

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
Appellee	:	PENNSYLVANIA
	:	
v.	:	
	:	
ANTHONY DIODORO,	:	
Appellant	:	No. 1889 EDA 2005

Appeal from the Judgment of Sentence of
May 23, 2005 in the Court of Common Pleas of
Delaware County, Criminal, No. 2200-04

BEFORE: MUSMANNO, KLEIN and TAMILIA, JJ.

*****Petition for Reargument Filed November 16, 2006*****

OPINION BY KLEIN, J.:

Filed: November 2, 2006

¶ 1 Anthony Diodoro appeals from the judgment of sentence of 9 to 23 months' incarceration imposed upon his convictions for 30 counts of sexual abuse of children for possessing child pornography, 18 Pa.C.S.A. § 6312(d), and one count of criminal use of a communication facility, 18 Pa.C.S.A. § 7512(a). Because we conclude that Diodoro did not "knowingly possess" child pornography, we reverse.

¶ 2 Although the pornographic images were automatically saved to an internet cache file on the computer's hard drive, there is no evidence that Diodoro *knew* that the images were saved. Therefore, the issue is whether merely *viewing* child pornography on the internet without intentionally *saving* or *downloading* any of the images constitutes "knowing possession" of child pornography under section 6312(d). We conclude that it does not.

¶ 3 This is an issue of first impression in Pennsylvania. We have found no case exactly on point in which a conviction for "possession" of child pornography for simply viewing it on a website without any evidence that the

defendant knew the image was being saved on the computer's hard drive. In cases from other jurisdictions affirming such convictions, there was evidence that the defendant knew the images were being stored, and usually distinguished those cases from the situation where the defendant merely viewed the images without knowing they were being stored. Those cases point out that to establish possession, a defendant must know that the image is being stored, so he or she knows he or she has the ability to save, print, or e-mail the images to others.

¶ 4 We note that it is well within the power of the legislature to criminalize the act of viewing child pornography on a website without saving the image. The language used in section 6712(d), however, is simply "possession." Because this is a penal statute with an ambiguous term when it comes to computer technology, it must be construed strictly and in favor of the defendant. **See** 1 Pa.C.S.A. § 1928(b)(1). A defendant must have fair notice that his conduct is criminal. Because of the ambiguity, sufficient notice was not provided here. For this reason, we are constrained to reverse and leave it to the legislature to clarify the language if it intends to make the mere "viewing" of child pornography a crime.

¶ 5 The facts in this case were stipulated. Diodoro admitted that he viewed several hundred photographs that fit within the definition of child pornography. He also admitted that he intentionally visited the websites for the purpose of viewing child pornography. (**See** N.T. Trial, 2/24/05, at 250-51.) The Commonwealth presented no evidence that Diodoro ever intentionally

J. A23036/06

downloaded or saved the photographs to his hard drive or to any floppy drive or that he was aware that the images were automatically being saved to an internet cache file. (**See** Appellee's Brief at 12.)

¶ 6 At trial, the Commonwealth's computer forensics expert testified that when a website is viewed, the image is automatically saved to an internet cache file. (N.T. Trial, 2/24/05, at 248-49.) The purpose is to save time, so that if the site is viewed again, the old file can be quickly uploaded rather than requiring the time to reload the file. However, the Commonwealth presented no evidence that Diodoro *knew* that the pornographic images were being saved to a hidden file or that he could retrieve it relatively easily.

¶ 7 Section 6312(d) prohibits the following conduct:

Any person who **knowingly possesses or controls** any book, magazine, pamphlet, slide, photograph, film, videotape, computer depiction or other material depicting a child under the age of 18 years engaging in a prohibited sexual act or in the simulation of such acts commits an offense.

18 Pa.C.S.A. § 6312(d) (emphasis added). To establish the elements of the offense, the Commonwealth must prove beyond a reasonable doubt: (1) a depiction of an actual child engaged in a prohibited sexual act or simulated sexual act; (2) the child depicted is under the age of 18; and (3) the defendant knowingly possessed or controlled the depiction. **Commonwealth v. Davidson**, 860 A.2d 575, 580 (Pa. Super. 2004), **app. granted**, 871 A.2d 185 (Pa. 2005).

¶ 8 The Commonwealth does not contend that "possession" of child pornography was established by the fact that the images were, in fact, saved

on Diodoro's computer. Instead, the fact that 370 images were saved on the computer is considered evidence that Diodoro intentionally viewed child pornography rather than accidentally clicked on a website without knowledge. Diodoro does concede that he intentionally viewed child pornography on the internet, while denying that he intentionally saved it to his computer or even knew that it was saved.

¶ 9 Therefore, while the Commonwealth proved that Diodoro intentionally viewed child pornography on the internet, it failed to prove that he intentionally saved the images to his computer.

¶ 10 The question before us is whether viewing a pornographic image on a computer screen without intentionally downloading or saving it amounts to "constructive possession" such that it constitutes a crime. This is an issue of first impression in Pennsylvania.¹ To date, we have found no state or federal appellate case that has held that it is a crime.

¹ In **Davidson, supra**, this Court considered whether the evidence was sufficient to sustain the defendant's conviction for possession of child pornography under section 6312(d) based on computer images on his hard drive. However, the issue in that case was not whether mere viewing constitutes "possession" under section 6312(d). In **Davidson**, the defendant asserted that there were so many images on his computer and so few images of child pornography in comparison as to raise an inference that he did not know the pornography existed at all. 860 A.2d at 579. Our Court upheld the conviction because (1) the images were found in more than one location on the computer's hard drive, (2) the defendant was the admitted builder, owner, and administrator of his computer with specialized computer knowledge, and (3) he admitted downloading pornography "randomly." **Id.** at 581.

We note that our Supreme Court granted review in **Davidson**, limited to constitutional questions relating to section 6312(d). **See Commonwealth v. Davidson**, 871 A.2d 185 (Pa. 2005).

¶ 11 If there is evidence that the defendant *knew* that the images would be saved to a cache file on his computer, that would be sufficient to establish possession. However, in this case, Diodoro claims that he did not know that every image he viewed was automatically saved to a hidden file.

¶ 12 A criminal statute must be sufficiently specific so as to give reasonable notice of the proscribed conduct. ***Commonwealth v. Heinbaugh***, 354 A.2d 244, 246 (Pa. 1976); ***Commonwealth v. Highhawk***, 687 A.2d 1123, 1128 (Pa. Super. 1996). The Pennsylvania legislature could have drafted section 6712(d) in such a way that the mere viewing of child pornography is a crime, but it did not.

¶ 13 In fact, the federal statute outlawing such conduct does not merely use the term “possession,” but also makes it a crime to “knowingly receive” child pornography, including that sent by computer. **See** 18 U.S.C.A. §§ 2252(a)(2) & (a)(5)(B). Yet even under federal jurisprudence, the mere viewing of images on the internet does not constitute the crime of possession of child pornography absent knowledge that the images are being saved.

¶ 14 In the recent case of ***United States v. Romm***, 455 F.3d 990 (9th Cir. 2006), the Ninth Circuit upheld the conviction where the defendant admitted that he *knew* the images were automatically saved to a cache drive, and enlarged some of the images from the otherwise hidden cache drive and consciously erased them. Because the defendant knew the images were saved, the court noted that he had the ability to copy, print or email the images to others. ***Id.*** at 1000-01. The ***Romm*** court stated, “Therefore, to

possess the images in the cache, the defendant must, at a minimum, know that the unlawful images are stored on a disk or other tangible material in his possession.” **Id.** at 1000. That is the key difference in the instant case. Here, there is no evidence that Diodoro had any idea that the images were automatically saved in a hidden cache file.

¶ 15 The Eighth Circuit also held that merely viewing an image without knowing it is being saved does not constitute “possession” or even “receipt.” In **United States v. Stulock**, 308 F.3d 922 (8th Cir. 2002), while affirming convictions of child pornography knowingly saved to a hard drive, the Eighth Circuit cited with approval the trial court’s acquittal on the charge of possession of images found in the defendant’s cache file, stating, “The possession charge specified only the images found in the browser cache. . . . [O]ne cannot be guilty of possession for simply having viewed an image on a web site, thereby causing the image to be automatically stored in the browser's cache, without having purposely saved or downloaded the image.” **Id.** at 925.

¶ 16 In **United States v. Tucker**, 305 F.3d 1193 (10th Cir. 2002), the Tenth Circuit upheld a conviction for possession where the defendant intentionally sought out and viewed child pornography, knowing that the images would be saved on his hard drive. The defendant testified that: (1) he knew his web browser was automatically caching the images he viewed; (2) he did not want the images on his hard drive; and (3) he intentionally deleted them from his cache file after each computer session. Therefore, his possession was knowing

and voluntary. **Id.** at 1205. The court specifically declined to reach the question of “whether an individual could be found guilty of knowingly possessing child pornography if he viewed such images over the Internet but was ignorant of the fact that his Web browser cached such images.” **Id.** at 1205 n.16.

¶ 17 Moreover, several state appellate courts have upheld convictions for possession of child pornography where there was evidence that the defendant had intentionally saved the images. **See, e.g., State v. Mobley**, 118 P.3d 413 (Wash. App. 2005) (upholding conviction where there was sufficient evidence that defendant sought out and controlled pornographic images by downloading and/or saving them on his computer), **app. denied**, 136 P.3d 758 (Wash. 2006); **Kromer v. Commonwealth**, 613 S.E.2d 871 (Va. App. 2005) (upholding conviction where evidence showed that defendant downloaded and saved images onto computer and desktop shortcut indicated that he manipulated them to be easily accessible and continuously available); **State v. Lindgren**, 687 N.W.2d 60 (Wis. App.) (upholding conviction where defendant repeatedly visited child pornography websites, clicked on thumbnail images to create larger pictures for viewing, and saved at least one image to his personal folder), **app. denied**, 689 N.W.2d 56 (Wis. 2004).

¶ 18 We agree with the reasoning of these decisions. We hold that absent specific statutory language prohibiting the mere viewing of pornographic images or evidence that the defendant knowingly downloaded or saved pornographic images to his hard drive or knew that the web browser cached

J. A23036/06

the images, he cannot be held criminally liable for viewing images on his computer screen. Therefore, we conclude that the evidence was insufficient to sustain Diodoro's conviction for knowing possession of child pornography under section 6312(d).

¶ 19 As to Diodoro's second claim, because we conclude that the evidence is insufficient to establish possession, it is also insufficient to establish criminal use of a communication facility. **See** 18 Pa.C.S.A. § 7512(a). Because the Commonwealth failed to prove that Diodoro committed a crime by merely viewing child pornography on his computer, his conviction for criminal use of a communication facility cannot stand.

¶ 20 Judgment of sentence reversed. Defendant is discharged.