[Cite as *State v. Eal*, 2012-Ohio-1373.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 11AP-460
v.	:	(C.P.C. No. 10CR-1268)
Nathan R. Eal,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 29, 2012

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert*, for appellee.

Shaw & Miller, and *Mark J. Miller*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶ 1} Defendant-appellant, Nathan R. Eal, appeals from a judgment of the Franklin County Court of Common Pleas finding him guilty, pursuant to no contest pleas, of ten counts of pandering sexually oriented matter involving a minor, felonies of the second degree, and ten counts of pandering sexually oriented matter involving a minor, felonies of the fourth degree. Because (1) the trial court did not err in denying defendant's pretrial motions, (2) defendant suffered no prejudice from the trial court's failure to rule on his Crim.R. 12(F) motion, (3) the trial court properly refused to merge all counts in the indictment, (4) the trial court did not plainly err in imposing conditions of community

control, (5) defendant's Tier II sex offender registration requirements are constitutional, and (6) the trial court did not err in failing to stay the registration requirements, we affirm.

I. Facts and Procedural History

{¶ 2} On September 7, 2009, the National Center for Missing and Exploited Children ("NCMEC") sent the Franklin County Internet Crimes Against Children Task Force ("FCICAC") a "cyber tip" indicating that on April 8, 2009 a user of an Internet Protocol ("IP") address registered to defendant's house in Galloway, Ohio uploaded 14 files of suspected child pornography to an internet website; it also forwarded a disk with copies of the images. FCICAC received another tip on September 14, 2009 from a detective with the Seattle Police Department who received a cyber tip indicating that on March 10, 2009 a Yahoo account owner, using an IP address registered to defendant's house, uploaded suspected child pornography to an internet website. Officer Priest, an Upper Arlington police officer assigned to FCICAC, examined the images and concluded the images met the statutory definition of child pornography.

{¶ 3} With that information, police secured a warrant to search defendant's house. Police executed the warrant on September 16, 2009, seizing and searching all of the computers in defendant's household and interviewing defendant during the search. The forensic preview of the computer located in defendant's bedroom revealed images of child pornography. By indictment filed February 26, 2010, defendant was charged with ten counts of pandering sexually oriented matter involving a minor, in violation of R.C. 2907.322(A)(1) and/or (2) and ten counts of pandering sexually oriented matter involving a minor, in violation of R.C. 2907.322(A)(5).

{¶ 4} In response, defendant filed a number of pretrial motions, including (1) motions to suppress the evidence obtained from the search of his house and the statements he made to law enforcement officers, (2) a motion challenging the constitutionality of R.C. 2907.322, and (3) motions to dismiss the indictment based on lack of effective expert assistance and insufficient particularity. The trial court held a hearing on defendant's various motions on January 11, 2011 and denied them all on March 16, 2011.

{¶ 5} In light of those rulings, defendant entered a plea of no contest to the charges on March 23, 2011. The court accepted defendant's plea and found him guilty of all counts. Defendant filed a motion requesting the court to merge counts one through twenty for purposes of sentencing. The court granted it in part, merged counts eleven through twenty with counts one through ten, sentenced defendant to four years of community control and classified him a Tier II sex offender.

II. Assignments of Error

{¶ 6} On appeal, defendant assigns the following errors:

> **ASSIGNMENT OF ERROR I**
>
> **THE TRIAL COURT ERRED IN FAILING TO STATE ITS FINDINGS OF FACT AND CONCLUSIONS OF LAW, UPON REQUEST OF APPELLANT, PURSUANT TO CRIMINAL RULE 12(F).**
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> **ASSIGNMENT OF ERROR II**
>
> **THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS THE SEARCH OF HIS HOME.**
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> **ASSIGNMENT OF ERROR III**
>
> **THE TRIAL COURT ERRED IN FAILING TO SUPPRESS STATEMENTS MADE BY THE APPELLANT.**
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> **ASSIGNMENT OF ERROR IV**
>
> **THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION CHALLENGING THE CONSTITUTIONALITY OF OHIO REVISED CODE § 2907.322.**
>
> **ASSIGNMENT OF ERROR V**
>
> **THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS THE INDICTMENT, BECAUSE THE INDICTMENT AGAINST THE APPELLANT VIOLATED THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND THE OHIO CONSTITUTION BY DENYING THE APPELLANT DUE PROCESS AND THE RIGHT TO A FAIR TRIAL.**

ASSIGNMENT OF ERROR VI

THE TRIAL COURT ERRED IN FAILING TO MERGE APPELLANT'S TWENTY COUNTS OF PANDERING SEXUALLY ORIENTED MATERIAL INVOLVING A MINOR UNDER OHIO REVISED CODE § 2907.322.

ASSIGNMENT OF ERROR VII

THE TRIAL COURT ERRED IN ORDERING RANDOM DRUG TESTING AS A CONDITION OF APPELLANT'S COMMUNITY CONTROL.

ASSIGNMENT OF ERROR VIII

THE TIER-TWO SEX OFFENDER REGISTRATION REQUIREMENTS VIOLATE BOTH THE SEPARATION OF POWERS AND THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE[S] OF THE UNITED STATES AND OHIO CONSTITUTIONS.

ASSIGNMENT OF ERROR IX

THE TRIAL COURT ERRED IN FAILING TO STAY THE APPELLANT'S SEX OFFENDER REGISTRATION REQUIREMENT.

ASSIGNMENT OF ERROR X

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS THE INDICTMENT.

ASSIGNMENT OF ERROR XI

THE TRIAL COURT'S RESTRICTION ON APPELLANT'S INTERNET USE VIOLATES HIS FIRST AMENDMENT RIGHT TO FREE SPEECH.

For ease of discussion, we address defendant's assignments of error out of order.

III. Second Assignment of Error – Motion to Suppress

{¶ 7} Defendant's second assignment of error asserts the trial court erred in denying his motion to suppress the evidence retrieved from the search of his home. Defendant contends the affidavit supporting the warrant lacked sufficient information

to establish probable cause, the affidavit included stale information, and the police failed to properly execute the warrant.

A. *Affidavit Supporting Warrant*

{¶ 8} Defendant contends the affidavit supporting the warrant failed to establish probable cause. The Fourth Amendment to the United States Constitution requires that warrants issue only "upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." *See also* R.C. 2933.22(A); Crim.R. 41(C).

{¶ 9} In determining probable cause from an affidavit submitted to support a search warrant, the issuing magistrate must " 'make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.' " *State v. George*, 45 Ohio St.3d 325 (1989), paragraph one of the syllabus, following *Illinois v. Gates*, 462 U.S. 213, 238-239, 103 S.Ct. 2317 (1983). By contrast, a reviewing court should not conduct a de novo review of a magistrate's determination of probable cause, but reviews the warrant "simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed," according "great deference to the magistrate's determination of probable cause," and resolving "doubtful or marginal cases * * * in favor of upholding the warrant." *Id*. at paragraph two of the syllabus.

{¶ 10} Probable cause means less evidence than would justify condemnation, so that only the "probability, and not a prima facie showing, of criminal activity is the standard of probable cause." *Id*. at 329 (internal quotations and emphasis omitted). In determining whether probable cause supports a search warrant, the issuing judge generally is confined to the averments contained in the supporting affidavit. *State v. Yanowitz*, 67 Ohio App.2d 141, 144 (8th Dist.1980).

{¶ 11} Here, a Franklin County Municipal Court judge approved the warrant on September 16, 2009. The affidavit supporting the warrant stated FCICAC received two separate cyber tips indicating that an IP address registered to defendant's household uploaded files of "suspected child pornography" to the internet. According to the affidavit,

the Yahoo account owner who uploaded the suspected child pornography was "Mr. B L using a screen name of 'luvsboys69' for Yahoo and 'blpicmaster' for Flicr.com[.]" In the affidavit, Officer Priest described the images as depicting "young preteen boys who where [sic] in various stages of undress." (State's Exhibit A.) Priest stated that, based on his training and experience, "users of child pornography will maintain a collection of the child pornography on a wide array of digital storage media." (State's Exhibit A.)

{¶ 12} Relying primarily on *United States v. Brunette*, 256 F.3d 14 (1st Cir.2001), defendant contends the affidavit fails to establish probable cause because Officer Priest did not attach the actual images to the affidavit but merely described the images as depicting preteen boys "in various stages of undress." (Appellant's brief, 7.) As a decision of a federal circuit court, *Brunette* is not binding authority on this court, though we examine its reasoning to determine its persuasiveness on the facts presented. *State v. Burnett*, 93 Ohio St.3d 419, 424 (2001).

{¶ 13} In *Brunette*, the court found a search warrant affidavit insufficient to establish probable cause where, although it described the images as depicting a "prepubescent boy lasciviously displaying his genitals," it did not attach to the affidavit the actual images involved. *Id.* at 16-17. According to *Brunette*, identifying an image as lascivious required "inherent subjectivity" that only the issuing magistrate could determine. *Id.* at 18. As a result, the appellate court determined the magistrate in *Brunette* erred in issuing the warrant "without either a look at the allegedly pornographic images, or at least an assessment based on a detailed, factual description of them." *Id*. *Cf. State v. Steele*, 12th Dist. No. CA2003-11-276, 2005-Ohio-943, ¶ 43 (noting that whether a photograph "of a prepubescent boy's genitals are *lasciviously* displayed is certainly open to subjective interpretation, and would reasonably require a magistrate to view the photographs," but whether an image depicts "children engaged in sexual activity * * * is a significantly easier question") (emphasis sic); *United States v. Battershell*, 457 F.3d 1048, 1053 (9th Cir.2006) (concluding "the more demanding standard for establishing probable cause of 'lascivious' images that the First Circuit employed in *Brunette* [did] not apply" where the affidavit supporting the search warrant described the image as depicting a minor engaged in "sexual intercourse," a description which involved "easily

identifiable nouns that are not qualified by amorphous adjectives"); *United States v. Chrobak*, 289 F.3d 1043, 1045 (8th Cir.2002).

{¶ 14} Officer Priest's description of the images as depicting young preteen boys "in various stages of undress" required the issuing judge to employ a certain level of subjectivity. The phrase "various stages of undress" could mean partially clothed individuals who either may or may not be exposing their genitalia. *Cf.* R.C. 2907.01(H) (defining nudity); R.C. 2907.323 (requiring minor to be in a "state of nudity"); R.C. 2907.322 (requiring the material depict a minor "engaging in sexual activity, masturbation, or bestiality"); *Battershell* at 1051 (finding an officer's description of a photograph as " 'a young female (8-10 YOA) naked in a bathtub' * * * insufficient to establish probable cause that the photograph lasciviously exhibited the genitals or pubic area").

{¶ 15} Were Officer Priest's description of the images the sole information in the affidavit concerning the images, probable cause would be questionable. We, however, must consider the totality of the circumstances set forth in the affidavit when ruling on probable cause. *George,* following *Gates*. In addition to Officer Priest's description of the images, the affidavit explained that FCICAC received two separate cyber tips, one directly from NCMEC, advising that an IP address registered to the Eal household uploaded images of "suspected child pornography" to the internet. (State's Exhibit A.)

{¶ 16} NCMEC "assists law enforcement agencies in child-exploitation investigations by cataloguing child-pornography images and sharing with law enforcement officials the victims' identities as learned in prior criminal investigations." *State v. Kraft*, 1st Dist. No. C-060238, 2007-Ohio-2247, ¶ 13. Any company engaged in providing an electronic communication service or a remote computing service to the public, through a facility or means of interstate or foreign commerce, and obtains actual knowledge of facts or circumstances indicating a violation of the federal child pornography statutes must "provide to the CyberTipline of the National Center for Missing and Exploited Children" a report of the facts and circumstances indicating a violation of the child pornography statutes. 18 U.S.C. 2258A(a).

{¶ 17} Here, Yahoo reported both tips and described the images as "suspected child pornography." (State's Exhibit A.). Because Yahoo had a statutory duty to report

such information, the trial court reasonably could rely on it to eliminate some of the subjectivity otherwise evident in the affidavit. *See State v. Woldridge*, 958 So.2d 455, 458-459 (Fla.App.2007) (finding "AOL's compliance with a federal law mandating that it report Woldridge's activities to NCMEC provide[d] a presumption of reliability akin to that afforded a citizen informant"); *People v. Rabes*, 258 P.3d 937, 941 (Colo.App.2010) (determining tip from AOL that indicated defendant uploaded child pornography was reliable where the tip "resulted from a mandatory reporting requirement imposed by a federal statute").

{¶ 18} Moreover, Officer Priest, while not describing the images directly, in effect described the images as pornographic in describing them to the magistrate and in stating his experience indicated "users of child pornography will maintain a collection of the child pornography on a wide array of digital storage media." (State's Exhibit A.) An affidavit describing materials as "child pornography" may provide "sufficient indicia of probable cause to issue a warrant" because "the term 'child pornography' and its illegality" sufficiently convey to the judge what type of evidence is required. *United States v. Simpson*, 152 F.3d 1241, 1247 (10th Cir.1998). "This is so because the words 'child pornography' 'need no expert training or experience to clarify their meaning.' " *Id.*, quoting *United States v. Layne*, 43 F.3d 127, 133 (5th Cir.1995), quoting *United States v. Hurt*, 808 F.2d 707, 708 (9th Cir.1987). *See also United States v. Grant*, 434 F.Supp.2d 735, 746 (D.Neb.2006) (determining "an apparently unbiased computer repairman's claim to have seen 'child pornography' on a computer" was sufficient to establish probable cause).

{¶ 19} Although the affidavit Officer Priest supplied may present a close case on the sufficiency issue, the affidavit, under the totality of the circumstances, provided the issuing magistrate a substantial basis on which to conclude the officers had a fair probability of finding child pornography at defendant's residence. Accordingly, defendant's contention that the search warrant affidavit lacked sufficient information to establish probable cause is not persuasive under these facts.

B. *Staleness*

{¶ 20} The search warrant affidavit alleged defendant uploaded suspected child pornography on March 10, 2009 and April 8, 2009. At the time the judge approved the

search warrant on September 16, six months had passed since the March incident and five months since the April incident. Defendant contends such lapses of time rendered the information in the affidavit stale and insufficient to support issuing a search warrant.

{¶ 21} "An affidavit in support of a search warrant must present timely information and include facts so closely related to the time of issuing the warrant as to justify a finding of probable cause at that time." *State v. Ingold*, 10th Dist. No. 07AP-648, 2008-Ohio-2303, ¶ 22, citing *State v. Hollis*, 98 Ohio App.3d 549, 554 (11th Dist.1994), citing *State v. Jones*, 72 Ohio App.3d 522, 526 (6th Dist.1991). The test for staleness is simply "whether the alleged facts justify the conclusion that contraband is probably on the person or premises to be searched at the time the warrant issues." *Id*., citing *State v. Prater*, 12th Dist. No. CA2001-12-114, 2002-Ohio-4487, ¶ 12, citing *State v. Floyd*, 2d Dist. No. 1389 (Mar. 29, 1996). The factors to consider in determining whether the information in the affidavit is stale include the character of the crime, the criminal, the thing to be seized and in particular whether it is perishable, the place to be searched, and the nature of the incident as either isolated or ongoing criminal activity. *Id*. at ¶ 23, citing *Prater* at ¶ 13.

{¶ 22} "In child pornography cases, these factors are so closely intertwined that consideration of one necessarily involves consideration of the others." *Id*. When the case "involve[s] images stored on a computer," courts "typically employ a staleness analysis sensitive to technology and to the particular criminal activity at issue." *Ingold* at ¶ 24. Both federal and state courts acknowledge, as does *Ingold*, that expert opinion in an affidavit establishing that child pornography collectors tend to retain their collections for long periods of time helps prevent otherwise dated information from becoming stale. *See Ingold* at ¶ 25, 34 (noting affiant "attested that based upon his training and experience, a person who possesses child pornography tends to keep the images he collects indefinitely"); *State v. Van Voorhis*, 3d Dist. No. 8-07-23, 2008-Ohio-3224, ¶ 82, 86; *United States v. Lacy*, 119 F.3d 742, 745-746 (9th Cir.1997) (upholding search warrant based on ten-month old information); *United States v. Lemon*, 590 F.3d 612, 614-615 (8th Cir.2010) (upholding search warrant based on 18-month old information).

{¶ 23} Defendant contends the present case is distinguishable from *Ingold* and the cases cited in it because here "the warrant affidavit contained neither a statement

from an expert explaining that pedophiles tend to retain their child pornography collection, nor any statements by witnesses claiming to have actually seen the alleged child pornography on the [defendant's] computer." (Appellant's brief, 10.) *Ingold*, however, observed that "[c]ourts have also upheld search warrants against staleness challenges even in the absence of an expert opinion in the affidavit" regarding the tendency of child pornography collectors to retain their collections for extended periods of time. *Id*. at ¶ 26, 31, citing *United States v. Newsom*, 402 F.3d 780, 783 (7th Cir.2005) and *United States v. Rowell*, N.D.Texas No. 2:06CR0074(1) (Jan. 16, 2007), citing *United States v. Winningham*, 953 F.Supp. 1068, 1079, fn.19 (D.Minn.1996).

{¶ 24} Ohio courts have determined an issuing magistrate, even with no statement in the affidavit indicating that child pornography collectors tend to hoard their collected images, independently may notice that conduct involving child pornography is of a continuing nature. *See State v. Bates*, 5th Dist. No. 08 CA 15, 2009-Ohio-275, ¶ 52; *State v. Birk*, 5th Dist. No. 2001-CA-63, 2008-Ohio-5571, ¶ 46 and *State v. Rogers*, 12th Dist. No. 2006-033-055, 2007-Ohio-1890, ¶ 45 (both stating the trial court, which noted conduct involving child pornography is of a continuing nature, correctly determined the information set forth in the affidavit was not stale when the warrant was issued).

{¶ 25} Moreover, given Officer Priest's statement in the affidavit that collectors of child pornography typically maintain their collections on a wide array of digital storage media, the issuing judge reasonably could have concluded defendant would continue to possess the images stored on such a device for a long time. *See State v. Marler*, 2d Dist. No. 2007 CA 8, 2009-Ohio-2423, ¶ 41 (noting images of child pornography have a particularly enduring quality as the "images can be stored indefinitely in the hard drive of an individual's computer")*; Newsom* at 783 (observing statements in affidavit, "that computers provide ample storage space for hundreds or thousands of images, [and] that computers make it easier to make and swap images," allowed the trial court to imply "one could hold on to these images for long periods of time because of the immense amount of storage space provided on newer machines").

{¶ 26} In a slightly different tack, defendant further points out that "even though computers are easily movable, the affidavit sworn by Officer Priest does not state whether the computer was still believed to be at [defendant's] house." (Appellant's brief,

8.) (State's Exhibit A.) Because, however, viewing "child pornography is, by its nature, a solitary and secretive crime, * * * [an] issuing judge could reasonably assume that [defendant] would keep his computer-based images of child pornography in a secret safe place, such as his home." *Ingold* at ¶ 36. *See also State v. O'Connor*, 12th Dist. No. CA2001-08-195, 2002-Ohio-4122, ¶ 19 (noting the "obvious connection" between the place to be searched being the defendant's home, and the item to be seized being child pornography, because such a defendant needs "a secure place where he could keep such material *and* have access to it during his leisure time"). (Emphasis sic.)

{¶ 27} Defendant also notes that, "unlike *Ingold*, the officers did not obtain separate search warrants for the residence and for the computers." (Appellant's brief, 10.) The search warrant, however, by its terms authorized police to search defendant's residence for evidence of various sex crimes, "stored by means of a computerized information system," including computer programs, files, and data contained therein, and "to seize the above described materials for further examination by a qualified computer expert." (State's Exhibit A.) Accordingly, the single warrant authorized the officers to search the computer files and defendant's home.

{¶ 28} In the end, the *Prater* factors indicate the information in the affidavit did not become stale in the time periods after the incidents, as the crime of uploading child pornography involved images of a particularly enduring quality stored both in defendant's computer's hard drive and on the internet. Indeed, the facts here reveal two separate incidents, separated by one month, and thus suggest ongoing criminal activity, not a single isolated incident, that often is conducted in the home. Defendant's challenge to the search warrant on staleness grounds lacks merit.

C. *Daytime search*

{¶ 29} Defendant next contends the police conducted an unauthorized nighttime search of his residence. A "warrant shall be served in the daytime, unless the issuing court, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime." Crim.R. 41(C)(2); R.C. 2933.24(A). The search warrant in the present case authorized the officers "to enter" defendant's household "in the daytime." (State's Exhibit A.)

{¶ 30} Officer Priest testified the officers executed the warrant at 7:50 p.m. After executing the warrant, the officers continued to search the residence and stayed in the residence until they interviewed defendant at 9:30 p.m. Having presented the trial court with a computer printout of an internet almanac indicating the sun set at 7:39 p.m. in Columbus, Ohio on September 16, 2009, defendant contends the officers executed the warrant during nighttime.

{¶ 31} Crim.R. 41(F) defines "daytime" to mean "the hours from 7:00 a.m. to 8:00 p.m." Defendant does not cite any authority, nor have we found any, to support his contention that courts should rely on the varying times of sunset rather than the clear mandates of Crim.R. 41 in determining when daytime ends. *Cf. United States v. Keene*, 915 F.2d 1164, 1168 (8th Cir.1990) (overruling defendant's assertion that police, who executed warrant at 8:20 p.m. after the sun set, executed warrant during "nighttime," when Fed.R.Crim.Pro. 41 defined "daytime" to be the hours between 6:00 a.m. and 10:00 p.m.). The police properly executed the warrant during the daytime by doing so before 8:00 p.m.

{¶ 32} Moreover, Crim.R. 41 is satisfied "when the execution of the warrant limited to a daytime search is begun during the daylight hours, even though the police presence may thereafter continue into or through the night for the purpose of completing the search already begun." *State v. Susser*, 2d Dist. No. CA 11787 (Dec. 5, 1990), abrogated on other grounds, *State v. Teamer*, 82 Ohio St.3d 490, 491-492 (1998), citing *State v. Valenzuela*, 130 N.H. 175, 536 A.2d 1252 (1987). The officer's search of defendant's residence continuing into the nighttime is irrelevant since their initial entry into the house and execution of the warrant occurred during the daytime.

{¶ 33} Defendant's second assignment of error is overruled.

IV. Third Assignment of Error – Suppression of Statements

{¶ 34} Defendant's third assignment of error asserts the trial court erred in failing to suppress the statements defendant made to police on the night police executed the search warrant.

{¶ 35} The Fifth Amendment to the United States Constitution provides that an individual shall not "be compelled in any criminal case to be a witness against himself." The United States Supreme Court applied the protection of the Fifth Amendment right

against self incrimination to police interrogations of individuals in custody. *See Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602 (1966). As neither party to the present case contends defendant's statements arose out of a custodial interrogation, *Miranda* is not implicated. *See State v. Walker*, 10th Dist. No. 04AP-1107, 2005-Ohio-3540, ¶ 23.

{¶ 36} Defendant, however, asserts the "trial court failed to make a separate inquiry into the voluntariness of the [defendant's] statements." (Appellant's brief, 12.) The voluntariness of a confession presents "an issue analytically separate from those issues surrounding custodial interrogations and *Miranda* warnings." *Walker* at ¶ 24, citing *State v. Kelly*, 2d Dist. No. 2004-CA-20, 2005-Ohio-305. "Using an involuntary statement against a defendant in a criminal trial is a denial of due process of law." *State v. Carse*, 10th Dist. No. 09AP-932, 2010-Ohio-4513, ¶ 23, citing *Mincey v. Arizona*, 437 U.S. 385, 398, 98 S.Ct. 2408 (1978). " 'The voluntariness of a defendant's statement is determined from the totality of the circumstances.' " *Id.*, quoting *State v. Douglas*, 10th Dist. No. 09AP-111, 2009-Ohio-6659, ¶ 26, citing *State v. Frazier*, 115 Ohio St.3d 139, 2007-Ohio-5048, ¶ 112. The court should consider the age, mentality, and prior criminal experience of the accused, the length, intensity, and frequency of interrogation, the existence of physical deprivation or mistreatment, and the existence of threats or inducements in determining the voluntariness of a defendant's statements. *Id.*, quoting *Frazier*, quoting *State v. Mason*, 82 Ohio St.3d 144, 154 (1998), quoting *State v. Edwards*, 49 Ohio St.2d 31 (1976), paragraph two of the syllabus.

{¶ 37} "[C]oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." *Colorado v. Connelly*, 479 U.S. 157, 167, 107 S.Ct. 515 (1986). "Absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law." *Id.* at 164. "Evidence of use by the interrogators of an inherently coercive tactic (e.g., physical abuse, threats, deprivation of food, medical treatment, or sleep) will trigger the totality of the circumstances analysis." *State v. Clark*, 38 Ohio St.3d 252, 261 (1988).

{¶ 38} Two police officers here interviewed defendant in the finished basement of his house at approximately 9:30 p.m. on September 16, 2009. Defendant had just

returned home from work and had his dinner with him, "[s]o throughout the process of the interview [defendant] did consume part of his dinner." (Suppression Hearing Tr. 25.) The police read defendant his *Miranda* rights prior to interviewing him, and defendant signed a constitutional rights waiver form. The interview lasted about one hour, defendant was not in handcuffs, and, according to the evidence, the officers did not threaten defendant in any way during the interview.

{¶ 39} Defendant nonetheless asserts the officers' style of questioning was inherently coercive because the officers were aware of defendant's mental condition, carried firearms, and isolated defendant away from his parents during the interview. Defendant states he suffers from Asperger's syndrome, a disease "on the autism spectrum of disorders, seen as idiosyncratic, unusual interpersonally." (Sentencing Hearing Tr. 28.) Although defendant was 19 years old at the time of the interview, defendant asserts that, as a result of his Asperger's syndrome, he "was interacting and understanding the world like a 14, 15, 16-year-old." (Sentencing Hearing Tr. 30.)

{¶ 40} The record includes no evidence to support defendant's contention that the officers were aware of his Asperger's syndrome at the time of the interview. Officer Priest stated that, prior to the interview, he knew defendant was 19 years old and had no prior experience with the criminal justice system. When asked if he discussed defendant's Asperger's syndrome with defendant's parents prior to the interview, Officer Priest stated he did not "specifically recall that" conversation, noting "[i]t could be possible, but [he didn't] recall it." (Suppression Hearing Tr. 40.)

{¶ 41} Even assuming the officers were aware of defendant's Asperger's syndrome at the time of the interview, "[m]ere knowledge of [a defendant's] mental condition, standing alone, does not suggest that the law enforcement officials resorted to psychological pressure or tactics to induce [defendant] to make incriminating statements." *State v. Knotts*, 111 Ohio App.3d 753, 758 (3d Dist.1995); *State v. Dailey*, 53 Ohio St.3d 88, 92 (1990) (determining defendant's confession was voluntary where no evidence indicated police coercion, and defendant's "age [of 18 years] and low I.Q., standing alone, [did] not negate the voluntariness of his statement"). Moreover, although defendant's treating psychologist testified at the sentencing hearing regarding the effects of Asperger's syndrome, defendant did not present similar evidence at the

suppression hearing. *See State v. Monford*, 190 Ohio App.3d 35, 2010-Ohio-4732, ¶ 45 (10th Dist.) (noting an appellate court reviewing a trial court's ruling on a motion to suppress may consider only evidence presented during the suppression hearing).

{¶ 42} Defendant further asserts the officers isolated him from his parents "despite the officers' knowledge of his mental condition." (Appellant's brief, 14.) Apart from questions about the officers' knowledge of defendant's condition, defendant does not explain how his parents' absence rendered the officers' conduct coercive. *See In re Watson*, 47 Ohio St.3d 86, 88-90 (1989) (concluding that because a juvenile defendant is not required to have a parent or guardian present in order to voluntarily waive *Miranda* rights, courts should consider the totality of the circumstances to determine whether juvenile's confession was voluntary). Additionally, although defendant notes the officers' carried firearms during the interview, he does not allege the officers brandished their weapons or otherwise used their firearms to threaten or coerce him.

{¶ 43} Defendant asserts that even if police did not brandish guns, they used tactics to induce defendant to speak to them. Defendant notes Officer Priest told defendant during the interview that "if he was untrue to" the detectives, they would have to "continue [their] investigation into every member of the household until [they] determined who was the primary responsible party for the child pornography." (Suppression Hearing Tr. 42.) Defendant fails to explain how the statement amounts to coercive conduct. The statement was not improper or deceitful, as the two cyber tips traced the suspected child pornography to an IP address registered to defendant's household where other family members resided. *Cf. State v. Perez*, 124 Ohio St.3d 122, 2009-Ohio-6179, ¶ 72 (stating that if "police had probable cause to arrest the person in question, a threat to do so is not coercive and thus does not render a confession involuntary") (internal citations omitted). Similarly, " '[a]ssurances that a defendant's cooperation will be considered or that a confession will be helpful do not invalidate a confession.' " *Carse* at ¶ 25, quoting *Douglas* at ¶ 28, citing *State v. Copley*, 10th Dist. No. 04AP-1128, 2006-Ohio-2737, ¶ 32.

{¶ 44} Defendant points out that Officer Priest also told defendant he had "very high expectations" for defendant "to be trustworthy, [and] honest," because defendant was an Eagle Scout, "the highest rank attained in the Boy Scout progressive system." (Tr.

41.) Although defendant contends Officer Priest's reference to his rank of Eagle Scout amounted to undue pressure, "admonitions to tell the truth directed at a suspect by police officers are not coercive in nature." *State v. Wiles*, 59 Ohio St.3d 71, 81 (1991), citing *State v. Cooey*, 46 Ohio St.3d 20, 28 (1989) (finding defendant's allegation that the police "badgered * * * [him] for 'the truth' " did not amount to coercive police conduct).

{¶ 45} The totality of the circumstances does not support defendant's contention that his confession was involuntary. The interview occurred at defendant's home, it lasted about one hour, defendant was not handcuffed or otherwise in custody, and defendant ate part of his dinner during the interview. No evidence in the record reflects physical deprivation, mistreatment, threats, or inducements that would indicate coercive police conduct. *See State v. Hughbanks*, 99 Ohio St.3d 365, 2003-Ohio-4121, ¶ 63 (finding no evidence of police coercion or overreaching where the police did not subject defendant to "threats or physical abuse or deprive[] him of food, sleep, or medical treatment" and the "police interview * * * lasted only several hours"); *Walker* at ¶ 28 (finding no evidence of police coercion in 30-minute interview at defendant's home where defendant was free to leave, "and not deprived of anything necessary to satisfy his physical needs").

{¶ 46} Defendant's third assignment of error is overruled.

V. Fourth Assignment of Error – Constitutionality of R.C. 2907.322

{¶ 47} Defendant's fourth assignment of error contends R.C. 2907.322 is unconstitutionally overbroad, is vague, and violates the Commerce Clause.

A. *Overbroad*

{¶ 48} According to the First Amendment's "overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech." *United States v. Williams*, 553 U.S. 285, 292, 128 S.Ct. 1830 (2008); *Virginia v. Hicks*, 539 U.S. 113, 119, 123 S.Ct. 2191 (2003) (so concluding because a threat to enforce an overbroad law may deter or chill constitutionally protected speech, especially if the statute imposes criminal sanctions). Because statutes "have a strong presumption of constitutionality," a court may not declare a statute unconstitutional unless " 'beyond a reasonable doubt * * * the legislation and constitutional provisions are clearly incompatible.' " *Arbino v. Johnson &*

Johnson, 116 Ohio St.3d 468, 2007-Ohio-6948, ¶ 25, quoting *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142 (1955), paragraph one of the syllabus.

{¶ 49} R.C. 2907.322 forbids any person, "with knowledge of the character of the material or performance involved," to "[c]reate, record, photograph, film, develop, reproduce, * * * publish, * * * [a]dvertise for sale or dissemination, sell, distribute, transport, disseminate, exhibit, * * * display, * * * solicit, receive, purchase, exchange, possess, or control" material that shows a minor participating or engaging "in sexual activity, masturbation, or bestiality." R.C. 2907.322(A)(1), (2) & (5). In a prosecution under R.C. 2907.322, the trier of fact may "infer that a person in the material or performance involved is a minor if the material or performance, through its title, text, visual representation, or otherwise, represents or depicts the person as a minor." R.C. 2907.322(B)(3).

{¶ 50} Defendant contends, because "it is impossible to distinguish what is actual child pornography and virtual child pornography, the permissive inference of R.C. 2907.322(B)(3) renders the statute unconstitutionally overbroad." (Appellant's brief, 16.) The distinction between actual child pornography and virtual child pornography is significant, as pornography depicting real children may be proscribed regardless of whether the images satisfy the test for obscenity set forth in *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607 (1973); *New York v. Ferber*, 458 U.S. 747, 758, 761, 102 S.Ct. 3348 (1982). Virtual child pornography, however, does not use any real children in its creation or production and is a form of protected speech under the First Amendment. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 250, 122 S.Ct. 1389 (2002). *See State v. Brady*, 119 Ohio St.3d 375, 2008-Ohio-4493, ¶ 32.

{¶ 51} "The permissive inference of R.C. 2907.322(B)(3) does not render R.C. 2907.322(A)(5) unconstitutionally overbroad by equating virtual child pornography, which is protected expression under the First Amendment, with pornography that involves real children, which is not protected." *State v. Tooley*, 114 Ohio St.3d 366, 2007-Ohio-3698, paragraph one of the syllabus, following *Ashcroft*. Rather, R.C. 2907.322(B)(3) "simply allows what the common law has always permitted; that is, it allows the state to prove its case with circumstantial evidence." *Id*. at ¶ 33, citing *State v. Jenks*, 61 Ohio St.3d 259 (1991). The state still has the burden to "prove all elements

beyond a reasonable doubt, including that a real child is depicted, to support a conviction for possession of child pornography under * * * R.C. 2907.322." *Id*. at ¶ 35.

{¶ 52} Defendant attempts to distinguish *Tooley* by noting that, although the expert in *Tooley* did not actually view the images in question there, defendant here presented testimony of one who, based on actually viewing the images at issue, stated distinguishing between virtual and actual child pornography is virtually impossible. In *Tooley*, the defendant's expert witness testified "repeatedly * * * that it is impossible to determine by looking at a digital image whether it has been altered or entirely computer generated." *Id*. at ¶ 23. As the expert in *Tooley* explained, "he could alter downloaded digital images of adults so that they appeared to depict minors and could combine images of actresses under the age of 18 with images of topless or nude adult females so that the actresses appeared to be nude." *Id*. *Tooley* concluded the expert's testimony did not render R.C. 2907.322 unconstitutional pursuant to *Ashcroft*. *Id*. at ¶ 24.

{¶ 53} Defendant's expert's testimony at the motion hearing nearly tracked the testimony of the expert in *Tooley*. Defendant's expert, Dean Boland, testified that by using computer software people can "make undetectable alterations to digital images." (Suppression Hearing Tr. 70.) He explained the ability to "manipulate digital images" means anything in the image could be "both completely digitally painted like an image that someone came up with out of their head," or it could be "a composite of actual humans whose images have been * * * put together in that configuration." (Suppression Hearing Tr. 73.) According to Boland, an individual could not look at an image and determine whether it depicted a real child or "a composite where it [was] a real child's face but it [sic] somebody else's body." (Suppression Hearing Tr. 74.) Boland viewed the images at issue in the case and, based on his training and experience, stated that neither he, nor any other expert, could "examine a digital image and reliably determine whether or not it is authentic." (Suppression Hearing Tr. 76.)

{¶ 54} Boland's testimony may be relevant to the extent it discussed how an individual could manipulate an image of an adult to appear like a minor, but to the extent Boland's testimony "establishe[d] that images of real children may be altered or 'morphed' without detection," the image "is not the type of protected material that is discussed in *Ashcroft*." *Tooley* at ¶ 25, 27. Furthermore, although Boland noted that

someone could digitally paint an image, he "did not testify as to whether pornographic images or videos that simply *appear* to depict actual children are widely available." (Emphasis sic.) *Tooley* at ¶ 25. *See Ashcroft*, 535 U.S. at 254 (observing that "[i]f virtual images were identical to illegal child pornography, the illegal images would be driven from the market by the indistinguishable substitutes" and pornographers would not "risk persecution by abusing real children if fictional, computerized images would suffice"). *Tooley* further held that, despite advances in technology, "juries are still capable of distinguishing between real and virtual images." *Id.* at ¶ 52 (citations omitted).

{¶ 55} Although defendant may have established that the creation of virtual child pornography is possible, he failed to establish that virtual child pornography "is so prevalent that there is an unacceptable risk that a person will be convicted for possessing pornography not involving minors." *Tooley* at ¶ 45. As such, defendant failed to establish that R.C. 2907.322 chills a substantial amount of protected speech.

B. *Vagueness*

{¶ 56} The "[v]agueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause of the Fifth Amendment." *Williams*, 553 U.S. at 304. "Due process demands that the law give sufficient warning of what conduct is proscribed so that people may conduct themselves so as to avoid that which is forbidden." *Columbus v. Bahgat*, 10th Dist. No. 10AP-943, 2011-Ohio-3315, ¶ 20, citing *Rose v. Locke*, 423 U.S. 48, 50, 96 S.Ct. 243 (1975). When a statute is challenged under the void-for-vagueness doctrine, "the court must determine whether the enactment (1) provides sufficient notice of its proscriptions to facilitate compliance by persons of ordinary intelligence and (2) is specific enough to prevent official arbitrariness or discrimination in its enforcement." *Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, ¶ 84, citing *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855 (1983).

{¶ 57} Defendant asserts "that an individual of common intelligence would not be able to determine what conduct is prohibited under" R.C. 2907.322 because that statute "on its face, does not provide any descriptions of the conduct that is prohibited." (Appellant's brief, 17.) Citing *Ashcroft*, defendant reasons that "[b]ecause virtual child pornography is indistinguishable from actual child pornography, a person of common

intelligence would not know if he or she is in actual violation of the statute." (Appellant's brief, 17.)

{¶ 58} R.C. 2907.322 makes clear that "its prohibitions apply to pornography depicting an actual minor." *State v. Huffman*, 165 Ohio App.3d 518, 2006-Ohio-1106, ¶ 31 (1st Dist.). It "leaves no discretion for the application and enforcement of the statute, describing with sufficient particularity what a person must do to commit a violation." *Id*. *Huffman* rejected the argument that "advances in computer technology" making "it impossible for a person to distinguish between images created with actual minors and those that are not" rendered R.C. 2907.322 vague. *Id*. at ¶ 32. The court determined the scienter requirement in R.C. 2907.322, requiring a defendant to have "knowledge of the character of the material or performance involved," eliminated any potential vagueness claim. *Id*. at ¶ 33. *See also State v. Kraft*, 1st Dist. No. C-060238, 2007-Ohio-2247, ¶ 44-45, quoting *Mishkin v. New York*, 383 U.S. 502, 512, 86 S.Ct. 958 (1966) (concluding the scienter requirement in R.C. 2907.322 "requires evidence that the offender knew that the image involved a real minor," thus demonstrating that "the focus of the statute is on the 'calculated purvey[or]' of child pornography").

{¶ 59} "[T]he mere fact that close cases can be envisioned" does not render "a statute vague." *Williams*, 553 U.S. at 305. In a "close case" the "problem * * * is addressed, not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt." *Id*. at 306. "What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is." *Id*. Here the statute presents no indeterminacy regarding what R.C. 2907.322 prohibits: it prohibits possessing or distributing pornography which one knows to depict an actual minor.

{¶ 60} Defendant's contention that R.C. 2907.322 is unconstitutionally vague lacks merit.

C. *Dormant Commerce Clause*

{¶ 61} The Commerce Clause provides that "Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States." U.S. Constitution, Article I, Section 8, cl. 3. "Though phrased as a grant of regulatory power to Congress, the Clause has long been understood to have a 'negative' aspect that denies the

States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Sys., Inc. v. Dept. of Environmental Quality of State of Oregon*, 511 U.S. 93, 98, 114 S.Ct. 1345 (1994); *Emerson Elec. Co. & Subsidiaries v. Tracy*, 90 Ohio St.3d 157, 159 (2000) (noting the dormant aspect of the Commerce Clause serves the related purpose of preventing states from promulgating protectionist policies and restraining the states from excessive interference in foreign affairs).

{¶ 62} The first step in analyzing a law challenged under the dormant Commerce Clause "is to determine whether it 'regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce.' " *Oregon Waste Sys., Inc.*, 511 U.S. at 99, quoting *Hughes v. Oklahoma*, 441 U.S. 322, 336, 99 S.Ct. 1727 (1979). A law discriminates against interstate commerce when it treats in-state and out-of-state economic interests differently, benefitting the former and burdening the latter. *Id.* A discriminatory restriction on commerce "is virtually *per se* invalid." *Id*.

{¶ 63} Where a statute "regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844 (1970), citing *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 443, 80 S.Ct. 813 (1960). If a legitimate local purpose exists, "then the question becomes one of degree" so that the extent of the burden to be "tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Id.*

{¶ 64} To the extent R.C. 2907.322 regulates commerce, it does so even-handedly and treats child pornography the same, whether it originates in-state or out-of-state. Moreover, R.C. 2907.322 has a legitimate local benefit in prosecuting individuals who possess, distribute, publish or create child pornography. "It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.' " *Ferber*, 458 U.S. at 756-757, quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982) (noting that the "use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child"). The court in *Ferber* concluded that "the distribution network for

child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled." *Id*. at 759. In the end, the impact R.C. 2907.322 has on interstate commerce is minimal or non-existent. R.C. 2907.322 prohibits only the sale or transmission of actual child pornography, which is illegal under federal law and in all 50 states. *Tooley* at ¶ 11, fn.9; 18 U.S.C. 2252, 2252A.

{¶ 65} Relying on *Cyberspace, Communications, Inc. v. Engler,* 55 F.Supp.2d 737 (E.D.Mich.1999), defendant contends a "majority of images that would fall under the purview of R.C. 2907.322 would be obtained over the internet, and as such, Ohio's regulation of these images violates the Commerce Clause." (Appellant's brief, 19.) In *Cyberspace,* the Sixth Circuit upheld an injunction against a Michigan law declaring it "unlawful to communicate, transmit, display, or otherwise make available by means of the Internet or a computer, computer program, computer system, or computer network this sexually explicit matter" to a minor. *Id*. at 740.

{¶ 66} *Cyberspace* concluded the law, "as a direct regulation of interstate commerce, [was] a *per se* violation of the Commerce Clause." *Id*. at 751. The court also recognized that, due to the significance of the Internet as an international network of computers, it would be "virtually impossible to prevent the content of messages from being read by someone under 18." *Id*. at 748. *Cyberspace* noted that prohibiting sexually explicit material which was harmful to a minor was broad enough to encompass a chat room discussion about contraceptives and abstention, where words utilized in the discussion "could be construed as 'sexually explicit' and 'harmful to a minor.' " *Id*. at 749.

{¶ 67} In contrast, R.C. 2907.322 regulates only the conduct of individuals who seek to create, possess, or distribute actual child pornography, material the First Amendment does not protect. *Ashcroft*. *Cf. State v. Cunningham*, 156 Ohio App.3d 714, 2004-Ohio-1935, ¶ 46 (2d Dist.), quoting *People v. Foley*, 94 N.Y.2d 668, 684 (2000) (concluding the court was " 'hard pressed to ascertain any legitimate commerce that is derived from the intentional transmission of sexually graphic images to minors for the purpose of luring them into sexual activity' "). R.C. 2907.322 prohibits individuals from publishing or disseminating child pornography, regardless of the medium or who ultimately views the images, and does not violate the dormant Commerce Clause.

{¶ 68} Accordingly, defendant's fourth assignment of error is overruled.

VI. Fifth Assignment of Error – Expert Assistance

{¶ 69} Defendant's fifth assignment of error asserts the trial court erred in denying his motion to dismiss the indictment. Defendant's motion pointed to *Brady*, where the Supreme Court of Ohio concluded that, because a prosecution under R.C. 2907.322 requires the state "to prove beyond a reasonable doubt that the images depict real children, * * * a defendant in this type of case may seek expert assistance in his defense." *Id.* at ¶ 34, citing *Tooley* at ¶ 35. Defendant asserted that, despite needing such an expert, he was unable to obtain one because, even though R.C. 2907.322(B)(1) contains a "proper persons" exception that permits a person having a proper interest in the material to possess or display images of child pornography for a judicial, governmental, or other proper purpose, the federal child pornography statutes, 18 U.S.C. 2251, et seq., do not contain a similar provision. Defendant's motion contended that, for fear of prosecution under federal law, defendant's expert could not perform the tasks necessary to present an effective defense.

{¶ 70} *Brady* addressed and found unpersuasive the argument that the "threat of federal prosecution for the performance of tasks necessary to [Brady's] defense, * * * made it impossible for him to obtain a fair trial." *Id.* at ¶ 35. Despite Brady's assertion that his expert could not "even *view* the evidence against him without the risk of federal prosecution," the court found 18 U.S.C. 3509(m) "contain[ed] a provision that permits an expert to view and analyze the government's evidence." (Emphasis sic.) *Id.* at ¶ 41; *see* 18 U.S.C. 3509(m). *Brady* further pointed out that the restrictions in 18 U.S.C. 3509(m) were consistent with Crim.R. 16(E), which permits courts to "place restrictions upon access to evidence, particularly when that evidence consists of alleged contraband, e.g., controlled substances or counterfeit money." *Id.* at ¶ 46. Just as in *Brady*, defendant's expert here could view the images at the prosecutor's office. *Id.* at ¶ 47.

{¶ 71} To the extent defendant contends his expert must be able to create exhibits of images appearing to depict child pornography, *Brady* rejected the argument, concluding a defendant's expert may not violate the law by creating such exhibits. *Id.* at ¶ 48. In so concluding, *Brady* observed such a requirement is "no different from the practice of prohibiting experts in drug cases from manufacturing controlled substances or

prohibiting experts in counterfeiting cases from printing counterfeit money." *Id*., citing 18 U.S.C. 2256(8)(A) & (C). *See also Doe v. Boland*, 630 F.3d 491, 496 (6th Cir.2011) (noting no constitutional provision "allows a criminal defendant to defend *one* criminal charge by urging his lawyer or witness to commit *another*") (Emphasis sic). An expert instead must use alternatives. See *Boland* at 496; *Ashcroft*, 535 U.S. at 249-250.

{¶ 72} Defendant also asserts he must be able to research the origins of the images in order to discover potentially exculpatory evidence, an issue *Brady* did not expressly address. *Id*. at ¶ 6. *Brady* nonetheless suggests that, to the extent researching the origins of the images would require defendant's expert to violate 18 U.S.C. 2252 or 2252A, the conduct would be unacceptable unless the "inspection" or "examination" pursuant to 18 U.S.C. 3509(m) entailed researching the origins of the images at a government facility. *See United States v. McNealy*, 625 F.3d 858, 868 (5th Cir.2010) (determining the defendant, pursuant to 18 U.S.C. 3509(m), "had full access to the Government's exhibits and could have completed all the tasks he now enumerates").

{¶ 73} In the end, "[t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038 (1973). Because 18 U.S.C. 3509(m) provides defendant with a fair opportunity to defend against the state's accusations without fear of federal prosecution, and allows defendant's expert to inspect, view, and examine the images at issue, the trial court did not err in denying defendant's motion to dismiss the indictment.

{¶ 74} Defendant's fifth assignment of error is overruled.

VII. Tenth Assignment of Error – Deficient Indictment

{¶ 75} Defendant's tenth assignment of error asserts the trial court erred in denying his motion to dismiss the indictment for lack of insufficient particularity. Defendant's motion alleged the indictment, in failing to delineate what images supported each count, failed to provide defendant with adequate notice of the charges against him and failed to protect him against double jeopardy.

{¶ 76} Counts one through ten of the indictment alleged defendant on or about April 8, 2009 violated R.C. 2907.322(A)(1), R.C. 2907.322(A)(2), or both; counts eleven through twenty alleged defendant violated R.C. 2907.322(A)(5) on or about

September 16, 2009. All counts tracked verbatim the language of the statute. The state filed a bill of particulars on March 24, 2010, adding only the time and the location the incidents were alleged to have occurred: 9:30 a.m. at defendant's residence on all counts.

{¶ 77} An indictment sufficiently complies with due process if it (1) contains the elements of the charged offense, (2) gives the defendant adequate notice of the charges, and (3) protects the defendant against double jeopardy. *Valentine v. Konteh*, 395 F.3d 626, 631 (6th Cir.2005), citing *Russell v. United States*, 369 U.S. 749, 763-764, 82 S.Ct. 1038 (1962). Defendant contends the indictment fails to meet *Valentine's* second and third prongs.

{¶ 78} In *Valentine*, the indictment charged the defendant with 20 "carbon-copy" counts of child rape and 20 "carbon-copy" counts of felonious sexual penetration. *Id.* at 628. The state did not attempt to "distinguish the factual bases of these charges in the indictment, in the bill of particulars, or even at trial." *Id*. at 628, 629 (involving an eight-year-old victim who was able to testify at trial to "about twenty" occasions of forced fellatio and "about fifteen" occasions of vaginal penetration). *Valentine* concluded "the multiple, undifferentiated charges in the indictment violated Valentine's rights to notice and his right to be protected from double jeopardy," and since "the forty criminal counts were not anchored to forty distinguishable criminal offenses, Valentine had little ability to defend himself." *Id*. at 631, 633.

{¶ 79} Unlike *Valentine*, ten "separate and distinct" images and videos supported the charges in defendant's indictment. (Suppression Hearing Tr. 21-24.) The state during discovery notified defendant which images supported each charge. Before the motion hearing, defendant's attorney met with the prosecution "in [its] office and [the prosecution] specifically went over which images went for which indictment and gave [defense counsel] copies, edited copies, containing the file names, which images were for each count of the indictment." (Suppression Hearing Tr. 99.) Defense counsel acknowledged he met with the prosecution and viewed the images. The prosecution noted that, if the case went to trial "a jury [was] going to hear specifically which counts deal with which images." (Suppression Hearing Tr. 101.)

{¶ 80} *Valentine* suggests such procedure is adequate, quoting favorably from *Parks v. Hargett*, 188 F.3d 519 (10th Cir.1999) (unpublished disposition) where, although the indictment lacked sufficient particularity, the court determined the defendant suffered no prejudice because "[a]t a pre-trial hearing, the defendant 'received actual notice of the name and identity of the six-year old child and the fact that he was charged with three separate incidents of molestation' " at three different locations. *Valentine* at 633, quoting *Parks*. "With this specific information, * * * the defendant had 'actual notice of sufficiently specific facts to respond to the charges and prepare an adequate defense.' " *Id.*, quoting *Parks*. *Cf. State v. Barrett*, 8th Dist. No. 89918, 2008-Ohio-2370, ¶ 2, 21 (concluding trial court acted prematurely in granting defendant's pretrial motion to dismiss the indictment containing "carbon copy" counts of rape, gross sexual imposition, and kidnapping because the "court should have afforded the state the opportunity to delineate the factual bases for the separate incidents, either through discovery or at trial, prior to dismissing the charges"); *State v. Crosky*, 10th Dist. No. 06AP-655, 2008-Ohio-145, ¶ 92-93; *State v. Yaacov*, 8th Dist. No. 86674, 2006-Ohio-5321, ¶ 21. Here defendant received actual notice prior to the motion hearing of the specific images that supported each count in the indictment.

{¶ 81} Regarding the double jeopardy issue, *Valentine* recognized two problems with the indictment in that case: (1) "there was insufficient specificity in the indictment or in the trial record to enable Valentine to plead convictions or acquittals as a bar to future prosecutions," and (2) "the undifferentiated counts introduced the very real possibility that Valentine would be subject to double jeopardy in his initial trial by being punished multiple times for what may have been the same offense." *Id.* at 634-635.

{¶ 82} Defendant cannot claim either double jeopardy issue here. The record demonstrates defendant's convictions corresponded to ten separate and distinct images, allowing defendant to plead his convictions on those ten images as a bar to future prosecutions. Because separate and distinct images "anchored" the multiple counts in the indictment, the state would be unable to punish defendant multiple times for the same offense. Moreover, the judgment entry imposing sentence contains a provision stating "the State will not indict on any other charges relating to this case and/or anything relating to the search of Defendant's home in September, 2009." (R. 108, 110, 112, 113.)

{¶ 83} Accordingly, defendant's tenth assignment of error is overruled.

VIII. First Assignment of Error – Crim.R. 12(F) Findings of Fact

{¶ 84} Defendant's first assignment of error asserts the trial court erred in failing to comply with his request for findings of fact and conclusions of law pursuant to defendant's Crim.R. 12(F) motion.

{¶ 85} Defendant filed his Crim.R. 12(F) motion on March 17, 2011 following the court's March 16 ruling on his various pretrial motions, some of which defendant contended implicated the portion of Crim.R. 12(F) requiring the trial court to "state its essential findings on the record" where "factual issues are involved in determining a motion." Crim.R. 12(F); *Bedford v. McLeod*, 8th Dist. No. 94649, 2011-Ohio-3380, ¶ 17 (concluding "Crim.R. 12(F) does require, however, that there be factual issues in dispute before a trial court is required to make findings of fact"); *State v. Groce*, 10th Dist. No. 06AP-1094, 2007-Ohio-2874, ¶ 13. The trial court did not issue the requested findings and conclusions before defendant pled no contest on March 23, 2011 or in its final judgment entry of May 27, 2011.

{¶ 86} Although the trial court should have ruled on defendant's motion, defendant must demonstrate prejudice from the trial court's failure to state its "essential factual findings" on the record. *State v. Brewer*, 48 Ohio St.3d 50, 60 (1990). Such prejudice is lacking if an appellate court can fully review the issues pertaining to the pretrial motions. *Id.*; *State v. Brown*, 2d Dist. No. 24297, 2012-Ohio-195, ¶ 10, citing *State v. Benner*, 40 Ohio St.3d 301, 317-318 (1988) (noting that "[w]hile it is error for the trial court to fail in providing requested findings of fact, [it] is not prejudicial where the record provides an appellate court with a sufficient basis to review the assignments of error"); *State v. McDonald*, 6th Dist. No. L-08-1181, 2010-Ohio-183, ¶ 20 (determining that, "[a]lthough the trial court erred by not issuing findings and reasons" pursuant to the defendant's Crim.R. 12(F) motion, the defendant failed to demonstrate prejudice because "the written briefs and the suppression hearing transcript contained in the record * * * allowed th[e] court to fully review the suppression issues").

{¶ 87} Here, defendant cannot demonstrate prejudice from the court's failure to rule on his motion. The transcript from the motion hearing and the written briefs of

counsel permitted this court to review fully the issues regarding defendant's pretrial motions.

{¶ 88} Accordingly, defendant's first assignment of error is overruled.

IX. Sixth Assignment of Error - Merger

{¶ 89} Defendant's sixth assignment of error asserts the trial court erred in denying his motion to merge all twenty counts in the indictment into one for purposes of sentencing. At the sentencing hearing the trial court acknowledged that the charges in the indictment pertained to defendant's acts of downloading "ten separate and distinct images and/or videos." (Sentencing Hearing Tr. 24-25.) The court merged counts eleven through twenty, the fourth degree felonies, with counts one through ten, the second degree felonies, and sentenced defendant only on the first ten counts in the indictment.

{¶ 90} R.C. 2941.25 provides that where a defendant's same conduct "can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one." R.C. 2941.25(A). Where, however, "the defendant's conduct constitutes two or more offenses of dissimilar import" or "results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them." R.C. 2941.25(B).

{¶ 91} When determining whether two offenses "are allied offenses of similar import subject to merger under R.C. 2941.25, the conduct of the accused must be considered." *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, syllabus, overruling *State v. Rance,* 85 Ohio St.3d 632 (1999). The court "need not perform any hypothetical or abstract comparison of the offenses at issue"; rather, the court must ask whether the defendant committed the offenses with the same conduct: " 'a single act, committed with a single state of mind.' " *Id.* at ¶ 47, 49, quoting *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, ¶ 50 (Lanzinger, J., dissenting). If the offenses are of similar import because the defendant committed them through the same conduct, the court then must ask whether the offenses were committed separately or with a separate animus. *Id.* at ¶ 49-51.

{¶ 92} Defendant contends he committed counts one through ten by the same conduct because the charges were "alleged to have occurred on the same day, at the same time and in the same place." (Appellant's brief, 26.) Defendant points to the bill of particulars, filed pursuant to defendant's request, that indicates the actions resulting in the first ten counts occurred "at approximately 9:30 am, on or about the 8th day of April," 2009, at defendant's home. (R. 17.) Defendant, through counsel, nonetheless acknowledged the first ten charges in the indictment pertained to "seven video short clips and three images, for a total of ten" separate images. (Sentencing Hearing Tr. 21.)

{¶ 93} Although defendant may have uploaded the ten images at around the same time, each file he uploaded constitutes a new and distinct crime. "[T]he mere fact that the crimes occurred in quick succession * * * does not mean that they were not committed separately or with separate animus." *State v. Blanchard*, 8th Dist. No. 90935, 2009-Ohio-1357, ¶ 12, reversed on other grounds, *State v. Williams*, 129 Ohio St.3d 344, 2011-Ohio-3374. *See State v. Cooper*, 8th Dist. No. 93308, 2010-Ohio-1983, ¶ 34, quoting *State v. Hendricks*, 8th Dist. No. 92213, 2009-Ohio-5556, ¶ 35 (finding "multiple convictions are allowed for each individual image because a separate animus exists every time a separate image or file is downloaded and saved"); *State v. Collier*, 8th Dist. No. 95572, 2011-Ohio-2791, ¶ 12 (concluding the four different digital images found on the defendant's cell phone "resulted in four separate violations of R.C. 2907.322(A)(5), so the counts do not merge"); *State v. Stone*, 1st Dist. No. C-40323, 2005-Ohio-5206, ¶ 8-9.

{¶ 94} Because each image is a new and distinct crime, the trial court properly refused to merge all the charges into one. Defendant's sixth assignment of error is overruled.

X. Seventh & Eleventh Assignments of Error – Community Control Sanctions

{¶ 95} Defendant's seventh and eleventh assignments of error assert the trial court erred in imposing certain community control conditions as part of defendant's sentence.

A. *Random Urine Screening*

{¶ 96} Defendant's seventh assignment of error asserts the trial court erred in ordering random urine screening as a condition of his community control. Among the

various conditions of community control, the court ordered defendant not only to submit to random urine screens as his probation officer determined to be appropriate, but also to obtain and maintain full-time verifiable employment, complete a cognitive behavior program, continue studies at Columbus State Community College, and have no unsupervised use of computers, except while on campus at Columbus State or at work. Although defendant objected to the condition that he have no unsupervised use of the Internet, defendant did not object to the random urine screens.

{¶ 97} Because defendant did not object to the requirement that he submit to random urinalysis, he has forfeited all but plain error. *State v. Policaro,* 10th Dist. No. 06AP-913, 2007-Ohio-1469, ¶ 6. Under Crim.R. 52(B), plain errors affecting substantial rights may be noticed by an appellate court even though they were not brought to the attention of the trial court. Plain error is (1) an error, or a deviation from a legal rule, (2) that is plain or obvious, and (3) that affected substantial rights. *State v. Barnes,* 94 Ohio St.3d 21, 27 (2002) (citations omitted). Even if an error satisfies these prongs, appellate courts are not required to correct the error, but retain discretion to correct plain errors. *Id*. Courts are to notice plain error under Crim.R. 52(B) " 'with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.' " *Id*., quoting *State v. Long*, 53 Ohio St.2d 91 (1978), paragraph three of the syllabus.

{¶ 98} "R.C. 2929.15(A)(1) governs the authority of the trial court to impose conditions of community control." *State v. Talty*, 103 Ohio St.3d 177, 2004-Ohio-4888, ¶ 10. When sentencing a felony offender, the court may impose a sentence consisting of one or more community control sanctions including residential, nonresidential, and financial sanctions that R.C. 2929.16, 2929.17, and 2929.18 authorizes. R.C. 2929.15(A)(1). If the court imposes community control under R.C. 2929.17, the "court may impose any other conditions of release under a community control sanction that the court considers appropriate." R.C. 2929.15(A). An appropriate community control sanction may include requiring the offender to submit to random drug testing. R.C. 2929.15(A)(1); 2929.17(H).

{¶ 99} "The General Assembly has thus granted broad discretion to trial courts in imposing community-control sanctions," and we review for an abuse of such discretion. *Talty* at ¶ 10, citing *Lakewood v. Hartman*, 86 Ohio St.3d 275, 277 (1999). Although the

trial court's discretion is broad, it "is not limitless," and community control conditions "cannot be overly broad so as to unnecessarily impinge upon the probation's liberty." *State v. Jones*, 49 Ohio St.3d 51, 52 (1990); *Talty* at ¶ 16 (finding "no meaningful distinction between community control and probation for purposes of reviewing the reasonableness of their conditions"). Community control provisions, like probation conditions previously, must reasonably relate to the goals of rehabilitation, administering justice, and ensuring good behavior. *Talty* at ¶ 16.

{¶ 100} To determine whether a community control sanction reasonably relates to the three probationary goals, "courts should consider whether the condition (1) is reasonably related to rehabilitating the offender, (2) has some relationship to the crime of which the offender was convicted, and (3) relates to conduct which is criminal or reasonably related to future criminality and serves the statutory ends of probation," now community control. *Jones* at 53; *Talty* at ¶ 16 (finding the *Jones* test applicable to community control sanctions).

{¶ 101} Here, defendant was charged with and ultimately convicted of uploading child pornography. Nothing in the record or in the pre-sentence investigation suggests either that drugs or alcohol played a role in the crimes or that defendant had a history of substance abuse. Similarly, the record discloses no basis to conclude the requirement will help rehabilitate defendant from viewing child pornography. *See State v. Robinson*, 2d Dist. No. Civ.A.2003 CA 101, 2004-Ohio-5984, ¶ 11-14 (concluding that, where a defendant pled guilty to violating a protection order, and nothing suggested the defendant "was under the influence of alcohol or drugs when he contacted" the subject of the protection order or "had a substance abuse problem," the condition of defendant's probation requiring that he submit to drug and alcohol testing was not reasonably related to defendant's crime or to rehabilitating the defendant); *Strongsville v. Feliciano*, 8th Dist. No. 96294, 2011-Ohio-5394, ¶ 3, 8; *State v. Wooten*, 10th Dist. No. 03AP-546, 2003-Ohio-7159, ¶ 2-18.

{¶ 102} The trial court arguably erred in ordering random urine screening as a condition of defendant's community control, but defendant failed to object. Requiring defendant to submit to random urine screening as a condition of his community control

is not such a manifest miscarriage of justice that it rises to the level of plain error. Accordingly, defendant's seventh assignment of error is overruled.

B. *Internet Usage*

{¶ 103} Defendant's eleventh assignment of error asserts the trial court's ordering that he have no unsupervised use of computers, except while on campus at Columbus State or at work, "is overbroad and impermissibly burdens his First Amendment rights." (Appellant's brief, 34.) Defendant notes he is in college and, "[w]hile it is possible for him to do some tasks from work and school, there may be circumstances where he is required to do work from home using the internet," making "it * * * unrealistic to require someone to be present at all times while he is conducting this work." (Appellant's brief, 34-35.)

{¶ 104} Defendant's First Amendment right to freedom of speech is not absolute. *Miller*, 413 U.S. at 23 (citations omitted). While "restrictions on Internet usage may effect some deprivation of liberty, * * * a limited restriction on a sex offender's Internet use is a necessary and reasonable condition of supervised release." *United States v. Zinn*, 321 F.3d 1084, 1093, 1092 (11th Cir.2003) (noting "the strong link between child pornography and the Internet, and the need to protect the public, particularly children, from sex offenders"); *State v. Mills*, 2d Dist. No. 2002-CA-114, 2004-Ohio-267, ¶ 3, 7 (concluding community control condition requiring defendant, convicted of gross sexual imposition, not to "have internet service until further notice of the Court" was not overly broad).

{¶ 105} Defendant committed the acts at issue while using the Internet in his house. Requiring defendant to have only supervised use of computers is directly related to defendant's conviction and is reasonably related to rehabilitating defendant by deterring him from using the Internet as he did in committing the crimes subject of this appeal. *See Jones* at 53. As such, the restriction is neither overly broad nor unrelated to defendant's crime or his rehabilitation. *Mills* at ¶ 7; *State v. Hultz*, 5th Dist. No. 06-COA-003, 2006-Ohio-4056, ¶ 24, 25 (determining community control sanction requiring defendant to "not possess, use, or have access to a computer" satisfied the *Jones* test where not only did the defendant ply "a minor girl with alcohol and drugs after meeting her and maintaining a relationship with her via the use of a computer and the internet"

but defendant's computer "was loaded with internet sites depicting pornography, bondage and sadistic behavior").

{¶ 106} Defendant's eleventh assignment of error is overruled.

XI. Eighth Assignment of Error – Constitutionality of Sex Offender Registration Requirement

{¶ 107} Defendant's eighth assignment of error asserts the sex offender registration requirements violate the separation of powers doctrine and the constitutional prohibition against cruel and unusual punishment. At the sentencing hearing, defendant objected to the Tier II sex offender registration requirements on both grounds.

{¶ 108} In 2006, Congress passed the Adam Walsh Child Protection and Safety Act ("AWA"), codified at 42 U.S.C. 16901 et seq. (creating national standards for sexual offender classification, registration, and community notification). In 2007, Ohio enacted its version of the AWA, also known as Am.Sub.S.B. No. 10, effective January 1, 2008. The AWA repealed the sexual offender registration scheme under Megan's Law, a three-level scheme utilizing the terms "sexually orientated offender," "habitual sexual offender," and "sexual predator," and replaced it with a new three tier system, "Tier I," "Tier II," and "Tier III."

{¶ 109} A conviction for pandering sexually oriented matter involving a minor pursuant to R.C. 2907.322 is a "sexually oriented offense" and subjects the offender to classification as a "Tier II sex offender." R.C. 2950.01(A)(1); R.C. 2950.01(F)(1)(a). An offender convicted of a sexually oriented offense must register personally with the sheriff of the county in which the offender resides, goes to school or is employed. R.C. 2950.04(A)(2). As a Tier II sex offender, defendant must register for 25 years and verify his address every 180 days. R.C. 2950.07(B)(2); R.C. 2950.06(B)(2).

{¶ 110} Defendant contends the sex offender registration requirements violate the separation of powers doctrine "by removing the court's sentencing authority and leaving it in the power of the legislature." (Appellant's brief, 30.) "The separation-of-powers doctrine represents the constitutional diffusion of power within our tripartite government." *Norwood* at ¶ 114. Through the Ohio Constitution, the people of Ohio vested the legislative power in the General Assembly, the executive power in the Governor, and the judicial power in the courts. *Id*. at ¶ 115, quoting *State ex rel. Ohio*

Academy of Trial Lawyers v. Sheward, 86 Ohio St.3d 451, 462 (1999), citing Ohio Constitution, Article II, Section 1; Article III, Section 5; and Article IV, Section 1. "The judiciary has both the power and the solemn duty to determine the constitutionality and validity of acts by other branches of the government and to ensure that the boundaries between branches remain intact." *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, ¶ 46, paragraph two of the syllabus (declaring unconstitutional sex-offender provisions not at issue here).

{¶ 111} "A long-standing principle of constitutional law is that the authority for a trial court to impose sentences derives from the statutes enacted by the General Assembly." *State v. Bates*, 118 Ohio St.3d 174, 2008-Ohio-1983, ¶ 12, citing *Jones* at 52. "The function and duty of a court is to apply the law as written." *State v. Beasley*, 14 Ohio St.3d 74, 75 (1984). Because " '[c]rimes are statutory, as are the penalties therefor, * * * the only sentence which a trial judge may impose is that provided for by statute.' " *Id*., quoting *Colegrove v. Burns*, 175 Ohio St. 437, 438 (1964). The trial court thus only had the authority to classify defendant as a Tier II sex offender, with the accompanying registration duties, because the General Assembly enacted statutes to that affect, much like any other sentencing law. As with other sentencing laws, the provision does not violate separation of power principles.

{¶ 112} Defendant next contends that requiring him to register as a Tier II sex offender for 25 years is cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. The Supreme Court of Ohio recently held that, S.B. 10, with its increased notification, registration, and verification requirements, is punitive. *Williams* at ¶ 16 (noting that "[f]ollowing the enactment of S.B. 10, all doubt has been removed: R.C. Chapter 2950 is punitive"). The issue, then, is whether it violates the Eighth Amendment.

{¶ 113} The Eighth Amendment to the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *See also* Ohio Constitution, Article I, Section 9. The Eighth Amendment " 'does not require strict proportionality between crime and sentence' " but rather " 'forbids only extreme sentences that are 'grossly disproportionate' to the crime.' " *State v. Hairston*, 118 Ohio St.3d 289, 2008-Ohio-2338, ¶ 13, quoting *State v.*

Weitbrecht, 86 Ohio St.3d 368, 373 (1999), quoting *Harmelin v. Michigan*, 501 U.S. 957, 997, 111 S.Ct. 2680 (1991) (Kennedy, J., concurring). A sentence is grossly disproportional to the crime charged if the sentence would be " 'considered shocking to any reasonable person,' " or would " 'shock the sense of justice of the community.' " *Id.* at ¶ 14, quoting *Weitbrecht* at 371, quoting *McDougle v. Maxwell*, 1 Ohio St.2d 68, 70 (1964), and citing *State v. Chaffin*, 30 Ohio St.2d 13 (1972), paragraph three of the syllabus. Typically, "a sentence that falls within the terms of a valid statute cannot amount to a cruel and unusual punishment." *McDougle* at 69 (citations omitted).

{¶ 114} Because defendant was convicted of ten second degree felony counts, the trial court could have sentenced defendant to a maximum of eight years imprisonment on each count. R.C. 2907.322(C); R.C. 2929.14(A)(2). The court did not sentence defendant to any time in prison, instead imposing a community control period of four years and classifying defendant as a sexual offender. Requiring defendant to register as a sex offender for 25 years is not "one of those rare cases where the punishment is so extreme as to be grossly disproportionate to the crime or that it is shocking to a reasonable person and to the community's sense of justice." *State v. Bradley*, 1st Dist. No. C-100833, 2011-Ohio-6266, ¶ 13 (involving a defendant convicted of sexual conduct with a minor and classified a Tier II offender). Defendant obtained images of children being sexually abused and then posted those images to a public Internet website so others could view and download the images. Accordingly, his sex offender registration requirements are not unconstitutionally excessive in violation of the Eighth Amendment.

{¶ 115} Defendant's eighth assignment of error is overruled.

XII. Ninth Assignment of Error – Stay of Registration Requirement

{¶ 116} Defendant's ninth assignment of error asserts the trial court erred in failing to grant his motion requesting a stay of his sex offender registration requirements pending appeal. After the trial court denied the motion for a stay, defendant filed a motion in this court seeking a stay of the sex offender registration requirements; we denied the motion.

{¶ 117} Defendant contends the trial court erroneously concluded it lacked the authority to stay the requirements. Pointing to App.R. 8(B), defendant notes at least two

trial courts have stayed sex offender registration requirements pending appeal. The trial court, relying on *State v. Cook*, 83 Ohio St.3d 404 (1998) and *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, concluded the sex offender registration requirements were civil in nature, de minimus, remedial, and were not part of defendant's sentence.

{¶ 118} Two months after defendant's sentencing hearing, the Supreme Court concluded the statutory scheme changed after the court's decisions in *Cook* and, due to the enactment of S.B. 10, the court determined R.C. Chapter 2950 is punitive. *State v. Williams*, 129 Ohio St.3d 344, 2011-Ohio-3374, ¶ 16. *Cf. State v. Bush*, 2d Dist. No. 10CA82, 2011-Ohio-5954, ¶ 20 (J. Fain, concurring) (concluding that because *Williams* found the registration, notification, and verification requirements under the AWA to be punitive, those requirements are now "part of the penalty for the offense").

{¶ 119} Even if the trial court could have stayed the registration requirements pending appeal, defendant does not demonstrate he suffered any prejudice in view of our disposition of his assigned errors. Accordingly, defendant's ninth assignment of error is overruled.

XIII. Disposition

{¶ 120} Having overruled defendant's eleven assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

SADLER and CONNOR, JJ., concur.
