[Cite as *State v. Hendricks*, 2009-Ohio-5556.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92213

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

BENJAMIN HENDRICKS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR RESENTENCING

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-507237

BEFORE: Gallagher, P.J., McMonagle, J., and Celebrezze, J.
RELEASED: October 22, 2009

JOURNALIZED:

ATTORNEY FOR APPELLANT

Kelly A. Gallagher
P. O. Box 306
Avon Lake, Ohio 44012

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: Kevin R. Filiatraut
Assistant Prosecuting Attorney
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

SEAN C. GALLAGHER, P.J.:

{¶ 1} Defendant-appellant, Benjamin Hendricks, appeals his conviction from the Cuyahoga County Court of Common Pleas. Finding some merit to this appeal, we affirm in part, reverse in part, and remand for resentencing.

{¶ 2} Hendricks was on probation for pandering sexually oriented matter involving a minor. While he was on probation, the Cuyahoga County Sheriff's Department received a phone call from Hendricks's roommate reporting that Hendricks was in possession of a laptop computer containing child pornography. The message was forwarded to Hendricks's probation officer, Cheryl Parker.

{¶ 3} Ms. Parker consulted with her supervisor, and they decided to conduct a home visit pursuant to the rules of probation. Under the rules of probation, each probationer consents to warrantless searches of himself, his home, and his vehicle.

{¶ 4} Ms. Parker, her supervisor, two detectives from the sheriff's department, and an officer from the sex offender unit went to Hendricks's apartment to conduct a search. Prior to the search, Hendricks was informed that they would be looking at his apartment, his computer, and his vehicle. Hendricks signed a form consenting to the warrantless search.

{¶ 5} A search of the house produced a laptop computer containing child pornography. The laptop was found in Hendricks's bedroom, on the

bed. The computer was on, and the program "Media Player" was open, as well as the programs "Internet Explorer" and "My Shared Folder." Ms. Parker testified that they did not open any files, but they did minimize the Media Player window and observed that there were three videos that, from their titles, appeared to contain child pornography. After reading the titles, the detectives from the sheriff's department seized the computer and then spoke with Hendricks. Hendricks explained where, when, and from whom he bought the computer.

{¶ 6} The sheriff's department obtained a search warrant to search the contents of the computer. Two videos containing child pornography and three still photos of child pornography were recovered. Hendricks was indicted.

{¶ 7} After his motion for speedy trial and his motion to suppress were denied, Hendricks pled no contest to five counts of pandering sexually oriented matter involving a minor under R.C. 2907.322(A)(1), felonies of the second degree; and five counts under R.C. 2907.322(A)(5) with notice of prior conviction, felonies of the third degree. Hendricks appeals, assigning five errors for our review.

{¶ 8} Hendricks's first and second assignments of error state the following:

{¶ 9} "The trial court erred by not suppressing evidence because a probation search cannot serve as subterfuge for a criminal investigation."

{¶ 10} "The trial court erred by not suppressing evidence because the probation officer's search was not reasonable."

{¶ 11} Under these two assignments of error, Hendricks argues that the search by the probation officer served as a "stalking horse" for the sheriff's department, because the sheriff's department did not have probable cause to obtain a search warrant. Hendricks also complains that the tip received by the probation officer lacked detail sufficient to conduct a search.

{¶ 12} "[A] probation officer may search a probationer's home without a warrant and upon less than probable cause." *State v. Cowans*, 87 Ohio St.3d 68, 76, 1999-Ohio-250, citing *Griffin v. Wisconsin* (1987), 483 U.S. 868, 877-878. Ohio law permits a probation officer to conduct a warrantless search of a probationer's person or home if an officer has "reasonable grounds" to believe the probationer failed to abide by the law or by the terms of probation. R.C. 2967.131(C). To establish "reasonable grounds," an officer need not possess the same level of certainty that is necessary to establish "probable cause." Instead, the officer's information need only establish the "likelihood" that contraband will be found in a probationer's home. *State v. Howell* (Nov. 17, 1998), Jackson App. No. 97CA824; *Helton v. Ohio Adult Parole Auth.* (June 26, 2001), Franklin App. No. 00AP-1108.

{¶ 13} In 1998, the Ohio Supreme Court held that when a probationer has given prior consent for a search as part of a community control sanction, the search is constitutional, and opined that the only limit on such searches is that they must not be carried out on the basis of "ill will or intent to harass." See *State v. Benton* (1998), 82 Ohio St.3d 316, 321. In *United States v. Knights* (2001), 534 U.S. 112, the United States Supreme Court upheld "probation searches" conducted pursuant to a condition of probation, provided that a "reasonable suspicion" exists that evidence of criminal activity can be found in a probationer's home. See id. at 120-121. "Although the Fourth Amendment ordinarily requires the degree of probability embodied in the term 'probable cause,' a lesser degree satisfies the Constitution when the balance of governmental and private interests makes such a standard reasonable. Those interests warrant a lesser than probable-cause standard here. When an officer has reasonable suspicion that a probationer subject to a search condition is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion on the probationer's significantly diminished privacy interests is reasonable." (Citations omitted.) *Knights*, 534 U.S. at 121.

{¶ 14} In this case, Hendricks was on probation for pandering sexually oriented matter involving a minor because he was in possession of a computer containing child pornography. The pornography was discovered by his

probation officer, who conducted a search of Hendricks's place while Hendricks was on probation, convicted of importuning (he had arranged online to meet with what he thought was a 14-year-old female).

{¶ 15} At his first probation meeting, Hendricks signed the rules of probation after Ms. Parker read each rule to him. Rule number 13 states: "You shall consent to search and seizure by any probation officer or law enforcement officer, any search may be done without a warrant and includes your person, property, place of residence, vehicle or personal effects." This was signed November 9, 2006, and Hendricks was given a copy.

{¶ 16} Hendricks's probation officer decided to conduct a search of Hendricks's property because she was informed that Hendricks was in possession of a laptop computer containing child pornography. This information was reported to the sheriff's department by Hendricks's roommate and then forwarded to Hendricks's probation officer, Ms. Parker. After getting permission from her supervisor, Ms. Parker, along with two detectives from the sheriff's department, her supervisor, and another officer in the sex offender unit, conducted a home visit.

{¶ 17} On the day of the search, Hendricks signed another consent-to-search form, which indicated that the areas to be searched were his apartment, computer, and vehicle. The computer was observed on his bed. It was turned on, and the program Media Player was open. In

addition, Internet Explorer was open but not connected to the Internet, and My Shared Folder was open. The officers and detectives did not open any files, but minimized Media Player and saw three videos listed in My Shared Folder, which, from their titles, appeared to contain child pornography. The computer was confiscated.

{¶ 18} Hendricks had two convictions for sex offenses, both involving a computer. His roommate reported that Hendricks was in possession of a computer with child pornography. We find that the probation officer had reasonable grounds to believe Hendricks failed to abide by the law or by the terms of his probation, and therefore the warrantless search of Hendricks's apartment was constitutional.

{¶ 19} We find no merit to Hendricks's argument that the probation search was a "stalking horse" for the sheriff's department. "A 'stalking horse' refers to a theory in federal jurisprudence whereby police, who do not have sufficient Fourth Amendment bases to conduct a search, nevertheless make use of the suspect's probation officer as a subterfuge to enter and search the home for contraband." *State v. Sowards*, Gallia App. No. 06CA13, 2007-Ohio-4863, citing *United States v. Golliday* (C.A.6, 2005), 145 Fed. Appx. 502, 505.

{¶ 20} There is no evidence in the record that the sheriff's department did anything to press the probation officer into conducting a search of

Hendricks's home. Although the tip was passed on from the sheriff's department to Hendricks's probation officer and detectives from the sheriff's department accompanied the probation officer to Hendricks's home, there is no evidence that the sheriff's department used the search as a fishing expedition. The fact that the probation officer and the sheriff's department worked together to search Hendricks's apartment does not make the search invalid.

{¶ 21} Hendricks's first and second assignments of error are overruled.

{¶ 22} Hendricks's third assignment of error states the following:

{¶ 23} "The defendant's convictions were allied offenses of similar import and the convictions must merge."

{¶ 24} Hendricks pled no contest to five counts of pandering sexually oriented matter involving a minor under R.C. 2907.322(A)(1), felonies of the second degree; and five counts of pandering sexually oriented matter involving a minor under R.C. 2907.322(A)(5), with furthermore specifications for a prior conviction, all felonies of the third degree. He was sentenced to seven years on the first five counts and four years on the second five counts. The sentences were ordered to run concurrently.

{¶ 25} The record reflects that Hendricks was in possession of two movies of child pornography copied into My Shared Folder and at least three

still photographs of child pornography. The photos were files taken from the movies and reproduced into their own separate files.

{¶ 26} R.C. 2941.25(A) provides that where the same conduct by a defendant can be construed to constitute two or more allied offenses of similar import, the defendant may be convicted of only one of the offenses. But R.C. 2941.25(B) provides that where the conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the defendant may be convicted of all the offenses.

{¶ 27} In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), the Ohio Supreme Court recently instructed as follows: "[C]ourts are required to compare the elements of offenses in the abstract without considering the evidence in the case, but are not required to find an exact alignment of the elements. Instead, if, in comparing the elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in commission of the other, then the offenses are allied offenses of similar import." *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, paragraph one of the syllabus.

{¶ 28} Nonetheless, even when the offenses are of similar import under R.C. 2941.25(A), subsection (B) requires a court to review a defendant's conduct and permits convictions for two or more similar offenses if the offenses were either (1) committed separately, or (2) committed with a

separate animus as to each. See id. at 57, citing *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117.

{¶ 29} "R.C. 2907.322(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:

{¶ 30} "(1) Create, record, photograph, film, develop, reproduce, or publish any material that shows a minor participating or engaging in sexual activity, masturbation, or bestiality;

{¶ 31} "* * *

{¶ 32} "(5) Knowingly solicit, receive, purchase, exchange, possess, or control any material that shows a minor participating in or engaging in sexual activity, masturbation, or bestiality; * * *."

{¶ 33} Despite the fact that the elements do not align, when comparing these two sections of R.C. 2907.322(A), the commission of the offense described in subsection (1) will necessarily result in the commission of the offense described in subsection (5). We find no separate animus in these two charges and hence conclude that R.C. 2907.322(A)(1) and (5) are allied offenses of similar import. As a result, we reverse and remand the sentence of the trial court with instructions to merge counts six through ten into counts one through five.[1]

[1] Subsection (A)(5) merges into subsection (A)(1) because when two charges are allied offenses of similar import, the offense with the longer sentence is preferred over the offense with the shorter sentence. See *State v. Valenzona*, Cuyahoga App.

{¶ 34} In addition, imposing concurrent sentences does not cure the error as the state contends. *State v. Nievas* (1997), 121 Ohio App.3d 451. Even concurrent sentences would be prejudicial because the potential for adverse consequences exists, for instance, at parole hearings. Id.; see, also, *State v. Hendrickson*, Montgomery App. No. 19045, 2003-Ohio-611.

{¶ 35} Regarding Hendricks's convictions under R.C. 2907.322(A)(1), we find that those counts do not merge into one conviction, as suggested by Hendricks. As the First and Eleventh Districts have already found, multiple convictions are allowed for each individual image because a separate animus exists every time a separate image or file is downloaded and saved. See *State v. Stone,* Hamilton App. No. C-040323, 2005-Ohio-5206; *State v. Yodice*, Lake App. No. 2001-L-155, 2002-Ohio-7344. Since Hendricks had two movies and three photo images, he can be convicted of five separate charges.

{¶ 36} Hendricks's third assignment of error is sustained in part and overruled in part.

{¶ 37} Hendricks's fourth assignment of error states the following:

{¶ 38} "The trial court erred classifying Mr. Hendricks as a Tier III Offender."

No. 89099, 2007-Ohio-6892; *State v. Jude* (Feb. 18, 1994), Wood App. No. 92WD101; *State v. Whitt* (Dec. 5, 1989), Montgomery App. No. 11803.

{¶ 39} Hendricks argues that the classification-enhancement provision in R.C. 2950.01(G)(1)(I) does not apply to him. He contends that since he had not been classified a Tier II sex offender for his previous conviction in 2006 (the new classification system was not in effect yet) at the time he committed this crime in 2007, his previous conviction cannot enhance his classification.

{¶ 40} R.C. 2950.01(G) "Tier III sex offender/child-victim offender" means any of the following:

{¶ 41} "(1) A sex offender who is convicted of, pleads guilty to, has been convicted of, or has pleaded guilty to any of the following sexually oriented offenses:

{¶ 42} "* * *

{¶ 43} "(i) Any sexually oriented offense that is committed after the sex offender previously has been convicted of, pleaded guilty to, or been adjudicated a delinquent child for committing any sexually oriented offense or child-victim oriented offense for which the offender was classified a tier II sex offender/child-victim offender or a tier III sex offender/child-victim offender."

{¶ 44} Hendricks's prior conviction in November 2006 was for pandering sexually oriented matter involving a minor under R.C. 2907.322, which is a Tier II offense under the new law. He would have been notified by the Ohio Attorney General by certified mail in December 2007 of his reclassification

under the new law. Then Hendricks was convicted in this case in September 2008, although the crimes were committed in March 2007. Standing alone, this case would result in Hendricks's being labeled a Tier II offender. However, because of his previous conviction for a sexually oriented offense, which is a Tier II offense, Hendricks was labeled a Tier III offender. We find no merit to Hendricks's argument that he needed to be reclassified as a Tier II offender before he committed the new Tier II crimes in order for the enhancement to take effect. The intent of the statute is to protect the public from repeat offenders by requiring stricter reporting requirements and community notification. Hendricks is the type of offender R.C. 2950.01(G)(1)(i) intended to address. Accordingly, Hendricks's fourth assignment of error is overruled.

{¶ 45} Hendricks's fifth assignment of error states the following:

{¶ 46} "The trial court erred by not granting Mr. Hendricks's motion to dismiss for a violation of his speedy trial rights."

{¶ 47} Hendricks claims that his constitutional right to speedy trial was violated because the trial court granted at least 15 pretrial and trial continuances without the existence of a speedy trial waiver, and he was incarcerated from August 20, 2007 through August 4, 2008.

{¶ 48} The constitutional right to a speedy trial is guaranteed by the Sixth Amendment to the United States Constitution and Section 10, Article I

of the Ohio Constitution. Ohio also provides an accused with a statutory right to be brought to trial within a specified number of days after the accused's arrest, namely, 270 days or 90 days if the person is held in jail in lieu of bail on the pending charges. See R.C. 2945.71 to 2945.73 (the statutory scheme provides for tolling the time for speedy trial purposes when the delay arises from the defendant, e.g., requests for continuances or failure to appear).

{¶ 49} When examining a constitutional claim on speedy trial grounds, the statutory time requirements of R.C. 2945.71 to 2945.73 are not relevant; instead, courts should employ the balancing test enunciated by the United States Supreme Court in *Barker v. Wingo* (1972), 407 U.S. 514. The test includes considering (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his or her right to a speedy trial; and (4) the prejudice to the defendant. Id. at 530-32.

{¶ 50} We agree with the trial court that Hendricks's constitutional right to speedy trial was not violated. We do not find the length of the delay to be excessive in light of the fact that Hendricks had a probation hold. The record reflects numerous continuances at Hendricks's request; numerous motions filed both pro se and by Hendricks's attorney; Hendricks's refusal to dress for trial; Hendricks's tampering with his colostomy bag during voir dire, causing a mistrial; and Hendricks's filing a federal lawsuit against the judge,

requiring her to recuse and have his case reassigned. For these reasons, we find that any prejudice to Hendricks was caused by his own actions, and as a result, his speedy trial rights were not violated.

{¶ 51} Hendricks's fifth assignment of error is overruled.

{¶ 52} Judgment affirmed in part, reversed in a part, and case remanded for resentencing.

It is ordered that appellant and appellee share the 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 common pleas 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.

SEAN C. GALLAGHER, PRESIDING JUDGE

CHRISTINE T. MCMONAGLE, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR