STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED – JUNE 26, 2012)

STATE OF RHODE ISLAND	:	
	:	
V.	:	**No. P2/12-0701A**
	:	
JUSTIN MENOCHE	:	
	:	

DECISION

GALLO, J. Before the Court, pursuant to Rule 9.1 of the Superior Court Rules of Criminal Procedure, is Defendant, Justin Menoche's ("Defendant" or "Menoche") Motion to Dismiss a Charge by information against him for possession of child pornography in violation of R.I. Gen. Laws 1956 § 11-9-1.3 (the "Statute"). Defendant asserts that the images upon which the Charge is based fail to meet the statutory criteria for child pornography under § 11-9-1.3 and therefore, there is no probable cause to believe the charged crime was committed, and accordingly the Charge should be dismissed. For the reasons stated herein, this Court finds probable cause to believe the images do contain child pornography as described in § 11-9-1.3 and denies Defendant's Motion to Dismiss. Jurisdiction is proper under Gen. Laws 1956 § 12-12-1.7 and Rule 9.1 of the Rhode Island Rules of Criminal Procedure.

I

Facts and Travel

Defendant is a twenty-four year old male from Burrillville, Rhode Island, who at the time of his arrest on May 20, 2011 was twenty-three and employed by the Burrillville School Department as a substitute teacher. The images at issue in the instant Motion are

of a nude thirteen year-old female (the "minor") with whom Menoche established an approximately month long relationship beginning in April of 2011. Menoche first noticed the minor while a substitute teacher in her math and social studies classes at Burrillville Middle School. After first posing as a sixteen year-old boy and contacting her via Facebook, Menoche revealed his true identity to the minor and the two subsequently began communicating regularly through cell phone texting and over the internet via instant messaging software. At one point during these communications, Menoche asked the minor to send photos of herself to him showing her in her underwear, which she did. These images included a series of images taken by the minor of herself in various stages of undressing as well as three fully nude images of herself, which are the basis for the present Charge.

The three images were taken by the minor using a camera phone, which is visible in her hand, facing a mirror presumably in her parent's bathroom. In all three images, she is completely naked. The first shows the minor's entire backside including her buttocks with her head turned to face the mirror. The second image shows the minor in full frontal nudity in which the minor, whose face is partially cut-off by the edge of the image, exhibits a slight pose, and though her legs are together; her genitals and pubic area are visible. The third image is similar to the second in that it also shows full frontal nudity. In this picture, however, the minor's entire face is shown and because her legs are further apart than in the second picture, her genitals and pubic area are more visible.

Menoche's relationship with the minor came to an abrupt end when, after the two had been meeting in Menoche's car parked in the middle school parking lot, Menoche asked her to spend the night with him. The minor female agreed, and after telling her

mother that she would be spending the night with a female friend, Menoche picked her up and drove her to his parents' house where he was living. The minor denies that a sexual encounter took place, and the Court need not discuss the events of that evening to decide the present Motion. Whatever occurred, by the next morning Menoche drove the minor home after she stated that she was uncomfortable with what had happened. After pulling into the minor's driveway to drop her off, Menoche was spotted by the minor's parents who notified the Burrillville Police. After conducting a preliminary investigation, police executed a valid search warrant on Menoche's home during which they recovered digital media that was later found to contain the three nude photos for which Menoche has been charged.

Menoche asserts that the three images fall short of the definition of child pornography contained in § 11-9-1.3 because he claims the images depict mere nudity with nothing more to suggest sexually explicit conduct as required by the Statute. Menoche argues that because the images are not focused on the minor's genitals but rather her entire body there is no "graphic or lascivious exhibition" of her genitals or pubic area, which would constitute child pornography under the Statute. See § 11-9-1.3(d)(6)(v). Menoche further claims that the Court may only consider whether the images are pornographic by viewing the images themselves and not taking into account the surrounding circumstances of their creation and use. Lastly, because visual images are a recognized form of speech, Menoche argues that the Court must narrowly construe § 11-9-1.3 and find that the nude images taken by the minor of herself, without more, do not fit within the Statute's prohibitions.

The State asserts that in determining whether the images depict child pornography, the Court may look to non-statutory factors for assistance in interpreting the criteria contained in § 11-9-1.3. The State concedes that the minor's genitals are not the focus of the images, but nevertheless, the State argues that the Court may take into account other factors including the setting and pose of the minor when determining whether the images are still pornographic. The State has also pointed out that, within the context of First Amendment protections, the standard for child pornography is much lower than that for adult obscenity.[1]

II

Standard of Review

When presented with a Rule 9.1 motion to dismiss a criminal information, a trial justice must "examine the information and any attached exhibits to determine whether . . . probable cause [exists] to believe that the offense charged was committed and that the defendant committed it." State v. Martini, 860 A.2d 689, 691 (R.I. 2004) (citing State v. Fritz, 801 A.2d 679, 682 (R.I. 2002)). "The probable cause standard applied to a motion to dismiss is the same as that for an arrest." State v. Aponte, 649 A.2d 219, 222 (R.I. 1994) (citing State v. Jenison, 442 A.2d 866, 875 (R.I. 1982)). Thus, probable cause is established where after taking into account relevant evidence and circumstances, a

[1] In Miller v. California, 413 U.S. 15 (1973), the Supreme Court defined adult obscenity as:

> "works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole do not have serious literary, artistic, political or scientific value." Id. at 24.

"reasonable person" would conclude that the charged crime occurred and was committed by the defendant. State v. Reed, 764 A.2d 144, 146 (R.I. 2001).

A trial justice's determination as to whether probable cause exists "may be based in whole or in part upon hearsay evidence" as well as evidence subsequently "ruled to be inadmissible at trial." R.I. Gen. Laws 1956 § 12-12-1.9. In considering the evidence, "the trial justice should grant the state 'the benefit of every reasonable inference' in favor of a finding of probable cause." State v. Young, 941 A.2d 124, 128 (R.I. 2008) (quoting Jenison, 442 A.2d at 875-76).

III

Discussion

Specifically, Menoche is charged under R.I. Gen. Laws § 11-9-1.3(a)(4), which makes it a felony to "knowingly possess any . . . computer file . . . that contains an image of child pornography." Included in the definition of child pornography is "a digital image, computer image, or computer-generated image of a minor engaged in sexually explicit conduct." See § 11-9-1.3(c)(1)(ii) (emphasis added). Thus, Menoche's guilt rests in part on whether the three nude images of the minor display "sexually explicit conduct."[2] The Definitions section of § 11-9-1.3 defines "sexually explicit conduct" as:

> "(i) Graphic sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, or lascivious sexual intercourse where the genitals, or pubic area of any person is exposed;

[2] While probable cause must exist for all elements of a charged offense, it appears that both Parties accept that Menoche "knowingly possessed the images." The Court therefore will focus solely on the question of whether the images constitute child pornography. See generally, United States v. Frabizio, 459 F.3d 80, 82 n.2 (1st Cir 2006) (acknowledging the elements that must be proven for a conviction under the analogous federal statute and noting that the court's decision was limited to whether the images satisfied the definition of child pornography).

(ii) Bestiality;
(iii) Masturbation;
(iv) Sadistic or masochistic abuse; or
(v) Graphic or lascivious exhibition of the genitals or pubic area of any person." § 11-9-1.3(c)(6).

Given that none of the three images depict items (i) through (iv), the only category for consideration by the Court is (v), whether the images display a "graphic or lascivious exhibition of the genitals or pubic area."[3] Our Supreme Court has yet to interpret this section. Thus, the Court will look to analogous federal decisions that have interpreted federal child pornography statutes whose language is similar to that of our own. See 18 U.S.C. § 2256(2)(B)(iii) ("graphic or simulated lascivious exhibition of the genitals or pubic area of any person"); see also State v. Byrne, 972 A.2d 633, 641 n.11 (R.I. 2009) (noting similarity between Rhode Island and federal child pornography statutes).

A

Implications of the Court's Decision

The ultimate question before the Court in this Motion to Dismiss is whether probable cause exists to sustain the criminal information against Menoche. Ordinarily, the determination of whether probable cause exists is a "mixed-law-and-fact analysis," State v. Oritz, 824 A.2d 473, 480 (R.I. 2003). This is because the Court must first evaluate the facts and circumstances relied on by the hearing justice at the time the defendant was charged. See, Reed, 764 A.2d at 147 (overturning Rule 9.1 dismissal where trial justice ignored relevant evidence present in the information package); see also State v. Kryla, 742 A.2d 1178, 1183 (R.I. 1999) (probable cause supported by evidence

[3] In its memorandum objecting to Menoche's Motion, the State acknowledged that the image of the minor's back could not be considered pornographic under the Statute because, though the minor is completely nude, her genitals are not visible. Thus, the Court will ignore this image for the remainder of this Decision.

that a murder had been committed and that various informants provided credible information implicating the defendant). Once the factual record is considered, the court then must make a determination as to whether, based on "the totality of the circumstances," the standard for probable cause is met, which is to say that a reasonable person could believe that the defendant has committed the crime charged. Guzman, 752 A.2d at 4; see also Jenison, 442 A.2d at 873-74.

In the instant matter, the necessary evidence consists solely of the images themselves. See United States v. Dost, 636 F. Supp. 828, 832 (S.D. Cal. 1986) (listing six objective factors to be considered when deciding whether images depict "lascivious exhibition of the genitals); United States v. Amirault, 173 F.3d 28, 34-35 (1st Cir. 1999) (focus is on "objective design" of the image). The issue for the Court's determination is whether there exists probable cause to believe that the images in question constitute child pornography as defined by § 11-9-1.3. See U.S. v. Beckett, 321 F.3d 26, 31 (1st Cir. 2003) (stating "determination that a given set of facts constitute[s] probable cause is a question of law subject to de novo review") (citing United States v. Khounsavanh, 113 F.3d 279, 282 (1st Cir. 1997)).

The Court's task is not to be confused with that of the jury, which is to decide beyond a reasonable doubt whether these specific images are in fact child pornography. See State v. Guzman, 752 A.2d 1, 4 (R.I. 2000) ("[T]he existence of probable cause . . . does not require the same degree of proof needed to determine whether that person is guilty of the crime in question.") (internal citations omitted); see also United States v. Frabizio, 459 F.3d 80, 85 (1st Cir. 2006) (overturning dismissal of an indictment where trial judge overstepped in deciding whether images could be found to be pornographic

and stating "it is up to the jury to determine whether the images identified in the bill of particulars as a basis for an indictment . . . constitute visual depictions of 'sexually explicit conduct' . . .") (emphasis in original) (quoting 18 U.S.C. § 2256).

B

Lascivious Exhibition

A finding that an image depicts child pornography "require[s] more than mere nudity." United States v. Amirault, 173 F.3d 28, 33 (1st Cir. 1999) (citing United States v. Villard, 885 F.2d 117, 124 (3rd Cir. 1989) (finding that if mere nudity constituted child pornography, the requirement that an image be "lascivious" would be superfluous)). Unlike with the term "graphic," § 11-9-1.3, like its federal counterpart, does not define the term "lascivious." Thus, when determining whether images display "sexually explicit conduct" under child pornography statutes analogous to our own, courts have looked beyond the statutory language in order to interpret "lascivious." Perhaps the most widely used method is to consider an image in the light of six factors first articulated in United States v. Dost, 636 F. Supp. 828, 832 (S.D. Cal. 1986), aff'd sub nom., United States v. Weigand, 812 F.2d 1239, 1244 (9th Cir. 1987); see, e.g., United States v. Wilder, 526 F.3d 1, 12 (1st Cir. 2008); United States v. Hilton, 257 F.3d 50, 57 (1st Cir. 2001); United States v. Knox, 32 F.3d 733, 745-46 (3rd Cir. 1992); United States v. Wolf, 890 F.2d 241, 245 (10th Cir. 1989).

In Dost, the defendant sought to dismiss an indictment because he asserted the images he possessed did not display a lascivious exhibition of the genitals or pubic areas of the fourteen and ten year-old girls he was alleged to have photographed. Id. at 830. In the photographs, one minor was positioned on a bed in various positions that left her

genitals completely visible to the viewer. In another, the minor was positioned on a beach with one leg bent in such a way as to expose her genitals as well. Id. at 833. Noting the difficulty with which courts and legal scholars have experienced defining "lascivious" within the context of child pornography statutes, the Dost court suggested a finder of fact consider six factors which the court considered to be instructive in determining whether an image is lascivious:

> "1) whether the focal point of the visual depiction is on the child's genitalia or pubic area;
>
> 2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;
>
> 3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
>
> 4) whether the child is fully or partially clothed, or nude;
>
> 5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity;
>
> 6) whether the visual depiction is intended or designed to elicit a sexual response from the viewer." Id. at 832.

Noting that "a visual depiction need not involve all of these factors," the Dost Court nonetheless found each of the six factors were satisfied and upheld the indictment. Id. at 832-33.

The First Circuit subsequently adopted the Dost factors in United States v. Amirault wherein the Court found that an image of a nude minor female standing in a hole in the sand at the beach was not lascivious under the federal pornography statute. 173 F.3d 28, 33 (1st Cir. 1999). In considering the Dost factors, the First Circuit noted that while the girl's genitals could be seen, they were visible just above the hole in which

the girl was standing and were not the focal point of the photograph. Id. at 33. The Court also found that the location in which the photo was taken, the beach, was a public place with a natural landscape not necessarily associated with sexual activity. Id. Additionally, the Court noted that though the girl was nude, she was not striking a sexually suggestive pose but rather standing naturally straight with her arm extended as if she were about to pat or smooth the sand. Id. Similarly, the Court noted that because her face was turned away from the camera, there was no expression inviting a sexual encounter. Id. at 33-34.

Lastly, in discussing the sixth Dost factor, the Court in Amirault stated that "in determining whether there is an intent to elicit a sexual response, the focus should be on the objective criteria of the photograph's design. Id. at 35. By this, the Amirault Court meant for the sixth factor to be used as a reconsideration of the first five factors in an effort to determine whether – taking into account all of the other factors – the image's overall design suggested an intent to create a sexual response. Id. Basing its decision primarily on the Dost factors and finding that the image was not lascivious, the court nonetheless cautioned that:

> "[T]hese factors are neither comprehensive nor necessarily applicable in every situation. Although Dost provides some specific, workable criteria, there are many factors that are equally if not more important in determining whether an image contains a lascivious exhibition. The inquiry will always be case-specific." Id. at 32.

The First Circuit echoed this language in a later decision, United States v. Brunette, where it emphasized that a judicial officer rather than an investigating agent must decide whether images are pornographic within the context of issuing a search warrant. 256 F.3d 14, 18 (1st Cir. 2001); see State v. Flores, 996 A.2d 156, 161 (R.I. 2010) ("It is generally assumed . . . that the same quantum of evidence is required

whether one is concerned with probable cause to arrest or probable cause to search.") (internal citations omitted). Recognizing that the Dost factors enumerated in Amirault were meant to "guide the inquiry," the Court also noted that an independent "judicial determination is particularly important in child pornography cases, where the existence of criminal conduct often depends solely on the nature of the pictures." Id.

Despite the wide use of the Dost factors, when applying them in specific cases, the various federal circuit courts have tended to pick and choose amongst the six factors in a non-uniform way and have occasionally disagreed over the number of factors that must be present in order for images to be found lascivious. See Frabizio, 459 F.3d at 88 (comparing United States v. Wolf, 890 F.2d 241, 245 n.6 (10th Cir. 1989) which found the presence of one Dost factor to be sufficient with Villard, 885 F.2d at 122 (3rd Cir. 1989) noting that more than one factor but not all six were required). As noted above, the Amirault Court found that despite the minor's genitals being visible to the viewer, because the camera was not zeroed in on them, their appearance did not lend support to a finding of lasciviousness. 173 F.3d at 33. In United States v. Knox, however, the Third Circuit found that full nudity was not required for an image to be lascivious and that photographs focused on a minor's genital area – though covered by her undergarments – still satisfied the definition for an "exhibition" of the genital area under the statute. 32 F.3d 733, 745 ("[I]t is not true that by scantily or barely covering the genitals of young girls that the display of the young girls in seductive poses destroys the value of the poses to the viewer of child pornography." Id.). While expressly declining to decide this issue, our own Supreme Court, in acknowledging the similarities between the Rhode Island child pornography statue and its federal counterpart, noted the Knox decision's

suggestion that genitals need not be visible for an image to be considered "lascivious." Byrne, 972 A.2d at 641 n.11.

In Frabizio, a case considering images similar to those at issue here, the First Circuit discounted a strict application of the Dost factors and found images of young girls standing nude with their legs slightly parted and their genitals visible were lascivious even though the girls were merely standing and staring straight at the camera and the setting in which the pictures were taken was not discernable. 459 F.3d at 86. Disagreeing with the majority's analysis, Justice Torruella, in providing his own description of the images, noted that the girls' genitals were not the focal point of the image, nor the setting sexually suggestive, nor the girls' poses unnatural. Id. at 96. In qualifying its earlier adoption of the Dost factors in Amirault, the majority in Frabizio stressed that it had never held "that the Dost factors were the equivalent of – or the established limits of – the statutory term 'lascivious.'" Id. at 88.

Using the Dost factors as a guide rather than a rule, therefore, the Court finds that a reasonable person could find that the two images of the minor in this case do constitute a "lascivious exhibition of the genitals or pubic area." 636 F. Supp. at 833. In both images, though not the focus of the images, the minor's genitals are exposed and add to the overall sexual nature of the image. Unlike in Amirault, where the setting for one of the images was a public beach, here the minor is alone in a bathroom, which like a bedroom, is customarily a private place where one would not expect a stranger to be invited. It is also a place where it is not uncommon for sexual activity to take place.

Additionally, the Court finds the image of the minor using her cell phone to take a nude picture of herself does depict an unnatural and suggestive pose. A minor depicted

as taking a nude photo of herself using a camera phone is not an ordinary pose one would expect of someone her age. See Dost, 636 F. Supp. at 833 (noting that a normal ten year-old does not sit nude on the beach with her legs spread apart). Regardless of whether it was her choice to pose in this way, the Court's function is not to discern her intent but rather to examine the overall design of the photograph in eliciting a sexual response. See Amirault, 173 F.3d at 34-35 ("[I]n determining whether there is an intent to elicit a sexual response, the focus should be on the objective criteria of the photograph's design.") Also, there is something suggestive in the fact that the minor is seen creating and presumably about to send a nude image of herself. While the Court is generally hesitant to consider an external factor such as the mode by which the image was taken or the message the minor intended to send, see id. at 34 (rejecting consideration into photographer's intent and means through which an image was taken), in this case, the means by which the photograph was taken and sent is objectively apparent and the Court finds that the appearance of the minor in this case using her camera to photograph herself does in fact suggest "sexual coyness or a willingness to engage in sexual activity." Dost, 636 F. Supp. at 832 (referring to fifth factor).

Much of defendant's argument is based on the fact that the focus of the image is on the minor's entire body rather than on her genitals or pubic area. Menoche compares this image to artistic depictions of nudity rather than "lascivious" focus on the minor's genitals. The Court finds, however, that though the minor's genitals are not "the focal point of the image," they are visible and when combined with the other aspects of the photo, the image could certainly suggest to a reasonable person a desire to "elicit a sexual response." Dost, 636 F. Supp. at 832 (referring to the sixth factor).

The Court further rejects Menoche's argument that the images must focus on the minor's genitals because while a focus on a subject's genitals would strongly suggest a lascivious exhibition, such a focus is not the only factor courts have taken into account. See United v. Hilton, 257 F.3d 50, 57 (1st Cir. 2001) ("[A]lthough generally relevant, [the Dost factors] are not comprehensive and[,] each determination . . . is necessarily case specific."). For the Court to limit its consideration of other aspects of the images merely because the images do not focus on the minor's genitals would ignore the otherwise clear sexual message contained in the image, which was certainly intended to be proscribed by the General Assembly when enacting § 11-9-1.3. See Frabizio, 459 F.3d at 88 ("[T]here is a risk that the Dost factors will be used to inappropriately limit the scope of the statutory definition. That is impermissible.") (emphasis added). Were the focus on the genitals of a minor a threshold question as it appears Menoche asserts, the numerous courts that have interpreted the term "lascivious" would have treated it so rather than as one of many factors to be included in their decision. Accordingly, the Court finds that, from viewing the images in the light of those factors enumerated in Dost as well as with the Court's own judgment, the images are sufficiently suggestive for a reasonable person to conclude that they represent a "lascivious exhibition" of the minor's genitals.

Menoche also asserts that artistic images – even of nude children – are afforded First Amendment protection, and accordingly § 11-9-1.3 must be interpreted narrowly to require a focus on the minor's genitals. In support, Menoche cites Osborne v. Ohio, 495 U.S. 103 (1990), a case upholding a state statute prohibiting the possession of child pornography, for the proposition that "depictions of nudity, without more, constitute protected speech." Id. at 112. While the Court is cognizant of the potential First

Amendment issues raised by this case, its determination is guided by well-accepted principles used to decide similar cases and which, to the best of the Court's knowledge, have withstood First Amendment scrutiny. See Villard, 885 F.2d 120-21 (applying Dost factors and noting "[t]he Supreme Court has recognized 'child pornography as a category outside the protection of the First Amendment'" and that "'the test for child pornography is separate'" from that for adult obscenity) (citing New York v. Ferber, 458 U.S. 747, 763 (1982)).

IV

Conclusion

For the reasons set forth above, the Court finds probable cause to believe that Menoche possessed child pornography. Consequently, his Motion to Dismiss is denied.