APPELLATE RECORD

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Whittier Law School

Center for Children's Rights

and

Moot Court Honors Board

Jacquelyn Gentry

Director, Center for Children's Rights

United States Court of Appeals, Ninth Circuit

UNITED STATES of America, Plaintiff-Appellee,
v.
JOHN DOE, Defendant-Appellant.

No. 10-54321

On Appeal from the United States District Court, Central District of California

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United States District Court
Central District of California

UNITED STATES of America, Plaintiff,

v.

JOHN DOE, Defendant.

No. 10-54321

November 10, 2010

PORTIA SOLOMON, Chief Judge.

This case involves "sexting," a growing trend among teenagers to send sexually explicit digital images of themselves to each other. In this case the teenage defendant, a high school student, took pictures of his girlfriend that resulted in their transmission beyond the original intention. We find the defendant guilty of charges involving child pornography, and consequently he is required to register as a sex offender under the Sex Offender Registration and Notification Act.

FACTUAL AND PROCEDURAL BACKGROUND

At the time of the relevant facts, John Doe was a 17-year-old high school senior who had been dating Jane Coe, a 15-year-old sophomore, for several months (each so named to protect the privacy of the juveniles involved). John and Jane reside and attend school in Orange County, California. The testimony of both John and Jane indicated that although they had explored some degree of physical intimacy with each other, they had not engaged in sexual intercourse. The child pornography charge does not involve any depiction of explicit sexual intercourse, but rather it is based entirely on nude photographs of Jane that were taken and transmitted by John.

When John and Jane were going together, they had heard that some of their classmates sent sexually explicit pictures of themselves to each other, but they had not actually seen any. The idea of taking a nude picture of Jane came to John when he was "Googling" some information for the trip to Europe that his parents had promised him upon his graduation from high school. He ran across pictures of two of the most famous paintings by Francisco Goya at the Prado Museum in Madrid: the *Clothed Maja* and the

Nude Maja[1]. He was instantly struck by how much his girlfriend Jane looked like a younger version of the subject of the paintings. He printed color copies of the paintings and showed them to Jane.

Jane agreed that she resembled the paintings in both face and figure. When John suggested that she pose for pictures like the woman in the paintings, Jane said she would pose with clothes, but not without clothes. They took the pictures one afternoon when they were sure Jane's parents would not be at home. Jane's father, a lawyer, was in trial, and her mother was out of town on a business trip. John used his cellular telephone camera to take pictures of Jane wearing clothes similar to those in the painting of the *Clothed Maja*. She posed on the bed in her own bedroom.

They were both pleased with the pictures, and then John tried to persuade Jane to take off her clothes to pose nude. She refused even when he said the pictures would be for their eyes only. He persisted and said that as his girlfriend she should want to please him and that it was all he wanted for his birthday, which would be the following month. Finally, she relented, and he took three nearly identical nude pictures of her, trying to replicate the *Nude Maja.* He then e-mailed them to her, thus making them available on her cellular telephone and her laptop computer.

A few days after making the pictures, John received a text message from his classmate and best friend, Fred B. Fred attached pictures of some nude women he found on the Internet that he said he thought John would like because they were "really hot." John responded, "hey i've got something even hotter take a look at these," and he then e-mailed the three nude pictures of Jane to his friend. The next day, Fred saw Jane at school and told her he could see why she was John's girlfriend because she looked "really hot" in the photos.

Jane was mortified and furious at John for sending the pictures to his friend. She called John as soon as she got home from school and yelled at him about sending the pictures to his friend. Her mother overheard the conversation and immediately called Jane's father at his office. After discussing the matter that night, they informed the attorney general's office the next day and charges against John ensued. The current issues concern (I) the charge against John for violation of 18 U.S.C. § 2252A and (II) the consequent requirement that he must register as a sex offender under 42 U.S.C. §§ 16901 et seq., the Sex Offender Registration and Notification Act.

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[1] In the *Nude Maja*, the subject of the painting is entirely unclothed, in a reclining pose that exhibits full frontal nudity including the pubic area.

STATEMENT OF JURISDICTION

Since these issues arise from offenses against the laws of the United States, this court has jurisdiction under 18 U.S.C. § 3231.

DISCUSSION

I. Child Pornography under 18 U.S.C. § 2252A

The relevant federal child pornography statute concerns certain activities relating to material constituting or containing child pornography, but this court has not yet had occasion to apply it to the activity of sexting, which currently appears to be growing among teenagers. Since the plain language of the statute does encompass the acts of the defendant in this case, we find that he is guilty of violating 18 U.S.C. § 2252A. The statute provides, in relevant part, as follows:

> **(a)** Any person who--
> **(1)** knowingly mails, or transports or ships using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, any child pornography;
> **(2)** knowingly receives or distributes--
> **(A)** any child pornography that has been mailed, or using any means or facility of interstate or foreign commerce shipped or transported in or affecting interstate or foreign commerce by any means, including by computer; or
> **(B)** any material that contains child pornography that has been mailed, or using any means or facility of interstate or foreign commerce shipped or transported in or affecting interstate or foreign commerce by any means, including by computer;
> **(3)** knowingly--
> **(A)** reproduces any child pornography for distribution through the mails, or using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer; or
> **(B)** . . . distributes, . . . using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains--
> **(i)** an obscene visual depiction of a minor engaging in sexually explicit conduct; or
> **(ii)** a visual depiction of an actual minor engaging in sexually explicit conduct;
> . . . .
> shall be punished as provided in subsection (b).

> **(b)(1)** Whoever violates, or attempts or conspires to violate, paragraph (1), (2), (3), (4), or (6) of subsection (a) shall be fined under this title and imprisoned not less than 5 years and not more than 20 years . . . .

The images constituting child pornography in this case are three nude photos showing a 15-year-old girl in a sexually provocative pose, exhibiting full frontal nudity including the pubic area. Although the photos are not necessarily obscene, we find that they are "a visual depiction of an actual minor engaging in sexually explicit conduct" as specified in § 2252A (a)(3)(B)(ii). She herself apparently considered them sexually explicit, having first refused to pose in such a manner and then agreeing only after being pressured by her boyfriend. Likewise, they were undoubtedly viewed as sexually explicit conduct not only by her but also by the defendant and his friend, who said he thought she looked "really hot" in the pictures. Moreover, by any objective measure, the pictures come within the category of sexually explicit conduct specified in § 2252A (a)(3)(B)(ii).

The defendant's actions also come squarely within § 2252A (a) (1) and (2) regarding transporting and distributing child pornography. The undisputed facts show that the defendant knowingly reproduced the images and transmitted them through the Internet to both Jane and his friend. We adopt the per se approach that transmitting material through the Internet inherently places it in the stream of interstate commerce. *See U.S. v. Carroll*, 105 F.3d 740, 742 (1st Cir. 1997) ("Transmission of photographs by means of the Internet is tantamount to moving photographs across state lines and thus constitutes transportation in interstate commerce."). Also affecting interstate commerce is the obvious potential for further distribution, as observed in *A.H. v. State*, 949 So. 2d 234 (Fla. Ct. App. 2008). There, the court reasoned that the photographs that included sexual conduct of a child were shared by two minors who did not have a reasonable expectation that the other would not show the photos to a third party. *Id.* at 237.

The court in *A.H.* also noted that one motive for revealing such photos is profit, and the market for child pornography in this country appears to be flourishing. *Id.* In addition, some teenagers want to let their friends know of their sexual prowess, as appeared to be so in this case. A reasonably prudent person would believe that this type of material in the hands of a teenager at some point, either for profit or bragging rights, will be disseminated to other members of the public. *Id.* Unlawful distribution of these types of photos is likely, especially considering the temporary nature of teenage relationships. *Id.* The court found that the mere fact of a subjective belief that the pictures would remain private was subordinate to whether society is willing to recognize an objective expectation of privacy. *Id.* at 238.

These same concerns apply in this case, and accordingly defendant violated § 2252A (a) (1), (2), and (3) and is punishable under § 2252A (b). After careful consideration, however, this court does not find the defendant's acts to be of the same nature or as egregious as those who sexually exploit children and deliberately set out to reproduce and distribute child pornography for profit. Therefore, since the sentencing guidelines are not mandatory but allow for judicial discretion, *see, e.g., U.S. v. Schmitt*, 495 F.3d 860 (7th Cir. 2007), this court has determined that the appropriate sentence under these circumstances is five years of probation.

II. Sex Offender Registration under 42 U.S.C. §§ 16901 et seq., SORNA

The Sex Offender Registration and Notification Act (SORNA) is also known as the "Adam Walsh Child Protection and Safety Act of 2006" (§ 16901 (a), Sec. 101), introduced as "An Act to protect children from sexual exploitation and violent crime, to prevent child abuse and child pornography, to promote Internet safety, and to honor the memory of Adam Walsh and other child crime victims." In addition to recognition of Adam's parents on the occasion of the 25th anniversary of Adam's abduction and murder, SORNA declares this purpose: "In order to protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators against the victims listed below, Congress in this Act establishes a comprehensive national system for the registration of those offenders . . . ." *Id.*, Sec. 102.

These statements of purpose certainly imply that SORNA is primarily intended to be applied to serious and especially violent crimes against children. Yet the specification of three tiers of sex offenders in Sec. 111 also makes it clear that SORNA is intended to reach different degrees of offenses against children. Numerous articles have questioned whether child pornography laws or sex offender registration should apply to teenage sexting, which may be viewed as a far less serious offense when the sexting occurs between or among willing participants of more or less equal status. *See, e.g.*, John A. Humbach, " 'Sexting' and the First Amendment," 37 Hastings Constitutional Law Quarterly, Spring 2010, 433; Amy F. Kimpel, "Using Laws Designed To Protect as a Weapon: Prosecuting Minors under Child Pornography Laws," 34 New York University Review of Law and Social Change, 2010, 299; Robert H. Wood, " The Failure of Sexting Criminalization: A Plea for the Exercise of Prosecutorial Restraint," 16 Michigan Telecommunications and Technology Law Review, Fall 2009, 151.

It is not the function of this court, however, to question the appropriateness of the law applied to emerging practices that come as a result of new technologies. Rather, this court must determine whether the law as plainly written applies to the facts of the case before the court. Thus, based on SORNA as written, this court has no choice but to conclude that it applies in this case.

Based on the conclusion above that the defendant violated and is punishable under § 2252A, this court also finds that he is required to register as a Tier II sex offender. In relevant part under SORNA, "The term 'Tier II sex offender' means a sex offender . . . whose offense is punishable by imprisonment for more than 1 year and . . . involves . . . production or distribution of child pornography . . . ." § 16901, Sec. 111. This court's conclusion regarding defendant's culpability under § 2252A thus demonstrates that defendant fits within the definition of a Tier II sex offender and accordingly is required to register as a sex offender as specified in the statute.

DISPOSITION

Therefore, for the reasons set forth above, this court finds that the facts sufficiently support conviction under 18 U.S.C. § 2252A, and defendant is hereby sentenced to five years of probation for reproducing, transporting, and distributing child pornography. Based on that conviction, this court also finds that defendant is required to register as a Tier II sex offender under SORNA.

IT IS SO ORDERED.

Portia Solomon

Portia Solomon
Chief Judge of the District Court

F I L E D USCA9
November 12, 2010

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

NOTICE OF APPEAL

United States Court of Appeals, Ninth Circuit

UNITED STATES of America, Plaintiff-Appellee,
v.
JOHN DOE, Defendant-Appellant.

On Appeal from the United States District Court, Central District of California

No. 10-54321

Defendant John Doe appeals from the judgment of the United States District Court, Central District of California, in the above-referenced case entered on November 10, 2010. The two issues raised in this appeal are the following:

1. whether the evidence was sufficient to sustain a finding under 18 U.S.C. § 2252A (a) (1), (2), and (3) with regard to child pornography;

2. whether the defendant should be required to register as a sex offender under 42 U.S.C. §§ 16901 et seq., the Sex Offender Registration and Notification Act.

Date: November 12, 2010

Devin Atkinson

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