

**IN THE
SUPREME COURT OF OHIO**

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| STATE OF OHIO | : | NO. 2007-1006 |
| Plaintiff-Appellee | : | On Appeal from the Hamilton County Court of Appeals, First Appellate District |
| vs. | : | |
| ROBERT J. ANDREWS A/K/A ROB ANDREWS | : | Court of Appeals Case Number C-060545 |
| Defendant-Appellant | : | |

MEMORANDUM IN RESPONSE

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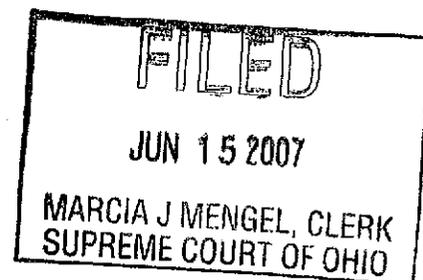


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IN THE
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STATE OF OHIO : NO. 07-1006
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ROBERT J. ANDREWS A/K/A ROB : MEMORANDUM IN RESPONSE
ANDREWS :
Defendant-Appellant :

**EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC OR
GREAT GENERAL INTEREST AND DOES NOT INVOLVE A
SUBSTANTIAL CONSTITUTIONAL QUESTION**

The primary issue in this case is whether attempted importuning is a criminal offense. Andrews pled no contest to attempted importuning after engaging in a sexually explicit chat discussion with a fictitious 13 year old girl. In this chat discussion, Andrews solicited sex from the fictitious girl. Andrews was charged under R.C. 2907.07(D), which reads:

“No person shall solicit another by means of a telecommunications device, as defined in section 2913.01 of the Revised Code, to engage in sexual activity with the offender when the offender is eighteen years of age or older and either of the following applies:

(1) The other person is thirteen years of age or older but less than sixteen years of age, the offender knows that the other person is thirteen years of age or older but less than sixteen years of age or is reckless in that regard, and the offender is four or more years older than the other person.

(2) The other person is a law enforcement officer posing as a person who is thirteen years of age or older but less than sixteen years of age, the offender believes that the other person is thirteen years of age or older but less than sixteen years of age or is reckless in that regard, and the offender is four or more years older than the age the law enforcement officer assumes in posing as the person who is thirteen years of age or older but less than sixteen years of age.”

Andrews argues that importuning is an attempt offense and that the crime of attempted importuning is an attempt of an attempt.

Andrews is incorrect. Ohio's importuning statute is aimed at protecting children from sexual exploration over the Internet. Nowhere in the statute does the word attempt appear. In fact, Andrews did all that was necessary to complete the crime of importuning. The extraneous factor that intervened to make the crime an attempted rather than completed importuning is the fact that Andrews was communicating with a civilian adult posing as a minor rather than a law enforcement officer posing as a minor.

Moreover, several states have considered this issue and support this conclusion.¹

The Court of Appeals applied the correct analysis and its conclusion is supported by case law. This case therefore does not involve a question of great public concern or an issue of significant constitutional import.

¹ Wisconsin v. Robins, 253 Wisc.2d 298, 2002-WI-65, 646 N.W.2d 287; Adams v. Wyoming, 2005-WY-94, 117 P.3d 1210; Laughner v. Indiana (2002), 769 N.E.2d 1147.

STATEMENT OF THE CASE

Procedural Posture:

A Hamilton County Grand Jury on December 15, 2004, returned a 5 Count indictment against defendant-appellant Robert Andrews that charged him with: pandering sexually oriented matter involving a minor [Counts 1 and 2, R.C. 2907.322(A)(1)], felonies of the second degree; illegal use of a minor in nudity-oriented material or performance [Count 3, R.C. 2907.323(A)(3)], a felony of the fifth degree; tampering with evidence [Count 4, R.C. 2921.12(A)(1)], a felony of the third degree; and, attempted importuning [Count 5, R.C. 2923.02(A)], a misdemeanor of the first degree.

On April 14, 2006, Andrews entered into a plea agreement with the state. Andrews pled no contest to an attempted tampering with evidence in Count 4, taking it from a felony of the third degree to a felony of the fourth degree; and, to attempted importuning as charged in Count 5. In exchange for his plea of no contest, the state dismissed counts 1,2, and 3. Andrews was sentenced to serve a 3 year period of community-control on each count and designated a sexual-oriented offender. The community-control sanction was stayed pending appeal. On April 27, 2007, the Court of Appeals affirmed.

Facts:

Andrews pled no contest to attempted tampering with evidence and attempted importuning. The facts as stated by the prosecutor at the plea hearing were as follows. Andrews engaged in conduct between November 13, 2004, and November 19, 2004, that, if successful, would have resulted in him completing the offense of tampering with evidence, knowing that an official proceeding or investigation was in progress or was about to be or likely instituted and that he altered,

destroyed, concealed or removed a certain record, document or thing (computer images), with purpose to impair the value or availability of evidence in such proceeding or investigation. (T.p.57)

On November 13, 2004, Andrews knowingly engaged in conduct, which if successful, would have constituted or resulted in him completing the offense of importuning. Andrews engaged in computer chat discussions with an adult posing as a 13 year old girl. During those chat discussions, Andrews solicited sexual activity from the fictitious 13 year old. It was stipulated that the person posing as the 13-year old was an adult but not a law enforcement officer. (T.p.58)

ARGUMENT

FIRST PROPOSITION OF LAW: THE CRIME OF IMPORTUNING REQUIRES THE CRIMINAL ACT OF A VERBAL SOLICITATION OF SEXUAL ACTIVITY

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RATHER THAN A
LAW
ENFORCEMENT**

**OFFICER POSING
AS A MINOR.**

Andrews argues that the trial court erred in overruling his motion to dismiss. Andrews filed a motion to dismiss the attempted importuning charge in Count 5 of the indictment on two grounds: that importuning is already an attempt crime and it is unconstitutional to charge someone with an attempt to commit an attempt; and, that the substantive crime of importuning criminalizes free speech that is protected by the First Amendment. Neither argument has merit.

In Andrew's plea of no contest to the charge of attempted importuning he admitted that he knowingly engaged in conduct that, if successful, would have constituted or resulted in the offense of attempted importuning.

By pleading no contest to the charge of attempted importuning, Andrews admitted to the truth of the facts as alleged in the indictment.² At the plea hearing, the prosecutor specifically stated that on November 13, 2004, Andrews "knowingly engaged in conduct which if successful would have constituted or resulted in the offense of importuning as defined in Section 2907.07 (E) of the Ohio Revised Code." (T.p. 58) Andrews accepted these facts. (T.p. 58) By pleading no contest, Andrews waived his right to present additional affirmative defenses and factual allegations to prove his innocence of the charges.³ Andrews waived all defects in the indictment at the plea hearing. (T.p. 56-57)

Consequently, once Andrews entered his pleas of no contest to the charged offenses, the trial court was required to enter a judgment of conviction, so long as the indictment contained allegations sufficient to state the relevant charges. Andrews agreed that the indictment was not defective in this

²*State v. Bird*, 81 Ohio St.3d 582, 1998-Ohio-606, 695 N.E.2d 266.

³*State v. Mascio*, 75 Ohio St.3d 422, 1996-Ohio-93, 662 N.E.2d 370.

regard. Andrews' no contest pleas operated to waive his right to assert error pertaining to the sufficiency of the evidence against him.⁴

Andrews did all that he believed was necessary to commit the crime of importuning. The extraneous factor that intervened to make the crime an attempted rather than a completed importuning is the fact that Andrews was communicating with a civilian adult posing as a minor rather than a law enforcement officer posing as a minor.

Contrary to Andrews assertion, attempted importuning is a crime. Here, the State charged Andrews with conduct which, if successful, would have constituted the offense of importuning as defined in R.C. 2907.07, which states in relevant part as follows:

“No person shall solicit another by means of a telecommunications device . . . to engage in sexual activity when the offender is eighteen years of age or older and either of the following applies:

“. . . The other person is a law enforcement officer posing as a person who is thirteen years of age or older but less than sixteen years of age, the offender believes that the other person is thirteen years or older but less than sixteen years of age or is reckless in that regard, and the offender is four or more years older than the age the law enforcement officer assumes in posing as the person who is thirteen years of age or older but less than sixteen years of age.”

In Ohio, in order to be found guilty of an attempt, the offender must take a “substantial step” toward complete commission of the offense. A “substantial step” is one that strongly corroborates criminal purpose.⁵

At bar, the uncontested facts are that Andrews engaged in computer conversations with someone whom he believed was a 13-year old when in fact it was an adult posing as a 13-year old.

⁴*Id.*

⁵*State v. Briscoe* (1992), 84 Ohio App.3d 569, 617 N.E.2d 747.

It was stipulated that the adult was not a police officer. During these conversations, Andrews solicited sexual activity with the fictitious 13-year old. (T.p. 58)

Andrews took a “substantial step” in committing the crime of importuning when he entered into a sexually explicit computer chat discussion with someone he believed was a 13- year old girl. His expressed intent to meet the girl and engage in sexual activity with her strongly corroborates his criminal purpose. The extraneous factor that intervened to make the crime an attempted rather than completed importuning is the fact that Andrews was communicating with a civilian adult posing as a minor rather than a law enforcement officer posing as a minor. But Andrews unquestionably did all that he believed necessary to commit the substantive crime of importuning and the fact that it was impossible for him to commit the crime is of no consequence.⁶

Andrews argues that since the *actus reus* of importuning is *soliciting* a minor to engage in sexual activity and not the actual participation of the minor in sexual activity, he claims that there can be no such thing as an attempted solicitation because such a charge would amount to an attempt to commit an attempt crime. Andrews cites to a 1979 decision issued by a trial court that held that there could not be an attempt to commit the offenses of prostitution and soliciting as those offenses were defined in 1979.⁷ These offenses at that time targeted criminal activity aimed at adult victims. The language and target of Ohio’s rather new importuning law aims to protect the sexual exploitation of children by adults over the Internet. The criminal act committed by Andrews here was a verbal solicitation of a 13-year old to engage in sexual activity. The question therefore is whether a verbal

⁶R.C. 2923.02(B).

⁷*State v. Anderson* (1979), 62 Ohio Misc. 1, 404 N.E.2d 176.

solicitation, in the context of Internet chat discussions, can involve a substantial step toward commission of a substantive crime.

The State found no Ohio authority for the proposition that there can *not* be an attempt to commit importuning under the current statute. However, the Indiana courts have construed their computer-facilitated luring or soliciting of a child statute and determined that attempted solicitation under such a statute *is* a crime.

The analysis must begin with the Indiana Supreme Court's finding that attempted child molesting is a crime.⁸ In so finding, the Indiana Supreme Court determined that a verbal solicitation rises to the level of an attempt to commit the crime of child molesting. In its analysis the court set out the following three step test to determine whether a verbal solicitation amounts to an attempt: (1) the solicitation takes on the form of urging; (2) the solicitation urges the commission of the crime at some immediate time and not in the future; and (3) the cooperation or submission of the person being solicited is an essential feature of the substantive crime.⁹

Hence, the court held that a verbal solicitation can be a substantial step, given certain facts. As to the second step, the court expressly noted that "child molesting is a sufficiently serious crime to justify drawing a fairly early line to identify and sanction behavior as an attempt."¹⁰

Applying the above reasoning to an attempted child solicitation offense, an Indiana appellate court concluded that attempted child solicitation is a crime.¹¹

⁸ *Ward v. State* (1988), 528 N.E.2d 52.

⁹ *Ward v. State*, 528 N.E.2d 52.

¹⁰ *Id* at 54.

¹¹ *Laughner v. State* (2002), 769 N.E.2d 1147.

Indiana's child solicitation statute reads as follows:

"A person eighteen (18) years of age or older who knowingly and intentionally solicits a child under fourteen (14) years of age to engage in

... any fondling or touching intended to arouse or satisfy the sexual desires of either the child or the older person; commits child solicitation, a class D felony. However, the offense is a Class C felony if it is committed by using a computer network."¹²

Indiana's definition of attempt is similar to Ohio's in that the culpability required for commission of an attempt crime is that a person "engages in conduct that constitutes a substantial step toward commission of the crime".¹³ Indiana, like Ohio, states that it is no defense that it would have been impossible for the accused person to commit the crime attempted.¹⁴

The Indiana appellate court applying the analysis of the Indiana Supreme Court in the child molesting charge concluded that "the provisions of Indiana statutory and common law suffice to support the existence of the crime of attempted child solicitation in the case of one who engages in an overt act that constitutes a substantial step toward soliciting someone believed to be a child under fourteen to engage in sexual activity, even if it turns out the solicited person is an adult."¹⁵

Using the analysis of the Indiana courts, a person can attempt to solicit a child for sexual activity through verbal acts. That is exactly what Andrews did here. Andrews urged whom he believed to be a 13-year old girl to have sex with him in the immediate future and the cooperation or submission of the person being solicited is an essential feature of Ohio's importuning statute, same as Indiana's computer-facilitated or soliciting of a child statute.

¹²Ind.Code § 35-42-4-6.

¹³Ind.Code § 35-41-5-1.

¹⁴Ind.Code § 35-41-5-1(b).

¹⁵*Laughner v. State*, 769 N.E.2d at 1155.

Even if Andrews had not waived this issue, he entered a plea of no contest to the unlawful offense of attempted importuning.

Soliciting a child for sex is not protected speech under the First Amendment.

Andrews contends that his sexually explicit Internet conversations with an adult posing as a 13-year old was protected speech under the First Amendment. Andrews relies on the United States Supreme Court decision in *Ashcroft v. Free Speech Coalition*.¹⁶

In *Ashcroft*, the Court considered a First Amendment challenge to two provisions of the Child Pornography Prevention Act of 1996 (“CPPA”), which extended the federal prohibition against child pornography to include not only using pornographic images using actual children, but also visual depictions of “virtual minors” that appear to be engaged in sexual conduct. The Court recognized the prohibited images of what appeared to be minors engaged in sexual conduct was neither obscene under *Miller v. California*¹⁷, nor child pornography produced by the depiction of real children under *New York v. Ferber*¹⁸. The Court said the government may not suppress lawful speech as a means to suppress unlawful speech and recognized the CPPA prohibited speech that created no crime or victims by its production.¹⁹ The Court held both provisions of the CCPA were substantially overbroad and violated the First Amendment.²⁰

¹⁶(2002), 535 U.S. 234, 152 L. Ed. 2d 403, 122 S. Ct. 1389.

¹⁷(1973), 413 U.S. 15, 37 L. Ed. 419, 93 S. Ct. 2607

¹⁸(1982), 458 U.S. 747, 73 L. Ed. 1113, 102 S. Ct. 3348; *Ashcroft*, at 250-251

¹⁹Compare *Ashcroft*, supra, with *Ferber*, at 761.(Pornography depicting actual children can be proscribed even if not obscene because state has interest in protecting children exploited by the production process).

²⁰*Ashcroft*, at 258.

Ashcroft involved a First Amendment challenge to a statute that prohibited the dissemination or production of certain materials; it did not involve a challenge to a statute, like the one at bar, that prohibits speech used to *solicit* a minor to engage in sexual acts. This is an important distinction that seriously undermines Andrews' First Amendment argument under *Ashcroft* that R.C. 2907.07(E)(2) infringes on constitutionally protected free speech because no real victims are involved. R.C. 2907.07(E)(2) does not impose an unconstitutional burden on protected adult speech, but is directed to regulating the activity of attempting to solicit a minor for sexual activity. A defendant does not have a First Amendment right to attempt to solicit minors to engage in illegal sexual acts.²¹

Other courts have considered comparable statutes to R.C. 2907.07(E)(2) and concluded that the First Amendment does not protect speech used in conjunction with the conduct of child solicitation.²² In *People v. Foley*²³ the court recognized New York's luring statute was "a preemptive strike against sexual abuse of children by creating criminal liability for conduct directed towards the ultimate acts of abuse." It is the prohibited conduct of soliciting a child for sex that R.C. 2907.07(E)(2) seeks to regulate, conduct which is not protected by the Constitution.²⁴

²¹ *State v. Tarbay* (2004), 157 Ohio App.3d 261, 810 N. E.2d 979; *State v. Bailey*, (6th Cir. 2000), 228 F. 3d 637, 639.

²² *People v. Hsu* (2000), 82 Cal. App. 4th 976, 99 Cal. Rptr. 2d 184; *People v. Foley* (2000), 94 N.Y. 2d 668, 709 N.Y.S.2d 467, 731 N.E.2d 123; *People v. Barrows* (2000), 273 A.D.2d 246, N.Y.S.2d 573; *State v. Robins* (2002), 253 Wis. 2d 298, 646 N.W.2d 287; *Laughner v. State* (2003), 769 N.E.2d 1147; and, *State v. Backlund*, 2003 ND 184, 627 N.W.2d 431, 2003 N.D. LEXIS 198.

²³ 731 N.E.2d at 129

²⁴ *State v. Snyder*, 155 Ohio App.3d 453.

Further, this Court has held that “the First Amendment does not protect all forms of sexual solicitation, particularly those that involve underage persons. And even among teenagers and adults, certain offensive forms of sexual solicitation may cross over into the area of fighting words when they have the potential to cause emotional injury or provoke a violent reaction.”²⁵

R.C. 2907.07(E)(2) prohibits offensive sexual solicitations that are “fighting words”. Here, Andrews’ chat discussions with a minor female was sexually explicit and certainly had the potential to cause emotional injury to a minor child.

In sum, the speech targeted by R.C. 2907.07(E)(2) falls outside the protection of the First Amendment. Andrews’ proposition of law is properly overruled.

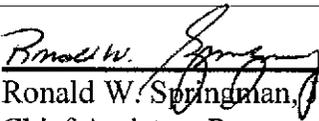
²⁵*State v. Bailey* 2002 Ohio 3133, 2002 Ohio App. LEXIS 3193 at ¶22.

CONCLUSION

Appellee submits that jurisdiction must be denied.

Respectfully,

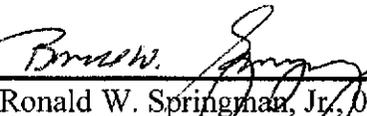
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I hereby certify that I have sent a copy of the foregoing Memorandum in Response, by United States mail, addressed to H. Louis Sirkin and Candace C. Crouse, Attorneys at Law, 105 West Fourth Street, Suite 920, Cincinnati, Ohio 45202 and Clayton G. Napier, Attorney at Law 29 North D Street, Hamilton, Ohio 45013-3128, counsel of record, this 14th day of June, 2007.


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