

## CSE Case Law Update

February 2009

State v. Russell, 2009 Minn. App. Unpub LEXIS 156(Minnesota, February 3, 2009)

In an unpublished opinion Court Of Appeals of Minnesota rejected defendant's multiple bases for conviction and sentencing of two counts of possession of child pornography. The court rejected defendant's claim that search warrant was unreasonable because of an error in the address of the home to be searched. The Court agreed with defendant that the admission of an adult pornography video of conduct between two men was error, but concluded it was harmless. Court considered and rejected defendant's claim that impeachment by prior conviction was in error. The Court also agreed with the district court's decision to allow multiple convictions based on the ruling in *State v. Rhoades* 690 N.W.2d 135, 138-139 (Minn App. 2004) that possession of multiple images of child pornography depicting separate minors satisfies requirement under Minnesota statutes allowing for multiple convictions for same conduct. Finally, defendant's argument that his sentence violated Blakely because the severity was set by the judge and not by a jury was also rejected.

U.S. v. Shields, 597 F.Supp. 2d 224, 2009 U.S. Dist. LEXIS 11037 (D.C. Mass. February 12, 2009)

Court found defendant to be a sexually dangerous person and ordered he be civilly committed as such to the custody of the Attorney General. The Court gives a pretty good discussion of the uses of the RRASOR and STATIC-99 actuarial tests and how ultimately they do not correspond to the risk of recidivism of an individual offender but rather a group. The Court does not address the constitutionality of 18 U.S.C. §4248.

Gonzalez v. Texas, 2009 Tex.App. LEXIS 879 (5<sup>th</sup> Dist Appeals Texas, February 10, 2009, Unpublished)

Defendant appealed conviction for aggravated criminal sexual assault. Defendant appealed based on victim being able to testify as to prior conduct between defendant and victim. Appellate Court ruled it was permissible to rebut defense allegation that victim falsely accused defendant. Additionally, defendant's prior conviction for sex offense not a clear abuse of discretion as Appellate Court considers 5 factors under Texas law.

U.S. v. Parson, 599 F.Supp. 2d 592 (W.D. Penn February 25, 2009)

Defendant's Motion to Suppress Evidence granted based on involuntariness of consent. Court concluded that ICE agents engaged in ruse about defendant being victim of identity theft. Based on the misrepresentation of ICE agents defendant's consent not voluntary.

U.S. v. Russell, 2009 U.S. Dist. LEXIS 13960 (N. Dist. N.Y., February 24, 2009)

Court rejected defendant's Motion to Suppress Evidence. Defendant claimed search warrant invalid for multiple reasons. First basis was false and misleading information. Fact specific as affiant had name of defendant but in running criminal history had wrong middle initial and included information in application for search warrant. Court ruled there was sufficient evidence within the application in addition to the misidentification to establish probable cause. Additionally, Court rejected defendant's contention that search of the automobile at the scene was improper as defendant failed to provide any showing as to why. Finally, as to the search warrant, the Court ruled that even if search warrant was improper, good faith exception under Leon applied. Defendant's challenge to suppress statements he made was not considered by the Court as he failed to identify which ones he thought should be suppressed.

In Re: Standard Jury Instructions in Criminal Cases—Report, 6 So.3d 574(Sup Ct Florida, February 26, 2009)

Decision adopts amendments to Florida jury instructions in charges of: Soliciting a Child for Unlawful Sexual Conduct Using a Computer Services or Devices; Soliciting a Parent of A Child for Unlawful Sexual Conduct Using Computer Services or Devices; Traveling to Meet a Minor; Traveling Meet a Minor Facilitated by Parent or Custodian.

U.S. v. Sweeney, 2009 U.S. Dist. LEXIS 13727 (N.D. W. Va., February 20, 2009)

District Court denied defendant's Motion to Suppress Evidence. Court rejected defendant claims that affidavit did not contain a sufficient indicia of reliability, the denial of being able to call a witness at the motion to suppress, and that the Leon exception is inapplicable because the officers reliance on the warrant was not objectively reasonable.

U.S. v. Phinney, 599 F.Supp.2d 1037(E.D.Wisc. February 20, 2009)

District Court sentences defendant to a sentence that is a downward departure from the federal sentencing guidelines. The court cites the particular factors of the defendant including age, health, lack of criminal history, and small number of images defendant possessed. The District Court attacks Congress' impulsive increase of the sentencing ranges in child pornography cases. Instead Court reverts to sentencing commission's initial guidelines in child pornography cases. Also Court finds fault with Bourke-Hernandez Butner study citing U.S. v. Johnson, 588 F.Supp.2d (S.D. Iowa 2008), based on conclusion that study skewed because of possibility of being removed from study if inmate does not disclose contact offense.

In Re: Grand Jury Subpoena to Sebastien Boucher, 2009 U.S. Dist LEXIS 13006 (D.C. Vermont, Feb. 19, 2009)

Government appealed Magistrate's Order quashing grand jury subpoena on grounds violated defendant's *Fifth Amendment* right against self incrimination. Government was not seeking the password to the encrypted hard drive that was seized but was requesting the defendant present a copy of it by opening it in front of the grand jury. Magistrate's decision was reversed and defendant was required to comply with the grand jury subpoena. The Court ruled that neither of the two situations where compliance with a subpoena would present incriminating information would be present in the instant case. Interestingly the Court ruled that the government had to come up with a different way to authenticate the hard drive other than the defendant providing an unencrypted copy.

Nelson v. U.S., 2009 U.S. Dist. LEXIS 16196 (E.D. Cal Feb. 12, 2009)

Defendant's §2255 Motion to Reconsider based on ineffective assistance of counsel and non-consensual search. Court reviewed record and upheld search and rejected defendant's claim of ineffective assistance of counsel.

U.S. v. Krueger, 2009 U.S. Dist LEXIS 16289 (E.D. Kan., Feb. 11, 2009)

District Court denies defendant's motion to suppress statements made after Miranda warnings. Factually, defendant home searched by several law enforcement agents, while the search was taking place defendant was asked several questions by one of the agents. Court found that at that time defendant had been taken into custody and brought to station and given *Miranda* and then makes additional statements. Government indicates not intending on using the statements made during the search only the ones at the station. The Court found the initial statements at the search scene did not rise to level of an interrogation. Additionally, Court found that government met burden of proving defendant given Miranda and waived rights as to the statements government sought to introduce at trial.

U.S. v. Davis, 313 F.Appx. 672, (4<sup>th</sup> Circuit, Feb 27, 2009) (Unpublished Opinion)

In unpublished opinion Appellate Court considered and rejected defendant's three separate grounds for suppressing evidence seized during the execution of a search warrant. Defendant claimed there were material misstatements in the warrant application, the information in the warrant was stale, and the execution of the warrant was not within the time of day requirements of the federal rules. The Court considered and rejected all of the defendant's arguments.

People v. Ramirez, 2009 Cal App. Unpub.LEXIS 1661 (2<sup>nd</sup> Dist Cal App. Feb 27, 2009) (Unpubl Opinion)

Defendant was charged with multiple counts of unwanted sexual contact with a minor. Prosecution admitted 8 photos of contact between minor victim and defendant. Defendant argued

that admission of evidence was improper as he offered to stipulate to the contact. Prosecution declined defendant's stipulation. Reviewing Court ruled not improper, photos were corroborative of victim's testimony.

U.S. v. Hatton, 2009 U.S. Dist. LEXIS 15600 (W.D. LA, Feb. 26, 2009)

Defendant sought review and reversal of two level enhancement for unduly influencing a minor when the age difference was more than 10 years. Defendant claimed that enhancement should not apply because it was an undercover law enforcement officer and not a real minor. Court reasoned that the enhancement should apply based on the defendant's intent rather than the actual harm.

U.S. v. Hartnett, 2009 Cal.App.Unpub LEXIS 1564 (4<sup>th</sup> Dist App. Cal. Feb. 26, 2009) (Unpublished Opinion)

Defendant pleaded guilty to two counts of possession of child pornography. On appeal complains of issuance of search warrant based on no probable cause because of staleness and that the *Leon* good faith exception should not have applied. Appellate Court rejected defendant's staleness claims and ruled that even if there was not probable cause for the warrant the *Leon* exception would apply.

U.S. v. Rogers, 2009 U.S. Dist LEXIS 14902 (D.C. Maine, February 25, 2009)

Defendant was ultimately convicted for child pornography after a search warrant was executed at home based on a search warrant from information police received from a business where defendant sold a laptop computer that contained child pornography. During the search of the defendant's home defendant made statements. Defendant was then asked to come down to station and given Miranda warnings from an NCIS officer as defendant was affiliated with the Navy. Defendant signed the notice form and then gave additional statements. Defendant claimed that he was in custody at his home and those statements should be suppressed because he did not receive proper Miranda warnings. Additionally, defendant claimed that the Miranda warning form he received at the police department was insufficient and that even with those warnings all his statements should be suppressed because of the violation at his home. The Court rejected all of the defendant's arguments. Court gives a very thorough discussion of all the factors to consider in reviewing custody determination under Miranda.

U.S. v. Macomber, 67 M.J. 214 (C.A.A.F. Feb. 24, 2009)

Defendant sought review of his conviction for receipt and possession of child pornography in violation of Unif. Code Mil Just art. 134, 10 U.S.C.S. §934. His sole claim was whether his motion to suppress evidence was incorrectly denied by the military judge. The defendant claimed that the search warrant was improper because there was insufficient nexus between the

information in the warrant and the place to be searched. Factually, the government was able to demonstrate an ongoing interest in child pornography which the court concluded supported the issuance of the warrant.

U.S. v. Beiermann, 599 F.Supp.2d 1087 (N.D. Iowa Feb. 24, 2009)

In a sentencing memorandum Judge Mark Bennett wrote an extensive opinion as to why he was sentencing a defendant in a downward departure from the federal sentencing guidelines. He ruled that based on Congressional action the sentencing range for possession of child pornography should be given little deference. Interestingly, he appointed a doctor to assess the dangerousness or risk of recidivism of the defendant but then refused to allow the government to either have access to the information the doctor used to come up with his opinion nor call the doctor as a witness at the sentencing, but concludes in his opinion that he is a good candidate for rehabilitation.

U.S. v. Friedlander, 2009 U.S. Dist. LEXIS 14264 (M.D. Fla. February 6, 2009)

Defendant granted a new trial when prosecutor for government impeached the defense witness with incorrect information. Prosecutor incorrectly believed she had a different date of the DSM IV TR which she then used to attack the credibility of defense expert. Court held that impeachment using false presumption, while inadvertent, irreparably tarnished the defense and warranted a new trial.

U.S. v. Stevahn, 313 Fed. Appx 138 (10<sup>th</sup> Circuit, Feb. 19, 2009)

Appellate Court upheld district Court's determination that *Leon* good faith exception to search warrant requirement applied in the case. The agent's application in this case of peer-to-peer investigation lacked probable cause tying a nexus between the agent's experience and that of two separate unnamed officers who assisted in the investigation. The Court ruled that there needed to be additional information in the warrant as to the investigative techniques, the software the officers used and its reliability. In the absence of such facts the Court determined that probable cause was missing, however, there was enough information in the warrant to satisfy the *Leon* exception.

State v. Staggs, 2009 Tenn. Crim. App. LEXIS 115 (Nash App Ct. Feb. 13, 2009)

Defendant convicted of 59 counts of sexual exploitation of a minor under Tennessee statutes. Defendant appealed arguing that there was insufficient evidence for all counts and that 58 of the 59 convictions were improper. The Appellate Court ruled that two of the counts were based on drawings of a child and under an Ashcroft review they could not be sustained since they were not real children. The Court also determined that since the state failed to provide evidence of a separation of time or location of the charged counts the charges were multiplicitous and therefore only one count could be sustained. Additionally, the court ruled that child pornography

did not fit into the statute that allowed for consecutive sentencing in Tennessee and that child pornography sentences must be served concurrently.