CSE Case Law Update

August 2009

STATE SUPREME COURTS

Commonwealth v. Lopez, 2009 Ky. 185 (Ky. Aug. 27, 2009) (*per curium*).

- Revocation of Parole

While serving in the Army, the defendant was charged with violating the Uniform Code of Military Justice (UCMJ) by viewing child pornography on his computer and accepted a discharge, admitting the offense. At the same time, the defendant was under probation by a Kentucky circuit court for attempted first-degree sexual abuse, conditioned on not committing another offense. This probation was revoked because of the UCMJ charge, and the Kentucky Supreme Court upheld the revocation of parole because the violation of the UCMJ subjected the violator to a fine or imprisonment. The defendant did not need to be convicted of the offense to have his probation revoked, therefore it was not material that he was not convicted of the UCMJ offense because his admission demonstrated that he violated a condition of his parole.

State v. Berosik, 214 P.3d 776 (Mont. Aug. 5, 2009).

- Voir Dire
- Expert Qualifications
- Prior Acts Evidence – Transaction Rule
    - Grooming
- Search and Seizure – Private Searches

The Supreme Court of Montana reversed the defendant's conviction for incest and covered four independent issues on appeal. First, the court held that because the defendant was not present during the independent voir dire held in the judge's chambers, and because there was no evidence that he expressly waived his right, the case should be reversed and remanded. Second, it held that the district court did not abuse its discretion in admitting testimony from a child abuse expert. In light of her extensive other qualifications, she was not required to have first-hand experience with sexually and non-sexually abused children. The state's expert had testified about grooming a child for sexual abuse. Based on this testimony, the district court had allowed prior bad acts evidence that showed the defendant grooming his two step-daughters. The Supreme Court found no error. The prior acts evidence was admissible under the transaction rule as part of the transaction in dispute (the incest) because they were acts of grooming for that incest. Finally, the Supreme Court held that evidence seized by the defendant's wife and daughter should not have been suppressed because they seized it in a private search

prior to contacting law enforcement and because the police made no suggestions as to further searches.

State v. Oliver, 293 S.W.3d 437 (Mo. Aug. 4, 2009).

- Child Pornography
    - Motion to Suppress Evidence
    - Inevitable Discovery Doctrine
- Sufficiency of Evidence

The Supreme Court of Missouri upheld the decision of the Circuit Court to deny the defendant's motion to suppress physical evidence, including a computer, camera, and camera card, during the defendant's prosecution for sexual exploitation of a minor and promoting child pornography. The Supreme Court held that though the search which produced the evidence may have been based on flawed consent, the evidence was admissible under the inevitable discovery doctrine because it would have been discovered pursuant to a warrant for which the detective had applied and for which there was sufficient probable cause at the time of the search. The defendant further argued that because the initial seizure was invalid, the warrant to search the items seized (the physical computer, camera, and card) was also invalid. The Supreme Court, however, rejected this argument because "the fact that illegally obtained evidence is included in the affidavit does not invalidate the warrant." Finally, the court held that there was sufficient evidence for a jury to find the defendant guilty of sexual exploitation based on many factors, including the primary object of the photographs and the circumstances under which the photographs were taken. There was also sufficient evidence to support a finding of possession with intent to exhibit, and this intent to exhibit need not still exist at the time of trial.

COURTS OF APPEAL

Ex Parte Yusafi, 2009 Tex. App. LEXIS 6715 (Tex. Crim. App. August 26, 2009).

- Child Pornography
    - Search and Seizure
- Effective Assistance of Counsel

Defendant was convicted of possession or promotion of child pornography and unsuccessfully sought habeas corpus relief on the grounds that he was denied effective assistance of counsel. Specifically, defendant contends that the child pornography extracted from his two home computers was the product of an illegal search and seizure and that but for the ineffective assistance of his trial or appellate counsel or both, the trial court would have suppressed the evidence. The defendant had given signed, written consent for investigators to search his home and office computers. On appeal, the Court

found that the evidence supported a finding that the accused's written consent was voluntary, and thus defendant's claim of ineffective assistance of counsel was properly denied by the trial court.

State v. Kennealy, 214 P.3d 200 (Wash. Ct. App. August 25, 2009).

- Evidence
    - Competency
    - Hearsay
    - Relevancy – Prior Acts, Crimes Wrongs

Defendant was convicted of child rape, child molestation, assault with sexual motivation, and communication with a minor for immoral purposes. There were three child victims in the case. Defendant appealed based on three alleged errors. He argued that victim one was not competent to testify at trial, that the trial court improperly admitted the victims' hearsay statements, and that the trial court improperly admitted evidence of defendant's uncharged prior misconduct as evidence of a common scheme or plan to molest children. The Appellate Court affirmed the defendant's conviction. It held that competency determinations are within the sound discretion of the trial court and that the trial court in this case did not abuse that discretion. Further, statements that victim one made to his mother and sister were close to the incident, appeared consistent, and there was no evidence of motive or bias to misrepresent facts; statements that the victim made to a police officer were made under circumstances where there was a sufficient level of reliability and trustworthiness. Thus, the statements were properly admitted under the hearsay exception for statements describing sexual or physical abuse in a criminal or dependency case. Lastly, the Court held that because of the similarity between the three victims' allegations and the testimony of the defendant's prior victims, the trial court did not err in finding that the prior acts demonstrated a design to molest children.

People v. Arevaloherrera, 2009 Cal. App. Unpub. LEXIS 6845 (Cal. Ct. App. Aug. 24, 2009).

- Jury Instructions
- Child Sexual Abuse Accommodation Syndrome (CSAAS)
- Lesser Included Offenses

A Court of Appeal of California upheld the defendant's conviction for multiple counts of lewd conduct as well as sexual abuse upon his 14-year old daughter over the defendant's objections that the jury instructions erred on two points: phrasing of instructions on Child Sexual Abuse Accommodation Syndrome (CSAAS) and failure to instruct on lesser included offenses. The court held, first, that a limiting jury instruction on CSAAS which informed the jury that CSAAS evidence could be used to determine the child witness's credibility did not equate to telling the jury that it could use CSAAS evidence

to find the defendant guilty. The court also held that the facts from which the lewd act charges arose do not support the conclusion that the defendant committed a lesser included offense, such as assault or battery, instead of the greater offense. Finally, any failure to instruct on lesser included offenses was harmless because it was not reasonably probable that the jury would have convicted the defendant of any lesser offense.

State v. Acord, 2009 Ohio App. 3592 (Ohio Ct. App. Aug. 24, 2009).

- Search Warrants – Sufficiency, Particularity, Good Faith Reliance
- Knock and Announce Violations

The defendant was convicted of eight counts of rape, 115 second-degree felony accounts involving sexually-oriented material and minors, and other related fifth-degree felonies. His motion to suppress was based on alleged insufficiencies in the warrant. First, he alleged that the warrant stated the wrong address in one place and therefore the police could not know where to search. The court held that the warrant was sufficiently accurate because it listed the correct address in several places as well as a description of the defendant's house in several places and therefore the police obviously knew where to execute the warrant. Second, he alleged that the warrant failed to particularly describe the items to be searched and seized. The court held, however, that an attached hospital report describing where the abuse occurred was sufficient to allow the police to make a reasonable inference that evidence would be located there. Finally, the court held that facts that describe exactly what happened were sufficient to support a belief that property would be found in the defendant's home. The court went on to note that even if the warrants had been defective in the sense that they were not supported by probable cause, the officers' searches were justified by good faith reliance on the warrants during their execution. The court further concluded that on the particular facts of the case the police did not violate the knock and announce rule, but noted that a violation of that rule does not necessarily require suppression of evidence.

State v. Garbaccio, 214 P.3d 168 (Wash. Ct. App. Aug. 24, 2009).

- Search Warrants—Probable Cause
    - Staleness
- Jury Instructions
    - Time
    - Permissible Inference
- Sufficiency of Evidence

The Washington Court of Appeals affirmed the defendant's conviction of possession of child pornography. The court found that there was probable cause for the warrant to search the defendant's home and computer because the evidence had not become stale in the five months between the download and the application for a search warrant. It was reasonable to infer that the evidence of the contraband, in the form of metadata, would likely be found on the computer, even if the images themselves had been deleted. The jury instructions were also proper because they required a finding that the defendant

knowingly possessed the material and that he knew the nature of the material, including that it portrayed a minor. The amount of time that the defendant handled the material with knowledge of its content would have been relevant to the jury instruction, but the defendant did not propose such an instruction and the court was not required to include it on its own. Additionally, the permissive inference of knowledge jury instruction was not an error because it allowed the inference, but did not require it. There was also sufficient evidence for conviction because the video file depicted child pornography, and the defendant confessed to the police and conceded at trial that he had occasionally downloaded child pornography.

State v. Gray 2009 Ohio App. 3535 (Ohio Ct. App. Aug. 20, 2009).

- Sentencing
- Uncharged Conduct
- Possession of Child Pornography

The defendant was convicted of thirty-eight counts of sexual battery, one count of gross sexual imposition, and one count of importuning. During the sentencing phase of the trial, along with other pertinent sentencing factors the court considered the fact that the defendant was under federal investigation for possession of child pornography on his home computer, though he had not yet been charged. The appellate court upheld the defendant's convictions despite the defendant's arguments that the trial court abused its discretion in considering this evidence relating to the uncharged conduct. In its decision the court pointed out that the uncharged conduct was merely one factor in the sentencing decision and not the sole basis. It also noted that the use of the uncharged conduct was justified because the defendant's own counsel acknowledged the uncharged conduct as part of plea negotiations in the sexual battery case.

Ogletree v. Alaska, 2009 Alas. App. LEXIS 120 (Alaska Ct. App. Aug. 19, 2009).

- Joinder of Offenses
    - Child abuse and pornography
- Severance of Offenses
    - Possession and distribution of child pornography
- Shackling

Defendant appealed his conviction of sexual abuse of a minor, unlawful exploitation of a minor, burglary, violation of a protective order, and distribution and possession of child pornography. The Alaska court of appeals upheld the trial court's denial of the defendant's motion to sever the pornography and child abuse charges, because the charges both dealt with the same conduct. However, the court of appeals did find that the trial court erred in failing to merge the possession and distribution of child pornography charges because the State did not sufficiently differentiate the evidence at trial to show that the charges were based upon separate acts. Additionally, the court of appeals found that the defendant should not have been shackled at trial because he did not display any

aggressive behavior or propensity toward violence while in custody. Therefore, the case was remanded for a determination of whether the shackling caused any prejudice.

State v. Josephitis, 2009 Ill. App. 784 (Ill. App. Ct. Aug. 19, 2009).

- Possession—Exercise of Dominion
- Sufficiency of Evidence

The court affirmed the defendant's conviction of child pornography, rejecting the defendant's argument that he did not "possess" the photos which were accessed online and automatically saved in the browser's "Temporary Files" folder. Although the defendant did not print, copy, or send the images, he exercised control over the images to do so for sufficient time to be able to terminate his possession. The mere presence of the images in a cache file is not enough for a finding of possession. But in this case the defendant exercised control and dominion over the images because he actively sought them out, could access the file, and maintained the web site in his "favorites."

People v. Clendenin, 2009 Ill. App. 781 (Ill. App. Ct. August 18, 2009).

- Child Pornography
- Search and Seizure
- Ineffective Assistance of Counsel

Defendant was convicted of unlawful possession of child pornography. A neighbor, who had permission to enter the defendant's home, saw and viewed some of defendant's computer discs, which contained child pornography. The neighbor then gave the discs to police who viewed the contents without first obtaining a warrant and confirmed the neighbor's discovery. Defense counsel filed two stipulations, one of which contained incriminating statements, such as defendant supposedly telling one investigating officer that he did not believe the discs contained very much child pornography when he wanted to state that he was not aware of any child pornography on them. After his conviction based on these statements, defendant appealed, arguing that the evidence should have been suppressed because it was the product of a warrantless search and seizure and that his lawyer provided ineffective assistance by preparing a stipulation with factual errors and that the defendant never agreed to. The Appellate Court reversed the trial court's judgment. The Court held that the search by two police officers was reasonable because the neighbor was not acting as an agent of the State when she turned the discos over to police and they merely confirmed her discovery. However, it also found that defense counsel did provide ineffective assistance because he did not make sure defendant knew what specifically was contained in the incriminating stipulation, and thus, did not validly waive defendant's right of confrontation.

State v. Ling, 2009 Wash. App. 2095 (Wash. Ct. App. Aug. 18, 2009).

- Luring
- Sufficiency of Evidence

The Washington Court of Appeals reversed the defendant's conviction of luring because there was insufficient evidence to support the conviction. The defendant, a Burmese refugee, had stopped riding his bike and was having a friendly conversation with a group of children when he asked a six year old girl if she wanted to go to his home. Adults overheard and called the police. When asked why he asked her to come to his house, the defendant answered that he was lonely. The Court of Appeals reversed the luring conviction because the evidence showed nothing more than a friendly invitation, and did not show any enticement.

Sellers v. Florida, 2009 Fla. App. 11393 (Fla. Dist. Ct. App. Aug. 14, 2009).

- Parole—Material Evidence for Revocation

Defendant had been convicted of numerous counts of possession of child pornography and sentenced to three years of incarceration, followed by ten years of probation. Shortly after his release from prison, probation officers searched his apartment and seized five videos and two books at random. The trial court found that some of the materials were explicit, and even though they only involved adults, found that they were material to his deviant behavior pattern and revoked his probation, sentencing him to fifteen years. The Court of Appeals agreed that the material does not need to have children to be material as long as it shows an adolescent theme, but remanded for the trial court to provide a basis for their conclusion that the evidence was material.

State v. Larson, 214 P.3d 429 (Ariz. Ct. App. Aug. 13, 2009).

- Continuous Sexual Abuse of a Child
    - Lesser Included Offenses
        - Elements Test
        - Charging Documents Test

The court held that sexual conduct with a minor does not constitute a lesser-included offense of continuous sexual abuse of a child. The defendant was charged with and found not guilty of continuous sexual abuse of a child, but was convicted of sexual contact with a minor as a lesser included offense. The court applied both the elements test and the charging documents test. Under the elements test, a lesser-included offense must be "composed solely of some but not all of the elements of the greater crime so that it is impossible to have committed the crime charged without having committed the lesser one." Sexual contact with a minor is not a lesser included offense because it is possible to commit continuous sexual abuse of a child without committing sexual conduct with a minor, and vice versa. Under the charging documents test, an offense can be a lesser-included offense even though it would not always be part of the greater offense, as long as it is described in the charging document. The charging document test, however, does

not apply in this case because the state continuous sexual abuse of a child statute precludes its use. The statute states that the prosecution cannot charge the defendant of a second felony sexual offense in the same proceeding as continuous sexual abuse of a child unless 1) the second offense is charged in the alternative in the indictment, 2) the two charges have different victims, or 3) the two charges have different time frames. Because sexual contact with a minor is not a lesser included offense under either test, the defendant was convicted of an uncharged offense in violation of the Sixth Amendment's notice requirement and the conviction must be reversed.

Cleveland v. Cieslak, 2009 Ohio 4035 (Ohio Ct. App. Aug. 13, 2009).

- Constitutionality—over-broad

The Ohio Court of Appeals found the Cleveland ordinance against child enticement unconstitutionally overbroad and vacated the defendant's conviction. The ordinance was overbroad because it failed to require that the solicitation occur with intent to commit an unlawful act, instead punishing the knowing solicitation of a child under 14 to accompany the person in any manner for any purpose. Also, the statute allowed the inference of criminal intent from innocent acts. Therefore, the statute was overbroad because it could punish innocent conduct.

Wisconsin v. Graham, 2009 Wisc. App. LEXIS 627 (Wisc. Ct. App. Aug. 11, 2009).

- Presumptive Mandatory Release
    - Sex Offender Treatment
    - Sufficiency of Evidence

The defendant, who was serving a fourteen-year sentence for sexual assault of a child, was up for presumptive mandatory release. The Commission denied the defendant's request for parole because he had not participated in sex offender treatment (SOT), which was identified as one of his needs. The court found that there was substantial evidence for the Commission to conclude that the defendant should be denied parole based on the undisputed fact that he had not participated in SOT, regardless of the reasons he had not had the treatment.

State v. Fay, 2009 Minn. App. Unpub. LEXIS 871 (Minn. Ct. App. Aug. 11, 2009).

- Seizure of persons—"knock and talk"
- Search—voluntary consent
- Separate counts of possession of child pornography

Defendant was not "seized" under the 4th Amendment when plain clothes officers approached his house and asked to speak with him. The "knock and talk" was not coercive because they were not wearing uniforms, did not display weapons, and offered to speak at a later time, even though they did not inform him of his right to terminate the interview. The defendant's consent to the search of his computer during the interview was voluntary because there was no threat and he consented at the first request.

Additionally, the conviction on five counts of possession of child pornography was correct because there were five images found, even though they were found on one computer. Therefore the defendant's conviction was affirmed.

State v. Kansas, 212 P.3d 1039 (Kan. Ct. App. Aug. 7, 2009).

- Prosecutorial Misconduct
- Prior Consistent Statements
- Comment on Credibility
- Evidence—chat logs and downloads

Kansas Court of Appeals affirmed the defendant's convictions of rape, aggravated criminal sodomy, sexual exploitation of a child, and promoting obscenity to a child. The defendant argued that the prosecutor misled the jury regarding forensic evidence in his questioning and closing argument and improperly argued that the defendant had destroyed evidence. The court rejected the claim because the defendant had not objected to the questioning during trial and the questioning was not improper anyway. The closing argument's suggestion that evidence could have been disposed of was not prejudicial because it was raised in rebuttal to the defense council's closing argument. Admission of the victim's statements to a clinical social worker was proper even if repetitive, as well as the social worker's assessment of the victim's credibility. The admission of evidence of chat logs and downloads was proper for the crimes of sexual exploitation and promoting obscenity because the state proved that the defendant used that username and the evidence was direct proof the crime charged, not prior crimes or civil wrongs. They were not direct evidence for the charges of rape or sodomy, but were evidence of preparation to commit the crimes and the probative value outweighed any prejudicial effect.

Fuller v. Texas, 2009 Tex. App. LEXIS 6169 (Tex. Crim. App. Aug. 6, 2009).

- Expunction

Court reversed the lower court and granted the petition for expunction. The petitioner had been charged with possession of child pornography, but the indictment was dismissed when the petitioner was sentenced in another felony proceeding. The court held that petitioner was entitled to expunction because the limitations period for the child pornography possession offense had expired.

People v. Mantos, 2009 Colo. App. LEXIS 1382 (Colo. App. Aug. 6, 2009).

- Child Pornography
- File Sharing

Defendant was convicted of sexual exploitation of a child under *Colo. Rev. Stat. § 18-6-403(3)(b)* after defendant's stepdaughter came across some files with children's names and explaining sexual activities while downloading music through a file sharing program

installed on defendant's work computer. During a forensic examination of defendant's computer hard drive, detectives discovered numerous digital picture and video files containing child pornography in the computer's recycle bin and a copy of "KAZAA Light", which defendant claimed he purchased online for the purpose of downloading music. The statute under which defendant was convicted states, in relevant part, "A person commits sexual exploitation of a child if, for any purpose, he or she knowingly: (b) prepares, arranges for, publishes, including but not limited to publishing through digital or electronic means, produces, promotes, makes, sells, finances, offers, exhibits, advertises, deals in, or distributes, including but not limited to distributing through digital or electronic means, any sexually exploitive material."
The State argued that because defendant has child pornography on his computer, which was capable of file-sharing, defendant "prepared" sexually exploitive material because that term encompasses the "conduct of possessing with the potential to distribute sexually exploitive material." On appeal, the Court vacated the defendant's judgment, holding that downloading and saving sexually exploitive material in a share-capable computer file did not constitute the felony offense of sexual exploitation of a child as defined in the statute. The Colorado General Assembly did not proscribe arranging for obtaining or distributing pornographic material in the plain language of the statute, and thus the State failed to prove the defendant had committed any crime.

State v. Lala, 2009 Wis. App. LEXIS 610 (Wis. Ct. App. Aug 5, 2009).

- Sufficiency of Evidence
- Sexually Explicit Conduct

Wisconsin Court of Appeals affirmed the defendant's conviction on four counts of possession of child pornography. The court found that there was sufficient evidence to find beyond a reasonable doubt that the child in the photos was engaging in sexually explicit conduct and that the defendant knew the character and content of the photos. The fact that the child was wearing sheer nylons did not matter because her pubic area was still visibly displayed, and therefore was sexually explicit. "Sexually explicit" does not require that the child be unclothed, just that there be a visible display and a sexual posing, which there was in this case.

State v. Park, 2009 Wis. App. LEXIS 606 (Wis. Ct. App. Aug. 4, 2009).

- Search Warrant—Affidavit
    - False Statements—Omission
    - Probable Cause
        - Staleness
- Motion to Suppress Evidence

Wisconsin Court of Appeals affirmed the lower court's finding that an officer did not make false statements in his affidavit for a search warrant application and that there was probable cause to grant said search warrant to search the defendant's computer and home. The defendant had filed a motion to suppress the evidence of child pornography gained

from the search of his computer. This court affirmed the lower courts finding in the *Franks* hearing that the officer did not intentionally or recklessly make false statements in his affidavit when he said that the defendant had done nothing to delete illegal images omitted fact (that he had deleted some images) did not make the statement a reckless disregard for the truth. Also, the omitted fact that images will not always be recovered on a hard drive after they have been deleted was not material to probable cause. The Court of Appeals also found that there was probable cause for the warrant based on the officer's extensive experience in investigating internet crimes against children, which allowed an inference of the authenticity of his statements about practices and behaviors of child predators. The two year lapse in time between finding the child pornography on the defendant's website and the application for the search warrant did not make the facts too stale for probable cause because there was a fair probability that evidence of the crime would still be on the defendant's computer.

DISTRICT COURTS

State v. Dabney, 2009 Del. Super. LEXIS 290 (Del. Super. Ct. Aug. 4, 2009).

- Speedy trial
- Ineffective Assistance of Counsel

Defendant was convicted of several sexual offenses involving children including one count of rape. Following his sentencing, defendant filed a direct appeal to the Delaware Supreme Court, alleging that the State violated his right to a speedy trial with respect to prosecuting the rape charge. Defendant's rape conviction was reversed and the case remanded for resentencing. In his motion for post-conviction relief, defendant claims his remaining convictions should be vacated because his counsel was ineffective by limiting his speedy-trial claim on appeal solely to the rape conviction. Because it was defendant's decision to appeal only the rape conviction, however, the Court held that defendant failed to show how counsel acted unreasonably. Quoting the United States Supreme Court, the Court stated, "the accused has the 'ultimate authority' to make the certain fundamental decisions regarding the case, including whether to take an appeal."