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State v. Al-Khayyal***Whether Defendant Was Aware of, and Thus Possessed Deleted Images of Child Pornography On His Computer, Is A Jury Question***

In *State v. Al-Khayyal*, A13A0623 (June 19, 2013), the defendant was indicted on 49 counts of sexual exploitation of children in violation of O.C.G.A. § 16-12-100(b)(8), based upon allegations that he possessed and controlled child pornography in the form of digital files on his laptop computer. The evidence showed that Al-Khayyal, a professor at Georgia Tech, was detained at the airport after returning from China. Immigration control officers detained him in the airport (in Clayton County) and seized the laptop computer he carried with him. A forensic computer specialist for the GBI conducted a forensic examination of the computer, using specialized forensic software, and discovered 29 digital files that contained sexually explicit images of young girls. The files had been placed in the computer's trash folder, which had then been emptied, so that the files were permanently deleted or "double-deleted" and inaccessible to the user. A subsequent examination of the computer yielded 20 additional files that had been "deleted" but remained saved in the trash folder. Those files were in a compressed format, and the images contained in the files could be viewed only with an "uncompressing" or "unzipping" program that at that time was not loaded on the computer. A different unzipping program, however, was loaded on the computer, and the computer's history files showed that the software had been used, though not on the files at issue in this case. Nevertheless, the evidence showed that the software required to access these particular files was readily available to the public and could be used without special training. When the computer specialist used the required software to "rebuild" the files in the trash folder, she found that the files also contained sexually explicit images of young girls.

After an evidentiary hearing, the trial court sustained Al-Khayyal's plea in bar and dismissed the indictment, finding that there was no evidence that Al-Khayyal was in knowing possession and control of the images in Clayton County. The State appealed, but only as to the 20 counts concerning the 20 files still in the computer's trash folder. The Court stated that a person who knowingly has direct physical control over a thing at a given time is in actual possession of it. A person who, though not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion or control over a thing is then in constructive possession of it. Therefore, the Court stated, "[i]n any criminal prosecution for possession, ... *the State must prove that the defendant was aware he possessed the contraband* at issue." (Emphasis supplied).

First, the Court rejected Al-Khayyal's argument that the State could not prove that he possessed the contraband in Clayton County because, while he was in the county, he lacked the ability to access the images stored on his computer because the software required to view the prohibited visual depictions was not loaded on his computer at that time. The Court stated that it could find no support under Georgia law for the proposition that possession of prohibited material under O.C.G.A. § 16-12-100(b)(8) exists only in conjunction with the defendant's present ability to view the prohibited material, especially given the evidence that the needed software was readily available to the public.

Second, the Court rejected Al-Khayyal's argument that the evidence precluded the requisite finding that he possessed the contraband at issue *knowingly*, i.e., that he was *aware* that the files containing the illegal images were stored in his computer's memory. The Court noted that there was no evidence that the type of files at issue here could have been saved to his hard drive automatically and without his knowledge. Rather, the evidence authorized an inference that the subject files originally came to be saved to Al-Khayyal's computer deliberately. Further, the evidence, including evidence that he actively manipulated the files by deleting them, authorized an inference that he was aware that the files were saved to his hard drive. Evidence that Al-Khayyal had double-deleted other files authorized an inference that he knew that deleting a file moves it to the trash folder and that, without further action, a deleted file remains stored there. By extension, this evidence also authorized an inference that he knew that the files were in the trash folder and still accessible. Evidence that he had used other unzipping software authorized an inference that he knew about the kind of software needed to access and manipulate compressed files. In addition, all of this evidence must be viewed in light of Al-Khayyal's educational background and professional expertise.

Taking these permissible inferences together, the Court concluded that the evidence did not establish as a matter of law that, while Al-Khayyal possessed his computer in Clayton County, he had no knowledge of the presence of the files in his computer's trash folder. Instead, the question of whether Al-Khayyal's efforts to abandon the illegal files were successful remained a question of fact for the jury and could not be determined as a matter of law at this pretrial stage. Consequently, as to the 20 counts concerning these files, the trial court erred in sustaining Al-Khayyal's plea in bar and his motion to dismiss the indictment.

The requirement that a defendant be shown to be aware of the contraband in order to be found guilty of possessing that same contraband, is not new in our law. See *Tift v. State*, 211 Ga.App. 409, 410 (1974) (to be guilty of "possession," one must have knowledgeable possession). However, its emphasis in *Al Khayyal* is noteworthy because of the recent amendments to our trafficking statutes. Beginning July 1, 2013, the word "knowingly" has been removed from the language in O.C.G.A. §§ 16-13-31 and 16-13-31.1 governing trafficking offenses occurring after that date. See §§ 4 and 5 of 2013 HB 349 (Criminal Justice Reform II) For example, O.C.G.A. § 16-13-31(e) which provided, "[a]ny person who *knowingly* sells, delivers, or brings into this state or has possession of 28 grams or more of methamphetamine, amphetamine, or any mixture containing either methamphetamine or amphetamine..." (Emphasis supplied), now as of July 1 states, "[a]ny person who sells, delivers, or brings into this state or has possession of 28 grams or more of methamphetamine, amphetamine, or any mixture containing either methamphetamine or amphetamine..."

The deletion of the word "knowingly" was intended by the legislature to address and "fix" *Wilson v. State*, 291 Ga. 458 (2012) (Court suggests that the General Assembly clarify the essential elements of trafficking in illegal substances regarding whether the State must prove that the defendant not only had knowledge of possession of the drugs but also knowledge of the weight of the drugs). Nevertheless, *Wilson* was also addressed by the passage of a new code section, O.C.G.A. § 16-13-54.1, which provides as follows: "When an offense in this part measures a controlled substance or marijuana by weight or quantity, the defendant's knowledge of such weight or quantity shall not be an essential element of the offense, and the state shall not have the burden of proving that a defendant knew the weight or quantity of the controlled substance or marijuana in order to be convicted of an offense."

The decision in *Al Khayyal* re-emphasizes that the term "possession" carries its own mens rea requirement. Thus, although the term "knowingly" has been deleted from the trafficking statute, the State must still prove *knowing* possession of a trafficking amount of an illegal substance in order to obtain a conviction. And since one could argue that in order to be convicted of "manufacturing," "selling," "delivering" or "bringing into the state" a controlled substance, one must also show possession (actual or constructive) of the contraband, these terms as well still require a showing of knowledge in order to convict.