

IN THE SUPREME COURT OF OHIO

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	Case No. 2014-2028
	:	
v.	:	On appeal from the Montgomery
	:	County Court of Appeals,
Terry Lee Martin,	:	Second Appellate District
	:	Case No. 26033
Defendant-Appellant.	:	

Reply Brief of Appellant Terry Lee Martin

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Statement of the Case and Facts

Terry Martin primarily relies on the Statement of the Case and Facts in his merit brief, with a clarification on the certified question. The State paraphrased the Second District’s opinion below and the certified conflict question to suggest that there is legally permissible child pornography. State’s Brief at 3 and 4 (saying “under First Amendment principles, creating child pornography is sufficiently different from possessing it” and “[t]he question certified now asks this Court to consider whether there is a First Amendment difference between creating versus possessing child pornography”). All child pornography is illegal.

The narrowed *Young* definition of nudity sanctioned morally innocent conduct that fell within the broad definition of nudity, that which was not child pornography. *State v. Young*, 37 Ohio St.3d 249, 252, 525 N.E.2d 1363 (1988) (narrowing the scope so as not to “outlaw all depictions of minors in a state of nudity, but rather only those depictions which constitute child pornography”).

The question before this Court is not whether creating child pornography is legally permissible, rather, it is what definition of nudity makes that material illegal. The question certified asks this Court to consider if all nudity, as defined in 2907.01(H), constitutes illegal child pornography or whether the nudity must be lewd or have a graphic focus on the genitals, and therefore morally culpable, as defined in *Young*.

Argument

Introduction

Mr. Martin does not dispute the necessity and constitutionality of regulating child pornography. In its introduction, the State discusses the history of regulating the child pornography industry and that “statutes that regulate the child pornography industry have withstood constitutional attack.” State’s Brief at 4-8. The Ohio Revised Code does not define nor include the term “pornography.” Webster’s dictionary defines “pornography” as “movies, pictures, magazines, etc., that show or describe naked people or sex in a very open and direct way in order to cause sexual excitement.” Merriam-Webster.com. <http://www.merriam-webster.com/dictionary/pornography> (accessed June 10, 2015). Some depictions of minors in a state of nudity are not child pornography.

Depictions of nudity, without more, even if the subject is a minor, are protected expression. *New York v. Ferber*, 458 U.S. 747, 765, 102 S. Ct. 3348, 73 L.Ed.2d 113 (1982). Despite the State’s assertion, *Ferber* does not affirm “a state’s right to ban the production of non-obscene child pornography.” State’s Brief at 7. It affirms the state’s right to ban child pornography without the material being held to the more lenient obscenity standard. *Ferber* at 762-764. The *Ferber* court acknowledged that the conduct prohibited must be “adequately defined by state law, as written or authoritatively construed.” *Id.* at 764.

Here, this Court is asked to clarify the definition of nudity as it relates to R.C. 2907.323(A)(1). The definition would clarify what is not immoral conduct, said another way, what is morally innocent nudity-oriented material, and therefore not criminal to produce even if the production does not fall within the delineated statutory exceptions.

This Court determined that R.C. 2907.322(A)(5) and 2907.323(A)(3) were constitutional statutes regulating nudity-oriented material involving a minor. *State v. Meadows*, 28 Ohio St.3d 42, 503 N.E. 2d 697 (1968), *Young*, 37 Ohio St.3d 249, 525 N.E.2d 1363 (1988). In *Meadows*, this Court determined that prohibiting possession of depictions of minors in sexual activity is constitutional. R.C. 2907.322(A)(5). Relying on *Ferber* in conducting a constitutional analysis, this Court held “the value of permitting possession of ‘photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not de minimis.’” *Id.* at 49.

The statute in question in *Meadows* explicitly prohibited depictions of minors in sexual activity. But the statute in *Young*, R.C. 2907.323(A)(3), is not linked to sexual activity. This Court authoritatively construed the statute to prohibit possession of minors in nudity-oriented material when it was non-morally innocent, defined as involving “lewd exhibition or involves a graphic focus on the genitals.” *Young* at 251-252. *Id.* at 252. If the material does not meet that definition, it is not child pornography, it is morally innocent, and it is not prohibited by law.

Similarly applying the *Young* definition of nudity to R.C. 2907.323(A)(1) would not make legal what is already illegal - child pornography. Instead, it would make sure the prohibition was adequately defined and limited to prohibit the production of non-morally innocent depictions of minors in nudity-oriented material. Mr. Martin asks this Court to resolve this conflict between appellate courts and hold that the nudity-oriented material produced must constitute a lewd exhibition or a graphic focus on the genitals.

Certified Conflict Issue

With respect to R.C. 2907.323(A)(1), which proscribes the creation or production of nudity-oriented material involving a minor, which definition of nudity applies; the statutory definition (R.C. 2907.01(H)), or the narrower definition set forth in *State v. Young*, 37 Ohio St.3d 249, 525 N.E.2d 1363 (1988), which requires additional elements of “lewd depiction” and “graphic focus on the genitals.”

The State describes *Young* as a case “on the mere possession of child pornography.” State’s Brief, *passim*. This is misleading for three reasons. First, *Young* and R.C. 2907.323(A)(3) do not sanction “mere possession of child pornography.” Instead, the *Young* court authoritatively construed the regulation to ensure that it adequately defined the prohibited conduct. That prohibition was limited, only slightly, to depictions of minors in nudity-oriented material that was not morally innocent.

Essentially, the *Young* court ensured that the statute prohibited material that was prurient in nature, or “child pornography.” Second, “mere possession” is not mentioned in the *Young* opinion. This Court did not rely on a distinction between possession and any other conduct to construe the statute. Ohio Revised Code Section 2907.323(A)(3) prohibited possession only. Finally, “mere possession” is a term of art used in obscenity jurisprudence that does not apply to nudity-oriented material involving minors. The obscenity standard allows for “mere possession” of obscene material, whereas the test for child pornography is different – and less lenient. *Ferber*, 458 U.S. 747, 764, 102 S. Ct. 3348, 73 L.Ed.2d 113 (1982); *Stanley v. Georgia*, 394 U.S. 557, 89 S. Ct. 1243, 22 L. Ed. 2d 542 (1969). There is a fundamental right to possess obscenity, and there is no such right to possess child pornography.

Child pornography is per se unprotected speech, so the only question here is what is child pornography within Ohio law. Ohio Revised Code 2907.323(A)(3) did not make clear what is impermissible nudity-oriented material involving a minor. So this Court, in *Young*,

clarified the meaning of nudity – because not all nudity-oriented material involving minors should be criminalized and not all nudity-oriented material involving minors is child pornography. The same clarification is needed with respect to R.C. 2907.323(A)(1). Without it, there would be an absurd result. There would be nudity-oriented material involving minors that was not illegal child pornography when possessed, but was illegal child pornography when created. For example, a person could not lawfully have surveillance cameras on her property documenting her swimming pool and record neighborhood kids skinny-dipping in her pool – but that same person could lawfully possess that same footage.

The State argues that there are adequate protections imbedded in the “proper purposes” exceptions to this statute. However the possession statute, R.C. 2907.323(A)(3), has nearly the same exceptions and this Court still required a narrowed definition of nudity. Further, that narrowed definition protects the possession of morally innocent material even if the exceptions do not apply. The same protection is necessary for morally innocent production.

Mr. Martin is only asking this Court for the correct analysis – one that makes sure the depiction is not morally innocent, and the way to conduct this analysis was already determined by this Court in *Young*. The correct resolution of this case would be to require trial courts to find that the produced nudity-oriented material involving a minor is lewd or has a graphic focus on the genitals. As State’s amicus points out, it is possible that the video Mr. Martin created is lewd – however that is not for this Court to decide. Brief of Amicus Curiae at 9-11.

Conclusion

This Court should find that R.C. 2907.323(A)(1) must be read with the same narrowed definition of nudity as construed by this Court in *Young* for R.C. 2907.323(A)(3) because they each have nearly identical statutory exceptions and prohibit intrinsically related conduct. A conviction for illegal creation or production of minor in oriented-material must be limited to immoral and not constitutionally protected conduct. Mr. Martin asks this Court to reverse and remand his case to the trial court for the application of the narrowed definition of nudity.

Respectfully submitted,

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Certificate of Service

I certify that a copy of this document was sent by regular U.S. mail to April Campbell, Assistant Prosecuting Attorney, Montgomery County Prosecutor's Office, P.O. Box 972, Dayton, Ohio 45422-0972, this 15th day of June, 2015.

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Merit Brief of Appellant Terry Lee Martin

Page's Ohio Revised Code Annotated
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Current through Legislation passed by the 131st General Assembly and filed with the Secretary of
State through file 5 (HB 47)

Title 29: Crimes -- Procedure
Chapter 2907: Sex Offenses
Obscenity

Go to the Ohio Code Archive Directory

ORC Ann. 2907.322 (2015)

§ 2907.322 Pandering sexually oriented matter involving a minor.

(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:

(1) Create, record, photograph, film, develop, reproduce, or publish any material that shows a minor participating or engaging in sexual activity, masturbation, or bestiality;

(2) Advertise for sale or dissemination, sell, distribute, transport, disseminate, exhibit, or display any material that shows a minor participating or engaging in sexual activity, masturbation, or bestiality;

(3) Create, direct, or produce a performance that shows a minor participating or engaging in sexual activity, masturbation, or bestiality;

(4) Advertise for presentation, present, or participate in presenting a performance that shows a minor participating or engaging in sexual activity, masturbation, or bestiality;

(5) Knowingly solicit, receive, purchase, exchange, possess, or control any material that shows a minor participating or engaging in sexual activity, masturbation, or bestiality;

(6) Bring or cause to be brought into this state any material that shows a minor participating or engaging in sexual activity, masturbation, or bestiality, or bring, cause to be brought, or finance the bringing of any minor into or across this state with the intent that the minor engage in sexual activity, masturbation, or bestiality in a performance or for the purpose of producing material containing a visual representation depicting the minor engaged in sexual activity, masturbation, or bestiality.

(B) (1) This section does not apply to any material or performance that is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies

or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance.

(2) Mistake of age is not a defense to a charge under this section.

(3) In a prosecution under this section, the trier of fact may infer that a person in the material or performance involved is a minor if the material or performance, through its title, text, visual representation, or otherwise, represents or depicts the person as a minor.

(C) Whoever violates this section is guilty of pandering sexually oriented matter involving a minor. Violation of division (A)(1), (2), (3), (4), or (6) of this section is a felony of the second degree. Violation of division (A)(5) of this section is a felony of the fourth degree. If the offender previously has been convicted of or pleaded guilty to a violation of this section or *section 2907.321* or *2907.323 of the Revised Code*, pandering sexually oriented matter involving a minor in violation of division (A)(5) of this section is a felony of the third degree.

HISTORY: 140 v H 44 (Eff 9-27-84); 142 v H 51 (Eff 3-17-89); 146 v S 2 (Eff 7-1-96); 148 v H 724, Eff 3-22-2001.