2019 IL App (2d) 160942-U
No. 2-16-0942
Order filed August 9, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. MICHAEL DiMICHELE, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of De Kalb County. No. 12-CF-808 Honorable Robbin J. Stuckert, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justice Schostok concurred in the judgment.
Justice Hutchinson dissented.

ORDER

¶ 1 *Held*: The trial court did not err in denying defendant's third-stage postconviction petition. Therefore, we affirmed.

¶ 2 Defendant, Michael DiMichele, pleaded guilty to one count of child pornography (720 ILCS 5/11-20.1(a)(I)(i) (West 2012)). The trial court sentenced him to four years' imprisonment followed by mandatory supervised release (MSR) for three years to life. It also required defendant to undergo community registration as a sex offender. Defendant filed a petition pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122 *et seq*. (West 2014)),

alleging a violation of his first amendment rights and ineffective assistance of trial counsel. The trial court denied the petition after a third-stage evidentiary hearing. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On December 21, 2012, defendant was charged by indictment with (1) one count of criminal sexual assault (720 ILCS 5/11-1.20(a)(4) (West 2012)); (2) one count of aggravated criminal sexual abuse (720 ILCS 5/11-1.60(a),(f) (West 2012)); and (3) five counts of child pornography (720 ILCS 5/11-20.1(a)(1)(i) (West 2012)). The first two charges alleged that defendant employed K.E., who was between the ages of 13 and 17, and held a position of authority in relation to him. The child pornography charges alleged that K.E. was under the age of 18. All of the actions were alleged to have taken place on or about November 16, 2012. On July 16, 2013, defendant entered into a negotiated guilty plea to one count of child pornography. He was sentenced to four years' imprisonment, received three years to life of MSR, and was fined $1,000. In exchange for the guilty plea, the State dismissed the remaining charges.

¶ 5 On April 21, 2014, defendant filed a *pro se* petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2014)). His petition alleged that the United States Supreme Court's holding in *U.S. v. Stevens*, 559 U.S. 460 (2010), was new evidence unknown to him at the time of his guilty plea to the child pornography charge as neither his attorney nor the court had mentioned it. He also claimed he was denied due process and equal protection, and that the child pornography statute violated the proportionate penalties clause. The trial court found that a section 2-1401 petition was not a proper vehicle to collaterally attack denials of constitutional rights and dismissed the petition on June 4, 2014.

¶ 6 On May 22, 2015, defendant's counsel filed a petition pursuant to the Act. Defendant's petition alleged that his constitutional right to free speech was violated when the trial court

entered a judgment of conviction on July 16, 2013. Defendant alleged that he was in a legal, consensual sexual relationship with the then 17-year old K.E. when he engaged in photographing an act of sexual penetration upon which the child pornography charge was predicated. Defendant also alleged that his trial counsel was ineffective for failing to assert this constitutional violation. Defendant attached to his petition the affidavit of K.E., which stated that K.E. gave knowing consent to the act of sexual penetration alleged in the indictment and that defendant was not in a position of trust, authority, or supervision over him during the act of photographing said sexual penetration.

¶ 7 On October 6, 2015, the trial court advanced defendant's postconviction petition to the second stage. Following the June 2, 2016, denial of the State's motion to dismiss defendant's petition, the matter advanced to the third stage.

¶ 8 On August 29, 2016, the trial court held a third-stage evidentiary hearing on defendant's postconviction petition. Defendant testified that he pled guilty to the child pornography charge because he had photographed K.E. engaged in an act of sexual penetration on November 16, 2012, when he knew that K.E. was under 18 years old. At that time, defendant was self-employed as a technology and computer consultant. He worked exclusively out of his home in De Kalb. He never had any employees working for him. In June 2012, defendant met K.E. on a gay dating website. K.E. was 17 years old. After conversing online, defendant and K.E. met at K.E.'s home in Woodstock, where he lived with his family. They immediately started a sexual relationship. In August 2012, defendant met with K.E.'s parents to discuss K.E. working for him. This conversation was a ruse to allow K.E. to continue meeting with defendant twice per week at his home in De Kalb to further their sexual relationship, during which he and K.E. photographed their sexual activities. Defendant and K.E. agreed to mislead K.E.'s parents prior to their

meeting. At no time did K.E. perform any type of work connected with defendant's computer business.

¶ 9 Upon his arrest, defendant told the police he had hired K.E. to work on computers with him. Defendant testified that this was a lie intended to protect K.E. from being discovered as a member of the gay community. Still, he admitted to police that he was engaged in sexual conduct with K.E.

¶ 10 Defendant introduced into evidence an affidavit from a customer stating that he had hired defendant for computer services in the 1990's, and it was his experience that defendant worked alone. Defendant introduced a second affidavit from a friend who had observed defendant working on many occasions, and had stayed with him a few days before his arrest. He attested that defendant was always working alone.

¶ 11 On October 14, 2016, the trial court issued a written order denying defendant's postconviction petition. On the subject of whether defendant was in a position of trust or authority over K.E. on the date alleged in the charge to which defendant pled guilty, the trial court stated that defendant's client's affidavit carried little weight because his observations were limited to work that occurred in the 1990's. Defendant's friend's affidavit did not state how long he stayed with defendant, and because K.E.'s parents were told K.E. would be working for defendant two days per week, K.E. could have worked for defendant in the friend's absence. K.E.'s affidavit did not mention whether or not he had ever worked for defendant. As for defendant, he testified that:

> "he had never employed [K.E.], and that his statement to [K.E.'s] parents and the police were a rouse [*sic*] to protect [K.E.'s] sexual orientation. However, he admitted to police upon questioning that he was engaged in sexual conduct with [K.E.], as well as being his

> employer. And at the time of his statements, he had already known that [K.E.'s] sexual orientation had been discovered by [K.E.'s] parents based on the text messages he had received from [K.E.] that morning. Therefore, the explanation he provided for telling the police he was [K.E.'s] employer was suspect."

¶ 12 The trial court stated "[t]hat being said," it would still address defendant's constitutional argument. In denying the petition's claim that *Stevens* compelled reversal based on a violation of defendant's first amendment rights, the trial court stated:

> "The *Stevens* court reiterated that the first step in an overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers. In addition, what is the nature of the governmental interest the statute is intended to advance? These are all questions the court would need to appropriately analyze a First Amendment challenge, but [defendant] has failed to specifically address these or other issues necessary to prevail on [his] constitutional violation claims. Based on the majority holding in *Hollins* [*People v. Hollins*, 2012 IL 112754], the court finds that the petitioner has failed to clearly establish that the challenged statute violates the petitioner's constitutional protections."

In denying the petition's claim that defendant's trial counsel was ineffective for failing to challenge the constitutionality of the child pornography statute, the trial court stated:

> "The Illinois Supreme Court had addressed this very issue in *Hollins,* holding that the challenged statute in this matter [is] rationally related to a legitimate government purpose and [is] neither arbitrary nor discriminatory. The petitioner's failure to establish either deficient performance or sufficient prejudice negates his claim of ineffectiveness."

Defendant timely appealed.

¶ 13 II. ANALYSIS

¶ 14 On appeal, defendant argues that the trial court erred in denying his postconviction petition, because the subject photograph of his conviction for child pornography was protected speech under the first amendment to the United States Constitution (U.S. Const., amend. I) and article 1 section 4 of the Illinois State Constitution (Ill. Const. 1970, art. I, § 9), rendering his conviction under the Illinois child pornography statute (720 ILCS 5/11-20.1(a)(I)(i) (West 2012)) unconstitutional as applied to him. Additionally, defendant argues that the trial court erred in finding that he failed to prove that his trial counsel provided ineffective assistance in failing to raise the challenge asserted above.

¶ 15 In the third stage of a postconviction proceeding, a defendant must make a substantial showing of a constitutional violation. *People v. Carballido*, 2015 IL App (2d) 140760, ¶ 65. During this stage, the trial court serves as the fact finder and determines witness credibility, decides the weight to be given to testimony and evidence, and resolves conflicts in the evidence. *People v. Domagala*, 2013 IL 113688, ¶ 34. After a third-stage evidentiary hearing, we will not disturb the trial court's determination unless it is manifestly erroneous. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). "Manifestly erroneous" is defined as error that is clearly evident, plain, and indisputable. *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009). However, where issues presented are pure questions of law, we review *de novo* the trial court's ruling. *People v. Velasco*, 2018 IL App (1st) 161683, ¶ 137.

¶ 16 We initially note that defendant pled guilty to child pornography and never sought to withdraw his guilty plea. In *People v. Townsell*, 209 Ill. 2d 543, 546 (2004), which involved an *Apprendi* challenge, our supreme court stated that "a voluntary guilty plea waives all non-jurisdictional errors or irregularities, including constitutional ones." However, because

defendant here "challenges the State's power to prosecute his admitted conduct and thereby questions the State's power to constitutionally prosecute him," as opposed to challenging case-related constitutional defects that occurred before the entry of his guilty plea, he has not waived his constitutional argument. *People v. Patterson*, 2018 IL App (1st) 160610, ¶ 21. Additionally, defendant alleged that he pled guilty due to ineffective assistance of trial counsel. For such a claim, a defendant must satisfy the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Hodges*, 234 Ill. 2d 1, 17 (2009). The defendant must first establish that counsel's representation fell below an objective standard of reasonableness. *People v. Brown*, 2017 IL 121681, ¶ 26. Second, a defendant who pled guilty must establish prejudice by showing that there a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. *Id.*

¶ 17 The State argues that our supreme court's holding in *Hollins*, 2012 IL 112754, supports the trial court's denial of defendant's postconviction petition. The facts of the present case are similar to those in *Hollins*. In *Hollins*, the then 32-year-old defendant had engaged in a consensual sexual relationship with A.V., who was then 17 years old. *Id.* ¶ 6. The defendant admitted to taking cell phone pictures of himself having sex with A.V., whom he knew to be under 18 years old at the time. *Id*. The defendant was found guilty of three counts of child pornography and sentenced to concurrent eight-year prison terms for each count. *Id*. ¶ 9.

¶ 18 The defendant in *Hollins* raised two arguments on appeal before our supreme court: (1) the child pornography statute, as applied in that case, denied him due process of law under the United States and Illinois constitutions; and (2) the child pornography statute as applied violated the equal protection clauses of the United States and Illinois constitutions. *Id*. ¶ 11. The defendant conceded that his case did not implicate a fundamental right, and the court examined his due

process challenge to the child pornography statute under the rational basis test. *Id*. ¶ 15. The court found that the child pornography statute's legitimate government purpose is protecting children from sexual abuse and exploitation, and the prohibition of photographing minors engaged in sexuality activity bears a rational relationship to protecting them from such abuse. *Id*. ¶ 24. As to his equal protection challenge of the statute, the court found that the defendant was not a member of a suspect class and that no fundamental right had been implicated, before reiterating the statute's rational relationship to the legitimate purpose of preventing the sexual abuse and exploitation of children. *Id*. ¶ 42.

¶ 19 In her dissent, Justice Burke stated that the majority addressed the defendant's constitutional claim under a rational basis review based on the defendant's concession that no fundamental constitutional rights were implicated by criminally prohibiting the photographs taken by the defendant. *Id*. ¶ 56 (Burke, J., dissenting). Justice Burke argued that the holding in *Stevens* required the court to apply a heightened level of scrutiny to the defendant's constitutional challenge as the photographs taken were legal and, therefore, not child pornography for purposes of the first amendment. *Id*. ¶ 68 (Burke, J., dissenting).

¶ 20 Defendant argues that unlike *Hollins*, he has not conceded that the photograph at issue was excluded from free speech protections under the federal and Illinois constitutions, or that the constitutionality analysis of the Illinois child pornography statute, as applied to the facts of this case, is subject only to rational basis review. Defendant maintains that, to the contrary, he has consistently argued that the photograph does not fall under any categorical exclusion to first amendment protection and that the child pornography statute is unconstitutional when applied to the facts of this case and properly reviewed under strict scrutiny. Defendant argues that we should apply the analysis set for by Justice Burke in her *Hollins* dissent.

¶ 21 Illinois' child pornography statute states :

"(a) A person commits child pornography who:

(1) films, videotapes, photographs, or otherwise depicts or portrays by means of any similar visual medium or reproduction or depicts by computer any child whom he or she knows or reasonably should know to be under the age of 18 or any person with a severe or profound intellectual disability where such child or person with a severe or profound intellectual disability is:

(i) actually or by simulation engaged in any act of sexual penetration or sexual conduct with any person or animal." 720 ILCS 5/11-20.1(a)(1)(i) (West 2012).

¶ 22 Defendant's argument is grounded in the assertion that his underlying sexual conduct with K.E. was legal because K.E. was 17 years old at the time that it occurred. In order to succeed on his constitutional claim, defendant therefore had the burden of showing that the sexual conduct was legal, which involves questions of fact. The dissent states that "there is no dispute that the sexual conduct that occurred between defendant and K.E. during their relationship was legal" (*infra*, ¶ 35) and that "the sexual conduct depicted was entirely legal" (*infra*, ¶ 47). We disagree, as the State has consistently contested this point. The State's position is grounded in the law, because although the age of sexual consent is generally 17 in Illinois (see 720 ILCS 5/11-1.60(d) (West 2012)), it increases to age 18 if the defendant is in a position of trust, authority, or supervision in relation to the victim (see 720 ILCS 5/11-1.60(f) (West 2012)). This distinction is contained within subsections of the very statute the dissent relies on in stating that the underlying conduct was legal. See *infra* ¶ 39. Thus, a crucial distinction between this case and *Hollins* is that *Hollins* did not involve a question of whether the defendant was in a

position of trust, authority, or supervision, so the supreme court reached the merits of the defendant's constitutional argument. Here, in contrast, defendant was allegedly in such a position.

¶ 23 We should resolve a case on constitutional principles only as a last resort, when a case cannot be resolved any other way. *In re Haley D.*, 2011 IL 110886, ¶ 54. In this case, defendant himself presented evidence at the evidentiary hearing in an effort to show that he was not in a position of trust, authority, or supervision over K.E. In order to meet his burden on this issue, he submitted several affidavits, including one from K.E., and testified regarding the subject. However, the trial court did not make a finding in defendant's favor on his assertion that he had not employed K.E. in his computer repair business. It is undisputed that in the first week of August 2012, defendant met K.E.'s parents and K.E. in his home and told them that K.E. would be working for him. Defendant testified that he and K.E. had decided to do so to hide their sexual orientation. Defendant testified that K.E. then came to his house twice per week, but he never did any work for defendant's computer business. However, the trial court noted that defendant also stated to the police both that he was K.E.'s employer and that he had engaged in sexual contact with him. The trial court further stated that, at the time of defendant's statements to the police, he already knew that K.E.'s parents had discovered K.E.'s sexual orientation. The trial court stated, "[t]herefore, the explanation he provided for telling the police he was [K.E.'s] employer was suspect."

¶ 24 As stated, during the third stage of postconviction proceedings, it is the trial court's role to serve as the fact finder and determine witness credibility, decide the weight to be given to testimony and evidence, and resolve conflicts in the evidence. *Domagala*, 2013 IL 113688, ¶ 34. Because the trial court did not find credible defendant's assertion that he never employed K.E., it

likewise did not find that defendant was not in a position of trust, authority, or supervision over K.E. Accordingly, defendant did not meet his burden of showing that the underlying sexual conduct was not criminal, undermining defendant's argument that the pornography conviction was unconstitutional because the sexual contact depicted was legal. As a consequence, trial counsel could not be said to have acted ineffectively in advising defendant to plead guilty. Therefore, the trial court's ruling, that defendant failed to make a substantial showing of a constitutional violation, was not manifestly erroneous.

¶ 25 Defendant argues that we may not consider the crimes that he was initially charged with because those charges were dropped as part of the negotiated guilty plea. Defendant argues that this court cannot assume the role of a trier of fact to convict him of such charges. The dissent similarly states that we cannot consider dismissed charges and that "our holding makes this court into a trier of fact[,] which is not our function." *Infra*, ¶ 35. Defendant argues that even if we could consider the issue, he did not make any statement during the plea colloquy that addressed any alleged trust, authority, or supervisory relationship to K.E.

¶ 26 Defendant's argument, that we are limited to considering the plea colloquy, is without merit. The factual basis for defendant's guilty plea consisted of defendant stipulating that he "had knowingly photographed a juvenile victim with the initials K.E., a child whom the defendant knew to be under the age of 18 years, while actually engaged in an act of sexual penetration with the defendant in violation of the statute." Thus, the factual basis for the guilty plea did not set forth K.E.'s actual age at the time of the incident. For defendant to meet his burden of making a substantial showing of a constitutional violation (see *Carballido*, 2015 IL App (2d) 140760, ¶ 65), specifically for the *as-applied* constitutional challenge he asserts, he necessarily had to introduce evidence about the circumstances of the case beyond those of the

factual basis. See *People v. Harris*, 2018 IL 121932, ¶ 39 ("All as-applied constitutional challenges are, by definition, dependent on the specific facts and circumstances of the person raising the challenge"); *People v. Mosely*, 2015 IL 115872, ¶ 47 (a court cannot make an as-applied determination of unconstitutionality if there has been no evidentiary hearing and no findings of fact). Indeed, defendant's argument rests on the circumstances of the case, including that K.E. was 17 when defendant took the photograph and that K.E. consented. The case's circumstances would also include defendant's relationship to K.E., for, as stated, although the age for sexual consent is generally 17 (see 720 ILCS 5/11-1.60(d) (West 2012)), it increases to age 18 if the defendant is in a position of trust, authority, or supervision in relation to the victim (see 720 ILCS 5/11-1.60(f) (West 2012)).

¶ 27 Postconviction counsel submitted affidavits and elicited testimony regarding defendant's alleged lack of an employer relationship with K.E., thereby putting the subject directly at issue in defendant's postconviction claim, a point that the dissent ignores. The State cross-examined defendant on this subject and did not concede the issue. Defendant's appellate counsel argues that postconviction counsel was ineffective for "permit[ing] or respond[ing] to any such argument in this regard ***." However, appellate counsel had not cited authority or developed an argument that postconviction counsel was ineffective, thereby forfeiting the argument for review. See Ill. S. Ct. R. 341(h)(7) (eff. Nov. 1, 2017) (argument shall contain citation to authority); *People v. Olsson*, 2014 IL App (2d) 131217, ¶ 16 (the failure to clearly define issues and support them with authority results in forfeiture of the argument); see also *People v. Bass*, 2018 IL App (1st) 152650, ¶ 11 (postconviction counsel is required to provide a defendant with a reasonable level of assistance, which is a less rigorous standard than that for trial counsel). For the reasons discussed, it also is not clear that defendant could succeed in such an argument. See also *Brown*,

2017 IL 121681, ¶ 49 (where the defendant's allegation in his postconviction petition alone was insufficient to show that he was prejudiced by trial counsel's action, the reviewing court looked at the circumstances surrounding the defendant's plea, including the initial charges).

¶ 28 Although we agree with the dissent that we are not permitted to make factual findings as a court of review, the trial court was in the role of a trier of fact after the third stage evidentiary hearing (see *Domagala*, 2013 IL 113688, ¶ 34), and it did not find in defendant's favor on the question of the employer-employee relationship. Again, for defendant to succeed on his constitutional argument, he had the burden of showing that the underlying conduct was legal. Regardless of the dropped charges, part of the circumstances of the case necessarily included defendant's relationship to K.E., and defendant directly put the question of whether he was K.E.'s employer before the trial court. The trial court did not find in favor of defendant on this subject, meaning that defendant did not meet his burden of showing that the age of consent for the underlying sexual conduct with K.E. would have been 17, as opposed to 18, thereby undermining defendant's constitutional argument.

¶ 29 Even if, *arguendo*, the issue of whether defendant was in a position of trust, authority, or supervision as to K.E. is not relevant here, or if the trial court had found in defendant's favor on this question, we would still affirm its ruling. As discussed, *Hollins* rejected the defendant's argument that the child pornography statute was unconstitutional when applied to persons old enough to legally consent to the underlying sexual activity. Defendant here asserts that we are not bound by *Hollins* because the *Hollins* defendant did not argue that the photograph was subject to free speech protection and that the child pornography statute should be subject to strict scrutiny. However, the *Hollins* court stated: "Defendant concedes that, *as this case does not implicate a fundamental right*, the test for determining whether the statute complies with

substantive due process is the rational basis test." (Emphasis added.) *Hollins*, 2012 IL 112754, ¶ 15. Thus, the *Hollins* majority appeared to agree with the defendant that the case did not implicate a fundamental right, such as free speech. Further, defendant's entire argument follows along with the *Hollins* dissent, to the extent that defense counsel stated at oral argument that the dissent provides a "roadmap" as to how we should analyze this case. What we cannot ignore is that the *Hollins* majority had the very same "roadmap" before it and decided that the dissent's route was incorrect. " 'Where the Supreme Court has declared the law on any point, it alone can overrule and modify its previous opinion, and the lower judicial tribunals are bound by such decision and it is the duty of such lower tribunals to follow such decision in similar cases.' " (Emphasis omitted.) *Price v. Philip Morris, Inc.*, 2015 IL 117687, ¶ 38 (quoting *Agricultural Transportation Ass'n v. Carpentier*, 2 Ill. 2d 19, 27 (1953)). Based on the majority decision in *Hollins*, we cannot say that the trial court erred in rejecting defendant's constitutional argument.

¶ 30 III. CONCLUSION

¶ 31 For the reasons stated, we affirm the judgment of the De Kalb County circuit court.

¶ 32 Affirmed.

¶ 33 Justice Hutchinson dissenting.

¶ 34 I respectfully dissent from the majority's affirmance of the trial court's rejection of defendant's argument that the subject photographs taken of K.E. constitute protected speech under both the U.S. and Illinois constitutions, and that the Illinois Child Pornography Law (720 ILCS 5/11-20.1(a)(1)(i) (West 2012)) is unconstitutional as applied to the facts of this case.

¶ 35 The majority's holding makes this court into a trier of fact which is not our function. We are effectively affirming defendant's conviction for a crime the State chose not to pursue. Defendant's post-conviction petition specifically asserts that his constitutional right to free

speech was violated when the court entered a conviction under section 11-20.1(a)(1)(i) of the Illinois Child Pornography Law. Whether defendant was in "a position of trust, authority, or supervision in relation to the victim" under the auspices of 720 ILCS 5/11-1.20(a)(4) or 720 ILCS 5/11-1.60(a),(f) is wholly irrelevant to this appeal. The State dismissed those charges in exchange for defendant's plea to the child pornography charge. Our analysis is limited to whether that statute is unconstitutional as-applied to defendant. The trial court's statement that defendant's "explanation *** provided for telling police he was [K.E.'s] employer was suspect", has nothing to do with the First Amendment challenge to the only statute under which defendant was convicted here. Indeed, the trial court's denial of defendant's post-conviction petition was ultimately limited to the majority holding in *Hollins*, and it is that reliance upon which I find the trial court's folly.

¶ 36 Our majority here states that "the *Hollins* majority appeared to agree with the defendant that the case did not implicate a fundamental right, such as free speech." Is it this court's position that because the defendant in *Hollins* conceded that his argument was rooted in a due process challenge, therefore free speech is not a fundamental right? I do not believe that is the position of our supreme court, but merely an acceptance of that defendant's concession that his argument was confined to a due process analysis. Therefore that analysis was limited to the rational basis test. As I stated at the outset of my dissent, defendant in the present appeal is making an explicit assertion that the photography taken of K.E. constitutes protected speech under both the U.S. and Illinois constitutions, and that the Illinois Child Pornography Law (720 ILCS 5/11-20.1(a)(1)(i) (West 2012)) is unconstitutional as applied to the facts of this case.

¶ 37 The defendant in *Hollins* raised two arguments on appeal before our supreme court: (1) the child pornography statute, as applied in that case, denies defendant due process of law

under the United States and Illinois constitutions; and (2) the child pornography statute as applied violates the equal protection clauses of the United States and Illinois constitutions. *Id*. ¶ 11. Hollins conceded that his case did not implicate a fundamental right, prompting the court to examine his due process challenge to the child pornography statute under the rational basis test. *Id*. ¶ 15. The court found that the child pornography statute's legitimate government purpose is protecting children from sexual abuse and exploitation, and the prohibition of photographing minors engaged in sexuality activity bears a rational relationship to protecting them from such abuse. *Id*. ¶ 24. As to his equal protection challenge of the statute, the court found that Hollins was not a member of a suspect class and no fundamental right had been implicated before reiterating the statute's rational relationship to the legitimate purpose of preventing the sexual abuse and exploitation of children. *Id*. ¶ 42.

¶ 38 In her dissent in *Hollins*, Justice Burke stated that the majority addressed defendant's constitutional claim under a rational basis review based on defendant's concession that no fundamental constitutional rights were implicated by criminally prohibiting the photographs taken by defendant. *Id*. ¶ 56 (J. Burke dissenting). Justice Burke pointed out that the holding in *U.S. v. Stevens*, 559 U.S. 460 (2010), required the court to apply a heightened level of scrutiny to defendant's constitutional challenge as the photographs taken were legal and, therefore, not child pornography for purposes of the First Amendment. *Id*. ¶ 68 (J. Burke dissenting). The defendant in the present case makes no such concession concerning a violation of his fundamental constitutional rights. Here, defendant explicitly argues that the photography taken of K.E. constitutes protected speech under both the U.S. and Illinois constitutions, and that the Illinois Child Pornography Law (720 ILCS 5/11-20.1(a)(1)(i) (West 2012)) is unconstitutional as applied to the facts of this case.

¶ 39 In Illinois, the age of sexual consent is generally 17 (see 720 ILCS 5/11-1.60(d) (West 2012), and there is no dispute that the sexual conduct that occurred between defendant and K.E. during their relationship was legal. However, Illinois' child pornography statute states that:

> "(a) A person commits child pornography who:
>
> (1) films, videotapes, photographs, or otherwise depicts or portrays by means of any similar visual medium or reproduction or depicts by computer any child whom he or she knows or reasonably should know to be under the age of 18 or any person with a severe or profound intellectual disability where such child or person with a severe or profound intellectual disability is:
>
> (i) actually or by simulation engaged in any act of sexual penetration or sexual conduct with any person or animal." 720 ILCS 5/11-20.1(a)(1)(i) (West 2012).

Therefore, while defendant did not violate any law when engaged in a consensual sexual relationship with K.E., his actions became criminal when he photographed the otherwise legal act of sexual intercourse with K.E.

¶ 40 The First Amendment to the United States Constitution states that:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amdend, I.

Article I, section 4 of the Illinois State Constitution states that:

> "All persons may speak, write, and publish freely, being responsible for the abuse of that liberty." Ill. Const. art. I, § 4.

Freedom of speech is a fundamental personal liberty protected by the due process clause of the Fourteenth Amendment of the U.S. Constitution from invasion by state action. *Lovell v. City of Griffin*, 303 U.S. 444, 450 (1938). Government has no power to restrict expression because of its message, ideas, subject matter, or content. *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972). The United States Supreme Court has recognized certain categories of speech to be exceptions to First Amendment protection including obscenity, *Roth v. United States,* 354 U.S. 476, 483 (1957), defamation, *Beauharnais v. Illinois,* 343 U.S. 250, 254-55 (1952), fraud, *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 771 (1976), incitement, *Brandenburg v. Ohio,* 395 U.S. 444, 447-49 (1969), and speech integral to criminal conduct, *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949). Defendant in the present case contends that the subject photograph depicting himself and K.E. engaged in an act of sexual penetration is speech subject to First Amendment protection as it does not fall into any recognized category of exception.

¶ 41 *New York v. Ferber* concerned a First Amendment challenge to a New York statute which prohibited "persons from knowingly promoting sexual performances by children under the age of 16 by distributing material which depicts such performances." *New York v. Ferber*, 458 U.S. 747, 740 (1982). The defendant was convicted under the statute for selling two films to undercover police officers that depicted young boys engaged in masturbation. *Id.* at 751-52. The Court held that child pornography is not entitled to First Amendment protection.

¶ 42 In upholding the New York statute, the Court recognized child pornography as a category of unprotected speech under the First Amendment because it "bears so heavily and pervasively on the welfare of children engaged in its production ***." *Id.* at 764. The Court recognized excluding child pornography from protected speech under the First Amendment by noting the

following policy justifications: (1) it is a governmental objective of "surpassing importance" to prevent the "sexual exploitation and abuse of children" that occurs in the creation of the material; (2) the distribution of the material is "intrinsically related to the sexual abuse of children," both because the materials produced are a "permanent record" of the children's participation and the harm to the child is exacerbated by their circulation, and because prohibiting distribution of the material is the only effective way to stop "the production of material which requires the sexual exploitation of children"; (3) it is a crime "throughout the Nation" to employ children in the creation of pornography, and thus the advertising and selling of child pornography provide an "economic motive" for and are "an integral part of" that criminal activity; (4) "[t]he value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis* ". For these reasons, the Court concluded that "the evil to be restricted *** overwhelmingly outweighs the expressive interests, if any, at stake" and "it is permissible to consider these materials as without the protection of the First Amendment." *Id.* at 756-67, 759, 761-62.

¶ 43 *Ferber* was extended in *Osborne v. Ohio*, 495 U.S. 103 (1990). In *Osborne*, the Court considered an Ohio statute that prohibited "any person from possessing or viewing any material or performance showing a minor who is not his child or ward in a state of nudity, unless (a) the material or performance is presented for a bona fide purpose by or to a person having a proper interest therein, or (b) the possessor knows that the minor's parents or guardian has consented in writing to such photographing or use of the minor." *Id.* The Court upheld the statute as constitutional as it was enacted "in order to protect the victims of child pornography; it hopes to destroy a market for the exploitative use of children." *Id.* at 108. In extending the language from *Ferber* that called the production of child pornography and distribution of child pornography "an

integral part of conduct in violation of a valid criminal statute," the Court found that a ban on possession of such material was necessary "to solve the child pornography problem." *Id*. at 110. Criminalizing possession and viewing of child pornography "encourages possessors of these materials to destroy them" and "encouraging the destruction *** is *** desirable because evidence suggests that pedophiles use child pornography to seduce other children into sexual activity." *Id*. at 111.

¶ 44 In *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), the Court examined a federal statute that banned virtual child pornography. The statute in question, the Child Pornography Prevention Act of 1996, expanded the federal prohibition on child pornography to include not only pornographic images made using actual children, but also "any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture," that "is, or appears to be, of a minor engaging in sexually explicit conduct," and any sexually explicit image that is "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression" it depicts "a minor engaging in sexually explicit conduct." *Id*. The Court struck down the law on First Amendment grounds reasoning that the Court's holding in *Ferber* was based on how child pornography is produced, not the content itself. *Id*. at 249. The Court in Ashcroft stated that:

> "In contrast to the speech in *Ferber*, speech that itself is the record of sexual abuse, the [statute] prohibits speech that records no crime and creates no victims by its production. Virtual child pornography is not "intrinsically related" to the sexual abuse of children, as were the materials in *Ferber*. 458 U.S., at 759. While the Government asserts that the images can lead to actual instances of child abuse *** the causal link is contingent and

> indirect. The harm does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts." *Ashcroft*, 535 U.S. at 250.

The Court further found that *Ferber* "did not hold that child pornography is by definition without value." *Id*. at 251. The Court ruled that virtual pornography was permissible speech and subject to full protection of the First Amendment. *Id*. at 258.

¶ 45 In *U.S. v. Stevens*, 559 U.S. 460 (2010), the Court considered a First Amendment challenge to a federal statute that criminalized the creation, sale, or possession of certain depictions of animal cruelty. In that case, the government pointed to the Court's holding in *Ferber* to assert that depictions of animal cruelty (in that case "crush" videos) should be recognized as another category of speech excepted from First Amendment protection. *Stevens*, 559 U.S. at 469-70. The Court rejected the government's position as "startling and dangerous." The Court explained that the holding in *Ferber* should be interpreted as follows:

> "When we have identified categories of speech as fully outside the protection of the First Amendment, it has not been on the basis of a simple cost-benefit analysis. In *Ferber,* for example, we classified child pornography as such a category, 458 U.S., at 763. We noted that the State of New York had a compelling interest in protecting children from abuse, and that the value of using children in these works (as opposed to simulated conduct or adult actors) was *de minimis*. *Id.,* at 756-57, 762. But our decision did not rest on this "balance of competing interests" alone. *Id.,* at 764. We made clear that *Ferber* presented a special case: The market for child pornography was "intrinsically related" to the underlying abuse, and was therefore "an integral part of the production of such materials, an activity illegal throughout the Nation." As we noted, " '[i]t rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used

> as an integral part of conduct in violation of a valid criminal statute.' " *Id.*, at 761-62 (quoting *Giboney [v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949)]). *Ferber* thus grounded its analysis in a previously recognized, long-established category of unprotected speech, and our subsequent decisions have shared this understanding. See *Osborne v. Ohio*, 495 U.S. 103, 110 (1990) (describing *Ferber* as finding "persuasive" the argument that the advertising and sale of child pornography was "an integral part" of its unlawful production (internal quotation marks omitted)); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 249-50 (2002) (noting that distribution and sale "were intrinsically related to the sexual abuse of children," giving the speech at issue "a proximate link to the crime from which it came" (internal quotation marks omitted))." *Stevens*, 559 U.S. at 471.

¶ 46 I believe *Stevens* to be instructive in determining that there is no *per se* First Amendment exception for child pornography. For a photographic depiction to be deemed child pornography and an exception from First Amendment protection, it must be "an integral part of conduct in violation of a valid criminal statute."

¶ 47 In the case-at-bar, there was nothing unlawful about the production of the photograph taken by defendant of K.E. because the sexual conduct depicted was entirely legal. Therefore, the photograph is not child pornography as it was not "conduct in violation of a criminal statute" and must be afforded First Amendment protection. However, this does not end my analysis as the photograph at issue here may still be subject to content-based regulation if the challenged statute satisfies a test under strict scrutiny.

¶ 48 The speech limited by the Illinois child pornography statute (720 ILCS 5/11-20.1(a)(I)(i)) is a content-based restriction. See *supra* ¶ 16. The statute can only stand if it satisfies strict scrutiny. *U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000). If a statute regulates

speech based on its content, it must be narrowly tailored to promote a compelling government interest. *Id*. at 813. If a less restrictive alternative would serve the government's purpose, the legislature must use that alternative. *Id*.

¶ 49 Returning to *Hollins*, our supreme court noted that the Illinois child pornography statute's "legitimate government purpose is protecting children from sexual abuse and exploitation ***." *Hollins*, ¶ 24. The supreme court went on to note that "[r]aising the age to 18, even though the age of consent for sexual activity is 17, is a reasonable means of accomplishing this legitimate government purpose as it aids the State in enforcing child pornography laws." *Id*. This reasoning satisfies a rational basis review but cannot satisfy a strict scrutiny test required by *Stevens*, as the photograph constitutes the fundamental right of protected speech.

¶ 50 As the statute criminalizes constitutionally-protected speech, our legislature must use a less restrictive alternative to serve the government's purpose. Simply put, revising the statute to criminalize acts of sexual penetration with minors under the age of consent (here, 17) would constitute an obvious less restrictive means of accomplishing the purpose of protecting children from sexual abuse and exploitation while avoiding the age inconsistency leading to the infringement of defendant's fundamental rights.

¶ 51 In summary, the subject photograph does not meet any exception from First Amendment protection, and the Illinois child pornography statute (720 ILCS 5/11-20.1(a)(1)(i) (West 2012)), as applied to the facts of the present case, cannot overcome a strict scrutiny analysis. Therefore, I believe, the trial court erred in denying defendant's post-conviction petition because the subject photograph of his conviction for child pornography was protected speech under the First Amendment to the United States Constitution (U.S. Const., amend. I) and Article 1 Section 4 of

the Illinois State Constitution (Ill. Const. 1970, art. I, § 9), rendering his conviction under the Illinois child pornography statute (720 ILCS 5/11-20.1(a)(I)(i) (West 2012)).