prosecutor
Shannon Millard
Assistant City Prosecutor
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, OH 44113

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

CHRISTINE T. McMONAGLE, J.:

{¶ 1} Defendant-appellant, Dennis Cieslak, appeals his child enticement conviction. We reverse and remand.

{¶ 2} A criminal complaint charging Cieslak with child enticement under Cleveland Codified Ordinances 609.09 was filed against him in the Cleveland Municipal Court in August 2007. In February 2008, the case proceeded to a jury trial; the jury found Cieslak guilty as charged.

{¶ 3} The complaint and conviction were based on the following facts. The victim, D.C.,[1] who was 12 years old at the time of the incident, was with her mother at her mother's place of work on July 2, 2007. Her mother co-owned several business interests, including a restaurant on Superior Avenue in Cleveland.

{¶ 4} At one point in the afternoon, D.C. was outside of the restaurant talking on her cell phone, when Cieslak drove up in a pickup truck and stopped by the curb near where she was. D.C. testified that Cieslak rolled down the passenger window, and said to her, "Hey you, come here. Let's go for a ride." D.C. told him "no," but he repeated his request three or four times. Scared, D.C. went back into the restaurant, and told her mother what

[1]We use initials in the interest of protecting the identities of juveniles.

had happened. Her mother asked D.C. if she had gotten a license plate number; D.C. had not.

{¶ 5} D.C.'s mother immediately called 911. While the mother was on the phone with the dispatcher, D.C. "peeked" her head out of the front door of the restaurant, saw Cieslak's vehicle down the street, and made note of the license plate number. D.C. then went back to her mother and told her the license plate number. Her mother was still on the phone with the 911 dispatcher and informed him of the number.

CONSTITUTIONALITY OF ORDINANCE

{¶ 6} At the July 2008 sentencing hearing, Cieslak raised the constitutionality of Cleveland Codified Ordinances 609.09 in light of a decision from the Second Appellate District,[2] rendered subsequent to the verdict. The court overruled his argument that the ordinance was constitutionally overbroad, and sentenced him to five days in jail, a $500 fine, and one year of probation. The court also labeled him a Tier I sex offender.

{¶ 7} In his second assignment of error, Cieslak challenges the constitutionality of Cleveland Codified Ordinances 609.09. We find this assignment dispositive.

---

[2]*State v. Chapple*, 175 Ohio App.3d 658, 2008-Ohio-1157, 888 N.E.2d 1121, discretionary appeal not allowed, 119 Ohio St.3d 1412, 2008-Ohio-3880, 891 N.E.2d 771.

{¶ 8} The ordinance provides in relevant part as follows:

{¶ 9} "(a) No person, by any means and without privilege to do so, shall knowingly solicit, coax, entice or lure any child under fourteen years of age to accompany the person in any manner, including entering into any vehicle * * * or onto any vessel * * * whether or not the offender knows the age of the child, if both of the following apply:

{¶ 10} "(1) The actor does not have the express or implied permission of the parent, guardian or other legal custodian of the child in undertaking the activity;

{¶ 11} "(2) The actor is not a law enforcement officer, medic, firefighter or other person who regularly provides emergency services, and is not an employee or agent of, or a volunteer acting under the direction of any Board of Education, or the actor is any of such persons, but at the time the actor undertakes the activity, the actor is not acting within the scope of his lawful duties in that capacity."[3]

{¶ 12} In *Chapple*, the Second Appellate District analyzed the version of R.C. 2905.05(A) that in substance mirrored the version of Cleveland Codified

[3] Cleveland Codified Ordinances 609.09 first became effective in November 1986, and was limited to soliciting, coaxing, enticing, or luring a child under 14 years of age "to enter into any vehicle." It was amended in March 2006 to include the language at issue in this case of soliciting, coaxing, enticing, or luring a child under 14 years of age "*in any manner, including entering into any vehicle*." (Emphasis added.)

Ordinances 609.09 at issue here, and held that it was facially unconstitutional.[4] Specifically, the court held:

{¶ 13} "R.C. 2905.05(A) criminalizes a substantial amount of activity protected by the First Amendment. The statute prohibits a person without privilege or permission from knowingly soliciting a child under the age of fourteen to accompany the person in any manner for any purpose. As the Eleventh District recently observed when reviewing the sufficiency of the evidence to sustain a conviction under R.C. 2905.05(A), "[t]he common, ordinary meaning of the word 'solicit' encompasses 'merely asking.'" *State v. Carle*, Ashtabula App. No. 2007-A-0008, 2007-Ohio-5376. The motive for the solicitation is irrelevant, and there is no requirement that the offender be aggressive toward the victim. Id.

{¶ 14} "The child enticement statute presumably is intended to prevent child abductions or the commission of lewd acts with children. But R.C. 2905.05(A) fails to require that the prohibited solicitation occur with the intent to commit any unlawful act. Instead, the statute appears to infer a criminal intent from countless innocent acts. As [the defendant] points out, the statute very well might criminalize a senior citizen asking a neighborhood boy to help carry her groceries, to help her across the street, or to rake leaves

[4]See, also, *State v. Cunningham*, 178 Ohio App.3d 558, 2008-Ohio-5164, 899 N.E.2d 171 (Second Appellate District again finding former R.C. 2905.05 unconstitutional).

in her back yard for money. Moreover, because the statute applies to any 'person,' and not just to adults, it very well might criminalize a thirteen-year-old boy asking his thirteen-year-old friend to accompany him on an afternoon bike ride or a trip to the ball field. In each of the foregoing examples, the only potential defense to a criminal charge under R.C. 2905.05(A) would be the existence of permission, which may or may not have been obtained.

{¶ 15} "[The defendant] also points out that the statute criminalizes many innocent scenarios where permission plainly would not exist. For instance, the statute would criminalize a thirteen-year-old girl accompanying a classmate to a school dance or accompanying her aunt to a movie against her parents' wishes. The potential applications of R.C. 2905.05(A) to entirely innocent solicitations are endless largely because the statute fails to require the solicitor to have any illicit intent and fails to distinguish between solicitations made by other children and adults. As a result, we conclude that R.C. 2905.05(A) is substantially overbroad and unconstitutional on its face." *Chapple* at ¶16-18.

{¶ 16} Following the Second Appellate District, we find that Cleveland Codified Ordinances 609.09 is unconstitutionally overbroad, and sustain Cieslak's second assignment of error.

{¶ 17} We note that the R.C. 2905.05 was held constitutional by the First Appellate District in *State v. Kroner* (1988), 49 Ohio App.3d 133, 551 N.E.2d 212, and *State v. Long* (1989), 49 Ohio App.3d 1, 550 N.E. 2d 522. Those cases, however, were analyzed under a narrower version of R.C. 2905.05 (substantially similar to former Cleveland Codified Ordinances 609.09) that prohibited soliciting, coaxing, enticing, or luring a child under 14 years of age "to enter into any vehicle."

{¶ 18} Moreover, the First Appellate District case of *State v. Clark*, Hamilton App. No. C-040329, 2005-Ohio-1324, upheld the constitutionality of a different version of R.C. 2905.05 that, similar to the version of Cleveland Codified Ordinances 609.09 at issue here, prohibited soliciting, coaxing, enticing, or luring a child under 14 years of age "*in any manner, including entering into any vehicle*." (Emphasis added.) In upholding the statute, however, the *Clark* Court summarily referred to its previous decisions in *Kroner* and *Long*, without any mention or analysis of the fact that the version of the statute in that case was different from the version in *Kroner* and *Long*. *Clark* at ¶8. (See, also, *Chappel* at ¶19: "Because *Kroner* and *Long* involved a narrow version of the statute, we believe the First District's citation [in *Clark*] to those cases in the context of overbreadth was misplaced.")

{¶ 19} We note that subsequent to the above-mentioned cases and *Cunningham* (see fn. 4), R.C. 2905.05 was amended January 1, 2008, to

include the following: "[n]o person, with a sexual motivation, shall violate division (A) of this section."

{¶ 20} Additionally, we note that the dissent would not reach the constitutional issue, but would reverse and discharge Cieslak because the City failed to produce evidence that he was not a law enforcement officer, medic, firefighter, or other emergency services provider under Cleveland Codified Ordinances 609.09(a)(2). We follow *State v. Hurd* (1991), 74 Ohio App.3d 94, 598 N.E.2d 72, which held that proof of whether a defendant was a person who regularly provided emergency services is in the nature of an affirmative defense, and the burden of proof on that issue, therefore, is on the defendant, not the City or State. An affirmative defense is defined as "[a] defense involving an excuse or justification peculiarly within the knowledge of the accused, on which he can fairly be required to adduce supporting evidence." R.C. 2901.05(C)(2). The status of law enforcement officer, medic, firefighter, or other emergency services provider contemplated under subsection (a)(2) of Cleveland Codified Ordinances 609.09 provides "an excuse or justification peculiarly within the knowledge of the accused, on which he can fairly be required to adduce supporting evidence" and, thus, is an affirmative defense to subsection 609.09(a)(1).

{¶ 21} In light of the above, the judgment is reversed and the case remanded to vacate the conviction and discharge the defendant-appellant.

The remaining assignments of error are moot in light of our resolution of the second assignment of error, and we do not address them. See App.R. 12(A)(1)(c).

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the municipal court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

CHRISTINE T. McMONAGLE, JUDGE

PATRICIA A. BLACKMON, J., CONCURS

COLLEEN CONWAY COONEY, A.J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE OPINION

COLLEEN CONWAY COONEY, A.J., CONCURRING IN PART, DISSENTING IN PART:

{¶ 22} I concur in the reversal of Cieslak's conviction. I respectfully dissent, however, on reaching the constitutional issue because the City failed to produce any evidence on the second element under C.C.O. 609.09(a)(2). The prosecutor maintained that the parties stipulated off the record, but there is nothing in the record to establish this element. Therefore, I would reverse the conviction on sufficiency and discharge Cieslak.

{¶ 23} Because a court should not reach the constitutionality of a statute where the determination of other issues disposes of the case on its merits, I dissent. See *Greenhills Home Owners Corp. v. Village of Greenhills* (1966), 5 Ohio St.2d 207, paragraph one of the syllabus.