

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT  
CRIMINAL INDICTMENT  
NO. 2003-0546

COMMONWEALTH OF MASSACHUSETTS

vs.

KELLY HOOSE

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION TO DISMISS

The defendant, Kelly Hoose, is charged in four indictments with possession of child pornography in violation of G.L. c. 272, § 29C. He now moves to dismiss the indictments pursuant to *Commonwealth v. McCarthy*, 385 Mass. 160 (1982), and *Commonwealth v. O'Dell*, 392 Mass. 445 (1984). For the reasons discussed below, the defendant's motion to dismiss is **DENIED**.

BACKGROUND

The facts relevant to the motion to dismiss, as revealed by the transcripts of proceedings before the Worcester Grand Jury and certain other documentary and photographic evidence presented at the hearing on the motion, are as follows:

Detective Christopher Donais of the Sturbridge Police Department received a telephone call from the National Center for Missing and Exploited Children ("National Center"), and the Detective was advised that the defendant had called the National Center on three occasions. In those calls to the National Center, the defendant identified himself, provided his address and other personal information, and revealed that he had intentionally downloaded child pornography onto his computer

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over a six-month period. The defendant even disclosed the names of the folders on his computer on which he had saved the images. Those calls with the National Center were tape recorded.<sup>1</sup>

The police seized the defendant's computer pursuant to a search warrant, and concluded, after a forensic examination of the computer, that it contained 110 photographic images that appeared to be consistent with child pornography. Dr. Christine Barron of the UMass Memorial Medical Center's Child Protection Program in Worcester, Massachusetts, was shown the images, and opined that 38 separate images contained female children under the age of eighteen years old, who were posed in a partial or complete state of undress with breasts, pubic areas and/or buttocks exposed. According to Dr. Barron, some of the photographs contain a child or children in lewd or actual or simulated acts of sexual contact.<sup>2</sup>

The defendant has presented the affidavit of an attorney for ALS Scan, Inc., the owner of the web site from which the images that form the basis for Indictments Nos. 03-456 (2- 4) were downloaded, as well as a copy of the first page of the ALS Scan site, which states, in pertinent part: "All models appearing on this site are 18 years of age or older and are intended to be portrayed as such." The images all contain a copyright year, the first name or names of the "models," and the words "ALS Scan, Inc." and "www.alsscan.com." The affidavit further avers that the Commonwealth has never contacted ALS Scan. The Grand Jury was not presented with any information concerning the web site from which the images were obtained, including the site's statement regarding the age of its "models."

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<sup>1</sup> Although given the opportunity to listen to the tape, the jury voted not to do so.

<sup>2</sup> The images were neither shown nor offered to the grand jurors.

## DISCUSSION

### 1. Sufficiency of the evidence

As a general matter, the “court will not inquire into the competency or sufficiency of the evidence before the grand jury.” *Commonwealth v. McCarthy*, 385 Mass. at 161-162, quoting *Commonwealth v. Robinson*, 373 Mass. 591, 592 (1967). See also *Commonwealth v. Caracciola*, 409 Mass. 648, 650 (1991) (*McCarthy* carves “out a very limited departure from this principle where no evidence of criminality was presented to the grand jury.”). In order for an indictment to be valid, however, the grand jury must, at a minimum, “hear sufficient evidence to establish the identity of the accused, . . . and [that there was] probable cause to arrest him.” *McCarthy*, 385 Mass. At 163 (citations omitted). See also *In the Matter of a Grand Jury Investigation*, 427 Mass. 221, 224 (1998). Probable cause to arrest consists of “reasonably trustworthy information . . . sufficient to warrant a prudent man in believing that the defendant ha[s] committed . . . an offense.” *Commonwealth v. Coonan*, 428 Mass. 823, 825 (1999), quoting *O’Dell*, 392 Mass. at 450.

The defendant maintains that the evidence presented to the Grand Jury was insufficient because there is no evidence that the individuals portrayed in the images were actually children, and, as to Indictment No. 03-0546 (1), there is no aspect of the images that meets the statutory requirement of lewdness of G.L. c. 272, § 29C.

The parties agree that the Commonwealth has the burden of proving that the images are of actual children. The defendant claims that the only evidence presented to the Grand Jury on that element was the opinion of Dr. Baron, and that the United States Court of Appeals for the First Circuit, in *United States v. Hilton*, 386 F.3d 13(1st Cir. 2004), has held that testimony of a pediatrician utilizing the so-called “Tanner Scale” to estimate the ages of the individuals depicted is legally insufficient to establish that the images are of real people. The *Hilton* court, however,

while expressing doubt that the opinion evidence in that case compelled the conclusion that the images represented real children, based its decision on the trial court's failure, in a jury-waived trial, to make a finding of fact on an essential element of the federal offense of possession of child pornography. *Id.* at 18-19. Neither the First Circuit nor any other court that has considered the issue has held that the prosecution must do more than introduce the images in evidence; the trier of fact has consistently been deemed capable of "determining whether real children were used in pornographic images simply by viewing the images themselves." *People v. Normand*, 215 Ill. 2d 539, 551, 553-554, 831 N.E.2d 587 (2005), and cases cited therein.

Although the images themselves were not presented to the Grand Jury in the case at bar, there was testimony that both Sergeant Jude Buckley of the Massachusetts State Police Computer Forensic Unit and Dr. Barron examined the images and stated that they were of children. Moreover, the Grand Jury could infer from the statements attributed to the defendant that he too believed the images to be of actual children. Because the grand jurors were entitled to rely on hearsay evidence to make their probable cause determination, *O'Dell*, 392 Mass. at 450-451, the testimony of Detective Donais, the sole witness to testify before the Grand Jury, was sufficient to support the indictment. Moreover, the grand jurors, without the images themselves before them, were entitled to rely on the testimony describing such images to determine whether they were of the nature that possession of the images would violate the statute. Thus, the evidence was sufficient as to Indictment No. 03-0546 (1).

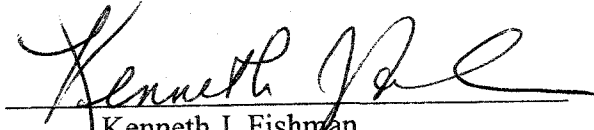
The defendant also argues that the presentation to the Grand Jury was unfair and misleading. Specifically, he claims that the Commonwealth should have shown the images to the Grand Jury, reflecting that most of the images were the copyrighted property of a business, and should have ascertained that the ALS Scan web site informed viewers that the images were of individuals

eighteen and older, and brought that information to the attention of the grand jurors.

The failure to at least make the grand jury aware of exculpatory evidence may impair the integrity of its proceedings to the extent that an indictment must be dismissed, “[w]here . . . evidence known to the prosecutor would greatly undermine the credibility of an important witness.” *Commonwealth v. Connor*, 392 Mass. 838, 854 (1984). There is, however, no “rule that would require prosecutors in all instances to bring exculpatory evidence to the attention of grand juries.” *O’Dell*, 392 Mass. at 447. While the web site’s claim that “all models appearing on this site are 18 years of age or older” is indeed exculpatory, there is no evidence that the Commonwealth had investigated the site prior to the presentment to the Grand Jury. Therefore, this Court cannot conclude that the prosecution withheld evidence to which the Grand Jury should have been alerted. Moreover, although the better practice might be to advise the grand jurors that the images were available to them for their viewing, these grand jurors did not obtain the kind of “shoddy merchandise” that would warrant dismissal of the indictment simply because the grand jurors were unaware that the images were the copyrighted property of an incorporated entity. See *Commonwealth v. St. Pierre*, 377 Mass. 650, 655 (1979). Indeed, the exculpatory value of that evidence is diminished by virtue of the defendant’s own alleged statements in his call to the National Center identifying the images as “child pornography.”

**ORDER**

For the foregoing reasons, it is hereby **ORDERED** that the defendant's motion to dismiss is **DENIED**.

  
Kenneth J. Fishman  
Justice of the Superior Court

DATED: October 17, 2005.