IN THE SUPREME COURT OF FLORIDA

SC 00-214

FILED
DEBBIE CAUSSEAUX
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BY

JIM WADE,

Petitioner

vs. Case No. 2000-214

STATE OF FLORIDA,

Respondent

_____/

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

BRIEF OF RESPONDENT ON JURISDICTION

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STATEMENT REGARDING TYPE

The size and style of type used in this brief is 12-point Courier New, a font that is not proportionately spaced.

TABLE OF CITATIONS

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts.

SUMMARY OF THE ARGUMENT

No conflict has been presented between the case cited by Petitioner and the opinion of the Second District Court of Appeal which, upon the issue raised herein relies on an opinion from this Court. Therefore no conflict has been presented, rather the opinion of the Second District Court of appeal presents adherence to the law as previously applied to similar cases by this Court.

ARGUMENT

ISSUE I

WHETHER THE OPINION OF THE SECOND DISTRICT COURT OF APPEAL IN WADE V. STATE, CASE NO. 98-00180 CONFLICTS WITH THE DECISION OF THIS COURT IN MCKENDRY V. STATE, 641 SO.2D 45 (FLA. 1994).

Petitioner argues he should have been charged under a statutory provision that addresses pornography via computer rather than under the generic pornography statute because his child pornography was stored in his computer and that the specific statute should prevail over the general.

Although Respondent argued below that Petitioner waived this issue inasmuch as no motion to dismiss the Information was filed before the trial court, it is clear that a prosecutor has discretion to determine which charges the State can prove beyond a reasonable doubt, and to make the determination as to which statutory provision has been violated, and to charge accordingly. In the instant case, both the statutory provision under which Petitioner was charged, and that which he claims he should have been prosecuted under address child pornography. Section 821.071(5) for which Petitioner was convicted of violating, and section 847.0135(2) for which he argues he should have been prosecuted under are third degree felonies yet they each possess different elements. It is one of the functions of a prosecutor to determine what charges should be filed, and what provisions should be alleged

to have been violated, and which elements can be proven at trial.

The decision of the Second District Court of Appeal rests upon the decision of this Court in State v. Cogswell, 521 So.2d 1081 (Fla. 1988) where, the court relied upon United States v. Batchelder, 442 U.S. 114, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979) where the United States Supreme Court held:

> There is no appreciable difference between the discretion a prosecutor exercises when deciding whether to charge under one of two statutes with different elements and the discretion he exercises when choosing one of two statute with identical elements ..."

State v. Cogswell, supra at 1082. The opinion of the Second District Court of Appeal is not in conflict with McKendry v. State, 641 So.2d 45 (Fla. 1994) as urged by Petitioner, which addresses statutory construction principles in the sentencing, not charging arena. Id. at 46.

CONCLUSION

Based on the foregoing, Petitioner has failed to establish the opinion under attack is in conflict with an opinion of this Court and the opinion of the District Court of Appeal was so clearly correct in its analysis and result, this Court need not exercise its power of discretionary review.

Respectfully submitted,
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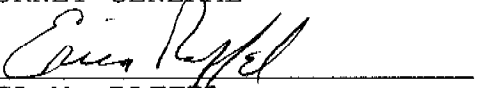
ATTORNEY GENERAL



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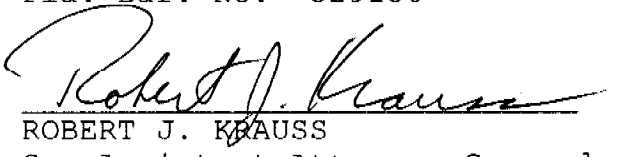

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Jim Wade, DOC# H04015, Central Florida Reception, P. O. Box 628050, Orlando, Florida 32862-8050 this 4th day of February, 2000.

OF COUNSEL FOR RESPONDENT

Criminal law -- Possession of child pornography with intent to promote -- Possession of child pornography -- No merit to claim that defendant should have been charged on counts relating to computer hard drive files under statute which specifically deals with computers and child pornography rather than under statute which prohibits child pornography in general -- Prosecutor had discretion to determine under which statute to charge defendant -- Error to adjudicate defendant guilty of multiple counts of possession of child pornography with intent to promote where multiple copies of three different photographs were found during single search of defendant's residence -- Only one conviction is allowed for single episode

JIM LEE WADE, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 98-00180. Opinion filed January 12, 2000. Appeal from the Circuit Court for Polk County; Cecelia M. Moore, Judge. Counsel: Lynn A. Williams, Tallahassee, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Erica M. Raffel, Assistant Attorney General, Tampa, for Appellee.

(PATTERSON, Chief Judge.) Jim Wade appeals from his judgment and sentence for three counts of possession of child pornography with intent to promote and fifty-four counts of possession of child pornography. We reverse two of the convictions for possession of child pornography with intent to promote, affirm the remaining convictions, and remand for resentencing.

As the result of undercover operations by United States Customs agents, Polk County Sheriff's officers arrested Wade when he accepted delivery of three child pornography videotapes he had ordered on the Internet from the undercover agents. Wade was arrested at a Days Inn where he resided and was the general manager. Wade consented to a search of his two connecting rooms. The officers found the three videotapes that had just been delivered, a computer with America Online service, and printed reproductions of computer files showing children involved in sexual conduct. After obtaining a search warrant, a computer expert with the Florida Department of Law Enforcement searched the computer hard drive and found files containing images of children involved in sexual conduct.

The State charged Wade in counts one through three with possession of child pornography with intent to promote, pursuant to section 827.071(4), Florida Statutes (1995). Count one was based on six printed reproductions of a single computer graphic file and a print which law enforcement produced from the computer file. Four of the reproductions were found on the nightstand and two were found on the entertainment center in Wade's rooms. Count two was based on three reproductions of the same image. One was found in the nightstand drawer, one was found on top of the entertainment center, and one was printed by law enforcement from a computer graphic file. Count three was based on four images of the same photo law enforcement retrieved and printed from the computer hard drive files. In counts four through fifty-seven, the State charged Wade with possession of child pornography, pursuant to section 827.071(5), Florida Statutes (1995). These possession charges were based on Wade's computer hard drive files and the three videotapes.

The jury found Wade guilty as charged on all counts. On counts one through three, the trial court sentenced Wade as a habitual offender to concurrent terms of twenty years in prison, to be followed by ten years' probation. On counts four through fifty-seven, the trial court sentenced Wade

as a habitual offender to concurrent terms of ten years in prison, also concurrent with counts one through three.

First, we reject Wade's argument that the prosecutor should have charged him on the counts relating to the computer hard drive files under section 847.0135, Florida Statutes (1995), which specifically deals with computers and child pornography, rather than under section 827.071, Florida Statutes (1995), which prohibits child pornography in general. As the State argues, the prosecutor had the discretion to determine under which statute to charge Wade. *See State v. Cogswell,* 521 So. 2d 1081 (Fla. 1988). Thus, the trial court correctly denied Wade's motion for judgment of acquittal on this ground.

Wade also contends that the trial court should not have adjudicated him guilty of more than one count of possession of child pornography with intent to promote. Section 827.071(4), Florida Statutes (1995), provides the following:

> It is unlawful for any person to possess with the intent to promote any photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, includes any sexual conduct by a child. The possession of three or more copies of such photograph, motion picture, representation, or presentation is prima facie evidence of an intent to promote. Whoever violates this subsection is guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Relying on *State v. Parrella*, 736 So. 2d 94 (Fla. 4th DCA 1999), Wade argues that in using the modifier ``any" rather than ``a" before the terms ``photograph, motion picture, exhibition, show, representation, or other presentation," the legislature intended to punish as a single crime any possession of these items, regardless of the number of items possessed during the episode. Parrella was charged with four counts of possession of child pornography with intent to promote for showing portions of four different videotapes to undercover detectives on one occasion. The Fourth District affirmed the dismissal of three of the four counts and held that the legislature's use of the modifier ``any" in section 827.071(4) showed an intent ``that all of the contraband be viewed in the episodic sense with only a single unit of prosecution intended." *Id.* at 95. *See also Wallace v. State*, 724 So. 2d 1176 (Fla. 1998) (holding that section 843.01, Florida Statutes (1993), which prohibits resisting ``any officer," allowed only one conviction when the defendant resisted two officers in a single incident).

The State suggests that the *Parrella* decision is incorrect and points to the portion of section 827.071(4) which provides, ``The possession of three or more copies of such photograph, motion picture, representation, or presentation is prima facie evidence of an intent to promote." The State contends that this language evinces an intent to prosecute for each set of different photos. We read this language to provide only for a presumption of the defendant's intent to promote when the defendant possesses three or more copies. For example, in *Parrella*, a presumption of intent to promote was unnecessary because the detectives actually caught Parrella trying to sell four different videotapes. Here, the multiple copies of three different photos provide prima facie evidence that Wade intended to promote these photos. Law enforcement found all the photos, however, during one search of Wade's connecting rooms at the Days Inn. This is one episode and, under *Parrella*, allows for only one conviction. Therefore, we direct the trial court to vacate two of Wade's convictions for possession of child pornography with intent to promote and to resentence Wade on the remaining convictions.

Affirmed in part, reversed in part and remanded. (PARKER and STRINGER, JJ., Concur.)

* * *