

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRUCE P. GAMINO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 38945

FILED

MAY 06 2003

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

This is an appeal from a judgment of conviction upon a plea of guilty to one count of possession of a visual presentation depicting a person under the age of sixteen years as the subject of a sexual portrayal, a violation of NRS 200.730.¹ Appellant, Bruce Gamino, entered into a plea agreement under which he preserves the right to challenge the constitutional validity of NRS 200.730 on appeal to this court.²

FACTUAL BACKGROUND

¹NRS 200.730 states, in pertinent part:

A person 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 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.

²See NRS 177.015(4).

The facts of this case are undisputed. Gamino, while positioned on the roof of his home, filmed his thirteen-year-old stepdaughter through a skylight as she prepared to take a bath and while bathing. Throughout the video, which lasted approximately three to five minutes, Gamino repeatedly zoomed in with the camera on his stepdaughter's exposed buttocks, breasts and genital area. The victim's mother inadvertently discovered the video two years later and reported the incident to the police.

The State initially charged Gamino with violation of: (1) NRS 200.710 and NRS 200.750, using a minor in producing pornography and/or as the subject of a sexual portrayal; and (2) NRS 200.730, possessing a visual presentation depicting sexual conduct or sexual portrayal of a person under sixteen years of age.

The State and Gamino ultimately reached a plea bargain. In exchange for pleading guilty to a violation of NRS 200.730, the State agreed to drop the more serious charges under NRS 200.710 and NRS 200.750 and, as noted, the State also agreed that Gamino could challenge the constitutionality of NRS 200.730 on appeal.

The district court sentenced Gamino to a term of twelve to thirty-six months in the Nevada State Prison. This sentence was suspended and Gamino was placed on probation for an indeterminate period of time not to exceed sixty months. The district court also ordered Gamino to pay a statutory \$25.00 administrative assessment fee, a \$150.00 DNA testing fee, and a \$900.00 psychosexual evaluation fee. Gamino appeals pursuant to the terms of his plea agreement.

DISCUSSION

District court's finding of "sexual portrayal"

Counsel for Gamino convinced the district court at sentencing to make a finding of fact regarding whether the videotape of Gamino's stepdaughter constituted a "sexual portrayal" under NRS 200.730, and NRS 200.700(4).³ The district court made an affirmative finding in that regard.

On appeal, Gamino asks this court to consider whether the district court erred in finding that the videotape was a "sexual portrayal" for these statutory purposes. First, Gamino plead guilty to the charge. Second, this particular issue was not preserved via the plea agreement. Thus, we will not consider it in this appeal.

Facial vagueness of NRS 200.730

Gamino argues that NRS 200.730 is unconstitutionally vague because it fails to give adequate notice respecting "just what depictions of minor children are prohibited." This court has held "that a facial vagueness challenge is appropriate, even where no substantial First Amendment concerns are implicated, if the penal statute is so imprecise, and vagueness so permeates its text, that persons of ordinary intelligence

³NRS 200.700(4) states, in part:

As used in NRS 200.700 to 200.760, inclusive,
unless the context otherwise provides:

. . . .

4. "Sexual portrayal" means the depiction of a person in a manner which appeals to the prurient interest in sex and which does not have serious literary, artistic, political or scientific value.

cannot understand what conduct is prohibited, and the enactment authorizes or encourages arbitrary and discriminatory enforcement.”⁴

We conclude that Gamino has not carried his burden to prove that NRS 200.730: (1) fails to give fair notice of the prohibited conduct; and (2) authorizes and encourages arbitrary enforcement.

Due process does not require impossible standards of specificity in statutory language, especially when, if viewed in the context of the entire statutory provision, there are well settled and ordinary meanings for the words used.⁵ The term “sexual portrayal” in NRS 200.730 is not unconstitutionally vague when examined in light of the specific definition provided under NRS 200.700(4); a “depiction of a person in a manner which appeals to the prurient interest in sex and which does not have serious literary, artistic, political or scientific value.” Additionally, this definition is patterned after the definition of obscenity articulated by the United States Supreme Court in Miller v. California.⁶ We agree with the Illinois Court of Appeals that child pornography provisions that incorporate the essential elements of Miller, much like the Nevada provision at issue here, are not unconstitutionally vague.⁷

⁴City of Las Vegas v. Dist. Ct., 118 Nev. ___, ___, 59 P.3d 477, 480 (2002).

⁵Woofter v. O'Donnell, 91 Nev. 756, 762, 542 P.2d 1396, 1400 (1975) (citing United States v. Brown, 333 U.S. 18, 25-26 (1948); United States v. Sullivan, 332 U.S. 689, 693-94 (1947)).

⁶413 U.S. 15, 24 (1973).

⁷State of Illinois v. Spargo, 431 N.E.2d 27, 34 (Ill. App. Ct. 1982).

Additionally, the statute provides a specific standard by which police can judge whether an individual possesses a “sexual portrayal” and thus does not leave absolute discretion in the hands of the police or encourage arbitrary enforcement. Therefore, NRS 200.730 is not unconstitutionally vague.

Overbreadth

Gamino argues, without case law or statutory support, that NRS 200.730 is unconstitutionally overbroad. This court has recognized that, “[t]he overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when ‘judged in relation to the statute’s plainly legitimate sweep.’”⁸ Absent an infringement on constitutionally protected conduct, “an overbreadth challenge must fail.”⁹

The Supreme Court has recognized and classified child pornography as a category of material that the First Amendment does not protect.¹⁰ Therefore, “States are entitled to greater leeway in the regulation of pornographic depictions of children.”¹¹ The government’s objective in preventing sexual exploitation and abuse of children is of surpassing importance.¹²

⁸City of Las Vegas, 118 Nev. at ___, 59 P.3d at 479 (quoting Chicago v. Morales, 527 U.S. 41, 52 (1999) (quoting Broadrick v. Oklahoma, 413 U.S. 601, 612-15).

⁹Williams v. State, 118 Nev. ___, ___, 50 P.3d 1116, 1123-24 (citing Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 494 (1982)).

¹⁰New York v. Ferber, 458 U.S. 747, 763 (1982).

¹¹Id. at 756.

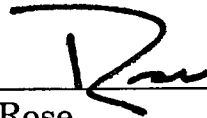
¹²Id. at 757.

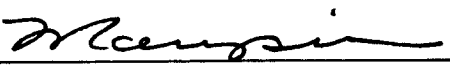
In the present case, NRS 200.730 has a plainly legitimate purpose of protecting children from sexual exploitation. The scope and extent of the statutory protection do not burden areas of protected speech or conduct and do not unconstitutionally reach a broad range of innocent conduct. The statute does not forbid possession of material that has a serious literary, artistic, political or scientific value and does not threaten to sexually exploit children. Thus, we conclude that NRS 200.730 is not unconstitutionally overbroad.


CONCLUSION

We conclude that NRS 200.730 is neither unconstitutionally vague or overbroad. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Rose


_____, J.
Maupin


_____, J.
Gibbons

cc: Hon. Janet J. Berry, District Judge
Walter B. Fey
John E. Oakes
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk