

CSE Case Law Update

December 2009

Minnesota v. Johnson, 775 N.W.2d 377 (Minn. Ct. App. Dec. 1, 2009).

- Statutory Construction
 - Definition of Sexual Conduct in Child Pornography
 - Other Acts Evidence

Defendant was convicted of possession of child pornography. The court reversed the conviction finding that the trial court erred in considering the subjective viewpoint of the possessor in determining whether an image qualified as child pornography. The court reviewed the definition of statutory construction and ruled that the proper review was objective rather than subjective in determining whether an image included sexual conduct. Additionally, the court rejected the use of other acts evidence to determine whether sexual conduct existed, ruling that a court must rely on the four corners of the image.

Gill v. Missouri, 300 S.W.3d 225 (Mo. Dec. 1, 2009).

- Ineffective Assistance of Counsel

In a death penalty case the Missouri Supreme Court ruled that the defense attorney's failure to review the victim's computer, which contained child pornography, rose to the level of ineffective assistance of counsel at the sentencing phase. The court remanded for a new sentencing hearing based on the ineffective assistance claim.

Massachusetts v. Bell, 917 N.E.2d 740 (Mass. Dec. 4, 2009).

- Sufficiency of Evidence
- Statutory Construction
 - Vagueness
- Duplicious Indictment
- Jury Instructions
- Ineffective Assistance of Counsel

Defendant was convicted of solicitation and attempted rape of a child. The Massachusetts Supreme Court reversed the conviction for attempted rape, but upheld the solicitation conviction. The basis of the reversal focused on the failure of the prosecution to prove defendant took an overt act toward the commission of the rape. While the court agreed defendant certainly met the requirements of solicitation, he did not take additional steps that were close in proximity or time in order to establish the attempted rape conviction. The court did not consider the other issues as its decision made them moot.

Louisiana v. Slocum, 26 So.3d 926 (La. Ct. App. Dec. 9, 2009).

- Sentencing

Defendant pleaded guilty to a reduced charge of obscenity stemming from an Internet sting where he believed he was chatting with a 15-year-old girl. Defendant was sentenced to three years hard labor. Defendant appealed his sentence on the ground it was excessive. The court denied defendant's appeal using a two-prong test including a review of the factual record and constitutional excessiveness. In reviewing the facts of the case and the defendant's conduct and benefit of a plea bargain to a lesser charge, the court refused to consider the imposition of the sentence an abuse of discretion.

Kansas v. Murphy, 220 P.3d 592 (Kan. Dec. 11, 2009).

- Sentencing

The Supreme Court of Kansas rejected defendant's contention that the use of his prior convictions at sentencing for his current conviction of indecent solicitation of a child violated *Apprendi v. New Jersey*. The court relied upon *State v. Fisher*, 203 P.3d 1269 (2009), which had already considered and rejected this challenge.

Howell v. Indiana, 921 N.E.2d 503 (Ind. Ct. App. Dec. 9, 2009).

- Sufficiency of Evidence

Defendant was charged with child solicitation following an online investigation. After his arrest he was released on bond with a condition of no internet usage. While defendant was on bond an officer started receiving messages from defendant's screen name, but that purported to be from another person. The resulting investigation revealed that defendant gave his password and screen name to another person to send messages to the officer to build a defense that someone else had used the account. Defendant was charged with obstructing justice. Defendant appealed his conviction claiming that the state failed to prove the existence of a false record, document or thing under the Indiana statute. The court disagreed and ruled that the messages sent by the third party at the behest of the defendant constituted false records, documents or things.

Matiatos v. Georgia, 688 S.E.385 (Ga. Ct. App. Dec. 11, 2009).

- Improper Evidence
- Ineffective Assistance of Counsel

Defendant was convicted of 27 counts of sexual exploitation of a child based on possession of computer files depicting children engaged in sexually explicit conduct. Defendant appealed claiming five different issues of ineffective assistance and denial of a motion for a mistrial based on a pre-trial motion to bar certain evidence. As to the latter issue of introduction of the barred evidence, a tape recording, the court ruled that the

curative instruction given by the trial court cured the error. As to the argument claiming five additional ineffective assistance of counsel issues, the court ruled defendant failed to show any actual prejudice from the errors and was not entitled to any relief.

Warner v. Indiana, No. 29A04-0907-CR-420, 2009 Ind.App. Unpub. LEXIS 1996 (Ind. Ct. App. Dec. 11, 2009).

- Jury Instructions

The court rejected defendant's claim that conviction for criminal deviate conduct should be overturned because the trial court instructed the jury that a child under the age of 16 cannot consent to sexual intercourse or criminal deviate conduct. The court ruled that the instructions should be taken as a whole and in reference to each other, and will not require reversal unless the entire set of instructions misleads the jury. Additionally, there was another instruction that required that the state prove the act included force, as opposed to consent of the victim. The court ruled that the difference was not prejudicial.

California v. Hughes, No. G040721, 2009 Cal.App. Unpub. LEXIS 10085 (Cal. Ct. App. Dec. 21, 2009).

- Sufficiency of Evidence

The court denied defendant's challenge to the sufficiency of the evidence supporting his convictions for forcible lewd acts and aggravated sexual assault. Specifically, defendant claimed the prosecution failed to show force, fear, duress or menace to sustain the forcible lewd act conviction. The court ruled that defendant's threat of harm to the victim if she told anyone and threatening her with a staple gun satisfied that requirement.

Arizona v. Paredes-Solano, 222 P.3d 900 (Ariz. Ct. App. Dec. 24, 2009).

- Indictment
 - Duplicitous

Defendant was convicted of two counts of sexual exploitation of a minor under fifteen years of age and one count of child molestation. The court upheld defendant's conviction for child molestation but reversed and remanded his convictions for sexual exploitation of a minor. The court's decision was based on the language of the indictment, which included conduct in two separate subsections of the statute: creation of visual images and their subsequent distribution and viewing. The court ruled that because the indictments contained both they were duplicitous on their face. The court also found that defendant suffered actual prejudice because he raised different defenses and the trial court took no curative action to ensure a unanimous decision.

Louisiana v. Hearn, 30 So.3d 873 (La. Ct. App. Dec. 29, 2009).

- Sentencing

Defendant pleaded guilty to two counts, of 12 total, of pornography involving juveniles. He was sentenced to 100 months' imprisonment on each count, to run concurrent with each other. After the court reviewed the trial court's factual basis for the sentence, it rejected defendant's contention that the sentence was excessive and determined it was not an abuse of discretion.

Michigan v. Waclawski, 780 N.W.2d 321 (Mich. Ct. App. Dec. 29, 2009).

- Interstate Detainer Act
 - Speedy Trial Demand
- Other Acts Evidence
- Search and Seizure
- Improper Evidence
- Sentencing

Defendant appealed his convictions for criminal sexual conduct, and using a computer to produce child sexually abusive material. Defendant claimed multiple errors. The court ultimately rejected each of the defendant's contentions. Defendant, who was arrested in Illinois, claimed a violation under the Interstate Detainer Act, which the court rejected on the basis that the delay did not prejudice the defendant's ability to prepare a defense. The court also rejected defendant's claim that admission of evidence of defendant's chats with undercover police officers was in error. The court ruled that the chats were properly admitted to demonstrate intent, identity, and common scheme, plan or system. The court noted the commonality between the age, gender, specific acts, and body type defendant sought out. The court also noted the limiting instruction given by the trial court as to the use of the other acts evidence. The court also rejected defendant's claim of improper sentencing by an unfounded upward departure by the trial court. The court reviewed the trial court's determination and found no error. Finally, the court rejected defendant's final series of pro se arguments relating the search and seizure of the evidence in the case.

Pennsylvania v. Jarowecki, 985 A.2d 955 (Pa. Dec. 30, 2009).

- Sentencing
 - Statutory Construction

Defendant successfully challenged the imposition of second offenses for multiple counts of the same indictment. The Pennsylvania Supreme Court ruled that multiple convictions within the same prosecution do not trigger enhancing factors under the sentencing statute. The court ruled that in order for the enhanced penalties to apply, the triggering offense must be a prior conviction.

State v. Luman, 223 P.3d 1041 (Or. Dec. 31, 2009).

- Search and Seizure
 - Privacy Rights

The Oregon Supreme Court reviewed and reversed an Appellate Court decision that overturned a trial court order denying a defendant's motion to suppress evidence. Factually, the defendant owned a restaurant and had a television in the kitchen of the restaurant. He instructed staff not to use the television. One time, when the defendant was out of the facility the staff turned on the television and a VCR that was attached began to play a movie that showed images from the female restroom within the restaurant. The staff found wires from the VCR going into the female bathroom. The staff found additional video tapes. All of the tapes were turned over to the police department. Approximately 48 different victims were found on the tape. The police viewed the tapes turned over by the staff without a warrant. Defendant challenged the police reviewing the tapes without a warrant as a violation of his 4th Amendment right to privacy. The Oregon Supreme Court disagreed and held that the private search by the staff frustrated the defendant's privacy right in the videotapes, both under the Oregon Constitution and the federal constitution.