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IN THE

Supreme Court of Virginia

RECORD NO. 181033

ROBERT LEIGH STOLTZ,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 1

CERTIFICATE OF SERVICE 10

TABLE OF AUTHORITIES

CASES

Commonwealth v. Vaughn, 263 Va. 31 (2002) 3

Dowdy v. Commonwealth, 278 Va. 577 (2009)..... 7

Gorin v. United States, 312 U.S. 19 (1941)..... 5, 6

Hix v. Commonwealth, 270 Va. 335 (2005) 2

Holmes v. Levine, 273 Va. 150 (2007)..... 3

Lindsey v. Commonwealth, 293 Va. 1 (2017) 3

McDonnell v. United States, 136 S. Ct. 2355 (2016) 1, 2, 4

Sandstrom v. Montana, 442 U.S. 510 (1979)..... 4

United States v. Wuliger, 981 F.2d 1497 (6th Cir. 1992) 6

ARGUMENT

Fundamentally the Commonwealth never clearly addresses the issue in this case: whether the jury *could have found* that Stoltz reasonably, objectively and correctly believed that the person he was communicating with was an adult, but nevertheless found him guilty because "reason to believe" is vague or overbroad. Illustrative of this failing are three important omissions from the Brief of the Commonwealth. First that the Commonwealth never proposes what it believes is the appropriate analysis for a vagueness challenge and so never discusses what Stoltz believes is the most relevant analysis for this case, *McDonnell v. United States*, 136 S. Ct. 2355 (2016). Second, surprisingly the Commonwealth never acknowledges and so never discusses the import of the jury's question in this case. Third, the Commonwealth spends virtually its entire argument on the fact that similar statutes exist and have not been struck down as unconstitutional.

In *McDonnell* the unanimous court evaluated whether McDonnell was unconstitutionally convicted in violation of the due process clause by an over-inclusive definition of "official act." A similar situation to Stoltz's case in that "had reason to believe" is over-inclusive of non-criminal conduct. Importantly, the *McDonnell* court acknowledged that under a more limited

and constitutional definition McDonnell might still be guilty. The Court noted that the "jury may have disbelieved that testimony or found other evidence that Governor McDonnell agreed to exert pressure on those officials to initiate the research studies or add Anatabloc to the state health plan, *but it is also possible that the jury convicted Governor McDonnell without finding* that he agreed to make a decision or take an action on a properly defined 'question, matter, cause, suit, proceeding or controversy.'" *Id.* at 2374-75 (emphasis added). The Court concluded that the instruction was unconstitutionally vague because "the jury *could have* convicted Governor McDonnell without finding that he committed or agreed to commit an "official act." *Id.* at 2374 (emphasis added). Likewise here the jury *could have* convicted Stoltz while finding that he reasonably believed that the person was an adult.

Perhaps because the Commonwealth failed to undertake any constitutional vagueness analysis, they posit an incorrect standard of review. The Commonwealth cites a case in which the defendant challenged the sufficiency of the evidence, Brief of the Commonwealth at 15 (citing *Hix v. Commonwealth,* 270 Va. 335, 342 (2005)), and in that case this Court obviously viewed the evidence in the light most favorable to the Commonwealth. Stoltz is not raising a sufficiency challenge. In this case

the Court views the evidence in the light most favorable to Stoltz, whether this Court views the case as a challenge to a refused jury instruction, or because it's a constitutional vagueness challenge. *Holmes v. Levine*, 273 Va. 150, 157, 159 (2007) (looking at the evidence in the light most favorable to the proponent of the refused instruction and reversing for new trial observing that "[t]he issue of proximate cause was the subject of a question from the jury during the course of its deliberations"); *see Commonwealth v. Vaughn*, 263 Va. 31, 33 (2002) (looking at the evidence in the light most favorable to the proponent of the refused instruction); *see also Lindsey v. Commonwealth*, 293 Va. 1, 11 (2017) (Goodwyn, J., dissenting) (the key question in deciding whether a jury instruction violated a defendant's due process rights is "what a reasonable juror could have understood" and considering all the evidence). However this Court views the evidence, the end result is the same. The Commonwealth concedes that its evidence in this case included that they presented Stoltz with a picture of a 25-year-old woman, Brief of the Commonwealth at 6, and had him speak with an adult detective. *Id.* at 8.[1] The answer to the question

[1] Curiously the Commonwealth never either admits that the detective was 39 years old nor discusses the import of this fact anywhere in its argument. Regarding the facts, Stoltz asks this Court to ignore or strike footnote three in the Brief of the Commonwealth as its entirely improper to assert new non-record facts in an appeal.

whether the jury *could have* convicted Stoltz while finding that he reasonably believed the person was an adult is yes - regardless of how this Court views the evidence.

Further, because the Commonwealth failed to analyze *McDonnell* or similar cases such as *Sandstrom v. Montana*, 442 U.S. 510 (1979), but instead cites to cases challenging the sufficiency of the evidence, they mistakenly posit that Stoltz's argument is premised on the conclusion that the jury accepted his testimony. *See, e.g., id.* at 36. It is not. The question is not whether the jury rejected or accepted Stoltz's account – the point is that Stoltz could have been convicted *even if the jury accepted that he believed the person was an adult* because the statute is vague and overbroad and allows a conviction even if it finds that Stoltz reasonably, objectively and correctly believed that "Annie" was an adult.

Nothing illustrates better the conundrum of this case than the jury's question, which the Commonwealth chose to entirely omit from its brief. The jury asked for clarification about the exact meaning of "had reason to believe in the context of a minor or not…Specifically, does he have to find the reason credible in order to have reason to believe." JA 847. The judge referred the jury back to the jury instructions, which of course did not answer the question. The question itself makes obvious the problem that

trial counsel was trying to point out to the trial court, and makes even more clear that this jury *could have* found that Stoltz reasonably believed that the person he was communicating with was an adult, but nevertheless found him guilty. That is because the jury's question indicates that they believed Stoltz was given a reason to believe the person was a minor, but the jury questioned whether Stoltz himself found the reason credible.

The Commonwealth spends virtually its entire argument on the fact that similar statutes still exist. But all the statutes differ in some important way - either mens rea or they are for crimes where the vagueness or overbreadth issue that occurred here is unlikely or impossible to occur. The crux of this case is the "had reason to believe" language in conjunction with a solicitation over the internet where the defendant and alleged victim do not come face to face, that there was no actual victim less than fifteen in this case and instead law enforcement presented significant evidence that the alleged victim was not less than fifteen (a picture and voice of an adult) to Stoltz.

The Commonwealth presents this Court with one allegedly relevant case from the United States Supreme Court, *Gorin v. United States*, 312 U.S. 19 (1941). But a cursory reading of *Gorin* makes clear that the defendant never challenged the *mens rea* language of the statute and the

court never analyzed the *mens rea*. *Id.* at 23. The main case the Commonwealth cites is *United States v. Wuliger*, 981 F.2d 1497 (6th Cir. 1992). Brief of the Commonwealth at 28. But the court did *not* reject the vagueness challenge as the Commonwealth argues, instead it agreed with the defendant that the definition was "vague and overbroad" as "reason to know" was defined in that case. Under a section entitled "reason to know" the court noted that the trial court defined "reason to know" as when "there is a reasonable foreseeability of such a fact or circumstance." *Id.* at 1503. The court found that definition did not satisfy the "reason to know" requirement and reversed the conviction. *Id.* at 1504.

It remains that Virginia and Wisconsin are the only two states in the nation that criminalize internet solicitation of a child with a *mens rea* that fails to require that the defendant himself at least know or believe that the "victim" is a minor. The Commonwealth throughout its brief analyzed language in different kinds of statutes that is similar to the "knew, or had reason to believe" language used in this case, but often with critical differences.[2] JA 21.

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[2] Confusingly, in discussing the instruction in this case the Commonwealth uses several variations of the actual instructed language, variations that change the analysis including "had reason to know," Brief of the Commonwealth at 16, "have reasonable cause to believe," *id.* at 24, "knowing or having reason to know," *id.* at 28, and "has reason to belief

The Commonwealth argues that Stoltz abandoned his facial challenge in the Court of Appeals.[3] Brief of the Commonwealth at 17. There is no rule that an appellant must repeat at oral argument in the Court of Appeals all claims that he makes in his brief to preserve those arguments. And surely it takes more to abandon a written claim at oral argument than to state that the speaker is only "reaching" a particular issue. *See Dowdy v. Commonwealth*, 278 Va. 577, 589 (2009) (reversing the court of appeals ruling that Dowdy "waived" certain arguments in the court of appeals because although Dowdy briefed them in his memorandum in the circuit court he did not argue them during the hearings).

The Commonwealth argues that jury instruction N on "reason" is relevant to the as-applied vagueness analysis. Brief of the Commonwealth at 34-35. Jury instruction N defined the noun "reason," which obviously has two definitions: the first a cause or explanation for an event; the second the faculty of the mind to think. The court granted the request, instructing the

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[sic]" *id*. at 30. And the Commonwealth continues with analyzing many variations from other statutes including "has reason to know," *id*. at 20, "have reason to know," *id.* at 23, "had reasonable cause to believe," *id.* at 25 and again at 26,

[3] The Commonwealth also asserts that Stoltz "abandoned any as applied challenge . . . ." Brief of the Commonwealth at 17. Stoltz assumes this is a typographical error and so does not address this assertion.

jury on the "faculty of the mind." JA at 760. There is nothing about the "faculty of the mind" jury instruction which cures in any way the vagueness or overbreadth problem in this case, or prevented the jury from finding Stoltz guilty even if they found that he reasonably, objectively and correctly believed the person was an adult.

The problem with this statute as it was applied to Stoltz, is that when a jury finds that a defendant actually and correctly believes that the person he is communicating with is an adult, he *can still be convicted* under this statute if the jury finds that the defendant had *any reason to believe* the intended adult target could be a minor no matter how lacking in credibility the reason. This is highly likely to have occurred to Stoltz as he *saw* a picture of the person and *spoke* with the person and it *was* an adult. Stoltz's first trial ended in a mistrial. At his second trial the jury asked "does he [Stoltz] have to find the reason credible in order to have reason to believe," JA 831, acquitted him of attempted indecent liberties with a minor, and after less than eight minutes of deliberation the jury recommended the mandatory minimum sentence of five years on the solicitation charge. Under these unique set of facts this Court must find the statute unconstitutional facially or as applied to Stoltz.

Respectfully Submitted,
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By counsel

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CERTIFICATE OF SERVICE
IN COMPLIANCE WITH RULE 5:26 OF THE SUPREME COURT

I hereby certify on this 26th day of April, 2019, that the foregoing Reply Brief of Appellant has been filed with the Supreme Court of Virginia and a copy served via email on opposing counsel this same day.

/s/ Jonathan P. Sheldon, Esq.