

Summary of SC92236, *State of Missouri v. Robin S. Roggenbuck*

Appeal from the Platte County circuit court, Judge Abe Shafer

Argued and submitted Oct. 23, 2012; opinion issued Dec. 4, 2012

Attorneys: Roggenbuck was represented by Frederick J. Ernst of the public defender's office in Kansas City, (816) 889-7699, and the state was represented by James B. Farnsworth and Shaun J. Mackelprang of the attorney general's office in Jefferson City, (573) 751-3321.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A man convicted of five counts of possession of child pornography appeals his conviction. In a 6-0 decision written by Chief Justice Richard B. Teitelman, the Supreme Court of Missouri affirms the judgment. The trial court did not clearly err in overruling the man's motion to suppress evidence seized from his residence as the totality of circumstances detailed in the probable cause affidavit supporting the warrant was sufficient to establish there was a fair probability evidence of a crime would be found at the man's residence. The trial court did not violate the man's right to trial by jury or his right to due process or clearly err in entering convictions for each separate count of possession of child pornography. Because the evidence showed he came to possess each photograph at a different time, his separate convictions for each instance of possession did not violate double jeopardy. The trial court also did not err in overruling the man's objection to the admission of certain evidence found on his computer, as this evidence did not constitute hearsay.

Facts: In February 2008, police obtained a warrant authorizing a search of Robin Roggenbuck's residence and computer for child pornography. The warrant was based primarily on information reported by an informant claiming Roggenbuck had abused him sexually. Police searched Roggenbuck's residence and seized his computer pursuant to the warrant. A forensic analysis of the computer revealed five different pornographic photographs of young boys that had been downloaded and saved at different times in a folder labeled "My Pictures" in a user account named "Robin." In the same folder was a photograph of Roggenbuck labeled as "My Pic." A jury found Roggenbuck guilty of five counts of possession of child pornography, and the trial court sentenced him as a prior and persistent offender to five consecutive terms of seven years in prison. Roggenbuck appeals.

AFFIRMED.

Court en banc holds: (1) The trial court did not clearly err in overruling Roggenbuck's motion to suppress the evidence seized from his residence.

- (a) The totality of circumstances detailed in the detective's probable cause affidavit supporting the search warrant is plainly sufficient to establish that there was a fair probability that evidence of a crime would be found in Roggenbuck's residence. The affidavit alleged criminal activity because the informant told the detective that Roggenbuck committed specific acts of sexual abuse – which is a crime under section

566.100, RSMo Supp. 2007 – that there were “other victims” of sexual abuse perpetrated by Roggenbuck and that Roggenbuck kept alcohol under his sink to give to “boys” to “have his way with them.” The probable cause affidavit also alleged that a psychologist who accompanied the informant to Roggenbuck’s home to gather his belongings observed large quantities of alcohol in the home and an electric “massager” plugged into the bedroom wall.

(b) The affidavit supporting the warrant also alleged sufficient facts to support a finding that there was probable cause that evidence of child pornography would be found on Roggenbuck’s computer. Given the context of the allegations in the affidavit – almost all of which allege that Roggenbuck committed a variety of sex crimes – it is reasonable to conclude that the images of children alleged to be on Roggenbuck’s computer also were sexual in nature.

(2) The trial court did not violate Roggenbuck’s right to trial by jury or his right to due process or clearly err in entering convictions for each separate count of possession of child pornography. The double jeopardy clause protects a defendant both from successive prosecution for the same offense and from multiple punishments for the same offense. When Roggenbuck was charged, section 573.037, RSMo Supp. 2007, defined the crime of possession of child pornography as possessing “any obscene material that has a child as one of its participants or portrays what appears to be a child as an observer or participant of sexual conduct.” In *State v. Liberty*, 370 S.W.3d 537, 553 (Mo. banc 2012), this Court found that the proscription in section 573.037 against possession of “any obscene material” is ambiguous, as it reasonably could be interpreted to permit either a single prosecution or multiple prosecutions for a single incidence of possession of multiple images of child pornography. Under the facts of that case – in which the evidence showed only that, at the time of the search and seizure, the defendant possessed eight photographs depicting child pornography at the same time – this Court held that the defendant’s multiple convictions violated double jeopardy, reversing the judgment and sending the case back, noting the state could determine whether there were separate offenses, for example, because the defendant possessed photographs at different times or from different sources. Here, in contrast, the evidence showed Roggenbuck acquired the five different photographs at five different points in time ranging from mid-January through early February 2007. Because each act of acquiring and possessing the pornography was temporally distinguishable and constituted a separate act in violation of the statute, the court had the power to enter convictions for each separate count. Because the time when Roggenbuck acquired each photograph was not an element of the crime, it was not a fact the jury was required to find, and there is no need to send the case back for further factual findings as to this issue.

(3) The trial court did not err in overruling Roggenbuck’s objection to the admission of evidence of resumes found on his computer, as this evidence did not constitute hearsay. The evidence was admitted to demonstrate that Roggenbuck had access to the computer and to the pornographic photographs on the computer, not the veracity of the educational and occupational credential listed in the resume.