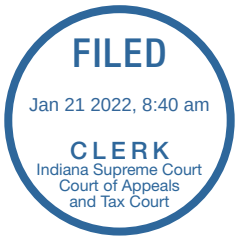
MEMORANDUM DECISION



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IN THE COURT OF APPEALS OF INDIANA

Nathan J. Pittman,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

January 21, 2022

Court of Appeals Case No. 21A-CR-916

Appeal from the Floyd Circuit Court

The Honorable J. Terrence Cody, Judge

Trial Court Cause No. 22C01-2002-F4-312

Bradford, Chief Judge.

Case Summary

[1] Nathan Pittman was charged with child exploitation after officers discovered digital images of his then-eight-year-old stepdaughter's uncovered vagina on his cellular phone. He subsequently moved to dismiss the child exploitation charge, arguing that the image recovered by the State from his cellular phone was insufficient to prove that he had committed the charged offense. This interlocutory appeal follows the denial of Pittman's motion. On appeal, Pittman contends that the trial court erred in denying his motion to dismiss and that Indiana Code section 35-42-4-4, the statutory section defining the crime of child exploitation, is unconstitutionally vague as applied. We affirm.

Facts and Procedural History

[2] According to the probable cause affidavit,[1] New Albany Police Officer Patrick Clarke initiated an investigation into Pittman on October 25, 2019, after receiving information that Pittman's stepdaughter had told a school counselor that Pittman had twice attempted to "record her while she was taking a shower" by hiding his cellular phone under a pair of her mother's underwear. Appellant's App. Vol. II p. 9. Officer Clarke obtained a search warrant for Pittman's cellular phone. On January 30, 2020, Officer Clarke reviewed a

[1] Given that the matter comes before us on interlocutory appeal rather than after a completed trial, we do not have an established factual record of the events leading to the filing of charges. As such, in order to provide the reader with an overview of the case, we cite to the factual allegations contained in the probable cause affidavit.

video recovered from Pittman's cellular phone that showed his stepdaughter, who was eight years old at the time, "using the toilet and you can clearly see her vagina and buttocks." Appellant's App. Vol. II p. 10.

[3] On February 18, 2020, the State charged Pittman with Level 4 felony child exploitation and Level 6 felony voyeurism. On January 21, 2021, Pittman moved to dismiss the child exploitation charge. The State filed an amended information on February 4, 2021, in which it added a second count of Level 6 felony voyeurism. With regard to the child exploitation charge, the State alleged that Pittman

> did knowingly or intentionally create a digitized image of any performance or incident that included the uncovered genitals by Victim 1, a child less than twelve (12) years of age, to wit: 8 years of age (DOB: REDACTED), and that [Pittman] did commit said acts with the intent to satisfy or arouse the sexual desires of [Pittman.]

Appellant's App. Vol. II p. 18.

[4] The trial court heard arguments on Pittman's motion to dismiss the child exploitation charge on February 4, 2021. The trial court denied Pittman's motion on February 12, 2021. Pittman thereafter sought, and was granted, permission to file the instant interlocutory appeal.

Discussion and Decision

I. Denial of Motion to Dismiss

[5] Pittman contends that the trial court erred in denying his motion to dismiss the child exploitation charge. We review a trial court's decision to grant or deny a motion to dismiss a criminal charge under the abuse of discretion standard. *State v. Sturman*, 56 N.E.3d 1187, 1195 (Ind. Ct. App. 2016).

> We will reverse the trial court's decision as being an abuse of discretion if it is clearly against the logic and effect of the facts and circumstances. To the extent that our decision requires a statutory interpretation, our review is de novo because it presents a question of law.
>
> In general, when a defendant files a motion to dismiss an information, the facts alleged in the information are to be taken as true. A motion to dismiss is not a proper vehicle for raising questions of fact to be decided at trial or facts constituting a defense. A hearing on a motion to dismiss is not a trial of the defendant on the offense charged.

Id. at 1195–96 (cleaned up).

[6] Indiana Code section 35-42-4-4(b)(4)(A) provides that a person who, with the intent to satisfy or arouse the sexual desires of any person, knowingly or intentionally photographs, films, videotapes, or creates a digitized image "that includes the uncovered genitals of a child less than eighteen (18) years of age … commits child exploitation." The offense is a Level 4 felony if the image depicts or describes a child who "is less than twelve (12) years of age." Ind. Code § 35-42-4-4(c)(1)(F). Again, in charging Pittman with Level 4 felony child

exploitation, the State alleged that Pittman created a digitized image of his then-eight-year-old stepdaughter's uncovered genitals and that he acted with the intent to satisfy or arouse his sexual desires. This allegation adequately states the elements of the offense of Level 4 felony child exploitation. *See* Ind. Code §§ 35-42-4-4(b)(4)(A) and (c)(1)(F).

[7] In arguing that the trial court erroneously denied his motion to dismiss, Pittman asserts that because the images recovered from his cellular phone were not "sexualized," the images could not support a child exploitation charge because nothing about the images indicates that the images were recorded with the intent to satisfy or arouse the sexual desires of any person. Appellant's Br. p. 11. In support, Pittman relies on *Siebenaler v. State*, 124 N.E.3d 61, 68 (Ind. Ct. App. 2019), in which a panel of this court, noting that "depictions of nudity, without more, constituted protected expression[,]" found the evidence insufficient to sustain some of the defendant's convictions for child exploitation.

[8] *Siebenaler*, however, is easily distinguished. In *Siebenaler*, the defendant appealed after having been convicted of child exploitation and, by the time the sufficiency question came before the court, there was a factual record on which the court could base its decision. *Id.* at 70. In this case, because there has been no trial, we have no way of knowing what evidence the State may present and whether said evidence will be sufficient to prove that Pittman had the requisite intent at the time he allegedly created the digitized image of his stepdaughter's

uncovered genitalia. Again, a motion to dismiss is not a proper vehicle for raising questions of fact, which are to be decided by the factfinder at trial. *Sturman*, 56 N.E.3d at 1196. As such, we conclude that the trial court did not abuse its discretion in denying Pittman's motion to dismiss the child exploitation charge.

[9] Furthermore, even without knowing what other evidence the State may present at trial, we believe that reasonable jurors could potentially infer from the evidence alleged in the probable cause affidavit that Pittman acted with the requisite intent, *i.e.*, the intent to satisfy or arouse the sexual desires of either himself or another individual when he recorded the images of his stepdaughter. The facts provided in the probable cause affidavit alleged that Pittman hid his phone under his victim's mother's underwear, instructed his victim to take a shower, and recorded video and images of his victim's uncovered vagina while she was in the bathroom. The victim's mother also told investigating officers that (1) her daughter had indicated that she did not want to be left alone with Pittman, (2) some of her underwear had come up missing, and (3) when she asked Pittman about whether her daughter was telling the truth, Pittman replied "What if she is telling the truth?" Appellant's App. Vol. II p. 10. These allegations, even without more, could potentially be enough for a reasonable juror to decide that Pittman acted with the requisite intent.

II. Pittman's Constitutional Claim

[10] Pittman alternatively challenges the constitutionality of Indiana Code section 35-42-4-4, claiming that it is unconstitutionally vague. "There are two types of constitutional vagueness challenges that can be made to a given criminal statute: as-applied and facial." *Hale v. State*, 171 N.E.3d 141, 148 (Ind. Ct. App. 2021), *trans. denied*. "Pittman does not contest the facial constitutionality of the statute; rather he argues that the statute is unconstitutional as applied to him." Appellant's Reply Br. p. 4.

> An as-applied challenge requires a court to focus not on the language of the statute itself, but rather whether that statute is unconstitutionally vague as applied to the conduct of the particular challenger. In other words, an as-applied constitutional challenge need only demonstrate that a statute failed to provide notice of proscribed conduct to a particular challenger, or that the statute was susceptible to arbitrary enforcement in that specific case, even if the same statute might have permissible constitutional applications in other scenarios.

Hale, 171 N.E.3d at 148 (internal citation omitted).

[11] In claiming that Indiana Code section 35-42-4-4 is unconstitutionally vague, Pittman argues as follows:

> The troubling language contained in the statute is "exhibition of the uncovered genitals intended to satisfy or arouse the sexual desires of any person." Any person may be aroused by images that are not sexual in nature. The images that Pittman allegedly had in his possession do not show any sexual activity and were

> not intended to satisfy or arouse the sexual desires of any person.
>
> The exhibition of the "uncovered genitals" of a child under the age of eighteen is not, per se lewd and/or obscene.… The statute permits an infringement of a defendant's constitutional rights to exhibit non-obscene material showing nudity by relying on the overly vague phrase "sexual conduct," which includes an exhibition of uncovered genitals. As deployed here, any innocent photograph of an infant in a bath could subject the parent to prosecution.

Appellant's Br. p. 15.

[12] We considered a similar vagueness challenge in *Logan v. State*, 836 N.E.2d 467 (Ind. Ct. App. 2005), *trans. denied*. In considering Logan's vagueness challenge, we noted the following:

> Under basic principles of due process, a statute is void for vagueness if its prohibitions are not clearly defined. A statute is not unconstitutionally vague if persons of ordinary intelligence would interpret it to adequately inform them of the proscribed conduct. No statute need avoid all vagueness, and because statutes are condemned to the use of words, there will always be uncertainties for we cannot expect mathematical certainty from our language.

Logan, 836 N.E.2d at 473 (internal citation and quotation omitted).

[13] Logan argued that the term "sexual conduct" was vague as it did not "adequately inform reasonable people about what conduct [was] prohibited, thereby providing excessive discretion to law enforcement officials." *Id.* at 472. Specifically, he argued that "exhibition of the uncovered genitals intended to

satisfy or arouse the sexual desires of any person" was vague. *Id.* at 473. We disagreed, noting that "this is essentially the definition of 'lewd' conduct, which the [United States Supreme] Court discussed at length in [*New York v. Ferber*, 458 U.S. 747, 765 (1982)] and found no constitutional infirmity." *Id.* Indeed, "lewd" is defined as "inciting to sensual desire or imagination," WEBSTER'S THIRD NEW INT'L DICTIONARY 1301 (Phillip Babcock Gove et al. eds., G.&C. Merriam Company 1964), which is merely another way of saying "intended to satisfy or arouse the sexual desires." *See* Ind. Code § 35-42-4-4(b).

[14] Furthermore, we cannot agree with Pittman's assertion that the allegedly vague language of the statute makes it susceptible to arbitrary and unreasonable enforcement. Indiana Code section 35-42-4-4(b)(4) explicitly provides that in order for one to commit the offense of child exploitation, the individual must knowingly or intentionally videotape or create a digitized image of a child's uncovered genitals "*with the intent to satisfy or arouse the sexual desires of any person*." (Emphasis added). Thus, innocent photographs of a child in a bathtub would not violate the statute so long as the parent did not have "the intent to satisfy or arouse the sexual desires of any person" when he or she took the photograph. Ind. Code § 35-42-4-4(b)(4). We do not believe that the wording of the statute is unclear or is susceptible to arbitrary or unreasonable enforcement. The statute clearly requires that alleged offender have the intent to satisfy or arouse his or another's sexual desires while photographing, filming, videotaping, or creating a digitized image of a child under the age of eighteen's uncovered genitalia. *See* Ind. Code § 35-42-4-4(b)(4).

[15] The judgment of the trial court is affirmed.

Crone, J., and Tavitas, J., concur.