

Supp. App. Brief

NO. 39274-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

FREDRICK K. HAACK,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY _____
DEPUTY

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR LEWIS COUNTY

The Honorable James W. Lawler, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

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A. SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. The state failed to prove beyond a reasonable doubt that the appellant communicated with a minor for immoral purposes.

2. RCW 9.68A.090, which prohibits communications with a minor for immoral purposes, does not prohibit communications about sexual conduct that would be legal if performed.

3. If communications about conduct that is legal if performed can be punishable as communications with a minor for immoral purposes, the communicating statute is unconstitutionally vague as applied to the appellant.

Issues Pertaining to Supplemental Assignment of Error

1. Where every communication between the appellant and the 16-year-old minor involved conduct that would have been legal if performed, must the appellant's convictions be reversed and dismissed for insufficient proof of communicating with a minor for immoral purposes?

2. If communications about conduct that is legal if performed can be punishable as communications with a minor for immoral purposes, is the communicating statute unconstitutionally vague as applied to the appellant?

B. STATEMENT OF THE CASE

Frederick K. Haack was the pastor of a church in the small town of Randle. 2RP 56, 224.¹ C.G. moved to Randle in September 2005 and her 16-year-old daughter, B.G., joined her about one month later. 2RP 66-67, 81.

B.G. began going to Haack's church for services and youth group. 2RP 56-57, 67-68, 230-31. She met Haack through church activities and quickly became friends with Haack and his family. 2RP 57-59, 68-71, 225, 229-32, 249-51, 301-06. B.G. visited the Haacks' home nearly every day, at times for several hours. 2RP 70, 240-42, 273-74, 304-06, 310-11. When she visited, B.G. often used Haack's personal computer because her mother did not have Internet access in 2005. 2RP 68-69, 91, 96, 108-09, 242-43, 274-75.

B.G. also used her father's computer, including when she visited him at his home in another town around Christmastime in 2005. 2RP 58-61, 65, 71-72, 77-78, 81-82, 93, 99-100. B.G. and Haack began exchanging emails during these days around Christmas. 2RP 71-72, 78, 124, 232, 255, 257-58, 300.

¹ The verbatim report of proceedings is cited as follows: 1RP – 2/9/2009; 2RP – 3/9/2009 and 3/10/2009; 3RP – 3/11/2009; 4RP – 5/1/2009.

B.G. returned to Randle from her father's residence on December 30, 2005. 2RP 82. Her visits to the Haacks' residence increased in 2006. 2RP 293. She remained in Randle until about August 2006, when she went to live with her father in another town. 2RP 61, 98, 241, 245-46, 249. While living with her father, B.G. continued to call and email Haack and his wife. 2RP 98-99, 238-40, 245-46, 248, 251, 309. She saved email messages Haack sent to her. 2RP 72-73, 75-77, 144.

B.G. moved back to Randle in August 2007 and returned to Haack's church and the youth group. 2RP 89, 245-47, 309-10. In about November 2007, Haack learned that although B.G. received rides to church from fellow congregants, she was staying for only five or ten minutes before going elsewhere. 2RP 89-90, 247-48. Haack learned of B.G.'s early departures and told her in a phone call that if someone gave her a ride to church, she needed to stay at church. This angered B.G. and the phone conversation quickly ended. 2RP 248.

About two weeks later, on November 17, 2007, B.G. disclosed to her mother that Haack sent her inappropriate emails in December 2005. 2RP 61-62, 90-91, 112, 248-49. She showed her mother several email messages, which her mother read before calling the police. 2RP 61-63, 78-80, 91-92, 112.

Detective Bruce Kimsey met with B.G. and her mother at their residence. 2RP 112-14. Kimsey observed a host of email messages sent from Haack to B.G. during late December 2005 2RP 71-72, 79-80, 91-92, 112-15, 134-35, 261.²

Kimsey met with and questioned Haack two weeks later. 2RP 117-18, 233-34. Haack told Kimsey the content of the email messages between him and B.G. went from professional to personal to inappropriate. 2RP 124-26. Haack told the detective B.G. began to discuss her boyfriend and matters of a sexual nature in email messages. He admitted he erred by participating in the correspondence. 2RP 125-26. Kimsey showed Haack printed copies of some messages and Haack admitted he sent them to B.G. 2RP 126-28.

The state charged Haack with six counts of communicating with B.G. for immoral purposes. 2RP 95-97. At the resulting jury trial, B.G. testified the correspondence began when Haack asked her for her email address. Haack first brought up sexual subjects and encouraged her to discuss sexual matters. 2RP 70-71, 80-81, 94. She did not ask him

² The trial court admitted exhibits 1-27, which were messages sent from Haack's email account to B.G., between December 22 and December 27, 2005. The trial court gave a unanimity instruction to address the multiple acts. CP 62 (instruction 3).

questions about sex, although she did send a question about the word "pussy," which he answered. 2RP 94-95.

Haack testified his messages to B.G. were in response to her questions about relationship problems she had with a boyfriend. 2RP 236-37, 268, 281. Haack tried to discourage B.G. from engaging in inappropriate activities. 2RP 237, 261. He never asked questions about sexual things. 2RP 260-61.

A Lewis County jury found Haack guilty as charged. CP 50-55. The trial judge imposed statutory maximum concurrent terms of 60 months per count, along with community custody for a time "equal to the amount of earned early release time." CP 17-27; 4RP 28-31.³

D. ARGUMENT

THE STATE FAILED TO PROVE HAACK GUILTY BEYOND A REASONABLE DOUBT BECAUSE THE CHARGES DO NOT APPLY TO HAACK'S ALLEGED CONDUCT.

The email messages submitted to the jury are not unlawful communications with a minor for immoral purposes because all acts discussed in the messages would have been legal had B.G. performed

³ Haack challenged his sentence in the Brief of Appellant, filed October 28, 2009. The state conceded error on November 2.

them. The state therefore could not, and did not, prove Haack guilty beyond a reasonable doubt.

The statute setting forth the offense of communicating with a minor for immoral purposes "prohibits communication with children for the predatory purpose of promoting their exposure to and involvement in sexual misconduct." State v. McNallie, 120 Wn.2d 925, 933, 846 P.2d 1358 (1993); see State v. Schimmelpfennig, 92 Wn.2d 95, 102, 594 P.2d 442 (1979) ("The scope of the statutory prohibition is thus limited by its context and wording to communication for the purposes of sexual misconduct.").

In so holding, the McNallie Court overruled State v. Danforth,⁴ which held that only communications about conduct that would have been proscribed by other sections of RCW 9.68A were punishable under RCW 9.68A.090. This limitation was necessarily, according to the Danforth court, because "[t]he phrase 'immoral purposes' would be too vague under constitutional standards if it were read in a vacuum." Danforth, 56 Wn. App. at 136. Under Danforth's interpretation of the law, the only types of communications that were punishable under the statute were those that involved criminal conduct "relating to the sexual exploitation and abuse of

⁴56 Wn. App. 133, 136, 782 P.2d 1091 (1989).

children as it regards sexually explicit conduct that will be photographed or made part of a live performance and the patronizing of a juvenile prostitute." Danforth, 56 Wn. App. at 136.

For purposes of Haack's appeal, McNallie is important for two things it did not do. First, the Court did not indicate what it meant by "sexual misconduct." Second, the Court did not overrule this Court's decision in State v. Luther, 65 Wn. App. 424, 830 P.2d 674 (1992).

In Luther, the defendant and a girl, both 16 years old, engaged in two sexual acts. Before each act, the defendant asked the girl whether she was going to perform as previously offered. Luther, 65 Wn. App. at 425. The question was whether RCW 9.68A.090 prohibited the defendant's communications to the girl. The court asked whether the Legislature intended to forbid communications about immoral sexual conduct that would not be criminal if actually performed. Luther, 65 Wn. App. at 425-27. The court concluded that RCW 9.68A.090 does not proscribe communications about sexual acts that would be legal if performed. Luther, 65 Wn. App. at 427-28.

McNallie did not upset the holding in Luther. Instead, the Court merely noted Luther had "called into question" the reasoning of the Danforth Court. McNallie, 120 Wn.2d at 931 n.2.⁵

The holding of Luther was also acknowledged in State v. Pietrzak, 100 Wn. App. 291, 296-97, 997 P.2d 947 (2000). The court distinguished Luther on the ground the trial court found Pietrzak "employed, authorized, or caused" his 16-year-old niece to "engage in sexually explicit conduct," by exhibiting her unclothed body for "sexual stimulation of the viewer" and photographs. Pietrzak, 100 Wn. App. at 297. The trial court found Pietrzak committed sexual exploitation of a minor under RCW 9.68A.040, which prohibits a person from "compelling, aiding, inviting, employing, authorizing, or causing a minor to engage in sexually explicit conduct with the knowledge that such conduct will be photographed." Pietrzak, 100 Wn. App. at 297. Because Pietrzak's resulting conduct was criminal, any communication regarding that conduct was also illegal. Pietrzak, 100 Wn. App. at 297 (citing Luther, 65 Wn. App. at 425-28).

⁵ This Court in Luther held Danforth went too far by deciding the case based on unconstitutional vagueness standards. Luther, 65 Wn. App. at 426. Luther limited itself to the question of legislative intent, held that RCW 9.68A.090 was ambiguous, and concluded that under the rule of lenity and substantive due process, there could be "no rational reason for prohibiting communications about peaceful, consensual conduct that would be legal if performed." Luther, 65 Wn. App. at 427-28.

No such distinction exists in Haack's case. The "communication" upon which the state relied for the convictions consisted of 27 email messages from Haack's email account to B.G. A summary of the messages indicates none discussed conduct that would have been illegal if performed.

One group of messages appears to be in response to B.G.'s emails about a sex scene she saw in a movie and activities between her and her boyfriend. One message from Haack's email address said, "Well now, about that movie . . . seems to me you're getting hesitant to tell me about the sex scene. . . . is it that bad? OK, I will watch it with you if you think you can handle it." Ex. 21. A second said, "Tell me more about your make out session with what's his name." Ex. 26. A third asked, "AND what happened with you and what's his name at the movies?" Ex. 25. Part of a different message asked, "And what's that I hear about what's his name . . . trying to get his you know what . . . you know where? You are right about telling him NO." Ex. 17.

A second group, which consists of two messages, mentions filming. The first, obviously in response to an email from B.G. said, "So, you'd like to do a little acting? Well, we'll just have to give that some serious consideration! Maybe we can do a bit of experimenting with the

cam corder sometime." Ex. 13. The second said, "I bet you'll look fantastic in your [swimming] suit. Hey, maybe you could do some modeling for me when you get back in your cute outfits. I'll film you!" Ex. 14.

A third group of emails involved B.G.'s clothes. One message said, "Baby, tell me 'bout your underwear." Ex. 11. A second says, "Can you try them on for me? Big Bubba will approve baby sister's new panties. OK? Maybe you should show then [sic] to me one at a time. . . . OK maybe tomorrow?" Ex. 12. Another message asks, "I'm wondering why U R so messy? Do U need to take off your dirty shirt?" Ex. 10. Finally, "You'll have to do the best U can to get comfortable. I'm not able to assist u like I'd like 2. What R U wearing? R your clothes loose? If not, take them off." Ex. 6.

Another group of messages appeared to offer support. For example, one said, "Hey sweet sexy sister. Ya, your big bubba wants to hear about your favorite memories, movies and moments. Please know most of all you can tell me anything." Ex. 23. A second said, "Let's be together. It'll be all right. Do you know that we'll be together soon?" Ex. 24.

A different group of emails discusses touching: "It sounds like you need a bit of TLC. Is that true baby girl? You need some strong hands to work their magic don't you." Ex. 17; "My fingertips can sooth your pain." Ex. 8; "OK, so you are going to take a soak in the tub. Good! Just don't forget to wash those smelly armpits! Do I have to tell you where else to wash little sister? Next thing you know you're going to make me come in there and wash your back for you." Ex. 16; "Do you know what? Right now think about how wonderful it feels to have someone hug you and caress your stressed muscles. Can you feel that? Are you better now?" Ex. 15.

The final set involves more general subject matter. For example, one message informed, "Hey, baby sis, I have a place for U to crash. There's an RV next to the church that is available for U. It will be warm & cozy. OK?" Ex. 9. A second asked, "Does my sweet sister like nasty sex?" Ex. 5. Also, "So, you get ugly as in down & dirty? Tell me, what's the worst thing you've done to anyone (guy or chick)?" Ex. 19; A third asked, "Tell me baby, are you touching yourself?" Ex. 1. A fourth: "also you wondered why some people use the word pussy instead of the medical term. Soooooo what name do you like? Ex. 3. The next message picks up on this theme: So, you wonder why people call it a pussy?"

Maybe it's because it's sort of irresistible . . . and it's kinda soft . . . and they like to be petted . . . right? Ex. 4.

As this review shows, the communications discuss nothing of a sexually explicit nature. The term "sexually explicit conduct" is defined in RCW 9A.68A.011(3) as actual or simulated:

(a) Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex or between humans and animals;

(b) Penetration of the vagina or rectum by any object;

(c) Masturbation;

(d) Sadomasochistic abuse for the purpose of sexual stimulation of the viewer;

(e) Exhibition of the genitals or unclothed pubic or rectal areas of any minor, or the unclothed breast of a female minor, for the purpose of sexual stimulation of the viewer;

(f) Defecation or urination for the purpose of sexual stimulation of the viewer; and

(g) Touching of a person's clothed or unclothed genitals, pubic area, buttocks, or breast area for the purpose of sexual stimulation of the viewer.

Nor did any of the communications discuss payment of fees or receipt of compensation, or involve exposure to a live erotic performance. See RCW 9.68A.100-.103 (prohibiting commercial sexual abuse of a minor); RCW 9A.68A.150 (prohibiting allowance of minor on premises of business

showing live erotic performance). For these reasons, none of the communications involved conduct that, if performed, would have violated any provisions of RCW 9A.68A.

Similarly, none of the communications discussed conduct that would constitute voyeurism, sexual intercourse or sexual contact, which is defined as "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party." RCW 9A.44.010(2). As a result, none of the communications involved conduct that, if performed, would have violated any provisions of RCW 9A.44.

In summary, all communications of a sexual nature sent from Haack to B.G. involved conduct that would be legal if performed. Under this Court's decision in Luther, Haack's convictions must therefore be reversed and dismissed with prejudice.

2. IF COMMUNICATIONS INVOLVING CONDUCT THAT WOULD BE LEGAL IF PERFORMED IS PUNISHABLE, THE COMMUNICATING STATUTE IS UNCONSTITUTIONALLY VAGUE AS APPLIED TO HAACK.

In the alternative, the term "immoral purposes" is unconstitutionally vague as applied to Haack's communications. His convictions should therefore be reversed.

The due process vagueness doctrine under the Fourteenth Amendment and article I, section 3 of the state constitution guarantees citizens fair warning of prohibited conduct. State v. Bahl, 164 Wn.2d 739, 752, 193 P.3d 678 (2008). The vagueness doctrine serves two main purposes. First, it provides citizens with fair warning of what conduct they must avoid. Second, it protects them from arbitrary, ad hoc or discriminatory enforcement. State v. Halstien, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993). A prohibition is void for vagueness if either: (1) it does not define the offense with sufficient definiteness such that ordinary people can understand what conduct is prohibited; or (2) it does not provide ascertainable standards of guilt to protect against arbitrary enforcement. State v. Sullivan, 143 Wn.2d 162, 181-182, 19 P.3d 1012 (2001).

The communicating statute at issue here prohibits only language directed toward sexual misconduct with a minor, which is not protected by the First Amendment. Schimmelpfennig, 92 Wn.2d at 103. "Vagueness challenges to enactments which do not involve First Amendment rights are to be evaluated in light of the particular facts of each case." City of Spokane v. Douglass, 115 Wn.2d 171, 182, 795 P.2d 693 (1990).

If the terms "immoral purposes," "sexual misconduct" or "of a sexual nature" are not tethered to illegal conduct, they are inherently vague as applied to the communications in Haack's case. None of the communications hinted at sexual intercourse or sexual contact. Haack did not suggest B.G. expose any portions of her sexual anatomy to him or to anyone else. While in two messages Haack told B.G. to take her clothes off, he never suggested that she do that in his presence, in her boyfriend's presence, for photography, for posting on a web site, or in any inappropriate way. The only filming Haack offered to do was of B.G. in swimwear and "cute outfits."

In other cases, it was easy given the communications at issue to reject vagueness challenges. McNallie drove up to three young girls, aged 11, 10, and 11, asked them if there was anyone in the area who gave "hand jobs," suggested people could be paid for such services, and handled his penis in front of two of the girls. McNallie, 120 Wn.2d at 926-27. Schimmelpfennig stopped his van near a group of girls aged 4, 6 and 7. He spoke with the 4-year old, attempting to lure her into his van and asking her in explicit terms to engage in various sexual acts with him. Schimmelpfennig, 92 Wn.2d at 97. In Pietrzak, the accused

communicated a desire to photograph his nude 16-year-old niece. Pietrzak, 100 Wn. App. at 297.

It is clear ordinary people would believe those communications would be prohibited by law. This is not true with respect to Haack's communications. Some communications had nothing to do with matters of a sexual nature. None had to do with sexual misconduct. Punishing Haack's communications under RCW 9.68A.090 thus requires a type of guessing on the part of the citizenry and arbitrary enforcement on the part of the police and prosecution that is anathema to the constitutional protection against vague penal laws. As applied to Haack's conduct, RCW 9.68A.090 is unconstitutionally vague. This Court should reverse Haack's convictions. City of Sumner v. Walsh, 148 Wn.2d 490, 502, 61 P.3d 1111 (2003).

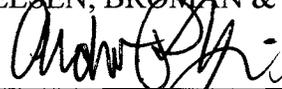
D. CONCLUSION

The state failed to prove Haack communicated with a minor for immoral purposes because the conduct he communicated would not have been illegal if performed. Alternatively, RCW 9.68A.090 is vague as applied to Haack's conduct. In either event, this Court should reverse Haack's convictions and remand for dismissal with prejudice.

DATED this 1 day of December, 2009.

Respectfully submitted,

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DIVISION II**

STATE OF WASHINGTON)	
)	
Respondent,)	
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vs.)	COA NO. 39274-7-II
)	
FREDERICK K. HAACK,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 1ST DAY OF DECEMBER 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 1ST DAY OF DECEMBER 2009.

x *Patrick Mayovsky*

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