

Appellant/Defendant Jeff Howell appeals from his conviction for Class C felony Child Solicitation.¹ Concluding that Howell has waived his constitutional challenge to Indiana Code section 35-42-4-6, we affirm.

FACTS AND PROCEDURAL HISTORY

On July 2, 2008, the State charged Howell with Class C felony child solicitation and two counts of Class D felony attempted dissemination of matter harmful to minors.² On February 9, 2009, a jury found Howell guilty of child solicitation. On February 27, 2009, the trial court sentenced Howell to four years of incarceration with two years suspended to probation.

DISCUSSION AND DECISION

Whether Howell Waived his Constitutional Challenge

On appeal, Howell challenges only the constitutionality of Indiana Code section 35-42-4-6, contending that it is both impermissibly vague and overbroad. Howell, however, is making this challenge for the first time on appeal. Generally, a challenge to the constitutionality of a criminal statute must be raised by a motion to dismiss prior to trial, and the failure to do so waives the issue on appeal. *See, e.g., Adams v. State*, 804 N.E.2d 1169, 1172 (Ind. Ct. App. 2004). Here, Howell did not file a motion to dismiss on this issue, and did not object to the constitutionality of the statute at trial. As such, the issue is waived. *See*

¹ Ind. Code § 35-42-4-6 (2008).

² Howell's attempted dissemination of matter harmful to minors charges were later dropped. (Appellant's App. 12-13).

id.

Waiver notwithstanding, we conclude that Howell's challenges are without merit. This court has already determined that Indiana Code section 35-42-4-6 is not impermissibly vague. *See LaRose v. State*, 820 N.E.2d 727, 732 (Ind. Ct. App. 2005). Howell provides us with no reason to depart from that holding, and we can think of none.

As for Howell's overbreadth challenge,

[t]he First Amendment overbreadth doctrine allows an individual to attack the constitutionality of a statute that applies to protected speech, even if the conduct by the challenging party is clearly unprotected. [*New York v. Ferber*, 458 U.S. [747,] 769, 102 S.Ct. 3348 [(1982)]. However, because of the relative ease of imagining a situation in which the application of a statute would infringe on constitutional rights, the overbreadth in a First Amendment challenge must be "substantial." *Id.* at 769-70, 102 S.Ct. 3348 (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 615, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973)).

Logan v. State, 836 N.E.2d 467, 472 (Ind. Ct. App. 2005).

Howell's argument seems to be that Indiana Code section 35-42-4-6 covers protected speech between adults who are "role-playing" as children, both with full knowledge that neither of them actually *is* a child. As the State points out, however, section 35-42-4-6 already accounts for this possibility. Section 35-42-4-6 criminalizes only the knowing or intentional solicitation of minors. In other words, if a person believes he is speaking to an adult who is merely "role-playing" as a child, his activities are not covered by section 35-42-4-6 even if he actually *is* speaking to a minor. Because section 35-42-4-6 does not cover the protected speech Howell contends that it does, we need not address his overbreadth challenge further. Howell has failed to establish that section 35-42-4-6 is unconstitutional.

The judgment of the trial court is affirmed.

BAILEY, J., and VAIDIK, J., concur.