

Virginia State Crime Commission

Reproduction of Child Pornography

2014

Reproduction of Child Pornography

Executive Summary

In February 2014, Delegate Benjamin Cline requested the Crime Commission to conduct a study regarding the reproduction of child pornography and, in particular, a clarification of Va. Code § 18.2-374.1:1(C). Specifically, the clarification involved whether all of the acts constituting child pornography in this Code section require lascivious intent, or whether lascivious intent is only required for the display of child pornography. Crime Commission staff completed a legal analysis to address the letter request.

The Virginia statute that criminalizes the production, transmission, or display of child pornography is Va. Code § 18.2-374.1:1, which reads in relevant part:

Any person who (i) reproduces by any means, including by computer, sells, gives away, distributes, electronically transmits, displays with lascivious intent, purchases, or possesses with intent to sell, give away, distribute, transmit, or display child pornography with lascivious intent or (ii)...

Recently, questions were raised on how this particular subdivision should be interpreted in regards to mens rea and “lascivious intent.” Additionally, a contradiction between statutes as to what the penalty for this offense is, was identified.

The Crime Commission reviewed study findings at its September meeting and directed staff to draft legislation for several key issues. As a result of the study effort, the Crime Commission unanimously endorsed all of the following legislative recommendations at its December meeting:

Recommendation 1: Amend subsection C of Va. Code § 18.2-374.1:1 to include a “knowingly” mens rea.

Recommendation 2: Amend subsection C of Va. Code § 18.2-374.1:1 to remove the term “lascivious intent.”

Recommendation 3: Amend Va. Code § 18.2-381 to eliminate the conflicts it creates relating to penalties in the Code.

Senator Janet Howell introduced Senate Bill 1056 during the 2015 Regular Session of the Virginia General Assembly, which incorporated all three Crime Commission recommendations. The bill makes clear that a person must “know” they are handling child pornography in order to be guilty of the offense, which will prevent an innocent person from being convicted if he is unaware that his computer was transmitting child pornography. The bill also removes the words “lascivious intent” from subsection C of Va. Code § 18.2-374.1:1 to make clear that such intent is not required to be guilty of the offense. Finally, the bill eliminates the conflicts created by Va. Code § 18.2-381 relating to penalties by having the higher penalties apply for the child pornography crimes.

Legal Analysis

The Virginia statute that criminalizes the production, transmission, or display of child pornography is Va. Code § 18.2-374.1:1, which reads in relevant part:

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Mens Rea Issue

The first issue raised deals with mens rea. Subsection A of Va. Code § 18.2-374.1:1, which criminalizes simple possession of child pornography, requires a mens rea of “knowingly.” However, the word “knowingly” is not found in Subsection C. It is unclear whether this should be interpreted to mean that Subsection C is strict liability crime. For example, a person receives a computer file that contains within it an encrypted child pornography image; if the person does not know of the image’s existence, and forwards the file to others, is he guilty of the reproduction or electronic transmission of child pornography? It should be made clear whether a person must “know” they are handling child pornography in order to be guilty of the offense.

Lascivious Intent Issue

Subsection C of Va. Code § 18.2-374.1:1 first uses the words “displays with lascivious intent,” but later uses the words “display child pornography with lascivious intent.” Clearly, lascivious intent is required if one displays pornography. However, an argument can be made that a strict statutory reading of all of the language in this subdivision requires a lascivious intent mens rea for all of the listed actions. Subsection C begins with the subject of “Any person,” and follows this with a series of verbs. The object of all of these verbs, “child pornography,” is then given, but *before* the words “lascivious intent” are used for a second time. To illustrate:

Figure 1: Visual Breakdown of Subsection C of Va. Code § 18.2-374.1:1

Any person who:

- Reproduces, sells gives away, distributes, electronically transmits, displays with *lascivious intent*, purchases,

OR

- Possesses with the intent to sell, give away, distribute, transmit or display

Child pornography,
With *lascivious intent*,
Shall be punished...

It is unclear whether the General Assembly intended for the second prepositional phrase, “with lascivious intent,” to be applied to all of the verbs. If so, the first use of “lascivious intent” is a redundancy. However, statutory language is customarily strictly construed against the Commonwealth. Some judges and prosecutors have worried that the way this subsection is written, a defense attorney could argue that if someone sold child pornography, but only to make money and not with lascivious intent, they would not be guilty of this crime. Removing the words “lascivious intent” from this subsection would settle any confusion.

Penalty Inconsistency Issue in § 18.2-381

Currently, Va. Code § 18.2-381 makes a second or subsequent offense a Class 6 felony for all crimes under §§ 18.2-374 to 18.2-379. This language, which pertains to obscenity offenses, comes from Title 18.1, and was carried over to Title 18.2. The obscenity offenses that this language applied to at the time of its enactment were all misdemeanors. The purpose of the statute was to make second offenses a Class 6 felony. Since that time, Virginia has passed a number of child pornography statutes, that numerically occur between § 18.2-374 and § 18.2-379.

As all of the child pornography offenses (except for a first offense simple possession) are Class 5 felonies or more severe, the language of Va. Code § 18.2-381 is in conflict with these heightened penalties. To resolve these inconsistencies, punishments for general obscenity crimes, second and subsequent offenses, should remain a Class 6 felony, per existing law. However, for the child pornography crimes, which currently have higher penalties, the higher penalties should apply rather than the Class 6 felony.

Summary and Recommendations

Crime Commission staff completed a legal analysis in order to clarify interpretive concerns relating to Va. Code § 18.2-374.1:1(C). Staff identified two areas of concern in the subsection: Is there, or should there be, a “knowingly” mens rea for these offenses, and does the element of “lascivious intent” apply to all of the offenses listed? Additionally, a contradiction between statutes as to what the penalty for this offense is, was identified.

The Crime Commission reviewed study findings at its September meeting and directed staff to draft legislation for these issues. As a result of the study effort, the Crime Commission unanimously endorsed all of the following legislative recommendations at its December meeting:

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Recommendation 2: Amend subsection C of Va. Code § 18.2-374.1:1 to remove the term “lascivious intent.”

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makes clear that a person must “know” they are handling child pornography in order to be guilty of the offense, which will prevent an innocent person from being convicted if he is unaware that his computer was transmitting child pornography. The bill also removes the words “lascivious intent” from subsection C of Va. Code § 18.2-374.1:1 to make clear that such intent is not required to be guilty of the offense. Finally, the bill eliminates the conflicts created by Va. Code § 18.2-381 relating to penalties by having the higher penalties apply for the child pornography crimes. After passing both the Senate and the House of Delegates, this bill was signed into law by the Governor on March 23, 2015.¹

¹ 2015 Va. Acts ch. 428.