



MARCH 6, 2017

Council Members

BERT POSTON
Chair
District Attorney
Conasauga Judicial Circuit

JOHN A. PIPKIN, III
Vice Chair
Solicitor-General
Henry County

LEIGH PATTERSON
Secretary
District Attorney
Rome Judicial Circuit

HAYWARD ALTMAN
District Attorney
Middle Judicial Circuit

GEORGE HARTWIG
District Attorney
Houston Judicial Circuit

TASHA MOSLEY
Solicitor-General
Clayton County

DANNY PORTER
District Attorney
Gwinnett Judicial Circuit

STEPHANIE WOODARD
Solicitor-General
Hall County

Bello v. State

The Supreme Court Holds That O.C.G.A. § 17-16-4(a)(3)(B), Which Requires That Evidence of Offenses Against Minors May be Inspected, But Not Copied, is Not Facially Unconstitutional

In *Bello v. State*, S16A1602 (3/6/17), appellant was charged with unlawful possession of video recordings that depict children engaged in sexually explicit conduct. Under O.C.G.A. § 17-16-4(a)(3), appellant demanded that the State produce the video recordings, as well as a written report that was prepared by law enforcement personnel in connection with a forensic examination of appellant’s personal computer. The prosecuting attorneys offered to make arrangements for the defense lawyers to inspect those materials at a secure law enforcement facility, but because the materials contain depictions of children engaged in sexually explicit conduct, the prosecuting attorneys refused to provide copies of the materials to the defense, citing O.C.G.A. § 17-16-4(a)(3)(B), which provides in relevant part “such evidence shall....be allowed to be inspected by the defendant but shall not be allowed to be copied.” Appellant filed a motion to compel asserting that the denial to provide copies denied him due process. The trial court denied the motion and the Supreme Court granted interlocutory review.

Appellant contended that O.C.G.A. § 17-16-4(a)(3)(B) was unconstitutional both facially and as applied in his case. The Court initially accepted that the video recordings and forensic report are “critical evidence,” and assumed arguendo that the constitutional guarantee of due process entitled appellant to have that evidence subjected to meaningful examination by counsel and a qualified expert of his choosing. But, the Court stated, nothing in O.C.G.A. § 17-16-4 denies such an examination to the accused. Indeed, O.C.G.A. § 17-16-4(a)(3)(B) explicitly provides that evidence of the sexual exploitation of children “shall . . . be allowed to be inspected by the defendant,” and when a discovery statute authorizes an “inspection” of evidence, it may properly be understood to permit not only visual observation, but also tests and examinations. And, while the statutory right to “inspect” evidence of the sexual exploitation of children is limited by the provision of O.C.G.A. § 17-16-4(a)(3)(B) that the accused may not obtain copies of such evidence, there are good reasons for such a limitation. Thus, a request for copies of evidence (as opposed to a request for an original) ordinarily will not implicate serious concerns about the evidence being forever lost or having its integrity irreparably compromised, which are the sorts of concerns that justify “appropriate safeguards.” But when the evidence in question contains depictions of children engaged in sexually explicit conduct that would be, if copied and relinquished to another, readily susceptible of further duplication and dissemination, the government has a compelling interest in retaining custody and control of the depictions.

Turning to the specific due process arguments made by appellant, the Court noted that a facial challenge to a statute requires one to establish that no set of circumstances exists under which the statute would be valid, i.e., that the law is unconstitutional in all of its applications, or at least that the statute lacks a plainly legitimate sweep. Here, even when the accused is constitutionally entitled to have suspected child pornography examined by counsel and an expert of his choosing, O.C.G.A. § 17-16-4(a)(3)(B) accommodates the demands of due process by allowing



State Prosecution Support Division

MARCH 6, 2017

Council Members

BERT POSTON
Chair
District Attorney
Conasauga Judicial Circuit

JOHN A. PIPKIN, III
Vice Chair
Solicitor-General
Henry County

LEIGH PATTERSON
Secretary
District Attorney
Rome Judicial Circuit

HAYWARD ALTMAN
District Attorney
Middle Judicial Circuit

GEORGE HARTWIG
District Attorney
Houston Judicial Circuit

TASHA MOSLEY
Solicitor-General
Clayton County

DANNY PORTER
District Attorney
Gwinnett Judicial Circuit

STEPHANIE WOODARD
Solicitor-General
Hall County

the defense to "inspect" the evidence, which permits the defense to carefully and closely scrutinize the evidence, although the evidence must remain at all times in the custody and control of the State. So long as the inspection authorized by O.C.G.A. § 17-16-4(a)(3)(B) affords the accused a meaningful opportunity to prepare his defense, the statutory restrictions on custody, care, control and copying are reasonable, and reasonable limits on defense counsel's access to the child pornography at issue in a criminal case do not raise constitutional concerns. And since appellant's lawyer conceded at oral argument that "it may be possible in some instances, but not necessarily in all," for counsel and a defense expert to undertake a meaningful examination of suspected child pornography by inspecting the evidence within the confines of a secure law enforcement facility, just as O.C.G.A. § 17-16-4(a)(3)(B) permits, the statute does not lack a "plainly legitimate sweep," and this concession was found to be fatal to appellant's facial challenge.

As to the contention that O.C.G.A. § 17-16-4(a)(3)(B) is unconstitutional as applied in this case the Court noted that an "as applied" challenge addresses whether a statute is unconstitutional on the facts of a particular case or to a particular party. Here, the Court noted, there was some indication in the record that a defense lawyer visited the office of the prosecuting attorneys to review the forensic report, but there was nothing in the record about the nature or adequacy of that review, other than the bald conclusion of defense counsel that "it's not enough." The record also showed nothing at all about any efforts to have a defense expert examine the evidence at a secure facility. And perhaps most importantly, the record was utterly silent about what, if anything, defense lawyers or an expert might want or need to do with the materials to prepare a defense that they could not do within the confines of a law enforcement facility. In fact, the Court noted, at oral argument, defense counsel admitted that he was never denied permission to have an expert inspect the evidence at a secure facility, and he had altogether failed to show that such an inspection would be inadequate to meaningfully test the State's evidence against him. Thus, the Court found, in the absence of a record showing that an inspection permitted by O.C.G.A. § 17-16-4(a)(3)(B) would not be adequate to permit appellant to meaningfully prepare a defense, he could not establish that a refusal to provide copies works a denial of due process. Accordingly, the Court concluded, appellant failed to demonstrate that the requirements of O.C.G.A. § 17-16-4(a)(3)(B) are inadequate to ensure due process in this case, so his as-applied challenge failed.

Finally, appellant argued that the absence of a statutory exception permitting defense lawyers to possess child pornography was unconstitutional. Specifically, appellant noted that in its refusal to provide copies of the video recordings and forensic report to appellant, the State noted that the possession of material that depicts minor children engaged in sexually explicit acts is a crime, see O.C.G.A. § 16-12-100(b)(8), and although there is a limited exception that permits prosecutors and law enforcement personnel to handle such materials in connection with criminal investigations and prosecutions, see O.C.G.A. § 16-12-100(d)(1), there is no similar exception for defense lawyers. But, the Court found, appellant's argument failed for the same reasons that his claim about the constitutionality of O.C.G.A. § 17-16-4(a)(3)(B) failed. If the Constitution allows the government to insist that materials containing child pornography remain in the custody and control of government agents, forbidding non-government lawyers from taking custody and control of child pornography is equally permissible.