

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

(FILED: OCTOBER 26, 2012)

STATE OF RHODE ISLAND	:	
	:	
v.	:	C.A. No. P2-2012-0835A
	:	
ARUNOTHAI ASAWABOWORNAN	:	
	:	

DECISION

McBURNEY, M. Before this Court, pursuant to Rule 9.1 of the Superior Court Rules of Criminal Procedure¹ and Rhode Island General Laws 1956 § 12-12-1.7,² is the Motion of Arunothai Asawabowornan (“Asawabowornan” or “Defendant”) to dismiss charges by information against her for Producing Child Pornography in violation of Rhode Island General Laws 1956 § 11-9-1.3(1), Transferring Child Pornography in violation of section 11-9-1.3(2), and Possessing Child Pornography in violation of section 11-9-1.3(4).

¹ Rule 9.1 of the Rules of Criminal Procedure for the Superior Court states:
“A defendant who has been charged by information may, within thirty (30) days after he or she has been served with a copy of the information, or at such later time as the court may permit, move to dismiss on the ground that the information and exhibits appended thereto do not demonstrate the existence of probable cause to believe that the offense charged has been committed or that the defendant committed it. The motion shall be scheduled to be heard within a reasonable time.”

² Rhode Island General Laws 1956 § 12-12-1.7 states:
“Within thirty (30) days after a defendant is served with a copy of an information charging him or her with an offense, he or she may move in the superior court to dismiss the information on the ground that the information and exhibits appended to it do not demonstrate the existence of probable cause to believe that the offense charged has been committed or that the defendant committed it. Upon the filing of the motion to dismiss the court shall schedule a hearing to be held within a reasonable time.”

Defendant asserts that the images and video upon which the charges are based fail to meet the statutory criteria for child pornography. Therefore, she argues, there is no probable cause to believe that the charged crimes were committed, and accordingly, the charges should be dismissed. For the reasons set forth below, this Court denies Defendant's Motion to Dismiss.

I. Facts and Travel

Arunothai Asawabowornan is a native of Thailand, living as a resident alien in Providence. In 2006 or 2007, Defendant, while in Thailand, became the legal guardian of her niece, Jane.³ From her adoption until February 2011, Jane lived with Defendant, Defendant's sister, and Defendant's boyfriend.

In September 2010, the Rhode Island State Police received a tip through the National Center of Missing and Exploited Children that a video had been uploaded to www.youtube.com ("YouTube") by a user with the e-mail address of arunothai4@gmail.com. That video's content centered on a young female, who was asleep and lying face-up on a bed. In the video, the female was wearing shorts, without underwear, and her genitalia was plainly visible under her shorts. The video-operator zoomed in on the female's bare genitals and then, while still zoomed in, pulled aside the young female's shorts, fully exposing her pubic area.

Based on the video, the Rhode Island State Police completed a search warrant for the e-mail address arunothai4@gmail.com, and made a subpoena request for the Internet Protocol ("IP") address associated with that e-mail. The e-mail logs from Google, sent in response to the search warrant and subpoena, revealed several other photographs,

³ To protect the privacy of the child victim in this case, the Court has given her a fictitious name.

including the three other photographs at issue in this case. Two of those photographs were of Jane, who at the time of the search warrant was eight years old. In one of the photographs (Image 1), Jane is completely nude. In the second photograph (Image 2), Jane's underwear is just above her knees. The camera frame is focused on her pubic area, and her face is not visible in the picture. The third photograph (Image 3) shows Jane in a park. Although another photograph depicts her wearing a bikini, in the photograph at issue, she has her top off, exposing her breasts.

The e-mail data additionally revealed that the e-mail address was registered to Arunothai Asawabowornan, and that the photographs had been sent to four other e-mail addresses. Based on this information, the Rhode Island State Police completed applications for search warrants for the four e-mail addresses to which the photographs had been sent. The police subsequently learned, through Defendant's statements and an investigation, that the four e-mail addresses were all registered to members of Defendant's family.

Based on the YouTube posting, the photographs that had been sent, and additional surveillance, the police executed a search warrant on Defendant's residence. While executing the search warrant, the police advised Defendant of her Miranda rights and asked her if she wished to speak with them about the subject matter of the investigation. The Defendant made a recorded statement, in which she admitted to taking the video, posting the video to YouTube, taking the photographs, and transmitting the photographs through e-mail. Additionally, upon executing the search warrant, the police seized computers, cameras, and a variety of electronic storage devices, such as external hard drives, flash cards, and thumb drives. The Defendant was charged with three counts

under section 11-9-1.3—Possession of Child Pornography in violation of section 11-9-1.3(a)(4); transfer of child pornography in violation of section 11-9-1.3(a)(2); and production of child pornography in violation of section 11-9-1.3(a)(1).

In March 2011, the Defendant made a Rule 5 Motion for Preliminary Examination under the District Court Rules of Criminal Procedure, seeking to dismiss the charges for lack of probable cause. After hearing testimony and reviewing evidence presented, the District Court hearing judge concluded that probable cause had been shown on each count of the felony complaint. In June 2012, the Defendant again sought to dismiss the charges for probable cause, basing this motion on Rule 9.1 of the Superior Court Rules of Criminal Procedure.

By agreement of the parties, this Court also engaged in an in camera viewing of the video, which is at the core of these allegations.

II. Standard of Review

It is well settled that “[w]hen addressing a motion to dismiss a criminal information, a [Superior Court] justice is required to examine the information and any attached exhibits to determine whether the state has satisfied its burden to establish probable cause to believe that the offense charged was committed and that the Defendant committed it.” State v. Martini, 860 A.2d 689, 691 (R.I. 2004) (quoting State v. Fritz, 801 A.2d 679, 682 (R.I. 2002)); see also State v. Aponte, 649 A.2d 219, 222 (R.I. 1994); State v. Reed, 764 A.2d 144, 146 (R.I. 2001). Further, when ruling on a motion to dismiss, “the trial justice should grant the state ‘the benefit of every reasonable inference’ in favor of a finding of probable cause.” State v. Young, 941 A.2d 124, 128 (R.I. 2008) (quoting State v. Jenison, 442 A.2d 866, 875-76 (R.I. 1982)).

Additionally, “[t]he probable-cause standard applied to a motion to dismiss is the same as that for an arrest.” Aponte, 649 A.2d at 222. “Probable cause to arrest ‘consist[s] of those facts and circumstances within the police officer’s knowledge at the moment of arrest and of which he had reasonably trustworthy information that would warrant a reasonably prudent person’s believing that a crime has been committed and that the prospective arrestee had committed it.’” Id. (quoting State v. Usenia, 599 A.2d 1026, 1029 (R.I. 1991)). Thus, probable cause sufficient to support an information is established when, after taking into account relevant facts and circumstances, a reasonable person would believe that the charged crime occurred and was committed by the Defendant. Furthermore, a trial justice’s finding of probable cause “may be based in whole or in part upon hearsay evidence or on evidence which may ultimately be ruled to be inadmissible at the trial.” 1956 § 12-12-1.9.

III. Analysis

A. Collateral Estoppel

The State has argued that the matter before the Court is barred from consideration by the doctrine of collateral estoppel due to a previous finding of probable cause in the felony complaint by a District Court hearing judge. “Collateral estoppel ‘means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.’” State v. Hie, 688 A.2d 283, 284 (R.I. 1996) (quoting Ashe v. Swenson, 397 U.S. 436, 443 (1970)). “For this doctrine to apply, three requirements must be satisfied: there must be an identity of issues; the prior proceeding must have resulted in a final judgment on the merits; and the party against whom collateral estoppel is sought must be

the same as or in privity with a party in the prior proceeding.” Id. (citing Providence Teachers Union, Local 958 v. McGovern, 113 R.I. 169, 172, 319 A.2d 358, 361 (1974)). Moreover, under the identity of the issues analysis, “there are three factors that must be considered: ‘first, the issue sought to be precluded must be identical to the issue decided in the prior proceeding; second, the issue must actually have been litigated; and third, the issue must necessarily have been decided.’” Id. at 285 (quoting State v. Chase, 588 A.2d 120, 123 (R.I. 1991)).

Additionally, the Rhode Island Supreme Court has determined that the doctrine of collateral estoppel can be applied against criminal defendants. Id. at 284. However, “[t]he United States Supreme Court has noted that ‘collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality.’” Id. at 284-85 (quoting Ashe, 397 U.S. at 444). The Court’s inquiry on whether to apply collateral estoppel “must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.” Id. at 285 (quoting Ashe, 397 U.S. at 444).

It is clear that there is an identity of the parties in this case, as the State of Rhode Island and Defendant have argued before the District Court and the Superior Court on these motions. Equally evident is that there is an identity of issues. In considering the first factor, the issue in this case is identical to the issue decided in the prior proceeding. In the District Court, Defendant requested a Preliminary Examination in accordance with Rule 5 of the District Court Rules of Criminal Procedure,⁴ which requires the hearing

⁴ Rule 5(c) of the District Court Rules of Criminal Procedure provides:
“**Preliminary Examination.** The defendant shall not be called upon to plead. If the defendant waives preliminary examination,

judge to determine whether probable cause exists to believe that an offense has been committed and that Defendant has committed the offense. In this Court, Defendant made a Motion to Dismiss for Lack of Probable Cause under Rule 9.1 of the Superior Court Rules of Criminal Procedure, which requires the Superior Court Justice to determine whether probable cause exists to believe that an offense has been committed and that Defendant committed it. Furthermore, in considering the second factor, this issue was fully litigated in the District Court, and the hearing judge issued a written decision: the “Decision on Defendant’s Motion for Preliminary Examination.” In that decision, he concluded, “[a]fter a thorough review of the testimony presented at the hearing, the Court’s inspection of the video, and a review of the pertinent statute, this Court finds that the probable cause has been shown on each count of the instant felony complaint.” Finally, in considering the third factor, the determination of probable cause was necessary to the prior proceeding: based on that decision, Defendant was held on the complaint to answer in Superior Court.

However, the doctrine of collateral estoppel does not apply because the District Court determination was not a final judgment. The Rhode Island Supreme Court has

the judge of the District Court shall forthwith hold the defendant to answer in the Superior Court. If the defendant does not waive examination, the judge shall hear the evidence within a reasonable time. The defendant may cross-examine witnesses against him or her and may introduce evidence in his or her own behalf. If from the evidence it appears to the judge that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the judge shall forthwith hold the defendant to answer in the Superior Court; otherwise the judge shall discharge the defendant. The judge shall, where authorized by statute, admit the defendant to bail as provided in these rules. After concluding the proceeding the judge shall transmit forthwith to the clerk of the Superior Court for the appropriate county all papers in the proceeding and any bail taken by him or her.”

determined that “[t]he denial of a motion to dismiss a criminal action (with the exception of a motion on double-jeopardy or collateral-estoppel grounds) is not a final judgment from which an appeal may be taken.” State v. Morejon, 675 A.2d 410, 412 (R.I. 1996); see also State v. Godette, 751 A.2d 742, 745-46 (R.I. 2000).

Additionally, in determining whether to apply collateral estoppel, this Court must consider all the circumstances of the proceeding and the practical consequences of applying the doctrine. Hie, 688 A.2d at 285. Therefore, because the procedural posture of this Motion differs with the posture of the matter before the District Court, and because different procedural rules apply to each motion, this Court declines to apply the doctrine of collateral estoppel in this matter. This Court now proceeds to an evaluation of the merits of Defendant’s motion.

B. Probable Cause

The Defendant is charged with three violations of the Child Pornography statute under Rhode Island General Laws 1956 § 11-9-1.3. Section 11-9-1.3 provides in pertinent part:

“Child pornography prohibited. – (a) Violations. It is a violation of this section for any person to:

- (1) Knowingly produce any child pornography;
- (2) Knowingly mail, transport, deliver or transfer by any means, including by computer, any child pornography;
- (3) Knowingly reproduce any child pornography by any means, including the computer; or
- (4) Knowingly possess any book, magazine, periodical, film, videotape, computer disk, computer file or any other material that contains an image of child pornography.

....

(c) Definitions. For purposes of this section:

- (1) ‘Child pornography’ means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or

produced by electronic, mechanical, or other means, of sexually explicit conduct where:

- (i) The production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
- (ii) Such visual depiction is a digital image, computer image, or computer-generated image of a minor engaging in sexually explicit conduct; or
- (iii) Such visual depiction has been created, adapted, or modified to display an identifiable minor engaging in sexually explicit conduct.

....

(6) ‘Sexually explicit conduct’ means actual:

- (i) Graphic sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, or lascivious sexual intercourse where the genitals, or pubic area of any person is exhibited;
- (ii) Bestiality;
- (iii) Masturbation;
- (iv) Sadistic or masochistic abuse; or
- (v) Graphic or lascivious exhibition of the genitals or pubic area of any person;

(7) ‘Visual depiction includes undeveloped film and videotape and data stored on a computer disk or by electronic means, which is capable of conversion into a visual image;

(8) ‘Graphic,’ when used with respect to a depiction of sexually explicit conduct, means that a viewer can observe any part of the genitals or pubic area of any depicted person or animal during any part of the time that the sexually explicit conduct is being depicted.

Since the Rhode Island Supreme Court has yet to interpret this statute, this Court looks to analogous federal decisions interpreting federal child pornography statutes for guidance in its application. See 18 U.S.C. § 2256(2)(B)(iii) (proscribing “graphic or simulated lascivious exhibition of the genitals or pubic area of any person”); see also State v. Byrne, 972 A.2d 633, 641 n.11 (R.I. 2009) (noting similarity between Rhode Island and federal child pornography statutes). Federal courts have recognized that the “graphic” or “lascivious” nature of the content at issue is a case-specific determination that must be established based on the totality of the circumstances. See, e.g., United

States v. Wallenfang, 568 F.3d 649, 658 (8th Cir. 2009); United States v. Amirault, 173 F.3d 28, 32 (1st Cir. 1999); United States v. Knox, 32 F.3d 733, 747 (3d Cir. 1994); United States v. Dost, 636 F. Supp. 828 (S.D. Cal. 1986), aff'd, 813 F.2d 1231 (9th Cir. 1987).

Specifically, courts have applied the list of factors articulated in United States v.

Dost:

- “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;
- 6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.”

Dost, 636 F. Supp. at 828; see also Wallenfang, 568 F.3d at 657-58 (applying the Dost factors as guidance to determine whether a depiction is lascivious); Amirault, 173 F.3d at 32 (noting that although the Dost factors provide “specific, workable criteria” in determining whether content is “lascivious,” other factors will also be evaluated and that “[t]he inquiry will always be case-specific”); Knox, 32 F.3d at 747 (concluding that fact-finders must determine whether content is lascivious “using the Dost factors and any other relevant factors given the particularities of the case”). The Dost factors are not exhaustive; they are, however, “generally relevant and provide some guidance in evaluating whether the display in question is lascivious.” Amirault, 173 F.3d at 31-32.

To withstand this Motion to Dismiss, the State must merely submit sufficient evidence that a reasonable person would believe that the charged offenses occurred, and

Defendant committed the offenses. In this case, that standard requires that the State produce sufficient evidence for a reasonable fact-finder to conclude that the video posted to YouTube or the photographs e-mailed by Defendant included content that was a “[g]raphic or lascivious exhibition of the genitals or pubic area of any person.” See § 11-9-1.3(c)(6).

Where, as here, a reasonable person would believe that the content at issue included a graphic or lascivious exhibition of a person’s genitals or pubic area, the Court will not dismiss a charge under Rule 9.1. In this case, the State has presented three photographs and one video. Applying the Dost factors, a reasonable jury could find that the photographs or the video depicted a graphic or lascivious exhibition of Jane’s pubic area. See Dost, 636 F. Supp. at 828.

In Image 1, Jane appears completely nude. When viewing this image in light of the Dost factors, this Court finds that there is probable cause to believe that the image constitutes child pornography under section 11-9-1.3 and that Defendant generated and distributed the image. The third and fourth factors in Dost are particularly relevant to this analysis. The image, which depicts a completely nude minor, is lascivious in this Court’s opinion, in part, because the complete nudity is inappropriate considering the age of this child. The fact that this image was recovered during the execution of a search warrant for Defendant’s e-mail address and that Defendant ultimately admitted to the taking of the photograph and transmittal of the photograph by e-mail further support the finding of probable cause.

In Image 2, Jane appears with her pubic area exposed and her underwear just above her knees. Her genital area is fully uncovered, and her pose of putting on

underwear is sexually suggestive. Further, the fact that she is exiting the shower and changing is also sexually suggestive. Therefore, this image implicates the first, second, third, and fourth factors in Dost. Based on the lascivious nature of the image, the manner of discovery of the image, and Defendant's statement and transmittal of the image, this Court finds probable cause to believe that the image violates the Child Pornography Statute.

In Image 3, Jane appears in a park without a top, so her breasts are exposed. Therefore, the third and fourth Dost factors are applicable to this image. Based upon the lascivious nature of the image and the manner of discovery of the image, as well as Defendant's statement and transmittal of the image, this Court finds probable cause to believe that it violates the Child Pornography Statute.

In the video, Jane appears sleeping on a bed. She is wearing shorts without underwear, and her pubic area is plainly visible under her shorts. The video-operator zooms in on the genital area, and then, while zoomed in, pulls aside Jane's shorts, fully exposing her genitals. Further, Jane is lying on a bed, and, as the United States Court of Appeals for the Second Circuit has determined in the context of evaluating whether an image is lascivious such that it constitutes child pornography, "a bed is 'generally associated with sexual activity[.]'" United States v. Rivera, 546 F.3d 245, 250 (2d Cir. 2008). Therefore, the first, second, third, and fourth Dost factors are applicable. Based upon the lascivious nature of the video, the manner of discovery of the video, as well as Defendant's statement and transmittal of the video, this Court finds probable cause to believe that the video violates the Child Pornography Statute. Additionally, this Court agrees with the State's contention that this video was graphic and would not be

considered constitutionally protected speech. This shocking depiction of Jane’s genitalia is exactly what the General Assembly sought to prohibit in the Child Pornography Statute.

Although the photographs or video may not meet all the Dost factors, a depiction need not meet all the Dost factors to be lascivious. United States v. Wolf, 890 F.2d 241, 247 (10th Cir. 1989). For example, in Wolf, the United States Court of Appeals for the Tenth Circuit held that a depiction can be “lascivious” even if it does not suggest sexual coyness or a willingness to engage in sexual activity. Id. In that case, the image at issue depicted a young girl lying on her back, while sleeping. Id. at 243. The girl’s sleep-shirt had been pulled up above her waist to expose the nude lower half of her body. Id. The Wolf court upheld the fact-finder’s conclusion that the picture was lascivious, reasoning that holding otherwise “would ignore the obvious exploitative nature of the depiction and require the child to exhibit lust, wantonness, sexual coyness or other inappropriate precocity.” Id. at 246.

In addition, the fact that Jane is partially clothed in some of the depictions does not preclude a finding that the images are graphic or lascivious. In fact, in United States v. Knox, the United States Court of Appeals for the Third Circuit noted that visual depictions of clothed genitalia may fall within the meaning of “lascivious exhibition of the genitals or pubic area,” and thereby qualify as child pornography. 32 F.3d at 754. Therefore, where, as here, the determination of whether the content at issue is “lascivious” or “graphic” is highly-fact specific, and where “the spectrum of constitutionally unprotected pornographic material [is] broader” because a child is the

subject matter of the content, it is inappropriate for this Court to dismiss for lack of probable cause. See id. at 750.

IV. Conclusion

Taking into account the relevant facts and circumstances, and granting the State the benefit of every reasonable inference, this Court denies the motion to dismiss for lack of probable cause. For the reasons set forth above, this Court finds that there is probable cause to support the charges of Producing Child Pornography in violation of Rhode Island General Laws 1956 § 11-9-1.3(1), Transferring Child Pornography in violation of section 11-9-1.3(2), and Possessing Child Pornography in violation of section 11-9-1.3(4).