

No. 17-6552

IN THE SUPREME COURT OF THE UNITED STATES

MARCUS B. FIFER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court was required to suppress evidence obtained from a search of petitioner's apartment pursuant to a search warrant that was issued after police had orchestrated two controlled buys of heroin from the apartment.

2. Whether 18 U.S.C. 2251(a), which criminalizes the production of child pornography, is unconstitutional under the First Amendment unless it is construed to include a mistake-of-age affirmative defense.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-17) is published at 863 F.3d 759. The orders of the district court are not published in the Federal Supplement but are available at 2015 WL 5996454 (suppression) and 2015 WL 6445035 (mistake of age).

JURISDICTION

The judgment of the court of appeals was entered on July 17, 2017. The petition for a writ of certiorari was filed on October 16, 2017 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Central District of Illinois, petitioner was convicted of 18 counts of producing child pornography, in violation of 18 U.S.C. 2251(a). Pet. App. 3-4. The district court sentenced petitioner to 420 months of imprisonment, to be followed by a lifetime of supervised release with mandatory sex-offender treatment. Id. at 4. The court of appeals affirmed. Id. at 1-17.

1. In 2008, petitioner was convicted of sexually assaulting an 11-year-old girl. Pet. App. 3 n.2. Thereafter, he lived in Springfield, Illinois, where he was a registered sex offender. Id. at 2.

In November 2013, police officers investigating drug crimes used an informant "to complete two controlled buys of heroin" from petitioner's apartment. Pet. App. 2. "Each controlled buy involved the same confidential informant and followed the same procedure" to ensure that the informant actually bought the drugs from petitioner. Id. at 5. "First, the informant arranged the drug deal with [petitioner] by making a phone call in the presence of the officers." Ibid. "Then the officers searched the informant for money or contraband; they checked his pockets, waistband, outer clothing and coat, and around his socks and shoes." Ibid. "Finding nothing, they gave the informant the buy-money, drove him to [petitioner's] apartment, and watched him exit the vehicle and

walk to a landing that led down some stairs to the apartment.” Id. at 5-6. “About a minute later, the informant reappeared on the landing, returned to the vehicle with a few packets of what was later confirmed to be heroin, and told the officers that [petitioner] had given him the heroin in exchange for the money.” Id. at 6. “The officers then searched the informant again and again found nothing.” Ibid.

Relying on the two controlled buys, the officers sought and obtained a state warrant to search petitioner’s apartment for heroin and evidence of drug trafficking. Pet. App. 2. When police executed the warrant, they found a half-naked 16-year-old girl hiding under petitioner’s bed. Ibid. The girl refused to come out from under the bed, lied about her name and age, and had to be handcuffed; she then attempted to slip out of her handcuffs and access her cell phone. Ibid.; Gov’t C.A. Br. 10. She later told police that she had been living with petitioner since April 2013 and that petitioner had created pornographic recordings of her; she said that she had hidden under petitioner’s bed “to protect” him, “because she was a minor and [he] was a sex offender.” 2015 WL 5996454, at *2; Pet. App. 2.¹ Based on these statements, the police obtained a federal warrant to search petitioner’s

¹ Petitioner was 42 years old on the date the warrant was executed. 2015 WL 6445035, at *1.

electronic devices for evidence of child pornography, which they found. Pet. App. 3.

2. A federal grand jury in the Central District of Illinois charged petitioner with 23 counts of producing child pornography, in violation of 18 U.S.C. 2251(a) and (e), and one count of production of child pornography while being registered as a sex offender, in violation of 18 U.S.C. 2260A. Indictment 1-11. Before trial, petitioner moved to suppress all of the evidence found during the search of his apartment, and he sought to introduce at trial evidence that he had mistakenly believed that the girl was not a minor. The district court denied both motions.

Following an evidentiary hearing, the district court denied petitioner's motion to suppress, finding that the search warrant had been supported by probable cause, and that, in any event, the search would have been justified under the good-faith exception. 2015 WL 5996454, at *3-*6. The court separately denied petitioner's post-hearing motion to supplement his motion to suppress -- which petitioner filed after the evidentiary hearing but before the district court rendered its decision -- to add an allegation under Franks v. Delaware, 438 U.S. 154 (1978), that the warrant affidavit contained misleading omissions. C.A. App. 154-

166; see D. Ct. Doc. 45 (June 11, 2015) (defense motion to supplement).²

Relying on circuit precedent, the district court also rejected petitioner's proposed mistake-of-age evidence, on the ground that the statute does not permit such a defense. 2015 WL 6445035, at *8; see United States v. Fletcher, 634 F.3d 395 (7th Cir.) cert. denied, 565 U.S. 942 (2011).

3. The court of appeals affirmed. Pet. App. 1-17. Like the district court, the court of appeals concluded that the "the affidavit supporting the state search warrant clearly established at least a probability of criminal activity at [petitioner's] apartment," and that, in any event, "the executing officers relied on the warrant in good faith." Id. at 6-7. The court of appeals then relied on Fletcher to hold that a defendant's "knowledge (or lack of knowledge) of" a minor's age "has no bearing on his guilt or innocence" for producing child pornography in violation of 18 U.S.C. 2251(a), and therefore concluded that the district court properly excluded petitioner's proposed mistake-of-age evidence as irrelevant. Id. at 11-12.

ARGUMENT

Petitioner contends (Pet. 6-9) that the evidence from the search of his apartment should be suppressed because, he asserts,

² In his motion to supplement, petitioner cited Franks but did not directly request a second evidentiary hearing. D. Ct. Doc. 45, at 3-4.

it was obtained through deliberate misrepresentations by police officers. The court of appeals correctly rejected that contention, and its decision is limited to the facts of this particular case. Petitioner also contends (Pet. 9-11) that the First Amendment requires courts to allow producers of child pornography to raise a defense of reasonable mistake of age in a prosecution under 18 U.S.C. 2251(a). The court correctly rejected that contention, and no conflict warranting this Court's review exists. This Court has previously denied review of similar questions, see, e.g., Henry v. United States, 137 S. Ct. 374 (2016) (No. 16-5379), and the same result is appropriate here. Further review is unwarranted.

1. Petitioner first contends (Pet. 6-9) that he was entitled to an evidentiary hearing under Franks v. Delaware, 438 U.S. 154 (1978), and that the evidence obtained from the search of his apartment should have been suppressed. The court of appeals correctly rejected petitioner's contention (Pet. App. 4-8), and his factbound claim would not warrant this Court's review in any event.

To merit an evidentiary hearing under Franks, a defendant must make an initial showing of a deliberate or reckless falsehood or omission by the search-warrant affiant such that, if the false statement were removed or the omitted material were included, the warrant affidavit would not establish probable cause. Franks, 438 U.S. at 171-172; see United States v. Yusuf, 461 F.3d 374, 383

(3d Cir. 2006) (explaining how Franks applies in the context of omissions), cert. denied, 549 U.S. 1338 (2007); see also, e.g., United States v. Mashek, 606 F.3d 922, 928 (8th Cir. 2010), cert. denied, 562 U.S. 1274 (2011); United States v. Campbell, 603 F.3d 1218, 1228 (10th Cir.), cert. denied, 562 U.S. 939 (2010). The probable-cause inquiry, in turn, entails "a practical, common-sense" evaluation of the facts recited in support of a search warrant to determine whether there is a "fair probability that contraband or evidence of a crime will be found" at a certain location. Illinois v. Gates, 462 U.S. 213, 238 (1983).

Petitioner argues (Pet. 7-8) that the controlled buys supporting probable cause to search his apartment "had not been fully controlled" because "the officer failed to watch the [informant] actually enter [petitioner's] apartment" and had "failed to perform a search sufficient to determine whether the [informant] had any contraband on his/her person." The district court found, however, that the police had searched the informant both before and after each of the two controlled buys, and had watched the informant walk down to the alcove right outside of petitioner's apartment and "re-emerge[] about one minute later." 2015 WL 5996454, at *1. The district court and the court of appeals properly rejected petitioner's apparent theory that, in order to establish probable cause, police must conduct a body cavity search of an informant before and after each controlled buy

and must continuously observe the informant during the entirety of the controlled buy. Id. at *4; Pet. App. 6.

In any event, petitioner does not claim that the court of appeals' decision conflicts with any decision of another court of appeals. Rather, petitioner challenges only the application of this Court's probable-cause standard to the facts of his case. Such a factbound question does not warrant this Court's review. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); see also United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts.").

2. Petitioner further contends (Pet. 9-11) that the First Amendment requires courts to engraft a mistake-of-age defense onto 18 U.S.C. 2251(a), which criminalizes the production of child pornography. The court of appeals correctly rejected that contention, and no conflict warranting this Court's review exists. The Court has denied review of similar questions, see Henry, supra (No. 16-5379); Malloy v. United States, 559 U.S. 991 (2010) (No. 09-523); McCloud v. United States, 562 U.S. 828 (2010) (No. 09-1177); Wilson v. United States, 558 U.S. 1117 (2010) (No. 09-6491), and the same result is appropriate here.

a. Section 2251(a) criminalizes the production of child pornography in interstate commerce. It applies to “[a]ny person who employs, uses, persuades, induces, entices, or coerces any minor to engage in * * * any sexually explicit conduct for the purpose of producing any visual depiction of such conduct * * * if that visual depiction was produced or transmitted using materials that have been * * * transported in or affecting interstate or foreign commerce.” 18 U.S.C. 2251(a). The statute does not contain an express affirmative defense for a reasonable mistake as to the victim’s age. And as this Court observed in United States v. X-Citement Video, Inc., 513 U.S. 64 (1994), Congress intended to hold producers of child pornography criminally liable even in the absence of evidence that they knew the age of their victims, so long as the victims were actually children. See id. at 74-77 & n.5.

b. Petitioner nevertheless contends (Pet. 9-11) that the First Amendment requires that a mistake-of-age defense be made available to defendants under Section 2251(a). He is mistaken.

i. The court of appeals adhered (Pet. App. 11-12) to its decision in United States v. Fletcher, 634 F.3d 395, 402-403 (7th Cir.), cert. denied, 565 U.S. 942 (2011), which observed that this Court’s decision in X-Citement Video distinguished between distribution and production of child pornography, explaining that “producers” of child pornography -- unlike distributors -- “may be

convicted under § 2251(a) without proof they had knowledge of age.” 513 U.S. at 76 n.5; see id. at 72 n.2. This Court compared a Section 2251 offense to statutory rape, observing that with both offenses “the victim’s actual age [i]s determinative despite defendant’s reasonable belief that the girl had reached age of consent.” Id. at 72 n.2 (citation omitted). The Court also explained that it “makes sense to impose the risk of error on producers” because, as compared to distributors or mere possessors of child pornography, they “are more conveniently able to ascertain the age of performers.” Id. at 76 n.5; see id. at 72 n.2 (noting that in pornography-production offenses, “the perpetrator confronts the underage victim personally and may reasonably be required to ascertain that victim’s age”).

Section 2251(a) reaches only depictions of real children engaging in sexually explicit conduct, and such depictions lack First Amendment protection. See 18 U.S.C. 2251(a); New York v. Ferber, 458 U.S. 747, 764 (1982). The statute does not apply to pornographic material with youthful-looking adult actors or to virtual child pornography. Cf. Ashcroft v. Free Speech Coal., 535 U.S. 234, 250-251 (2002) (invalidating statute criminalizing production of virtual child pornography). Indeed, petitioner has not identified any application of Section 2251(a) that would reach constitutionally protected expression. And because Section 2251 reaches only unprotected speech, it necessarily does not “punish[]

a 'substantial' amount of protected free speech, 'judged in relation to [its] plainly legitimate sweep,'" and thus is not vulnerable on overbreadth grounds. Virginia v. Hicks, 539 U.S. 113, 118-119 (2003) (quoting Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973)); see United States v. Johnson, 376 F.3d 689, 695-696 (7th Cir. 2004) (rejecting overbreadth challenge to Section 2251 because the statute reaches only unprotected speech).

Even if a statute reaching only unprotected speech could be subject to challenge because of its chilling effect on protected speech, petitioner has not shown that Section 2251(a) substantially chills producers of adult pornography. The only material potentially affected by Section 2251(a) is the subset of pornography involving youthful-looking adult actors. See, e.g., United States v. Malloy, 568 F.3d 166, 176 (4th Cir. 2009), cert. denied, 559 U.S. 991 (2010). The relative ease with which producers can verify their subjects' ages, see X-Citement Video, 513 U.S. at 76 n.5, suggests that Section 2251(a) will not deter production of otherwise-lawful pornography involving youthful-looking adults; rather, it will encourage producers of such material to verify their subjects' age in advance, as a separate statute already requires them to do. See 18 U.S.C. 2257(b)(1). There is no sound reason to believe that either commercial pornography producers or amateur pornography producers (who may be

more likely to know the performers personally) would have difficulty complying, or be chilled, by the need to verify age.

ii. Every court of appeals that has addressed the issue since this Court's decision in X-Citement Video has held that the First Amendment does not require a mistake-of-age defense in Section 2251(a) cases. See United States v. Henry, 827 F.3d 16, 24 (1st Cir.), cert. denied, 137 S. Ct. 374 (2016); Fletcher, 634 F.3d at 404; United States v. Humphrey, 608 F.3d 955, 962 (6th Cir. 2010); Malloy, 568 F.3d at 176; United States v. Wilson, 565 F.3d 1059, 1069 (8th Cir. 2009), cert. denied, 558 U.S. 1117 (2010); United States v. Deverso, 518 F.3d 1250, 1258 (11th Cir. 2008).

Before X-Citement Video, the Ninth Circuit had held that Section 2251(a) would be unconstitutional in the absence of a reasonable-mistake-of-age defense. See United States v. United States Dist. Court, 858 F.2d 534, 543-544 (1988) (Kantor). That case involved unique facts: an asserted "massive fraud" on the entire "adult entertainment industry" perpetrated by a 16-year-old minor who was an aspiring adult film actress and her agent, such that even those producers who took "the most elaborate steps to determine how old" their subject was would have been fooled. Id. at 536, 540. A divided panel of the court of appeals reasoned that the First Amendment "does not permit the imposition of criminal sanctions on the basis of strict liability where doing so would seriously chill protected speech," and it determined that

not allowing a reasonable-mistake-of-age defense under the circumstances would have that effect. Id. at 540. The court therefore decided to “engraft” a “very narrow” affirmative defense “onto [the] statute,” which would permit a defendant to escape liability if he proved, “by clear and convincing evidence, that he did not know, and could not reasonably have learned, that the actor or actress was under 18 years of age.” Id. at 542-543 (footnote omitted).

The Ninth Circuit’s decision relied in significant part on cases involving distributors and possessors, as opposed to producers, of unprotected material. See Kantor, 858 F.2d at 539. Because X-Citement Video later explained that producers of child pornography should be treated differently from distributors of such material -- specifically stating that “producers may be convicted under § 2251(a) without proof they had knowledge of age,” 513 U.S. at 76 n.5 -- the Ninth Circuit’s decision does not create a conflict warranting this Court’s review. The Ninth Circuit has not had an opportunity to reassess the validity of Kantor in light of X-Citement Video,³ and other courts’ decisions that relied on

³ Contrary to petitioner’s claim (Pet. 9), the Ninth Circuit did not reaffirm Kantor in United States v. Jayavarman, 871 F.3d 1050 (2017). In Jayavarman, the Ninth Circuit declined to extend Kantor’s “reasonable mistake of age defense” to “the opposite” situation, in which a defendant mistakenly believes that an adult is a minor. Id. at 1059-1060. Under those circumstances, the court of appeals concluded, a defendant could be convicted for attempting to produce and transport child pornography, without regard to any mistake-of-age defense. Ibid.

X-Citement Video to reject First Amendment challenges to Section 2251(a). The court of appeals should be permitted that opportunity, particularly because it stated that its holding was based on its "reading of the relevant Supreme Court opinions" and was valid "[u]nless and until the Supreme Court speaks otherwise." Kantor, 858 F.2d at 540, 542. Review by the Court at this time would be premature.

iii. Even if the disagreement in the circuits otherwise warranted this Court's review, this case would not be a suitable vehicle for resolving the conflict, because petitioner would not prevail even under the affirmative defense recognized by the Ninth Circuit. The Ninth Circuit adopted a "very narrow" affirmative defense, requiring a defendant to show, by clear and convincing evidence, not only that he "did not know" that the subject was underage, but also that he "could not reasonably have learned" his subject's true age. Kantor, 858 F.2d at 543. The Ninth Circuit noted that "[s]uch a defense would be entirely implausible under most circumstances" and should be limited to "rare" cases, such as "where the actress allegedly engaged in a deliberate and successful effort to deceive the entire industry." Id. at 542-543.

This is not such a case. Petitioner does not claim that he ever investigated the victim's age or asked to see any documents verifying her age, nor is there any basis in the record to believe that such efforts would have failed to reveal her age. To the

contrary, the record contains considerable evidence that both petitioner and the victim knew what they were doing: the reason the victim gave for hiding under the bed when the police arrived at petitioner's apartment was that she wanted "to protect" him, "because she was a minor and [he] was a sex offender." 2015 WL 5996454, at *2. In contrast, the defendants in Kantor claimed that the child victim had provided them with fraudulent "California photographic identification," "other official documents," and evidence that she had already been employed by "men's magazines" and other employers who, "according to industry custom and perception, reliably investigate the age of their models." 858 F.2d at 540. Because petitioner would not prevail even under the Ninth Circuit's pre-X-Citement Video standard, further review of petitioner's claim is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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