

## CSE Case Law Update

April 2010

### STATE SUPREME COURTS

State v. Nuss, No. S-09-546, 781 N.W.2d 60 (Neb. 2010).

- Probable cause to sustain a search warrant
- *Leon* good faith exception

Defendant appealed his conviction for possession of child pornography, stating that the search warrant used to search his computer lacked probable cause. As probable cause for a search warrant, the officer cited his work history, including participation in investigations relating to the sexual exploitation of children and his observation of many forms of child pornography. The officer also described two FBI investigations through which it was determined that child pornography was on the defendant's computer. In both investigations, files containing child pornography were downloaded from the defendant's IP address and, through an administrative subpoena, the IP address was traced to the defendant's residence. The officer, however, did not describe any of the images downloaded, nor did he attach copies of the images to the affidavit. The court held that, since the images were not described nor were they attached to the affidavit, that the affidavit was insufficient to establish probable cause for the issuance of the search warrant. The court, however, found that *Leon* good faith exception applied and denied the defendant's motion to suppress.

State v. Telford, 2010 ME 33 (Me. 2010).

- Sentencing
- Conditions of Probation

Defendant pleaded guilty to an indictment charging him with possession of sexually explicit material. He was sentenced to five years imprisonment and six years of probation. Three special conditions of probation were imposed, forbidding the defendant from possessing a personal computer, requiring that he forfeit the computer equipment used in the commission of his crime, and requiring him to comply with sex offender registration requirements. Six months after sentencing, the defendant's probation officer moved to amend the conditions of probation by adding three new conditions: (1) that the defendant complete a sex offender evaluation; (2) that he follow its recommendations; and (3) that he submit to random searches for sexually explicit material. The defendant opposed the motion, arguing that his plea agreement with the State constituted a contract, and because the additional conditions of probation the State later sought were not part of the agreement, the Superior Court erred in imposing them. The court ruled that, because the parties were presumed to be aware of the possibility of the addition and/or deletion of probation conditions, the defendant's argument that the imposition of additional conditions was barred failed.

## INTERMEDIATE STATE COURTS OF APPEAL

State v. Cardiel, No. 2009AP1039-CR, 2010 Wisc. App. LEXIS 320 (Wisc. App. 28, 2010).

- Probable cause to sustain a search warrant

Defendant appealed his conviction for possession of child pornography, stating that the search warrant used to search his home lacked probable cause. The search warrant was based on information the defendant's son provided to his probation agent, that he had seen child pornography on his father's computer. The police seized six VHS tapes and two mini-videotapes, and the defendant argued that the search warrant was invalid as to those items. The court held that, since the defendant's son had seen images of children performing sexual acts on his father's computer, it was reasonable to believe that there might also be images on other electronic storage devices in the defendant's home.

Deaver v. State, No. 2-08-329-CR, 2010 Tex. App. LEXIS 3024 (Tex. App. April. 22, 2010).

- Ineffective Assistance of Counsel

During an investigation dealing with a run-away child, an officer viewed child pornography on defendant's cell phone. The officer subsequently obtained a warrant to search the phone and discovered a fifteen-second pornographic video with a minor. The defendant was convicted of possession of child pornography and appealed on the basis of ineffective assistance of counsel. The defendant argued that his trial counsel was ineffective because they did not object to the admission of the video extracted from the defendant's cell phone on the basis of an allegedly unconstitutional search of the phone. The court held that, since the defendant could not demonstrate that his counsel's motion to suppress would have been successful, they would affirm his conviction.

Stringer v. State, No. PD-1569-08, 2010 Tex. Crim. App. LEXIS 249 (Tex. Crim. App. Apr. 14, 2010).

- Sentencing
- Right to confrontation in sentencing proceeding

Appellant pled guilty to possession of child pornography. The trial court accepted the plea and ordered a pre-sentence investigation report. At the sentencing hearing, the appellant objected to parts of the PSI that contained facts about a pending unadjudicated offense, claiming that the report violated his Sixth Amendment right to confrontation. The trial court overruled the objection, found him guilty, and sentenced him to nine years in prison. On appeal, the court reviewed whether the trial court's consideration of the portion of the PSI containing an unadjudicated prior offense violated the appellant's Sixth Amendment right to confrontation.

The court stated that the purpose of a report such as the PSI is to provide a wide range of information to the trial court without an adversarial hearing. The court ultimately held that, in a non-capital case in which the defendant has elected to have the judge determine sentencing, the confrontation clause does not apply. Unadjudicated offenses, therefore, the court concluded can be included in a PSI.

State v. Brennan, No. M2009-00895-CCA-R3-CD, 2010 Tenn. Crim. App. LEXIS 293 (Tenn. Crim. App. Apr. 9, 2010).

- Sentencing

Defendant pled guilty to incest and attempted rape of a child. In accordance to his plea agreement, the trial court sentenced the defendant to twenty four years of incarceration. On appeal the defendant contends that the trial court erred in denying him a sentence of split confinement. The appeals court stated that the following considerations provide guidance regarding review of a sentence: (a) the evidence adduced at the trial and the sentencing hearing; (b) the pre-sentence report; (c) the principles of sentencing and arguments as to sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) evidence and information offered by the parties on the enhancement and mitigating factors. Based on a factual analysis, the appellate court determined that the trial court properly considered all applicable principles of sentencing and found no error in its decision that the defendant failed to provide sufficient evidence that he was a favorable candidate for alternative sentencing.

State v. Holsapple, No. A09-1010, 2010 Minn. App. Unpub. LEXIS 343 (Minn. App. Apr. 20, 2010).

- Sentencing
- Motion for continuance to establish basis for a stayed sentence

Appellant pled guilty and was convicted of first-degree criminal sexual conduct, possession of child pornography, fifth-degree sexual conduct, and felony domestic assault. On appeal, he challenged the district court's denial of his request for a continuance of the sentencing hearing in order to give him additional time to establish a basis for a stayed sentence. The court stated that the district court's denial of his request should be based on the facts and circumstances surrounding the request, and that a reviewing court should look to whether there was material prejudice to the defendant in preparing or presenting his case, and a defendant must show prejudice to justify reversal. The district court in denying the motion, made it clear that it was concerned with appellant's lack of remorse and inability to accept responsibility for his conduct. The court held that the appellant could not show that he was materially prejudiced by the denial of the request for a continuance and upheld the trial court's decision.

State v. Cassidy, No. A09-158, 2010 Minn. App. Unpub. LEXIS 354 (Min. App. Apr. 27, 2010).

- Probable cause to sustain a search warrant
- Unfairly prejudicial evidence
- Non-disclosure of documents to the defense after in camera review
- Discovery violations

The defendant was convicted of first-degree sexual conduct. He appealed on four grounds, (1) faulty search warrant; (2) unfairly prejudicial evidence was presented; (3) nonpublic documents were not disclosed to the defense; and (4) discovery abuses by the state. During trial the district court allowed a video depicting child pornography, discovered on the defendant's home computer, could be admitted into evidence. The defendant, on appeal, objected to this video on two grounds, (1) the search warrant used to obtain the video was unsupported by probable cause, and (2) the video was unfairly prejudicial.

On the first ground, the court of appeals found that the affidavit used to obtain the search warrant was sufficient to establish probable cause. The affidavit described the victim's statements that abuse occurred in front of the defendant's computer and the officer's experience that some computers can take photos or videos and that the officer was aware of cases where suspects took pictures or videos of victims using a computer.

On the second ground, the court looked at whether the introduction of the video was erroneous and unfairly prejudicial. The court found that, in order for the video to be admissible five conditions must be met: (1) the state must give notice of its intent to use the evidence; (2) the state must clearly indicate what the evidence will be offered to prove; (3) there must be clear and convincing evidence that the defendant participated in the prior act; (4) the evidence must be relevant and material to the state's case; and (5) the probative value of the evidence must not be outweighed by the potential for unfair prejudice to the defendant. The court held that the district court erred by failing to ensure that the state was offering the video for a legitimate reason and that, therefore, it was an abuse of discretion to admit it. Ultimately, however, the introduction of the video was found to be harmless error.

The defendant also argued that the district court abused its discretion by denying the appellant access to certain nonpublic records following the court's in camera review. The appellate court concluded that the district court did not abuse its discretion by not disclosing the records on the grounds that the records were not relevant, were non-substantive, or duplicated other information provided to the defendant. Finally, the defendant argued that he was entitled a new trial because of the state's late disclosure of a witness. The witness was allowed to testify by the district court because they found that the defendant was not prejudiced by the testimony. The appellate court affirmed this decision as well.

Shaffer v. State of Texas, No. 14-09-00327-CR, 2010 Tex. App. LEXIS 3062 (Tex. App. Apr. 27, 2010).

- Guilty Plea Withdrawal After Probation
- Hearsay in Probation Reports

Defendant was convicted for aggravated sexual assault of a child and indecency with a child and online solicitation of a minor. On appeal, he argued that the evidence was legally and factually insufficient to support his convictions.

#### Aggravated Sexual Assault of a Child

His first argument was that the evidence was legally insufficient to establish that he digitally penetrated the sexual organ of a child (an element of aggravated sexual assault of a child). The victim testified, however that the defendant penetrated her sexual organ with his finger on more than one occasion. The court stated that “in sexual abuse cases, the testimony of the child victim alone is sufficient to support the conviction.” Accordingly, the court found that the evidence was legally sufficient to support the defendant’s conviction.

In support of his factual-insufficiency argument, the defendant argued that (1) witnesses never stated they saw the defendant place his finger in the victim’s sexual organ (2) the victim did not testify to digital penetration; (3) contrary evidence showed appellant had piercings on his penis and because of the piercings, any sexual intercourse would have caused physical damage to the victim; and (4) one of the state’s witnesses could not identify the defendant in the courtroom. The court, in viewing the evidence in a neutral light, found that it was not so obviously weak as to render the verdict clearly wrong and manifestly unjust nor was the proof of guilt outweighed by the great weight and preponderance of contrary proof.

#### Online Solicitation of a Minor

The defendant also argued that there was no evidence to support the legal conclusion that he was the person who solicited the minor. The court, viewing the evidence in the light most favorable to the government, concluded that a rational trier of fact could have found that the defendant was the one who, through a commercial online service, knowingly solicited a minor to meet him with the intent that she would engage in deviate sexual intercourse with him.

The defendant also argued that the evidence was factually insufficient to support his conviction. He argued that (1) no evidence was presented that defendant was the one who made the online solicitation; (2) no testimony proved that appellant or the minor had access to computers with internet service; (3) there was evidence that multiple people had access and, in fact, used the computers seized by law enforcement; and (4) the minor admitted that, at times, she thought she was talking to one person online only to realize it was someone else. Viewing the evidence in a neutral light, the evidence was not so

obviously weak as to render the verdict clearly wrong and manifestly unjust nor was the proof of guilt outweighed by the great weight and preponderance of contrary proof.

State v. Mazique, No. 09-KA-845, 2010 La. App. LEXIS 681 (La. App. Apr. 27, 2010).

- Sufficiency of the Evidence
- Sentencing

The defendant was charged with the sexual abuse of his teenaged stepdaughter and with videotaping the activity. On appeal the defendant argued that the evidence submitted at trial was insufficient to convict him of Aggravated Incest and of Possession of Pornography involving juveniles. The court stated that they would evaluate the evidence in the light most favorable to the prosecution and determine whether a possible alternative is sufficiently reasonable that a rational juror could not have found proof of guilt beyond a reasonable doubt.

The record showed that the victim and her mother recounted the incidents involving the defendant in detail. Further, the testimony of the victim alone can be sufficient to establish the elements of a sexual offense, even where the State does not introduce medical, scientific, or physical evidence to prove the commission of the offense. The defendant also argued that his ten-year sentence was constitutionally excessive. The court found that the defendant's sentence was comparable and possibly less harsh than similarly situated defendants. This led the court to the conclusion that the trial judge did not abuse his discretion in sentencing the defendant.

Bist v. State, No. 5D09-121, 2010 Fla. App. LEXIS 4698 (Fla. App. Apr. 9, 2010).

- Objective Entrapment

Defendant initiated communication with a Perverted Justice “decoy” on an online chat room. The defendant engaged in explicit, sexual conversations with the “decoy” and arranged to meet at “her house” to engage in sexual activity. At trial, defendant filed a motion to dismiss, arguing that the conduct engaged in by the government was so egregious that his due process rights were violated. On denial of his motion, defendant appealed the trial court's decision. This defense, known as objective entrapment, requires a dismissal when due process is violated when the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.

People v. Freeman, No. D046394, 2010 Cal. App. Unpub. LEXIS 2605 (Cal. App. Apr. 12, 2010).

- Child Abuse
- Custody of a Child

Defendant was convicted of solicitation to commit kidnapping, residential burglary, stalking, and misdemeanor child endangerment and battery. The offenses arose from the defendant's assaultive conduct towards her teenage daughter and actions taken against her daughter's foster parents. The defendant argued that she could not be convicted of solicitation to commit kidnapping because, under the law, one cannot kidnap one's own child. The court upheld her conviction and found that her parental rights to her daughter were impliedly revoked by the Child Protective Services when they placed her daughter with a foster family. The court upheld her other convictions as well, as she had watched her daughter's foster parent's house, broken into their house and stolen several items.

People v. Norman, No. D054896, 2010 Cal. App. Unpub. LEXIS 3174 (Cal. App. Apr. 30, 2010).

- Conditional Release of a Convicted Sex Offender

The Appellant, a sexually violent predator, was convicted of several crimes involving sexual activity and pornography with underage boys. Upon serving his prison time he was declared a sexually violent predator and confined at a state hospital. After six-years of confinement at the state hospital, the appellant petitioned for outpatient treatment through a conditional release program. The petition was granted by a trial court and the appellant was released to the community under the supervision of program that provided services on behalf of the Department of Mental Health's Conditional Release Program. As part of his release, the appellant agreed to more than 50 terms and conditions that if he failed to comply with, his outpatient treatment status could be revoked.

The appellant subsequently violated several of the conditions placed on his release. He then appealed the decision to revoke his conditional release because (1) the violations do not show that he was in need of extended inpatient treatment or that he had refused to accept further outpatient treatment; and (2) his ability to comply with the conditions of his release was largely due to the institutional failure of the system to provide him with a social network that could assist and support him. The court rejected his appeal and affirmed the decision to recommit the appellant to the state hospital.

People v. Riddle, No. G041755, 2010 Cal. App. Unpub. LEXIS 2696 (Cal. App. Apr. 15, 2010)

- Miranda statements
- Evidence necessary to convict, promoting child pornography

Appellant solicited child pornography from a 14-year-old girl. He was subsequently convicted and challenged his conviction on the grounds that certain statements made post-Miranda warnings, and that there was insufficient evidence necessary to convict him. The court ruled that there was no issue as to the post-Miranda warning statements, as they were never presented by the prosecutor at trial. As to his sufficiency argument, the appellant argued that the statute in question punished only the photographer of child pornography. Since he had not taken the pictures (the victim had taken the pictures) he

could not be punished under the statute. The court, however, found that the statute punishes those who coerce minors into engaging in sexual acts and since he had asked the minor to take the pictures, there was sufficient evidence. The appellant, in the alternative, argued that he had not “posed” the minor for the photographs. The court found that the appellant had told the minor how he wanted to see her in the photographs, and that was sufficient to uphold the conviction.

State v. M.L. JR., No. 09-392, 2010 La. App. LEXIS 540 (La. App. Apr. 14, 2010).

- Sufficiency of Evidence

The defendant appealed his conviction and sentence of indecent behavior with a juvenile. The defendant challenged the sufficiency of the evidence, the trial court’s decision not to disclose the identity of a confidential informant, the competency of the victim to testify at trial, the admission of the quantity of pornographic material seized from the defendant’s house, the effectiveness of his counsel, and several plain errors contained in the record. The court ultimately affirmed his conviction but remanded as to his sentence, which was illegally excessive.