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Highlights

COURT OF CRIMINAL APPEALS

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100 Count Child Pornography Case Reduced by 91

Brown v. State, F-2006-340, Decided January 23, 2008

James Cheyenne Brown, Appellant, was tried by a jury in the District Court of Oklahoma County and found guilty of 100 counts of Possession of Obscene Material Involving the Participation of a Child Under 18, in violation of Title 21 O.S. § 1021.2 . The jury sentenced Brown to six months in prison on each count. The trial judge sentenced Brown accordingly and ordered the sentences to be served consecutively.

Brown appealed his conviction and raised several issues, including the following:

(1) whether the convictions on 100 counts of possession of child pornography violate statutory and constitutional prohibitions against multiple punishment for the same offense;

(2) whether the jury convicted him on an improper basis; and

(3) whether he was denied a fair trial through admission of certain evidence that was irrelevant and highly prejudicial and through improper comments made by the prosecutor.

1. Multiple Punishment

In his first claim of error, Brown argued that his convictions on 100 counts of possession of child pornography violated the statutory prohibition against imposing multiple punishments for a single offense. He also argued that his multiple convictions violated the Double Jeopardy Clause of the Constitution.

At Brown's trial, the State introduced 88 individual images and 12 video clips of child pornography that had been taken from at least one computer hard drive and as many as eight CD-ROM disks. The State also introduced a 25-page exhibit that contained hundreds of images of nude or semi-nude children. However, the State offered no specific proof regarding what medium they were derived from, other than testimony from a police detective that most of the images were obtained from a computer hard drive from one of the two computers seized at Brown's residence. At trial, the State's theory was that Brown could be convicted on all 100 counts on the basis of the 88 images and 12 video clips depicting children engaged in sexual acts, or alternatively, on any 100 of the nude or semi-nude depictions, or any combination of the two, regardless of the number of media storage units on which they were collected.

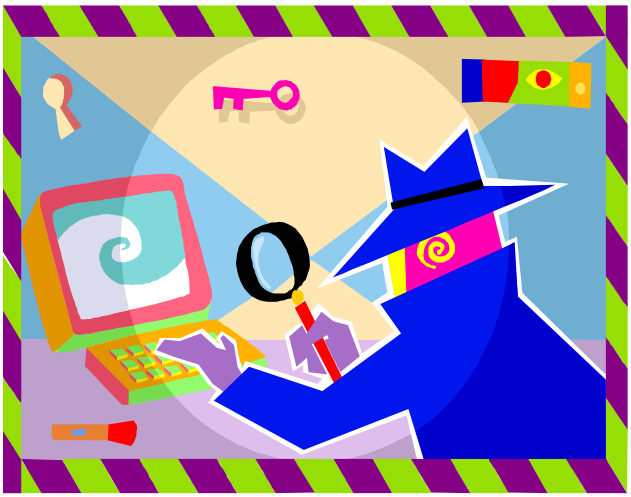
Title 21 O.S.§ 1024.1 defines a digital/magnetic storage device containing lewd images of children as a distinct item of child pornography and photographic products as separate items. In Brown's case, the State's evidence provided a factual basis showing that Brown possessed nine different digital/magnetic storage devices which contained hundreds of pornographic images of children. As a result, the Court found that the State had proven only nine counts of possession of child pornography. Therefore, the Court affirmed Counts 1 through 9, but reversed Counts 10 through 100 as impermissible multiple punishment.

Because the Court granted relief on this claim based on statutory grounds, the Court did not address Brown's double jeopardy claims.

2. Improper Basis for Alternative Finding of Guilt

Brown argued that it was error for the prosecutor to tell jurors that, in addition to convicting him on the basis of sexually explicit images contained in State's Exhibits 1 and 2, they could also convict in the alternative by relying on images of nude or semi-nude children contained in State's Exhibit 5.

The Court held that because Oklahoma statute defines child pornography as depictions of minors engaged in sexual acts, and also includes the "lewd exhibition of the uncovered genitals [for] the purpose of sexual stimulation of the viewer," the State's alternative theory presented the jury with a valid basis for conviction. This was especially true given Brown's testimony that he viewed the images for his own sexual stimulation. As a result, the Court stated no error had occurred on this issue.



3. Irrelevant and Prejudicial Evidence

Brown also argued that the trial court erred, in part, by admitting the testimony of his female companion in which she repeated statements made by Brown detailing his violent sexual fantasies about children.

The Court held that the female companion's testimony was relevant to show that the images Brown possessed that did not show children engaged in explicit sexual acts were nevertheless viewed by him for sexual stimulation. Therefore, the Court held that the trial court did not abuse its discretion by permitting the testimony.

Conclusion

Based on the first issue regarding multiple punishment, the Court affirmed Counts 1-9 of the Judgment and Sentence. Counts 10-100 were reversed and remanded with instructions to dismiss. As a result of the Court's decision, Brown's sentence was reduced from 50 years to 4 1/2 years.

NOTICE

The Legal Eagle is a news publication for law enforcement officers and is not designed to give legal advice. You should always contact your police legal advisor, municipal attorney, or district attorney concerning legal matters.

Tenth Circuit Court of Appeals

Father's Consent to Search Son's Computer Upheld

U.S. v. Andrus, 2007 U.S. App. LEXIS 11124

Defendant Andrus first became a suspect in a child pornography investigation after he used a credit card to subscribe to a pornographic website. Because agents of the Bureau of Immigration and Customs Enforcement (ICE) did not believe that they had enough information to obtain a warrant, they performed a "knock and talk" on Andrus's house.

When agents knocked on the door of the home, Defendant's elderly father answered. The father invited the agents inside and eventually gave written consent to a search of the home and any computers. During the search of a computer, agents found the defendant's individual user profile as well as evidence of child pornography.

Based upon digital images found on his computer, the defendant was indicted on one count of possession of child pornography. After he was sentenced to seventy months imprisonment, Andrus challenged the search of his computer by alleging that his father did not have the authority to consent to the search.

The Court began its analysis with a discussion of third-party consent. Voluntary consent to a police search, given by a third party with authority over the subject property, is a well-established exception to the warrant requirement. Valid third party consent can arise either through the third party's actual authority or apparent authority. Actual authority occurs when the third party has either: 1) mutual use of the property by virtue of joint access, or 2) control for most purposes. However, the Court acknowledged that, even where actual authority is lacking, a third party has apparent authority to consent to a search when an officer reasonably, even if erroneously, believes the third party possesses authority to consent. Whether apparent authority exists is an objective, totality-of-the-circumstances inquiry into whether the facts available to the officers at the time they commenced the search would lead a reasonable officer to believe the third party had authority to consent to the search.

Another issue concerned the search of objects that are typically associated with high expectations of privacy such as suitcases and strong boxes and whether computers should be counted among these types of objects. The Court decided that because intimate information is commonly stored on computers, it seemed natural to include computers in the same category as other personal items that command a "high degree of privacy".

The inquiry into whether the owner of a highly personal object has indicated a subjective expectation of privacy traditionally focuses on whether the container is locked.

Determining whether a computer is "locked" presents a different challenge. While other courts across the country have focused on different concerns when examining this issue (i.e. whether the computer was off, whether there were multiple users for the computer), the Tenth Circuit narrowed its concern to whether law enforcement knows or should reasonably suspect because of surrounding circumstances that the computer is password protected. The Court further stated that the location of the computer within the house and other household members' access to the computer should be examined when considering third party consent. Third party apparent authority to consent to a search has generally been upheld when the computer is located in a common area of the home that is accessible to other family members and under circumstances indicating the other family members were not excluded from using the computer. In contrast, where the third party has affirmatively disclaimed access to or control over the computer or a portion of the computer's files, courts have been unwilling to find third party authority.

In the Andrus case, the computer was located in a bedroom occupied by the homeowner's fifty-one-year-old son. The Court applied special emphasis to the fact that the father had unlimited access to the room. While officers did not ask specific questions about the father's use of the computer, the father said nothing indicating the need for such questions.

The Court acknowledged that the resolution of the appeal turned on whether

the officers' belief in the father's authority was reasonable, despite the lack of any affirmative assertion that the father used the computer and despite the existence of a user profile indicating the defendant's intent to exclude other household members from using the computer.

The Court held that, because the circumstances reasonably indicated that the father had mutual use of or control over the computer, the agents had no obligation to ask clarifying questions. Viewed under the totality of the circumstances, the Court ruled that the facts known to the agents at the time the computer search began created an objectively reasonable perception that the father was, at least, one user of the computer. As a result, the defendant's appeal was denied.

Law Enforcement Resources

National Center for Missing & Exploited Children

The National Center for Missing & Exploited Children's Exploited Child Unit (ECU) provides numerous services for law enforcement. As stated in their publication, "Exploited Child Unit - Technical Assistance Services for Law Enforcement", the two main services that ECU Analysts provide to law enforcement are: 1) processing reports received about the sexual exploitation of children through the CyperTipline® and disseminating the leads to

federal, state, local, and international law enforcement agencies for further investigation; and 2) providing technical assistance to law enforcement agencies investigating cases of child sexual exploitation.

The ECU also serves as a technical and informational resource for law enforcement and offers many services including, but not limited to, the following: a Child Victim Identification Program (aids in identifying unknown child victims featured in pornographic images); Internet Searches and Public-Record Database Searches; CyberTipline® Historical Searches (searches the tipline for previous reports relating to current investigations); Technical Expertise; Law-Enforcement Contacts (includes on an international level); and Internet Service Provider Contacts (includes Electronic Service Provider names, phone numbers, and e-mail addresses).

The National Center for Missing & Exploited Children also has numerous other resources available to law enforcement which address issues regarding children. These resources include numerous publications, training opportunities, and federal partnerships.

Additional information on these resources, or other areas of interest concerning missing and exploited children, may be found on the National Center's website, www.missingkids.com; or for more information on the free services and resources offered by the Exploited Child Unit, please visit www.cybertipline.com, or call 1-800-843-5678.

Internet Crimes Against Children Task Force

Working Together For
Oklahoma's Children

"Keep The Light in Their Eyes"

The Oklahoma State Bureau of Investigation maintains a full-time unit to investigate Internet Crimes Against Children (ICAC). The ICAC unit investigates adults who exploit children with the use of technology by conducting undercover operations and responding to complaints. They do this by utilizing specially trained agents and computer equipment.

The OSBI also coordinates investigative activities within Oklahoma as part of a National ICAC Task Force. OSBI manages a grant approved by the U.S. Department of Justice given to the State of Oklahoma for use by agencies throughout the State who actively investigate and prosecute these cases. Oklahoma currently has 30 agencies throughout the State who are active participants in the Oklahoma ICAC Task Force. These agencies consist of District Attorney Offices, Sheriff Departments, and municipal Police Departments. Through the use of these agencies and the OSBI staff, the numbers of investigations throughout the State have more than doubled over the past year.

If your law enforcement agency is interested in becoming an affiliate of the Oklahoma Internet Crimes Against Children Unit (ICAC), please contact Agent-in-Charge Steve Tanner at (405) 848-6724 or by e-mail at stanner@osbi.state.ok.us.