

Legal Notes: 2018

Phone cameras are everywhere these days. For better or worse. Besides taking pictures of food and cute puppies, some couples use them for more intimate images. All well and good when everyone consents but what happens later, when the relationship is not going so well?

In 2014, the State added a "revenge porn" crime to the books. The law was appended to already existing statutes that forbade any number of representations depicting nudity (Sec. 942.09) The existing statutes made it illegal to film in locker rooms and other places where people have reasonable expectations of privacy and do not consent to their images being captured. But what if the party does initially consent? The existing statutes didn't cover that situation.

The revenge porn provision makes it a misdemeanor for someone to post or publish an image of a person that the poster knows was private, and the person so depicted did not consent to such publication. The constitutionality of this law has been recently challenged and found constitutional.

In *State v. Culver*, the criminal defendant alleged that the statute was unconstitutional because it violated his free speech rights. The court said "no," that it was narrow enough not to curb a person's right to free speech.

As a side note, it is infinitely irritating to me and other attorneys, when people speak of constitutional rights as not being able to be curbed by state or federal laws. This rhetoric often comes up in the context of second amendments right (right to bear arms). The state has always had the right to prohibit certain protected acts under the bill of rights, it is really a question of how much and in what circumstances. The old saw about yelling fire in a crowded theater is a handy example.

Anyways, the defendant had taken nude pictures of his girlfriend with her consent using his phone, and saved the pictures to his phone's memory. So far, so good as she consented to his taking the pictures. The pictures stayed with him but she did not. After the split, he published the pictures of her (which means he gave them to someone other than himself and her). She did not consent to this publication. The defendant publisher admitted he did this because he was angry with her.

The first amendment regulations was upheld because its reach was "specific, limited and reasonable." The original consent of the girlfriend was given only to her then

boyfriend and he presumably understood that the consent to view the images only extended to himself. In other words, it was private. Convicted.