

No. _____

In The
Supreme Court of the United States
October Term, 2021

Walter Crayton,
petitioner

v.

Commonwealth of Massachusetts,
respondent

Appendix to
Petition for Writ of Certiorari

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Submitted April 12, 2021

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-1593

COMMONWEALTH

vs.

WALTER CRAYTON.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendant, Walter Crayton, appeals from his convictions, after a Superior Court jury trial, of possession of child pornography, G. L. c. 272, § 29C.¹ Concluding that trial exhibit ten (Exhibit 10) is child pornography within the meaning of the statute, we affirm.

1. Standard of review. Ordinarily, in reviewing the denial of a motion for a required finding of not guilty, "we consider the evidence introduced at trial in the light most favorable to the Commonwealth, and determine whether a rational

¹ The jury also convicted the defendant of larceny, G. L. c. 266, § 30 (1), and resisting arrest, G. L. c. 268, § 32B. The defendant raises no issue on appeal regarding these convictions. The defendant was convicted of six counts of possession of child pornography, one for each item seized from him on November 15, 2014. After a jury-waived trial on the prior convictions, the trial judge convicted the defendant as a second offender.

trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Commonwealth v. Oberle, 476 Mass. 539, 547 (2017). Here, however, the defendant challenges only whether the images seized from the defendant constitute "a lewd exhibition of the unclothed genitals, pubic area, buttocks or, if such person is female, a fully or partially developed breast of the child." G. L. c. 272, § 29C (vii). Whether an image constitutes a lewd exhibition is a matter that we consider de novo. See Commonwealth v. Rex, 469 Mass. 36, 41 (2014); Commonwealth v. Sullivan, 82 Mass. App. Ct. 293, 303 (2012).

2. Lewd exhibition. In determining whether an image is lewd, we consider the factors listed in United States v. Dost, 636 F. Supp. 828, 832 (S.D. Cal. 1986), aff'd sub nom. United States v. Wiegand, 812 F.2d 1239, 1244 (9th Cir.), cert. denied, 484 U.S. 856 (1987):

- "1) whether the focal point of the visual depiction is on the child's genitalia or pubic area;
- "2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;
- "3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
- "4) whether the child is fully or partially clothed, or nude;
- "5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; [and]
- "6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer." Rex, 469 Mass. at 44-45, quoting Dost, supra at 832.

"It is well settled that 'nudity alone is not enough to render a photograph lewd.'" Rex, supra at 44, quoting Sullivan, 82 Mass. App. Ct. at 302.

Here, Exhibit 10 depicts five naked girls standing side by side, facing front, with their arms around each other. They are arranged in order of height and development. The girl on the viewer's right (the least developed girl) is holding a placard with a "1" on it. The placard is positioned so that it does not obscure either her own genitals or breasts or the genitals or the breasts of the girl next to her. The girl next to her is holding a placard with a "2" on it. Again, the placard is positioned so that it does not obscure either her own genitals or breasts or the genitals or breasts of the children next to her. The girl on the viewer's left (the most developed girl) is holding a placard with a "5" on it. The placard is held out away from the other girls, and positioned so that it does not obscure the fifth girl's genitals or breasts.

The nudity of the children is the entire focus of the image. See Commonwealth v. Rollins, 470 Mass. 66, 77 (2014) ("girl's buttocks the focal point of the image"); Sullivan, 82 Mass. App. Ct. at 300 ("The focal point of the photograph is [the adolescent girl's] developing breasts and, to a lesser extent, her pubic area"). The unnatural ordering of the girls with the placards corresponding to their development, carefully

placed so as not to obscure any genitals or breasts, adds to the lewdness of the image. See Rollins, supra ("The pose is suggestive of either mischief or domination and thus seems designed to elicit a sexual response in the viewer"). This is not an image where "the children are not shown in any unnatural poses." Rex, 469 Mass. at 47. Rather, "[g]iven the nudity, posing, and touching, it is apparent that the picture is designed to elicit a sexual response in the viewer." Rollins, supra.

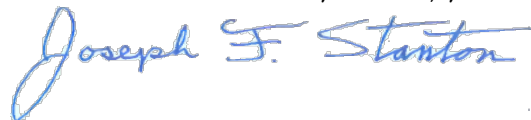
The parties agree (as did the trial judge) that all of the images constitute "a single cache," and thus may support only one conviction for possession of child pornography. Rollins, 470 Mass. at 67. Accordingly, we need go no farther than reviewing Exhibit 10, which was the basis of the count on which the defendant was sentenced.

3. Conclusion. The parties agree with the trial judge that, once appellate review is concluded, the convictions on the other counts of possession of child pornography must be vacated under Rollins, 470 Mass. at 74. Accordingly, the judgment on count A for possession of child pornography, second offense, is affirmed. The judgments on the convictions for larceny and resisting arrest are affirmed. The case is remanded to the Superior Court for the judge to vacate the duplicative

convictions for possession of child pornography.

So ordered.

By the Court (Green, C.J.,
Ditkoff & Hand, JJ.²),



Clerk

Entered: November 6, 2020.

² The panelists are listed in order of seniority.

From: SJCCommClerk@sjc.state.ma.us
Subject: FAR-27918 - Notice: FAR denied
Date: January 15, 2021 at 10:04 AM
To: david.hirsch@comcast.net



Supreme Judicial Court for the Commonwealth of Massachusetts

RE: Docket No. FAR-27918

COMMONWEALTH
vs.
WALTER CRAYTON

Norfolk Superior Court No. 1582CR00084
A.C. No. 2019-P-1593

NOTICE OF DENIAL OF APPLICATION FOR FURTHER APPELLATE REVIEW

Please take note that on January 14, 2021, the application for further appellate review was denied.

Francis V. Kenneally Clerk

Dated: January 14, 2021

To: Pamela Alford, A.D.A.
Meagen K. Monahan, A.D.A.
David B. Hirsch, Esquire

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COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

SUPERIOR COURT DEPT.
1582 CR 0084

COMMONWEALTH

v.

WALTER CRAYTON

DEFENDANT'S NOTICE OF APPEAL

Now comes the defendant in the above-entitled matter and provides notice, pursuant to Rule 3 of the Massachusetts Rules of Criminal Procedure, of his intent to appeal certain opinions, rulings, directions, and judgments of the Court in the above-entitled matter.

Respectfully submitted,

WALTER CRAYTON

By his attorney:

2/5/18
DATE


ETHAN S. YANKOWITZ

BBO # 667455

Committee for Public Counsel Services

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Norwood, MA 02062

(781) 381-5228

I, Ethan S. Yankowitz, hereby certify that a copy of the foregoing Notice of Appeal was delivered to the Norfolk County DA's Office this 5th day of February, 2018.

RECEIVED
NORFOLK COUNTY
FEB 28 PM 2:04

FILED
I ATTEST THAT THIS DOCUMENT IS
A CERTIFIED PHOTOCOPY OF AN
ORIGINAL ON FILE.

Brian B. Vacke
Assistant Clerk