THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

David A. Land, Appellant.

Appellate Case № 2014-002423

Appeal from Lexington County
Donald B. Hocker, Circuit Court Judge

Opinion № 5441
Heard June 9, 2014 - Filed September 28, 2016

Petition for Rehearing

Pursuant to Rule 221 of the South Carolina Appellate Court Appellate Court Rules, David A. Land hereby Petitions this Court to Rehear this matter based upon the following:

1. This Court erred in its Order by placing emphasis on the word "any" when the correct standard of review is to determine if the circumstantial evidence is "substantial" and not just "any." As the South Carolina Supreme Court has said " However, if there is any direct or *substantial* circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury. *State v. Odems*, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011)(emphasis in the original). The reason for the rule is simple. If the emphasis is placed upon the word "any" the standard of review would violate the principles

established in *Jackson v. Virginia*, 443 U.S. 307 (1979). In that decision the Court held "Any evidence that is relevant—that has any tendency to make the existence of an element of a crime slightly more probable than it would be without the evidence . . . could be deemed a 'mere modicum.' But it could not seriously be argued that such a 'modicum' of evidence could by itself rationally support a conviction beyond a reasonable doubt." *Id* at 320. Thus, this Court improperly looked to see if there were "any" substantial circumstantial evidence instead of reviewing the evidence with an eye toward determining if there was "substantial" circumstantial evidence.

While this Court and the South Carolina Supreme Court has frequently said the appellate court should not "weigh" the evidence, making a determination as to whether there is more than "some circumstantial" evidence and determining there is "substantial circumstantial" evidence, would in fact require an appellate court, in some degree, to weigh the evidence.

2. The Court failed to consider that at the trial below, the State urged upon the trial court a definition of the word "solicits" different from the definition used by the State below. At the trial the State when discussing the word "solicits" said "Judge, but - - just looking at the statute, one of the elements for second degree is knowing solicitation. It doesn't have to be they're receiving, just that they solicited it. And I don't believe that you even have to possess it in that case." Rec. on App. at 245, ll 21 to 246, l 1. The State should not be able to argue a ground for conviction here that they did not urge below and in fact urged that the word "solicit" actually means did not receive, but attempted to receive

3. The Court erred in failing to discuss the meaning of the word "receive." The State in its brief urged that Mr. Land could be convicted for merely "receiving" the child pornography.

This Court failed to discuss this issued raised by the State. The State argued at the trial below "David Austin Land solicited, received and then disseminated these files on December 4, 2009, December 7th, 2009 and January 27th, 2009." Rec. on App. at 380, ll 19-21. At the trial below the Court held that one who receives is guilty of only possession of child pornography, the State improperly asserted in its brief receiving, which the court held to be possession, as a basis for conviction of Criminal Exploitation of a minor second degree.

3. This Court erred in giving a definition of the word "solicit" which improperly defines the word. As noted in the Reply brief the word "solicit" means "to appeal for something" or "to ask earnestly" or "to ask for the purpose of receiving." The definition further continues "The term implies personal petition and importunity addressed to a particular individual to do some particular thing." Black's Law Dictionary 4th Ed. (1957). "The theme running through all the cases [defining solicit] is that to solicit means 'to appeal for something,' 'to ask earnestly,' 'to make petition to,' 'to plead for,' 'to endeavor to obtain by asking' and other similar expressions." *State v. Blakney*, 50 Ohio Misc. 3, 3–4, 361 N.E.2d 567, 568 (Mun. 1975); *State v. Jacob*, 2015 Ohio 4760, 50 N.E.3d 279, 283 (2015) ("Solicit means 'to seek, to ask, to influence, to invite, to tempt, to lead on, or to bring pressure to bear.'"); *Skelhorn v. State*, 332 Ga. App. 782, 787, 773 S.E.2d 45, 49 (2015), reconsideration denied (July 7, 2015), cert. denied (Oct. 5, 2015) ("In ordinary usage, the term 'to solicit' means '[t]o seek to obtain by persuasion, entreaty, or formal application ... [t]o commit the criminal offense of enticing or inciting (another) to commit an illegal act . . . .") A "Google" search on the internet hardly qualifies as soliciting. Such a search does not qualify as "an appeal for something," to make petition to," to plead for," or "to endeavor to obtain by asking." Nor does is qualify under the other common

definitions of "solicit." Solicit implies a personal request of another, which did not occur in this case. In common parlance, one does not do a computer search and say they are "soliciting" items. When one directly contacts another individual either face to face or by other direct communication, then soliciting occurs. That did not occur in this case. Therefore, there was no solicitation. If any ambiguity as to the meaning of the word "solicit" exist, that, ambiguity must be resolved in favor of Mr. Land. As the United States Supreme Court has said "Under a long line of our decisions the tie must go to the defendant. The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *United States v. Santos*, 553 U.S. 507, 514 (2008).

4. This Court erred in finding that Mr. Land admitted he solicited any child pornography. A simple web search is not a solicitation. The record establishes that is all he did. A person looking for items on the internet does not say they are "soliciting" those items. If a person were go into a grocery store to look for fruits and vegetables, one would not in common parlance say they went there "soliciting" fruits and vegetables. The admission of Mr. Land as to his searches and downloading is only an admission as to his possession.

5. This Court erred in concluding that knowing the basics of Limewire is equal to proving intent to distribute child pornography. The error being that in order to prove "distribution" the State is required to prove that Mr. Land had more than a general knowledge of the working of the Limewire program. The State is required to prove Mr. Land knew the default position on the Limewire program would permit others to access his files and that he intended others to access those files. The intent to distribute child pornography simply cannot be satisfied by showing a general knowledge of a software program. If this were true, then simply having the

Limewire program on the computer would be sufficient to convict even if the default setting was not to permit access to the general public. The State must prove more.

For the foregoing reasons, this Court should rehear this matter, issue an order clarifying the knowledge required to commit the crime and reverse the conviction of David A. Land.

October 7, 2016

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AFFIDAVIT OF SERVICE

PERSONALLY appeared before me Sandy Trayhnam who, after being duly sworn, deposes and says that she is the legal assistant for C. Rauch Wise, Attorney for the Petitioner in the above entitled case. That on October 7, 2016, she did deposit in the United States Mail with proper postage affixed thereto, a copy of the Petition for Rehearing in the above case addressed to William M. Blitch, Jr., Office of the Attorney General, P.O. Box 11549, Columbia, SC, 29211.

SWORN to and Subscribed

Sandy Trayhnam

before me this 7 day

of October, 2016.

Mary Jane Harter (L.S.)
Notary Public for South Carolina
My Commission expires: 11/30/22

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October 7, 2016

Jenny Abbott Kitchings, Clerk
SC Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: State vs. David A. Land, 2014-002423

Dear Ms. Kitchings:

Enclosed herewith is the original and six copies of the Petition for Rehearing concerning the above referenced matter, together with the original Affidavit of Service.

With kindest regards, I am

Very truly yours,

C. Rauch Wise

C. Rauch Wise

CRW/mjh
cc: William M. Blitch, Jr.