CSE Case Law Update December, 2010

December 1-11, 2010

State Supreme Courts

North Dakota v. Huether, 790 N.W.2d 901 (N.D. Dec. 2, 2010).

- Search & Seizure
- Miranda

Defendant was convicted of gross sexual imposition and filed this appeal alleging violation of his 4th Amendment and Miranda rights. Defendant lived in his own home with a child and child's mother (also Defendant's girlfriend). Child reported oral sodomy in the basement on the home. Law enforcement entered the house to view the scene, believing the house belonged to the child's family and that the mother had full access. While in the office, the officer saw pornography, a computer, video equipment and a utility bill in Defendant's name. Child's mother then stated that Defendant lived in the house but the office was "off limits." A search warrant was obtained, executed and evidence seized.

Defendant was questioned five weeks later, told he was not under arrest, free to leave and did not have to speak with police officers. No Miranda warnings were given and defendant made some incriminating statements. During the interview, one of the officers told Defendant there were other police officers in the home.

Defendant moved to suppress evidence seized from his home and his statements. The Court affirmed stating that the initial entry into the basement was not a violation of the 4th amendment since the officer "reasonably believed the child's mother had authority over the premises." Although the Defendant was not in custody for interrogation purposes; once law enforcement said there were other officers in the house the questioning became "police dominated." Therefore, statements made after being informed of other officers in the home should have been suppressed. Statements made before that knowledge, including admissions of oral sodomy, were correctly admitted.

Unreported Cases

Stelmack v. Florida, No. 2D09-3354, 2010 WL 4907468 (Dist. Ct. App. Dec. 3, 2010).

- Sufficiency of evidence

Defendant was convicted on five counts of possession of child pornography. He had possession of images which included the body of a nineteen year old female with her genitalia lewdly exposed and the faces of preteen girls. Defendant argued that this did not demonstrated 'sexual conduct by a child" and therefore were not child pornography. It was undisputed that the lewd exhibition of genitals were those of any adult and the

appellate court reversed the trial courts denial of Defendant's motion for judgment of acquittal.

Murray v. Texas, Nos. 05-09-00716-CR, 05-09-00717-CR, 2010 WL 4924913 (Ct. App. Dec. 6, 2010).

- Sentencing
- Medical records
- Ineffective assistance of counsel

Defendant pled guilty to possession of child pornography, indecency with a child and aggravated sexual assault of a child. He claims his motion to suppress should have been granted and that he received ineffective assistance of counsel. The trial court pronounced an oral sentence of 30 years imprisonment on two of the charges and 10 years imprisonment on a third charge. The written sentence did not reflect this and the appellate court stated that the oral sentence controls over the written sentence and that a single sentence on multiple convictions was improper.

Before sentencing, defendant was treated for sexual issues and this evidence was brought before the Court. Defendant stated his motion to suppress this evidence should have been granted because this was privileged information. The appellate court affirmed since there is no physician-patient privilege in criminal proceedings and treatment for sexual issues did not fall into any exception.

Defendant claimed his attorney was ineffective for failing to investigate, interview witnesses, to timely consult experts and to prepare for trial. The court stated defendant failed to establish this.

Michigan v. Acton, No. 289379, 2010 WL 4970754 (Ct. App. Dec. 7, 2010).

- Sufficiency
- Double Jeopardy
- Prosecutorial Misconduct

Defendant was convicted of three counts of possession of child sexually abusive material and using a computer to commit a crime. Defendant was found to be in possession of child pornography after his wife discovered it on defendant's personal laptop. He claimed that the evidence was not sufficient since the files were located in TIFs and there was no evidence that the photos had been viewed, etc. The court found the evidence sufficient for possession since the actions of defendant included purchase of the laptop for the purpose of viewing child pornography, hiding the laptop and checking website for such items.

Defendant also claimed that two of his convictions should not stand because each photo should not be one unit of possession. He argued that one Web page could have several images but this should still be only one unit of possession. The Court stated that even if

true, the evidence showed that multiple search terms were used and each image had been "clicked on" by the user so they could view the larger image.

Defendant claimed prosecutorial misconduct for a number of reasons including: burden-shifting, misrepresenting testimony and improper questioning. The court did not find such misconduct.

Minnesota v. Prince, No. A10-142, 2010 WL 4941480 (Ct. App. Dec. 7, 2010).

- Sentencing

Defendant pled guilty and was sentenced to 60 months for possession of child pornography. At the time of the offense, the defendant was on probation of possession of a firearm by a convicted felon. His probation was revoked at the time of his child pornography conviction. The Court sentenced him as an upward departure from the guidelines; however, failed to state reasons for this. The court abused its discretion and the case was remanded for resentencing.

Clager v. Ohio, No. 10-CA-49, 2010 WL 5110082 (Ct. App. Dec. 8, 2010).

- Sex offender classification

Defendant was convicted in Texas of possession of child pornography and subsequently moved to Ohio. He was reclassified in his sex offender status by the state of Ohio and appealed this saying it was unconstitutional. The court found that out-of state offenders were not subject to reclassification since it's a violation of the separation of powers doctrine.

De La Paz v. Texas, Nos. 05-10-01185-CR . . . 05-10-01188-CR, 2010 WL 4983602 (Ct. App. Dec. 9, 2010).

- Bonds

Defendant was charged with sexual assault of a child, online solicitation of a minor and possession of child pornography and granted a bond totaling $300,000. Defendant filed this appeal after the trial court denied his habeas corpus application. According to testimony from the defendant's wife, the family could raise $10,000 for the bond. However, after hearing that the defendant had no prior criminal record, had been in Texas two years, traveled to Memphis three days a week for work and lived near an elementary school, the Court reduced the bond by $100,000.

Defendant did not meet his burden showing the bond was excessive and the appellate court found the trial court did not abuse its discretion.

Green v. Nevada, No. 54650, 2010 WL 5135614 (Nev. Dec. 10, 2010).

- Nolo Contendere Plea

Defendant pled nolo contendere to numerous counts involving child pornography and later appeal this judgment of conviction. The court rejected his claims and affirmed the conviction.

December 12-18, 2010

Courts of Appeals

Ponsler v. Indiana, 939 N.E.2d 133, (Ct. App. Dec. 17, 2010).

- Evidence

Defendant appealed his two child solicitation convictions claiming that the evidence was insufficient. The Defendant engaged in sexually explicit "chats" online with a detective posing as a fifteen year old girl. The Appellate Court considered the probative evidence and reasonable inferences and did not assess witness credibility. The Court found the evidence sufficient since Defendant admitted to talking with "underage girls," receiving pictures of young girls and inquiring as to visiting with a girl as "long as he would not get in trouble."

Unreported Cases

Tennessee v. Webb, No. M2009-01364-CCA-R3-CD, 2010 WL 5140737 (Crim. App. Dec. 14, 2010).

- Sentencing

Defendant pled guilty to sexual exploitation of a minor and was sentenced to eight years in prison. Defendant moved to withdraw this plea stating he believed he would receive parole and be returned to federal custody on another matter. During the plea, the Court explained defendant's Boykin rights and defendant indicated his understood those rights and was giving them up to enter his plea.

Later, defendant wrote a letter to the course requesting withdrawal of the plea and the court scheduled a hearing. At the hearing, Defendant agreed he read his sentence and signed the plea agreement form. However, Defendant stated there was an unconstitutional search and seizure, a violation of his right of self-incrimination and ineffective assistance of counsel. The Court stated that there cannot be an appeal from a guilty plea unless "explicitly reserved with the consent of the state and of the court the right to appeal a certified question of law that is dispositive of the case." Since that was not done the Defendant has waived review of his self-incrimination and unconstitutional

search and seizure claims. The ineffective assistance claim was raised for the first time and cannot be reviewed.

Since the defendant filed his motion after sentence imposition, his plea could only be withdrawn to correct a manifest injustice. There is no evidence of this and the Court found that the trial court acted within its discretion in denying Defendant's motion.

Crosthwait v. Texas, No. 02-09-00375-CR… 02-09-00378-CR, 2010 WL 5118130, (Ct. App. Dec. 16, 2010).

- Unconstitutionality of Statute
- Evidence

Defendant was convicted for possession of child pornography and possession with intent to distribute child pornography. He was sentenced to thirty years and now claims that the penal code section is facially unconstitutional and that improper evidence was admitted during the punishment phase of trial.

Although Defendant claimed the code section was vague and overbroad, he cannot raise this claim for the first time on appeal and the Court overruled this point.

Defendant also claimed that the court abused its discretion when evidence depicting bestiality was introduced which he claimed was more prejudicial than probative. This evidence came in during testimony from a detective regarding images found on Defendant's laptop including: child & adult pornography, bestiality images and emails. Given the large amount of child pornography that was admitted during the case in chief, one exhibit of bestiality was not considered to have violated Defendant's rights. Further, the evidence during the guilt-innocence phase supported the jury's verdict and the trial court gave an extraneous offense jury instruction. Therefore, the judgment was affirmed.

New Jersey v. McCalip, 2010 WL 5109815 (Super. Ct. App. Div. Dec. 16, 2010).

- Sentencing

Defendant was charged with possession of child pornography and distribution of child pornography. He pled to possession only and as part of the plea the State did not object to his application for admission into a pre-trial intervention (PTI) program. Defendant told police that he "purposefully" sought out child pornography and was sexually aroused by the porn. However, during his pre-sentence psychiatric evaluation he denied knowingly downloading the pornography as being sexually aroused. The prosecutor denied his application to PTI and the Defendant appealed this decision.

It was not shown that the prosecutor's decision was a "patent and gross abuse of discretion." In fact, it was the Defendant's contradictory statements that were the basis of the rejection to PTI. Judgment affirmed.

December 19-25, 2010

Unreported Cases

Higerd v. Florida, No. 1D09-4028, 2010 WL 5540955 (Dist. Ct. App. Dec. 21, 2010).

- Search & Seizure

Defendant appeals from the denial of his motions to suppress. Defendant was flying from Pensacola to Colorado and checked one suitcase which was physically searched by TSA. During this search suspected child pornography was discovered and defendant was detained. Defendant moved to suppress this evidence claiming the bag was checked outside his presence and was a Fourth Amendment violation. The trial court denied his motion and the appellate court affirmed stating that these searches were "no more intrusive or extensive than necessary." The search did not exceed the officer's authority and was based on proper TSA protocol.

Louisiana v. Galatas, No. 2010 KA 0980, 2010 WL 5464829 (Ct. App. Dec. 22, 2010).

- Sentencing

Defendant was convicted of possession with intent to distribute marijuana and possession of child pornography and sentenced as a fourth-felony habitual violator. He appeals and the court vacated the habitual offender adjudications and sentences because evidence at the hearing did not clearly establish the Defendant's status. The State called an employee of the Probation and Parole who had a computer printout of the Defendant's criminal recorded but was not the custodian of records. The witness could not establish all requirements under State v. Payton, 810 So.2d 1127, (2002); hence, the information was insufficient to establish Defendant's identity. The habitual offender adjudication and sentences were vacated and the case remanded for sentencing.

Colorado v. Rabes, No. 07CA2176, 2010 WL 5248582 (Ct. App. Dec. 23, 2010).

- Search & Seizure
- Sentencing

Defendant was convicted of sexual assault on a child and sexual exploitation of a child (felony and misdemeanor) and appeals alleging his motion to suppress should have been granted and that sentence was incorrectly imposed. A tip led law enforcement to Defendant and to images on his computer including sexual contact between Defendant and a four year old girl. He was charged with five counts including two felony and one misdemeanor charges of sexual exploitation of a child. He was sentenced consecutively

Defendant believed his motion to suppress should have been granted because the affidavit to support the search warrant did not describe the child pornography images. The appellate court found that a magistrate must look at the totality of the circumstances and found probable cause existed from "reasonable inferences" from the affidavit.

Next, Defendant argued that his sentence should not be imposed consecutively because the convictions were based on "identical evidence." The court found no error since each image is a "discrete act of victimization of the child."

Walker v. Texas, No. 01-09-00902-CR, 2010 WL 5187711 (Ct. App. Dec. 23, 2010).

- Sentencing

Defendant pled guilty to child pornography and adjudication was deferred. Subsequently, he was arrested for DWI and the State filed a motion for adjudication of guilty. After a hearing, the trial court adjudicated the Defendant guilty and sentenced him to ten years in prison. Next, Defendant filed a motion "for shock probation" which the court denied. The appeal claimed abuse of discretion by the trial court. No such abuse was found by the appellate court.

Utah v. Newland, No. 20080977-CA, 2010 WL 5186660 (Ct. App. Dec. 23, 2010).

- Search & Seizure

Defendant appeals his motion to suppress child pornography found on his laptop computer claiming it was tainted by a "prior illegal search." Law enforcement officers discovered Defendant's computer at a crime scene along with other stolen property. One of the responding officers tied the computer to Defendant who had reported that his laptop was stolen. When the officer first located the computer he notice a document on the screen, he decided to look at that document for evidence from the original crime scene. He found thumbnail images of nude underage females and stopped his search.

Defendant arrived at the police station, was asked if a search could be done on the computer and he consented to the search; however, he was not told of the suspected child porn. After a forensic exam, child pornography was discovered and the defendant charged with sexual exploitation of a minor.

The Court affirmed the trial court saying the consent was voluntary and was not "obtained by police exploitation of a prior illegality." Defendant agreed that he gave his consent voluntarily but said it was obtained after an illegal search. All parties agreed that the initial search was illegal; however the State said the consent was not obtained through any exploitation.

The Court looked at three factors in affirming the trial court: temporal proximity, intervening circumstances and purpose and flagrancy. Although the officer asked for consent immediately after the illegal search, defendant's lack of knowledge of such

search decreased the temporal proximity. There were no intervening circumstances. Finally, although the officer's actions were negligent they were not purposeful or a flagrant violation of Defendant's rights.

Ward v. Texas, No. 02-10-00068-CR, 2010 WL 5186783 (Ct. App. Dec. 23, 2010).

- Sentencing

Defendant pled guilty to possession of child pornography, sentenced to ten years in prison suspended upon community supervision. As part of his sentence, Defendant was to successfully complete a sex offender program. Four years after sentencing, the State moved to revoke his probation because he violated conditions and the trail court revoked.

Testimony at the hearing demonstrated that Defendant wasn't "progressing" in the sex offender program, did not complete the program and was "unsuccessfully discharged." According to the Court, Defendant should have improved but seemingly regressed; therefore, there was no successful completion. The trial court did not abuse its discretion in the revocation.

December 26-31, 2010

Courts of Appeals

Illinois v. Dalton, 941 N.E.2d 428 (App. Ct. Dec. 29, 2010).

- Sentencing
- Reconsideration

Defendant pled guilty to predatory criminal sexual assault of a child and filed a motion for reconsideration. The appellate court found that some fees were impermissible and other could not be imposed without notice and hearing. They affirmed in part and vacated in part.

Unreported Cases

California v. Voight, No. G041846, 2010 WL 5312188 (Ct. App. Dec. 28, 2010).

- Prior bad acts
- Evidence
- Confidential informant
- Insufficiency of evidence

Defendant was convicted of lewd acts on a child under 14 and appeals alleging the trial court abused its discretion. The trial court allowed evidence of uncharged misconduct as well as prior bad acts. Evidence of prior sex crimes is allowed as long as it "is not unduly prejudicial." Defendant's prior conduct was not unduly remote nor unduly time

consuming. Additionally, the trial court excluded a good bit of the uncharged evidence. Therefore, this was not unduly prejudicial.

The trial court properly kept out the confidential informant's identity. The CI merely "tipped off" law enforcement but was not a participant or a witness; "therefore, his identity was immaterial."

Any error in admitting a victim's statement under the "fresh complaint doctrine" was harmless in this case. The evidence was found sufficient and his sentence constitutional.

Wooley v. Texas, No. 05-09-00455-CR, 2010 WL 5395650 (Ct. App. Dec. 30, 2010).

- Jury charges
- Statements
- Insufficiency of evidence

Defendant was convicted of aggravated sexual assault of a child and sentenced to prison. The victim, Defendant's step-daughter, said Defendant touched inside her vagina and it was painful. He also made the victim touch his penis. During the investigation, Defendant was ***Mirandized*** and wrote a statement admitting (while minimizing) the conduct. At trial, Appellant denied this conduct and was cross-examined by the prosecutor and asked to read his full statement admitting the conduct and discussing his possession of child pornography.

Defendant claimed "insufficient corroboration" of his statement; however, the Court did not find this to be true since the victim testified. The jury could decide which version was true and they were able to resolve inconsistencies. In this case there was sufficient evidence to support the charges.

The trial court admitted child pornography pictures which were on Defendant's home computer. Defendant claimed this was unduly prejudicial; however, the prejudicial value did not outweigh its probative value

Defendant said the court failed to instruct the jury that "they could not base a guilty verdict solely on appellant's confession." The court found that there was independent evidence and the court did not err in its jury instructions.