

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case No. 12-2042
	:	
Appellant,	:	On Appeal from the
	:	Franklin County Court
vs.	:	of Appeals, Tenth
	:	Appellate District
	:	
JASON ROMAGE	:	Court of Appeals
	:	Case No. 11 AP-822
Appellee.	:	

**APPELLANT'S MEMORANDUM
IN SUPPORT OF JURISDICTION**

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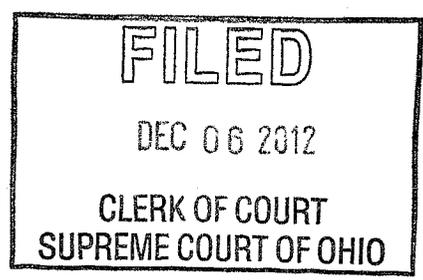


TABLE OF CONTENTS

	<u>PAGE</u>
EXPLANATION OF WHY THIS COURT SHOULD ACCEPT JURISDICTION	1
STATEMENT OF FACTS AND OF THE CASE	4
ARGUMENT	5
<u>First Proposition of Law</u>	5
Revised Code 2905.05(A) is not overbroad in its entirety because it is susceptible to a limiting construction or impartial invalidation	5
A. The meaning of the term “solicit” can be construed narrowly to require more than “merely asking”	8
B. If the meaning of the term “solicit” cannot be limited so as to exclude “merely asking”, then severing the word “solicit” from Revised Code 2905.05(A) is the appropriate remedy	11
CERTIFICATE OF SERVICE	14

EXPLANATION OF WHY THIS COURT SHOULD ACCEPT JURISDICTION

This case presents for review a matter of first impression involving a substantial constitutional question. In the instant case, the Tenth District Court of Appeals held that Revised Code 2905.05(A), criminal child enticement, is unconstitutionally overbroad. *State v. Romage*, 10th Dist. No. 11AP-822, 2012-Ohio-3381, ¶10. The lower court declined to apply a limiting construction or to sever the parts of the statute it deemed problematic. *Id.* at ¶11. As a result, the lower court's decision eviscerates the State's ability to enforce the statute and protect children from potential predators. As such, the implications of this decision are far reaching and this issue is of great importance.

The crime of criminal child enticement is a threshold prophylactic rule for the terrible crime of kidnapping and is a legitimate exercise of the legislature's discretion to prohibit persons from causing children to accompany them without a parent's permission. See *Commonwealth v. Figueroa* (1994), 436 Pa. Super. 569, 648 A.2d 555. The statute is located in Revised Code chapter 2950 entitled, "Kidnapping and Extortion". Once a child is taken or removed from an area by a person who may harbor a criminal motive, it becomes exceedingly difficult, if not impossible, for law enforcement personnel to intervene for the protection of the child. The state must be able to avert such dangerous situations by preventing the removal of children from one area to another from the start – when an individual first "solicits, coaxes, lures or entices" a child to accompany them.

Although the behaviors prohibited by the statute have speech implications and may involve expressive conduct, the individual's interest in expression in these situations is miniscule compared to the public interest in preventing the abuse and exploitation of children. Whatever minimal free speech value may be associated with a knowing attempt to manipulate a child into

accompanying a person without their parent's permission, simply because it is effected through verbal means, such value is clearly outweighed by the substantial government interest in preventing child abduction and exploitation.

It is well established that acts of the General Assembly enjoy a strong presumption of constitutionality. *State ex rel. Jackman v. Cuyahoga Cty. Court of Common Pleas* (1967), 9 Ohio St.2d 159, 161, 38 O.O.2d 404, 224 N.E.2d 906. Thus, a statute will be upheld unless proven beyond a reasonable doubt to be clearly unconstitutional. *State v. Warner* (1990), 55 Ohio St.3d 31, 43, 564 N.E.2d 18, citing *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, 57 O.O. 134, 128 N.E.2d 59, paragraph one of the syllabus. If possible, a court should construe a statute in a manner that will permit it to operate lawfully and constitutionally. *State v. Dorso* (1983), 4 Ohio St.3d 60, 61, 446 N.E.2d 449. Additionally, where a statute is susceptible of a narrow construction, a reviewing court must apply that narrow construction rather than find the statute facially overbroad. *Gooding v. Wilson* (1972), 405 U.S. 518, 92 S. Ct. 1103.

In the instant case, the Tenth District Court of Appeals determined that Revised Code 2905.05(A) criminalizes many innocent scenarios and is, therefore, overbroad in that “the potential applications of the statute to entirely innocent solicitations are endless.” *Romage* at ¶10, citing *State v. Chapple*, 175 Ohio App.3d 658, 2008-Ohio-1157, 17-18. The lower court further held that “the inherent problem in this statute is the use of the term ‘solicit’”, since “the common meaning of that term encompasses ‘merely asking’.” *Id.* at ¶10. The lower court declined to apply a more narrow construction to the word “solicit”, holding that to do so would be to ignore the plain terms of the statute. *Id.* at ¶12. The lower court did not examine whether the word “solicit” could be severed from the statute. In the case sub judice, the lower court erred

when it declined to apply a narrow construction to the term “solicit” and then failed to consider severing the term from the statute as a remedy. *Id.* at ¶7.

STATEMENT OF FACTS AND OF THE CASE

On October 18, 2010, a Columbus Police Officer filed a complaint in the Franklin County Municipal Court which alleged that the defendant, “without privilege to do so, knowingly solicited any child under fourteen years of age *** to accompany the person, *** without the express or implied permission of the parent, guardian, or legal custodian of the child in undertaking the activity ***.” *Romage* at ¶2. The defendant entered a not guilty plea to the charge. *Id.* at ¶2. Before trial, the defendant filed a motion to dismiss the complaint, arguing that RC 2905.05(A) was unconstitutionally overbroad and that appellate courts in Ohio have struck down RC 2905.05(A) or a substantially similar ordinance for that reason. *Id.* at ¶3, see *State v. Chapple*, 175 Ohio App.3d 658, 2008-Ohio-1157, ¶18; *Cleveland v. Cieslak*, 8th Dist. No. 92017, 2009-Ohio-4035, ¶16. The trial court agreed with the defendant, found RC 2905.05(A) to be unconstitutionally overbroad and, accordingly, dismissed the complaint filed against him. *Romage* at ¶3.

This timely appeal follows the appellate court’s affirmation of the trial court’s judgment, recorded in *State v. Romage*, 10th Dist. No. 11AP-822, 2012-Ohio-3381, (opinion, judgment entry and denial of motion for reconsideration attached).

ARGUMENT

Proposition of Law: Revised Code 2905.05(A) is not overbroad in its entirety because it is susceptible to a limiting construction or impartial invalidation.

The State of Ohio has a compelling interest in protecting children from harm and exploitation at the hands of persons who would employ methods of speech, not to communicate and express ideas, but for other unjustifiable motives. Protecting children from abuse and exploitation is within the constitutional power of the General Assembly and the aim of RC 2905.05(A) to protect children from abduction is substantial and compelling. *State v. Cook* (1998), 83 Ohio St.3d 404,406, 700 N.E.2d 570 (protecting the safety and general welfare of state citizens, particularly children, is a “paramount governmental interest”). And though RC 2905.05(A) has incidental speech implications, the statute is not aimed at prohibiting the communication and exchange of ideas, but rather serves to protect children from abduction and exploitation. As such, the statute is not overbroad.

The First Amendment commands, “Congress shall make no law....abridging the freedom of speech.” Accordingly, the Constitution gives significant protection from overbroad laws that chill speech within the First Amendment’s vast and privileged sphere. *Ashcroft v. Free Speech Coalition et al* (2002), 535 U.S. 234, 122 S.Ct. 1389. But, even allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. *Chaplinsky v. New Hampshire* (1942), 315 U.S. 568, 572, 62 S.Ct. 766 (lewd, obscene, libelous and fighting words do not enjoy constitutional protection). Revised Code 2905.05(A) is a legitimate exercise of the government’s power to promulgate legislation aimed at protecting children and does not sweep within its gambit a substantial amount of protected activity. Thus, the statute is constitutional

and the lower court erred when it held that RC 2909.05(A) is overbroad under the First and Fourteenth Amendments.

An overbroad statute “sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments.” *Akron v. Rowland* (1993), 67 Ohio St.3d 374, 618 N.E.2d 138, quoting *Grayned v. City of Rockford* (1972), 408 U.S. 104, 115, 92 S. Ct. 2294. In other words, a statute is overbroad “when the scope of the statute is so broad that it includes activity which would otherwise be legal.” *South Euclid v. Richardson* (1990), 49 Ohio St.3d 147, 151, 551 N.E.2d 606.

When faced with an overbreadth challenge to a statute which regulates in the area of the First Amendment, it is important for the reviewing court to look at the statute to determine whether it regulates only spoken words, rights of association or communicative conduct. *Broadrick v. Oklahoma* (1973), 413 U.S. 601, 93 S.Ct. 2908. In cases “where conduct and not merely speech is involved, to be unconstitutional the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute’s plainly legitimate sweep.” *Broadrick* at *615; *Ohralik v. Ohio State Bar Asso.*, 436 U.S. 447. “The party challenging the enactment must show that its potential application reaches a significant amount of protected activity.” *Akron* at *387. Further, a finding that a statute is overbroad is “manifestly strong medicine” that should be employed “sparingly, and only as a last resort.” *Broadrick* at *613.

Revised Code 2905.05(A) aims to protect the physical safety and well being of children under the age of fourteen and provides that:

(A) No person, by any means and without privilege to do so, shall knowingly solicit, coax, entice, or lure any child under fourteen years of age to accompany the person in any manner, including entering into any vehicle or onto any vessel, whether or not the offender knows the age of the child, if both the following apply:

- (1) The actor does not have the express or implied permission of the parent, guardian, or other legal custodian of the child undertaking the activity.
- (2) The actor is not a law enforcement officer, medic, firefighter, or other person who regularly provides emergency services, and is not an employee or agent of, or a volunteer acting under the direction of, any board of education, or the actor is any of such persons, but at the time the actor undertakes the activity, the actor is not acting within the scope of the actor's lawful duties in that capacity.

In order for a court to facially invalidate a criminal statute for overbreadth, the court must find that the statute sweeps within its gambit a *real* and *substantial* amount of protected conduct. In the instant case, in determining that RC 2905.05(A) is overbroad, the lower court found problematic the fact that the statute would criminalize many innocent scenarios because of the inclusion of the term "solicit" in the list of prohibited behavior. *Romage* at ¶10. The lower court found persuasive a decision out of the Second District Court of Appeals wherein the appellate court found RC 2905.05(A) to be overbroad because it could be regularly and improperly applied to prohibit protected conduct. *Id.* at ¶10, citing *State v. Chapple*, 175 Ohio App.3d, 2008-Ohio-1157, 888 N.E.2d 1121, ¶16.

In *Chapple*, the Second District held that because RC 2905.05(A) fails to require that the prohibited solicitation occur with the intent to commit any unlawful act, the statute would infer a criminal intent from many countless innocent acts. *Id.* at ¶17. The Court further held that because the word "solicit" is included in the statute, then merely asking a child to come with you would be sufficient to convict, regardless of the motive for solicitation or a requirement that the offender be aggressive toward the victim. *Id.* at ¶16, citing *State v. Carle*, Eleventh Dist. No. 2007-A-0008, 2007-Ohio-5376. To this end, the Second District held that RC 2905.05(A) "very well might criminalize a senior citizen asking a neighborhood boy to help carry her groceries, to help her cross the street, to rake leaves in her back yard for money....it very well might

criminalize a thirteen year old boy asking his thirteen year old friend to accompany him on an afternoon bike ride or a trip to the ball field.” *Id.* at ¶17.

Like the *Chapple* Court, the lower court in the instant case found the term “solicit” to be constitutionally problematic and declined to apply a limiting construction to the term “solicit” to mean more than “merely asking.” *Romage* at ¶11-12. This was error. If possible, a court should construe a statute in a manner that will permit it to operate lawfully and constitutionally. *Dorso* at *61. Where a statute is susceptible of a narrow construction, a reviewing court must apply that narrow construction rather than find the statute facially overbroad. *Gooding v. Wilson* (1972), 405 U.S. 518, 92 S. Ct. 1103.

A. The meaning of the term “solicit” can be construed narrowly to require more than “merely asking”.

Revised Code 2909.05(A) does not define the terms “solicit, entice, lure or coax”. As such, the words should be given their common, everyday meaning. *Dorso* at *62; RC 1.42 (words and phrases shall be read in context and construed according to the rules of grammar and common usage.) Three of these verbs, “entice”, “coax”, and “lure”, have similar characteristics and connotations that mean more than merely asking, but rather imply the use of artifice, deceit and/or promises to induce compliance. Merriam-Webster’s Dictionary defines “entice” as “to tempt with hope of reward or pleasure”. Webster’s New World Dictionary, 199 (Pocket Book Paperback Edition 1995). “Coax” is defined by Webster’s as “to cajole, to manipulate by persistent effort, to persuade using flattery”. Merriam-Webster’s online. The most commonly accepted definition of “lure” when used as a verb is “to draw with a hint of pleasure, to tempt or solicit”. Webster’s New World Dictionary, 351 (Pocket Book Paperback Edition 1995). Further, “lure” implies a “drawing into danger or evil through attracting and deceiving.” Webster’s New World Dictionary, 806 (3d. College Edition 1988). Because the word “tempt” is

used as a synonym for both “entice” and “lure”, it is helpful to look at its definition. The word “tempt” means “to induce or entice for something immoral or wrong, to strongly attract.” Webster’s New World Dictionary, 608 (Pocket Book Paperback Edition 1995).

The remaining verb, “solicit”, when taken in isolation, is susceptible to multiple, more wide-ranging definitions than “entice”, “coax” and “lure”. It can be defined as “to seek, request or petition.” The New American Webster Dictionary, 631 (3d. Edition 1995). But “solicit” can also mean “to entice or lure”. Webster’s New World Dictionary, 561 (Pocket Book Paperback Edition 1995). In the context of RC 2905.05(A), the meaning of “solicit” is narrowed by the canon of *noscitur a sociis* – which counsels that a word is given a more precise meaning by the neighboring words with which it is associated. *United States v. Williams* (2008), 553 U.S. 285, 294; *Ashland Chem. Co. v. Jones*, 92 Ohio St.3d 234, 2001-Ohio-184 (the rules of statutory construction embodied in the doctrine of *noscitur a sociis* and RC 1.42 require that words be read in context.) “Solicit”, in a list that includes “entice,” “coax,” and “lure”, is most sensibly read to mean to request something by means of tempting, strongly urging or wrongfully inducing – not merely “to ask”.

Construing “solicit,” “entice,” “coax” or “lure” to mean more than merely asking, but rather requiring proof that the offender engaged in behavior that “tempted a child with the promise of gain or pleasure” or that the offender “strongly urged or induced with a hint of reward” or “manipulated by persistent effort or flattery” to induce compliance, narrows the scope of the statute so that the various innocent factual scenarios that were problematic for the lower court would not come within the purview of the statute. See *Commonwealth of Pennsylvania v. Hart*, 28 A.3d 898, 2011 Pa. LEXIS 2334, *30-*31 (court held that definition of “lure”, as used in child enticement statute, encompassed more than “merely asking” or “extending a plain

invitation”; the plain meaning of “lure” meant to entice or induce a child with a promise of gain or reward. Also, absence of word “invite” or “ask” in statute demonstrated that definition of “lure” involved enticement or inducement); *State of Washington v. Dana*, 84 Wn. App. 16, 926 P.2d 344, *172 (the plain meaning of the word “lure” in child enticement statute meant “to attract by wiles or temptation, to entice and implied that one who lures another leads that person into a course of action that is wrong or foolish.) Simply asking a child to return a personal item that has blown over a fence or a senior citizen asking a neighborhood boy to help carry her groceries or help her cross the street would not be punishable. Similarly, a thirteen year old boy asking a thirteen year old girl to a school dance or one child asking another child to go to the park to play would also not be punishable using this narrow construction.

Narrowing the statute in this way allows the court to uphold its validity because the defendant cannot demonstrate that a real and substantial amount of protected activity is punishable under its terms. In an overbreadth analysis, it is not enough for a defendant to identify some possibly impermissible applications of RC 2905.05(A). As noted by Justice Scalia, “there is a tendency of our overbreadth doctrine to summon forth an endless stream of fanciful hypotheticals.” *United States v. Williams*, supra at *303. The mere fact “that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.” *Members of City Council of Los Angeles v. Taxpayers for Vincent* (1984), 466 U.S. 789, 800. There must be demonstrated a real and substantial amount of overbreadth, which is not present under the provisions of RC 2905.05(A). Further, finding that a statute is overbroad is “manifestly strong medicine” that should be employed “sparingly, and only as a last resort”. *Broadrick* at 613.

Individuals who have innocent motives will not find it necessary to tempt a child with the promise of reward or pleasure, cajole or manipulate a child through persistent effort, or lure a child with gifts or objects in order to encourage the child to accompany him/her without a parent's permission. Limiting the scope of the statute to conduct that rises to the level of "soliciting, enticing, coaxing, or luring" a child, as opposed to simply asking or inviting a child, prevents otherwise innocent citizens who bear no ill will from being punished under its terms. See *Hart*, supra at *36 (an interpretation of the word "lure" that includes merely asking or a simple offer creates the potential that citizens will be unwittingly exposed to criminal liability when they extend an innocent offer of a ride to a child; the plain meaning of "lure" implies inducement or promise of gain or reward and forecloses the aforementioned innocent scenarios from being prosecuted under the statute.)

Applying a narrow construction to Revised Code 2905.05(A) requires the State to prove more than a plain invitation or mere inquiry of a child in order to violate the statute and thus, RC 2909.05(A) would not sweep within its purview a real and substantial amount of protected activity. As such, RC 2905.05(A) is not overbroad and the lower court erred when it declined to construe the statute more narrowly and instead held that it was overbroad in its entirety.

B. If the meaning of the term "solicit" cannot be limited so as to exclude "merely asking", then severing the word "solicit" from Revised Code 2905.05(A) is the appropriate remedy.

The lower court erred when it failed to consider severing the word "solicit" from RC 2905.05(A) in an effort to uphold the statute's constitutionality. Per the lower court, the state waived this remedy by failing to specifically ask for it in its original argument to the court. (10/23/12 denial of Appellant's Application for Reconsideration at ¶5) The State did not need to specifically request severance as a remedy, though, in an effort to defend the constitutionality

of the statute. In its argument to the lower court regarding the constitutionality of RC 2905.05(A), the State asserted, and the lower court acknowledged, that the court had an obligation to construe the statute, if possible, in such a manner as to uphold its constitutionality. *Romage* at ¶7. This obligation necessarily includes considering the remedy of severance.

In *State v. Dorso* (1983), 4 Ohio St.3d 60, 61 this Court set forth the rules and standards on the subject of the constitutionality of statutes and held that “it is axiomatic that all legislative enactments enjoy a presumption of constitutionality. *** Similarly uncontroverted is the legal principle that the courts *must apply all presumptions and pertinent rules of construction* so as to uphold, if at all possible, a statute or ordinance assailed as unconstitutional.” See also *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, 128 N.E.2d 59 (a regularly enacted statute of Ohio is presumed to be constitutional and is therefore entitled to the benefit of every presumption in favor of its constitutionality.)

When a court finds a statute is unconstitutional, severance is a remedy that may be appropriate. RC 1.50 (statutory provisions are presumptively severable); *State v. Bodyke*, 126 Ohio St.3d 266, 933 N.E.2d 753, 2010-Ohio-2424, ¶64 (when court determines that a provision of a statute is unconstitutional the question then becomes which remedy to apply, including possible severance of offending provision). Severance is only appropriate if it satisfies the well established standard set forth by this Court in *Geiger v. Geiger* (1927), 117 Ohio St. 451, 466, 160 N.E. 28. See also *State v. Foster*, 109 Ohio St.3d 1, 845 N.E.2d 470, 2006-Ohio-856 (Per RC 1.50, severance of an unconstitutional portion of a statute is appropriate when the *Geiger* test is satisfied.)

In *Geiger*, this Court held that when determining whether a section of a statute is severable, the following test must be applied: (1) Are the constitutional and the unconstitutional

parts capable of separation so that each may be read and may stand by itself? (2) Is the unconstitutional part so connected with the general scope of the whole as to make it impossible to give effect to the apparent intention of the Legislature if the clause or part is stricken out? (3) Is the insertion of words or terms necessary in order to separate the constitutional part from the unconstitutional part, and to give effect to the former only? *Geiger* at *466; *Foster* at ¶94-95.

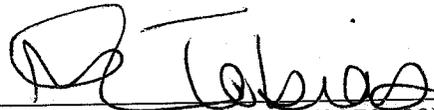
Applying RC 1.50 and the *Geiger* severability test to RC 2905.05(A), severing the word “solicit” renders the rest of RC 2905.05(A) constitutional. Without the word “solicit”, the only part of RC 2905.05(A) that the lower court deemed constitutionally infirm, the remaining portion of RC 2905.05(A) stands by itself. “Solicit” is not so connected to the general scope of the statute as to render the statute ineffectual without it. Removing the word “solicit” from a list that includes “entice, lure or coax” does not detract from the overriding objective of the General Assembly in promulgating the legislation, i.e. to prevent children from being moved to locations unknown to the child’s parent or guardian under circumstances that present a potential danger to the child. It is also unnecessary to insert additional words or terms once the word “solicit” is removed in order for the remainder of the statute to stand alone. As such, if the term “solicit” as used in RC 2905.05(A) is unconstitutional, the appropriate remedy is to sever the term, rather than invalidate the entire code section.

Respectfully submitted,

CITY OF COLUMBUS
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CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing Reply to Plaintiff's Supplemental Motion to Dismiss was mailed by regular U.S. Mail to Douglas E. Riddell, Jr., Counsel for Defendant-Appellee, 1441 King Avenue, Suite 101, Columbus, Ohio 43212-2180, this 6th day of December, 2012.



Melanie R. Tobias (0070499)
Director - Appellate Unit

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellant, :
 :
 v. : No. 11AP-822
 : (M.C. No. 2010 CRB 023662)
 Jason Romage, : (REGULAR CALENDAR)
 :
 Defendant-Appellee. :

JOURNAL ENTRY

For the reasons stated in the memorandum of this court rendered herein on October 23, 2012, it is the order of this court that the application for reconsideration is denied. We grant the State's motion to certify the conflict and certify the following question to the Supreme Court of Ohio for resolution:

Is R.C. 2905.05(A) unconstitutionally overbroad?

KLATT, BRYANT, and CONNOR, JJ.

/S/JUDGE _____

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellant,	:	
	:	No. 11AP-822
v.	:	(M.C. No. 2010 CRB 023662)
	:	
Jason Romage,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellee.	:	

MEMORANDUM DECISION

Rendered on October 23, 2012

Richard C. Pfeiffer, Jr., City Attorney, *Lara N. Baker*, City Prosecutor, and *Melanie R. Tobias*, for appellant.

Douglas E. Riddell, for appellee.

ON APPLICATION FOR RECONSIDERATION AND
MOTION TO CERTIFY CONFLICT

KLATT, J.

{¶ 1} Plaintiff-appellant, the State of Ohio, has filed an application for reconsideration, pursuant to App.R. 26(A), requesting that the court reconsider its decision rendered on July 26, 2012. The State also filed a motion to certify a conflict pursuant to App.R. 25(A) and Section 3(B)(4), Article IV, Ohio Constitution. For the following reasons, we deny the State's application for reconsideration and grant its motion to certify a conflict.

{¶ 2} When presented with an application for reconsideration, an appellate court must determine whether the application calls to the court's attention an obvious error in its decision or raises an issue for consideration that was either not considered at all or was not fully considered by the court when it should have been. *State v. Wade*, 10th Dist. No. 06AP-644, 2008-Ohio-1797, ¶ 2; *Columbus v. Hodge*, 37 Ohio App.3d 68, 69 (1987). "An application for reconsideration is not designed for use in instances where a party simply disagrees with the conclusions reached and the logic used by an appellate court."

Columbus v. Dials, 10th Dist. No. 04AP-1099, 2006-Ohio-227, ¶ 3, quoting *State v. Owens*, 112 Ohio App.3d 334, 336 (1996). "App.R. 26 provides a mechanism by which a party may prevent miscarriages of justice that could arise when an appellate court makes an obvious error or renders an unsupportable decision under the law." *Owens* at 336.

{¶ 3} In our decision, we affirmed a trial court's ruling which found that R.C. 2905.05(A) was unconstitutionally overbroad. The statute involved, R.C. 2905.05(A), provides that:

No person, by any means and without privilege to do so, shall knowingly solicit, coax, entice, or lure any child under fourteen years of age to accompany the person in any manner, including entering into any vehicle or onto any vessel, whether or not the offender knows the age of the child, if both of the following apply:

(1) The actor does not have the express or implied permission of the parent, guardian, or other legal custodian of the child in undertaking the activity.

(2) The actor is not a law enforcement officer, medic, firefighter, or other person who regularly provides emergency services, and is not an employee or agent of, or a volunteer acting under the direction of, any board of education, or the actor is any of such persons, but, at the time the actor undertakes the activity, the actor is not acting within the scope of the actor's lawful duties in that capacity.

{¶ 4} We concluded that the statute swept within its prohibitions "a significant amount of constitutionally-protected activity" because of the use of the term "solicit" in the statute. *State v. Rummage*, 10th Dist. No. 11AP-822, 2012-Ohio-3381, ¶ 10, 14. We also refused the State's request to uphold the constitutionality of the statute by giving the term "solicit" a more narrow construction. *Id.* at ¶ 11-12.

{¶ 5} The State now asks this court to reconsider and sever the term "solicit" from the statute in order to save it from the constitutional infirmity. However, the State did not present this argument to the trial court or to this court before the present application. We will not consider a new argument on an application for reconsideration. *State v. Stanley*, 7th Dist. No. 99-CA-55, 2002-Ohio-4372, ¶ 25 (waiving arguments made in application to reconsider by not making them in merit briefs).

{¶ 6} The State also requests this court to certify a conflict in case we decline to reconsider our decision. Section 3(B)(4), Article IV, Ohio Constitution, gives the courts of

appeals of this state the power to certify the record in a case to the Supreme Court of Ohio "whenever * * * a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals." Certification can be granted only where the judgments conflict upon the same question. *Johnson v. Indus. Comm.*, 61 Ohio App. 535, 537 (1939).

{¶ 7} The State argues that this court's decision is in conflict with a decision from the First District Court of Appeals. *State v. Clark*, 1st Dist. No. C-040329, 2005-Ohio-1324. We agree. The *Clark* court rejected the defendant's contention that R.C. 2905.05(A) was unconstitutional, thereby finding it constitutional. Our conclusion that R.C. 2905.05(A) is unconstitutional conflicts with the First District's resolution of the same question; the constitutionality of the statute.

{¶ 8} Therefore, we grant the State's motion to certify the conflict and certify the following question to the Supreme Court of Ohio for resolution:

{¶ 9} Is R.C. 2905.05(A) unconstitutionally overbroad?

{¶ 10} The State's motion to certify is granted and the above question is certified to the Supreme Court of Ohio for resolution of the conflict pursuant to Section 3(B)(4), Article IV, Ohio Constitution.

*Application for reconsideration denied;
motion to certify conflict granted.*

BRYANT and CONNOR, JJ., concur.

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

FILED
COURT OF APPEALS
FRANKLIN COUNTY, OHIO
JUL 31 2012 26 PM 1:35
CLERK OF COURTS

State of Ohio, :
Plaintiff-Appellant, :
v. : No. 11AP-822
Jason Romage, : (M.C. No. 2010 CRB 023662)
Defendant-Appellee. : (REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on July 26, 2012, appellant's assignment of error is overruled, and it is the judgment and order of this court that the judgment of the Franklin County Municipal Court is affirmed. Costs assessed against appellant.

KLATT, BRYANT and CONNOR, JJ.

By William A. Klatt
Judge William A. Klatt

Atty

FILED
COURT OF APPEALS
FRANKLIN CO. OHIO

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

2012 JUL 26 PM 1:28

CLERK OF COURTS

State of Ohio, :
 Plaintiff-Appellant, :
 v. :
 Jason Romage, :
 Defendant-Appellee. :

JUL 31 2012

No. 11AP-822
(M.C. No. 2010 CRB 023662)

(REGULAR CALENDAR)

DECISION

Rendered on July 26, 2012

Richard C. Pfeiffer, Jr., City Attorney, *Lara N. Baker*, City Prosecutor, and *Melanie R. Tobias*, for appellant.

Douglas E. Riddell, for appellee.

APPEAL from the Franklin County Municipal Court

KLATT, J.

{¶ 1} Plaintiff-appellant, the State of Ohio, appeals from a judgment of the Franklin County Municipal Court dismissing a criminal complaint which alleged that defendant-appellee, Jason Romage, violated R.C. 2905.05(A). Because the trial court did not err by finding that statute unconstitutional, we affirm the judgment.

I. Factual and Procedural Background

{¶ 2} On October 18, 2010, a Columbus Police Officer filed a complaint in the Franklin County Municipal Court which alleged that Romage, "without privilege to do so, knowingly solicit[ed] any child under fourteen years of age * * * to accompany the person, * * * without the express or implied permission of the parent, guardian, or legal custodian of the child in undertaking the activity * * *." The complaint specifically alleged that Romage asked a child if he would carry some boxes to his apartment in return for some

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money, conduct that would allegedly constitute criminal child enticement in violation of R.C. 2905.05(A). Romage entered a not guilty plea to the charge.

{¶ 3} Before trial, Romage filed a motion to dismiss the complaint, arguing that R.C. 2905.05(A) was unconstitutional. Romage argued that the statute was unconstitutionally overbroad and that appellate courts in Ohio have struck down R.C. 2905.05(A) or a substantially similar ordinance for that reason. *See State v. Chapple*, 175 Ohio App.3d 658, 2008-Ohio-1157, ¶ 18 (2d Dist.); *Cleveland v. Cieslak*, 8th Dist. No. 92017, 2009-Ohio-4035, ¶ 16. The trial court agreed with Romage, found R.C. 2905.05(A) to be unconstitutionally overbroad and, accordingly, dismissed the complaint filed against him.

{¶ 4} The State appeals and assigns the following error:

The trial court erred when it found R.C. 2905.05(A) unconstitutionally overbroad and dismissed the charges filed against appellee.

II. The State's Assignment of Error-The Constitutionality of R.C. 2905.05(A)

{¶ 5} The State argues that the trial court erred by declaring R.C. 2905.05(A) unconstitutionally overbroad and dismissing the complaint against Romage. We disagree.

A. Standard of Review

{¶ 6} We review a trial court's decision on a motion to dismiss with a de novo standard of review. *State v. Walker*, 10th Dist. No. 06AP-810, 2007-Ohio-4666, ¶ 9-10. A de novo standard of review affords no deference to the trial court's decision, and the appellate court independently reviews the record. *Id.*

B. R.C. 2905.05(A) is Unconstitutionally Overbroad

{¶ 7} Our analysis begins with the acknowledgement that statutes enjoy a strong presumption of constitutionality. *State v. Carswell*, 114 Ohio St.3d 210, 2007-Ohio-3723 ¶ 6; *State v. Collier*, 62 Ohio St.3d 267, 269 (1991). A statute will be upheld unless the challenger can meet the burden of establishing beyond a reasonable doubt that the statute is unconstitutional. *State v. Tooley*, 114 Ohio St.3d 366, 2007-Ohio-3698, ¶ 29; *Collier* at 269. If possible, courts must construe statutes in such a manner as to uphold their constitutionality. However, it is not the province of this court under the guise of construction, to ignore the plain terms of a statute or to insert a provision not

incorporated by the legislature. *Akron v. Rowland*, 67 Ohio St.3d 374, 380 (1993), citing *State ex rel. Defiance Spark Plug Corp. v. Brown*, 121 Ohio St. 329, 331-32 (1929).

{¶ 8} A clear and precise enactment may be overbroad if in its reach it prohibits constitutionally protected conduct. *Grayned v. Rockford*, 408 U.S. 104, 114 (1972); *Rowland* at 387. In considering an overbreadth challenge, the court must decide " 'whether the ordinance sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments.' " *Id.*, quoting *Grayned* at 115. A statute will be invalidated as overbroad only when its overbreadth has been shown by the defendant to be substantial, that its potential application reaches a significant amount of constitutionally-protected activity. *Rowland* at 387, citing *Houston v. Hill*, 482 U.S. 451, 458-59 (1987).

{¶ 9} The statute involved, R.C. 2905.05(A), provides that:

No person, by any means and without privilege to do so, shall knowingly solicit, coax, entice, or lure any child under fourteen years of age to accompany the person in any manner, including entering into any vehicle or onto any vessel, whether or not the offender knows the age of the child, if both of the following apply:

(1) The actor does not have the express or implied permission of the parent, guardian, or other legal custodian of the child in undertaking the activity.

(2) The actor is not a law enforcement officer, medic, firefighter, or other person who regularly provides emergency services, and is not an employee or agent of, or a volunteer acting under the direction of, any board of education, or the actor is any of such persons, but, at the time the actor undertakes the activity, the actor is not acting within the scope of the actor's lawful duties in that capacity.

{¶ 10} Romage argues that this statute criminalizes many innocent scenarios and is, therefore, overbroad. We agree. In arriving at the same conclusion, the *Chapple* court correctly noted that the "potential applications of R.C. 2905.05(A) to entirely innocent solicitations are endless." *Id.* at ¶ 17-18 (noting many innocent scenarios that would be criminalized under the statute). The inherent problem in this statute is the use of the term "solicit." The common meaning of that term encompasses "merely asking." *State v. Smith*, 11th Dist. No. 2011-P-0037, 2012-Ohio-401, ¶ 21; *Chapple* at ¶ 16. Thus, the

statute prohibits any person from asking any child to accompany the person in any manner and for any reason, without consideration of the person's motive or conduct. *Id.* This broad language leads to the many "innocent scenarios" that would be criminal offenses under this statute.

{¶ 11} The state argues that R.C. 2905.05(A) is not overbroad because although the term "solicit" generally means "merely asking," the term is subject to a more narrow construction in this statute because of the other verbs used in the statute: entice, coax, and lure. The state argues that those verbs all imply the use of artifice, deceit and/or promises to induce compliance. Given those verbs, the state argues that the term "solicit" should be defined as something more than just asking, but as a request by means of tempting, strongly urging or wrongfully inducing. We disagree.

{¶ 12} Although we must construe statutes in such a manner as to uphold their constitutionality, we cannot ignore the plain terms of a statute. This court has defined the term solicit in other contexts as "to entice, urge, lure, or ask." *Columbus v. Myles*, 10th Dist. No. 04AP-1255, 2005-Ohio-3933, ¶ 20. Under the guise of a narrow construction, the state in essence seeks to eliminate merely asking from the definition of the term "solicit" by defining solicit in light of the other verbs in the statute that appear to require more than merely the act of asking. We refuse to do so, because to solicit, as commonly understood, does encompass merely asking in its definition. *Smith; State v. Carle*, 11th Dist. No. 2007-A-0008, 2007-Ohio-5376, ¶ 17.¹

{¶ 13} To the extent that the state relies on cases from the First District Court of Appeals that have found R.C. 2905.05(A) not constitutionally overbroad, we note that those cases involved an earlier version of R.C. 2905.05(A) that criminalized solicitations of a child "to enter into any vehicle." *See, e.g., State v. Kroner*, 49 Ohio App.3d 133, 134 (1st Dist.1988). Because that more narrowed version of the statute required the offender to ask the child to get into a car, it did not criminalize the endless innocent scenarios that are implicated by the current version, which prohibits solicitations of a child "in any manner." Thus, the cases from the First District are not persuasive. *Chappel* at ¶ 19.

¹ The *Chappel* court also concluded that R.C. 2905.05(A) was not susceptible to a narrow construction. *Id.* at ¶ 18, fn. 3.

III. Conclusion

{¶ 14} Because R.C. 2905.05(A) sweeps within its prohibitions a significant amount of constitutionally-protected activity, we conclude that the statute is unconstitutionally overbroad. The trial court did not err by so holding and dismissing the complaint against Romage, which alleged a violation of the statute. Accordingly, we affirm the judgment of the Franklin County Municipal Court.

Judgment affirmed.

BRYANT and CONNOR, JJ., concur.
