IN THE SUPREME COURT OF OHIO

ORIGINAL

STATE OF OHIO,	:	**Case No. 2012-1958**
		Case No. 2012-2042
Appellant,	:	On Appeal from the Franklin County Court of Appeals, Tenth Appellate District
vs.	:	
	:	
JASON ROMAGE,	:	Court of Appeals Case No. 11AP-822
Appellee.	:	

MERIT BRIEF OF APPELLANT, STATE OF OHIO

CITY OF COLUMBUS, DEPARTMENT OF LAW
RICHARD C. PFEIFFER, JR. (0021982), CITY ATTORNEY
LARA N. BAKER-MOORISH (0063721), CITY PROSECUTOR
MELANIE R. TOBIAS (0070499), COUNSEL OF RECORD
DIRECTOR - APPELLATE UNIT
375 South High Street, 17th Floor
Columbus, Ohio 43215-4530
Telephone: (614) 645-8876
Fax: (614) 645-6548

COUNSEL FOR APPELLANT, STATE OF OHIO

DOUGLAS E. RIDDELL, JR. (0079839, COUNSEL OF RECORD
1441 King Avenue, Suite 101
Columbus, Ohio 43212-2800
Telephone: 614-488-2800

COUNSEL FOR APPELLEE, JASON ROMAGE

FILED
APR 24 2013
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

PAGE

STATEMENT OF FACTS AND OF THE CASE 1
ARGUMENT 1

Certified Conflict Question:

Is Revised Code 2905.05(A) unconstitutionally overbroad? 1

Proposition of Law I:

Revised Code 2905.05(A) is not overbroad in its entirety because it is susceptible to a limiting construction or impartial invalidation 1

A. Revised Code 2905.05(A) prohibits more than mere speech and thus, to be overbroad, must sweep within its gambit a substantial amount of protected activity 3

B. The meaning of the term "solicit" can be construed narrowly to require more than "merely asking" in order to eliminate the statute's overbreadth 5

C. 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 9

CONCLUSION. 11

CERTIFICATE OF SERVICE 12

TABLE OF AUTHORITIES

CASES **PAGE**

Akron v. Rowland (1993), 67 Ohio St.3d 374, 618 N.E.2d 138 3,4
Ashcroft v. Free Speech Coalition et al (2002), 535 U.S. 234, 122 S.Ct. 1389 3
Ashland Chem. Co. v. Jones, 92 Ohio St.3d 234, 2001-Ohio-184 6,7
Broadrick v. Oklahoma (1973), 413 U.S. 601, 93 S.Ct. 2908 4
Chaplinsky v. New Hampshire (1942), 315 U.S. 568, 572, 62 S.Ct. 766 3
Cleveland v. Cieslak, 8th Dist. No. 92017, 2009-Ohio-4035, ¶16 1
Colten v. Kentucky (1972), 407 U.S. 104, 92 S.Ct. 1953 3
Commonwealth of Pennsylvania v. Hart, 28 A.3d 898, 2011 Pa. LEXIS 2334, *30-*31 7,8
Geiger v. Geiger (1927), 117 Ohio St. 451, 466, 160 N.E. 28 10
Gooding v. Wilson (1972), 405 U.S. 518, 92 S. Ct. 1103 5
Grayned v. City of Rockford (1972), 408 U.S. 104, 115, 92 S. Ct. 2294 3
Members of City Council of Los Angeles v. Taxpayers for Vincent (1984), 466 U.S. 789, 800 8
Ohralik v. Ohio State Bar Asso., 436 U.S. 447 4
South Euclid v. Richardson (1990), 49 Ohio St.3d 147, 151, 551 N.E.2d 606 3
State v. Bodyke, 126 Ohio St.3d 266, 933 N.E.2d 753, 2010-Ohio-2424, ¶64 10
State v. Foster, 109 Oho St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, ¶89 10
State v. Carle, Eleventh Dist. No. 2007-A-0008, 2007-Ohio-5376 5
State v. Chapple , 175 Ohio App.3d 658, 2008-Ohio-1157, ¶18 1,5
State v. Cook (1998), 83 Ohio St.3d 404,406, 700 N.E.2d 570 2
State v. Dorso (1983), 4 Ohio St.3d 60, 61, 446 N.E.2d 449 5,9
State ex rel. Dickman v. Defenbacher (1955), 164 Ohio St. 142, 128 N.E.2d 59 9
State v. Goode, Ninth Dist. No. 26220, 2013-Ohio-556 5
State v. Romage, 10th Dist. No. 11AP-822, 2012-Ohio-3381 at ¶2 1,5,9
State of Washington v. Dana, 84 Wn. App. 16, 926 P.2d 344, *172 7
United States v. Williams (2008), 553 U.S. 285, 294 6,8

STATUTES

R.C. §1.42 5,6
R.C. §1.50 10
R.C. §2905.05(A) ..... passim

MISC

The New American Webster Dictionary, 631 (3d. Edition 1995) 6
Webster's New World Dictionary, 199 (Pocket Book Paperback Edition 1995) 6
Webster's New World Dictionary, 351 (Pocket Book Paperback Edition 1995) 6
Webster's New World Dictionary, 561 (Pocket Book Paperback Edition 1995) 6
Webster's New World Dictionary, 608 (Pocket Book Paperback Edition 1995) 6
Webster's New World Dictionary, 806 (3d. College Edition 1988) 6

STATEMENT OF THE CASE AND FACTS

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 ***." *State v. Romage*, 10th Dist. No. 11AP-822, 2012-Ohio-3381 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 substantially similar ordinances 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.

ARGUMENT

Certified Conflict Question: Is Revised Code 2905.05(A) unconstitutionally overbroad?

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 crime of criminal child enticement, located in Revised Code chapter 2950, entitled "Kidnapping and Extortion", 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. 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.

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. Once a child is taken into a vehicle 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 inception – when an individual first "solicits, coaxes, lures or entices" a child to accompany them.

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. An individual's interest in expression as

targeted by RC 2905.05(A) is miniscule compared to the public interest in preventing such expression at that particular time and place – specifically, to minor children without parental knowledge or consent. See *Colten v. Kentucky* (1972), 407 U.S. 104, 92 S.Ct. 1953 (court must balance interest in incidental speech with legitimate governmental interest.)

A. Revised Code 2905.05(A) prohibits more than mere speech and thus, to be overbroad, must sweep within its gambit a substantial amount of protected activity.

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.)

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.

Accordingly, in order to determine whether RC 2905.05(A) is overbroad, this Court must determine what exactly is prohibited – speech, conduct or a combination of the two. Revised Code 2905.05(A) makes it unlawful for any person to "knowingly solicit, coax, entice or lure a child under the age of fourteen to accompany them in any manner." To be sure, the act of "soliciting," "coaxing," "enticing," or "luring" implicates speech, but can be accomplished through conduct alone or a combination of conduct and speech, such as utilizing an enticing object, gesturing in some manner, or following a child in a car. As such, the statute contemplates not just speech, but also conduct and thus, to be overbroad must sweep within its gambit a substantial amount of protected activity.

All four prohibited verbs in RC 2905.05(A), "solicit," "entice," "coax," and "lure", may involve speech and non-speech behavior. Clearly, one may "strongly induce", "tempt", or "draw with a hint of promise" by simply speaking words such as "Come with me and I'll buy you a toy" or "If you get in my car, I'll give you some candy". But the prohibited acts of "soliciting", "coaxing", "luring" and "enticing" are more often accomplished through conduct, or conduct combined with speech (expressive conduct), such as waving a special toy at a child while gesturing to get into a vehicle, holding out to a child a puppy, bag of candy, or music cds while motioning for the child to follow you or following along next to a child while in a vehicle. It

may be enough in some instances to simply hold out the coveted item for a small child to see, while saying absolutely nothing and making no other gestures, with the expectation that the child will come over to or follow the person holding out the item. All of the aforementioned acts, done knowingly and without the parent's permission, would violate the statute.

B. The meaning of the term "solicit" can be construed narrowly to require more than "merely asking" in order to eliminate the statute's overbreadth.

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 Tenth District's concern echoed that of the Second, Eighth and Ninth District Courts of Appeal, which have all found RC 2905.05(A) to be overbroad because of its potential application to "countless innocent acts" such as a senior citizen asking a neighborhood boy to help carry her groceries, to help her cross the street, or a thirteen year old boy asking his thirteen year old friend to accompany him on a bike ride or a trip to the park. See *State v. Chapple*, 175 Ohio App.3d 358, 2008-Ohio-1157, 888 N.E.2d 1121; *State v. Carle,* Eleventh Dist. No. 2007-A-0008, 2007-Ohio-5376; *State v. Goode*, Ninth Dist. No. 26220, 2013-Ohio-556. The lower court erred, though, when it declined to apply a limiting construction to the statute. *Romage* at ¶11-12. 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. 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.

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". If the word "solicit" is construed so broadly as to mean "to ask", then the words "lure", "entice" or "coax" are superfluous as used in the statute. To accept the court of appeals' broad definition of "solicit" as to merely inquire or ask, would render the terms "entice, coax and lure" meaningless. See *Ashland Chem. Co.*, at *238 (Construing the word "employing", in a list that includes "applying, evaporating, and drying", to encompass "any use" would render the other words in the list meaningless.)

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. There 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) once the term "solicit" is narrowed.

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

C. 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. 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." (emphasis added) 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); *State v. Foster*, 109 Oho St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, ¶89 (once the Court determines that a statute is unconstitutional, severance may be appropriate remedy). 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.

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.

Applying a narrow construction to Revised Code 2905.05(A) by limiting the meaning of the term "solicit" or in the alternative, severing the term "solicit" from the list of prohibited behavior would render RC 2905.05(A) constitutional. The State would be required 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. A statute more narrowly tailored, such as one that requires that the state prove that the actor have an unlawful motivation, would not achieve the legislature's goals of preventing children from being moved to locations unknown to the child's parent or guardian under circumstances that present a potential danger to the child. Most often, an actor's true motivations in encouraging a child to accompany him/her without a parent's permission will not be apparent until the actor has exclusive control over the child and has actually caused harm. Revised Code 2905.05(A) aims to prevent this harm before it is too late.

Conclusion

For all of the aforementioned reasons, Appellant respectfully requests that this Honorable Court reverse the lower court's judgment and remand the case to the trial court for further proceedings.

Respectfully submitted,

CITY OF COLUMBUS
DEPARTMENT OF LAW

RICHARD C. PFEIFFER, JR. (0021982)
CITY ATTORNEY

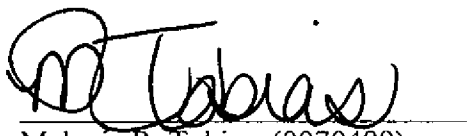
LARA N. BAKER (0063721)
CITY PROSECUTOR

MELANIE R. TOBIAS (0070499)
DIRECTOR-APPELLATE UNIT
375 South High Street, 17th Floor
Columbus, Ohio 43215-4530
Telephone: (614) 645-8876

COUNSEL FOR DEFENDANT

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing Appellant's Merit Brief was mailed by regular U.S. Mail to Douglas E. Riddell, Counsel for Jason Romage, 1441 King Avenue, Suite 101, Columbus, Ohio 43212-2180, this 24th day of April, 2013.



Melanie R. Tobias (0070499)
Director – Appellate Unit

NOTICE OF APPEAL FROM A COURT OF APPEALS

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

NOTICE OF APPEAL OF APPELLANT

CITY OF COLUMBUS, DEPARTMENT OF LAW
RICHARD C. PFEIFFER, JR. (0021982), CITY ATTORNEY
LARA N. BAKER (0063721), CITY PROSECUTOR

MELANIE R. TOBIAS (0070499), COUNSEL OF RECORD
DIRECTOR – APPELLANT UNIT
375 South High Street, 17th Floor
Columbus, Ohio 43215-4530
Telephone: (614) 645-8876
Fax: (614) 645-6548

COUNSEL FOR APPELLANT, STATE OF OHIO

DOUGLAS E. RIDDELL, COUNSEL OF RECORD
1441 King Avenue, Suite 101
Columbus, Ohio 43212-2180
Telephone: 614-488-2800

COUNSEL FOR APPELLEE, JASON ROMAGE

FILED
DEC 06 2012
CLERK OF COURT
SUPREME COURT OF OHIO

Notice of Appeal of Appellant

Appellant State of Ohio hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Franklin County Court of Appeals, Tenth Appellate District, entered in Court of Appeals case No. 11 AP-822 on July 26, 2012. A timely application for reconsideration was filed on August 3, 2012, and the Tenth Appellate District denied the application on October 23, 2012.

This case raises a substantial constitutional question and is one of public or great general interest.

Respectfully submitted,

CITY OF COLUMBUS
DEPARTMENT OF LAW

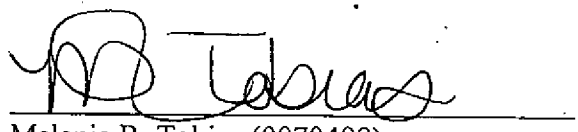
RICHARD C. PFEIFFER, JR. (0021982)
CITY ATTORNEY

LARA N. BAKER (0063721)
CITY PROSECUTOR

MELANIE R. TOBIAS (0070499)
DIRECTOR – APPELLATE UNIT
375 South High Street, 17th Floor
Columbus, Ohio 43215-4530
Telephone: (614) 645-8876
COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Notice of Appeal was sent via the regular U.S. Postal Service to Douglas E. Riddell, 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

Franklin County Ohio Court of Appeals Clerk of Courts- 2012 Oct 30 3:18 PM-11AP000822

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

Franklin County Ohio Court of Appeals Clerk of Courts- 2012 Oct 23 12:41 PM-11AP000822

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.	:	

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

Franklin County Ohio Court of Appeals Clerk of Courts- 2012 Oct 23 12:41 PM-11AP000822

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.

Franklin County Ohio Court of Appeals Clerk of Courts- 2012 Oct 23 12:41 PM-11AP000822

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

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.	:	

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
2012 JUL 26 PM 1:28
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

JUL 31 2012

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

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

MELANIE R. TOBIAS
ASST CITY PROS
375 SOUTH HIGH STREET
17TH FLOOR
COLUMBUS, OH 43215-4530

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

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.

ORIGINAL

IN THE SUPREME COURT OF OHIO

12-1958

STATE OF OHIO, :

Appellant, :

v. : Case No. 11 AP-000822

JASON ROMAGE :

Appellee. :

On Appeal from the Tenth District Court of Appeals
Columbus, Ohio

NOTICE OF CERTIFIED CONFLICT

DOUGLAS E. RIDDELL, JR. (0079839)
1441 King Avenue, Suite 101
Columbus, Ohio 43212-2180
Phone: 614-488-2800

COUNSEL FOR DEFENDANT-APPELLEE

CITY OF COLUMBUS
DEPARTMENT OF LAW
RICK C. PFEIFFER, JR. (0021982)
CITY ATTORNEY

LARA N. BAKER-MORRISH (0063721)
CITY PROSECUTOR

MELANIE R. TOBIAS (0070499)
DIRECTOR – APPELLATE UNIT
375 South High Street, 17th Floor
Columbus, Ohio 43215-4530
Telephone: (614) 645-8876
Fax: (614) 645-6548

COUNSEL FOR PLAINTIFF-APPELLANT

FILED
NOV 20 2012
CLERK OF COURT
SUPREME COURT OF OHIO

Franklin County Ohio Court of Appeals Clerk of Courts- 2012 Nov 21 2:59 PM-11AP000822

Franklin County Ohio Court of Appeals Clerk of Courts- 2012 Nov 21 2:59 PM-11AP000822

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing Appellant's Notice of Certified Conflict was sent via regular U.S. Mail to Douglas E. Riddell, Jr, Counsel for Defendant-Appellee, 1441 King Avenue, Suite 101, Columbus, Ohio 43212-2180, this 20th day of November, 2012.

Melanie R. Tobias (0070499)
Director – Appellate Unit

OA003 - Y20

Franklin County, Ohio Clerk of Courts 2012 Nov 23 1:59 PM 11-AP-000822

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

Franklin County Ohio Court of Appeals Clerk of Courts 2012 Nov 21 2:59 PM-11AP000822
Franklin County Ohio Court of Appeals Clerk of Courts 2012 Oct 23 12:41 PM-11AP000822

OA003 - Y22

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.

Franklin County Ohio Court of Appeals Clerk of Courts 2012 Nov 21 3:59 PM 11-AP-000822

THE STATE OF OHIO
MARYANN O'SHAUGHNESSY, Clerk
OF THE COURT OF APPEALS
COUNTY,
IS HEREBY TAKEN
Memo Decision
19 Nov
AND SEAL OF SAID
MARYANN O'SHAUGHNESSY, Clerk
By: Deputy

Franklin County, Ohio Court of Appeals Clerk of Courts 2012 Nov 21 3:59 PM-11AP000822

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

THE STATE OF OHIO
I, MARYELLEN O'SHAUGHNESSY, Clerk OF THE COURT OF APPEALS WITHIN AND FOR FRANKLIN COUNTY, DO HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS TRULY TAKEN
Journal Entry
NOW ON FILE IN MY OFFICE. WITNESS MY HAND AND SEAL OF SAID COURT THIS 19 DAY OF Nov A.D. 12
MARYELLEN O'SHAUGHNESSY, Clerk
By Deputy

Franklin County Ohio Court of Appeals Clerk of Courts- 2012 Nov 21 2:59 PM-11AP000822

FILED
COURT OF APPEALS
FRANKLIN CO. OHIO
2012 JUL 26 PM 1:28
CLERK OF COURTS

JUL 31 2012

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.	:	

D E C I S I O N

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

MELANIE R. TOBIAS
ASST CITY PROS
375 SOUTH HIGH STREET
17TH FLOOR
COLUMBUS, OH 43215-4530

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

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

Franklin County Ohio Court of Appeals Clerk of Courts- 2012 Nov 21 2:59 PM-11AP000822

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

Franklin County Ohio Court of Appeals Clerk of Courts- 2012 Nov 21 2:59 PM-11AP000822

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.

Franklin County Ohio Court of Appeals Clerk of Courts- 2012 Nov 21 2:59 PM-11AP000822

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.

Franklin County Ohio Court of Appeals Clerk of Courts- 2012 Nov 21 2:59 PM-11AP000822

Franklin County Ohio Court of Appeals Clerk of Courts- 2012 Nov 21 2:59 PM-11AP000822

*2005 Ohio 1324, *; 2005 Ohio App. LEXIS 1265, **

STATE OF OHIO, Plaintiff-Appellee, vs. GORDON **CLARK,** Defendant-Appellant.

APPEAL NO. **C-040329**

COURT OF APPEALS OF OHIO, FIRST APPELLATE DISTRICT, HAMILTON COUNTY

2005 Ohio 1324; 2005 Ohio App. LEXIS 1265

March 25, 2005, Date of Judgment Entry on Appeal

NOTICE:

[**1] THESE ARE NOT OFFICIAL HEADNOTES OR SYLLABI AND ARE NEITHER APPROVED IN ADVANCE NOR ENDORSED BY THE COURT. PLEASE REVIEW THE CASE IN FULL.

SUBSEQUENT HISTORY: Discretionary appeal not allowed by **State** v. **Clark,** 2005 Ohio 4605, 2005 Ohio LEXIS 1931 (Ohio, Sept. 7, 2005)

PRIOR HISTORY: Criminal Appeal From: Hamilton County Municipal Court. TRIAL NO. C-02CRB-10937.

DISPOSITION: Judgment reversed; defendant discharged.

CASE SUMMARY

PROCEDURAL POSTURE: The Hamilton County Municipal Court (Ohio) convicted defendant of criminal child enticement, a first-degree misdemeanor, in violation of Ohio Rev. Code Ann. § 2905.05(A). He was sentenced to 180 days in jail. Defendant appealed.

OVERVIEW: Defendant argued that the criminal child-enticement statute was void for vagueness and that there was insufficient evidence to convict him. The appellate court held that Ohio Rev. Code Ann. § 2905.05 was not unconstitutionally vague or overbroad as it provided reasonable notice of the conduct it prohibited. However, the evidence simply did not prove that defendant's behavior rose to the level of child enticement. The evidence showed that defendant had told the 13-year-old victim that she was pretty, that he had blown kisses and had waved to her, and that he had told her to "come here." The statute required that the offender "solicit, coax, entice, or lure" a child. During the entire encounter between defendant and the victim, defendant never left the vicinity of the hair salon where he worked. The only statements he made to her were to tell her that she was pretty, to ask that she "come here," and to ask where she was going. Although defendant's behavior was probably inappropriate, it could not be held, as a matter of law, that defendant committed criminal child enticement.

OUTCOME: The judgment of the trial court was reversed, and defendant was discharged.

CORE TERMS: offender, girl, salon, enticement, kisses, blowing, street, hair, pretty, truck, lure, insufficient evidence, present case, child-enticement, inappropriate, criminalize, encounter, favorable, sentence, walking, talking, solicit, convict, walked, waving, entice, front, coax, food, fun