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Castaneda v. State of Nevada, 132 Nev. Adv. Op. 44 (June 16, 2016)

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CRIMINAL LAW: STATUTORY INTERPRETATION

Summary

Appellant was convicted of 15 counts of child pornography under NRS 200.730.² Appellant contested 14 of the 15 charges, arguing that his possession of 15 images of child pornography constituted only one violation. The Court agreed and determined that prosecuting each image or depiction of child pornography as a separate charge under NRS 200.730 is not what the legislature intended. The statute should not be read to charge each “possession” as one violation. The Court reversed 14 of the charges.

Background

A former housemate of appellant (Castaneda) found a flash drive containing pornographic images of minors, and reported him to the Las Vegas Metropolitan Police Department (“Police”). The Police obtained a search warrant for Castaneda’s home and computers, and found a total of 15 depictions of child pornography. Castaneda told the Police, “[t]hose are kids, I’m sorry.” The State charged Castaneda with 15 counts of “knowingly and willfully possessing 15 image files depicting sexual conduct of a child in violation of NRS 200.730.” A jury convicted Castaneda on all 15 counts. The district court judge sentenced Castaneda to 28-72 months for each count to run concurrently, but the district court suspended the sentences and placed Castaneda on probation for five years. Castaneda appealed.

Castaneda argued 14 of the 15 convictions should be vacated because NRS 200.730 only penalizes “a singular act” of possession (i.e. the one occasion when police seized the evidence).³ Castaneda supported his theory with a Constitutional argument, claiming multiple punishments for the same offense is unconstitutional through double jeopardy.⁴ Castaneda asked the Court to interpret the statute and find his actions constituted one crime instead of 15.

Discussion

A. The Text and Plain Meaning

The Court faced the question of what “unit of prosecution” the statute prescribes;

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² NEV. REV. STAT. § 200.730 (2005) states: “A person who knowingly and willfully has in his or her possession for any purpose any film, photograph or other visual presentation depicting a person under the age of 16 years as the subject of a sexual portrayal or engaging in or simulating, or assisting others to engage in or simulate, sexual conduct:

1. For the first offense, is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 6 years, and may be further punished by a fine of not more than \$5,000.
2. For any subsequent offense, is guilty of a category A felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of life with the possibility of parole, and may be further punished by a fine of not more than \$5,000.”

³ *Id.*

⁴ U.S. CONST. amend. V; NEV. CONST. art. I, § 8.

specifically, if Castaneda's actions constituted one crime or 15 crimes. This is a question of statutory interpretation and is reviewed de novo.⁵

The State argued the word "any" is plain and unambiguous, and NRS 200.730 criminalizes possession of even one photograph. Thus, the State said every photograph thereafter is a separate crime. The Court disagreed. The Court read NRS 200.730 to mean a single possession is basis for prosecution but additional images do not necessarily create separate charges. The Court also said many criminal statutes use "any" to "catalog the objects of the prohibition the statute states,"⁶ but the word "any" has multiples meanings that can be as low as "one," "unlimited," or any variation in-between. Thus, the Court rejected the notion that using "any" introduces a list of objects that automatically "authorizes a per-object unit of prosecution." In sum, the word "any" is ambiguous.

B. Legislative History and Other Tools

Unsatisfied with the text's plain meaning, the Court next reviewed NRS 200.730 under other tools of statutory interpretation. The Court highlighted that the rule of lenity be applied if other statutory tools do not answer this question.⁷ First, the Court looked at the legislative history of NRS 200.730 and the series of statutes under "Pornography Involving Minors."⁸ The Court highlighted how the prohibition of "possession" of "any film, photograph or other visual presentation" of a minor engaged in sex has remained unchanged throughout the years. The Court noted the statute has not been amended to accommodate technology changes. And since the statute does not address this specific issue, the Court found the statute's text nor its legislative history answered the unit-of-prosecution question.

Next, the Court looked at a previous Nevada case where appellant was punished under NRS 200.710⁹ for "use of a minor in a performance" involving the minor in "sexual portrayal or conduct."¹⁰ The appellant in *Wilson* argued the 4 photographs he took constituted one violation. The State argued each "performance" included "any. . . film, photograph, . . . or other visual presentation" and thus equaled 4 separate performances. Each performance was a violation. This Court, in *Wilson*, agreed with appellant and reversed 3 of the 4 violations. The Court supported its finding by stating, "If the Legislature intended this statute to punish a party for every individual photograph produced of a sexual performance, it certainly could have effectuated that intent in the statute." While *Wilson* did not raise a unit of prosecution argument, this Court used it as a guideline for Castaneda's situation. Applying *Wilson*, this Court found prosecuting every downloadable image would be contrary to legislative intent.

Lastly, the Court looked at other jurisdictions. Some courts narrowed all charges to a single charge.¹¹ Other courts found the issue ambiguous and therefore applied the rule of lenity.¹²

⁵ *Firestone v. State*, 120 Nev. 13, 16 (2004)

⁶ See *United States v. Kinsley*, 518 F.2d 665, 667-68 (8th Cir. 1975)

⁷ See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 298-99 (2012). ("[a]mbiguity in a statute defining a crime or imposing a penalty should be resolved in a defendant's favor.")

⁸ NRS 200.730 is one of a series of statutes, NRS 200.700 through NRS 200.760, codified under the heading "Pornography Involving Minors."

⁹ NEV. REV. STAT. § 200.710 (1995)

¹⁰ *Wilson v. State*, 121 Nev. 345, 114 P.3d 285 (2005)

¹¹ *People v. Hertzog*, 67 Cal. Rptr. 3d 312, 316 (Ct. App. 2007); *Commonwealth v. Rollins*, 18 N.E.3d 670, 678 (Mass. 2014)

¹² *State v. Liberty*, 370 S.W.3d 537, 548, 553 (Mo. 2012); *State v. Sutherby*, 204 P.3d 916, 920 (Wash. 2009)

Since the rule of lenity interprets statutes in favor of the defendant, those courts permitted a single prosecution instead of multiple offenses.¹³ And some courts held each depiction or performance was a separate offense and should be prosecuted as such.¹⁴ Here, the Court followed *Liberty* and *Sutherby* (two cases in other jurisdictions) and applied the rule of lenity. The Court could not presume the legislature intended multiple punishments unless explicit in the statute's text and the State did not distinguish the offenses from each other (separate downloads, different times or places). Thus, the Court found Castaneda's possession of 15 images constituted a single violation under NRS 200.730.

C. Other Issues on Appeal

The Court also addressed other issues Castaneda brought on appeal. First, Castaneda challenged the sufficiency of the evidence based on failure to prove Castaneda (and not some other automated virus) willfully possessed the photographs. The Court reviewed the evidence and found it was likely human behavior that downloaded the images. The Court supported this finding based on testimony, the housemates limited access to Castaneda's password protected computers, and Castaneda's comment of "Those are kids, I'm sorry" to the Police. The Court found the evidence was sufficient and supported the jury's conviction under NRS 200.730.

Second, Castaneda challenged the district court's refusal of calling a "previously unnoticed" expert witness. Castaneda claimed a detective's testimony about file deletions on Castaneda's computer caught him by surprise. However, the detective testified to similar evidence at the preliminary hearing, Castaneda had several opportunities for cross-examination, and Castaneda received a continuance at trial so he could locate a computer expert witness (in which he did). The Court found the district court did not abuse its discretion in denying Castaneda's request to call an unnoticed expert witness.

Conclusion

Overall, the Court determined the State proved one, not 15, NRS 200.730 violations. The Court supported its decision by finding the plain text and legislative intent was unclear; thereby applying the rule of lenity. The Court also found there were no other reversible errors. Thus, the Court affirmed in part, vacated in part, and remanded for an amended judgment of conviction.

¹³ *Supra* note 5 ("Criminal statutes must be strictly construed and resolved in favor of the defendant.")

¹⁴ *State v. McPherson*, 269 P.3d 1181, 1184-85 (Ariz. Ct. App. 2012); *Fink v. State*, 817 A.2d 781, 788 (Del. 2003)