[Cite as *State v. Romage*, 2012-Ohio-3381.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	
		No. 11AP-822
v.	:	(M.C. No. 2010 CRB 023662)
Jason Romage,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on July 26, 2012

Richard C. Pfeiffer, Jr., City Attorney, *Lara N. Baker*, City Prosecutor, and *Melanie R. Tobias*, for appellant.

Douglas E. Riddell, for appellee.

APPEAL from the Franklin County Municipal Court

KLATT, J.

{¶ 1} Plaintiff-appellant, the State of Ohio, appeals from a judgment of the Franklin County Municipal Court dismissing a criminal complaint which alleged that defendant-appellee, Jason Romage, violated R.C. 2905.05(A). Because the trial court did not err by finding that statute unconstitutional, we affirm the judgment.

I. Factual and Procedural Background

{¶ 2} On October 18, 2010, a Columbus Police Officer filed a complaint in the Franklin County Municipal Court which alleged that Romage, "without privilege to do so, knowingly solicit[ed] any child under fourteen years of age * * * to accompany the person, * * * without the express or implied permission of the parent, guardian, or legal custodian of the child in undertaking the activity * * *." The complaint specifically alleged that Romage asked a child if he would carry some boxes to his apartment in return for some

money, conduct that would allegedly constitute criminal child enticement in violation of R.C. 2905.05(A). Romage entered a not guilty plea to the charge.

{¶ 3} Before trial, Romage filed a motion to dismiss the complaint, arguing that R.C. 2905.05(A) was unconstitutional. Romage argued that the statute was unconstitutionally overbroad and that appellate courts in Ohio have struck down R.C. 2905.05(A) or a substantially similar ordinance for that reason. *See State v. Chapple*, 175 Ohio App.3d 658, 2008-Ohio-1157, ¶ 18 (2d Dist.); *Cleveland v. Cieslak*, 8th Dist. No. 92017, 2009-Ohio-4035, ¶ 16. The trial court agreed with Romage, found R.C. 2905.05(A) to be unconstitutionally overbroad and, accordingly, dismissed the complaint filed against him.

{¶ 4} The State appeals and assigns the following error:

> The trial court erred when it found R.C. 2905.05(A) unconstitutionally overbroad and dismissed the charges filed against appellee.

II. The State's Assignment of Error-The Constitutionality of R.C. 2905.05(A)

{¶ 5} The State argues that the trial court erred by declaring R.C. 2905.05(A) unconstitutionally overbroad and dismissing the complaint against Romage. We disagree.

A. Standard of Review

{¶ 6} We review a trial court's decision on a motion to dismiss with a de novo standard of review. *State v. Walker*, 10th Dist. No. 06AP-810, 2007-Ohio-4666, ¶ 9-10. A de novo standard of review affords no deference to the trial court's decision, and the appellate court independently reviews the record. *Id.*

B. R.C. 2905.05(A) is Unconstitutionally Overbroad

{¶ 7} Our analysis begins with the acknowledgement that statutes enjoy a strong presumption of constitutionality. *State v. Carswell*, 114 Ohio St.3d 210, 2007-Ohio-3723 ¶ 6; *State v. Collier*, 62 Ohio St.3d 267, 269 (1991). A statute will be upheld unless the challenger can meet the burden of establishing beyond a reasonable doubt that the statute is unconstitutional. *State v. Tooley*, 114 Ohio St.3d 366, 2007-Ohio-3698, ¶ 29; *Collier* at 269. If possible, courts must construe statutes in such a manner as to uphold their constitutionality. However, it is not the province of this court under the guise of construction, to ignore the plain terms of a statute or to insert a provision not

incorporated by the legislature. *Akron v. Rowland*, 67 Ohio St.3d 374, 380 (1993), citing *State ex rel. Defiance Spark Plug Corp. v. Brown*, 121 Ohio St. 329, 331-32 (1929).

{¶ 8} A clear and precise enactment may be overbroad if in its reach it prohibits constitutionally protected conduct. *Grayned v. Rockford*, 408 U.S. 104, 114 (1972); *Rowland* at 387. In considering an overbreadth challenge, the court must decide " 'whether the ordinance sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments.' " *Id.*, quoting *Grayned* at 115. A statute will be invalidated as overbroad only when its overbreadth has been shown by the defendant to be substantial, that its potential application reaches a significant amount of constitutionally-protected activity. *Rowland* at 387, citing *Houston v. Hill*, 482 U.S. 451, 458-59 (1987).

{¶ 9} The statute involved, R.C. 2905.05(A), provides that:

> No person, by any means and without privilege to do so, shall knowingly solicit, coax, entice, or lure any child under fourteen years of age to accompany the person in any manner, including entering into any vehicle or onto any vessel, whether or not the offender knows the age of the child, if both of the following apply:
>
> (1) The actor does not have the express or implied permission of the parent, guardian, or other legal custodian of the child in undertaking the activity.
>
> (2) The actor is not a law enforcement officer, medic, firefighter, or other person who regularly provides emergency services, and is not an employee or agent of, or a volunteer acting under the direction of, any board of education, or the actor is any of such persons, but, at the time the actor undertakes the activity, the actor is not acting within the scope of the actor's lawful duties in that capacity.

{¶ 10} Romage argues that this statute criminalizes many innocent scenarios and is, therefore, overbroad. We agree. In arriving at the same conclusion, the *Chapple* court correctly noted that the "potential applications of R.C. 2905.05(A) to entirely innocent solicitations are endless." *Id.* at ¶ 17-18 (noting many innocent scenarios that would be criminalized under the statute). The inherent problem in this statute is the use of the term "solicit." The common meaning of that term encompasses "merely asking." *State v. Smith*, 11th Dist. No. 2011-P-0037, 2012-Ohio-401, ¶ 21; *Chapple* at ¶ 16. Thus, the

statute prohibits any person from asking any child to accompany the person in any manner and for any reason, without consideration of the person's motive or conduct. *Id.* This broad language leads to the many "innocent scenarios" that would be criminal offenses under this statute.

{¶ 11} The state argues that R.C. 2905.05(A) is not overbroad because although the term "solicit" generally means "merely asking," the term is subject to a more narrow construction in this statute because of the other verbs used in the statute: entice, coax, and lure. The state argues that those verbs all imply the use of artifice, deceit and/or promises to induce compliance. Given those verbs, the state argues that the term "solicit" should be defined as something more than just asking, but as a request by means of tempting, strongly urging or wrongfully inducing. We disagree.

{¶ 12} Although we must construe statutes in such a manner as to uphold their constitutionality, we cannot ignore the plain terms of a statute. This court has defined the term solicit in other contexts as "to entice, urge, lure, or ask." *Columbus v. Myles*, 10th Dist. No. 04AP-1255, 2005-Ohio-3933, ¶ 20. Under the guise of a narrow construction, the state in essence seeks to eliminate merely asking from the definition of the term "solicit" by defining solicit in light of the other verbs in the statute that appear to require more than merely the act of asking. We refuse to do so, because to solicit, as commonly understood, does encompass merely asking in its definition. *Smith*; *State v. Carle*, 11th Dist. No. 2007-A-0008, 2007-Ohio-5376, ¶ 17.[1]

{¶ 13} To the extent that the state relies on cases from the First District Court of Appeals that have found R.C. 2905.05(A) not constitutionally overbroad, we note that those cases involved an earlier version of R.C. 2905.05(A) that criminalized solicitations of a child "to enter into any vehicle." *See, e.g., State v. Kroner*, 49 Ohio App.3d 133, 134 (1st Dist.1988). Because that more narrowed version of the statute required the offender to ask the child to get into a car, it did not criminalize the endless innocent scenarios that are implicated by the current version, which prohibits solicitations of a child "in any manner." Thus, the cases from the First District are not persuasive. *Chappel* at ¶ 19.

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[1] The *Chappel* court also concluded that R.C. 2905.05(A) was not susceptible to a narrow construction. *Id.* at ¶ 18, fn. 3.

III. Conclusion

{¶ 14} Because R.C. 2905.05(A) sweeps within its prohibitions a significant amount of constitutionally-protected activity, we conclude that the statute is unconstitutionally overbroad. The trial court did not err by so holding and dismissing the complaint against Romage, which alleged a violation of the statute. Accordingly, we affirm the judgment of the Franklin County Municipal Court.

Judgment affirmed.

BRYANT and CONNOR, JJ., concur.