

CSE Case Law Report August 2011

August 1 – 7, 2011

Unpublished Opinions

State v. Jennings, No. W2010–01484–CCA–R3–CD, 2011 WL 3330244 (Tenn. Crim. App. August 3, 2011).

- Sufficiency of Evidence
- Sentencing

Defendant was convicted of sexual exploitation of a minor and three counts of rape of a child, relating to three separate victims. Defendant claimed two errors, first that the statements of the victims alone were not sufficient to support convictions. Second, defendant argued that the trial court improperly imposed consecutive sentences. Factually defendant was an Uncle, by marriage, to the victims. Defendant and his wife, resided at the home of the victim's during the assaults. Defendant was at home alone with the victims on various occasions and would have the other children play outside or go somewhere so that he would be alone with an individual victim. Defendant would then sexually assault them, sometimes employing grooming techniques of pornography, other times using threats. At the time the children disclosed to the police the defendant went to the police station to try and turn himself in. Defendant made some incriminating statements, but never admitted to any of the sexual assaults. All three victims testified. Corroborative evidence was introduced through the police officer's and the defendant's wife testimony. The reviewing court determined that the children's statements along with the corroborative evidence were sufficient to support the convictions.

Additionally, the defendant challenged the imposition of the consecutive sentences, based upon the criterion number 5 from Tennessee Code Annotated section 40-35-115(b)(5). The court reviewed the defendant's conduct to three separate victims, the emotional and mental harm to the victims and agreed with the sentencing court that the defendant's conduct clearly met the requirements of factor 5 and determined that the imposition of consecutive sentences was appropriate.

August 8 – 14, 2011

State Courts of Appeal

Austin v. State, 67 So.3d 403, (Fla. Dis. Ct. App. August 9, 2011).

- Jury Instructions

Defendant challenged his conviction for showing obscene material to a minor. Defendant argued that the jury instructions were incorrect because the third element did not contain the phrase

“reasonable person”. The appellate court rejected the defendant’s contention, holding that the first two prongs satisfied the requirement.

August 15 – 21, 2011

State Courts of Appeal

People v. Harding, 928 N.Y.S2d 734 (N.Y. App. Div. August 16, 2011).

- Statutory Construction
 - SORA

Defendant challenged the court finding that his sex offender risk level was a level three. Specifically, defendant argued that he should not have been assessed an additional 30 points for having three or more victims because he was convicted of child pornography. The reviewing court disagreed and determined that it was proper for a trial court to conclude that children depicted in child pornography are victims under the risk factors and that it was proper for the court to rely upon a description of those images in a report from a federal probation officer.

Unpublished Opinions

People v. Keister, No. C065219, 129 Cal.Rptr.3d 566 (Cal. Ct.App. August 15, 2011).
--Certified for Partial Publication--

- Constitutionality
 - Commerce Clause
 - Vagueness
 - First Amendment
 - Equal Protection
 - Single Subject
- Statutory Construction
- Grooming evidence

Defendant was convicted of multiple counts of committing a lewd act on a child, one count of battery, and multiple counts of contacting or communicating with a minor with the intent to commit an enumerated sex offense. The majority of defendant’s appeal attacked the constitutionality of the underlying statute for contacting or communicating with a minor. The court rejected defendant’s contention that the statute violated the commerce clause as it would restrict the movement of anyone who was interested in a child. The court noted the specific intent required to actually commit the underlying offense with a child. Defendant unsuccessfully argued that the statute was void for vagueness based on hypothetical situations. The court noted that the defendant’s situations were not an issue of vagueness, but rather an issue of reasonable doubt at trial. Likewise, the court rejected the defendant’s contention that the statute limited his ability speak. Defendant argued that the statute would criminalize any communication between a

child molester and any child. The court disagreed noting that the only conduct that would be criminalized would be the communication intending on facilitating a sex offense. The court also rejected the defendant's Equal Protection claim, declining to find that the statute criminalizes a thought crime. Again the court noted that the statute required an act of communicating and having the intent to commit a sex crime. The court also declined to follow defendant's final challenge that the statute violated the single subject rule. The court ruled that the common purpose of Proposition 83 (of which the statute was a part) was to protect citizens of California from sex offenders. Finally, the court also rejected the defendant's final claim that the offense was a lesser included of the crime of arranging a meeting with a minor for the purpose of engaging in lewd or lascivious behavior. In applying the elements test, the court concluded the greater offense could be committed without committing the lesser offense.

This case highlights great grooming evidence and grooming steps.

Petrik v. State, No. A11-150, 2011 WL 3557874 (Minn. Ct. App. August 15, 2011).

- Involuntary Plea
- Ineffective Assistance of Counsel

Defendant appealed the trial court's denial of his petition for post-conviction relief following his guilty plea to six counts of soliciting a child to engage in sexual conduct. During the course of his bail, defendant was given certain conditions relating to his ability to have contact with his children as well as the victim who was adopted. Initially, defendant was to have no contact with any children, then it was modified to allow him to have supervised visits with his biological children, then modified a second time to allow him to live with his wife and children (his adopted son was placed in foster care at that point). Defendant claims that these conditions were intentionally placed on him by the court to force him to plead guilty. The reviewing court dismissed these allegations, pointing out that defendant had them modified in his favor at least twice. Secondly, defendant claimed a variety of errors under the auspices of ineffective assistance of counsel. The first related to the attorney informing the defendant that the sentence for the offense was 39 months when it was really 36 months. The appellate court ruled there was no prejudice to the defendant based on the 3 month mistake. Defendant then claimed his attorney was ineffective for not going to trial. Defendant claimed that he was pressured by his attorney because his attorney wanted more money and said so on the record. This argument was also rejected as the court considered it part of the attorney's duty to inform his client about the contractual relationship. Finally, defendant argued his attorney was ineffective because he failed to raise possible defenses and instead chose to use them as mitigating circumstances for sentencing. The appellate court reviewed the very thorough colloquy with the attorney about the defenses versus using them as mitigating factors. The reviewing court determined none of the issues the defendant raised had merit.

State v. Bell, No. COA11-40, 2011 WL 3570064 (N.C. Ct. App. August 16, 2011).

- Prosecution Error
- Sentencing

Defendant was convicted of a sex act with a child who was thirteen to fifteen years old and the defendant is more than four but less than six years older. Defendant appealed claiming two errors. First that the prosecutor made three improper statements during closing argument. Second, that the sentencing court erred in requiring the defendant to enroll in lifetime satellite-based monitoring. The Court rejected the defendant's contention that the prosecutor's statement that there was no evidence to the contrary to how a witness testified, was the prosecutor commenting on the defendant's failure to testify. The reviewing court held that such statements, uncontradicted or unrebutted, do not rise to the level of a prosecutor commenting on a defendant's silence. As to the second error, the state conceded that the defendant was committed of a crime that was not one of the crimes enumerated in the registration statute. The appellate court removed that condition from the defendant's sentence.

Preston .v State, No. 03–11–00012–CR, 2011 WL 3659089 (Tex.App. August 16, 2011).

- Probation Revocation

Defendant was convicted of possession of child pornography and given supervision. While on supervision he admitted during a group counseling session that he had looked at adult and child pornography, which was a violation of his supervision. He admitted the same conduct to his probation officer. The probation officer testified to that effect at the hearing to revoke the defendant's supervision. The court found that by a preponderance of the evidence standard the defendant violated his supervision and sentenced him to 10 years in prison. Defendant argued that the sentencing court's finding of a violation based only on the probation officer's recitation of defendant's admission was not sufficient to support finding the images the defendant viewed were pornographic. Relying on *Cunningham v. State*, 488 S.W.2d 117, 121 (Tex.Crim.App. 1972), the reviewing court determined that the defendant's admissions were sufficient.

August 22 – 28, 2011

Unpublished Opinions

Outland v. State, No. 09–10–00168–CR, 2011 WL 3925623 (Tex. App. August 24, 2011).

- Statutory Construction
- Sentencing

Defendant challenged the imposition of the “two-strike policy” for repeat sex offenders under Tex. Penal Code Ann. § 12.42(c)(2), for a prior conviction in Utah for sexual exploitation of a child. Defendant argued that the elements for the Utah conviction were not sufficiently similar to the corresponding Texas statute and the mandatory life sentence should not apply. The reviewing court disagreed and reviewed the Utah statute defendant was convicted under and determined that there was no requirement that the statutes be identical. The court stated all that is

required is that they are substantially similar. The reviewing court determined that the Utah and Texas statutes were substantially similar.

Chavis v. State, No. 08–10–00025–CR, 2011 WL 3807747 (Tex. App. Aug. 26, 2011).

- Search and Seizure
- Sufficiency of Evidence

Defendant was convicted of possession of child pornography based on his use of Limewire. At the appellate level the defendant argued that his motion to suppress should have been granted by the trial court based on the police officer's use of the PHEX program to "intercept" his communications through Limewire. The Appellate Court reviewed Article 18.20 of the Texas Code of Criminal Procedure to determine whether the police conduct constituted an interception of a communication. Based on a review of the parallel federal statutory scheme and case law on the Electronic Communications Privacy Act, the Appellate Court rejected the defendant's argument and held that the files searched on the defendant's computer were not in flight, which would required to consider them a communication under the Texas statute. The court also rejected the defendant's claim that the police issuance of a subpoena duces tecum from the grand jury was improper. The court agreed with the prosecution that the defendant lacked standing to challenge the subpoena. The Court also rejected defendant's post-plea argument that his possession was not intentional based on statements made at the time of sentencing.

August 29 – 31, 2011

State Courts of Appeal

State v. Stocking, 131 Conn. App. 81 (Conn. App. Ct. August 30, 2011).

- Motion to Withdraw Guilty Plea
 - Involuntary Plea
 - Ineffective Assistance of Counsel
 - Search and Seizure

Defendant entered an *Alford* plea to possession of child pornography. The case arose out of a call for a domestic incident at the defendant's house between the defendant and his step-father. During the investigation of the underlying domestic incident the police saw child pornography in plain view in the defendant's bedroom. Defendant also made incriminating statements to the police about his sexual interest in children. Pursuant to the plea, the prosecutor informed the court that the defendant would not face charges for the domestic incident nor face federal prosecution for the child pornography. The trial court conducted a lengthy review of the defendant's rights and his understanding of the process, including the conduct of his attorney during the acceptance of the plea. Ultimately, the court accepted the factual basis and accepted the plea. Prior to the sentencing the defendant filed a motion to withdraw his guilty plea. He

claimed ineffective assistance of counsel, that the police illegally entered his home at the time of arrest and that the images and subsequent statements were the fruits of the illegal arrest. He claimed the defense attorney coerced him into pleading guilty, in part by deceiving him and failing to advise him of the legal ramifications of the case. The trial court conducted an evidentiary hearing on the defendant's claims and ultimately rejected them in denying defendant's motion. The reviewing court determined that based on the record it was abundantly clear that the defendant's attorney apprised him of the legal issues in the case. The appellate court also focused on the benefits inured to the defendant through the guilty plea: avoiding federal prosecution and the additional domestic abuse charges. Additionally, the reviewing court concurred with the trial court's conclusion that the defendant's motion to withdraw his guilty plea was not based on ineffective assistance of trial, but rather the defendant's subjective view that he would be successful on a motion to suppress. The appellate court agreed that was not the proper basis for a motion to withdraw a guilty plea.

Unpublished Opinions

DeLeon v. State, No. 13–09–00606–CR, 2011 WL 3847180 (Tex. App. August 30, 2011).

- Sufficiency of Evidence
- Other Acts Evidence
- Ineffective Assistance of Counsel

Defendant appealed his conviction for twenty counts of possession of child pornography. Defendant claimed a multitude of errors by the trial court. Factually, defendant lived with his brother at his mother's home. Defendant and his brother shared a computer. His brother was arrested for sexually assaulting their niece. Defendant's mother consented to a search of the house, which included the computer. A forensic examination of the computer revealed a file with the name "AD's files" containing multiple images of sex acts involving boys. Defendant maintained, and his brother also testified, that all the files were his brother's. The defendant's brother also testified that he had access to the computer and would have saved the files in something that did not indicate what they were. The prosecution introduced 5 chats, purportedly from the defendant indicating his interest in males, in addition to various pornographic photos of the defendant found on the computer. The jury rejected the defendant's defense blaming his brother for the crimes.

Defendant claims that the evidence was insufficient to find him guilty. The appellate court reviewed the evidence and determined that it would be possible for a jury to find the defendant guilty and reject his defense and explanation which the jury in the case did. Secondly, defendant argued that it was in error to admit the chats and pornographic photographs. As to the chats, the court did not consider those as the defense failed to object at trial. As to the photographs, the court determined that it was proper evidence considering the defense raised the argument that it was the brother. Clearly, the prosecution had the right to bring up evidence that supported the chats and indicated the defendant's responsibility. Finally, as to the defendant's ineffective assistance of counsel claim the appellate court ruled that he did not develop a proper evidentiary record as to the issue of ineffectiveness for failing to object to the admission of the chats.