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APPELLEE'S BRIEF

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

NORFOLK COUNTY

NO. 2012 – P- 1827

COMMONWEALTH,
Appellant

V.

JOHN REX,
Defendant-Appellee

ON APPEAL FROM ALLOWANCE OF MOTION
TO DISMISS IN NORFOLK SUPERIOR COURT

DEFENDANT-APPELLEE'S BRIEF

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ISSUE PRESENTED

Was the trial court judge correct when he allowed the defendant's Motion to Dismiss based on Commonwealth v. McCarthy, 385 Mass. 160 (1982), where the defendant was charged with seven counts of possession of child pornography in violation of M.G.L. c279, section 29C (vii), where there was no showing of any lewd exhibition of children in the images, there were no scenes of sexual behavior, and where the Grand Jury was not provided any instruction as to what child pornography is?

STATEMENT OF THE CASE

The Appellee has no modifications or additions to make to the Appellant's Statement of the Case.

STATEMENT OF FACTS

For the purposes of the Appellee's Motion to Dismiss (R. 20-31), and for this appeal, the only necessary and relevant facts are the seven images themselves, and that for the purposes of the Motion to Dismiss and the Commonwealth's appeal, the Appellee has conceded that the people depicted in the seven exhibits were real people, that they were under eighteen years of age, that they are naked, and that Mr. Rex was in fact in possession of the seven images (R. 24). The recitation of other facts in the Appellant's Brief are not pertinent or relevant to the issue presented in this case.

In fact, the Appellant seems to misapprehend some of the evidence that was present to the Grand Jury. It asserts in its brief, page 3, that hand drawn pictures of children engaged in sexual acts, a tracing of a boy holding a baseball bat, and the makings of a toy bear were all found in the same envelope as the seven images that constitute the basis for the seven counts of the indictment. Sergeant O'Malley made it clear the seven items were in an envelope (G.J. 12), that two drawings were found when he went further into the paperwork (G.J. 13, 21), and that later in the day two other drawing were recovered by another officer (G.J. 24).

The Grand Jurors, at least according to the Grand Jury minutes, were not instructed as to what the legal definition of child pornography is. Detective McSweeney, of the Massachusetts State Police, described the seven images and gave his opinion as to the ages of the various children, and whether or not the children were actual children and not virtual or morphed images (G.J. 34 – 39). Detective McSweeney was then asked about some of the other items that were seized from Mr. Rex. These included the hand drawings and the tracing of Adam Walsh, and some history concerning the Adam Walsh Act. (G.J. 40 – 42).

Immediately after Det. McSweeney's testimony about these other images, the Grand Jury received an instruction regarding the purpose of for which this other evidence was presented. The Grand Jury was instructed that this evidence could not be used to show Mr. Rex has a criminal personality or bad character (G.J. 43). But, the Grand Jury was then instructed it could use this evidence for a

limited purpose – the issue of intent, state of mind, motive, and absence of mistake, opportunity, preparation, plan, pattern of conduct, relationship, knowledge of identity, absence of mistake or accident (G.J. 43-44).

At no time was the Grand Jury instructed as to what child pornography is, or that mere nudity is not enough to establish that an image is pornographic.

The trial court judge who entered the order dismissing the indictments described the seven images in his Memorandum of Decision and Order on Motion to Dismiss (R. 78-90) and this Court should adopt the judge's findings and/or review the images themselves.

The parties, by agreement, also provided the trial court judge with copies of the original sources of the seven photographs. These were placed into a separate envelope and impounded by the court for its review of the material (Tr. 3, 24 - 25). One of the photographs was taken from a "National Geographic" magazine dated May 2008, page 122 (Tr. 6). One of the images was from pages 66-67 of a sociology textbook titled Sociology, by Rodney Stark, Ninth Edition, published by Thomson/Wadsworth, copyright 2004 (Tr. 6-7). The other five photographs were taken from Catalog 902 of a naturist's magazine titled "Internaturally, Inc", published in New Jersey (Tr. 7). For the convenience of the Court, these five subject photographs were circled for easier detection and recognition (Tr. 25). The Grand Jurors were not provided with any evidence as to the original source of these images. (Tr. 10).

ARGUMENT

The Massachusetts General Court enacted M.G.L. c272, section 29(C), making it a criminal offense, punishable by incarceration and/or a fine, to possess child pornography. On January 18, 2012, a Norfolk County Grand Jury heard evidence and reviewed exhibits concerning the seizure of photocopies of seven photographs that were seized from John Rex. The Grand Jury returned seven indictments charging Mr. Rex with violating this statute, specifically subsection (vii) (R. 80), which says a person shall not possess a photograph, or similar reproduction of a child under eighteen years of age and such child is... “depicted or portrayed in any pose, posture or setting involving lewd exhibition of the unclothed genitals, pubic area, buttocks, or, if such person is female, a fully or partially developed breast of the child, with knowledge of the nature or content...”.

There is no contention that the seven images do not depict real children who are under eighteen years of age, and that the children are nude. Nudity by itself is not pornography. See Commonwealth v. Bean, 435 Mass. 708 (2002), where the Supreme Judicial Court held in a case dealing with M.G.L. c272, section 29A, posing or exhibiting a child in a state of nudity, that the mere depiction of nudity is not enough to support a conviction under that statute. The same must be true for alleged violations of M.G.L. c272, section 29C. The decision in Bean, supra. is entirely consistent with an earlier Supreme Judicial Court decision that sections 29A, and 31(the section which lists the six factors to

be taken into account when determining whether lascivious intent is present) taken together do not prohibit mere visual depictions of nudity. Commonwealth v. Provost, 418 Mass. 416 (1994).

The Supreme Judicial Court rulings are consistent with each other on this issue, and they are consistent with the rulings of the United States Supreme Court. See Osborne v. Ohio, 495 U.S. 103 (1990), that held nudity without more constitutes protected expression. The Massachusetts Appeals Court made this same point in Howell v. Enterprise Publishing Co., 72 Mass. App. Ct. 739, 754, n. 3 (2008). There the Appeals Court noted the statute concerning possession of child pornography requires more than mere nudity, and that subsection (vii) requires a lewd exhibition of the unclothed genitals, pubic area, buttocks or female breast. The Appeals Court pointed to a dictionary definition of pornography that suggests that to be pornography the depiction must be one of “Licentiousness or lewdness: a portrayal of erotic behavior designed to cause sexual excitement.”

The Supreme Judicial Court has also made it abundantly clear that photography is a form of expression that is entitled to First Amendment protection just as the written or spoken word is protected. Commonwealth v. Oakes, 401 Mass. 602, 603 (1988), vacated and remanded, 491 U.S. 576 (1989).

In order for a photograph to be considered child pornography under subsection (vii) of section 29C, there must be some showing of a “lewd exhibition” of a child’s unclothed genitals, pubic area, buttocks, or for a female a

full or partially developed breast. None of the seven photographs in this case fit that definition or criterion.

The main issue therefore is to try to determine what constitutes “lewd exhibition”, and whether or not any of the seven images contain any such “lewd exhibition”. The most commonly used criteria found in case law appear to be those found in United States v. Dost, 636 F. Supp. 828, 832 (S.D. Cal. 1986), *aff’d sub. nom. United States v. Wiegand*, 812 F. 2d. 1239, 1244 (9th Cir.), *cert. denied*, 484 U.S. 856 (1987). In Dost, the factors were set out as: 1) whether the focal point of the visual depiction is on the child’s genitalia or pubic area; 2) whether the setting of the visual depiction is sexually suggestive, i.e. in a place or pose generally associated with sexual activity; 3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child; 4) whether the child is fully or partially clothed, or nude; 5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity, and; 6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer. The list is not designed to be exhaustive and the determination of lasciviousness has to be made based on the overall content of the depiction. Dost, at 832.

The Massachusetts state legislature also set out several, nonexclusive, criteria for determining when a portrayal is in fact lewd or what is lascivious intent. M.G.L. c272, section 31 sets out six factors that can be considered: 1) whether the circumstances include sexual behavior, sexual relations, infamous

conduct of a lustful or obscene nature, deviation from accepted customs and manners, or sexually oriented displays; 2) whether the focal point of a visual depiction is the child's genitalia, pubic area, or breast area of a female child; 3) whether the setting or pose of a visual depiction is generally associated with sexual activity; 4) whether the child is depicted in an unnatural pose or inappropriate attire considering the child's age; 5) whether the depiction denotes sexual suggestiveness or a willingness to engage in sexual activity; and, 6) whether the depiction is of a child engaging in or being engaged in sexual conduct, including, but not limited to sexual intercourse, unnatural sexual intercourse, bestiality, masturbation, sado-masochistic behavior, or lewd exhibition of the genitals. The Supreme Judicial Court acknowledged in Bean, supra. that these criteria originated in Dost. These factors were also found to be generally relevant in making the determination in United States v. Amirault, 173 F. 3d 28, 32, (1st Cir. 1999).

When evaluating the seven images in light of the Dost factors, the seven depictions do not provide any basis for finding a lascivious, or lewd, depiction of the genitalia or pubic areas. First, the focal point of the images is not the children's genitalia or pubic area. Each image clearly depicts a nude child or children, but the genitalia and pubic areas are not the focal point of the photos and do not accent those areas. The children are engaged in everyday, common activities. Whenever a photograph is taken of a nude child, or any nude person, it is likely these areas are going to be seen as being naked is, often times, the point

of the picture. While the Commonwealth contends in its brief that in each image the genitalia or buttocks of the child is in the center of the picture this simply is not true as a viewing of the images would establish. Also, using this standard, it would be impossible to have a head to foot photo of a naked child where the genitalia or buttocks would not be the center of the image. This is not, and cannot be, the basis for finding the focal point criterion. Thus, the first factor is not met.

The second Dost factor, a location associated with sexual activity, is not met in these images either. Again, the children are seen engaging in everyday activities, whether inside or outside, usually in the presence of others who are similarly dressed or undressed. The Commonwealth argues that a shower could be arguably a sexually suggestive setting. What one fantasizes from a scene should not be a basis to determine whether the actual behavior depicted is sexual or not. Exhibit 10, the shower image, does not contain any sexually suggestive facts. It depicts two young boys 'horsing' around in an outdoor shower. They are not engaged any sexual behavior. Thus, the second Dost factor is unmet.

The third factor, whether the child is depicted in an unnatural pose or in inappropriate attire, is not met either as none of the images fit this standard either. The children are busy mugging in a shower, picking up a bike, or engaged with others (probably family, or others in a group activity such as a party) in posed and un-posed photographs. The one image the Commonwealth directs the Court's attention to, Exhibit 11, shows a naked boy with a towel in his hand, and a naked girl with the girl's head inclined toward the boy's shoulder. This is a common,

everyday pose for people who are members of a family, people who are close friends, and it carries no sexual innuendo whatsoever. The two children are not engaged in any behavior that they would not be expected to be engaged in everyday life.

Whether the child is fully or partially clothed or nude is the fourth factor to be considered. As Judge Kaplan stated in his Memorandum of Decision (R. 84 – 85), nudity is largely the purpose of each of the photographs. In the sociology textbook, and in the National Geographic, nudity is discussed as part of the culture being portrayed. In the naturalist magazine, the point is that general every day activities can be enjoyed by people who are not clothed, and who might even enjoy life more living it naked. Not wearing clothes is the ‘essence’ of “Internaturally”, the source of five of the images. Nudity by itself is not sufficient to establish lewdness or lasciviousness. See New York v. Ferber, 458 U.S. 747, 765 n. 18 (1982); United States v. Grimes, 244 F. 2d 375, 381-82 (5th Cir. 2001), which notes that if nudity alone were sufficient for child pornography it would mean many works of art, or family photos of naked children in a bathtub would be outlawed. The Supreme Judicial Court made much the same observation in Oakes I, at 401 Mass. at 605, where it noted that an overbroad interpretation of G.L. c272, section 29A would criminalize a parent taking a frontal view picture of a naked one year old running on the beach, or playing in a wading pool.

The fifth Dost factor to be considered is ‘whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity’. This factor

has been the subject of much critical comment (see United States v. Wolf, 890 F.2d 241), and does not get much attention in the Commonwealth's Memorandum or its Brief. It appears as if the Commonwealth is even suggesting this factor should not be considered at all. In any event, the children in all seven of the photographs are not engaged in any sexually suggestive behavior or behavior that indicates the children are willing to engage in any sexual conduct. They are not being provocative, or alluring. Several of them do not even seem to be aware that they are being photographed.

The sixth factor, whether the depiction was intended to elicit a sexual response from the viewer is also lacking. It is not clear that this factor should even be considered when the issue is mere possession of child pornography as the possessor has no way of knowing what the photographer's intent was, and the possessor's intent, or subjective view of the image, is not a relevant consideration. This is so as the image has to be considered for what it is, not for what it conjures up in a viewer's mind. A photograph does not become pornography because it may be believed that lewd or lascivious thoughts have been directed at it. This is part of what the Court in United States v. Villard, 885 F.2d 117, 125 (3d. Cir 1989), had in mind when it wrote: "Child pornography is not created when [viewer] derives sexual enjoyment from an otherwise innocent photo. As the Ninth Circuit stated, 'private fantasies are not within the statute's ambit'. [United States v. Wiegand, 812 F.2d at 1245] When a picture does not constitute child pornography, even though it portrays nudity, it does not become child

pornography because it is placed in the hands of a pedophile, or in a forum where pedophiles might enjoy it. Faloon v. Hustler Magazine, Inc. 607 F. Supp. 1341 (N.D. Tex. 1985) (nude pictures of children did not constitute child pornography when published in legitimate “Sex Atlas” or in ‘raunchy’ Hustler magazine because they did not depict children engaged in sexual conduct [citation omitted] We must, therefore, look at the photograph, rather than the viewer.” See also, Osborne v. Ohio, 495 U.S. 103 (1990). Where the U.S. Supreme Court indicated a state may proscribe and prosecute possession and viewing child pornography, but the state could not rely on a paternalistic interest in regulating a person’s mind.

Judge Kaplan’s Order and Memorandum dealt with this factor very effectively by noting that in United States v. Amirault, 173 F.3d 28, 34 (1st Cir. 1999), the Court of Appeals concluded that “the focus should be on the objective criteria of the photograph’s design.” Id. at 35, and that child pornography cannot be determined by the viewer’s reaction as such a determination could turn a Sears catalogue into pornography. To hold otherwise would mean that a photograph might be pornography in one person’s hand but not in another’s. This cannot be the state of the law as the law must be applicable to everyone equally.

Furthermore, the seven photographs cannot be considered to have been intended to elicit a sexual response any more so than mere nudity would. In United States v. Johnson, 719 F. Supp. 2d 1059 (W.D. Mo. 2010), the court dealt with a similar issue when reviewing a case involving videos. In Johnson, at 1068, the court said, “These videos could not be considered to have been intended to

elicit a sexual response in the viewer any more than mere nudity would, which several courts have concluded is not sexual in character. We do have some limited context ...that [the defendant] set up a camera ... but that context indicates nothing more than an attempt to capture mere nudity and is very different than a person ... telling a minor to undress, lay on a bed, and open his legs for a nude photo.” The same is true for the photos at issue in this case.

When the defendant’s Motion to Dismiss was heard in the trial court, the defendant, with the agreement of the Commonwealth, presented the judge with information concerning the original sources for the seven photographs. It is entirely appropriate for this Court to consider these sources, especially in light of the decision in Commonwealth v. Sullivan, 82 Mass. App. Ct. 293, further appellate review denied, 463 Mass. 1112 (2012). One of the points the majority made in Sullivan, was that the photograph in that case (which was obtained from a Russian photo-sharing web site) was entitled to less protection than it would have if the photo had come from a medical textbook, National Geographic, or in an art museum.

One of the photographs is in fact from a National Geographic magazine, the May 2008 issue, a special issue focusing on China. This was grand jury exhibit 13. A second photograph, while not from a medical textbook, is in fact from a college level textbook. This was grand jury exhibit 12. This photograph is part of a photograph from Sociology, Ninth Edition, by Rodney Stark, published by Thompson/Wadsworth, copyright 2004, at pages 66-67, at the beginning of

chapter 3. To date, the defendant is unaware of any prosecutions begun against National Geographic or Sociology for distribution of child pornography by any federal or state prosecutor's offices.

The other five photographs, exhibits 7 through 11, all were taken from a catalog from a nationally distributed naturist (nudist) magazine, "Internaturally, Inc., Catalog number 902, published and distributed out of Newfoundland, N.J.

The magazine and catalog feature nude people, adults and children, and family groups, engaged in everyday activities and lifestyles where the whole purpose of the activity is to be naked. This magazine and catalog may not have a large national audience, but it might be referred to as a 'niche' population or audience.

This magazine, and its contents, has already been part of a court case, and appellate proceedings, and was reviewed by the Second Circuit Court of Appeals in 2000, United States v. Various Articles of Merchandise, 230 F. 3d 649 (2d Cir. 2000). At issue in Various Articles was the seizure of certain magazines arriving in the United States from Europe. These magazines were seized by federal authorities as being obscene. At the trial court level, in a jury waived agreed upon evidence trial, the magazines were determined to be obscene and were ordered forfeited. On appeal, the Second Circuit held otherwise. In its decision, the Court noted that the material in the seized magazines were not notably different than photographs that were found in a magazine called "Naturally", a nudist publication that was published in, and distributed from, Newfoundland, N.J. "Naturally" was the predecessor magazine to Internaturally, Inc. The Second

Circuit viewed the imported magazines as focusing on the children's activities, not their bodies, as they were shown swimming, boating, exercising, and the like. The Court then noted that "Naturally" depicted the same sorts of photographs. It held that the District Court had erred in determining the imported magazines were obscene as appealing to prurient interests because the magazines contained pictures of nudist children engaged in the activities typical of children. At one point, at page 657, the Circuit Court said, "... even a most conservative, straight-laced, and puritanical viewer of the photographs could not responsibly claim that the photographs are 'lewd'...It is true that some of the photographs are posed for the camera, but they are not posed in a way 'suggestive of moral looseness...All of the photographs are of smiling, happy and playful subjects, and none can be deemed lewd by any standard. The magazines just do not depict 'lewd exhibition of the genitals'".

While the Various Articles decision dealt with the issue of whether or not the magazines were obscene, and not with whether or not the photographs were child pornography, this is a distinction without merit. The Second Circuit specifically found the photographs did not contain any 'lewd' material, and did not depict any 'lewd exhibition of the genitals'. Thus, it is clear that the five photographs taken from the "Internaturally, Inc." are not child pornography.

The seven images that serve as the basis for the indictments in this case are consistent with images that can be, and are found, in any number of nationally distributed books and magazines that are available for purchase or viewing in

stores, libraries, and on line at sites such as Amazon.com. These include such items as Immediate Family by Sally Mann; Family Nudes, by Ralf Mohr; The Body – Photographs of the Human Form by William Ewing; Radiant Identities, by Jock Sturgis; and, Twenty-Five Years as an Artist, by David Hamilton.

Naturist and nudist organizations publish any number of magazines and books that depict naked minors, but they are legally available throughout the United States and internationally. The American Association for Nude Recreation even has a web site for naturists that provides stories, photos, travel hints and the like for people who are interested in that style of life.

The photographs at issue in this case are similar to the one that was at issue in Amirault which was found not to be pornography. The pictures are of children in various settings: at parties, at the shore, horsing around and the like, which are not associated with sexual activity. In Amirault the child was on a beach. The children are not in unnatural poses – they are part of a crowd, or frolicking around or part of a family portrait – where as in Amirault the young girl was digging in the sand. “[T]here is nothing particularly sexually suggestive in [her] expression or pose.” Amirault, at 33-34. Also see Bean, *supra* at 716 n. 19, where the Supreme Judicial Court noted “demeanor, facial expressions and body language are not sexually suggestive or inviting.” In the photos at issue here, the genitalia may be visible but are not the center of attention of the photos. Also, there is nothing about the photos from which one can extrapolate “an intent to elicit a sexual response. What is striking about the pictures is the childrens’

nakedness and their youth. Cf. United States v. Frabizio, 459 F. 3d 80, 93 (1st Cir. 2006) (J. Torruella concurring.) This has more to do with cultural mores and taboos regarding nude pictures of prepubescent children than because of any specific portrayal of any of the children.

Judge Kaplan's order in this case regarding the Commonwealth's assertion that the clipping of a photograph or two makes those items pornography now is also consistent with the legislative intent that lies behind the statute involved and should be sustained. That intent was '[T]o protect children from sexual exploitation... [by] prohibit[ing] the production of material which involves or is derived from such exploitation and to exclude all such material from the channels of trade and commerce.' St. 1997, c181, section 1(1). See Commonwealth v. Kenney, 449 Mass. 840, 853 (2007). This means that any sexual exploitation of a child must have occurred at the time the photograph was taken, not at the time it was clipped or viewed. If there was no sexual exploitation present at the time of the taking there can be no criminal liability for possessing it in some other form. See also, Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002). This line of reasoning is also consistent with what the United States Supreme Court seemed to be saying in New York v. Ferber, 458 U.S. 747 (1982). The language in that decision suggests the Supreme Court indicated it intended to outlaw only nude images of children that were sexually explicit, that is those that were sexually abusive in nature.

In the Commonwealth's brief, at pages 28-29, it suggests that in two cited cases other courts have held differently than the motion judge in this case: United States v. Cannon , 2011 WL 2600682, *16-17 (W.D. Ark. 2011); and United States v. Stewart, 839 F. Supp. 2d 914 (E.D. Mich. 2012). Clearly these cases are not precedent in the Commonwealth, and it is not clear exactly what these cases decided. In Cannon it is not clear that the photo referred to was what the defendant was prosecuted for, or was it just used to try to establish probable cause to search the defendant's computer. And in Stewart, it seems as the defendant in that case took the subject pictures himself which might make it more tenable to conflate his intent in taking the pictures with his cropping the pictures. In any event those were not the situations facing Mr. Rex and the motion judge in this case.

No errors of law were committed when Judge Kaplan ordered these indictments dismissed. When evaluating the evidence presented to a Grand Jury one of the things the judge hearing the motion to dismiss under McCarthy must do is determine whether or not the Commonwealth has met its burden of at least presenting some evidence to support every element of the crime(s) alleged. In this case, one of the necessary elements is whether or not the items at issue are child pornography or not. The motion judge is required to analyze the applicable law and apply it to the photographs at issue. This is especially true in a situation such as this case where the Grand Jury was not given any instructions as to what constituted 'child pornography' or what a 'lewd exhibition' might be. This is the

analysis and application Judge Kaplan used in this case, and he rightfully decided the seven photographs at issue did not contain any material that could fit the necessary legal analysis.

CONCLUSION

For the foregoing reasons this Honorable Court should affirm the order dismissing the indictments in this case, and remand the case to the Superior Court so that the Superior Court can discharge Mr. Rex as to these indictments.

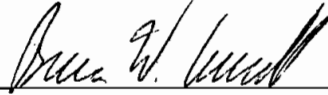
Respectfully submitted,



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CERTIFICATION BY COUNSEL

I, Bruce W. Carroll, hereby certify that this brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R. A. P. 16(a); Mass. R. A. P. 16 (e); Mass. R.A. P. 16 (f); Mass. R. A. P. (h); Mass. R. A. P. 18; and, Mass. R.A.P. 20.



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