In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00168-CR

RANDELL ERON OUTLAND, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 9th District Court
Montgomery County, Texas
Trial Cause No. 09-10-09767 CR

MEMORANDUM OPINION

A jury convicted Randell Eron Outland of aggravated sexual assault of a child under section 22.021 of the Penal Code. The indictment contained an enhancement allegation that Outland was previously convicted of sexual exploitation of a child under Utah law. The trial court found this enhancement allegation to be "true" and found that the elements of the Utah offense are substantially similar to the elements of possession or promotion of child pornography under Texas law. The trial court sentenced Outland to life in prison. In two issues, Outland contends that the trial court erred by imposing an

automatic life sentence and finding the enhancement allegation "true." We affirm the trial court's judgment.

Life Sentence

In issue one, Outland contends that the trial court improperly imposed an automatic life sentence pursuant to section 12.42(c)(2) of the Penal Code.

"Section 12.42(c)(2) effectively creates a 'two-strikes policy' for repeat sex offenders in Texas, embodying the legislature's intent to treat repeat sex offenders more harshly than other repeat offenders." *Prudholm v. State*, 333 S.W.3d 590, 592 (Tex. Crim. App. 2011). Section 12.42(c)(2) provides that a defendant shall be punished by life imprisonment under certain circumstances. *See* Tex. Penal Code Ann. § 12.42(c)(2) (West 2011). One such circumstance arises when the defendant (1) is convicted of an offense under section 22.021 of the Penal Code; and (2) has been previously convicted of an offense "under the laws of another state containing elements that are substantially similar to the elements of an offense" under certain sections of the Penal Code, such as possession or promotion of child pornography under section 43.26. *Id.* § 12.42(c)(2)(A)(i), (B). In this case, Outland does not contest his conviction under section 22.021 of the Penal Code, but challenges the trial court's finding that the elements of the offense of sexual exploitation of a minor under Utah law are substantially similar to the elements of the offense of possession or promotion of child pornography under Texas law. We conduct a *de novo* review of the trial court's determination that these statutes are

substantially similar. *Prudholm v. State*, 274 S.W.3d 236, 238 (Tex. App.—Houston [1st Dist.] 2008), *aff'd by* 333 S.W.3d 590 (Tex. Crim. App. 2011).

In *Ex parte White*, 211 S.W.3d 316 (Tex. Crim. App. 2007), White was previously convicted in Delaware for unlawful sexual contact in the second degree, which the statute defined as intentionally having sexual contact with another person under the age of sixteen or causing the victim to have sexual contact with the defendant or a third person. *See White*, 211 S.W.3d at 318. In Texas, a person was guilty of indecency with a child '"if, with a child younger than 17 years and not the person's spouse, whether the child is of the same or opposite sex, the person . . . engages in sexual contact with the child or causes the child to engage in sexual contact[.]"' *Id*. Without conducting a detailed analysis, the Court held that the two statutes were substantially similar. *See id.*

In *Prudholm*, Prudholm was previously convicted in California for sexual battery, the elements of which included: (1) for the purpose of sexual arousal, sexual gratification, or sexual abuse, (2) the person touches, (3) an intimate part of another person, (4) while that person is unlawfully restrained by the accused or an accomplice, and (5) the touching is against the will of the person touched. *Prudholm*, 333 S.W.3d at 596-97. In Texas, a person committed sexual assault by intentionally or knowingly causing (1) the penetration of the anus or sexual organ of another person by any means without the other person's consent, or the penetration of the mouth of another person by the sexual organ of the actor without the other person's consent; or (2) the contact or penetration by the

sexual organ of the victim to the mouth, anus, or sexual organ of another person, including the actor, without the victim's consent. *Id.* at 598. A person committed aggravated kidnapping by intentionally or knowingly, and with intent to abuse the victim sexually, abducting another person. *Id.*

The Court of Criminal Appeals noted that, in *White*, the two statutes were substantially similar despite the following differences: (1) "the circumstance of the victim's age was different by one year;" (2) "the Delaware offense did not contain an element that the victim was 'not the person's spouse[;]'" and (3) "the Delaware offense defined 'sexual contact' as a touching which, 'under the circumstances as viewed by a reasonable person, is intended to be sexual in nature,' whereas the Texas offense defined 'sexual contact' as a touching, if committed 'with the intent to arouse or gratify the sexual desire of any person.'" *Id.* at 593. The Court explained:

> The one-year age difference provides a good example of elements that are substantially similar, but not identical. The absence of the spouse element in the Delaware offense shows that one offense need not have every element of the other. Finally, the difference in the specific intent shows that, while an element of the foreign offense can be proved by a fact that would be insufficient to prove the respective Texas element, the elements may still be substantially similar.

Id. at 593-94 (internal footnotes omitted). The Court held that "the elements being compared . . . must display a high degree of likeness, but may be less than identical." *Id.* at 594. The Court noted that elements may be substantially similar "with respect to general characteristics such as terminology, function, and type of element, or with respect

to specific characteristics such as the seriousness of violent or sexual aspects." *Id*. (internal footnote omitted). The Court held that "the elements must be substantially similar with respect to the individual or public interests protected and the impact of the elements on the seriousness of the offenses." *Id*. at 595. The Court stated:

> "[T]hat a person guilty of the [foreign] law would also be guilty under the Texas law" is not a dispositive consideration. On the contrary, in *White* we found elements to be substantially similar despite the possibility that a person could be found guilty in Delaware on proof of facts insufficient to prove guilt in Texas. Also, this Court has not "held the elements of another state's law to be substantially similar to the elements of an [enumerated offense] when the elements of the other State's law *parallel* the elements of a single Texas offense." We have found no legal authority for this "parallel" test, and it seems of little assistance in applying the statute.

Id. at 595-96.

The Court found that the California statute was not substantially similar to the Texas sexual assault statute because: (1) the "'touching' of an 'intimate part'" involved in the California offense "encompasse[d] a markedly different range of conduct than the 'penetration or contact' of a person's 'anus' or 'sexual organ' involved in . . . the Texas offense[;]" in fact, the California Penal Code excluded rape and sexual penetration from the scope of sexual battery; (2) the California statute protected from the offensiveness of the contact, while the Texas statute protected from the "severe physical and psychological trauma of rape[;]" and (3) sexual battery was a misdemeanor punishable by six months imprisonment, but sexual assault was a second degree felony punishable by twenty years imprisonment. *Id*. at 599. The Court also found that the California offense

was not substantially similar to the Texas aggravated kidnapping offense because: (1) sexual battery contained a conduct element requiring the touching of an intimate part, but aggravated kidnapping contained a specific intent element requiring the intent to commit a non-consensual sex act; (2) sexual battery required "unlawful restraint," *i.e.*, "control of a person's liberty, against his will, by words, acts or authority of the perpetrator aimed at depriving the person's liberty[,]" but aggravated kidnapping required "abduction," *i.e.*, an "'unlawful restraint' — a substantial interference with the person's liberty, by moving the person from one place to another or by confining the person — committed with the specific intent to prevent the victim's liberation by secreting or holding him in a place where he is not likely to be found or using or threatening to use deadly force[;]" (3) the California statute protected individuals' liberty interests, while the Texas statute "protect[ed] against the considerable risk of death or serious bodily injury involved in an abduction[;]" and (4) sexual battery exposed a defendant to a maximum of four years in prison, while aggravated kidnapping exposed a defendant to a maximum of life or 99 years in prison. *Id*. at 599-600. For these reasons, an automatic life sentence was not warranted. *See id*. at 600.

In this case, we must determine whether the elements of Utah's sexual-exploitation-of-a-minor offense are substantially similar to the elements of Texas's possession or promotion of child pornography offense.[1] At the time Outland committed

[1] On appeal, Outland compares the Utah statute to section 43.26 of the Penal Code. The State, on appeal, compares the Utah statute to section 43.26, as well as section

the Utah offense, the Utah statute provided that a person is guilty of sexual exploitation of a minor when he "knowingly produces, distributes, possesses, or possesses with intent to distribute, material or a live performance depicting a nude or partially nude minor for the purpose of sexual arousal of any person or any person's engagement in sexual conduct with the minor." Utah Code Ann. § 76-5a-3(1)(a) (1990). The material need not appeal to the prurient interest in sex of the average person nor must the prohibited conduct be portrayed in a patently offensive manner. *Id*. § 76-5a-4 (1990). A "minor" is a person under the age of eighteen. *Id*. § 76-5a-2(4) (1990). "Distribute" includes "selling, exhibiting, displaying, wholesaling, retailing, providing, giving, granting admission to, or otherwise transferring or presenting material or live performances with or without consideration." *Id*. § 76-5a- 2(1). "'Material' means any visual representation including photographs, motion pictures, slides, videotapes, or other pictorial representations produced or recorded by any mechanical, chemical, photographic, or electrical means and includes undeveloped photographs, negatives, or other latent representational objects." *Id*. § 76-5a-2(3). "'Nude or partially nude' means any state of dress or undress in which the human genitals, pubic region, buttocks, or the female breast, at a point below the top of the areola, is less than completely and opaquely

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43.25 of the Penal Code, *i.e.*, sexual performance by a child. At trial, the State argued that the Utah statute was substantially similar to section 43.26. The trial court found that the Utah offense is substantially similar to the "Texas elements for Possession of Child Pornography," but cited section 43.25. The record demonstrates that the Texas offense at issue is that of possession or promotion of child pornography; thus, we limit our analysis to a comparison of the Utah statute with section 43.26 of the Penal Code.

covered." *Id*. § 76-5a-2(5). "Sexual conduct" includes sexual intercourse or deviate sexual intercourse, masturbation, sodomy or bestiality, sadomasochistic activities, the fondling or touching for purpose of sexual arousal of the genitals, pubic region, buttocks, or female breast, or the explicit representation of the defecation or urination functions. *Id*. § 76-5a-2(7).

In Texas, a person commits possession or promotion of child pornography by knowingly or intentionally promoting, possessing, or possessing with intent to promote visual material that visually depicts a child younger than eighteen years of age at the time the image of the child was made, who is engaging in sexual conduct and the person knows that the material depicts the child engaging in sexual conduct. Tex. Penal Code Ann. § 43.26(a), (e) (West 2011). "'Promote' means to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, present, exhibit, or advertise or to offer or agree to do any of the above." *Id*. § 43.25(a)(5) (West 2011). "'Visual material' means: (A) any film, photograph, videotape, negative, or slide or any photographic reproduction that contains or incorporates in any manner any film, photograph, videotape, negative, or slide; or (B) any disk, diskette, or other physical medium that allows an image to be displayed on a computer or other video screen and any image transmitted to a computer or other video screen by telephone line, cable, satellite transmission, or other method." *Id*. § 43.26(b)(3). "'Sexual conduct' means sexual contact, actual or simulated sexual

intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals, the anus, or any portion of the female breast below the top of the areola." *Id*. § 43.25(a)(2).

Outland argues that elements of the Utah and Texas offenses are distinguishable for several reasons. First, Outland contends that the Utah statute proscribes a "live performance," not just visual material. *See* Utah Code Ann. § 76-5a-3(1)(a); *see also* Tex. Penal Code Ann. § 43.26(a), (e). Second, Outland contends that (1) in Utah, the knowing possession or promotion of material depicting a nude or partially nude minor violates the statute if the material depicts the minor *for the purpose of sexual arousal of any person or any person's engagement in sexual conduct with the minor*, but (2) in Texas, the knowing or intentional possession or promotion of material depicting a child under the age of eighteen violates the statute if the material depicts a child engaging in sexual conduct. *See* Utah Code Ann. § 76-5a-3(1)(a); *see also* Tex. Penal Code Ann. § 43.26(a), (e). Third, Outland maintains that the two statutes treat "visual material" differently because (1) Texas requires that material depict "sexual conduct," but Utah requires that material depict "a nude or partially nude minor," which Outland contends is a lesser standard, and (2) "the content of the visual material [proscribed by the Utah statute] need not display Texas type 'sexual conduct' as long as 'nudity or partial nudity exists." *See* Utah Code Ann. §§ 76-5a-2(5), 76-5a-3(1)(a); *see also* Tex. Penal Code Ann. §§ 43.25(a)(2), 43.26(a), (e). Fourth, Outland contends that "a person guilty under

Utah law is not necessarily guilty under Texas law." In summary, Outland concludes that the elements of the Utah offense do not parallel those of the Texas offense.

Although not identical, the elements of the Utah and Texas offenses display a high degree of likeness. *See Prudholm*, 333 S.W.3d at 594. Unlike the Utah offense, a sexual response is not an essential element of the Texas offense and the Texas statute does not proscribe possession or promotion of a live performance. *See* Tex. Penal Code Ann. § 43.26(a), (e); *see also* Utah Code Ann. § 76-5a-3(1)(a). Nevertheless, elements need not be identical and one offense need not have every element of the other. *See Prudholm*, 333 S.W.3d at 593-94. The two statutes' treatment of "visual material" merely shows that an element of the Utah offense, material depicting a nude or partially nude minor, can be proved by a fact that may be insufficient to prove the respective Texas element, material depicting an image of a child engaging in sexual conduct. *See* Tex. Penal Code Ann. §§ 43.25(a)(2), 43.26(a), (e); *see also* Utah Code Ann. §§ 76-5a-2(5), 76-5a-3(1)(a). Finally, there is no requirement, as Outland suggests, that the elements of the Utah statute actually parallel the elements of the Texas statute or that a person guilty under Utah law also be guilty under Texas law. *See Prudholm*, 333 S.W.3d at 595-96. We cannot say that the Utah statute encompasses a markedly different range of conduct than the Texas statute.

Moreover, both statutes share the purpose of protecting minors from sexual exploitation. *See generally Vineyard v. State*, 958 S.W.2d 834, 839 (Tex. Crim. App. 1998); *see also State v. Bishop*, 753 P.2d 439, 480 (Utah 1988), *overruled on other grounds by State v. Menzies*, 889 P.2d 393 (Utah 1994). Additionally, little difference exists between the seriousness of the offenses. Under the Texas statute, possession of child pornography is a second-degree felony, while promotion of pornography or possession of pornography with intent to promote is a third-degree felony. Tex. Penal Code Ann. § 43.26(a), (d), (e), (g). A second-degree felony is punishable by two to twenty years in prison and a fine not to exceed $10,000. Tex. Penal Code Ann. § 12.33 (West 2011). A third-degree felony is punishable by two to ten years in prison and a fine not to exceed $10,000. *Id*. § 12.34 (West 2011). Under the Utah statute, sexual exploitation of a minor is a second-degree felony. Utah Code Ann. § 76-5a-3(2). In Utah, a second-degree felony is punishable by one to fifteen years in prison and a fine not to exceed $10,000. *Id*. §§ 76-3-203(2), 76-3-301(1)(a) (2003 & 1995).[2] The statutes are substantially similar with respect to the interests they protect and the impact of their elements on the seriousness of the offenses. *See Prudholm*, 333 S.W.3d at 595.

In summary, we conclude that the elements of sexual exploitation of a minor under Utah law are substantially similar to the elements of possession or promotion of child

[2] Because amended sections 76-3-203 and 76-3-301 contain no material changes applicable to this case, we cite to the current versions of the statutes.

pornography under Texas law. For this reason, the trial court properly imposed a life sentence pursuant to section 12.42(c)(2) of the Penal Code. We overrule issue one.

Enhancement Paragraph

In issue two, Outland contends that the trial court improperly found the enhancement allegation in the indictment "true." Outland contends that his prior Utah conviction for sexual exploitation of a minor could not be used for enhancement purposes because (1) the Utah statute is not substantially similar to Texas's possession or promotion of child pornography statute, and (2) his Utah conviction was not final, given that he received and successfully completed probation.

A prior foreign conviction for an offense containing elements that are substantially similar to the elements of one of the enumerated offenses listed in section 12.42(c)(2)(B) of the Penal Code may be used to enhance punishment in Texas under section 12.42(c)(2), even if the sentence for that conviction was probated and the probation was not revoked. *White*, 211 S.W.3d at 319. Because the elements of the Utah statute are substantially similar to the elements of section 43.26 of the Penal Code, an offense listed under section 12.42(c)(2)(B), Outland's Utah conviction could be used to enhance his punishment, even though he was placed on probation for the Utah offense and his probation was not revoked. *See id.*; *see also* Tex. Penal Code. Ann. § 12.42(c)(2)(B)(i), (v). The trial court properly found the enhancement allegation "true." We overrule issue two.

Having overruled Outland's two issues, we affirm the trial court's judgment.

AFFIRMED.

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STEVE McKEITHEN
Chief Justice

Submitted on July 7, 2011
Opinion Delivered August 24, 2011
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Before McKeithen, C.J., Gaultney and Horton, JJ.