[Cite as *State v. Hubbard*, 2005-Ohio-6425.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

PREBLE COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2004-12-018
	:	O P I N I O N
- vs -		12/5/2005
	:	
WILLIAM H. HUBBARD,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM PREBLE COUNTY COURT OF COMMON PLEAS
Case No. 04-CR-008997

Martin Votel, Preble County Prosecuting Attorney, Kathryn M. Worthington, 101 East Main Street, Courthouse, First Floor, Eaton, Ohio 45320, for plaintiff-appellee

Gray W. Bennett, 200 West Main Street, Eaton, Ohio 45320, for defendant-appellant

WALSH, J.

{¶1} Defendant-appellant, William Hubbard, appeals his conviction in the Preble County Court of Common Pleas for attempted pandering obscenity involving a minor. We affirm the conviction.

{¶2} On September 17, 2003, while investigating an unrelated fatality, Camden police searched a barn owned by the American Legion, which had given police permission to conduct the search. In the course of the search police found appellant's belongings, including a number of bags, a briefcase, various magazines and a light. According to police, "it was

obvious that somebody was living there." Police determined that the items belonged to appellant, a transient, upon finding his tax returns and U.S. Navy discharge papers. In a duffel bag police discovered a notebook in which appellant had written out numerous sexual fantasies involving K.E., a ten-year-old girl, and drawn numerous images depicting K.E. in sexual acts. The writings clearly identified K.E. and several of the drawings were clearly labeled with her name. Police also discovered K.E.'s school photo and a pair of panties among appellant's belongings.

{¶3} Police questioned appellant the following day, and appellant made a voluntary statement that he knew K.E., knew that she was a minor, that he wrote the sexually-explicit material, and drew the sexually-explicit images depicting her. Appellant stated that K.E.'s mother used to permit him to do laundry in her home, and that K.E.'s panties somehow got mixed in with his laundry. He stated that he had never had any sexual contact with K.E., and K.E. confirmed this.

{¶4} Appellant was indicted on one count of pandering obscenity involving a minor, and one count of pandering sexually-oriented material involving a minor. The trial court overruled both appellant's motion to suppress the evidence and his motion to dismiss based on the constitutionality of the pandering statute. Appellant subsequently pled no contest to attempted pandering obscenity involving a minor, in violation of R.C. 2923.02(A) and R.C. 2907.321. Appellant was convicted and sentenced accordingly. He appeals his conviction, raising a single assignment of error:

{¶5} "THE TRIAL COURT ERRED WHEN IT FOUND THAT R.C. 2907.321 ENTITLED 'PANDERING OBSCENITY INVOLVING A MINOR CHILD' AS APPLIED WAS NOT UNCONSTITUTIONAL WHERE THE CHILD WAS REAL BUT THE SEXUAL FANTASIES WERE ALL FICTITIOUS AND THERE WAS NO EFFORT TO CREATE, REPRODUCE OR PUBLISH OBSCENE MATERIAL."

{¶6} Appellant claims that the trial court should have granted his motion to dismiss the pandering charge because R.C. 2907.321, the statutory provision that his conviction is based upon, is unconstitutional as applied. This court reviews the trial court's decision on a motion to dismiss de novo, that is, without deference to the decision reached by the lower court. *State v. Stallings,* 150 Ohio App.3d 5, 2002-Ohio-5942, ¶6, citing *State v. Benton* (2000), 136 Ohio App.3d 801, 805.

{¶7} In assessing the constitutionality of the statute, this court must initially presume, as it does with all legislative enactments, that it is valid. *In re Columbus Skyline Secs., Inc.*, 74 Ohio St.3d 495, 498, 1996-Ohio-151. If at all possible, we must construe the statute in such a manner as to uphold its constitutionality. *State v. Dorso* (1983), 4 Ohio St.3d 60, 61. The party challenging the constitutionality of a particular statue shoulders the burden of demonstrating its defect beyond a reasonable doubt. *State v. Bennett,* 150 Ohio App.3d 450, 2002-Ohio-6651, ¶16, citing *Hilton v. Toledo* (1980), 62 Ohio St.2d 394, 396.

{¶8} R.C. 2907.321 prohibits the creation, reproduction, publication or possession "of any obscene material that has a minor as one of its participants." Obscene material has been broadly interpreted. In addition to photographs and video, journal entries and other writings, as well as objects, have been found to be obscene material. See *State v. Brooks* (1984), 21 Ohio App.3d 47; *State v. Dalton*, 153 Ohio App.3d 286, 2003-Ohio-3813. Appellant did not argue before the trial court, nor does he argue in the present appeal, that the materials he created are not obscene as defined by either R.C. 2907(F)(1-5) or the U.S. Supreme Court in *Miller v. California* (1973), 413 U.S. 15, 93 S.Ct. 2607, or that they do not depict an actual child.

{¶9} While the private possession of obscene material is constitutionally protected, *Stanley v. Georgia* (1969), 394 U.S. 557, 89 S.Ct. 1243, the private possession of child pornography may be constitutionally prohibited. *Osborne v. Ohio* (1990), 495 U.S. 103, 111,

110 S.Ct. 1691. Although the state "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts," the state has a legitimate interest in protecting children. *Stanley,* 394 U.S. at 566, 89 S.Ct. 1243. Consequently, even the private possession of pornography depicting children can be prohibited because such a prohibition helps protect the victims of child pornography. *Osborne,* 495 U.S. at 109, 110 S.Ct. 1691. See, also, *New York v. Ferber* (1982), 458 U.S. 747, 756, 102 S.Ct. 3348 ("the States are entitled to greater leeway in the regulation of pornographic depictions of children").

{¶10} However, the United States Supreme Court has struck down legislation banning "virtual" pornography which did not depict, and consequently did not harm, real children. See *Ashcroft v. The Free Speech Coalition* (2002), 535 U.S. 234, 122 S.Ct. 1389. The court found that child pornography involving fictional children "records no crime and creates no victims by its production." Id. at 1397. Ohio courts have likewise found that only the possession of obscene material depicting actual, real children can be prohibited. See *State v. Staup*, Auglaize App. No. 2-04-25, 2005-Ohio-1084; *State v. Anderson,* 151 Ohio App.3d 422, 2003-Ohio-429, ¶31; see, also, *State v. Dalton*, 153 Ohio App.3d 286, 2003-Ohio-3813. Where obscene material recounts fictitious events involving a real child, it may also be constitutionally prohibited, because the state has a compelling interest in preventing the exploitation of the child. See, e.g., *Dalton*.

{¶11} Appellant contends that R.C. 2907.321, prohibiting the creation or publication of obscene material depicting a minor, is constitutional as applied only when, in addition to involving the depiction of a real child, the material represents actual events involving that child, and the material has been further communicated or disseminated in some fashion. We disagree with appellant's contentions.

{¶12} Starting with appellant's last contention, that the material must be disseminated in some manner, we note that no pornography depicting real children is protected speech,

whether disseminated or merely possessed. *Ashcroft* at 246-247. In addition to prohibiting the publication of obscene material depicting minors, R.C. 2907.321 also prohibits the creation of obscene material depicting children. This prohibition is justified because "the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child." *Ferber* at 757. The Ohio Supreme Court has expressly held that Ohio's statute prohibiting the knowing "possession or control" of material depicting a minor in sexually-explicit material, absent dissemination, does not violate the First Amendment. See *State v. Meadows* (1986), 28 Ohio St.3d 43 (affirming the constitutionality of R.C. 2907.322). We consequently find no merit to this contention.

{¶13} We next turn to appellant's contention that the material must depict actual events involving a minor. In support of his argument appellant cites *State v. Lesinski* (June 30, 1987), Lucas App. No. L-86-265, 1987 WL 13692. *Lesinski* involved a prosecution for the creation of an obscene description of a sexual encounter with a minor. The court had "no way of knowing whether [the defendant], in fact, performed intercourse with the girl as he described." The *Lesinski* court held that it did not believe that the legislature "intended to punish the private possesion [sic] of an obsence [sic], but possibly fictitious letter, when it passed the 1984 version of R.C. 2907.321(A)(5)." Id. at *3. Although acknowledging that "the general rule is that participation need not be actual," the court, without citation to authority, went on to hold that "the legislature intended to punish the private possession of obscene materials which actually have a minor as one of its participants," not possession of an obscene, fictional depiction of a child, whether or not real. Id. In nearly twenty years, the *Lesinski* decision has been cited only once, in a case involving the creation of fictional, obscene material involving a fictional minor. See *Dalton*. We disagree with the unsupported reasoning of the *Lesinski* court, and find this decision and appellant's contention unpersuasive.

{¶14} A singular limitation on the prohibition against possessing child pornography has been recognized under the U.S. constitution, namely, that the material must depict an actual child. See *Ashcroft*. We agree with appellant's contention that "ideas that run through one's brain but no further cannot be the basis" of an offense. However, in the present case, appellant's ideas were reduced to writings and drawings depicting an identifiable child victim. The state may prohibit the possession of such material without abridging appellant's constitutional rights because the "prevention of sexual exploitation * * * of children constitutes a government objective of surpassing importance." *Ferber* at 757. Appellant created writings and drawings which are "harmful to the physiological, emotional, and mental health of the child." Id. at 758.

{¶15} Because there is constitutional significance to the distinction between obscene depictions of real children and similar depictions of fictional children, the factual basis for the charges are particularly important. In the present case, there is no factual dispute, and review of the record confirms, that appellant's obscene drawings and writings depict K.E., a real child. The materials are replete with references to her; she is identified in the writings and appellant's drawings are labeled with her name. We conclude that because the material depicts a real child, the state may constitutionally prohibit its creation and possession, and find that R.C. 2907.321, as applied to appellant, is constitutional. The assignment of error is overruled.

{¶16} Judgment affirmed.

POWELL, P.J., and BRESSLER, J., concur.

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