

[Cite as *State v. Wolf*, 2019-Ohio-4170.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ATHENS COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : Case No. 19CA2
 :
 vs. :
 :
 ZACHARY WOLF, : DECISION AND JUDGMENT ENTRY
 :
 Defendant-Appellant. :

APPEARANCES:

James Anzelmo, Gahanna, Ohio, for appellant.¹

Keller J. Blackburn, Athens County Prosecuting Attorney, and Merry M. Saunders, Assistant Athens County Prosecuting Attorney, Athens, Ohio, for appellee.

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 9-26-19
ABELE, J.

{¶ 1} This is an appeal from an Athens County Common Pleas Court judgment of conviction and sentence. The trial court found Zachary Wolf, defendant below and appellant herein, guilty of (1) five counts of pandering sexually-oriented matter involving a minor, in violation of R.C. 2907.322(A)(1), and (2) five counts of illegal use of a minor in nudity-oriented material or performance, in violation of R.C. 2907.323(A)(1). Appellant assigns the following error for review:

“THE TRIAL COURT ERRED BY DENYING WOLF’S MOTION TO DISMISS, IN VIOLATION OF HIS DUE PROCESS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.”

¹ Different counsel represented appellant during the trial court proceedings.

{¶ 2} Shortly after an Athens County grand jury returned an indictment that charged appellant with violating five counts each of R.C. 2907.322(A)(1) and R.C. 2907.323(A)(1),² appellant filed a motion to dismiss the indictment. In particular, appellant alleged that the statutes, R.C. 2907.322(A)(1) and R.C. 2907.323(A)(1), are void for vagueness as applied to his alleged conduct: pandering or using sexually or nudity oriented material that involved sixteen and seventeen year old females. Appellant argued that because the material involved minors above Ohio's age of consent, he could not have known that pandering or using sexually or nudity, oriented material that involved sixteen and seventeen year old females constituted a crime.

² R.C. 2907.322(A)(1) states:

No person, with knowledge of the character of the material or performance involved, shall do any of the following:

(1) Create, record, photograph, film, develop, reproduce, or publish any material that shows a minor or impaired person participating or engaging in sexual activity, masturbation, or bestiality;

R.C. 2907.323 reads:

(A) No person shall do any of the following:

(1) Photograph any minor or impaired person who is not the person's child or ward in a state of nudity, or create, direct, produce, or transfer any material or performance that shows the minor or impaired person in a state of nudity, unless both of the following apply:

(a) The material or performance is, or is to be, sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, member of the clergy, prosecutor, judge, or other person having a proper interest in the material or performance;

(b) The minor's or impaired person's parents, guardian, or custodian consents in writing to the photographing of the minor or impaired person, to the use of the minor or impaired person in the material or performance, or to the transfer of the material and to the specific manner in which the material or performance is to be used.

{¶ 3} Appellant additionally argued that the statutes encourage arbitrary and erratic arrests. Appellant contended that although the state charged him with violating the statutes, the state did not file charges against the females depicted in the material or against another individual who purportedly admitted that he distributed photos of the females. Appellant asserted that at least one of the females consented to producing the material and that the other female sent material to a third individual, who was not charged with violating either of the statutes. The trial court held a hearing to consider appellant's motion to dismiss and later overruled appellant's motion.

{¶ 4} Appellant subsequently entered guilty pleas to each count of the indictment. The trial court merged the pandering-sexually-oriented-matter-involving-a-minor offenses with the illegal-use-of-a-minor-in-nudity-oriented-material-or-performance offenses and sentenced appellant to serve twelve months in prison. This appeal followed.

{¶ 5} In his sole assignment of error, appellant asserts that the trial court erred by denying his motion to dismiss the indictment. Appellant contends that the charged offenses are void for vagueness as applied to his conduct and that his convictions violate his due process rights. Appellant reiterates the arguments he raised during the trial court proceedings: (1) that he could not have known that pandering or using the material constituted a crime when the minors involved are above the age of consent; and (2) that the statutes were arbitrarily applied.

STANDARD OF REVIEW

{¶ 6} "Generally, appellate courts conduct a de novo review of a trial court's decision concerning a defendant's motion to dismiss all or part of an indictment based upon a constitutional challenge to the statute under which the defendant stands indicted." *State v.*

Wheatley, 2018-Ohio-464, 94 N.E.3d 578 (4th Dist.), ¶ 5, citing *State v. Mason*, 2016-Ohio-8400, 111 N.E.3d 432, ¶ 17; *State v. Fisher*, 4th Dist. Ross No. 16CA3553, 2017-Ohio-7260, 2017 WL 3585616, ¶ 8 (stating that “we use a de novo standard of review to assess errors based upon violations of constitutional law”); accord *State v. Philpotts*, 8th Dist. Cuyahoga No. 107374, 2019-Ohio-2911, 2019 WL 3237897, ¶ 9; see *Crutchfield Corp. v. Testa*, 151 Ohio St.3d 278, 2016-Ohio-7760, 88 N.E.3d 900, ¶ 16 (stating that constitutionality of a statute is a legal question, which appellate court reviews de novo); *State v. Kirk*, 8th Dist. Cuyahoga No. 104866, 2016-Ohio-8296, 2016 WL 7496605, ¶ 4 (stating that courts review de novo trial court decision regarding motion to dismiss indictment); *State v. Anderson*, 148 Ohio St.3d 74, 2016-Ohio-5791, 68 N.E.3d 790, ¶ 20 (“Appellate courts apply a de novo standard of review when reviewing the denial of a motion to dismiss an indictment on the grounds of double jeopardy.”); *State v. Workman*, 4th Dist. Athens No. 14CA25, 2015-Ohio-4483, 2015 WL 6549290, ¶ 9. Accordingly, an appellate court does not defer to a trial court’s decision, but instead independently determines whether the trial court’s decision is legally correct. *Workman* at ¶ 9.

{¶ 7} In the case sub judice, appellant asserts that the trial court incorrectly concluded that the statutes are not void for vagueness as applied to his conduct.

VOID-FOR-VAGUENESS DOCTRINE

{¶ 8} The void-for-vagueness doctrine “rests on the twin constitutional pillars of due process and separation of powers.” *United States v. Davis*, — U.S. —, 139 S.Ct. 2319, 2325, 204 L.Ed.2d 757 (2019) (citations omitted). “Vague laws contravene the ‘first essential of due process of law’ that statutes must give people ‘of common intelligence’ fair notice of what the

law demands of them.” *Id.*, quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926); accord *Chicago v. Morales*, 527 U.S. 41, 56, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999); *Kolender v. Lawson*, 461 U.S. 352, 357–358, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983). In addition, vague laws “undermine the Constitution’s separation of powers and the democratic self-governance it aims to protect. Only the people’s elected representatives in the legislature are authorized to ‘make an act a crime.’” *Id.*, quoting *United States v. Hudson*, 7 Cranch 32, 34, 11 U.S. 32, 3 L.Ed. 259 (1812). The doctrine thus “guards against arbitrary or discriminatory law enforcement by insisting that a statute provide standards to govern the actions of police officers, prosecutors, juries, and judges.” *Sessions v. Dimaya*, — U.S. —, 138 S.Ct. 1204, 1212, 200 L.Ed.2d 549 (2018).

{¶ 9} A court that is reviewing whether a statute is void for vagueness “must determine whether the enactment (1) provides sufficient notice of its proscriptions to facilitate compliance by persons of ordinary intelligence and (2) is specific enough to prevent official arbitrariness or discrimination in its enforcement.” *Norwood v. Horney*, 110 Ohio St.3d 353, 2006–Ohio–3799, ¶ 84, citing *Kolender*, 461 U.S. at 357. In order to survive a void-for-vagueness challenge, a statute “must be written so that a person of common intelligence is able to determine what conduct is prohibited,” and the legislative enactment “must provide sufficient standards to prevent arbitrary and discriminatory enforcement.” *State v. Williams*, 88 Ohio St.3d 513, 532, 728 N.E.2d 342 (2000).

{¶ 10} “A statute may be challenged as unconstitutional on the basis that it is invalid on its face or as applied to a particular set of facts. In an as-applied challenge, the challenger ‘contends that application of the statute in the particular context in which he has acted, or in

which he proposes to act, [is] unconstitutional.” *State v. Lowe*, 112 Ohio St.3d 507, 2007-Ohio-606, 861 N.E.2d 512, ¶ 17, quoting *Ada v. Guam Soc. of Obstetricians & Gynecologists*, 506 U.S. 1011, 113 S.Ct. 633, 121 L.Ed.2d 564 (1992) (Scalia, J., dissenting). The party raising an as-applied challenge bears the burden “to present clear and convincing evidence of a presently existing set of facts” that makes the statute unconstitutional as applied. *Cleveland Gear Co. v. Limbach*, 35 Ohio St.3d 229, 231, 520 N.E.2d 188 (1988).

{¶ 11} In the case at bar, we first question whether appellant, by pleading guilty, preserved the as-applied void-for-vagueness issue for appeal. Generally, a guilty plea constitutes a complete admission of guilt, Crim.R. 11(B)(1), and “renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction if factual guilt is validly established.” *State v. Fitzpatrick*, 102 Ohio St.3d 321, 2004-Ohio-3167, 810 N.E.2d 927, ¶ 78, quoting *Menna v. New York*, 423 U.S. 61, 62, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975), fn.2; accord *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 19; *State v. Legg*, 2016-Ohio-801, 63 N.E.3d 424 (4th Dist.), ¶ 12. Thus, a defendant who voluntarily, knowingly, and intelligently enters a guilty plea “may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.” *Fitzpatrick* at ¶ 78, quoting *Tollett v. Henderson*, 411 U.S. 258, 267, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973). In other words, a voluntary, knowing, and intelligent guilty plea waives any alleged constitutional violations unrelated to the entry of the guilty plea and nonjurisdictional defects in the proceedings. *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, ¶ 105; *State v. Storms*, 4th Dist. Athens No. 05CA30, 2006-Ohio-3547, 2006 WL 1882428, ¶ 9. A guilty

plea thus “effectively waives all appealable errors at trial unrelated to the entry of the plea.” *Ketterer* at ¶ 105, quoting *State v. Kelley*, 57 Ohio St.3d 127, 566 N.E.2d 658 (1991), paragraph two of the syllabus. However, a guilty plea does not “waive a claim that judged on its face the charge is one which the State may not constitutionally prosecute.” *Menna*, 423 U.S. at 63, 96 S.Ct. 241; accord *Class v. United States*, — U.S. —, 138 S.Ct. 798, 803, 200 L.Ed.2d 37 (2018) (determining that defendant’s guilty plea did not waive right to challenge constitutionality of statute) *State v. Wilson*, 58 Ohio St.2d 52, 388 N.E.2d 745, 746 (1979), paragraph one of the syllabus (“While a counseled plea of guilty is an admission of factual guilt which removes issues of factual guilt from the case, a defendant is not precluded from raising on appeal other issues which attack the constitutionality of the statute under which he has been convicted.”). A defendant who enters a guilty plea nevertheless may not raise a constitutional challenge to a statute if the constitutional claim “contradict[s] the terms of the indictment.” In other words, a defendant who enters a guilty plea may raise a constitutional challenge to the statute under which the defendant was convicted when the constitutional claim is “consistent with [the defendant]’s knowing, voluntary, and intelligent admission that he did what the indictment alleged.” *Class*, 138 S.Ct. at 804.

{¶ 12} In *Class*, for instance, the United States Supreme Court held that the defendant, although he pleaded guilty, could challenge the statute under which the government charged him.

In *Class*, the government had charged the defendant with possessing firearms while located in the parking lot of the United States Capitol grounds. The defendant later asked the district court to dismiss the indictment and asserted that the statute with which the government had charged him was unconstitutional under the Second Amendment and under the Due Process Clause.

With respect to the due process issue, the defendant argued that the statute did not give him fair notice that the statute prohibited possessing firearms while in the parking lot of the United States Capitol. Ultimately, however, the defendant agreed to plead guilty.

{¶ 13} A written plea agreement listed the rights that the defendant expressly agreed to waive:

(1) all defenses based upon the statute of limitations; (2) several specified trial rights; (3) the right to appeal a sentence at or below the judicially determined, maximum sentencing guideline range; (4) most collateral attacks on the conviction and sentence; and (5) various rights to request or receive information concerning the investigation and prosecution of his criminal case.

Id. at 802.

{¶ 14} The plea agreement additionally specified the claims that the defendant could raise on appeal: “(1) newly discovered evidence; (2) ineffective assistance of counsel; and (3) certain statutes providing for sentence reductions.” *Id.* Importantly, “[t]he agreement said nothing about the right to raise on direct appeal a claim that the statute of conviction was unconstitutional.” *Id.*

{¶ 15} The defendant subsequently sought to appeal his conviction and restated his constitutional challenges. The appellate court determined that by pleading guilty, the defendant waived his right to challenge the constitutionality of the statute. However, on further appeal to the United States Supreme Court the defendant argued that a guilty plea, by itself, does not “waive[] the right to challenge the constitutionality of [the] statute of conviction.” *Id.* at 803. Somewhat surprisingly, the United States Supreme Court agreed with the defendant and held that a defendant does not “relinquish his right to appeal [a trial court]’s constitutional determinations simply by pleading guilty.” *Id.* The court reasoned that the defendant’s guilty plea did not

waive his right to raise the constitutional claims when the defendant did “not in any way deny that he engaged in the conduct to which he admitted” and when the constitutional claims were “consistent with [the defendant]’s knowing, voluntary, and intelligent admission that he did what the indictment alleged”. *Id.* at 805 and 804. The court further observed that resolving the defendant’s constitutional claims did not require the court “to venture beyond th[e] record.” *Id.* at 804, quoting *United States v. Broce*, 488 U.S. 563, 575, 109 S.Ct. 757, 200 L.Ed.2d 37 (2018). Rather, the court explained, the defendant asserted that the statute, ““judged on its face”” based upon the existing record, would extinguish the government’s power to “constitutionally prosecute” the defendant if the claim were successful.” *Id.* at 806, quoting *United States v. Broce*, 488 U.S. 563, 575, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989), quoting *Menna*, 423 U.S., at 62–63, and n. 2, 96 S.Ct. 241.

{¶ 16} The *Class* court further distinguished its holding from *Broce*. In *Broce*, the defendants agreed to plead guilty to two counts of conspiracy but later attempted to argue that they, in fact, engaged in only one count of conspiracy, and that the second count violated the Double Jeopardy Clause. The United States Supreme Court held that the guilty pleas waived the defendants’ rights “to challenge the theory of the indictments and to attempt to show the existence of only one conspiracy in a trial-type proceeding.” *Id.* at 571. The court also noted that the defendants could not “prove their claim by relying on those indictments and the existing record.” *Id.* at 576. Instead, the court observed that the defendants could not “prove their claim without contradicting those indictments.” *Id.* The court thus held that the “admissions inherent in [the defendants’] guilty pleas” precluded their opportunity to challenge the constitutionality of the two convictions. *Id.*

{¶ 17} In the case at bar, appellant’s constitutional claims appear to require consideration of facts that are not contained in the indictment and that never admitted into evidence. Instead, appellant entered guilty pleas and thereby waived his right to present evidence regarding the circumstances of the charged crimes. Also, the record does not contain any evidence to support appellant’s claims that the offenses involved minors above the age of consent. Neither party presented sworn testimony or evidence to establish the ages of the victims involved in the offenses. Indeed, by pleading guilty appellant waived any right to present testimony or evidence “in a trial-type proceeding.” *Id.* at 571. We further note that any references in the record to the minors’ ages occurred while the parties presented their arguments during the motion to dismiss hearing.

{¶ 18} Moreover, unlike the defendant in *Class*, appellant does not assert that the statutes, judged on their face, extinguish the state’s ability to constitutionally prosecute him. Instead, appellant argues that the statutes, specifically as applied to his conduct, extinguish the state’s ability to constitutionally prosecute him. Appellant thus does not deny that he engaged in the conduct alleged in the indictment. Rather, appellant claims that the conduct alleged in his indictment cannot constitutionally support a criminal conviction when the minors involved are above the age of consent. Consequently, considering appellant’s constitutional claims would require this court to venture outside the record and consider facts neither alleged in the indictment nor admitted into evidence. Appellant therefore, cannot “present clear and convincing evidence of a presently existing set of facts” that makes the statute unconstitutional as applied. *Cleveland Gear Co.*, 35 Ohio St.3d at 231 (noting that a party raising an as-applied challenge bears the burden ‘to present clear and convincing evidence of a presently existing set of

facts’ that makes the statute unconstitutional as applied); *see State v. Ross*, 4th Dist. No. 16CA3771, 2017-Ohio-9400, 103 N.E.3d 81, 2017 WL 6819407, ¶ 32 (concluding that defendant who pleaded guilty waived as-applied vagueness challenge to controlled-substance-analog statute). Appellant’s guilty plea thus constitutes a waiver of the right to assert that the statute is void-for-vagueness as applied to his specific situation. *Class*, 138 S.Ct. at 804, citing *Broce*, 488 U.S. at 569 (noting that defendant’s guilty plea waives constitutional claim when claim requires court to consider facts not contained in the record); *accord United States v. Miranda*, 780 F.3d 1185, 1189 (D.C.Cir.2015) (concluding that guilty plea waives as-applied constitutional challenge); *United States v. De Vaughn*, 694 F.3d 1141, 1150, 1153–54 (10th Cir.2012) (stating that a voluntary and intelligent guilty plea waives as-applied constitutional challenges).

{¶ 19} Accordingly, based upon the foregoing reasons, we overrule appellant’s sole assignment of error and affirm the trial court’s judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant 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 Athens County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

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

Smith, P.J. & Hess, J.: Concur in Judgment & Opinion

For the Court

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.