CSE Case Law Update
April 2011

April 1, 2011

Unpublished Opinion

Arizona v. Bowman, No. 2 CA-CR 2010-0229, 2011 WL 1226271 (Ariz. Ct. App. Apr. 1, 2011).

- Admissibility of Evidence
- Other Acts

Bowman appealed from his conviction for five counts of furnishing obscene materials to a minor, six counts of child molestation, fifteen counts of sexual conduct with a minor twelve years of age or under, three counts of public sexual indecency to a minor, and three counts of sexual exploitation of a minor. On appeal. Bowman argued that the trial court erred in allowing testimony summarizing two stories found on his computer that described sexual episodes with minors. Bowman suggested that the evidence was inadmissible because its prejudicial effect far outweighed the probative value. The trial court found that the evidence was probative of a character trait giving rise to aberrant sexual propensity to commit the acts charged because the stories' topics were sexual encounters between an adult and a child. The appellate court found that by limiting the admission of the stories to their summaries, their probative value outweighed any danger of undue prejudice. Bowman next argued to exclude letters he sent from prison to his wife discussing his plea options because the court's limiting instruction could not cure the prejudicial effect. Because Bowman did not preserve this issue, exclusion may only be granted for fundamental error. The court found no fundamental error in admitting the letters. Bowman did not show that he could not receive a fair trial or the alleged error caused him any prejudice.

April 4-8, 2011

State Supreme Courts

South Dakota v. Bruce, 796 N.W.2d 397 (S.D. Apr. 6, 2011).

- Speedy Trial
- Other Acts
- Instructions
- Sentencing

Bruce was convicted of 55 counts of knowing possession of child pornography. On appeal, Bruce challenged the trial court's admission of other acts evidence, the court's limitation on cross-examination or an alleged third party perpetrator, the failure to bring his case to trial within 180 days of his initial appearance, and the court's imposition of

maximum sentences on ten counts resulting in a 100-year sentence. Bruce argued that the trial court abused its discretion in admitting other acts evidence of the child pornography disc that was stained with Bruce's semen. Bruce argued that identifying the stain as his semen did not enhance the probative value of the evidence. The court found that the admission was proper to prove identity and knowledge of the content of the disc. Bruce also argued that the circuit court's limitation on cross-examination of witness Carol Pulscher, limiting the questioning to her access to Bruce's footlocker and safe, precluded him from presenting his third-party perpetrator defense. The court found that the trial court did not abuse its' discretion in limiting cross-examination because the court found that the jury would not have reached a different conclusion had more extensive cross-examination been permitted. The court found that due to defense requested continuances and retrial after a mistrial, the 180-day rule was not violated and the trial court did not err in denying the motion to dismiss. Finally, the court concluded that the sentences were grossly disproportionate to the "particulars of the offense and the offender. The court reversed and remanded to the circuit court to consider the evidence on re-sentencing.

Fink v. Del., 16 A.3d 937 (Del. Apr. 7, 2011).

- Pleas

In 2008, Fink plead guilty to one count of unlawfully dealing in Child Pornography, and the state entered a *nolle prosequi* on the remaining nine counts. Feb. 2010, Fink filed a motion for post-conviction relief. Fink contended that the indictment against him for "dealing" in child pornography was illegal because the State was aware that it could prove only "possession" of child pornography. Accordingly, Fink argued that the illegal indictment rendered his guilty plea "unknowing," and he was entitled to relief. The Court concluded that the denial of his post-conviction motion should be affirmed on the basis that Fink's claims were subject to procedural bar of Rule 61(i)(3) without exception.

State Courts of Appeal

Mass. v. Darby, 946 N.E.2d 632 (Mass. App. Ct. April 4, 2011).

- Admissibility of Evidence
- Search and Seizure
- Other Acts

On appeal from conviction of possessing child pornography, the defendant asserted that the admission of (1) prior recorded testimony and (2) selected videos depicting child pornography creates a substantial risk of a miscarriage of justice. The appellate court rejected the claim that the admission of prior recorded testimony violated his right to confrontation because defendant lodged no objection on that ground. Further, even if the admission was in error, no substantial risk of injustice arose because the other condemning evidence was so great. Defendant's claim that the admission of the videos of child pornography was unduly prejudicial was also rejected by the court. The court

stated that the jury needed to see the videos to know what the representative sample of other un-introduced child pornography to assess what it was representing.

Defendant also argued that evidence of internet chats admitted at trial violated his rights under the Fourth Amendment because the chats were outside the scope of the warrant for his computer. Defendant failed to preserve this constitutional claim at trial and the appellate court concluded defendant was precluded from bringing the constitutional claim. Additionally, defendant argued that admission of the chats gave rise to a substantial risk of a miscarriage of justice because the chats were prior bad acts improperly offered to show the defendant's propensity to commit the crimes charged. The court found that the chats were admitted to rebut the defendant's claims of lack of knowledge that the computer contained child pornography and established the manner in which defendant used internet chat rooms.

Nolan v. Fifteenth Judicial District Attorney's Office, 62 So.3d 805 (La. Ct. App. Apr. 6, 2011).

- Statutory Construction

Nolan appeals the decision of the trial court denying his motion to terminate his duty to register as a sex offender. Nolan pled guilty in July 2001 of five counts of "illegal use of a minor in nudity-oriented material or performance" under 2907.323 of the Ohio criminal code requiring him to register as a sexual offender for a period of ten years. In 2009, he filed a motion to terminate his duty to register in Ohio following a case ruling that people convicted of his offense prior to Jan. 1, 2008 were not subject to registration and notification requirements. While seeking the motion, Nolan moved to Louisiana, where he registered as required by law. His Ohio motion was granted in July 2009. Nolan then filed a motion to terminate his duty to register in Louisiana. The trial court denied his motion resulting in this appeal. On appeal, the court found that under Louisiana statute, Nolan's offense requires registration as a sexual offender and the Ohio judgment did not render the laws of Louisiana inapplicable to him.

People v. Rivera, 409 Ill.App.3d 122, 947 N.E.2d 918 (Ill. App. Ct., April 7, 2011)

- Miranda
- Sufficiency of Evidence
- Double Jeopardy

Defendant was convicted of multiple counts of predatory criminal sexual assault of a child, criminal sexual assault, criminal sexual abuse and one count of possession of child pornography. Case arose out of defendant serially molesting his step daughter under the initially grooming technique of preparing her for a modeling career where she would have to test out condoms by performing oral sex on him while he wore them. When she tried to refuse defendant threatened her with suing her and her mother and sending her to a boot camp. Ultimately, defendant talked her into having antoher victim participate in the sexual assault and the victim convinced a friend to help her on one occassion. On the

day the victim disclosed to her mother, her mother brought her to the police station and called the defendant to let him know what was happening. After her daughter gave a statement the mother accompanied the police back to her apartment where she consented to a search. Shockingly, the computer that had been in working order that morning was in pieces on the living room floor, with the hard drive missing, and there was some material that was burned in the kitchen sink. At the time the evidence technician found multiple pieces of digital evidence, including a compact disk with "Jose's Stuff" on it.When the defendant was ultimately found he started to make a statement then asked what assurances he would be given if he gave a statement. When informed no assurances could be made the defendant then asserted his 5th Amendment right to remain silent. Later on, defendant informed officers that he would give a statement if he was assurred of no jail time. Ultimately defendant gave a statement to the officers and an Assistant State's Attorney. At the trial the prosecution called a computer forensic examiner from the Secret Service. He was declared an expert by the court. He testified about one file found on the compact disk that had the file name "13 give head". His opinion was that the video was of a juvenile girl, based on her underdeveloped breasts and that she was small in stature. He also testified that the male in video appeared older than the girl perfoming oral sex. Following his conviction defendant appealed claimining multiple violations. The appellate court agreed with several and rejected several. First the appellate court indicated that the defendant's statements to the initial officers following his reinitation of conversation were not in violation of his Miranda rights as the defendant initiated the conversation. However, the court concluded that the statements made to the prosecutor were not freely given admissions but rather were plea negiotiations that should not have been told to the jury. The court determined that the plain error doctrine required that the defendant be re-tried without the plea related statements.
However, as to the charge of child pornography, the appellate court decided to make itself the finder of fact and reviewed the evidence of the video file. The court then went on to describe in detail, down to the seconds what the video depicted. In what can only be described as a disection of the video and all the surrounding facts of the case, the court reversed the jury finding that it was child pornography and inserted their own decision that it was not. The court then ruled that the prosecution was barred from trying the defendant again for the child pornography charge based on double jeopardy.

Jones v. Oklahoma, 253 P.3d 997 (Okla. Crim. Apr. 7, 2011).

Jones was found guilty of child sexual abuse after former convictions of two or more felonies. On appeal, Jones argued that prosecutorial misconduct denied him a fair trial. Jones failed to show that the prosecutor's tactics or argument were fundamentally unfair. Next, Jones claimed ineffective assistance of counsel. The court found that his counsel's failure to object to the misconduct alleged in the previous allegation resulted in no prejudice to Jones. Jones challenged his consecutive twelve year imprisonment in each count as excessive and shocking to the conscience. The court found that the sentencing errors that occurred were committed in the defendant's favor and therefore rejected the argument that the sentencing was excessive. The Court affirmed the trial court decision.

Unpublished Decisions

Wash. v. Johnson, 160 Wash. App. 1044 (Wash. Ct. App., Apr. 4, 2011) (Unpublished Opinion).

- Statutory Construction
- Sufficiency of Evidence

At trial, Johnson was convicted of two counts of first degree rape of a child, one count of first degree child molestation, and four counts of possessing depictions of minors engaged in sexually explicit conduct. On appeal, Johnson argued the trial court erred in considering only 7 of the 8 required statutory factors under RCW 10.58.090 as to whether evidence of prior sex offenses may be admitted as evidence. The trial court declined to consider the "necessity of the evidence" factor. The appellate court concluded that the court's failure constituted harmless error because the record was sufficient to determine that the trial court would have admitted the evidence if it had considered the factor. Johnson next argued that RCW 10.58.090 was an ex post facto law that violated the federal and state constitutions and the separation of powers doctrine. The court followed precedent in finding that the statute did not alter the quantum of evidence necessary to convict and therefore does not violate the constitutional prohibition against ex post facto laws. Johnson's separation of powers doctrine challenge failed because the statute is permissive, not mandatory and can be harmonized with the rules of evidence.

Ex Parte Jesus De Leon, Nos. WR-74073-07, WR-74073-02, 2011 WL 1303295 (Tex. Crim. App. Apr. 6, 2011) (Unpublished Opinion)

- Pleas
- Ineffective Assistance of Counsel.

De Leon was convicted of aggravated sexual assault of a child, sexual performance by a child, and two counts of possession of child pornography. In a separate cause, De Leon was convicted of twenty counts of possession of child pornography. De Leon contended that his guilty pleas were involuntary, the State breached the plea agreements, and that trial counsel rendered ineffective assistance. The court found that the record was insufficient to resolve De Leon's claims and the application was held in abeyance until the trial court has resolved the fact issues.

Arizona v. Pryor, No. 2 CA-CR 2010-0399-PR, 2011 WL 1344165 (Ariz. Ct. App. Apr. 7, 2011) (Unpublished Opinion).

- Ineffective Assistance of Counsel
- *Taylor* Violation

Pryor was convicted of two counts of continuous sexual abuse of a child and two counts of furnishing obscene or harmful items to a minor. Upon having the conviction affirmed on appeal, Pryor filed a petition for post-conviction relief arguing his trial counsel had

been ineffective for failing to raise a claim that the state had improperly used its peremptory strikes to remove several male jurors. The court found that the fact that the prosecutor used five of her six strikes to remove men, leaving three on the jury, was not enough to show the state lacked a gender-neutral reason to strike five men from the panel. Pryor failed to demonstrate a colorable claim of prejudice.

April 11-15, 2011

State Courts of Appeal

Missouri v. Liberty, ___ S.W.3d ___, 2011 WL 1363804 (Mo. Ct. App., April 12, 2011)

- Statutory Construction
- Sufficiency of the Evidence

Defendant was convicted and sentenced on possession of 8 counts of obscene material and promoting child pornography. Defendant appealed based on two reasons. First defendant claimed that the charge of promoting child pornography was not supported by sufficient evidence. Specifically, defendant claimed that since it was only text and described a child riding on an inner tube with an adult, the conduct was not obscene. The appellate court disagreed, holding that the conduct described went far beyond just an innocent trip down a lazy river and described erections and other sexual conduct which satisfied the statutory requirement of demonstrating it was for a sexual purpose, i.e., sexual conduct. Second, defendant successfully claimed that the individual sentences for the eight separate counts of child pornography were incorrect as violating double jeopardy. The appellate court agreed based on a statutory construction review. The court reasoned that if the legislature intended separate counts they would not have used the descriptive word "any" before obscene material, in the statute. Based on the statutory construction defendant could only be sentenced under the possession statute for one count regardless of the number of individual images possessed.

Bethards v. Texas, 2011 WL 1448162 (Tex. App., April 13, 2011)

- Search and Seizure
  - Consent
- Other Acts Evidence
- Temporary Internet Files
  - Intent

Defendant was convicted by a jury of fourteen counts of possession of child pornography and sentenced to 15 years. Police were given tip that defendant had child pornography on his computer. One officer began to draft search warrant. Complainant called police back and told them she had informed defendant of contact to police about child pornography. Other officers went to defendant's house to try and stop him from destroying possible evidence. Defendant met police at front door and agreed to come out onto porch and after being told why they were there he made admission that he had looked at child

pornography accidentally, and closed out web pages but did not delete because he wanted to show his wife. Police asked for consent and told him they were in process of obtaining a warrant. Police told him that until the warrant was either granted or denied they were not going to let him back into house. Defendant then let police into house. Defendant consented to seizure of two computers. Defendant was explained that he could withdraw his consent up until time search warrant was either granted or denied. Defendant again consented. The appellate court rejected defendant's argument that his consent was involuntary because he had been constructively evicted from his home. Defendant's next argument, improper other acts evidence, was also rejected. The court found no error in allowing the computer forensic examiner to testify that he found 1,200 images of child pornography on the computer. The reviewing court found the number probative of whether the images arrived there by accident or mistake. Defendant next claimed the state failed to prove he knowingly or intentionally possessed the child pornography. Defendant relied on a state case (*Barton v. State*, 648 S.E.2d 660 (Ga. Ct. App., Sep. 10, 2007)) and several federal cases to claim that because the images were found in temporary internet files the state failed to prove he intended on possessing them. The court disagreed and relied on an early ruling from the case, *Texas v. Gant*, 278 S.W.3d 836, 840-41 (Tex. App. Feb. 3, 2009). The court ruled that the testimony of the CFE detailing the 400 different websites containing child pornography as well as the 115 separate searches for child pornography was enough to demonstrate intent. Also, the defendant's wife's testimony about finding child pornography websites under the defendant's internet history favorites folder was also persuasive to the court.

<u>Unpublished Opinions</u>

Delaware v. Bradley, 2011 WL 1459177 (Del. Super. Ct. April 13, 2011) (Unpublished Opinion)

- Search and Seizure

A pediatrician in Delaware was videotaping over one hundred child patients. While the court denied the defendant's motion to suppress, he raised two grounds: the broadness of the search warrants and the scope of the search warrant. The Court reiterated that Delaware does not recognize a good faith exception to a search warrant based on U.S. v. Leon, but ruled that in this case the conduct that was not covered by the warrant would have been discovered under the doctrine of inevitable discovery. In what was a factually specific ruling, the court noted that the defendant's office complex consisted of several buildings, which the police would have had the opportunity to note with a little surveillance. The warrant only covered two of the buildings. Upon arriving at the scene to search, rather than wait for the prosecutor to arrive to discuss the situation or draft a new warrant the police went ahead and searched all the buildings. While the court ruled that two of the buildings were within the scope of the warrant because a nexus existed between the doctor seeing patients in those buildings and the possibility of finding patient records within the buildings, which was within the scope of the original warrant. However, the Court ruled that based on the other two buildings not being listed and no nexus existed between the buildings and the probable cause within the four corners of the

warrant. The court did come back to the materials seized within the other buildings and denied the motion to suppress based on inevitable discovery. Also, the defendant challenged the scope of the computer forensic examination and argued that the police should have done a preview search on-scene rather than a full search. The court rejected this conclusion as well and cited some other great cases for proposition that forensic examination should not be restricted to a preview only.

April 18-22, 2011

State Court of Appeal

Washington v. Ollivier, 254 P.3d 883 (Wash Ct. App., April 18, 2011)

- Search and Seizure
- Speedy Trial

Defendant was convicted of possessing depictions of minors engaged in sexually explicit materials. Defendant appealed claiming violation of Speedy Trial rights and violation 4th Amendment relating to the warrant police secured in case. Upon being charged defendant's attorney requested delays of approximately 22 months to prepare for trial. The continuances were over the defendant's objections. Court ruled that even though defendant objected to continuances, timeframe was not unreasonable to allow defense counsel to prepare for trial. Secondly, defendant claimed several issues with the search warrant. The first was the tip from the defendant's roommate was not reliable as the warrant did not establish the veracity and basis of the informant's knowledge. The reviewing court disagreed, reasoning that the warrant spelled out that he was his roommate and that the roommate told more than one officer he saw child pornography on the defendant's computer. Likewise, the court rejected defendant's contention that the failure to show the defendant the warrant at the time of the seizure of the computer from his residence invalidated the subsequent search.

April 25-29, 2011

State Court of Appeal

Connecticut v. Dimeco, 15 A.3d 1204 (Conn. App. Ct., April 26, 2011)

- Search and Seizure

Defendant filed a plea of nolo contendere to a county of possession of child pornography. Subsequently, defendant appealed claiming the trial court erred in denying his motion to suppress evidence. Defendant's claim was that the warrant lacked probable cause in that the affidavit contained conclusory assertions and hearsay. In the affidavit, the police listed out information given by the defendant's girlfriend's sister about the girlfriend finding a notebook with several websites whose names indicated the possibility of child

pornography being found on them. Additionally, she provided the police with the notebook and details of the girlfriend confronting the defendant about them and the defendant's response that the computer was broken, even though she found a hard drive hidden behind a mirror in their closet. The police officer, affiant for the warrant, visited the websites and included in the affidavit that they appeared to contain pre-teen children based on his training and experience. The court held that the notebook corroborated the information from the complainant and that the officer's conclusions about the pre-teens was justified based on his training and experience.

Unpublished Opinions

State of New Jersey v. Haywood, 2011 WL 1598968 (N.J. Super. Ct. App. Div., April 29, 2011) (Unpublished Opinion)

- Search and Seizure

State appealed trial court's order granting defendant's motion to suppress evidence found at crime scene within a car at the site of a traffic stop. The case involved a citizen complaint from a parent whose 13 year old child had been approached both in person as well on MySpace. The parent authorized the police officer to pose as the child and record the conversations over the internet. Multiple conversations occurred with the defendant on MySpace with the officer posing as the teen, until a meeting was agreed upon. During the last conversation the officer asked the defendant to bring alcohol and condoms. The officer who was in an unmarked car saw the defendant enter and leave the location. The officer called for a marked squad for the traffic stop. During the subsequent stop the liquor and condom were in plain view. However, there was some discrepancy in the officer's testimony about when he actually saw the corroborating evidence. The trial judge determined that the officer changed his version of the events on the stand and granted the motion to suppress. The reviewing court determined that the trial court's decision that the officer was lying about what he saw and when saw it was based on the un-artfully posed question and the response did not contradict his earlier testimony, but rather was limited to that specific question.