

A05-460
STATE OF MINNESOTA
IN SUPREME COURT

STATE OF MINNESOTA,

Respondent,

vs.

HELMUT HORST MAUER,

Appellant.

APPELLANT'S REPLY BRIEF

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INTRODUCTION

The appellant appealed his conviction for possession of child pornography, challenging the constitutionality of Minn. Stat. 617.247, subd. 4(a). The Court of Appeals affirmed his conviction. This Court granted appellant's Petition for Review to determine whether Minn. Stat. 617.247, subd. 4(a) violates the First Amendment. On June 13, 2007, the respondent, State of Minnesota, filed its responsive brief. Respondent's brief is characterized by an alarming disregard for the actual holdings of the cases cited and a disturbing misunderstanding of the legal doctrines invoked. In this reply, appellant will address at least some of those issues.

ARGUMENT

I. BECAUSE MINN. STAT. 617.247, SUBD. 4(a) RESTRICTS FREEDOM OF EXPRESSION, THE STATE HAS THE BURDEN OF PROVING THAT THE STATUTE IS CONSTITUTIONAL.

The respondent points out that statutes are presumed constitutional, citing State v. Cannady, 727 N.W.2d 403 (Minn. 2007). Standing alone, this statement is quite misleading in the context of this case. It is true that, ordinarily, legislative enactments enjoy a presumption of constitutionality which remains in force until the contrary is established beyond a reasonable doubt. See, e.g. In re Haggerty, 448 N.W. 2d 363 (Minn. 1989). However, a provision of law restricting freedom of expression does not bear the usual presumption of constitutionality normally accorded to legislative enactments, and the state bears the burden of establishing the constitutionality of the

statute. State by Humphrey v. Casino Marketing Group, Inc., 491 N.W. 2d 882 (Minn. 1992); Alexander v. City of St. Paul, 303 Minn. 201, 227 N.W. 2d 370 (1975); Johnson v. State Civil Service Dept., 280 Minn. 61, 157 N.W. 2d 747 (1968); *see also* State v. Zarnke, 589 N.W. 2d 370 (Wis. 1999). Because Minn. Stat. 617.247, subd. 4(a) restricts freedom of expression, the statute is not presumed to be constitutional, and the state has the burden of establishing constitutionality.

II. APPELLANT'S CHALLENGE TO MINN. STAT. 617.247, SUBD. 4(a) IS NOT BASED ON THE DOCTRINE OF OVERBREADTH.

Respondent asserts that "Although it is not entirely clear, it appears Appellant is challenging Minn. Stat. 617.247, subd. 4(a) on the grounds that it is overbroad." (Respondent's Brief at p. 15). On the contrary, there is nothing unclear about appellant's claim. The appellant has asserted and continues to assert that Minn. Stat. 617.247, subd. 4(a) violates the First Amendment to the United States Constitution because it does not require scienter as to the minority of the performers as an element of the offense.

Appellant's claim is well grounded in the First Amendment jurisprudence of the United States Supreme Court. Beginning with Smith v. California, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed. 2d 205 (1959), a long line of cases has held that statutes prohibiting the possession or distribution of obscene material or child pornography that do not require scienter as to the contents of the material violate the First Amendment of the United States Constitution. Smith v. California, *supra*; Hamling v. United States, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed. 2d 590 (1974); New York v. Ferber, 458 U.S. 747, 102

S.Ct. 3348, 73 L.Ed. 2d 1113 (1982); Osborne v. Ohio, 495 U.S. 103, 110 S.Ct. 1691, 109 L.Ed. 2d 98 (1990). Likewise, the cases indicate that statutes prohibiting the possession or distribution of child pornography violate the First Amendment if they do not contain a requirement of scienter as to the age of minority of the performers. United States v. X-Citement Video, 513 U.S. 64, 115 S.Ct. 464, 130 L.Ed. 2d 372 (1994); United States v. X-Citement Video, 982 F. 2d 1285 (9th Cir. 1992); State v. Peterson, 535 N.W. 2d 689 (Minn. App. 1995); State v. Zarnke, 589 N.W. 2d 370 (Wis. 1999).

Appellant's challenge to Minn. Stat. 617.247, subd. 4(a) is not based upon the theory of overbreadth.¹ A statute is overbroad on its face if it prohibits constitutionally protected activity, in addition to activity that may be prohibited without offending constitutional rights. State v. Macholz, 574 N.W. 2d 415 (Minn 1998). Thus, under the doctrine of facial overbreadth, a defendant is permitted to challenge a statute on its face, even though the defendant's own conduct could constitutionally be prohibited. State v. Hipp, 298 Minn. 81, 213 N.W. 2d 610 (1973). In contrast to a challenge under the overbreadth doctrine, the appellant in this case is not objecting that the statute could possibly be applied unconstitutionally to others; he objects that the statute has already been applied unconstitutionally to him, because it permitted his conviction without proof of scienter.

¹ The mischaracterization of appellant's claim has been a pattern of the respondent throughout this litigation. In the Court of Appeals the respondent argued unsuccessfully that appellant's claim was brought under the Due Process Clause. (Respondent's Court of Appeals Brief at p. 8). This claim is echoed once again in Respondent's Brief at note 4. Suffice it to say that the Due Process Clause is not implicated in this case, except insofar as the guarantees of the First Amendment are made applicable to the states by virtue of the Fourteenth Amendment. See Near v. Minnesota, ex rel Olson, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed 1357.

The First Amendment requirement of scienter exists quite separately from the doctrine of overbreadth. Scienter is an element of an offense which is constitutionally required regardless of the scope of a statute, and the lack of scienter is a defect which violates the First Amendment. In other words, while the doctrine of overbreadth refers to the conduct which is proscribed by a statute, the requirement of scienter refers to the state of mind which is required for liability, regardless of what conduct is proscribed. Thus a statute which is in no respect overbroadl may nevertheless violate the First Amendment because it lacks a scienter requirement.²

In summary, appellant's contention is that Minn. Stat. 617.247, subd. 4(a) violates the First Amendment because it does not require scienter as an element of the offense. Accordingly, the doctrine of overbreadth has no bearing upon the issues presented in this appeal.

III. MINN. STAT. 617.247, SUBD. 4(a) DOES NOT REQUIRE THAT THE DEFENDANT BE "IN SOME MANNER AWARE" THAT THE PERFORMER IS A MINOR.

The respondent argues that this Court should follow the reasoning of the Court of Appeals' opinion, which held that Minn. Stat. 617.247, subd. 4(a) should be interpreted to require that the possessor be "in some manner aware" that the performer is a minor.

² Some confusion may arise because of the fact that the inclusion of a scienter requirement can be one factor which may help to save a statute from overbreadth. For example, this was the case in Osborne v. Ohio, 495 U.S. 103, 110 S. Ct. 1691, 109 L.Ed. 2d 98 (1990). In other words, a broad statute may be saved from overbreadth in part because it contains a scienter requirement, but a statute which lacks scienter is not cured because it is narrowly drawn.

But respondent's argument must fail for the fundamental reason that the interpretation adopted by the Court of Appeals is untenable.

The interpretation adopted by the Court of Appeals is flatly inconsistent with the teaching of this Court in State v. Grover, 437 N.W. 2d 60 (Minn. 1989). In State v. Grover, this Court held that the term "know or has reason to believe" "has acquired a meaning in Minnesota involving reasonably definite standards," and that the phrase "reason to believe" is to be interpreted under the criminal negligence standard. 437 N.W. 2d at 63. In fact, in discussing the meaning of the child abuse reporting statute, which was at issue in the case, the Court went to great lengths to describe the correct application of the statute, and the mental state required for liability. The Court stated:

"A mandated reporter who has reason to know or believe that a child is being or has been abused but fails to recognize it also violates the statute though the actor's culpability is merely negligent rather than purposeful, knowing or reckless."

State v. Grover, 437 N.W. 2d at 63.

Given the clarity of the Grover decision, there can be no reasonable disagreement as to the meaning of the term "knowing or having reason to know" or any of the variants which are found in the statutes. There can be no doubt that the expression "knowing or with reason to know" is meant to impose liability though the actor's culpability is merely negligent rather than purposeful, knowing or reckless. Nor can there be any doubt that Minn. Stat. 617.247, subd. 4(a) cannot be interpreted to mean that the possessor of child pornography must be "in some manner aware" that the performer is a minor.

Furthermore, contrary to the respondent's contention, the Court of Appeals interpretation of Minn. Stat. 617.247, subd 4(a) is inconsistent with the plain language of the statute. Under the Court of Appeals' interpretation, "a person has 'reason to know' only if he has knowledge of the facts that subjectively lead him to believe that the performer is a child." 726 N.W. 2d at 814. But if that were the case, the words "with reason to know" in the statute would be superfluous, since "knowing" and "believing" are equivalent terms under Minn. Stat. 609.02, subd. 9(2). Of course it is a canon of construction that statutes are to be construed so that no word or phrase is superfluous. Boutin v. LaFleur, 591 N.W. 2d 711 (Minn. 1999).

Finally, if the narrowing construction adopted by the Court of Appeals is deemed correct, the new construction will raise a serious problem of due process, since the "in some manner aware" standard is itself inherently vague and ambiguous. It is impossible to know whether the supposed new standard requires knowledge, reckless disregard or some other mental state. A standard which requires that the defendant be "in some manner aware" of an elemental fact provides no guidance to the trier of fact and is really no standard at all. The construction adopted by the Court of Appeals clearly does not provide an adequate standard for application of Minn. Stat. 617.247, subd. 4(a).

For these reasons appellant submits that Minn. Stat. 617.247, subd. 4(a) cannot be interpreted in accordance with the opinion of the Court of Appeals.

IV. THE “REASON TO KNOW” STANDARD OF MINN. STAT. 617.247 SUBD. 4(A) DOES NOT SATISFY THE REQUIREMENT OF SCIENTER.

The relevant decisions of the United States Supreme Court indicate that the minimum standard of scienter for a statute prohibiting the possession of child pornography is the knowledge that the performers are minors or the reckless disregard of a known risk of that fact. Smith v. California, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed. 2d 205 (1959); Hamling v. United States, 418 U.S. 87, 94 S.Ct. 2887 41 L.Ed. 2d 590 (1974); Osborne v. Ohio, 495 U.S. 103, 110 S.Ct. 1691, 109 L.Ed. 2d 98 (1990); United States v. X-Citement Video, 513 U.S. 64, 115 S.Ct. 464, 130 L.Ed. 372 (1994).

The standard of “reason to know” contained in Minn. Stat. 617.247, subd. 4(a) cannot be equated with a requirement of scienter. The phrase “with reason to know” is an expression of the ordinary standard of criminal negligence. The criminal negligence standard requires a showing that the actor’s conduct involved a “gross deviation from the standard of care that a reasonable person would observed in the actor’s situation.” State v. Grover, 437 N.W. 2d 60 (Minn. 1989). Unlike the standards of knowledge or recklessness, which are subjective, the criminal negligence standard is objective; it requires only that the defendant ought to have been aware of the risk, even if he was not. As one commentator has pointed out, “Negligence is not a state of mind; it is a standard of conduct a defendant is expected to maintain regardless of his state of mind.” Egan, *Level of Scienter Required for Child Pornography Distributors: The Supreme Court’s*

Interpretation of “knowingly” in 18 W.S.C. §2252, 86 J. Crim. L. and Criminology 1341, 1379 (1996).

The language “with reason to know” in Minn. Stat. 617.247, subd. 4(a) allows the conviction of a defendant without either a knowing violation or the conscious disregard of a known risk concerning the age of the performers, and permits the state to convict the defendant without any showing of defendant’s subjective knowledge or belief. The effect of the statute is to place the burden on the possessor of pornographic materials to ensure that none of the performers are underage. The statute thereby relieves the state of the burden to establish any level of scienter. As a result the statute violates the First Amendment.

The respondent relies primarily on the case of Ginsberg v. New York, 390 U.S. 629, 88 S.Ct. 629, 20 L.Ed. 2d 195 (1968). But respondent’s reliance on Ginsberg is seriously misplaced. In Ginsberg the Supreme Court upheld against a facial challenge a New York statute that prohibited the “knowing” sale of obscene materials to minors. The statute defined “knowingly” to include “reason to know.” Id. at 644, 88 S.Ct. at 1283. However, in rejecting the challenge to the statute, the Court relied on the state court’s interpretation of the statute as applying only to “those who are in some manner aware of the character of the material they attempt to distribute.” Id. at 644, 88 S.Ct. at 1283.

Because the statute in Ginsberg was upheld on the basis of the construction given to it by the New York Court of Appeals, it is clear that Ginsberg v. New York has no application to this case unless Minn. Stat. 617.247, subd. 4(a) is interpreted to apply only to those possessors of pornographic material “who are in some manner aware” of the age

of the performers. But as appellant has previously shown, such an interpretation of Minn. Stat. 617.247, subd. 4(a) is unwarranted.

It is also important to note that the obscenity statute considered in Ginsberg and Minn. Stat. 617.247, subd. 4(a) are not at all similar. For example, the New York statute was directed to distributors of obscene material, while Minn. Stat. 617.247, subd. 4(a) is directed to possessors of child pornography. The respondent dismisses these differences as irrelevant, as did the Court of Appeals. But the fact remains that there is no persuasive reason why Minn. Stat. 617.247, subd. 4(a) should be interpreted in the same way as the New York obscenity law, except for the determination of the Court of Appeals to fashion a construction which would fit the holding of Ginsberg v. New York.³

The respondent also cites the case of Hamling v. United States, 418 U.S. 87, 94 S.Ct. 2887 (1974), but she misrepresents the holding of that case. Respondent describes the decision as “rejecting claim that defendant must actually know materials are obscene and holding it is sufficient if he ‘knew or had notice’ of the content of the material distributed.” (Respondent’s Brief at p. 24). But the supreme Court in Hamling made no reference to “notice.” What the Court said in Hamling was this:

“It is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials.”

³ Respondent also cites State v. Oman, 261 Minn. 10, 116 N.W. 2d 514 (1961). Oman interpreted a statute prohibiting the sale of obscene literature as requiring the defendant to be “in some manner aware” of the character and content of the material. But the case is not relevant here because the statute in question did not contain the language “knowing or with reason to know” or any similar language.

Hamling, 418 U.S. at 123, 94 S.Ct. at 2910. Thus Hamling most certainly did not hold that it was sufficient if the defendant “had notice” of the content of the materials. Far from supporting respondent’s position, Hamling actually supports appellant’s argument that knowledge is required.

The respondent also argues that the “reason to know” standard is necessary to prevent people from escaping prosecution through willful blindness or deliberate ignorance. The very same argument was made and rejected in Smith v. California:

“It is argued that unless the scienter requirement is dispensed with, regulation of the distribution of obscene material will be ineffective, as booksellers will falsely disclaim knowledge of their books’ contents or falsely deny reason to suspect their obscenity. We might observe that it has been some time now since the law viewed itself as impotent to explore the actual state of a man’s mind. Eyewitness testimony of a bookseller’s perusal of a book hardly need be a necessary element in proving his awareness of its contents. The circumstances may warrant the inference that he was aware of what a book contained, despite his denial.”

Smith v. California, 361 U.S. at 154, 80 S.Ct. at 215.

In summary, appellant submits that the “reason to know” standard of Minn. Stat. 617.247, subd. 4(a) fails to satisfy the First Amendment requirement of scienter. A statutory standard allowing conviction of those who merely have reason to know of the minority of the persons depicted will not serve the end of protecting the value of freedom of expression for which the requirement of scienter exists.

CONCLUSION

Minn. Stat. 617.247, subd. 4(a) violates the First Amendment to the United States Constitution because it does not require scienter as to the minority of the performers as an element of the offense. Therefore, the statute is unconstitutional on its face, and as applied in this case.

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