

Austrian Supreme Court Confirms: Jail for MightBe-Youthpornography

7 months imprisonment without probation for possession of 5 (!) pictures of two nude young men, according to expert evidence, aged between 16 and 21 years of age. This verdict has been confirmed recently by the Austrian Supreme Court.

The convict had stored 35 pictures of nude young men on his PC. The prosecution charged him with the offence of possession of youth-pornography (Art. 207a CC). The depictions would be pornographic and the models (over 14 but) under 18.

Austrian legislation stipulates that an age under 18 must be proven beyond reasonable doubt (Art. 14 CCP).

The defendant alleged that the young men are over the age of 18 and applied for expert evidence. In addition the entering page on the U.S.-American gay-erotic web-site from which the man had downloaded the pictures (showing no sexual acts) did display the information that all persons in sexually explicit depictions are over the age of 18 at the time of depiction. Finally he argued that the pictures are not pornographic but merely erotic.

Erection = Pornography

The Regional Criminal Court of Vienna acquitted the man in respect of 30 pictures for lack of pornography. The remaining 5 pictures however it qualified as pornographic, due to the fact that the penis is erected on them. This contradicts prior Austrian case-law saying that (different than in Germany or the UK, angle of 45 degrees and more) an erection alone does not suffice to qualify the depiction of a nude person as pornographic.

On the basis of these 5 (!) pictures the court condemned the man to 7 months imprisonment without probation. The two models would be clearly under 18, it said. An expert opinion would not be necessary. The judge even said that they could be under 14, but in the favour of the accused he decided for over 14.

10% doubt is not enough

On appeal the accused submitted expert evidence by a well reputed pediatric forensic expert. This expert explored the age of the two models on the basis of his pediatric experience and scientific literature including extensive international surveys on pubertal development.

Based on genital appearance, hair-growth and facial features the expert opinion came to the conclusion that the young men are not clearly under 18. Rather they are between 16 and 21 years of age. More than 10% of 18 year olds do look like the men on the pictures.

The Vienna Appeals Court nevertheless confirmed the verdict (OLG-Wien 04.10.2008, 19 Bs 407/08d). 90% probability were enough evidence. Conclusions based on probabilities would be enough for a criminal conviction. Compelling conclusions would not be necessary.

The judges (despite the expert evidence) did also not want to believe the accused that he believed the models to be over 18. Who searches for such pictures considers it possible that websites "with suchlike content" contain pictures of under 18 year olds, they said.

Proof of exoneration not admitted

The Appeals Court also rejected the application of the accused to obtain, by way of judicial assistance, the proof of age of the models, which (according to the website) is stored in the US.

The convict then addressed the Supreme Court and alleged a violation of his fundamental rights. The Supreme Court however fully confirmed the judgments of the lower courts and their reasoning (OGH 02.03.2010, 14 Os 73/09f). Presumption of innocence and the rule of reasonable doubt would, if there are more than one possible alternatives of fact, not (!) require a criminal court to base its finding on the one which is the most favourable for the defendant.

The convict will now apply to the European Court of Human Rights. This however will not prevent him from having to serve the jail sentence inflicted upon him for possession of 5 nude pictures of young men who might be under 18.

“Extension of the severe laws against child-pornography from 14 to 18 years of age, and therefore to depictions of persons sexually of age and entitled to vote, even in the private and non-commercial sphere, has been highly controversial”, says *Dr. Helmut Graupner*, counsel of the convict and co-president of Austrian Society for Sex Research (ÖGS), “This MightBe-Youthpornography-Verdict now shows, that this criminalization even exceeds the age of 18 and extends into adulthood”.

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