CSE Case Law Update

April 2009

STATE SUPREME COURTS

State of New Mexico v. Myers, 207 P.3d 1105 (N.M. April 7, 2009).

- Definition of lewd
- Constitutionality: Vagueness

The Supreme Court of New Mexico reversed the Appellate Court of New Mexico which had previously reversed the trial court's finding of guilty for sexual exploitation of children for secretly videotaping minor females using the bathroom at his workplace. The Supreme Court ruled that based on the voyeuristic nature of the photographs in question the images were deviant. The Court reviewed the Dost factors and focused on the intent of the photographer in this case and determined that it met the statutory guidelines for lewdness. Notably, the Supreme Court remanded back to the Appellate Court to determine whether the statute itself was unconstitutionally vague.

COURTS OF APPEAL

People v. Ogle, 2009 Cal.App. Unpub. LEXIS 3416 (Cal. Ct. App. April 30, 2009).

- Multiplicity

Defendant was convicted of multiple counts of possession of child pornography. The defendant's case arose from his being caught outside a young girl's window. At the time the defendant had a video camera containing multiple images of young girls in various stages of undress. Defendant entered a no contest plea to the multiple counts and then appealed claiming he should have only been convicted and sentenced on one count. The Appellate Court agreed with the defendant and ruled that People v. Hertzig 156 Cal.App.4th 398 mandated that the defendant's conduct was a single act of possession and not multiple acts.

State of Michigan v. McGivney, No. 282547, 2009 Mich. App. LEXIS 858 (Mich. Ct. App. April 23, 2009).

- Insufficient Evidence

- Closing Argument
- Ineffective assistance of Counsel

Defendant was convicted of multiple counts of child sexually abusive activity and using a computer to commit a crime. The Appellate Court rejected defendant's first claim that the verdict was against the great weight of the evidence. Defendant claimed there was evidence presented that someone else was responsible for the child pornography being placed throughout the defendant's possessions. The reviewing court rejected this claim holding that the possibility of someone else committing the crime did not give rise to the level of a miscarriage of justice. Defendant's claims of improper argument were also rejected as the Court concluded the prosecutor's remarks were a reasonable inference from the evidence and in response to an argument from defendant. Defendant's final claim of ineffective assistance of counsel was likewise rejected.

In Re the Detention of Clay M. Spears, No. 9-139 / 07-1601, 2009 Iowa. App. LEXIS 317 (Iowa Ct. App. April 22, 2009).

- Civil commitment of sex offender

Defendant was granted a new trial based on the newly discovered evidence that the State's expert witness, the same psychologist as above, was arrested for downloading child pornography and disclosed a history of suffering sexual abuse. The Appellate Court affirmed the trial court's granting of a new trial since the majority of the evidence presented at the commitment hearing was the opinion of the expert.

In Re the Detention of Paul Michael Blaise, No. 9-136 / 07-0188, 2009 Iowa App. Lexis 297 (Iowa Ct. App. April 22, 2009).

- Civil commitment of sex offender

Defendant granted new trial on order remanding him for civil commitment under the Iowa Sexually Violent Predator Act. The Court determined that the defendant was entitled to a new trial after it was revealed that the psychologist who testified for the state as an expert witness disclosed abuse as a child and was arrested for collecting child pornography. The court raised concerns about the psychologist's ability to fairly evaluate Blaise based upon his own history.

People v. Prinzing, 907 N.E.2d 87 (Ill. App. Ct. April 21, 2009).

- Search and Seizure
- Consent

In this case the sheriff's department went to defendant's home on a knock and talk. The defendant voluntarily gave his consent to search for viruses on his computer. The program the detective used to conduct the search, however, subsequently pulled up jpeg images. The Appellate Court ruled that the resulting search exceeded the scope of the defendant's consent. The Appellate Court then held that everything found after that point should be suppressed. The Court either failed to read or discounted the transcripts where the detective explained how the program would allow him to view images from the websites the defendant visited to see if his credit card information had been compromised. The case is currently on appeal to the Illinois Supreme Court.

State of Ohio v. Paquette, No. 08-CA-29, 2009 Ohio App. LEXIS 1653 (Ohio Ct. App. April 17, 2009).

- Insufficient evidence to prove age
- Search and Seizure
- Miranda

Defendant convicted of rape, gross sexual imposition, sexual battery, unlawful sexual conduct with a minor and pandering obscenity involving a minor. Court rejected defendant's claim that there was insufficient proof of the victim's age. The victim was the defendant's daughter who testified the abuse started when she was twelve. The jury could infer from that testimony that the photograph was taken when she was under thirteen. There was no requirement that the prosecutor present the actual photograph. The defendant was charged with creation, not possession. There was enough evidence to prove creation based on defendant's admissions during a taped phone call. The Court rejected defendant's contention that the victim, who provided the details for the affidavit for the search warrant, was not reliable. Finally, the Court found that the defendant's response to the police telling him they were at his house to execute a search warrant was not an interrogation under Miranda, and thus his statement that he would take the police to the evidence was admissible.

Green v. State of Texas, 287 S.W.3d 277 (Tex. Crim. App. April 16, 2009).

- Other Crimes Evidence
- Discovery

Defendant was convicted of multiple counts of sexual assault of a child and indecency with a child. Defendant's first three issues related to the court admitting evidence of other crimes. Factually, defendant, who was a police officer, was arrested after an investigation of a computer at the police department was found to have child pornography on it. When the officers arrived at the defendant's home to serve the arrest warrant he made incriminating statements asking if they were there for the sex assault. That statement led to the victim being identified and interviewed and additional separate charges against the defendant. The prosecutors tried the defendant on the second set of charges first. The trial court allowed the state to introduce evidence that the defendant had been arrested in the case. However, they were limited and could not tell the jury what the defendant was arrested for. The Appellate Court agreed that this limitation and admission was proper to explain the circumstances of the defendant making the statement. The Appellate Court also upheld the trial court's admission of two statements the defendant made to other people about his feelings for the victim. Finally, the Appellate Court ruled that the trial court did not commit an error in precluding the defendant from receiving the contents of the victim's medical records from Planned Parenthood after conducting an *in camera* inspection of them. It should be noted that this is an effective case to cite when demonstrating that seemingly innocent actions can be part of grooming process.

State of Michigan v. Larose, No. 282219, 2009 Mich.App.LEXIS 807 (Mich. Ct. App. April 16, 2009). (Unpublished)

- Jury questions
- Other crimes evidence

Defendant was convicted of multiple counts of criminal sexual misconduct. Appellate Court rejected defendant's contention that it was improper to allow jurors to ask questions during the case as the defendant did not object during trial. Additionally, Appellate Court ruled that the admission of child pornography found on defendant's computer was not in error. The Court determined that if the jury believed the defendant used it for his own purposes it would increase the likelihood of his commission of the underlying offense. The Court provides a thorough analysis as to why it should be admitted and bolsters the victim's testimony.

Warr v. State of Texas, No. 06-08-00089-CRF, 2009 Tex. App. LEXIS 2538 (Tex. Crim. App. April 15, 2009). (Unpublished)

- Other crimes evidence

Appellate Court reversed trial court's conviction for indecency with a child by sexual conduct. Appellate Court held that admission of sex toys into evidence was in error. The Court determined

that there was no correlation between the sex toys, some of which did not even belong to the defendant, and the underlying action against the child.

State of Minnesota v. Balzum, 2009 Minn.App. Unpub. LEXIS 348 (Minn. Ct. App. April 14, 2009).

- Search and Seizure

Defendant convicted of dissemination and possession of pornographic work involving minors. Defendant challenged search warrant claiming that it was overbroad, the affidavit did not contain enough particularity and that the affiant made material misrepresentations in the affidavit. The Appellate Court rejected each of the defendant's claims ruling that the search warrant authorized the search of defendant's computer and electronic media storage; the warrants were not overbroad or too general and there were no misrepresentations by the Ada police chief who signed the affidavit.

People v. Kircher, 2009 Cal.App. Unpub. LEXIS 2905 (Cal. Ct. App. April 13, 2009).

- Motion to Sever
- Expert Testimony: CSAAS
- Jury Instruction as to CSAAS
- Sufficiency of evidence
- Sentencing

Defendant was convicted of multiple counts of sexual assault and lewd conduct upon a child for multiple victims and possession of child pornography. Defendant challenged his conviction on multiple bases. The Appellate Court disagreed with defendant's first contention that the trial for the crimes against the two victims' should have been severed. The Appellate Court determined that there were substantial similarities between the crimes committed against the two victims that supported joinder of the offenses. Likewise the Appellate Court held that it was not in error to allow testimony of an expert witness as to Child Sex Abuse Accommodation Syndrome. The Court ruled that the expert was qualified to render testimony on the syndrome. The Court concluded that the trial court's failure to give a specific instruction as to CSAAS was a harmless error. The defendant's claim that there was not sufficient evidence to convict on the child pornography counts was also rejected as the Appellate Court focused on the computer forensic examiner's testimony about the temporary internet files and how likely it would be to have those appear on a computer. Additionally, the Appellate Court used effective language to discuss how

it was unlikely that the images found on the defendant's computer were there accidentally in light of the abuse he perpetrated on both the victims. Finally, the Court also rejected the defendant's claim that he was sentenced in part on unsubstantiated sexual conduct with a dog.

State of Maryland v. Duran, 967 A.2d 184 (Md. April 11, 2009).

- Sex offender registration

Defendant was convicted of indecent exposure and ordered to register as a sex offender. Defendant appealed the required condition of probation that mandated his registration as a sex offender. The Appellate Court reversed the trial court and held that the crime of indecent exposure was not one which required the defendant to register as an offender. The Court concluded that the act of indecent exposure was neither an enumerated crime under the sex offender registration act nor sexual in nature.

People v. Dyke, 92 Cal. Rptr.3d 146 (Cal. Ct. App. April 9, 2009).

- Sufficiency of Evidence

Appellate Court reversed jury's guilty finding of sending or exhibiting harmful material to minor. Court ruled that there were insufficient evidence to prove that the television scenes that the defendant showed the minor were "harmful matter" within the statutory code. The Court determined that the victim's testimony describing the two different scenes did not meet the standard for what was harmful material. The Court applied the three prong test set forth by the U.S. Supreme Court in Miller v. California, 413 U.S. 15, (1973), and determined that the images viewed by the victim did not meet those standards.

Daws v. State of Texas, No. 05-08-00651-CR, 2009 Tex.App. LEXIS 2364 (Tex. Crim. App. April 3, 2009). (Unpublished)

- Search and Seizure
- Sufficiency of evidence: age of victim

Defendant was convicted of possession of child pornography. A tip from Yahoo to NCMEC started an investigation of a Yahoo user who has posted child pornography on the internet. A police officer secured a search warrant for records from Yahoo which came back to the defendant. The Appellate Court upheld a finding by a magistrate judge that Yahoo's records were reliable and that four corners of the affidavit supported a finding of probable cause that

child pornography would discovered at the defendant's home. The Appellate Court rejected the defendant's contention that there was insufficient evidence presented to conclude that the victim in the images was under eighteen years of age. The Appellate Court relied upon the officer's testimony on the lack of facial and physical development of the victim and ruled that the trial court could conclude she was under eighteen.