[Cite as *State v. Hamrick*, 2011-Ohio-5357.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

MADISON COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-01-002
	:	O P I N I O N
- vs -		10/17/2011
	:	
CHARLES R. HAMRICK,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM MADISON COUNTY COURT OF COMMON PLEAS
Case No. CRI20100042

Stephen J. Pronai, Madison County Prosecuting Attorney, Eamon Costello and Rachel M. Price, 59 North Main Street, London, Ohio 43140, for plaintiff-appellee

Jonathan T. Tyack, 536 South High Street, Columbus, Ohio 43215, for defendant-appellant

HUTZEL, J.

{¶1} Defendant-appellant, Charles R. Hamrick, appeals his conviction and sentence in the Madison County Court of Common Pleas for multiple sexual offenses.

{¶2} In early November 2010, Detective Marcus Penwell of the Franklin County Sheriff's Office, Internet Crimes Against Children Task Force, conducted an internet

search for child pornography using the file share program known as "MP3 Rocket." MP3 Rocket allows "users," i.e., those who download the program onto their computer, to search for and share files with other users.

{¶3} Detective Penwell searched the MP3 Rocket network for files with titles indicative of child pornography. His search generated a list of files, along with the internet protocol address ("IP address"), of each computer possessing the files. An IP address is "similar to a home's mailing address and is unique to the computer's location." *State v. Thornton, II*, Franklin App. No. 09AP-108, 2009-Ohio-5125. See, also, *United States v. Kennedy* (D.Kan.2000), 81 F.Supp.2d 1103, footnote 3.

{¶4} Using MP3 Rocket, along with specialized investigative software, Detective Penwell made a direct connection with a specific IP address, at which time he discovered nearly 400 files with titles indicative of child pornography. As a result of his findings, Detective Penwell prepared an investigative subpoena to obtain the subscriber information associated with the IP address.[1] Detective Penwell delivered the subpoena to Time Warner Cable, the internet service provider for the IP address. Time Warner indicated the IP address belonged to appellant, who resided at 2830 Oneida Drive in London, Ohio.

{¶5} Using this information, Detective Penwell obtained a search warrant for appellant's residence. On November 25, 2010, Detective Penwell assisted the Madison County Sheriff's Office in executing the warrant. During the search, appellant indicated he was the primary user of the computer and admitted to installing MP3 Rocket on the hard drive. Appellant also indicated the pornography files were password-protected and that no one else knew his password or had access to the material.

{¶6} Pursuant to the search warrant, law enforcement seized various computer

1. Subscriber information typically includes a user's name, address and telephone number.

equipment from appellant's residence. Upon searching appellant's hard drive, investigators discovered 339 images and 28 videos containing child pornography. As a result, the Madison County Grand Jury issued an eight-count indictment against appellant. Counts 1 through 4 charged appellant with the illegal use of a minor in nudity-oriented material or performance in violation of R.C. 2907.323(A)(3). Counts 5 and 6 charged appellant with pandering obscenity involving a minor in violation of R.C. 2907.321(A)(1). Counts 7 and 8 charged appellant with pandering obscenity involving a minor in violation of R.C. 2907.321(A)(2).

{¶7} Appellant filed a pretrial motion to suppress the evidence obtained at his residence. Appellant argued law enforcement illegally obtained his subscriber information from Time Warner, therefore the search warrant based on this information was invalid. After a hearing, the trial court denied appellant's motion. Following a bench trial, appellant was convicted as charged in Counts 1-4, 6, and 8. As for Counts 5 and 7, the trial court found appellant guilty of R.C. 2907.321(A)(5), rather than R.C. 2907.321(A)(1) and (A)(2), respectively.

{¶8} Appellant timely appeals, raising three assignments of error for review.

{¶9} Assignment of Error No. 1:

{¶10} "THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO SUPPRESS ALL EVIDENCE ARISING OUT OF OR RESULTING FROM THE INVESTIGATIVE SUBPOENA SENT TO TIME WARNER CABLE BY DETECTIVE PENWELL FOR THE PURPOSES OF DETERMINING APPELLANT'S IDENTIY [sic]. (R.28)."

{¶11} In his first assignment of error, appellant argues law enforcement obtained his subscriber information in violation of the Electronic Communications Privacy Act, Section 2701, et seq., Title 18, U.S.Code (ECPA). Appellant argues the trial court

erroneously failed to suppress all evidence stemming from the illegal attainment of his subscriber information as fruit of the poisonous tree.

{¶12} Appellate review of a ruling on a motion to suppress presents a mixed question of law and fact. *State v. Little*, Warren App. No. CA2010-12-124, 2011-Ohio-4175, ¶10; *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶8. When considering a motion to suppress, the trial court, as the trier of fact, is in the best position to weigh the evidence in order to resolve factual questions and evaluate witness credibility. *Little* at ¶10. In turn, the appellate court must accept the trial court's findings of fact so long as they are supported by competent, credible evidence. Id. After accepting the trial court's factual findings as true, the appellate court must then determine, as a matter of law, and without deferring to the trial court's conclusions, whether the trial court applied the appropriate legal standard. Id.

{¶13} The ECPA regulates the disclosure of electronic communications and subscriber information. Section 2703(c)(1)(B), Title 18, U.S.Code states, in pertinent part: "[a] governmental entity may require a provider of electronic communication service or remote computing service to disclose a record or other information pertaining to a subscriber to or customer of such service * * * only when the governmental entity * * * (ii) obtains a court order for such disclosure under subsection (d) of this section[.]" Subsection (d) sets forth the requirements of a court order:

{¶14} "(d) Requirements for court order – A court order for disclosure under subsection (b) or (c) * * * shall issue only if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation." Section 2703(d), Title 18, U.S.Code.

{¶15} Appellant argues the investigative subpoena utilized in this case did not qualify as a "court order" under the ECPA or, for that matter, state law. Specifically, appellant argues law enforcement failed to comply with R.C. 2935.23 in applying for the investigative subpoena.[2] Absent compliance with state law, appellant argues there could be no compliance with federal standards for a court order. Appellant seeks to suppress all evidence obtained as a result of the allegedly invalid court order.

{¶16} Because the remedy appellant seeks is unavailable to him, we decline to address whether the investigative subpoena constituted a valid "court order."

{¶17} Even if law enforcement obtained appellant's subscriber information pursuant to an invalid court order, suppression is not a remedy contemplated under the ECPA. See *Kennedy*, 81 F.Supp.2d at 1110. "The statute specifically allows for civil damages and criminal punishment for violations of the ECPA, *see* 18 U.S.C. §§ 2707, 2701(b), but speaks nothing about the suppression of information in a court proceeding. Instead, Congress clearly intended for suppression not to be an option for a defendant whose electronic communications have been intercepted in violation of the ECPA." Id. (Emphasis sic.) See, also, Section 2703(e), Title 18, U.S.Code. The ECPA specifically states: "[t]he remedies and sanctions described in this chapter are the only judicial remedies and sanctions for nonconstitutional violations of this chapter." Section 2708, Title 18, U.S.Code. See, also, *Davis v. United States* (2011), __ U.S. __, 131 S.Ct. 2419, 2427 (suppression remedy should apply as a "last resort").

{¶18} Appellant's constitutional rights were not violated when law enforcement obtained his subscriber information from Time Warner because he has not demonstrated

2. R.C. 2935.23 controls the application process for subpoenas used to aid felony investigations. Under R.C. 2935.23, witnesses must appear to be examined under oath by the prosecuting attorney, or the court or magistrate taking the testimony. Additionally, the examination must be taken in writing and filed with the court or magistrate. Appellant argues the investigative subpoena utilized in this case was invalid because Time Warner failed to appear to testify under oath.

an objectively reasonable expectation of privacy in this information. "[W]hat a person knowingly exposes to the public, even in his home or office, is not a subject of Fourth Amendment protection." *Katz v. United States* (1967), 389 U.S. 347, 351, 88 S.Ct. 507. Further, "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Smith v. Maryland* (1979), 442 U.S. 735, 743-744, 99 S.Ct. 2577.

{¶19} When appellant entered an agreement with Time Warner for internet service, he knowingly revealed the subscriber information associated with his IP address, including his name, address and telephone number. Appellant cannot now claim to have a Fourth Amendment privacy interest in this information. See *United States v. Cray* (S.D.Ga.2009), 673 F.Supp.2d 1368, 1375; *Freedman v. Am. Online, Inc.* (D.Conn.2005), 412 F.Supp.2d 174, 181 ("courts have universally found that, for purposes of the Fourth Amendment, a subscriber does not maintain a reasonable expectation of privacy with respect to his subscriber information"); *Thornton*, 2009-Ohio-5125 at ¶12.

{¶20} Thus, even if law enforcement used an invalid court order to obtain appellant's subscriber information, this statutory violation would not provide appellant with a basis to suppress this information or any evidence stemming therefrom.

{¶21} Accordingly, the trial court did not err in overruling appellant's motion to suppress.

{¶22} Appellant's first assignment of error is overruled.

{¶23} Assignment of Error No. 2:

{¶24} "THE TRIAL COURT ERRED IN OVERRULING DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL PURSUANT TO CRIMINAL RULE 29 AS IT RELATES TO COUNTS 5 AND 7 OF THE INDICTMENT (Trial Tr. p. 166-167; R. 43)."

{¶25} In his second assignment of error, appellant argues the trial court

erroneously overruled his Crim.R. 29 motion for acquittal on Counts 5 and 7 of the indictment, charging him with violations of R.C. 2907.321(A)(1) and (A)(2), respectively. Counts 5 and 7 related to a video found on appellant's computer entitled "zooskool – Pthc Hussyfan – Thailand 2003.mpg" (Zooskool video).

{¶26} At the conclusion of trial, the court found the state had not met its burden of proof on pandering obscenity as charged under R.C. 2907.321(A)(1) and (A)(2). Instead, the trial court found appellant guilty on the "lesser included offense" of pandering obscenity in violation of R.C. 2907.321(A)(5).

{¶27} We first address appellant's argument that R.C. 2907.321(A)(5) is not a "lesser included offense" of subsections (A)(1) and (A)(2). Appellant argues the trial court was required to acquit him on Counts 5 and 7, rather than considering his guilt under subsection (A)(5).

{¶28} Pursuant to R.C. 2945.74 and Crim.R. 31, "a jury may consider three groups of lesser offenses on which, when supported by the evidence at trial, it must be charged and on which it may reach a verdict: (1) attempts to commit the crime charged, if such an attempt is an offense at law; (2) inferior degrees of the indicted offense; (3) lesser included offenses." *State v. Deem* (1988), 40 Ohio St.3d 205, paragraph one of the syllabus. Assuming, without deciding, that appellant is correct, we find the trial court was entitled to consider his guilt under R.C. 2907.321(A)(5) as an "inferior degree" of subsections (A)(1) and (A)(2).

{¶29} An offense is an "inferior degree" of the indicted offense "where its elements are identical to or contained within the indicted offense, except for one or more additional mitigating elements which will generally be presented in the defendant's case." Id. at 209. (Emphasis omitted.)

{¶30} R.C. 2907.321 states, in pertinent part:

{¶31} "(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:

{¶32} "(1) Create, reproduce, or publish any obscene material that has a minor as one of its participants or portrayed observers;

{¶33} "(2) Promote or advertise for sale or dissemination; sell, deliver, disseminate, display, exhibit, present, rent, or provide; or offer or agree to sell, deliver, disseminate, display, exhibit, present, rent, or provide, any obscene material that has a minor as one of its participants or portrayed observers;

{¶34} "* * *

{¶35} "* * *

{¶36} "(5) Buy, procure, possess, or control any obscene material, that has a minor as one of its participants[.]"

{¶37} Upon review, it is intuitive that an individual must "possess" or "control" obscene material in order to "create, reproduce, or publish" the same under R.C. 2907.321(A)(1). Similarly, an individual must "possess" or "control" obscene material in order to "promote, advertise, sell, deliver, disseminate, display, exhibit, present, [etc.]," the material under R.C. 2907.321(A)(2).

{¶38} Because R.C. 2907.321(A)(1)-(2) necessarily contain the element of possession, we find subsection (A)(5) constitutes an "inferior offense" thereof. Thus, the trial court was entitled to consider appellant's guilt under R.C. 2907.321(A)(5). Cf. *State v. Smith*, 121 Ohio St.3d 409, 2009-Ohio-787. Even if R.C. 2907.321(A)(5) is not a "lesser included offense" of the indicted offenses, we must affirm a trial court's judgment that achieves the right result for the wrong reason, because such an error is not considered prejudicial. See *State v. Adams*, Butler App. No. CA2010-12-321, 2011-Ohio-1721, ¶22.

{¶39} Accordingly, we reject appellant's first argument.

{¶40} Appellant next argues the state presented insufficient evidence to sustain his convictions under Counts 5 and 7 for pandering obscenity in violation of R.C. 2907.321(A)(1)-(2). Of course, appellant is correct in view of the fact that the trial court found him guilty of R.C. 2907.321(A)(5). Thus, we assume, for the sake of this appeal, that appellant is challenging the sufficiency of the evidence on his convictions under R.C. 2907.321(A)(5).

{¶41} A Crim.R. 29(A) motion for acquittal tests the sufficiency of the evidence presented at trial. See *State v. Evans* (1992), 63 Ohio St.3d 231, 248. When considering a motion for acquittal, a trial court must view the evidence in a light most favorable to the state. Id. An appellate court undertakes de novo review of the trial court's decision on a Crim.R. 29(A) motion and will not reverse the trial court's judgment unless reasonable minds could only reach the conclusion that the evidence failed to prove all the elements of the crime beyond a reasonable doubt. See *State v. Terry*, Fayette App. No. CA2001-07-012, 2002-Ohio-4378, ¶9; *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶42} In this case, the evidence shows Detective Penwell used specialized software to clone appellant's hard drive and to copy all material stored in appellant's MP3 Rocket folders. While speaking to Detective Penwell, appellant admitted he purchased a lifetime membership to MP3 Rocket and that the program contained "may[be] a hundred" images and videos of minor children. In reality, Detective Penwell discovered nearly 400 titles commonly associated with child pornography, including the Zooskool video and other videos, such as "Nancy Ver Now 3-Year Old," "13-Year-Old Preteen Underage Teen Sex," "Kinderkute PTHC 9-Year-Old-Niece," and "PTHC Amy MG 8-Year-Old." While appellant could not describe the contents of each file, he admitted to storing the material in MP3 Rocket, but assured Detective Penwell that the material was password-protected

and that no one else was "exposed to the child pornography[.]" Moreover, appellant repeatedly stated that if his behavior was "made public," it would "destroy" him.

{¶43} From this evidence, a reasonable trier of fact could conclude appellant procured the Zooskool video with knowledge of its obscene character. R.C. 2907.321(A). Because the material was password-protected, one could also reasonably conclude appellant was the sole possessor of the child pornography on his computer. R.C. 2907.321(A)(5). Cf. *State v. Howard*, Marion App. No. 9-10-50, 2011-Ohio-3524, ¶66-67.

{¶44} After examining the evidence in a light most favorable to the state, we find a reasonable trier of fact could have found the essential elements of pandering obscenity in violation of R.C. 2907.321(A)(5) proven beyond a reasonable doubt. See *State v. Curtis*, Marion App. No. 9-02-11, 2002-Ohio-5409, ¶21.

{¶45} For the reasons discussed above, we find the trial court did not err in overruling appellant's motion for acquittal on Counts 5 and 7 of the indictment.

{¶46} Appellant's second assignment of error is overruled.

{¶47} Assignment of Error No. 3:

{¶48} "THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL PURSUANT TO RULE 29 OF THE OHIO RULES OF CRIMINAL PROCEDURE AS IT RELATES TO COUNTS 6 AND 8 OF THE INDICTMENT. (Trial Tr. P. 166, 168; R. 43)."

{¶49} In his third assignment of error, appellant argues the trial court erroneously overruled his Crim.R. 29 motion for acquittal on Counts 6 and 8 of the indictment, charging him with violations of R.C. 2907.321(A)(1) and (A)(2), respectively. Counts 6 and 8 related to a video found on appellant's computer entitled "11-Year-Old Vicky Like a Pro," in which a nine-year-old girl performed oral sex on her father (Vicky video). At the conclusion of trial, the court found appellant guilty as charged and merged the two counts

for the purposes of sentencing.

{¶50} As previously discussed, this court will not reverse the trial court's decision on a Crim.R. 29(A) motion unless reasonable minds could only conclude that the evidence failed to prove all the elements of the crime beyond a reasonable doubt. *Terry*, 2002-Ohio-4378 at ¶9. Appellant asks this court to apply the "Rule of Lenity" in interpreting the language of R.C. 2907.321(A)(1)-(2), "which requires criminal statutes to be strictly construed against the state and liberally construed in favor of the accused[.]" *State v. Bess*, 126 Ohio St.3d 350, 2010-Ohio-3292, ¶16. See, also, R.C. 2901.04

{¶51} During his Crim.R. 29 motion, appellant argued the state presented no evidence that he engaged in an "affirmative act" to reproduce, advertise, present, or otherwise share the Vicky video as required under R.C. 2907.321(A)(1)-(2). In rejecting appellant's argument, the trial court cited *United States v. Williams* (2008), 553 U.S. 285, 128 S.Ct. 1830, wherein defendant shared seven pornographic images of children aged 5-15 with a Secret Service agent over the internet. The United States Supreme Court held that file sharing constitutes "distribution" of child pornography in violation of Section 2252(a)(3)(B), Title 18, U.S.Code. Id. at 295. The Court further held that the operative verb "distribute," in addition to "advertise," "promote," "present," and "solicit" were each reasonably read to have a "transactional connotation." Id. at 294. To run afoul of the federal statute, one need not seek remuneration for the transaction. Instead, it is sufficient to "seek to induce the transfer of child pornography from one person to another." Id. at 295.

{¶52} In overruling appellant's motion for acquittal, the trial court found that "distribution" was "not unlike" the operative verbs listed in R.C. 2907.321(A)(1)-(2), but assured appellant it would review the evidence relating to the charges at the conclusion of trial.

{¶53} Upon review of the record, we first find sufficient evidence exists such that a reasonable trier of fact could conclude appellant "reproduced" the Vicky video in violation of R.C. 2907.321(A)(1). During trial, Vicky Angelopoulos, a Special Agent with the Ohio Bureau of Criminal Identification and Investigation, described the file sharing process as follows:

{¶54} "[THE STATE]: [T]heoretically, if [appellant] was the only user that had [the Vicky video], there's one copy of it and it's on his computer; when I download it off of his computer, are there two copies of it now?

{¶55} "[ANGELOPOULOS]: Yes.

{¶56} "[THE STATE]: One on his computer and one on mine?

{¶57} "[ANGELOPOULOS]: Exactly."

{¶58} In the case at bar, appellant did not deny downloading the Vicky video from other users, which, according to Angelopoulos, created a "copy" onto appellant's computer. Moreover, Detective Penwell was able to download the Vicky video from appellant's computer, thereby creating yet *another* copy that did not previously exist in the file share network. From this evidence, a reasonable trier of fact could conclude appellant "reproduced" the Vicky video by downloading a copy from other users, and even induced future reproduction by sharing it from his own computer. R.C. 2907.321(A)(1). See, also, 2252(a)(3)(B), Title 18, U.S.Code.

{¶59} In the case of R.C. 2907.321(A)(2), both federal and state statutes forbid individuals from "advertising," "promoting," or "presenting" obscene material involving a minor. Based on the obvious similarity between the statutes, we are inclined to adopt the Supreme Court's view that these words are "transactional" activities akin to "distribution" of child pornography. See *Erie RR. Co. v. Steinberg* (1916), 94 Ohio St. 189, 202-203 (while not required, a state court may adopt a construction given to a similar law by the

United States Supreme Court, even though no federal question is involved, "unless it clearly appear[s] that a different conclusion should be reached"). Under these circumstances, a reasonable trier of fact could conclude that by storing obscene material in his shared MP3 Rocket folder, appellant not only "distributed" the material, but also engaged in synonymous activities, such as "advertising," "promoting," or "presenting" the material in violation of R.C. 2907.321(A)(2).

{¶60} Regarding whether appellant knew of the Vicky video's obscene character, we again rely on evidence that appellant admittedly stored pornographic images and videos of minor children in MP3 Rocket and recognized various files with highly provocative titles. Moreover, appellant repeatedly stated that if his behavior was "made public," it would "destroy" him. From this evidence, a reasonable trier of fact could conclude appellant procured the Vicky video with knowledge of its obscene character. Id.; R.C. 2907.321(A).

{¶61} Appellant argues that in order to convict him under R.C. 2907.321(A)(1)-(2), the state must also prove he knew, or understood, that other MP3 Rocket users could access his shared folder and download files from his computer.

{¶62} However, in *State v. Maxwell*, 95 Ohio St.3d 254, 2002-Ohio-2121, the Supreme Court of Ohio rejected this contention as irrelevant. Specifically, the court held that under "R.C. 2907.321(A), knowledge is a requirement only for the discrete clause within which it resides: 'with knowledge of the character of the material or performance involved.' Thus, the state must prove that appellee knew the character of the material at issue. The state is not required to prove that appellee knew that in downloading files via America Online he was also transmitting those files[.]" Id. at ¶29.

{¶63} Thus, it is irrelevant whether appellant understood that in storing the Vicky video, or any other material, in his shared MP3 Rocket folder, he could transmit the files to

other users.

{¶64} After reviewing the evidence in a light most favorable to the state, we find a reasonable trier of fact could have found the essential elements of pandering obscenity in violation of R.C. 2907.321(A)(1)-(2) proven beyond a reasonable doubt.

{¶65} Thus, the trial court did not err in overruling appellant's motion for acquittal on Counts 6 and 8 of the indictment.

{¶66} Appellant's third assignment of error is overruled.

{¶67} Judgment affirmed.

POWELL, P.J., and PIPER, J., concur.