[J-117-2005]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 34 MAP 2005
	:	
Appellee	:	
	:	Appeal from the Order of the Superior
	:	Court, entered October 14, 2004, at
v.	:	Docket Number 779 EDA 2003, affirming
	:	the order of the Court of Common Pleas of
	:	Delaware County, entered February 25,
JOSEPH HENRY PAUL DAVIDSON,	:	2003, at Criminal No. 1109-02.
	:	
Appellant	:	860 A.2d 575 (Pa. Super. 2004)
	:	
	:	ARGUED: October 19, 2005

CONCURRING AND DISSENTING OPINION

MR. JUSTICE BAER **DECIDED: November 20, 2007**

I join Mr. Chief Justice Cappy in recommending a remand of this case to the trial court to make clear factual findings regarding whether each identified image was depicted for the purpose of sexually stimulating the viewer based purely on the content of the image, rather than the context in which the image is found.

I write separately to address an issue raised during my consideration of whether the statute provides for separate convictions for each individual photograph. I fully join the Majority's holding that the possession of each photograph constitutes a separate criminal act based on the General Assembly's use of the singular form of "photograph," or "computer depiction." 18 Pa.C.S. § 6312(d) ("Any person who knowingly possesses or controls any book, magazine, pamphlet, slide, photograph, film, videotape, computer depiction or other material depicting a child under the age of 18 years engaging in a

prohibited sexual act or in the simulation of such act is guilty of a felony of the third degree."). Upon careful consideration, however, I believe the statute's use of the singular could result in arbitrary enforcement, and thus present a potential void-for-vagueness challenge. See Commonwealth v. Duda, 923 A.2d 1138, 1147 (Pa. 2007) ("The due process void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." (internal quotation marks omitted)); Commonwealth v. Hughes, 364 A.2d 306, 310 (Pa. 1976) ("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an [a]d hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.").

The statute allows for convictions for possession of a single "photograph" and for "a book," notwithstanding that such book could contain multiple photographs of child pornography. The potential for arbitrary and capricious enforcement arises in deciding whether a book with 500 photographs constitutes one count, as one book, or 500 separate counts, by virtue of the 500 individual photographs contained within it. If the book gives rise to 500 individual acts of criminal conduct, then I question the meaning of inclusion of the term "book" in the pertinent statutory section. Conversely, if the book gives rise to only one criminal act, which is consistent with a fair reading of the statute, then the determinative fact appears to be whether the defendant left his photographs loose, or organized them into a "book;" a term which could perhaps include a traditional photo album or loose leaf binder. The ambiguity highlighted herein has the potential to raise difficult distinctions for prosecutors trying to do the right thing, and for reviewing courts. I respectfully recommend that the legislature consider this issue, and provide district attorneys and courts with its wise guidance through statutory amendment before these questions come before us.

My concerns, however, do not affect my decision in the case at bar because the defendant did not raise this ambiguity and because it would not vary the counts charged in this case. Accordingly, I join Chief Justice Cappy's concurring and dissenting opinion in favor of a remand to consider eleven specific photographs.