

STATE OF INDIANA)
) §:
COUNTY OF STEUBEN)

BEFORE THE STEUBEN MAGISTRATE
ON BEHALF OF THE CIRCUIT COURT
CAUSE NO. 76C01-2005-CM-000421

THE STATE OF INDIANA,)
 plaintiff)
)
vs.)
)
CONNER A. KATZ,)
 defendant)

ORDER DISMISSING CHARGING INFORMATION

The Court finds and orders as follows:

STATEMENT OF THE CASE:

1. On May 28, 2020, the State of Indiana filed an Information alleging that the Defendant committed the offense of "Distribution of an Intimate Image", a Class A Misdemeanor, and a violation of ***Indiana Code § 35-45-4-8***.
2. On July 22, 2020, the Defendant, by counsel, Bryan W. Lewis, Esq. and R. Larry Helmer, Esq., filed a written "Motion and Memorandum to Dismiss" (the charging Information). As part of his motion, the Defendant also filed two documents labeled "Exhibit A" and "Exhibit B".
3. The Court directed the Clerk to issue a copy of the Defendant's Motion to the Indiana Attorney General, pursuant to ***Indiana Code § 34-33.1-1-1***. The Court also scheduled the Defendant's Motion for hearing.
4. A hearing on the Defendant's Motion took place on September 24, 2020. Both Attorney Lewis and Attorney Helmer appeared on behalf of the Defendant. The Defendant did not appear. The State of Indiana appeared by Deputy Prosecuting Attorney Ryan Frey. The Indiana Attorney General did not appear.

STATEMENT OF THE FACTS:

5. The charging Information alleges as follows:

On or about or between March 12, 2020, and March 15, 2020, in Steuben County, State of Indiana, Conner Katz, being a person who knows or reasonably should know that Rylee Sunday did not consent to the distribution of an intimate image of her, did distribute the intimate image of Rylee Sunday. All of which is contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the State of Indiana.

6. "Exhibit A" is one of two attachments to the Defendant's Motion and Memorandum to Dismiss. It is a copy of an unsworn "COMPLAINT FOR DAMAGES" filed in the Steuben Circuit Court under cause number 76C01-2007-CT-000265. It contains the signature of Attorney Allen R. Stout.
7. "Exhibit B" is the second of two attachments to the Defendant's Motion and Memorandum to Dismiss. It is a copy of several documents. The first page is an unsworn document titled: "Answer to Motion for Discovery". The second page is the charging Information for this cause. Pages three through six contain the Probable Cause Affidavit filed in this cause. This affidavit carries the typewritten signature of "Officer J. Otis - U-7". The rest of the exhibit appears to be a copy of the Defendant's driver's license information and/or criminal history.
8. At the commencement of the hearing hereon, the Court offered the parties the opportunity to present evidence concerning the Defendant's Motion. Neither party presented any evidence in support of each's respective position.

ISSUES:

9. Does the Court have jurisdiction to hear this cause?
10. Does the Information adequately describe the alleged act or crime?
11. Is *Indiana Code § 35-45-4-8* Constitutionally valid?

APPLICABLE LAW:

12. The Defendant is charged with violating **Indiana Code § 35-45-4-8(d)**. It states:

(d) A person who: (1) knows or reasonably should know that an individual depicted in an intimate image does not consent to the distribution of the intimate image; and (2) distributes the intimate image; commits distribution of an intimate image, a Class A misdemeanor.

13. **Indiana Code § 35-45-4-8(c)** defines "intimate image". It states:

(c) As used in this section, "intimate image" means a photograph, digital image, or video:

(1) that depicts: (A) sexual intercourse; (B) other sexual conduct (as defined in IC 35-31.5-2-221.5); or (C) exhibition of the uncovered buttocks, genitals, or female breast; of an individual; and

(2) taken, captured, or recorded by: (A) an individual depicted in the photograph, digital image, or video and given or transmitted directly to the person described in subsection (d); or (B) the person described in subsection (d) in the physical presence of an individual depicted in the photograph, digital image, or video.

14. **Indiana Code § 35-31.5-2-221.5** defines "other sexual conduct". It states:

"Other sexual conduct" means an act involving: (1) a sex organ of one (1) person and the mouth or anus of another person; or (2) the penetration of the sex organ or anus of a person by an object. [Emphasis added.]

15. The **United States Constitution, Amendment 1** in part says: "Congress shall make no law ... abridging the freedom of speech ..."

16. The **Indiana Constitution Article I, Section 9** says: "No law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatever: but for the abuse of that right, every person shall be responsible."

17. The ***Indiana Constitution Article I, Section 13(a)*** guarantees as follows: "In all criminal prosecutions, the accused shall have the right ... to a public trial ... in the county in which the offense shall have been committed; ... [and] to demand the nature and cause of the accusation against him, ..."
18. ***Indiana Code § 35-34-1-2*** recites the requirements for a charging information. As may be applicable to this decision, it states:

(a) The indictment or information shall be in writing and allege the commission of an offense by:

(1) stating the title of the action and the name of the court in which the indictment or information is filed;

(2) stating the name of the offense in the words of the statute or any other words conveying the same meaning;

(3) citing the statutory provision alleged to have been violated, except that any failure to include such a citation or any error in such a citation does not constitute grounds for reversal of a conviction where the defendant was not otherwise misled as to the nature of the charges against the defendant;

(4) setting forth the nature and elements of the offense charged in plain and concise language without unnecessary repetition;

(5) stating the date of the offense with sufficient particularity to show that the offense was committed within the period of limitations applicable to that offense;

(6) stating the time of the offense as definitely as can be done if time is of the essence of the offense;

(7) stating the place of the offense with sufficient particularity to show that the offense was committed within the jurisdiction of the court where the charge is to be filed;

(8) stating the place of the offense as definitely as can be done if the place is of the essence of the offense; and

(9) stating the name of every defendant, if known, and if not known, by designating the defendant by any name or description by which the defendant can be identified with reasonable certainty.

...

(e) The indictment or information shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged. It need not contain a

formal commencement, a formal conclusion, or any other matter not necessary to the statement. Presumptions of law and matters of which judicial notice is taken need not be stated...

[Emphasis added.]

19. **Indiana Code § 35-34-1-4(a)** states grounds upon which a Defendant may seek dismissal of a charging information. As the same applies to our cause, it states:

(a) The court may, upon motion of the defendant, dismiss the indictment or information upon any of the following grounds:

(1) The indictment or information, or any count thereof, is defective under section 6 [IC 35-34-1-6] of this chapter.

...

(4) The indictment or information does not state the offense with sufficient certainty.

(5) The facts stated do not constitute an offense.

...

(10) There exists some jurisdictional impediment to conviction of the defendant for the offense charged.

(11) Any other ground that is a basis for dismissal as a matter of law.

20. As it may apply to our circumstances, **Indiana Code § 35-34-1-6** states:

(a) An indictment or information is defective when:

(1) It does not substantially conform to the requirements of section 2(a) [IC 35-34-1-2(a)] of this chapter;

(2) The allegations demonstrate that the court does not have jurisdiction of the offense charged; or

(3) The statute defining the offense charged is unconstitutional [emphasis added] or otherwise invalid.

...

(c) Except as provided in section 5 [IC 35-34-1-5] of this chapter, an indictment or information or a count thereof shall be dismissed upon motion when it is defective.

[Emphasis added.]

21. **Indiana Code § 35-34-1-8(a)** details the filing requirement for a Defendant's motion to dismiss. As the same applies to our cause, it states:

(a) A motion to dismiss an indictment or information under section 4 [IC 35-34-1-4] of this chapter shall be in writing. The prosecutor must be given reasonable notice of a motion to dismiss. **If the motion is expressly or impliedly based upon the existence or occurrence of facts, the motion shall be accompanied by affidavits containing sworn allegations of these facts.** The sworn allegations may be based upon personal knowledge of the affiant or upon information and belief, provided that in the latter event the affiant discloses the sources of the information and the grounds for the belief. If the motion is expressly or impliedly based upon the existence of any question of law, the motion shall be accompanied by a memorandum stating specifically the legal question in issue. The defendant may also submit documentary evidence tending to support the allegations of the motion.

...

(d) The court shall grant the motion without conducting a hearing only if:

(1) The motion alleges a ground constituting a legal basis for the motion under section 4 [IC 35-34-1-4] of this chapter;

(2) The ground, if expressly or impliedly based upon the existence or occurrence of facts, is supported by sworn allegations of all facts essential to support the motion; and

(3) The sworn allegations of fact essential to support the motion are admitted as true by the prosecutor or are conclusively established by documentary evidence.

(e) The court may deny the motion without conducting a hearing only if:

(1) The motion does not allege a ground constituting a legal basis for the motion under section 4 [IC 35-34-1-4] of this chapter;

(2) The motion is expressly or impliedly based upon the existence or occurrence of facts, and the motion does not contain sworn allegations supporting all the essential facts; or

(3) An allegation of fact essential to support the motion is conclusively refuted by documentary evidence.

(f) If a hearing is necessary to resolve questions of fact, the court shall conduct a hearing and make findings of fact essential to the determination of the motion. The defendant has a right to be present and represented by counsel at the hearing but may waive this right. The defendant has the burden of proving by a preponderance of the evidence every fact essential to support the motion.
[Emphasis added.]

ADDITIONAL FACTS AND LAW, DISCUSSION, AND DECISION:

22. The Defendant demands dismissal of the charging information. According to his pleading, the information must be dismissed "... on the grounds that the court has no jurisdiction, the state cannot prove all the elements of the crime beyond a reasonable doubt and because the statute is unconstitutional."
23. The Defendant first alleges that the Court lacks jurisdiction over the acts alleged. Specifically, the Defendant alleges "[t]hat In (sic.) fact, nowhere in the information or probable cause affidavit is there evidence of from where the alleged videos were sent." Contrary to this assertion, the charging information clearly states that the Defendant committed the alleged violation "in Steuben County, State of Indiana". It fulfills all requirements of *Indiana Code § 35-34-1-2* (specifically sub-paragraph (a)(7)) and *Indiana Code § 35-34-1-6(b)*. Furthermore, the probable cause is NOT a part of the charging information. Consequently, even if the probable cause affidavit shows that the events happened outside of Indiana (and it does NOT), that absence is not a ground for dismissal of the charging information. See: *Gilliam v. State*, 270 Ind. 71, 383 N.E.2d 297 (1978).¹

¹ The *Gilliam* Court found and held as follows:

The basis of the motion was that the probable cause affidavit which accompanied the charging information failed "to state any act which Kenneth Gilliam performed which would be a public offense." *Ind. Code § 35-3.1-1-4(a)* (Burns 1975) [now *Indiana Code § 35-34-1-4*] lists the grounds upon which a motion to dismiss may be based. While subsection (9) thereof lists as grounds for dismissal that "the indictment or information does not state the crime with sufficient certainty or the facts stated do not constitute a crime," nowhere in section 4 is deficiency of a probable cause affidavit made grounds for dismissal of the information.

The probable cause affidavit is not the means by which the accused is charged with a crime, but is a means of satisfying the constitutional and statutory requirements that the

24. Additionally, as clearly stated in **Indiana Code § 35-34-1-8(a)**, when a motion to dismiss is based upon the existence or occurrence of facts, the Defendant's motion "... shall be accompanied by affidavits containing sworn allegations of these facts. The sworn allegations may be based upon personal knowledge of the affiant or upon information and belief, provided that in the latter event the affiant discloses the sources of the information and the grounds for the belief." [Emphasis added.] The Defendant failed to present any sworn allegations (except his reference to the probable cause affidavit). Although given the opportunity to present evidence at the hearing hereon, the Defendant refused to present any facts to support his contention. As stated in **Indiana Code § 35-34-1-8(f)**, "... [t]he defendant has the burden of proving by a preponderance of the evidence every fact essential to support the motion." The Defendant failed in this burden; he presented no evidence (facts) to support his contention.
25. The Court has jurisdiction to proceed. The Defendant's motion to dismiss concerning jurisdiction should be denied.
26. The Defendant next alleges that "[t]he prosecution's evidence does not support a violation of the statute." The Defendant argues that **Indiana Code § 35-45-4-8** requires proof of sexual intercourse, other sexual conduct [**Indiana Code § 35-31.5-2-221.5**], or exhibition of certain nudity, and that the state cannot prove these requirements. Contrary to the Defendant's assertion, the charging information specifically alleges every element required by **Indiana Code § 35-45-4-8(d)**. Also, as discussed above, when alleging facts as a basis for dismissal, the Defendant has the burden of proving by a preponderance of the evidence every fact essential to support the motion. And to repeat, to prove these allegations, a motion to dismiss must be accompanied by affidavits containing sworn allegations of these supporting facts. The Defendant failed to present any sworn allegations (except his reference to the probable cause affidavit, which clearly and repeatedly refers to

pre-trial detention of the accused to face the charge be based upon a determination, by a neutral and detached magistrate, that probable cause exists to believe that the accused committed the crime. *Ind. Code § 35-3.1-1-1(b), (d)* (Burns 1975); *Gerstein v. Pugh*, (1975) 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54. Appellant's motion stated no valid grounds for dismissal of the information and was properly denied.

If appellant's contention as to the sufficiency of the probable cause affidavit were correct, the only remedy available to him would be discharge from the custody of the sheriff based upon the probable cause determination supported by the deficient affidavit. *State ex rel. French v. Hendricks Superior Court*, (1969) 252 Ind. 213, 247 N.E.2d 519

oral sex). Further, as stated above, although given the opportunity to present evidence at the hearing hereon, the Defendant refused to present any facts to support his contention.

27. The charging information sufficiently alleges facts to support a violation of **Indiana Code § 35-45-4-8**. It meets the requirements of **Indiana Constitution Article I, Section 13(a)** and **Indiana Code § 35-34-1-2**. The Defendant's claim that facts show the contrary is not proved. This portion of the motion to dismiss should also be denied.
28. Lastly, based both upon the Indiana and United States Constitution, the Defendant asks the Court to declare that **Indiana Code § 35-45-4-8** is unconstitutional. The Defendant specifically asserts that the statute is overbroad "... because it contains a negligent mens rea and any person who received an intimate image and further disseminated it could also be charged." In support of the Defendant's conclusion, he directs the Court to two (2) decisions from other jurisdictions: a) **State v. Casillas**, 938 N.W.2d 74 (Minn. Ct. App. 2019); and b) **Ex parte Jones**, No. 12-17-00346-CR, 2018 Tex. App. LEXIS 3439 (Tex. App. May 16, 2018).
29. No Indiana authority exists which directly confronts the Defendant's argument on the constitutionality of **Indiana Code § 35-45-4-8**. The decisions from sister jurisdictions, while instructive, are not binding authority on the Indiana courts. With this in mind, the Court examines each authority below.
30. In the Texas matter, the Court reviewed the constitutionality of **Texas Penal Code § 21.16**. An examination of a portion of this statute reveals statutory elements that substantially mirror the language of **Indiana Code § 35-45-4-8(d)**. (In addition, other subsections exist which require proof substantially different elements for conviction.) The Texas Court examined the Constitutional issues in great detail. In doing so, it recognized that the statute is subject to the "strict scrutiny" test concerning validity. That Court ultimately concluded that the Texas statute violated the test, and found the Texas statute to be "... an invalid content-based restriction and overbroad in the sense that it violates rights of too many third parties by restricting more speech than the Constitution permits." **Ex parte Jones**, *supra*, at 16.
31. In a subsequent decision, the Texas Court of Appeals overruled **Ex parte Jones**, *supra*. Based upon an amendment to **Texas Penal Code § 21.16**, that Court, in **Ex parte Ellis**, No. 10-17-00047-CR, 2020 Tex. App. LEXIS 7056 (Tex. App. Aug. 31, 2020) found **Texas Penal Code §**

21.16 held the amended statute to be constitutional.² The amendment to the statute appears to replace the “knows or reason to believe” language of that statute. The amendment changed the mens rea contained in the statute to “intentional”. Based upon that change, the Texas court found the statute to be constitutional.

32. In the Minnesota matter, the Minnesota Court of Appeals reviewed the constitutionality of ***Minn. Stat. Ann. § 617.261*** (LexisNexis, Lexis Advance through the end of the 2020 Regular Session, and First Special Session, of the 91st Legislature). An examination of a portion of this statute reveals statutory elements that also substantially mirror the language of ***Indiana Code § 35-45-4-8(d)***. The Minnesota Court also examined the Constitutional issues in great detail. In doing so, that Court examined the “knows or should have known” language contained in the Minnesota statute. That court held:

That “knows or reasonably should have known” standard is a negligence mens rea that allows a person to be convicted under ***Minn. Stat. § 617.261*** even if he did not actually know that the person depicted in the image did not consent to the dissemination or that the image was obtained or created under circumstances in which the person depicted had a reasonable expectation of privacy. See ***A.J.B.***, 929 N.W.2d at 850 (describing a “knows or has reason to know” standard as a broad negligence mens rea).

State v. Casillas, 938 N.W.2d 74, 82 (Minn. Ct. App. 2019)

33. The Indiana Statute is nearly identical to the original Texas statute and to the Minnesota Statute. The decisions of these courts are persuasive. This Court discerns of no reason why the logic contained in the Minnesota and Texas decisions would not apply to the Indiana Statute. Without other Indiana guidance, incumbent on this Court is the duty to accept the decisions of our sister courts, especially as the same may apply to the United States Constitution.

² In *Ex parte Ellis*, No. 10-17-00047-CR, 2020 Tex. App. LEXIS 7056, at 10 (Tex. App. Aug. 31, 2020), the Court held: “The sweep of the statute is limited by the intent of the person disclosing the images and the requisite harm that the potential victim must show. We find that Section 21.16(b) is not overbroad.”

34. Rather than repeating the language of the decisions of the Texas and Minnesota Courts, this Court adopts those decisions and their holdings for this cause.
35. For the reasons stated in *State v. Casillas, supra*, and *Ex parte Jones, supra*, this Court finds that **Indiana Code § 35-45-4-8** is overbroad and unconstitutional. It violates the law of free speech as contained in **United States Constitution, Amendment 1**. It violates right to the free interchange of thought and opinion and the right to speak, write, or print, freely, on any subject whatever as contained in **Indiana Constitution Article I, Section 9**. It cannot stand.

The Court, so finding, now:

ORDERS AND DECREES THAT:

The Motion to Dismiss is granted. This cause is dismissed. The Defendant is discharged. Any bond is released.

Date: October 2, 2020



**Randy Coffey, Magistrate
Steuben Circuit Court**

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RJO entered _____
RJO not entered _____