COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Midwinter, 2015 ONCA 150
DATE: 20150309
DOCKET: C57805

Gillese, Watt and Brown JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Andrew Midwinter

Appellant

Antal Bakaity, for the appellant

Melissa Adams, for the respondent

Heard: February 20, 2015

On appeal from the conviction entered on August 14, 2013 by Justice Kofi N. Barnes of the Superior Court of Justice, sitting without a jury.

ENDORSEMENT

[1] The appellant, Andrew Midwinter, was charged with one count of possessing child pornography and one count of accessing child pornography contrary to sections 163.1(4) and (4.1) of the *Criminal Code*. Following a four-day trial, the appellant was convicted of possession of child pornography, but acquitted of accessing child pornography.

[2] The appellant appeals his conviction primarily on the basis that the trial judge failed to analyze whether he had knowledge of the nature of the images contained in a folder entitled “Movies”, which had been deleted from his basement computer.

Summary of the facts

[3] In the spring of 2009, the appellant became embroiled in a bitter custody dispute with his former wife, Wendy Midwinter, and her then husband, Stephen Shapcott. The custody dispute concerned Adriana Midwinter, the daughter of the appellant and Wendy who, at that time, was living with Wendy and Stephen.

[4] In June 2009, Stephen and Wendy provided an anonymous tip to the police alleging that the appellant possessed child pornography. That month the police went to the appellant’s residence to investigate the tip, but they found no one at home.

[5] On September 15, 2009, the police returned to the residence. Rose Midwinter, the appellant’s wife, was home. The police told her that they wanted to speak to the appellant about an old break and enter event in the neighborhood which they were investigating. Rose phoned the appellant who, in turn, contacted the police. The appellant agreed to meet the police at his home the next day, September 16, 2009.

[6] When the police arrived at the Midwinter home on the morning of the 16th, they told the appellant that they were investigating allegations of possession of child pornography. The appellant consented to the removal of all computers and hardware drives from his home so that the police could search them for images of child pornography. As a result of that search, the police discovered images of child pornography on a computer kept in the basement of the appellant's home and for which he was the primary, but not exclusive, user.

[7] The trial proceeded, in part, based on an Agreed Statement of Facts which set out the consensus findings of the parties' respective computer forensic experts. The appellant did not testify.

[8] The trial judge rejected the defence theory that the appellant had been the victim of a conspiracy amongst Stephen Shapcott, Wendy Midwinter and Trisha Dorman, an older daughter of Wendy by another marriage, to plant child pornography on the appellant's basement computer in order to distract him from the custody battle over Adriana.

[9] The Agreed Statement of Facts stipulated that a folder on the appellant's basement computer hard drive entitled "Movies" had contained 781 "total" images of child pornography and 167 movies of child pornography. Some of the movies and images were found within various sub-folders within the Movies

folder. Approximately 2,400 “total” images of child pornography were found in other locations on the hard drive.

[10] It was also agreed that on the evening of September 15, 2009, the Movies folder, and all of the folders and files within it, had been deleted from the hard drive using a program called WipeDisk. The Agreed Statement of Facts contained a detailed chronology of the efforts undertaken by a user of the computer between 7:14 p.m. and 11:26 p.m. on the evening of September 15, 2009, to search for and download from the Internet several “wipe drive” software programs and to run the wipe drive program against the first partition on Hard Drive No. 1 on the basement computer. That partition contained the Movies folder.

[11] The trial judge concluded that the appellant had deleted the Movies folder on the evening of September 15, 2009 and he had knowledge and control of the Movies folder. The trial judge was satisfied that the Crown had proved possession of child pornography beyond a reasonable doubt.

Analysis

[12] To establish personal possession for the purposes of s. 4(3) of the *Criminal Code*, the Crown must establish that the accused had both control over and knowledge of the thing: *R. v. Morelli*, 2010 SCC 8, at para. 15. Control

refers to power or authority over the thing, whether exercised or not: *R. v. Chalk*, 2007 ONCA 815, 88 O.R. (3d) 448 (C.A.), at para. 19.

[13] In the context of data contained in an electronic file, in order to commit the offence of possession of child pornography, one must knowingly acquire the underlying data files and store them in a place under one's control: *Morelli*, at para. 66.

[14] The requirement of knowledge encompasses two elements: the accused must be aware that he had physical custody of the thing in question and must be aware of what the thing is: *Morelli*, at para. 16. Possession requires knowledge of the criminal character of the item in issue: *Chalk*, at para. 18. Where the material in question reposes in an electronic file, the court may draw inferences about an accused's knowledge from circumstantial indicators such as ownership, access to, and usage of the computers on which the files are stored: *R. v. Braudy*, [2009] O.J. No. 347 (S.C.J.), at para. 52.

[15] The appellant submits that the trial judge misapprehended the evidence by fixing him with knowledge that images contained in the deleted Movies folder on his basement computer were child pornography. He further submits that there was absolutely no evidence that he had viewed, downloaded or organized the graphic content on the basement computer.

[16] We do not accept these submissions.

[17] The trial judge correctly instructed himself on the relevant legal principles relating to possession for the purposes of *Criminal Code* s. 4(3).

[18] The Agreed Statement of Facts stated that pornographic images were organized into folders and sub-files and that the sub-folders within the Movies folder in which the 781 "total" images were found bore titles which included the words "sexy child". The findings of fact made by the trial judge in his reasons, based upon the Agreed Statement of Facts and the evidence led at trial, included the following:

(i) The prohibited images found on the basement computer were child pornography;

(ii) The appellant was the owner and the primary user of the basement computer, but multiple other users also had access;

(iii) There was no evidence of any remote access to the basement computer;

(iv) The theory that Wendy Midwinter and Trisha Dorman conspired to plant the child pornography images on the appellant's basement computer was "speculative at best";

(v) It was illogical to expect those alleged conspirators would wipe out that which they had allegedly planted for the police to discover in the first place; and,

(vi) The appellant deleted the Movies folder on the evening of September 15, 2009, after learning that the police would visit his home the following day to talk with him.

After finding that the appellant had deleted the Movies file, the trial judge reached the following conclusion:

> To do so, Mr. Midwinter had knowledge and control of the "Movie" file. He had to know it was there to seek it. He had to be able to control it to make the decision to delete it.
>
> This court is satisfied that the Crown has proved the element of possession of child pornography beyond a reasonable doubt.

[19] That the appellant knew the criminal nature of the images in the Movies folder was necessarily implicit in the trial judge's conclusion that "he had to know it was there to seek it", so that he could delete the images in the Movies folder before the police paid him a visit the following morning. That was a logical inference for the trial judge to draw from the Agreed Statement of Facts and the other facts which he found. We see no error in the trial judge's reasoning or the conclusion which he reached on that point.

[20] Finally, the appellant submits that his conviction on the count of possession of child pornography was inconsistent with his acquittal on the count of accessing child pornography. We see no merit in this submission. As the trial judge's reasons disclose, the appellant's acquittal on the accessing count was based on his assessment of the evidence regarding cached files resulting from Internet searches. It was in that context that the possibility of other users of the computer to conduct Internet searches raised a reasonable doubt. By contrast, the appellant's conviction on the possession count was based on the evidence about the Movies folder stored on the computer's hard drive and the trial judge's conclusion that the appellant was the only person who enjoyed the opportunity to

delete it in advance of the police visit. There was no inconsistency between the two results.

[21] For these reasons, the appeal is dismissed.

"E.E. Gillese J.A."
"David Watt J.A."
"David Brown J.A."