

IN THE SUPREME COURT OF OHIO

07 - 1611

STATE OF OHIO

Appellant

vs.

JOSE A. RIVAS

Appellee

Case No. _____

On Appeal from the Greene County
Court of Appeals, Second Appellate
District

Court of Appeals
Case No. 2005-CA-147

MEMORANDUM IN SUPPORT OF JURISDICTION OF
APPELLANT- STATE OF OHIO

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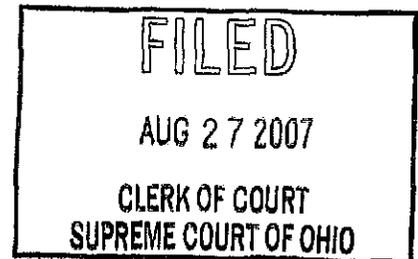


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**EXPLANATION OF WHY THIS CASE IS A CASE OF
PUBLIC OR GREAT GENERAL INTEREST AND
INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION**

This case involves an issue of great importance to all parties involved in criminal and potentially civil cases in the Second Appellate District. The State respectfully submits that the appellate court's holding that, "[w]hile the State insists that their witnesses verified the accuracy of the copies, a defendant should not be required to take the word of the adverse party - the police in this case - that a transcript of information stored on a hard drive is accurate, especially where that information constitutes the very crime that the defendant is alleged to have committed", would completely and utterly eviscerate the ability of a law enforcement officer to authenticate evidence of a crime. This holding in the case below will not only be applied to other criminal cases involving computer hard drives, but it could also be applied to evidence obtained from digital cameras or cellular phones or other electronic devices. Further, the appellate court's requirement of trial courts to employ experts to allow in camera inspections of digital or electronic media, will have an unduly burdensome effect on trial courts, as it will require additional cost and time.

Moreover, pursuant to R.C. 149.43 (A)(1)(h), the General Assembly clearly intended to make confidential law enforcement records exempt from discovery in certain instances. With its holding in the instant case, the Second District Court of Appeals has not only disregarded the will of the legislature and substituted its own, it has also eviscerated this Court's long-standing Evid. R. 901(B), regarding the admissibility of evidence based upon the testimony of a witness with knowledge. This holding is a usurpation of the legislative power of the General Assembly and this

Court.

In pertinent part, R.C. 149.43(A)(2)(a)-(d) clearly defines a confidential law enforcement investigatory record as a record which “pertains to a law enforcement matter of a criminal, quasi-criminal, civil, or administrative nature, but only to the extent that the release of the record would create a high probability of any of the following: (a) the identity of a suspect who has not been charged with the offense to which the record pertains...; (b) information provided by an information source ... to ...which information would reasonably tend to disclose the source’s or witness’s identity; (c) specific confidential investigatory techniques or procedures or specific investigatory work product; (d) information that would endanger the life or physical safety of law enforcement personnel, a crime victim, a witness, or a confidential information source.” The statute clearly intends that confidential law enforcement investigatory records that fall into any one of these four categories shall not be made available through the discovery process.

This case will potentially impact all criminal cases in the Second Appellate District, and possible other appellate districts. Thus, it may impact the lives of many of Ohio’s citizens. It further involves a substantial constitutional question in whether the Second District violated the separation of powers doctrine, in creating a rule of discovery that is clearly not intended by the statute enacted by the General Assembly, and a rule of authentication that is clearly not intended by this Court. Accordingly, the State of Ohio respectfully requests that this Court accept jurisdiction in this case, as it will at least impact the admissibility of evidence and discovery proceedings in all counties in the Second Appellate District, and possibly other districts as well.

STATEMENT OF THE CASE

On January 14, 2005, the Defendant was indicted for Importuning, a violation of O.R.C. 2907.07(D)(2), a felony in the fifth degree; and Attempted Unlawful Sexual Conduct With a Minor, a violation of O.R.C. 2907.04(A), a felony in the fourth degree. Defense counsel filed two discovery motions that were initially sustained on March 11, 2005. Defense counsel also filed a motion to suppress the chat room transcripts; for which a hearing was scheduled at a later date. On June 24, 2005, the Defendant filed a motion to compel production of the hard drive used by the Xenia Police Department in undercover internet cases. A hearing was held on this motion to compel on July 7, 2005, but due to an equipment malfunction, no transcript of this hearing is available. The parties agreed to stipulate to certain facts regarding that hearing. As a result of the hearing, the Defendant's motion was denied. A motion for reconsideration was filed on July 18, 2005, and after a hearing, this motion as well as the Defendant's motion to suppress were denied on August 11, 2005. A two-day jury trial took place on September 28 and 29, 2005, after which the Defendant was found guilty of both counts and sentenced to serve six months on each count, to run concurrently.

The Defendant appealed his conviction to the Second District Court of Appeals alleging the following assignments of error: 1.) The trial court erred in denying appellant's motion to compel inspection and copying of the computer hard drive; and 2.) The trial court erred in admitting into evidence at trial the State's unauthenticated paper printouts of electronic data. The Second District affirmed the first assignment of error and held that the trial court erred in overruling the Defendant's Motion to Compel because, "[w]hile the State insists that their witnesses verified the accuracy of

the copies, a defendant should not be required to take the word of the adverse party - the police in this case - that a transcript of information stored on a hard drive is accurate, especially where that information constitutes the very crime that the defendant is alleged to have committed." This holding could adversely impact the admissibility of evidence in all criminal cases in the Second District, with regard to authentication. Therefore, the State is respectfully requesting that this Court accept jurisdiction in this case, to reverse the unwarranted holding of the court of appeals in the instant case.

STATEMENT OF THE FACTS

On January 3, 2005, Detective Alonzo Wilson, posing as a 14-year-old girl named Molly, engaged in an internet chat with the Defendant, with the screen name of "Jrivas123". The Defendant told Detective Wilson that he was a 19 year-old male, and asked "Molly" how old she was. "Molly" indicated that she was 14 years old. After learning this information, the Defendant asked for a picture of "Molly", which was sent, and the Defendant quickly sent one back to her; the picture he sent was of his erect penis. The conversation quickly turned sexual, with the Defendant asking about sexual experience "Molly" did or did not have. He first asked whether or not she had ever engaged in oral sex; asking "so you mean you haven't even sucked on one yet?". "Molly" indicated she was scared of getting pregnant, to which he responded she should make sure the guy uses a condom and says "I'll help you". When "Molly" asked how the Defendant was going to help her, he indicated he would meet her somewhere, take her to a hotel and then in explicit sexual terms indicates what he would do to her upon meeting. The Defendant then asked who she lived with, to which "Molly"

responded she lived with her grandmother. The Defendant asked if she had a web camera, to which "Molly" responded she did not. The Defendant indicated he wished she had one so that he could see a picture of her vagina. The Defendant then offered to give "Molly" \$200 so she could buy a camera as well. After asking "Molly" if she had any other pictures and "Molly" responding in the negative, the Defendant said that she was "really cute". The Defendant began asking when "Molly" wanted to meet and asked if there was a hotel close to where she lived. "Molly" indicated there was a Holiday Inn visible from her house. The Defendant asked where she lived, and indicated he was from Cincinnati. He asked if she wanted to do it that night; when Detective Wilson was kicked off of AOL. By the time Detective Wilson was able to log back, the Defendant was gone. "Molly" then sent the Defendant an email saying she was booted off.

On January 4, 2005, the Defendant again contacted "Molly" just after 4:00 P.M. The Defendant again quickly turned the conversation sexual, asking "Molly" if she shaved her vaginal area and asking how large her breasts were. When "Molly" complained about her breast size, the Defendant said he would "suck on them and make them grow"; he then indicated they would get larger "after her first fuck". "Molly" then indicated she had to finish her homework before speaking with the Defendant, and that her grandmother had gotten mad she got on the computer before finishing her homework. After approximately 40 minutes, "Molly" indicated to the Defendant that she had finished her homework, and that she didn't think the Defendant should call the house because she was afraid she'd get in trouble. "Molly" indicated she had a pager and suggested the Defendant try that. The Defendant immediately paged her and left the numbers "999" in the pager to test and see if it

worked. The Defendant then asked if she wanted to meet that night, and asked her if she could shave her pubic region. When "Molly" indicated she could not, he asked her to cut her pubic hair very short. The Defendant indicated he would be in Xenia in approximately an hour to an hour and a half, and that he would put the room number in her pager. Before ending the conversation, the Defendant asked "Molly", "you are not a cop are you?"; "Molly" indicated she was not.

After terminating the conversation, Detective Wilson immediately contacted Detective Barlow, Detective Meadows and Detective Osborne to assist him in surveillance of the Holiday Inn hotel. Three unmarked cars were outside the Holiday Inn hotel in strategic locations so all traffic could be monitored. Detective Wilson informed the manager of the Holiday Inn what was going on; the manager allowed Detective Wilson to wait in the office behind the counter where patrons check in. At approximately 6:45, Detective Meadows observed a single male pull into the gas station right next to the Holiday Inn, go inside and use the ATM to withdraw money, and then drive over and pull in to the Holiday Inn. The Defendant then came inside and booked a room for one night. The manager at the Holiday Inn made a photo copy of the Defendant's license; the name on it being Jose Rivas from Cincinnati, Ohio. Detective Wilson was able to observe this information from his location inside the manager's office. Mr. Rivas was assigned room number 302; shortly thereafter, Detective Wilson's undercover pager went off with the number "302" displayed on the screen. The Defendant was arrested, and he was found carrying a cell phone, three condoms and a roll of \$200 that was kept outside of his wallet.

ARGUMENT

PROPOSITION OF LAW NO. 1

A TRIAL COURT PROPERLY DENIES A MOTION TO COMPEL DISCOVERY OF A CONFIDENTIAL, LAW ENFORCEMENT INVESTIGATORY RECORD, ABSENT A SHOWING OF PARTICULARIZED NEED.

The granting or denial of a motion to compel discovery is reviewed under an abuse of discretion standard. *State ex rel The V Cos v. Marshall* (1998), 81 Ohio St. 3d 467, 469. The term “abuse of discretion implies more than an error of law or judgment, it implies that the court’s attitude is unreasonable, arbitrary, or unconscionable. *State v. Adams* (1980), 62 Ohio St. 2d 151, 157. When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St. 3d 619, 621. In the case at bar, the trial court properly concluded that Criminal Rule 16 does not require the State of Ohio to provide a “mirror image” of its hard drive to the Defendant, in the absence of allegations and some evidence that what has been provided by the State is not accurate. Clearly, by holding that the Defendant should not have to take the word of a law enforcement officer under oath that an item of evidence is a fair and accurate depiction of what it purports to be, the Second District has substituted its discretion for that of the trial court in the instant case.

The holding of the trial court is a proper and logical ruling as the Detective testified that he has used that particular computer hard drive since 2002 to exclusively investigate child exploitation cases. Thus, the hard drive of the computer is a confidential law enforcement investigatory record. Under O.R.C. 149.43(A)(1)(h), a confidential law enforcement investigatory record is not a public record, and is therefore not subject to

disclosure. Courts employ a two-step test to determine whether a record is exempt as a confidential law enforcement record under the above statute. First, it must be determined whether the record in question is, in fact, a confidential law enforcement record. Secondly, would release of the record “create a high probability of disclosure” of any of the following: (1) the identity of a suspect who has not yet been charged with the offense to which the record pertains...; (2) information provided by an information source.. to ...which information would reasonably tend to disclose the source’s... identity; (3) specific confidential investigatory techniques or procedures or specific investigatory work product; or (4) information that would endanger the life or physical safety of a law enforcement officer, a victim or crime, a witness, or a confidential information source. O.R.C. 149.23(A)(2)(a)-(d), see also *State ex rel. Beacon Journal Publ. Co. v. Maurer* (2001), 91 Ohio St. 3d 54.

In this case, the Defendant sought discovery of the hard drive of the computer in which Detective Wilson of the Xenia Police Department used to participate in internet chats with the Defendant. Detective Wilson testified that this was the computer he used while investigating cases of this nature (TR 8/11/05 p. 7). He further testified that he was involved in other active investigations on the computer and hard drive in question since the Defendant’s arrest (TR 8/11/05 p. 7, 8). Detective Wilson also testified that the chats he participates in, as well as any email correspondence that takes place, are in separate folders designated by screen name (TR 8/11/05 p. 18). The hard drive of this particular computer contains the screen names of suspects who were the subject of ongoing investigation, which were separated by folder and would have been disclosed had the hard drive been copied in any way.

The testimony of the Detective has established that the hard drive of Detective Wilson's computer is a confidential law enforcement investigatory record. Thus, the State submits that similar to obtaining a grand jury transcript, the Defendant must show something akin to a particularized need which outweighs law enforcement's need for confidentiality in order to obtain a copy of it. *See State v. Greer* (1991), 66 Ohio St. 2d 139. Determining whether there exists a particularized need is solely within the trial court's discretion. *Id.* Such a need exists "when the circumstances reveal a probability that the failure to provide the grand jury testimony would deny the defendant a fair trial." *State v. Davis* (1988), 38 Ohio St 3d 361, 364-365 *qtg.* *State v. Sellards* (1985), 17 Ohio St. 3d 169, 173. In the case at bar, the lower court found that the defendant did not demonstrate that his need of a copy of the hard drive would outweigh the need for secrecy, especially where the Defendant would have access to the same transcript on his own computer hard drive, that he conveniently destroyed.

Moreover, the appellate court erroneously concluded that the information contained in the transcript of the internet chat constitutes the commission of the crime of importuning and attempted unlawful sexual conduct with a minor. To the contrary, the evidence of the crime is demonstrated by the testimony of Detective Wilson, and is corroborated by the transcript of the chat. It is possible that the testimony of the Detective alone could have been sufficient evidence to convict the Defendant. The transcript of the chat is merely corroborative and similar to an oral and/or written confession of a defendant. When introducing the confession of a defendant, the officer obtaining the confession testifies to the conversation they had with the defendant. Then, if it is available to corroborate that testimony, the State will offer the written statement of a defendant and

the officer will authenticate that it fairly and accurately depicts the statement he obtained. Then, if the defendant disputes the authenticity of the statement, he can impeach the officer. There is no difference between this process and the case at bar, except for the manner in which the transcript is created.

Further, the documents and files on Detective Wilson's hard drive pertain to criminal matters that fall under the scope of a confidential law enforcement record, and the release of these records would create an extremely high probability of disclosure of the identities of multiple suspects who had not yet been charged with crimes. Thus, the trial court did not err in denying the Defendant access to the hard drive or a copy thereof, nor did it deny the Defendant his due process right to the discovery of evidence.

A criminal defendant has a due process right to discovery of evidence that is material to that defendant's guilt or punishment. *State v. Hesson* (1996), 110 Ohio App. 3d 845 citing *Brady v. Maryland* (1963), 373 U.S. 83. The Supreme Court of Ohio has set forth the test to determine whether a defendant's due process rights have been violated by the failure to disclose evidence. In making such a determination, evidence shall be deemed material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *State v. Johnston* (1988), 39 Ohio St. 3d 48. "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome". *Id.* The right to discovery does not entitle a defendant "to the pre-trial disclosure of all information that might be useful in contradicting unfavorable testimony and does not enable her to search through all of the state's files" *Hesson*, 110 Ohio App. 3d 845, citing *Pennsylvania v. Ritchie* (1987), 480 U.S.

39.

The Defendant erroneously relied upon *State v. Robinson*, 8th App. No. 84930, 2005 Ohio 1988 in the appellate court for the proposition that a defendant has a right to independent testing of evidence. In *Robinson*, the Court recognized that, by statute, the defendant in that case had the right to independent testing because he was being charged with an offense involving a controlled substance. *Robinson*, 2005 Ohio 1988. That case is inapplicable here, as that statute only applies to offenses involving a controlled substance, and is not applicable to either one of the charges the Defendant was facing at trial.

In this case, Detective Wilson testified the chat conversations, as introduced, were complete and accurate. He testified that the chat logs were printed January 4, 2005 at 5:54 pm, just 24 minutes after the conclusion of the last chat. (TR 8/11/05 p.77) Further, based on the testimony of the Defendant's own expert, there is nothing to suggest any information existed on the hard drive that would have been material to the Defendant. (TR 8/11/05 p.67-68) The State is fully aware that, had such information existed, they would have an obligation to turn it over and certainly would have done so. The fact is, no such information did, in fact, exist.

The Defendant's argument is essentially that he thought he was traveling to Xenia to meet a 41 year old woman instead of a 14 year old girl. He argues that repeated "booting" of the Detective's computer altered the files of the chat logs and changed 41 to 14. However, this contention is completely belied by the record. As previously mentioned, the Detective testified that he printed the chat logs that were provided in discovery on January 4, 2005. Thus, the concern that the "booting" of the computer fifty times somehow altered the transcript is allayed. Further, throughout the chats, the Defendant

engages in numerous conversations with “Molly” about school, homework, and getting in trouble with her grandmother. It is doubtful that any 41 year old woman would be worried about getting in trouble with her grandmother for checking her email before doing homework. Therefore, even if the computer somehow magically changed 41 to 14, there is no evidence that it could invent the language contained in the rest of the transcript.

Moreover, the Defendant sent a naked picture of a much younger man during the initial chat. It is not logical that he would be concerned about appearing younger if he is having a conversation with a 41 year old. Finally, the Defendant’s own hard drive contained the same chat log as the Detective’s. If the transcript truly revealed that the Defendant believed he was talking with a 41 year old woman, it is not likely that he would have erased it. As such, the trial court appropriately held that he was not entitled to the production of the hard drive, absent a showing of some defect. Again, his own witness testified that if the Detective printed the chat logs almost immediately after the conclusion of the chat, and he reviewed the logs and found that they represent an accurate replication of the conversations with the Defendant, his concerns as to authenticity are minimized or eliminated. (TR 8/15/05 p.68)

Because there is no reasonable probability the result of the trial would have been different had the Defendant been granted access to the Xenia Police Department’s hard drive, there has been no violation of the Defendant’s due process rights.

PROPOSITION OF LAW NO. 2:

THE INTERNET CHAT TRANSCRIPTS WERE PROPERLY AUTHENTICATED PURSUANT TO EVID. R. 901(B)(1) BECAUSE DETECTIVE WILSON HAD KNOWLEDGE REGARDING THE CONVERSATION THAT WAS TRANSCRIBED.

Authentication or identification is a condition precedent to admissibility of

evidence, which is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. *State v. Brown* (1995), 107 Ohio App. 3d 194. There are several ways to prove authentication, provided by illustration pursuant to Evid. R. 901(B). One way to meet this requirement is of a witness with knowledge; this includes testimony that a matter is what it is claimed to be. Evid. R. 901(B)(1), *State v. Easter* (1991), 75 Ohio App.3d 22. “This low threshold standard does not require conclusive proof of authenticity, but only sufficient foundational evidence for the trier of fact to conclude that the document is what its proponent claims it to be.” *Id.* The evidence necessary to support the finding that a document in question is what the proponent claims it to be has a very low threshold - one that is less demanding than the preponderance of the evidence. *State v. May* (1999), 133 Ohio App. 3d 351. “Any firsthand knowledge, however acquired, is an appropriate basis for testimony on the issue of authentication where the testimony logically connects the documents with the issues of the case.” *Bross v. Smith* (1992), 80 Ohio App.3d 246 (finding the authentication requirement does not require proof of authorship; the question of whether a jury had sufficient evidence to determine whether the Defendant was in fact the author of a writing is an entirely separate question than whether the disputed writing was properly authenticated).

In this case, Detective Wilson was the individual that was, at all times, seated at the computer in Xenia chatting with the Defendant online. As the only other participant to that conversation, he certainly has firsthand knowledge with respect to the ability to answer the question of whether or not the print outs accurately reflect his conversations with the Defendant. There is a low standard applied with respect to this issue; one that is certainly met by the testimony of Detective Wilson. In the instant case, Detective Wilson testified

he had firsthand knowledge as to the contents of the internet chat conversations and was able to competently authenticate the transcripts. Thus, the trial court did not err in admitting them as evidence.

Further, establishing the chain of custody is part of the authentication and identification requirement found in Evid. R. 901. *State v. Brown* (1995), 107 Ohio App. 3d 194. The burden of establishing the chain of custody with respect to a particular piece of evidence rests with the State. *Id* citing *State v. Barzacchini* (1994), 96 Ohio App. 3d 440. This burden is not conclusive; the State must only establish that it is reasonably certain that substitution, alteration or tampering did not occur. *State v. Blevins* (1987), 36 Ohio App. 3d 147. Even if the chain of custody is broken, it goes to the weight afforded the evidence, not its admissibility. *Id*.

In the case at bar, Detective Wilson testified that he maintained the chat transcripts from the time he printed them out and throughout the investigation until they were turned over for trial. Detective Wilson further testified that the computer print outs were accurate with respect to his conversations with the Defendant, and that he maintained the transcript of the conversation since the day of the investigation (Trial TR p. 83) This is sufficient to establish the chain of custody, and the trial court did not err in admitting this evidence

CONCLUSION

In this case, the Defendant's objection to the transcripts was based on issues of authenticity and an incomplete chain of custody (Trial TR p. 118). The transcripts were originally stored on a computer; and were printouts that Detective Wilson testified reflected that data fairly and accurately. Because Detective Wilson had firsthand knowledge as to the contents of the internet chat conversations and was able to

competently authenticate the transcripts, these documents were properly authenticated. The accuracy of the computer print out was rightfully authenticated by the testimony of the person having control and direction of the computer system. Detective Wilson testified that he maintained the chat transcripts from the time he printed them out and throughout the investigation until they were turned over for trial. Detective Wilson further testified that the computer transcript was accurate with respect to his conversations with the Defendant, and that he maintained the transcript of the conversation since the day of the investigation (Trial TR 83) This is sufficient to establish the authentication and chain of custody, and the trial court did not err in admitting this evidence.

For the foregoing reasons, the State respectfully requests this Court accept jurisdiction and reverse the unduly burdensome ruling of the Greene County Court of Appeals.

Respectfully submitted,

OFFICE OF THE GREENE COUNTY
PROSECUTING ATTORNEY

By: _____

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Assistant Prosecuting Attorney

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been sent by regular U. S. Mail the date same as filed of record above to Marc Mezibov & Stacy Hinnens, Mezibov & Jenkins, 401 E. Court Street, Suite 600, Cincinnati, OH 45202.

Angela M. Howard

FILED

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COURT OF APPEALS
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
GREENE COUNTY

STATE OF OHIO

Plaintiff-Appellee

v.

JOSE A. RIVAS

Defendant-Appellant

Appellate Case No. 05-CA-147

Trial Court Case No. 05-CR-33

(Criminal Appeal from
Common Pleas Court)

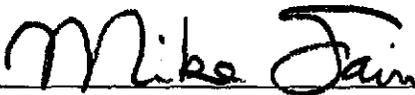
FINAL ENTRY

Pursuant to the opinion of this court rendered on the 13th day
of July, 2007, the judgment of the trial court is **Reversed**, and this cause is
Remanded for further proceedings consistent with the opinion.

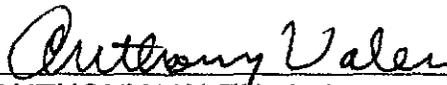
Costs to be paid as stated in App.R. 24.



JAMES A. BROGAN, Judge



MIKE FAIN, Judge



ANTHONY VALEN, Judge
(sitting by assignment)

07-07-1535

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07-07-1536

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COURT OF APPEALS
CLERK OF COURTS

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
GREENE COUNTY**

STATE OF OHIO

Plaintiff-Appellee

v.

JOSE A. RIVAS

Defendant-Appellant

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:
: Appellate Case No. 05-CA-147
:
: Trial Court Case No. 05-CA-33
:
: (Criminal Appeal from
: Common Pleas Court)
:

OPINION

Rendered on the 13th day of July, 2007.

STEPHEN K. HALLER, Atty. Reg. #0009172, by ELIZABETH A. ELLIS, Atty. Reg. #0074332, Greene County Prosecutor's Office, 61 Greene Street, Xenia, Ohio 45385
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Attorneys for Defendant-Appellant

FAIN, J.

Defendant-Appellant Jose Rivas appeals from his convictions for Importuning and Attempted Unlawful Sexual Conduct with a Minor. The charges arose from Rivas's on-line

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DATE 07/16/2007

THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT

COMPUTER

07-07-1527

chats with a Xenia police officer posing as a fourteen-year-old girl whom Rivas arranged to meet at a hotel for sex. Rivas filed a series of pre-trial motions regarding discovery issues, after which the case proceeded to a jury trial. The jury found Rivas guilty as charged, and the trial court sentenced him to six months in prison.

Rivas challenges the trial court's ruling that he not be allowed to make an electronic copy of the police department's computer hard drive on which the original records of the on-line chats were stored. Rivas also maintains that the transcripts of those chats should not have been admitted into evidence, because they were not properly authenticated. Although allowing Rivas to copy the entire hard drive may have compromised other investigations, as well as the privacy of those involved, we conclude that the trial court did have an obligation to conduct an in camera review to verify the accuracy of the copied records that Rivas received. In our view, forcing a litigant to rely upon an adverse party's representation that a transcript from a hard drive accurately reflects the information stored on the hard drive, when that accuracy could be directly verified, is inconsistent with due process. The judgment of the trial court is Reversed, and this cause is Remanded for further proceedings consistent with this opinion.

In early January, 2005 Xenia Police Detective Alonzo Wilson, who works in the Internet Child Protection Unit, entered an America On Line (AOL) chat room. Within minutes of Alonzo entering the general chat room, and before he had even made any contributions, thirty-six-year-old Rivas contacted Wilson via instant messaging and identified himself as a nineteen-year-old man. Wilson identified himself as a fourteen-year-

old girl named Molly.

The conversation quickly became sexual in nature, and Rivas sent a photograph of a young man laying naked on a bed. Much of the chat consisted of Rivas asking Molly about her sexual experience and describing in great detail what sexual acts he wanted to perform on Molly and have performed by Molly on him. Rivas offered Molly \$200 and encouraged her to buy a \$20 web camera so that she could send him nude photos of herself. Molly did send one photo purporting to be of herself that was actually a photo of another, female detective taken when she was about fourteen years old. While the two were making plans to meet for sex, Wilson's computer shut down. By the time he returned to the chat room, Rivas was gone.

The following day Wilson contacted Rivas through the same chat room. Rivas again offered Wilson \$200, and the two arranged to meet for sex at an area hotel later that afternoon. During the course of both conversations, Wilson made several references to being only 14 and not wanting to get pregnant. He also talked of school, homework, and cheerleading, and he told Rivas that he lived with his grandmother.

Wilson, three other detectives, and a patrol officer set up a surveillance of the hotel. Rivas stopped at a gas station across the street and withdrew \$300 from the ATM before checking into the hotel. Rivas paged Wilson with the room number. As the detectives approached the room, Rivas exited. The detectives arrested Rivas, who was carrying \$200 in cash, three condoms, and a cell phone.

Rivas testified in his own defense along with several character witnesses. Rivas disputed the accuracy of more than half of the content of the conversation with Wilson. He denied sending or receiving photos, and he denied claiming to be 19. Moreover, Rivas

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maintained that there was nothing said that could have led him to believe that he was communicating with a minor. Rivas insisted that he thought he was arranging to meet a forty-one-year-old woman.

II

Rivas's First Assignment of Error is as follows:

"THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO COMPEL INSPECTION AND COPYING OF THE COMPUTER HARD DRIVE."

In his First Assignment of Error, Rivas argues that the trial court erred in refusing to order the State to allow his expert to make an electronic copy of the police department's computer hard drive. The granting or denial of a motion to compel discovery is reviewed under an abuse of discretion standard. The inquiry is whether the trial court's decision is unreasonable, arbitrary, or unconscionable. *State ex rel The V Companies v. Marshall* (1998), 81 Ohio St.3d 467, 469, 692 N.E.2d 198, citations omitted. While we do not hold that the trial court was required to allow the making of the electronic copy of the hard drive, we do conclude that the trial court abused its discretion by refusing to allow any means for Rivas to be assured that the transcripts provided to him by the police, purporting to represent the information stored on the hard drive concerning his conversation with "Molly," were both complete and accurate.

In preparation for trial, Rivas filed a motion to preserve all electronic evidence in the possession of the Xenia Police Department regarding the charges against him, and he filed a Crim.R. 16 demand for discovery. The trial court granted both motions, stating that Rivas could inspect the evidence in the presence and under the control of the Xenia Police

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Department. Citing security concerns, the State refused Rivas's expert access to the police department's hard drive, and refused to allow Rivas's expert to make a "mirror image" or "electronic snapshot" of the information stored on the hard drive. The State did provide Rivas with a transcript of the chats both on paper and on disk.

Claiming that the transcripts were incomplete, Rivas filed a motion to compel discovery. The trial court held that absent any allegations or evidence that the transcripts were inaccurate, Crim.R. 16 did not require that the State provide Rivas with a mirror image of the police department's hard drive. Insisting that the transcripts did not contain the complete record of the internet exchanges between himself and "Molly," Rivas moved for reconsideration, which the trial court overruled.

Rivas's defense centers on his claim that he believed that he was communicating with a forty-one-year-old woman rather than a fourteen-year-old girl. He denies receiving the photo of Molly. Additionally, he disputes more than half of the conversation, denying all references to Molly going to school, doing homework, cheerleading, living with her grandmother, or in any other way revealing that she was a minor. In order to support his claims, Rivas maintains that he needed access to the police department's hard drive because the only way that he could determine that the copies provided by the police were complete and accurate was to compare them to the information stored on the hard drive.

The State contends that its interest in safeguarding the details of other investigations justified not allowing Rivas to have access to the hard drive. It is undisputed that the hard drive in question contained information regarding three years of investigation of child exploitation cases, including many on-going cases.

Without adequate discovery, a defendant's ability to prepare a defense is

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compromised. While the State insists that their witnesses verified the accuracy of the copies, a defendant should not be required to take the word of the adverse party – the police in this case – that a transcript of information stored on a hard drive is accurate, especially where that information constitutes the very crime that the defendant is alleged to have committed.

While we are sympathetic to the State's concerns, and we agree that there is a sufficient justification to disallow Rivas access to all of the information stored on the hard drive, which includes other investigations having nothing to do with his case, we conclude that the trial court overlooked a means of protecting that interest while also protecting Rivas's right to a determination of the accuracy of the transcript provided by the State.

In camera reviews are used by trial courts in many instances. Here, perhaps with the assistance of an expert of its own choosing, the trial court could have compared the information on the hard drive with the transcripts provided to Rivas by the State. The trial court would then be in a position to determine whether or not the copies were complete and accurate.

One important aspect of the right to a fair trial is the right of the accused to confront the evidence against him. This is normally thought of as the right to confront witnesses, enshrined in the Sixth Amendment to the Constitution of the United States and Article I, Section 10, of the Ohio Constitution. Increasingly, the testimony of witnesses may actually be less important to the outcome of a criminal trial than demonstrative evidence. Examples of this tendency include DNA evidence and the result of a blood-alcohol test in a prosecution for driving with a prohibited concentration of alcohol in the blood. Preventing an accused from having a reasonable means of verifying that a transcript, prepared by his

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adversary, the State, accurately and completely reflects direct evidence, in the State's possession, of the very conversation allegedly constituting the crime with which the accused is charged is, in our view, inconsistent with the accused's fair-trial right to confront the evidence against him.

Where there is direct evidence of a conversation allegedly constituting the crime with which a defendant is charged, we hold that the right to a fair trial, embodied in the Due Process clause of the Fourteenth Amendment to the United States Constitution, and in Section 10, Article I, of the Ohio Constitution, includes the right of the defendant to some reasonable means of verifying that a purported transcript of the conversation, prepared from the direct evidence by the adverse party, is accurate and complete.

Rivas's First Assignment of Error is sustained.

III

Rivas's Second Assignment of Error is as Follows:

"THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE AT TRIAL THE STATE'S UNAUTHENTICATED PAPER PRINTOUTS OF ELECTRONIC DATA."

Because we have sustained Rivas's First Assignment of Error, his Second Assignment of Error is rendered moot, and we need not address the merits of this claim

IV

Rivas's First Assignment of Error having been sustained, the judgment of the trial court is Reversed, and this cause is Remanded for further proceedings consistent with this opinion.

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BROGAN and VALEN, JJ., concur.

(Hon. Anthony Valen, retired from the 12th Appellate District, sitting by assignment of the Chief Justice of the Supreme Court of Ohio)

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