CSE Case Law Update

August 1-8, 2010

STATE SUPREME COURTS

In re Groezinger, 904 N.Y.S.2nd 915 (N.Y. August 3, 2010).

- Statutory compatibility

The Respondent, Robert Groezinger, was convicted of possession of child pornography, in violation of 18 USC § 2252A(a)(5)(B). The New York State Bar Association sought to disbar the Respondent based on his felony possession of child pornography conviction, pursuant to Judiciary Law § 90(4). The Court found that the federal statute that formed the basis of the Respondent's conviction was sufficiently similar to New York Penal Law that the he should be disbarred. The statutes need not be identical to permit action. "Inasmuch as the respondent's conviction under 18 USC § 2252A(a)(5)(B) is essentially similar to conviction under Penal Law § 263.16, the respondent ceased to be an attorney and counselor-at-law upon his conviction of this felony pursuant to Judiciary Law § 90(4)".

COURTS OF APPEALS

Mark Fleming v. Texas, 323 S.W.3d 540 (Tex. Ct. App. Aug. 5, 2010).

- *Mens Rea*

The Defendant, Mark Flemming, pled guilty to a reduced count of aggravated sexual assault of a child younger than 14, pursuant to Texas Penal Code § 22.02(a)(1)(B)(iii), (2)(B). He was sentenced to 10 years in prison and 10 years community supervision. The prison term was suspended. The Defendant appealed his conviction claiming that the lack of *mens rea* makes the above statute unconstitutional. The Court of Appeals rejected the defendant's argument finding that the Defendant had no fundamental right to knowing the age of the child, that there was no due process violation and that the State of Texas has a legitimate government interest in protecting children from sexual abuse.

UNPUBLISHED CASES

William Michael Urnick v. Texas, No. 14-09-01047-CR, 2010 WL 3046229 (Tex. Ct. App. August 5, 2010).

- Failure to state a claim for appeal

The Defendant, William Urnick, pled guilty to possession of child pornography. The trial court deferred adjudication of guilt and placed the Defendant under community supervision for a period of 10 year. The State moved to adjudicate guilt alleging that the Defendant had violated the terms of his community supervision. The trial court agreed and sentenced the Defendant to 10 years in prison. The defendant appealed, however his attorney filed a notice with the

appellate court that the appeal was "wholly frivolous and without merit". The court agreed and refused to hear any appeal. The court did correct a number of errors in the judgment.

Teddy Eugene Morris v. Texas, No. 11-09-00163-CR, 2010 WL 3048996 (Tex. Ct. App. Aug. 5, 2010).

- 404b

The Defendant, Teddy Eugene Morris, was convicted following a jury trial of possession of child pornography. He also pled "true" to two felonies for enhancement purposes. The Defendant was sentenced to 80 years in prison. The Defendant appealed the admission, pursuant to Texas Rule of Evidence 404(b), of nine photographs from his cell phone. The defendant was found to have 27 pornographic images of his 14 year old niece on his cell phone. Also, found on his phone were 24 pornographic images of adult women. The State sought to have all of these images admitted to rebut the Defendant's claim that he took the photographs of his niece to "help her". The trial court allowed the State to present 9 on the images to the jury; finding that they were similar in how the woman were posed when compared to the images of his niece. The Appellate Court upheld this ruling after finding that the images were admitted for a proper purpose, to countermand the Defendant's claim of "helping" the victim, that they were not substantially more prejudicial than probative and that the trial court had conducted the appropriate review of the material.

Washington v. Derrick Lang Hunter, No. 38828-6-II, 2010 WL 3064972 (Wash. Ct. App. Aug. 5, 2010).

- Sentencing
- Sufficiency of the evidence
- Comparability of laws

The Defendant, Derrick Lang Hunter, was convicted following a bench trial of one count of failure to register as a sex offender, in violation of RCW 9A.44.130, and four counts of communications with a minor for immoral purposes, in violation of RCW 9.98A.090. He was found to have two prior sexual assault convictions, out of Oregon, and sentenced to 120 years in prison.

The instant convictions resulted from the defendant approaching 5 different 15 year old girls and sexually propositioning them under the guise of being a fashion photographer. In each case, the Defendant engaged the victims in sexual conversation and propositioned them.

The Defendant claimed on appeal that the evidence for conviction as insufficient, that his prior convictions should not be considered at sentencing because they lacked a *mens rea*, and that he did not receives sufficient notice that he would have to register as a sex offender. The appellate court held that the evidence presented, by the State, through the testimony of the victims, was sufficient to establish that his communication with them was for an immoral purpose. The Court also held that the Defendant's notice to register was sufficient even though it did not give a specific location, in the State of Washington, for him to register. Finally the Court found that the

Defendant's *mens rea* argument lacked merit. They held that the intent provisions of the Oregon statutes were sufficient to establish that the Defendant's prior convictions were sufficiently similar to Washington law to be used to enhance his sentence.

August 8-14, 2010

COURT OF APPEALS

Louisiana v. Kevin Dewayne Haltom, 46 So.3d 708 (La. Ct. App. Aug. 11, 2010).

- Sentencing

Defendant was charged in a multiple count indictment for indecent behavior with a juvenile, computer-aided solicitation of a minor, one count of attempted carnal knowledge of a juvenile, and seven counts of pornography involving a juvenile. Defendant entered a plea agreement to the first count with an open sentence and the remainder of the counts were dismissed. The trial court sentenced the defendant to seven years of hard labor, with one and a half suspended and five years of supervised probation and a fine. Defendant appealed claiming his sentence was excessive. The Appellate Court reviewed the trial courts carefully articulated factual basis in determining that the sentence was not an abuse of the trial court's discretion.

UNPUBLISHED CASES

In re Dunn, No. 63480-1-I, 2010 WL 3102681 (Wash. Ct. App. Aug. 9, 2010)

- Double Jeopardy
- Charging Decisions

Defendant was charged and convicted of one count of first-degree kidnapping, one count of first-degree child molestation, and six counts of child pornography. Defendant was sentenced for each separate count of possession of child pornography. In applying State v. Sutherby, 165 Wn.2d 870, 204 P.3d 916 (2009), the Appellate Court ruled that sentencing was in error. The Appellate Court ruled that the defendant could only be convicted of one count of possession regardless of the number of images or the number of children depicted in the images.

Stearman v. Indiana, No. 29A02-1002-CR-214, 2010 WL 3159827 (Ind. Ct. App. Aug. 11, 2010).

- Admissibility of Evidence

Defendant was convicted of Child Solicitation based on a Yahoo! chat with an undercover police officer. The defendant appealed the conviction claiming that the admission of the printed out chat was in error under Rule 901 because the printed out chat was not in its original form. The chat that was admitted at trial was a copy of the chat that the officer copied and pasted into a

Word document. The Appellate Court rejected the defendant's claim based in part upon Rule 1001(3) which holds any printout from a computer is admissible as an original if it viewable by sight, and reflects the date accurately. The officer testified that the chat was the entire chat between the defendant and the officer and the admitted document was the entirety of the chat. The Court rejected defendant's reliance on State v. Jackson, 488 F.Supp.2d 866 (D. Neb. 2007) where the court ruled the chat was inadmissible because there were portions that were missing and it was incomplete.

August 15-21, 2010

STATE SUPREME COURTS

Kansas v. Joshua L. Stone, 237 P.3d 1229 (Kan. Aug. 20, 2010).

- Prosecutorial misconduct
- Suppression

The Defendant was convicted, following a jury trial, of one count of aggravated indecent liberties with a child. It was alleged that the Defendant forced the Victim, his ex-girlfriend's daughter, to touch him in a sexual manner.

On appeal he alleges that the prosecutor committed misconduct by shifting the burned to him and improperly vouching for the credibility of the Victim. The Court held that while the prosecutor may have been in-artful with her argument, taken in context, she did not commit prosecutorial misconduct.

The Defendant also argues that the trial court erred in admitting the statement that he made to the investigating detective. During questioning, the investigating detective led the Defendant to believe that they had found semen on the Victims shirt and insisted that the evidence came from the Defendant. The Defendant also argued that the late hour of the interrogation and the fact that he had adopted facts from the investigating detective should have led to suppression of his statement. The Court held that the trial court did not appropriately evaluate the statement from a totality of the circumstances perspective. The Court reversed the conviction and remanded the case for a new trial. The Court also found that applying the totality of the circumstances review mandated that the Defendant's statement should be suppressed for the new trial.

COURTS OF APPEAL

North Carolina v. Ligon, 697 S.E.2d 481 (Ct. App. Aug. 17, 2010)

- Lay opinion testimony regarding photographs
- Hearsay to establish age of child
- Jury instructions

Convicted of first degree sexual exploitation of a minor and taking indecent liberties with a child based on photographs he took, the Defendant challenged the trial court's decision to permit witnesses to give their opinions regarding the photographic evidence; admit hearsay statements; deny his motion to dismiss the charges due to insufficient evidence; and not instruct the jury on second-degree sexual exploitation of a minor. On the first point, which was reviewed for plain error, he argued that each lay opinion as to what was depicted was improper and prejudicial because as "shorthand statements of fact", no specialized training was necessary to discern the pictures, and because the jury would have determined that the pictures were not sexual in nature. The court ruled that testimony regarding the State's witnesses' reactions to the photographs was admissible and not plain error. Assuming error in testimony to establish that the subjects of his pictures were unaware that they were being photographed, the Defendant could not demonstrate juror prejudice as a result. He also claimed that the detective's statement that the Defendant's explanation was inconsistent with what the photographs depicted, which the court held was not prejudicial error. On the second point, the Defendant argued that allowing statements of the alleged victim and babysitter was plain error, as they were hearsay and used to impeach the Defendant. The court held that the Defendant opened the door to allow the State to ask related questions, and that the "testimony merely corroborated a fact which the jury could deduce from other evidence." On the third point, the Court did not allow him to address his claim that the trial court erred in denying his motion to dismiss the charge of taking indecent liberties with a child, as he failed to renew his motion to dismiss at the close of all the evidence and therefore failed to preserve his claim. With regard to the charge of sexual exploitation of a minor, he argued that none of the photographs show any sexual activity and the court agreed. The definition of masturbation was not satisfied by a picture of the child's hand near her crotch area; nor did a picture of the Defendant's hand touching the child's shorts satisfy the definition of touching the "genitals, pubic area, or buttocks." While there is a reasonable inference that the Defendant "induced, coerced, encouraged, or facilitated" the child to touch herself, his use of the photographs to masturbate does not prove that the photographs depict masturbation or that masturbation can be inferred. Therefore, the court held that the trial court erred in denying the Defendant's motion to dismiss the charge of sexual exploitation of a minor and did not address his fourth point.

Chapman v Virginia, 697 S.E.2d 20 (Ct. App. Aug. 17, 2010).

- Jury instruction – proffered constructive possession of contraband instruction in possession of child pornography case

The Defendant was convicted of one count of possession of child pornography and nine counts of possession, second or subsequent offense. He appealed the trial court's denial of his motion to strike four of the ten counts and the jury instruction he offered. The statute defining "sexually explicit visual material" includes "such material stored in a computer's temporary Internet cache when three or more images or streaming videos are present…" The Defendant contended that it should be strictly construed to require the Commonwealth to introduce three or more separate images containing child pornography in order to support each conviction, therefore rendering the twenty images found in his temporary Internet cache insufficient to prove the ten counts. The court highlighted the legislature's intent that possession of a single photograph containing child pornography could constitute and offense and that multiple punishments could result from

multiple violations of the statute. With regard to the jury instruction, the Defendant disputed the trial court's finding that portions of his proposed jury instruction were inapplicable to the facts (such as an instruction regarding shared possession, which was not at issue) and could potentially confuse the jury (such as an instruction regarding the length of possession as immaterial, which was material and relevant). The court upheld the trial court's rulings and affirmed the convictions.

UNPUBLISHED CASES

Michigan v. Williams, No. 291363, 2010 WL 3238962 (Ct. App. Aug. 17, 2010).

- Miranda warnings
- Ineffective Assistance of Counsel
- Offense Variable scoring

The Defendant was found guilty for using a computer to commit a crime and for possession of child sexually abusive material. He challenged the admission of his statements to the police, but under plain error review, he failed to preserve the issue on appeal by not filing a motion to suppress. He also claimed ineffective assistance of counsel because counsel did not object to these statements made without having been read or waiving his *Miranda* rights. Given that the Defendant was free to leave and given that Miranda warnings are only necessary when there is a custodial interrogation, Miranda warnings were not required. Since Miranda warnings were not required, an objection would have been futile and would not meet the standard of ineffective assistance of counsel. With regard to the sufficiency of the evidence, the Defendant argued that it did not show that the person depicted was a child or that he knowingly possessed the material. Under de novo review, the Court cited a statute which states that expert testimony regarding the age of the child is admissible and is a legitimate basis for determining age if age is not otherwise proven. With regard to "knowing possession", the Court reasoned that the jury could have reasonably concluded that the Defendant acted deliberately, given that he admitted to downloading "photographs of females whom he believed to be 15 or 16 years old"; he admitted to signing up for a child pornography website; and it was confirmed that he "visited child pornography websites from which pictures were downloaded and remained accessible on his computer." He also challenged the score of 25 points for Offense Variable (OV) 13, arguing that the crimes all arose out of one criminal transaction. The Court stated that 29 images of possible pornography were found and that he committed multiple offenses involving the possession of child sexually abusive material; as such, the trial court did not err.

Worden v Alaska, No. A-10005, 2010 WL 3273926 (Ct. App. Aug. 18, 2010).

- Sentencing
- Grooming

The Court affirmed convictions of three counts of sexual abuse of a minor, first degree; six counts of sexual abuse of a minor, second degree; one count of indecent exposure, second degree; and unlawful exploitation of a minor. It reversed four merged counts of possession of

child pornography and remanded the case for resentencing. On remand, the trial court did not indicate that it was reconsidering his earlier sentence. The Defendant argued that the trial court was required to reconsider his sentence in its entirety in light of the acquittal; parts of the presentence report should now be stricken; the probation conditions restricting Internet access is now inappropriate; and that his composite sentence is excessive. The Court concluded that it was not an abuse of discretion to strike his conviction and sentence for possession but not reconsider sentencing. With regard to the presentence report and probation conditions, the Defendant failed to object in his original sentence appeal and on remand, and it was established that he groomed the victim for sexual activity by showing her pornographic images and videos on his computer; therefore, he failed to establish plain error. Finally, the Court reasoned that because the trial court found that the Defendant engaged in conduct that involved multiple offenses against two young victims over a significant period of time and that he had poor prospects for rehabilitation, the sentence should be affirmed.

August 22-28, 2010

STATE SUPREME COURTS

Disciplinary Counsel v. O'Malley, 935 N.E.2d 5 (Ohio Aug. 24, 2010).

- Attorney Misconduct

The Defendant plead guilty to and was convicted for knowingly using an interactive computer service to transport obscene materials in interstate or foreign commerce. The Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio recommended a one-year suspension from the practice of law and credit him for time served under the interim suspension of his license. However, the court concluded that due to the severity of the crime, as measured by the duration of his prison term and supervised release, and in light of mitigating factors, a two-year suspension with credit for time served was more appropriate.

COURTS OF APPEAL

Ohio v. Wood

- Competency - competing expert opinions
- Sentencing – aggravating and mitigating factors, including alleged mental retardation and cerebral palsy; unsworn testimony at sentencing hearing

Convicted of one count of importuning (soliciting a child under 13 years of age to engage in sexual activity), one count of gross sexual imposition, and ten counts of pandering sexually oriented material involving a minor, the Defendant appealed his aggregate term of 12 years in prison. He claimed that the trial court failed to consider mitigating circumstances in sentencing,

arguing that both doctors found him mentally retarded. In affirming, the court pointed out that both doctors' reports did not find that he suffered from mental retardation; one stated that the defendant was able to participate in meaningful discussions regarding his charges, potential consequences, plea-bargaining, and his explanation of his behaviors relative to the allegations, as well as communicate his desires and expectations sufficiently. Competing expert opinions regarding competency raised the issue of credibility, which is reserved for the trier of fact. As such, the appellate court deferred to the trial court's judgment regarding the mitigating factors of cerebral palsy and mental retardation. The Defendant contended that federal courts were troubled with the length of the sentences imposed for the possession of child pornography, but the court was concerned with whether the principles and purposes of its state sentencing statute were followed. The court pointed to the Defendant's guilty pleas for the receipt of and keeping a record of child pornography on his computer and for importuning and gross sexual imposition charges resulting from sexual activity with young girls, stating that an eight-year prison term for each violation, served concurrently, was lenient. The Defendant also argued that his Sixth Amendment Due Process rights were violated by allowing the investigating officer to speak about the facts of the case without being sworn. The court rejected his argument, citing that the Sixth Amendment permits the offender, prosecutor, victim or representative, and any other person (with the approval of the court) to present information relevant to the imposition of sentence in the case. Lastly, the Defendant claimed that his First Amendment right to free speech was violated by allowing the prosecutor to read portions of e-mail correspondence regarding having children for the purpose of incestuous relationships. The court concluded that the e-mails were relevant to the defendant's criminal activity and thus, reading them did not violate his free speech rights.

Rader v. Indiana, 932 N.E.2d 755 (Ct. App. Aug. 24, 2010).

- Search warrant – nexus between place searched and criminal activity
- Privacy interest in subscriber information of an internet account

The Defendant appealed a denied motion to suppress the evidence seized from the search of a home, arguing that there was no probable cause, the warrant did not establish a nexus between the place searched and the criminal activity, and that he had a constitutionally-protected privacy interest in his internet service provider (ISP) account information. On interlocutory appeal, the court reviewed *de novo* whether the issuing magistrate had a substantial basis for concluding that probable cause existed. The Defendant challenged the connection between the Internet Protocol (IP) address and the home searched, and complained that the probable cause affidavit failed to specifically list the actual IP address used. The court ruled that this was not a fatal omission. The probable cause affidavit stated that IP address used to log in to the account in question was, on the dates in question, assigned to the Defendants home. The court agreed that based on this information, the issuing magistrate could properly link the criminal activity of the account in question to the Defendant and to the Defendant's home; therefore, the magistrate properly issued the search warrant. The court declined to recognize a privacy interest in the subscriber information of an individual's internet account, stating that federal courts have rejected Fourth Amendment protection of such information and that its supreme court has held that a prosecutor can properly secure information from a third party via subpoena.

Missouri v Hall, 319 S.W.3d 519 (Ct. App. Aug. 25, 2010).

- Affirmative defense
- Jury instruction

On appeal from two charges of sexual misconduct involving a child, the Defendant contested that he knowingly exposed his genitals to a child because he actually exposed himself over the internet to an undercover officer. The defendant argued that the statute required exposure to an actual child under the age of fourteen. The statute at issue stated that it is not an affirmative defense that the other person was a peace officer masquerading as a minor. The court reasoned that the statute was intended to protect children from predators; it was intended to criminalize exposure of a defendant's genitals to a child or someone that the defendant believed to be a child. The court reviewed whether the evidence was sufficient for a reasonable juror to find each element of the crime beyond a reasonable doubt and denied the defendant's claims. He also requested plain error review of the jury instruction, asserting that it did not require the jury to find that he knew that the person he exposed himself to was under fourteen years of age. The court stated that the evidence overwhelmingly showed that the defendant thought the target was a child. Therefore, the court denied that any alleged error in the instructions resulted in a manifest injustice or miscarriage of justice and declined the review.

UNPUBLISHED CASES

Minnesota v Prow, No. A09-2012, 2010 WL 3306909 (Ct. App. Aug. 24, 2010).

- Affidavit – probable cause

Convicted of three counts of controlled substance crimes, the Defendant challenged the conviction, arguing that the affidavit supporting the search warrant for his home lacked probable cause. The Defendant allegedly physically and sexually abused his child and video recorded the same. He claimed that the affidavit supporting the search warrant for a video camera, digital camera, DVD discs, and other property items was based on multiple hearsay by the child's mother and the investigator. However, the investigator had personal knowledge of what the child, mother and child protection worker said; the informants were presumed credible; and the mother's statement of what the child told her was partly corroborated. Therefore, the court concluded that the judge issuing the warrant had a substantial basis for concluding that probable cause existed. The Defendant also claimed that the investigator misrepresented some facts and omitted other facts from the affidavit. The court reiterated the credibility and veracity of the child protection worker, upon whom the facts in question relied, and said the affidavit was free of deliberate misrepresentations or omissions and provided probable cause.

People v Brunt, No. F057452, 2010 WL 3328610 (Cal. Ct. App. Aug. 25, 2010).

- Sufficiency of evidence – knowledge of age
- Jury instructions – propensity evidence

After the Defendant was convicted of 28 counts of sex offenses and one count of possession of child pornography, he challenged the sufficiency of the evidence to sustain the possession count. He argued that there must be proof that the models depicted are children; otherwise, a required element of the offense is missing. The court concluded that the evidence, including the actual appearance of the girls and evidence presented by a pediatric nurse and police technician, was sufficient to prove that the images depicted girls under 18 years of age. Further, the evidence of the girls' appearances and apparent ages and the names of the websites the Defendant searched were sufficient to support an inference beyond a reasonable doubt that he knew the girls were less than 18 years of age. The Defendant also argued that the jury was not properly instructed on how to consider the evidence used to prove the possession count, thereby allowing the jury to consider the images as improper propensity evidence. The court determined that the evidence was admissible and necessary to prove the possession count; they were offered to show propensity to commit a current offense based on a prior offense as well as to prove the elements of the current (possession) offense; and the images would have had little impact on the jury's determination of credibility in light of the other evidence (including testimony by the defendant's daughters and physical evidence to support their testimony).

August 29-31, 2010

COURTS OF APPEAL

Grafmuller v Commonwealth, 698 S.E.2d 276 (Va. Ct. App. Aug. 31, 2010).

- Solicitation of a minor
- Mandatory minimum sentencing

The Defendant plead guilty via an Alford plea to soliciting a person he knows or has reason to believe was under the age of 15. The Defendant challenged the mandatory minimum sentence provision, which provides that if a defendant is at least seven years older than the child he knows or has reason to believe is less than 15 years of age, then the defendant shall be sentenced to a term of five to 30 years of imprisonment of which five years must be mandatory minimum term of imprisonment. The Defendant contends that the crime did not actually involve a child, so the mandatory minimum provision does not apply. Under *de novo* review, the court held that the solicitation statute does not require the victim to be an actual child. Similarly, the mandatory minimum sentencing provisions apply even if the victim is not actually a child. The conviction and sentence were affirmed.

UNPUBLISHED CASES

Panuski v Delaware, No. 88,2010, 2010 WL 3398945 (Del. Aug. 30, 2010).

- Double jeopardy – possessing and dealing in child pornography

The Defendant plead guilty to two counts of dealing in child pornography, and as part of the plea bargain, the State entered a *nolle prosequi* for 27 other counts of the same. Each count involved a separate video. After the trial court accepted the plea, the Defendant filed a Motion to Merge and/or Downgrade Counts for Sentencing, arguing that because the indictment did not specify dealing in or possession, he should be sentenced for possession. The trial court disagreed and the Defendant was sentenced for dealing in child pornography. On appeal, the Defendant argued that the conviction violated the Double Jeopardy Clauses of the United States and Delaware Constitutions, and that he should have been sentenced for possession rather than dealing in child pornography. The Defendant argued that the dealing in statute and the possession statute both punish the same wrongdoing of possession. However, the Defendant was not charged with the same offense under two statutes; he was charged with multiple offenses under the dealing in statute. The court maintained that at trial, the Defendant could have contested whether he dealt in child pornography and he could have withdrawn his guilty plea when given the opportunity. Instead, the Defendant declined to do so and accepted the plea bargain for dealing in child pornography. The sentence was affirmed.