

Criminal Offenses

Larceny & Related Offenses

[*State v. Robinson*](#), ___ N.C. ___, ___ S.E.2d ___ (Nov. 6, 2015). The court modified and affirmed the decision below, ___ N.C. App. ___, 763 S.E.2d 178 (2014), holding that unauthorized use of a motor vehicle is not a lesser-included offense of possession of a stolen vehicle. The court noted that it has adopted a definitional test (as distinct from a factual test) for determining whether one offense is a lesser-included offense of another. Applying that rule, it reasoned that unauthorized use contains an essential element that is not an essential element of possession of a stolen vehicle (that the defendant took or operated a motor-propelled conveyance). The court overruled *State v. Oliver*, 217 N.C. App. 369 (2011) (holding that unauthorized use is not a lesser-included offense of possession of a stolen vehicle but, according to the *Robinson* court, mistakenly reasoning that *Nickerson* mandated that result), to the extent that it is inconsistent with its opinion.

Sex Offenders

[*State v. Packingham*](#), ___ N.C. ___, ___ S.E.2d ___ (Nov. 6, 2015). Reversing the court of appeals, ___ N.C. App. ___, 748 S.E.2d 146 (2013), the court held that G.S. 14-202.5 (unlawful for registered sex offender to access certain social networking websites) is constitutional. The court of appeals had held that the statute was unconstitutional on its face and as applied to the defendant, as it violated the defendant's first amendment free speech rights. The court began by finding that the statute is a regulation on conduct, not speech, stating:

[T]he essential purpose of section 14-202.5 is to limit conduct, specifically the ability of registered sex offenders to access certain carefully-defined Web sites. This limitation on conduct only incidentally burdens the ability of registered sex offenders to engage in speech after accessing those Web sites that fall within the statute's reach.

Next, the court held that rather than governing conduct on the basis of the content of speech, the statute is a content-neutral regulation. It explained:

On its face, this statute imposes a ban on accessing certain defined commercial social networking Web sites without regard to any content or message conveyed on those sites. The limitations imposed by the statute are based not upon speech contained in or posted on a site, but instead focus on whether functions of a particular Web site are available for use by minors.

The court found that the purpose of the statute—protecting minors from registered sex offenders—is unrelated to any speech on a regulated site. Nor, the court noted, “does the statute have anything to say regarding the content of any speech on a regulated site.” As a result, intermediate scrutiny applied. Having found that the statute is a content-neutral regulation that imposes only an incidental burden on speech, the court applied the four-factor test from *United States v. O'Brien*, 391 U.S. 367 (1968) (regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest). Here, the parties agreed that

promulgating the statute is within the General Assembly's constitutional power and that protecting children from sexual abuse is a substantial governmental interest. The court then turned to the third *O'Brien* factor, whether this governmental interest is related to the suppression of free expression, and concluded: "The interest reflected in the statute at bar, which protects children from convicted sex offenders who could harvest information to facilitate contact with potential victims, is unrelated to the suppression of free speech." Next, the court found that the statute was narrowly tailored and left open ample alternative channels for communication that registered sex offenders may freely access, thus satisfying the fourth factor. Having so found, the court concluded that the defendant failed to show that the statute was facially invalid. Rejecting the defendant's as applied challenge, the court concluded: "the incidental burden imposed upon this defendant, who is barred from Facebook.com but not from many other sites, is not greater than necessary to further the governmental interest of protecting children from registered sex offenders." Next, the court rejected the defendant's argument that the statute was unconstitutionally overbroad, stating: "we conclude section 14-202.5 does not sweep too broadly in preventing registered sex offenders from accessing carefully delineated Web sites where vulnerable youthful users may congregate." Finally, the court held that the defendant's own conduct defeated his void for vagueness argument.