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Summary of Wilson v. State, 121 Nev. Adv. Op. 34

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CRIMINAL-CHILD PORNOGRAPHY

Summary

A jury convicted Wiley Gene Wilson of four counts of use of a minor in the production of pornography and four counts of possession of visual presentations depicting sexual conduct of a person under sixteen years of age. Wilson appealed, arguing that his four convictions for using a child in a sexual performance were redundant convictions.

In September of 2001, Wilson and the ten-year-old female victim (M.T.) left M.T.'s father's trailer to attend to errands related to installing a satellite television system. Apparently, while running errands and stuck in traffic, M.T. urinated in her clothing. Subsequently, Wilson took M.T. to Wal-Mart and purchased her new clothes to replace the ones she had urinated in. Wilson also purchased a Polaroid camera and instant film at the same time. Subsequently, while M.T. changed her clothes, Wilson told M.T. to pose in various positions and took four photographs of M.T. unclothed. Based on these facts, a jury convicted Wilson on four counts of using a child in a sexual performance. Wilson appealed, arguing that the four convictions were redundant because they involved the use of a child in a single sexual performance.

The court held that the threshold issue to determine whether Wilson's convictions were redundant is "whether Wilson committed a single act or four individual acts that are punishable as separate violations of NRS 200.710."² Based upon the statutory language of NRS 200.710, the court held that "the crux of the prohibited conduct is the use of a minor in sexual performance and not how the performance is otherwise recorded or documented."³ For example, had Wilson filmed the minor's performance rather than taken photographs, Wilson would have only been convicted of one violation rather than four. Based on this logic, the court unequivocally held that the focus of the crime must be on the performance and not the way it is documented. As a result, the court reversed three of Wilson's four convictions for the production of child pornography.

Wilson was also convicted of possession of child pornography under NRS 200.730.⁴ Wilson argued that his conviction on four counts of possession of child

¹ By Kathleen L. Fellows

² *Wilson v. State*, 121 Nev. Adv. Op. 34, 114 P.3d 285 (2005). NEV. REV. STAT. 200.710 states:

1. A person who knowingly uses, encourages, entices or permits a minor to simulate or engage in or assist others to simulate or engage in sexual conduct to produce a performance is guilty of a category A felony and shall be punished as provided in NRS 200.750.

2. A person who knowingly uses, encourages, entices, coerces or permits a minor to be the subject of a sexual portrayal in a performance is guilty of a category A felony and shall be punished as provided in NRS 200.750, regardless of whether the minor is aware that the sexual portrayal is part of a performance.

³ *Wilson*, 121 Nev. Adv. Op. 34, 114 P.3d 285.

⁴ A person violates NEV. REV. STAT. 200.730 "who knowingly and willfully has in his possession for any purpose any film, photograph or other visual presentation depicting a person under the age of 16 years as

pornography violated double jeopardy because those counts were lesser-included offenses of the production charges. The court, however, upheld Wilson's convictions under NRS 200.730 because the requisite intent between the two statutes differed.

Further, Wilson's right to confront his victim under the Sixth Amendment was not violated. While the child victim was cross-examined at trial with her back to Wilson, Wilson did not produce sufficient evidence to prove his right under the Sixth Amendment had been violated and failed to object until the end of his case.

The court also dismissed Wilson's claim that the State violated Article IV(c) of the Interstate Agreement on Detainers (IAD) for failure to commence trial within 180 days of Wilson's detention. The court held that the 180-day time limit is not absolute and can be extended with good cause.

Lastly, the court dismissed Wilson's claim that his due process was violated when the district court failed to compel attendance of out-of-state witnesses. The court held that because of jurisdictional limitations, they may only compel out-of-state witnesses if they are present in the State of Nevada.

Issues and Dispositions

Issues

1. Does the use of a child in a single sexual performance in which multiple photographs are taken constitute a single offense or multiple offenses under NRS 200.710?
2. Is possession of child pornography under NRS 200.730 a lesser-included offense to the production of child pornography under NRS 200.710?
3. Is a criminal defendant's constitutional right to confront his or her accuser under the Sixth Amendment violated when the victim is cross-examined at trial but cannot see the defendant?

Dispositions

1. The act of photographing a victim constitutes one event for purposes of NRS 200.710.
2. No. The crime of possession of child pornography is not a lesser-included offense to the production of child pornography as defined by Nevada law.
3. No. Wilson did not provide the substantive proof necessary to prove that the prosecutor violated his Sixth Amendment right.

Commentary

State of the Law Before *Wilson*

Redundant Convictions

Prior to *Wilson*, the Nevada Supreme Court declared convictions redundant in two situations: (1) when the statutory language indicates one rather than multiple criminal violations was contemplated;⁵ and (2) when legislative history shows that an ambiguous statute was intended to assess punishment.⁶ “When a defendant receives multiple convictions based on a single act, this court will reverse ‘redundant convictions that do not comport with legislative intent.’”⁷ Additionally, *Crowley v. State*⁸ recently set forth that where conduct was incidental to a sexual assault, it should be treated as one episode of assault.⁹

Nevada uses the *Blockburger*¹⁰ test to determine whether multiple convictions arising from a single incident are permissible. “Under this test, ‘if the elements of one offense are entirely included within the elements of a second offense, the first offense is a lesser included offense and the Double Jeopardy Clause prohibits a conviction for both offenses.’”¹¹

Confrontation Clause

The Sixth Amendment to the United States Constitution provides every criminal defendant with the right to confront his or her accuser.¹² The United States Supreme Court held in *Coy v. Iowa*¹³ that a screen to block the defendant’s view of a witness on the stand violates the Sixth Amendment.¹⁴ The Supreme Court noted that “[i]t is difficult to imagine a more obvious or damaging violation of the defendant’s right to a face-to-face encounter.”¹⁵

Nevada held in *Smith v. State*¹⁶ that the Sixth Amendment was violated when the prosecutor positioned himself between the child victim and the defendant so that the witness could not see the defendant during her direct testimony and vice versa.¹⁷

Effect of *Wilson* on Current Nevada Law

Redundant Convictions

“The purpose of Nevada's child pornography statutes is to protect children from the harms of sexual exploitation and prevent the distribution of child pornography.”¹⁸ As

⁵ *Jefferson v. State*, 95 Nev. 577, 599 P.2d 1043 (1979).

⁶ *Carter v. State*, 98 Nev. 331, 334-35, 647 P.2d 374, 376 (1982).

⁷ *Eberling v. State*, 120 Nev. 401, 404, 91 P.3d 599, 601 (2004).

⁸ 120 Nev. 30, 83 P.3d 282 (2004).

⁹ *Id.*

¹⁰ *Blockburger v. U.S.*, 284 U.S. 299 (1932).

¹¹ *Wilson*, 121 Nev. Adv. Op. 34, 114 P.3d 285 (citations omitted).

¹² U.S. CONST. amend. VI;

¹³ 487 U.S. 1012 (1988).

¹⁴ *Id.* at 1015-22.

¹⁵ *Id.* at 1020.

¹⁶ 111 Nev. 499, 894 P.2d 974 (1995).

¹⁷ *Id.*

such, the holding in *Wilson* is very limited in scope. The court determined that Wilson's convictions were redundant because they happened all on the same day, at the same time, and with one child. Nevertheless, it seems as if the photographs had been taken at different times of day or there had been multiple children involved, the court may have held the convictions were not redundant.

Additionally, the court upheld all four convictions for possession of child pornography, which conflicts slightly with the reasoning the court utilized in overturning the redundant convictions for production of child pornography. Using the same video analogy, under NRS 200.730, possession of one video, no matter how long in length, would constitute one conviction. However, possession of multiple still photographs constitutes multiple convictions under *Wilson*. Accordingly, the court has sent conflicting messages regarding what type of crimes may be evaluated under their test for redundant convictions.

Another interesting perspective regarding the mutual exclusivity of NRS 200.710 and NRS 200.730 is that *Crowley* held anything incidental to the production of child pornography to be included in the charge under NRS 200.710. *Wilson* does not clarify whether memorializing the activity is incidental to the production of child pornography. The court noted that the fact Wilson "maintained possession, until he was arrested days later on an unrelated offense, amounts to the commission of a separate and distinct crime from the initial production of the photographs."¹⁹ Yet, the court never clarified whether *Wilson* would have been guilty under NRS 200.730 had he not maintained possession of the photographs beyond the performance of the sexual activity.

Confrontation Clause

Nevada's interpretation of the confrontation clause does not appear to have changed under *Wilson v. State*. Nevertheless, *Wilson* refines the level of substantive proof necessary to establish a violation of the Sixth Amendment and the timing for making an objection. As a result of *Wilson*, a defendant must make a contemporaneous objection during the questioning of his or her accuser and a defendant must firmly establish exactly how his view was blocked during questioning.

Conclusion

In conclusion, the act of photographing a victim on the same day, at the same time, with the same child constitutes one event for purposes of NRS 200.710. Additionally, the crime of possession of child pornography is not a lesser-included offense to the production of child pornography as defined by Nevada law.

¹⁸ *Id.* (citing *State v. Dist. Ct.*, 120 Nev. 254, 263, 89 P.3d 663, 668 (2004)).

¹⁹ *Wilson*, 121 Nev. Adv. Op. 34, 114 P.3d 285.