0/A 2-7-91 1-14-91

IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,317

FILED
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DEC 21 1990
CLERK, SUPREME COURT
By
Deputy Clerk

KENNETH D. SCHMITT,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

****

ON CERTIORARI FROM THE FOURTH DISTRICT COURT OF APPEAL

****

ANSWER BRIEF OF THE STATE ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, Kenneth Schmitt, the criminal defendant and appellant below in the appended Schmitt v. State, 563 So.2d 1095 (Fla. 4th DCA 1990), review granted, Case No. 76,317 (Fla. 1990) will be referred to as "petitioner." Respondent, the State of Florida, the prosecuting authority and appellee below, will be referred to as "the State."

References to the one-volume record on appeal will be designated "(R:);" and to the one-volume supplemental record, "(SR:)."

Any emphasis will be supplied by the State unless otherwise specified.

STATEMENT OF THE CASE AND FACTS

Subject to the additions and clarifications contained in the argument portion of this brief, the State accepts petitioner's "statement of the case and facts" as a reasonably accurate portrait of the events below for purposes of resolving the narrow issues raised upon certiorari.

SUMMARY OF ARGUMENTS

Although this Court should not review the matter, the judge below properly denied petitioner's motion to suppress physical evidence, since the search revealing same was predicated upon a warrant obtained with either probable cause to suspect petitioner's criminal complicity, as the Fourth District Court of Appeal held, or a good faith belief in same.

The judge also properly denied petitioner's motion to dismiss those counts of the information charging him with possessing child pornography on constitutional grounds, because the statutory scheme criminalizing such conduct is constitutional in every respect, as the Fourth District also held.

ISSUE I

THIS COURT SHOULD REFUSE TO CONSIDER WHETHER THE FOURTH DISTRICT CORRECTLY HELD THAT THE JUDGE BELOW VALIDLY DENIED PETITIONER'S MOTION TO SUPPRESS; ALTERNATIVELY, THE LOWER COURTS RULED PROPERLY

ARGUMENT

Petitioner first alleges that the Fourth District incorrectly held that the judge below validly denied (SR 75-82; R 134) his motion to suppress incriminating physical evidence (R 92-93) because the search warrant which resulted in the seizure of this evidence (R 109-110) was issued pursuant to an affidavit from Detective John Silvas (R 107-108) which evinced neither objective probable cause to suspect petitioner's complicity in criminal activity nor reasonable grounds for the officer's good faith belief in same.

This Court should not review this claim since it is distinct from the bases upon which petitioner sought to invoke its jurisdiction, see e.g. Blackshear v. State, 522 So.2d 1083, 1084 (Fla. 1988).[1] In any event, petitioner's claim is meritless, for two reasons.

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[1] If this Court does elect to review petitioner's ancillary issue, the State would respectfully request that it concurrently indicate that the Fourth District wrongfully held in Schmitt v. State, 563 So.2d 1095, 1101 that petitioner's possession of multiple photographs of sexual performances by a child contrary to section 827.071(5), Fla. Stat. (1987) constituted only one crime. The Fourth District relied upon this Court's decision in State v. Watts, 462 So.2d 813 (Fla. 1985) for this conclusion, but failed to appreciate that Watts was distinguishable as involving multiple convictions for the possession of contraband by a prison inmate, which unlike the possession of multiple photographs of children performing sexually may be a victimless crime. An inmate who possesses 20 valium pills has not

A review of the record reveals that the detective was indirectly informed by petitioner's ex-wife that petitioner had been taking nude photographs of their 12-year old daughter C[redacted] S[redacted] in his residence (SR 27-28). Detective Silvas accordingly interviewed C[redacted] on January 7, 1988 (R 113-127). The physically well-developed victim (SR 44-45) informed Silvas that petitioner had been taking nude photographs of her for 4 years (R 114), that he had recently made a VCR tape of her and her friend A[redacted] M[redacted] toplessly "dancing nude....like stripping" (R 121), that he had also taken nude photographs of a "slut" or "prostitute" named Patty in her presence (R 117), that he had had her photograph him in the nude (R 123), and that he frequently went around their residence in the nude (R 119-120). Based upon this information, the detective believed in

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necessarily directly victimized 20 people, while a defendant who possesses 20 photograhps of 20 different children engaged in sexual performances has definitely directly victimized at least 20 people. Floridians have declared their sympathy for the victims of crime, not the perpetrators, see Article I, Section 16(b), Constitution of the State of Florida and section 960.02, Fla. Stat.

Even if this Court believes this portion of Schmitt was good law at one time, it should at least note that such is no longer viable given the amendment of section 775.021(4), Fla. Stat. (1988 Supp.) subsequent to Schmitt's conduct to more liberally permit multiple criminal prosecutions and dispositions for acts of the instant nature, see State v. Smith, 547 So.2d 613 (Fla. 1989). The State realizes, naturally, that it cannot benefit here from any opinion this Court might venture concerning its foregoing arguments, given its failure to file a cross-petition for certiorari in this case, cf. State v. Rogers, 565 So.2d 724, 725 (Fla. 4th DCA 1990). However, this does not preclude this Court from addressing this subject to provide guidance for litigants in future cases, see e.g. State v. Kinner, 398 So.2d 1360, 1362 (Fla. 1981) and Harp v. Hinckley, 410 So.2d 619, 620-621 (Fla. 4th DCA 1982). The State notes that it has advanced the foregoing arguments concerning Schmitt in its pending appeal in State v. Shaver, Fla. 4th DCA Case No. 90-2220.

uncontroverted good faith that he had probable cause to secure a warrant for the search of petitioner's residence for evidence that petitioner had caused a sexual performance by a child, had committed lewd and lascivious acts involving a child, had committed child abuse, and had possessed obscene literature (SR 43-47; 61; R 107-108). Silvas accordingly drafted an affidavit with the assistance of Sergeant Lloyd Jones, which resulted in Judge David Harper's issuance of a warrant (R 107-108; SR 61; R 109-110), the execution of which resulted in the discovery of numerous pieces of incriminating evidence (SR 11-12). Upon these facts, Judge Dwight Geiger denied the bulk of petitioner's motion to suppress, ruling that the search warrant had issued upon probable cause and that, even if it had not, Detective Silvas had acted in good faith in securing it (SR 75-82).

The judge ruled correctly. Axiomatically, "probable cause exists if a reasonable man, having the specialized training of a police officer, in reviewing the facts known to him, would consider that a felony is being or has been committed by the person" under suspicion. Mayo v. State, 382 So.2d 327, 329 (Fla. 1st DCA 1980), review denied, 388 So.2d 1116 (Fla. 1980), referencing State v. Profera, 239 So.2d 867, 868-869 (Fla. 4th DCA 1970). In determining whether probable cause to issue a warrant exists, a judge should not niggardly scrutinize the affiant's observations for blind obedience to technical niceties. United States v. Ventresca, 380 U.S. 102 (1965). Rather, "affidavits for search warrants....must be tested and interpreted by magistrates and courts in a commonsense fashion. They are

normally drafted by nonlawyers in the midst and haste of a criminal investigation." State v. Cook, 213 So.2d 18, 22 (Fla. 3rd DCA 1968), referencing United States v. Ventresca, 380 U.S. 102, 108. The decision of the magistrate in making a probable cause determination should be afforded great deference by both trial and appellate courts. Massachusetts v. Upton, 466 U.S. 727 (1984). The State submits that Judge Harper did not abuse his vast discretion in issuing a search warrant for petitioner's residence based upon Detective Silvas' observations, and that Judge Geiger properly validated the search occurring pursuant thereto. A man who has repeatedly photographed his physically well-endowed daughter in the nude, who has made a VCR tape of her toplessly dancing nude with a playmate like strippers, who has taken photographs of a nude woman in her presence, and who has himself directed her to photograph him in the nude, may be reasonably suspected of child abuse at the very least, not to mention sexual misconduct. Cf. Egal v. State, 469 So.2d 196 (Fla. 2nd DCA 1985), review denied, 476 So.2d 673 (Fla. 1985) and State v. Cote, 547 So.2d 993 (Fla. 4th DCA 1989).

Assuming arguendo that the warrant somehow issued absent probable cause, the detective's undisputed good faith belief that he had same to procure this warrant would render the fruits of its execution admissible in any event. See e.g. United States v. Leon, 468 U.S. 902 (1984); Bernie v. State, 524 So.2d 988 (Fla. 1988); State v. Wildes, 468 So.2d 550 (Fla. 5th DCA 1985); and United States v. Feola, 651 F.Supp. 1068, 1117-1118 (S.D.N.Y. 1987); cf. Illinois v. Rodriguez, 487 U.S. ___, 111 L.Ed.2d 148 (1990) and State v. Grace, 564 So.2d 1265 (Fla. 4th DCA 1990).

In sum, petitioner's motion to suppress was properly denied.

ISSUE II

THE FOURTH DISTRICT CORRECTLY HELD THAT THE JUDGE BELOW PROPERLY DENIED PETITIONER'S MOTION TO DISMISS THOSE COUNTS OF THE INFORMATION CHARGING HIM WITH POSSESSING CHILD PORNOGRAPHY ON CONSTITUTIONAL GROUNDS

ARGUMENT

Petitioner lastly alleges that the the Fourth District incorrectly held that the judge below validly denied (SR 18; R 135) his motion to dismiss (R 94) those counts of the information charging him with possessing child pornography in violation of section 827.071(5), Fla. Stat. as defined by section 827.071(1)(g), Fla. Stat. (R 50-54) because this statutory scheme is unconstitutional in three respects.[2] The State disagrees.

Petitioner's claim that this statutory scheme violates the proscriptions against vagueness and overbreadth guaranteed by the First, Fifth and Fourteenth Amendments to the Constitution of the United States because it is either unclear or criminalizes potentially innocent conduct is unavailing. As for vagueness, "it is well settled that the language of a statute or ordinance must convey a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice." Marrs v. State, 413 So.2d 774, 775 (Fla. 1st DCA 1981). "A vague statute is one that fails to give adequate notice of what conduct

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[2] The State notes that petitioner has wisely abandoned his contention below that section 827.071(5) violates the right to free speech guaranteed by the First and Fourteenth Amendments to the Constitution of the United States, obviously in light of the contrary holding in Osborne v. Ohio, 495 U.S.___, 109 L.Ed 2d 98 (1990), see also State v. Beckman, 547 So.2d 210 (Fla. 5th DCA 1989).

is prohibited and which, because of its imprecision, may also invite arbitrary and discriminatory enforcement." Southeastern Fisheries Assoc., Inc. v. Dept. of Natural Resources, 453 So.2d 1351, 1353-1354 (Fla. 1984). "When people of ordinary intelligence must necessarily guess as to its meaning and differ as to its application, the statute or ordinance violates the due process clause." Marrs v. State, 413 So.2d 774, 775. However, "courts cannot require the legislature to draft laws with such specificity that the intent and purpose of the law may be easily avoided." Southeastern Fisheries Assoc., Inc. v. Dept. of Natural Resources, 453 So.2d 1351, 1353.

The State quite confidently submits that the legislative declaration contained in section 827.071(5) that "it is unlawful for any person to knowingly possess any photograph, motion picture....or other presentation which, in whole or in part, he knows to include any sexual conduct by a child," put this petitioner of presumably average intelligence that the conduct for which he was charged was prohibited. Cf. Egal v. State. Indeed, the courts have upheld far less precisely worded statutes against charges that they were unconstitutionally void for vagueness. Compare Powell v. State, 508 So.2d 1307 (Fla. 1st DCA 1987), review denied, 518 So.2d 1277 (Fla. 1987), holding that section 950.09, Fla. Stat., which proscribes "malpractice by a jailer" through "willful inhumanity and oppression to any prisoner," was not unconstitutionally vague. As for overbreadth, the State notes that petitioner's colorful listing of numerous innocent examples of societially acceptable nudity which could

allegedly result in prosecutions under the instant statutory scheme has been rendered legally irrelevant by the Fourth District's acceptance in Schmitt v. State, 563 So.2d 1095, 1099-1100 of the Fifth District's decision of State v. Tirohn, 556 So.2d 447 (Fla. 5th DCA 1990), which gave this scheme a limiting construction to prevent its criminalization of innocent conduct. See also Osborne v. Ohio, 495 U.S.___, 109 L.Ed.2d 98 (1990).

Petitioner's claim that the statutory scheme violates the right to due process guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States because it constitutes an unreasonable exercise of the State's "police power" is also unavailing, since its means bears a rational relationship to its end. See United States v. Agilar, 612 F.Supp. 889, 890 (D.C.N.Y. 1985). Petitioner concedes that the scheme's legitimate end is the "elimination of the child pornography industry" ("Petitioner's Initial Brief on the Merits," p. 26); the criminalization of possession of the fruits of this industry is certainly a legitimate means to acheive this end. Compare State v. Burch, 545 So.2d 279, 282-286 (Fla. 4th DCA 1989), approved, Burch v. State, 558 So.2d 1, 3 (Fla. 1990), holding that the enhanced criminalization of the purchase or sale of drugs within one thousand feet of a schoolyard is a legitimate means of fulfilling the legitimate end of making drugs less accessible to children.

Petitioner's claim that the statutory scheme violates the right to privacy secured by Article I, Section 23 of the Constitution of the State of Florida is also unavailing. This

amendment was adopted by the Florida electorate on November 4, 1980, while the amendment to Article I, Section 12 of the Constitution of the State of Florida, limiting the right to protection from unreasonable searches and seizures to that afforded by the Fourth Amendment to the Constitution of the United States, was adopted by the electorate exactly two years later. Florida Statutes Annotated, 1989 Cumulative Annual Pocket Part, p. 89, 260. Hence, it is clear that the criminal community may not rely upon the privacy amendment for greater protection against governmental searches and seizures than that afforded under the Fourth Amendment, see State v. Hume, 512 So.2d 185, 188 (Fla. 1987); see also Stall v. State, 15 FLW S520 (Fla. October 11, 1990). The State has already demonstrated that the instant search and seizure comported with the Fourth Amendment. Moreover, petitioner's construction of the privacy amendment is contrary to C████ S████ right to privacy! See also Article I, Section 16(b), Constitution of the State of Florida and section 960.02, Fla. Stat., affording certain protections to the victims of crime.

In sum, petitioner's motion to dismiss those counts of the information charging him with possessing child pornography on constitutional grounds was properly denied.

CONCLUSION

WHEREFORE respondent, the State of Florida, respectfully submits that this Honorable Court must APPROVE the dispositions under review.

Respectfully submitted,

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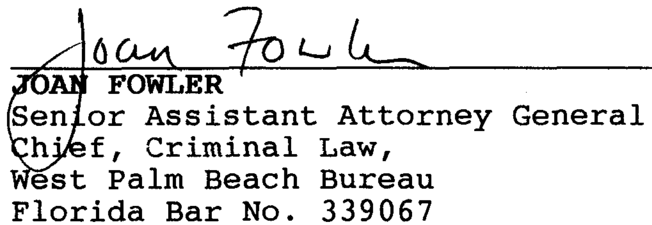

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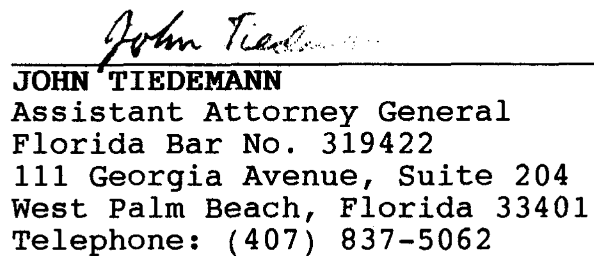

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by courier to: **CHERRY GRANT, ESQUIRE**, Assistant Public Defender, The Governmental Center, 301 N. Olive Avenue, 9th Floor, West Palm Beach, Florida 33401, this 19th day of December, 1990.

John Tiedemann

Of Counsel

/mmc

IN THE SUPREME COURT OF FLORIDA

KENNETH D. SCHMITT,

Petitioner,

vs. CASE NO. **76,317**

STATE OF FLORIDA,

Respondent.

_______________________________/

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PER CURIAM.

Madick Developers, Inc. appeals an adverse final judgment after a bench trial. We affirm in part and reverse in part.

[1] Appellee Heritage Corporation of South Florida was plaintiff below in a suit to collect, inter alia, a fee for arranging loans pursuant to a letter agreement between the parties. Madick contended that after initial involvement in negotiating the loan, Heritage effectively abandoned the project and forfeited the right to a fee. Heritage contended that it had substantially complied with its obligations under the letter agreement, that Madick and the lender chose to deal directly with each other while keeping Heritage informed of their progress, and that Heritage did all that was asked of it. As there was conflicting evidence presented at trial in support of these contentions, we do not disturb the trial court's resolution of the conflict by which the court determined that Heritage had earned a fee. *See Taylor Creek Village Association v. Houghton,* 349 So.2d 1219 (Fla. 3d DCA 1977); *Fountainhead Motel, Inc. v. Massey,* 336 So.2d 397 (Fla. 3d DCA 1976), *cert. denied,* 344 So.2d 324 (Fla.1977).

[2] We reach a different conclusion with regard to the amount of the fee. The agreement is clear on its face.* The agreement contemplated that there would be a construction loan and a permanent loan, and that Heritage would earn a fee of .75 percent of the loan amount for each loan. Heritage located the lender for the project and participated in obtaining the financing. However, the transaction was ultimately structured as a single thirty-year loan with a two-tier interest rate, a higher interest rate during the construction phase and a lower interest rate during the permanent phase. As there was but one loan, Heritage was entitled to a single fee, and was not entitled to a second fee when the loan interest rate dropped as the loan entered its "permanent" phase. We therefore reverse the final judgment on count three. In view of this result, Madick's remaining point on appeal and Heritage's cross-appeal are moot.

Affirmed in part, reversed in part and remanded for entry of judgment in favor of Madick on count III.

* Were there ambiguity, it would be construed against Heritage, the drafter. *Belen School, Inc. v. Higgins,* 462 So.2d 1151, 1154 (Fla. 4th DCA 1984).

Kenneth D. SCHMITT, Appellant,

v.

STATE of Florida, Appellee.

No. 89-0187.

District Court of Appeal of Florida, Fourth District.

June 13, 1990.

Defendant was convicted in the Circuit Court, Martin County, Dwight L. Geiger, J., of lewd and lascivious behavior, sexual performance by a child, promotion of sexual performance by a child, and possession of child pornography, and he appealed. The District Court of Appeal, Polen, J., held that: (1) statute defining sexual conduct is overbroad but would be construed narrowly as applying only to lewd or lascivious; (2) defendant had no constitutional right to possess child pornography in his home; (3) there was probable cause for a search of defendant's home; (4) indictment did not adequately allege promotion of a sexual performance by a child; (5) State could refile proper information; and (6) possession of several articles of child pornography is to be treated as a single offense.

Affirmed in part and reversed and remanded in part.

1. Arrest ⚷63.4(2)

Probable cause exists where reasonable man, having the specialized training of a police officer, in reviewing the facts known to him, would consider that a felony is being or has been committed by the person under suspicion.

2. Arrest ⚷63.4(2)

Process of probable cause does not deal with certainties but with probabilities; they are not technical niceties but are factual and practical considerations of everyday life upon which reasonable and prudent men, not legal technicians, act.

3. Arrest ⚷63.4(2)

Probable cause is a fluid concept, turning on the assessment of probabilities in particular factual contexts, not readily or even usefully reduced to a neat set of legal rules.

4. Searches and Seizures ⚷105

Affidavits for search warrants must be tested and interpreted by magistrates and courts in a common sense fashion.

5. Searches and Seizures ⚷124

Technical requirements of elaborate specificity once exacted under the common-law pleadings have no place in the area of search warrants.

6. Searches and Seizures ⚷113

Facts constituting cause for a search need not meet the standard of conclusiveness and probability required of circumstantial facts upon which a conviction must be based.

7. Searches and Seizures ⚷200

Magistrate's determination of probable cause should be paid great deference by reviewing courts, and after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of de novo review.

8. Searches and Seizures ⚷200

Duty of the reviewing court is to insure that the magistrate who issued the search warrant had a substantial basis for concluding that probable cause existed.

9. Searches and Seizures ⚷113

Probable cause for search of defendant's home was presented by affidavit which indicated that defendant began taking nude pictures of his child at age eight and continued for over a four-year period, that he had begun making videotape recordings after the child matured into womanhood, and that there were continuing incidents of nude photography.

10. Obscenity ⚷1.2

Although nudity alone may be purely innocent, conduct which might be purely innocent can be found to be lewd and lascivious if accompanied by the requisite improper intent.

11. Obscenity ⚷2.5

Child pornography statute is not unconstitutional. West's F.S.A. § 827.071(5).

12. Obscenity ⚷2.5

Provision of child pornography statute defining sexual conduct as actual physical conduct with a person's clothed or unclothed genitals or buttocks is overbroad, but is to be construed narrowly as applying only to lewd or lascivious conduct. West's F.S.A. § 827.071(1)(g).

13. Obscenity ⚷2.5

Definition of sexual conduct in child pornography statute is not void for vagueness. West's F.S.A. § 827.071(1)(g).

14. Criminal Law ⚷13.1(1)

Fact that several interpretations of a statute may be possible does not render a law void for vagueness.

15. Constitutional Law ⚷82(10), 90.4(1)

Defendant did not have constitutional right to possess child pornography in his own home. West's F.S.A. Const. Art. 1, § 23; West's F.S.A. § 827.071.

16. Indictment and Information ⚷60

Where an indictment or information wholly omits to allege one or more essential elements of the crime, it fails to charge a crime under the law of the State.

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17. Habeas Corpus ⟹271

Indictment and Information ⟹196(5)

Complete failure of accusatory instrument to charge a crime is a defect that can be raised at any time, before trial, after trial, on appeal, or by habeas corpus.

18. Infants ⟹20

Indictment which charged that defendant photographed his daughter while dancing topless wearing only bikini panties did not allege any sexual conduct and thus did not assert the offense of promoting sexual performance by a child. West's F.S.A. § 827.071(1)(g, h), (2).

19. Criminal Law ⟹1190

Reversal of defendant's conviction for promoting sexual performance because indictment did not allege activity which constituted sexual conduct was without prejudice to the State's right to refile a proper information setting forth allegations which would support those counts, where the record was clear that the State could have amended the counts to provide graphic detail of defendant's vile conduct. West's F.S.A. § 827.071(1)(g, h), (2).

20. Infants ⟹13

Defendant could be convicted of promoting sexual performance by a child even though videotape which he made of his daughter and another was never shown to an audience. West's F.S.A. § 827.071.

21. Infants ⟹13

Fact that child was aware of videotaping did not preclude finding that defendant was guilty of promoting sexual performance by a child. West's F.S.A. § 827.071.

22. Criminal Law ⟹29(12), 984(3)

Use of the word "any" in statute making it a crime to knowingly possess any photograph which includes sexual conduct by a child indicates legislative intent that possession of several articles should be treated as a single offense, with multiple convictions and punishments precluded. West's F.S.A. § 827.071(5).

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Robert A. Butterworth, Atty. Gen., Tallahassee, and John Tiedemann, Asst. Atty. Gen., West Palm Beach, for appellee.

POLEN, Judge.

Schmitt appeals his conviction for lewd and lascivious behavior, sexual performance by a child, promotion of a sexual performance by a child and possession of child pornography. He raises five points on appeal. We affirm in part and reverse in part.

In January 1988 the Martin County Sheriff's Office received information that appellant was taking nude photographs of his twelve-year-old physically well developed daughter in Port Salerno. Sheriff's deputies interviewed the child and learned that the nude photography occurred over a four-year period. The interview revealed that appellant recently videotaped the child and another female child dancing topless. The child informed the deputies that appellant took nude photographs of an adult woman in her presence. Appellant also instructed the child to take nude photographs of him. The child indicated that appellant walked around his residence in the nude and in her presence.

Based upon this information, deputies applied for and obtained a search warrant for appellant's residence. The deputies executed the warrant and discovered numerous pieces of incriminating evidence. Appellant moved to dismiss several counts of the information. The trial court denied these motions. Appellant then entered a plea of nolo contendere reserving his right to appeal.

Appellant's first point argues that there was insufficient evidence to indicate any type of criminal activity which would establish probable cause for the issuance of the warrant. We disagree.

The deputy's affidavit in support of the application for the search warrant alleged in pertinent part:

Kenneth Schmitt, had taken numerous nude photographs of her in various poses ... that her father had a nude adult white female pose for nude photographs in her presence. The juvenile victim also stated that she has taken nude photographs of her father numerous times.

....

[T]he father obtained a VHS video recording system. During this time ... the father utilized the camera to record the juvenile victim and a white female friend disrobe, or as the juvenile described it, stripping down to their panties.... During the same time frame ... the father utilized the same VHS camera to record the juvenile victim swimming in the nude.

Based upon this activity, the affidavit alleged violations of section 827.071, Florida Statutes (1987), sexual performance of a child; section 800.04, lewd or lascivious acts or indecent assault or act upon or in the presence of a child; section 827.04, child abuse; and chapter 847, obscene literature or profanity. The affidavit further indicates that the officer had been a sheriff's deputy for six years; that he was assigned to the criminal investigations division; and that he previously investigated a number of child abuse and sexual battery cases.

[1, 2] Probable cause exists if a reasonable man, having the specialized training of a police officer, in reviewing the facts known to him, would consider that a felony is being or has been committed by the person under suspicion. *Mayo v. State*, 382 So.2d 327 (Fla. 1st DCA 1980), *review denied*, 388 So.2d 1116 (Fla.1980). In dealing with probable cause as the very name implies, *the process does not deal with certainties but with probabilities.* These are not technical niceties. They are factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act. *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). In *Gates*, the Supreme Court wrote:

Long before the law of probabilities was articulated as such, practical people formulated certain common sense conclusions about human behavior; jurors as fact finders are permitted to do the same and so are law enforcement officers. Finally the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.

Id. at 231–232, 103 S.Ct. at 2328–2329, 76 L.Ed.2d at 544, *quoting United States v. Cortez*, 449 U.S. 411, 418, 101 S.Ct. 690, 695, 66 L.Ed.2d 621 (1981).

[3] Thus, "probable cause is a fluid concept—turning on the *assessment of probabilities* in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules. (Emphasis added). *Gates*, 462 U.S. at 232, 103 S.Ct. at 2329, 76 L.Ed.2d at 544.

[4–6] In the same vein, affidavits for search warrants must be tested and interpreted by magistrates and courts in a commonsense fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. *State v. Cook*, 213 So.2d 18 (Fla. 3d DCA 1968), *citing United States v. Ventresca*, 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965). The facts constituting cause need not meet the standard of conclusiveness and probability required of circumstantial facts upon which a conviction must be based. *State v. Drowne*, 436 So.2d 916 (Fla. 4th DCA 1983). Reaffirming these premises, the Supreme Court in *New York v. P.J. Video, Inc.*, 475 U.S. 868, 876, 106 S.Ct. 1610, 1615, 89 L.Ed.2d 871, 881 (1986), concluded:

Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the magistrate's decision.

....

The task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before

him, ... there is a fair probability that contraband or evidence of a crime will be found in a particular place.

[7, 8] Accordingly, a magistrate's determination of probable cause should be paid great deference by reviewing courts. After the fact scrutiny by courts of the sufficiency of an affidavit should not take the form of de novo review. *Massachusetts v. Upton,* 466 U.S. 727, 104 S.Ct. 2085, 80 L.Ed.2d 721 (1984). The duty of the reviewing court is to insure that the magistrate who has issued the search warrant had a substantial basis for concluding that probable cause existed. *State v. Jacobs,* 437 So.2d 166 (Fla. 5th DCA 1983).

[9] In applying these time tested standards to the instant case, we believe that the magistrate had a substantial basis for concluding that there was a fair probability that contraband or evidence of a crime would be found at appellant's residence.

The deputy's affidavit indicates that appellant began taking nude pictures of the child at age eight and continued over a four-year period. The affidavit further reflects that appellant was taking pictures of the nude child in various poses and that appellant graduated into videotape recording after the child matured into womanhood.

We believe that continuing incidents of nude photography involving appellant and an adult female, the nude videotaping of a twelve-year-old physically developed female child and *another female child* stripping down to her panties, the frequency and duration of these sessions, indicates a course of conduct whereby the magistrate could reasonably believe that appellant's conduct involved illegal activity.

[10] We agree that nudity alone may *under different circumstances* be purely innocent. Yet, conduct which might be purely innocent can be found to be lewd and lascivious if accompanied by the requisite improper intent. *Egal v. State,* 469 So.2d 196 (Fla. 2d DCA 1985), *review denied,* 476 So.2d 673 (Fla.1985).

Based upon the totality of the circumstances presented by the facts of this case, we affirm point I on appeal.

[11] Appellant's second point on appeal raises several issues. First, he challenges the constitutionality of section 827.071(5), Florida Statutes (1987). We disagree and uphold the constitutionality of the statute upon the authority of *State v. Beckman,* 547 So.2d 210 (Fla. 5th DCA 1989).

Appellant's second issue under this point warrants discussion. Schmitt claims that section 827.071(1)(g), Florida Statute (1987), is void for vagueness and suffers from overbreadth.

Section 827.071(1)(g) provides:

> (g) "Sexual conduct" means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual lewd exhibition of the genitals; *actual physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast;* or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed.

(Emphasis added.)

[12–14] Appellant argues that the statute is overbroad because this conduct can include a parent patting a baby's diapered behind or a high school yearbook with prom photos showing couples draped around each other in a slow dance.

In *State v. Tirohn,* 556 So.2d 447 (Fla. 5th DCA 1990), appellee claimed that the language of section 827.071(1)(g) would prohibit possession of a picture of a father bathing his son, two clothed children hugging each other in such a way that their clothed genitals made actual physical contact, or a photograph of a junior high school coach giving a congratulatory smack of the hand to the buttocks of one of his players fully dressed in football uniform. The fifth district concluded that the statute was overbroad and struck down this portion of the statute as unconstitutional. We agree that the statute is overbroad. However, we choose to construe the statute

narrowly as applying only to lewd or lascivious conduct.[1] We also reject appellant's void-for-vagueness argument. The fact that several interpretations of the statute may be possible does not render a law void for vagueness. "Words inevitably contain germs of uncertainty" but when regulations "are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, there is no sacrifice to the public interest." *City of Daytona Beach v. Del Percio,* 476 So.2d 197 (Fla.1985).

[15] Appellant erroneously asserts that he has a constitutional right to possess child pornography in his own home. Recently, the United States Supreme Court addressed a similar issue in *Osborne v. Ohio,* — U.S. —, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990). In that case, an Ohio statute made it a criminal offense to "possess or view any material or performance that shows a minor who is not the person's child in a state of nudity." Appellant was convicted of possessing nude photographs of a male adolescent in sexually explicit positions. The Ohio Supreme Court construed the statute narrowly as applying to lewd exhibitions or graphic focus on the genitals. By limiting the statute's operation, the Ohio Supreme Court avoided penalizing persons for viewing or possessing innocuous photographs of naked children. Appellant challenged the statute on overbreadth grounds. The Supreme Court upheld the constitutionality of the statute. Justice White, writing for the majority, rejected appellant's argument that possession of child pornography in the home is protected by the First Amendment. Referring to its decision in *Stanley v. Georgia,* 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969), Justice White cautioned that *Stanley* should not be read too broadly.

> We have previously noted that *Stanley* was a narrow holding ... and, since the decision in that case, the value of permitting child pornography has been characterized as "exceedingly modest, if not *de minimis.*" (Citations omitted.)

— U.S. at —, 110 S.Ct. at 1695.

In the same vein, the high court rejected Osborne's overbreadth challenge and found that the narrow construction of the statute avoided any overbreadth problems. Likewise, we hold that appellant has no constitutional right to possess child pornography in his home and reject his overbreadth challenge. Lastly, we reject appellant's privacy argument pursuant to Article I, Section 23, of the Florida Constitution. *State v. Hume,* 512 So.2d 185 (Fla.1987).

As to appellant's third point raised on appeal, we find that the trial court erred in adjudicating appellant guilty in counts IV, VI, VII and IX of the indictment. The trial judge declined to dismiss certain counts of the information charging appellant with promoting a sexual performance by a child in violation of section 827.071(2), Florida Statutes (1987), because topless dancing by a well-developed female child wearing only bikini panties does not constitute "sexual conduct" by a child as that phrase is defined in section 827.071(1)(g) and (h).

[16, 17] In *State v. Gray,* 435 So.2d 816 (Fla.1983), the supreme court concluded that if a charging instrument completely fails to charge a crime, a conviction violates due process. Moreover, where an indictment or information wholly omits to allege one or more essential elements of the crime, it fails to charge a crime under the law of the state. Since a conviction cannot rest upon such an indictment or information, the complete failure of an accusatory instrument to charge a crime is a defect that can be raised at any time, before trial, after trial, on appeal or by habeas corpus. *Id.* at 818.

[18, 19] In the instant case, sexual performance, pursuant to the statute, has two requirements. First, it must be a performance. Second, the performance must in-

1. "The term 'lewd and lascivious' has been referred to as generally and usually involving 'an unlawful indulgence in lust, eager for sexual indulgence'.... That term has also been said to connote wicked, lustful, unchaste, licentious, or sensual design on the part of the perpetrator .... The term 'imports more than a negligent disregard of the decent proprieties and consideration due to others.'" *Egal v. State,* 469 So.2d at 197 (citations omitted).

clude the criteria enounced for sexual conduct. These requirements were not met. Indeed, if the legislature did intend to proscribe this type of conduct, the language of these statutes does not support that intent. The record is clear that the state could have amended these counts to provide graphic detail of appellant's vile conduct. While we reverse the convictions in these counts, we do so without prejudice to the state's right to refile a proper information setting forth the allegations which would support these counts.[2] *See, e.g., Zanger v. State*, 548 So.2d 746 (Fla. 4th DCA 1989). Accordingly, we reverse and remand point III on appeal.

[20, 21] In point IV, appellant argues that the trial court erred in failing to dismiss counts IV through VII where the videotape was never shown to an audience. This court addressed a similar argument addressed in *Firkey v. State*, 557 So.2d 582 (Fla. 4th DCA 1990). In *Firkey*, appellant videotaped an alleged sexual battery. He asserted that his conviction for having a child engage in a sexual performance, pursuant to section 827.071, Florida Statutes (1987), could not stand since the videotape had never been exhibited to an audience. Section 827.071(1)(b), Florida Statutes (1987), reads:

> (b) Performance means any play, motion picture, photograph, or dance or any other visual representation exhibited before an audience.

Appellant chooses to read this court's decision as requiring that the person recorded must be unaware of the videotaping. Thus, since the child was aware of the videotaping, no violation of the statute occurred. Such an interpretation is without logic or support. As the *Firkey* court stated:

> [T]he legislature did not intend the creator of such a motion picture complete with sound should escape prosecution because he had not, as yet, had time to exhibit his vile handiwork."

Id. at 584.

Accordingly, we affirm point IV on appeal.

[22] Finally, we find that the trial court erred in adjudging appellant guilty of seven counts of possession of photographs of a child's sexual conduct. Section 827.071(5), Florida Statutes (1987), reads in pertinent part:

> (5) It is unlawful for any person to knowingly possess *any* photograph, motion picture, exhibition, show, representation, or other presentation which in whole or in part, he knows to include any sexual conduct by a child.

(Emphasis added).

Appellant was charged in counts VIII through XIV and adjudged guilty with the possession of seven different photographs. We conclude that by use of the word "any," the legislature intended that possession of several articles should be treated as a single offense with multiple convictions and punishments precluded. *State v. Watt*, 462 So.2d 813 (Fla.1985). Thus, appellant's six additional convictions must fall. Accordingly, we affirm in part and reverse and remand in part to the trial court for further action consistent with this opinion.

DELL and WALDEN, JJ., concur.

2. The record reveals that police seized several video scripts entitled, "Female Rambos" and "Christy Nasty" complete with costumes, that were ready for production by appellant. Similarly, one videotape seized reveals appellant directing his daughter to insert an object into her vagina. Thus, the state could have amended the information to comply with the statutory language.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by courier to: **CHERRY GRANT, ESQUIRE**, Assistant Public Defender, The Governmental Center, 301 N. Olive Avenue, 9th Floor, West Palm Beach, Florida 33401, this 19th day of December, 1990.

John Tiedemann

Of Counsel

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