

IN THE UTAH COURT OF APPEALS

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State of Utah,)	AMENDED
)	MEMORANDUM DECISION ¹
Plaintiff and Appellee,)	(Not For Official Publication)
)	Case No. 20060902-CA
v.)	
)	F I L E D
Tyler Zesiger,)	(June 19, 2008)
)	
Defendant and Appellant.)	<u>2008 UT App 231</u>

First District, Logan Department, 991100886
The Honorable Clint S. Judkins

Attorneys: Elizabeth Hunt, Salt Lake City, for Appellant
Mark L. Shurtleff and Christopher D. Ballard, Salt
Lake City, for Appellee

Before Judges Thorne, Davis, and Orme.

ORME, Judge:

We have determined that "[t]he facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument." Utah R. App. P. 29(a)(3). Moreover, the issues presented are readily resolved under existing law.

"A constitutional challenge to a statute presents a question of law, which we review for correctness[.]" State v. Morrison, 2001 UT 73, ¶ 5, 31 P.3d 547 (citation omitted). Of central importance to the United States Supreme Court's decision in Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002), was Congress's use of the specific language "or appears to be" in subsection (B) and "or distributed in such a manner that conveys the impression" in subsection (D). 18 U.S.C. § 2256(8)(B), (D) (2000). See Ashcroft, 535 U.S. at 241-43, 246-49.

1. This memorandum decision supersedes our original decision in this matter, 2008 UT App 57, filed on February 28, 2008.

Notwithstanding that the statute under which Defendant was convicted, Utah Code Ann. § 76-5a-3 (1999),² does not contain such language, Defendant argues that it might nevertheless be read to prohibit possession of "any visual representation," id. § 76-5a-2(3), "depicting a nude or partially nude minor," id. § 76-5a-3(1)(a), regardless of whether an actual minor was portrayed.

Defendant's constitutional rights were not violated simply because the conceivable reach of the statute might be so far stretched. We recognize that the overbreadth doctrine is an exception to the general rule that a person may not challenge the constitutionality of a statute when it is being applied constitutionally to him. See New York v. Ferber, 458 U.S. 747, 767-69 (1982); Provo City Corp. v. Thompson, 2004 UT 14, ¶ 10, 86 P.3d 735. Nonetheless, "the mere fact that a statute is overbroad to some degree does not automatically warrant reversal. '[W]here a statute regulates expressive conduct, the scope of the statute does not render it unconstitutional unless its overbreadth is not only real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.'" Morrison, 2001 UT 73, ¶ 6 (alteration in original) (citation omitted). See United States v. Williams, 128 S. Ct. 1830, 1838 (2008) ("[W]e have vigorously enforced the requirement that a statute's overbreadth be substantial, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep. . . . Invalidation for overbreadth is strong medicine that is not to be casually employed.") (emphasis in original) (citations and internal quotation marks omitted).

We do not think the "plainly legitimate sweep" of section 76-5a-3 includes in any real way a limitation on those activities Defendant asserts are constitutionally protected. Indeed, we have not been able to find a single instance of a prosecution pursuant to the statute under which Defendant was convicted that did not involve the exploitation of an actual minor. See, e.g., Morrison, 2001 UT 73, ¶¶ 2-3, 16 (noting that there was no dispute that actual minors were depicted); State v. Workman, 852 P.2d 981, 983 (Utah 1993) (same); State v. Nuttall, 861 P.2d 454, 454-55 (Utah Ct. App. 1993) (same); State v. Moore, 788 P.2d 525, 526 (Utah Ct. App.) (same), cert. denied, 800 P.2d 1105 (Utah 1990). See also State v. Atkin, 2003 UT App 359, ¶¶ 13, 37, 80 P.3d 157 (stating that expert testimony established that actual minors were depicted), cert. denied, 90 P.3d 1041 (Utah 2004). And in denying Defendant's motion to dismiss, the trial court

2. The statute has subsequently been changed. Defendant agrees that if the current version of the statute applied, his argument would be unavailing.

here ruled that "at trial the State must prove beyond a reasonable doubt that the people portrayed in the images at issue were actual minors."

Significantly, the Legislature's stated purpose in enacting section 76-5a-3 was "to prohibit the production, possession, possession with intent to distribute, and distribution of materials which sexually exploit minors." Utah Code Ann. § 76-5a-1 (1999) (emphasis added). Defendant's strained interpretation of section 76-5a-3 is inconsistent with the Legislature's stated purpose for enacting it, which further bolsters our conclusion that his interpretation is implausible. See Morrison, 2001 UT 73, ¶¶ 10-12 (choosing to adopt a construction of section 76-5a-3 that "is consistent with the legislature's purpose in enacting that section" and recognizing its "duty to construe a statute whenever possible so as to . . . save it from constitutional conflicts or infirmities") (citations and internal quotation marks omitted).

Affirmed.

Gregory K. Orme, Judge

WE CONCUR:

William A. Thorne Jr.,
Associate Presiding Judge

James Z. Davis, Judge