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OF WISCONSIN**

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Case No. 2014AP002770-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ALBERT J. CHAGNON,

Defendant-Appellant.

On Review of a Non-Final Order Entered
in the Winnebago County Circuit Court on
November 21, 2014, the Honorable Scott C. Woldt Presiding.

BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT

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ISSUE PRESENTED

Whether possessing photographs of clothed children taken from magazines and newspapers is a violation of Wis. Stat. § 948.14, which prohibits a registered sex offender from intentionally capturing a representation of a minor without parental consent.

The circuit court answered yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Publication is warranted because there is no Wisconsin case law on Wis. Stat. § 948.14, which was enacted in 2006. A decision interpreting the meaning and scope of the statute is necessary to guide lower courts and to ensure a fair and uniform application of the law. Oral argument is not requested, but would be welcomed if ordered.

RELEVANT STATUTES

948.14 Registered sex offender and photographing minors.

- (1) Definitions. In this section: (a) "Captures a representation" has the meaning given in s. 942.09 (1) (a).
- (b) "Minor" means an individual who is under 17 years of age.
- (c) "Representation" has the meaning giving in s. 942.09 (1) (c).
- (d) "Sex offender" means a person who is required to register under s. 301.45.

(2) Prohibition. (a) A sex offender may not intentionally capture a representation of any minor without the written consent of the minor's parent, legal custodian, or guardian. The written consent required under this paragraph shall state that the person seeking the consent is required to register as a sex offender with the department of corrections.

(b) Paragraph (a) does not apply to a sex offender who is capturing a representation of a minor if the sex offender is the minor's parent, legal custodian, or guardian.

(3) Penalty. Whoever violates sub. (2) is guilty of a Class I felony.

942.09 Representations depicting nudity.

(1) In this section: (a) "Captures a representation" means takes a photograph, makes a motion picture, videotape, or other visual representation, or records or stores in any medium data that represents a visual image.

(am) "Nude or partially nude person" has the meaning given in s. 942.08 (1) (a).

...

(2) (am) Whoever does any of the following is guilty of a Class I felony: 1. Captures a representation that depicts nudity without the knowledge and consent of the person who is depicted nude while that person is nude in a circumstance in which he or she has a reasonable expectation of privacy, if the person knows or has reason to know that the person who is depicted nude does not know of and consent to the capture of the representation.

[2. make a reproduction] [3. possess, distribute, exhibit]

...

STATEMENT OF THE CASE AND FACTS

The State charged Mr. Chagnon with 23 counts of intentionally photographing a minor as a registered sex offender without parental consent, contrary to Wis. Stat. § 948.14(2)(a). In addition, the State charged 4 counts of violating a law governing a state penal institution, contrary to Wis. Stat. § 946.73. (1).

This appeal concerns counts 1-23 of the complaint. As relevant to those charges, the complaint alleged that, after Mr. Chagnon was released from Oshkosh Correctional Institution, a correctional officer conducted an inventory of his belongings. The officer found a red notebook in Mr. Chagnon's pants pocket that contained images of clothed children 12 and under that appeared to be cut out of magazines and newspapers. Next to the photos were handwritten comments of a sexually explicit nature. In addition, some photos were accompanied by the names and ages of the children. (1:11-14). The other charges are for violating the prison rules (because the notebook and other materials that were found are considered contraband).

The notebook was turned over to the Oshkosh Police Department. Detective Wilson located 23 parents of the children from the publications. They said they did not consent to Mr. Chagnon having the photos. (13:7).

Defense counsel filed a motion and supplemental motion to dismiss the charges based on the insufficiency of the complaint. (3, 6). Counsel agreed that Mr. Chagnon was a registered sex offender. However, counsel argued that the statute intended to prohibit the creation of images of children, not mere possession. None of the photos were created by Mr. Chagnon. The State countered that the statutory

definition of “capture” includes “store in any medium data that represents a visual image.” (5).

The Winnebago County Circuit Court, the Honorable Scott C. Woldt presiding, held a hearing and denied the motion to dismiss. (14). The court ruled:

With respect to the four elements of the crime,¹ we’re dealing here with the second element which is the defendant captures a representation of a minor. According to the definition of the -- of what that means, the jury instruction clearly indicates “captures a representation” means stores in any medium data that represents a visual image. This is not so much according to the legislative history and my knowledge of the statute and when it came down is that we’re concerned about is people who are on the Sexual Offender Registry not only taking but storing this type of data, and when someone takes these photographs of minors and puts them in a notebook and writes things next to them, that is exactly what this statute is about. We do not want people to - - who have this history of being required to - - or because of the sexual nature and the Sexual Offender Registry, we don’t want those people taking these types or having these types of images no matter what source they get them from...

(14:4-5; App 101-107).

A written order denying the motion was filed on November 21, 2014. (7). Mr. Chagnon filed a petition for leave to appeal this non-final order. This Court granted the petition on January 7, 2015. (11).

This appeal follows.

¹ The parties focused their argument on the jury instruction for Wis. Stat. § 948.14(2)(a), WIS-Jury Instruction 2196.

ARGUMENT

I. Possessing Photographs of Clothed Children Taken from Newspapers, Magazines, and Other Publications Does Not Constitute “Capturing” an Image and is Therefore Not a Violation of Wis. Stat. § 948.14.

A. Standard of review and legal principles of statutory interpretation.

Statutory interpretation presents a question of law that this Court reviews de novo. *State v. Johnson*, 2009 WI 57, ¶63, 318 Wis. 2d 21, 767 N.W.2d 207. To the extent that statutory interpretation raises a constitutional issue, this issue is also reviewed de novo. *Id.*

“The purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect.” *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110. Thus, statutory interpretation begins with the language of the statute. “If this process of analysis yields a plain, clear statutory meaning, then there is no ambiguity, and the statute is applied according to this ascertainment of its meaning”; legislative history does not need to be consulted. However, “the court is free to consult legislative history to confirm or verify a plain-meaning interpretation.” *Id.*, ¶51.

If the meaning is ambiguous, the reviewing court will look to extrinsic sources such as legislative history to determine the intent of the legislature. A statute is ambiguous “if it is capable of being understood by reasonably well-informed persons in two or more senses.” *Bruno v. Milwaukee County*, 2003 WI 28, ¶19, 260 Wis. 2d 633, 660 N.W.2d 656.

Statutory language is “given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning.” *Bruno*, 260 Wis. 2d 633, at ¶¶8, 20. Context is important and statutory language is interpreted “reasonably to avoid absurd or unreasonable results.” *Kalal*, 271 Wis. 2d 633 at ¶46; *also see State v. Lamar*, 2011 WI 50, ¶33, 334 Wis. 2d 536, 799 N.W.2d 758.

The legislature is presumed to have drafted a law in a constitutional manner. *State v. Cole*, 2003 WI 112, ¶11, 264 Wis. 2d 520, 665 N.W.2d 328. The Wisconsin Supreme Court has held that it “indulges every presumption to sustain the law if at all possible, and if any doubt exists about a statute’s constitutionality, we must resolve that doubt in favor of constitutionality.” *Id.* at ¶11. Finally, “penal statutes are to be strictly construed in favor of the accused.” *State v. Schaller*, 70 Wis. 2d 107, 110, 233 N.W.2d. 416 (1975).

B. Wis. Stat. § 948.14 prohibits registered sex offenders from creating—not possessing—images of minors without parental consent.

At the outset, it is important to recognize that this case is not about child pornography. The photos found in the notebook were of fully-clothed children from regularly circulated publications. As such, the issue is whether a registered sex offender may be arrested, charged, and convicted of a felony for simply possessing a published, non-pornographic photo of a child without that child’s parents’ consent.²

² Another interesting question presented by this case, but not litigated below, is the issue of “consent.” Presumably, by allowing their children’s photos to be published, the parents gave some type of consent.

The controversy in this case centers on the meaning of the term “capture.” Section 948.14, was enacted in 2006. In substantive part it provides that “a sex offender may not intentionally capture a representation of any minor without the written consent of the minor's parent, legal custodian, or guardian.”³

The statute incorporates the definition of “capture” provided in Wis. Stat. § 942.09.⁴ Section 942.09 prohibits a person from taking a picture or video of a nude or partially nude person without that person’s consent. The statute prohibits creating the image, reproducing the image, and even merely possessing the image.

The term “capture” was added to § 942.09 in 2001 Wisconsin Act 33 as subsection (1)(a).

‘Captures a representation’ means takes a photograph, makes a motion picture, videotape, or other visual representation, or records or stores in any medium data that represents a visual image.

The corresponding assembly bill, 2001 Assembly Bill 60, contains an analysis by the Legislative Reference Bureau. The analysis explains that one of the changes being made by the bill was to expand the category of prohibited representations to include digital images. It states:

The bill expands the categories of representations that a person may not create, reproduce, possess, or distribute

³ It also provides that the written consent shall state that the person seeking the consent is required to register as a sex offender with the department of corrections, and the prohibition does not apply if the sex offender is the minor's parent, legal custodian, or guardian.

⁴ Section 948.14(1)(a) states, “[c]aptures a representation” has the meaning given in s. 942.09 (1) (a).”

by prohibiting creation, reproduction, possession, or distribution of data representations of visual images including computer programs and *the stored memory of an image captured with a digital camera.*

(emphasis added).

This analysis shows that the purpose behind the statutory changes was to keep up with changing technology to close any loopholes. Whereas traditionally, a photo would necessarily be in physical form—it would need to be developed to see it—digital cameras made it possible to create an image without creating a physical item.

The circuit court held that the term “store in any medium,” means that merely possessing the images, whether digital or physical, is prohibited. The court was mistaken. All of the terms included in the definition of “capture” have to do with *creating* an image. The other definitions are “takes a photograph,” make “a motion picture, “videotape,” or “other visual representation.” One rule of statutory construction, *ejudem generis*, states that the meaning of a general phrase when placed in a string of specific terms is limited to the “same kind, class, character, or nature, as those enumerated.” ***Cheatham v. State***, 85 Wis. 2d 112, 270 N.W.2d 194 (1978). In context, the term “store in any medium data that represents a visual image” means to create an image using a digital camera or digital video camera.

Moreover, the Assembly Bill, having created the definition of “capture,” proceeded to replace terms such as “take a photograph, make a motion picture, or other visual representation or production” with the word “capture.” This demonstrates that the term “capture” was meant as shorthand for various types of image-creation.

Under § 948.14, it is the creation, not mere possession, of an image of a child by a registered sex offender that is prohibited. The Legislative Reference Bureau’s analysis to the bill that created the law, 2005 Assembly Bill 251, states: “[t]his bill prohibits persons who are required to register as sex offenders from intentionally photographing, filming, or videotaping any person under the age of 17 unless [parental consent].”

The legislature knows how to prohibit mere possession and chose not to do so here. For example, simple possession of child pornography is illegal. Wis. Stat. § 948.12.⁵ Likewise, in addition to prohibiting the capture of images of a nude person, Wis. Stat. § 942.09—from which the definition of “capture” is taken—also prohibits “possession” under subsection (2)(am)(3):

(2)(am) Whoever does any of the following is guilty of a Class I felony:

1. Captures a representation...
2. Makes a reproduction of a representation...
3. Possesses, distributes, or exhibits a representation...

If possession was encompassed in the definition of “capture,” the use of the term “possession” would be superfluous. “Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage.” *Bruno*, 260 Wis. 2d 633, at ¶24. Under § 948.14, a registered sex offender may not take pictures of children, for example, at a park or sports game without the

⁵ Also see e.g., Wis. Stat. § 941.24, possession of a switchblade knife, Wis. Stat. § 941.292, possession of a weaponized drone, and all of Chapter 961, the uniform controlled substance act.

parents' consent. Possessing pictures of clothed children from publications such as magazines and newspapers is different and is not prohibited.

C. The State's interpretation of Wis. Stat. § 948.14 creates constitutional problems.

Mr. Chagnon did not raise a constitutional challenge to the statute in his petition for review of a non-final order. Instead, this appeal centers on statutory interpretation.⁶ The legislature is presumed to have drafted a law in a constitutional manner and every effort is made to sustain a law by resolving any doubt in favor of constitutionality. *Cole*, 264 Wis. 2d 520, ¶11. If this Court agrees that Mr. Chagnon's conduct does not meet the statutory definition of "capture," the court does not need to decide the constitutionality of § 948.14. On the other hand, if this Court agrees with the circuit court, the following constitutional issues are presented.

1. Due process.

Vagueness is a procedural due process concept, based on notions of fair play. A statute is void for vagueness if it does not provide "fair notice" of prohibited conduct and does not provide objective standards for enforcement of violations. *State v. Smith*, 215 Wis. 2d 84, 572 N.W.2d 496 (Ct. App. 1997).

If cutting out a photo of a child from a publication is unlawful for a registered sex offender, where do we draw the line? Under the State's view, a person like Mr. Chagnon risks the humiliation and harm of being arrested, charged, and

⁶ This Court's order granting review states that "[b]riefing is limited to those issues outlined in the petition." (11).

convicted of a felony offense for a wide-range of normal, everyday behavior. What if a person such as Mr. Chagnon accepted a flyer handed to him on the street that contains an image of a clothed child? What about a person who receives an unsolicited catalog from a toy store in the mail and does not immediately dispose of it? Would a person such as Mr. Chagnon be prohibited from having a newspaper subscription, since images of children are often featured?

The circuit court's interpretation of § 948.14 leads to unreasonable and absurd results. *See Kalal*, 271 Wis. 2d 633 at ¶46. It makes it impossible to draw a line between acceptable everyday conduct and prohibited activity. Due Process requires that the government put individuals on notice that their conduct is unlawful. The State's interpretation, if accepted, would render the statute void for vagueness.

2. First amendment.

If the circuit court's interpretation of the meaning of "capture" in this context was correct, the statute would violate the First Amendment because it prohibits mere possession of non-pornographic images of children.⁷ "As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245 (2002). "The First Amendment does not permit the imposition of criminal sanctions when doing so would substantially chill protected speech." *State v. Weidner*, 2000 WI 52, ¶35, 235 Wis. 2d 306, 321-322, 611 N.W.2d 684.

⁷ The issue of whether Wis. Stat. § 948.14 is facially invalid as a violation of the First Amendment is pending in *State v. Christopher J. Oatman*, Case No. 2014AP002084-CR in District III.

It is true that “[t]he freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children.” *Id.*, at 245-246. However, the photos in this case do not fit any of these narrow exceptions. The photos are not obscene, nor are they pornographic.

In any case, this Court does not need to address any constitutional issues to resolve this appeal because, as explained above, the circuit court’s interpretation of Wis. Stat. § 948.14 is incorrect.

In conclusion, a valid criminal complaint must allege facts that establish probable cause. Here, even accepting the alleged facts as true (because at this juncture they are merely allegations), the described conduct involves simple possession of published images of clothed children. This conduct does not violate Wis. Stat. § 948.14. As such, charges 1-23 of the complaint must be dismissed.

CONCLUSION

For the reasons set forth above, Mr. Chagnon respectfully asks this Court to reverse the circuit court and remand with directions to dismiss counts 1-23 of the criminal complaint.

Dated this 27th day of March, 2015.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,576 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 27th day of March, 2015.

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A P P E N D I X

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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