

CSE Case Law Updates February 2011

February 1-4, 2011

Courts of Appeals

Louisiana v. R.B., 54 So. 3d 1261 (La. Ct. App. Feb. 2, 2011).

- Sufficiency of the Evidence

Defendant challenged conviction for multiple counts of sexual battery and multiple counts of molestation. The defendant argued that insufficient evidence existed as all the counts were based on the differing testimony of the multiple victims. The case arose out of a family member turning over a camera and memory card with images of the victims in various states of undress. The children all gave different versions as to how they ended up in that situation and whether the defendant actually touched them. On the molestation charge the defendant claimed that since the children testified that he instructed them to undress and touch themselves, he had not participated in the lewd and lascivious acts and therefore could not be convicted. The Appellate Court disagreed, ruling that the defendant's acts of directing the children to disrobe, and play with each other's privates was enough to satisfy the definition of lewd and lascivious acts and could certainly be construed as set-up for the purpose of the defendant's arousal or sexual gratification.

February 7-11, 2011

State Supreme Courts

North Dakota v. Gomez, 793 N.W.2d 451 (N.D. Feb. 8, 2011).

- Jury Instructions
- Sufficiency of Evidence
- Sentencing
- Statutory Construction

Defendant was convicted of continuous child abuse following a jury trial. Defendant made multiple challenges to the conviction. First, defendant argued that he was entitled to a special verdict form that included that the jury specifically find three or more separate acts of sexual conduct. The North Dakota Supreme Court disagreed ruling that the criminal rules of procedure do not provide for special verdict forms and that the verdict form used in defendant's case fairly and adequately informed the jury of the applicable law. Second, defendant argued, both in the trial court and at appeal that insufficient evidence was presented to support a conviction for sexual conduct. The basis of the defendant's argument related to the statutory construction of the phrase sexual conduct. The defendant's flawed argument was based on a belief that under the definition of sexual conduct only included an offender touching a child; and conduct of a child touching an offender was not covered by the statute. In rejecting this argument the Court relied upon the term "person" in the definition lacking a definition and ruled that it could be either the

defendant or the child victim. Finally, defendant argued that his sentence violated the Eighth Amendment's cruel and unusual punishment prohibition. Defendant argued that since there were no allegations of sexual intercourse, his life sentence with a possibility of parole after thirty years was cruel and unusual. The Court found that his sentence was within the sentencing range and not grossly disproportionate to the offense.

Courts of Appeals

Ohio v. McCrory, Nos. 2009CR0259, 2008CR0370, 2011 WL 382757 (Ohio Ct. App. Feb. 8, 2011).

- Search and Seizure

Defendant was convicted of one count of gross sexual imposition and ten counts of pandering sexually oriented matter involving a minor. Following denial of the defendant's motion to suppress he pleaded guilty and was sentenced. He appealed alleging the same issues at the motion to suppress: the search warrants were insufficiently particular, executed beyond a reasonable timeframe and not supported by probable cause. The facts were that an adult woman claimed the defendant, whom she met through Craigslist, sexually assaulted her. Police sought a warrant for the defendant's computer to look for indicia of communications from Craigslist to the victim. During the execution of the initial warrant the forensic examiner discovered a treasure trove of child pornography. Defendant claimed the first warrant was without probable cause because it was based on the hearsay of the complaining victim without any additional corroborative evidence. The Appellate Court rejected defendant's contention, stating that additional corroborative evidence was only required in cases of confidential informants. The court ruled that when the victim of a crime provides information, generally that disclosure has additional information that contains inherent suggestions of reliability. The second argument the defendant raised was that the warrant should be limited to the time frame of the alleged communications with the victim. The defendant argued that anything before or after was irrelevant. The Court disagreed finding that the subject matter of the warrants limited the time frame. Finally, defendant argued that the warrant was overbroad because it failed to detail out how the forensic examination, including search terms, was going to be conducted. The court cited numerous cases as precedent to support their conclusion that such detail is unnecessary.

Unpublished Decisions

New Jersey v. Bilski, 2011 WL 408790 (N.J. Super. Ct. App. Div., Feb. 9, 2011).

- Discovery
- Grand Jury Subpoena
- Venue
- Sentencing

Defendant was convicted of 143 counts relating to the abuse of a child starting when the victim was 2 years old. Defendant made video and audio recordings of the abuse. Defendant first claimed that the protective order entered in the case precluding his defense attorney from

obtaining a copy of the contraband movies and images, instead of being able to view them at the prosecutor's office, was erroneous. The Appellate Court disagreed, ruling that the state's invocation of good cause because of the nature of the discovery was justified. The court noted that one of the factors it relied upon was that the defendant and his attorney were not precluded from the discovery, but rather their access was limited. However, the Court did specifically reject the Adam Walsh Act's limitations on discovery. The reviewing court also rejected defendant's claim of excessive sentencing for the 52 counts of hands on offenses when it imposed consecutive terms for four of the counts. The trial court gave great language describing the defendant's conduct and the harm to the victim. On the issue of notice of a grand jury subpoena to the defendant's Internet Service Provider, the court rejected it by citing to *State v. Reid*, 194 N.J. 386, 403-404 (2008).

February 14-18, 2011

Unpublished Decisions

California v. Mays, No. B222621, 2011 WL 507355 (Cal. Ct. App. Feb. 15, 2011).

- Other Acts Evidence
- Statutory Construction
- Sentencing

Defendant appealed his convictions for multiple offenses to different victims as well as the sentence. The Appellate Court rejected all of defendant's claims, except for sentencing as to two counts and referred those back to court. The other acts evidence that was allowed by the trial court related to uncharged sexual offenses to another victim. The trial court ruled, and the Appellate Court agreed, that Evidence Code section 1108 allowed for the introduction of such evidence and did not violate the defendant's due process or equal protection.

February 21-25, 2011

Courts of Appeals

Oregon v. Porter, 249 P.3d 139 (Or. Ct. App. Feb. 23, 2011).

- Statutory Construction

Defendant challenged his conviction for three counts of using a child in a display of sexually explicit conduct. Defendant argued that the state failed to prove he "permitted" the child to participate or engage in the underlying criminal activity. Defendant, his wife and two men rented a home in Oregon. During the time they rented the house defendant paid the bills. All four adults engaged in sadiomasochistic sexual activities with each other. Defendant's wife's 15 year-old daughter came to live with the four adults. Defendant's wife decided it would be a good idea if the daughter was taught to be a submissive to one of the other adults. Defendant charges stem from three times where he was present in the room when the other adult was sexually assaulting the daughter. The defendant wanted a narrowly construed definition of the word permit, i.e., that

he must have legal responsibility or authority over the individual. The Appellate Court disagreed and ruled that permit meant to allow or make possible and upheld the defendant's convictions.

Unpublished Decisions

Tennessee v. Parks, No. E2009–01984–CCA–R3CD, 2011 WL 649569 (Tenn. Crim. App. Feb. 23, 2011).

- Sentencing
- Probation Conditions

Defendant was caught in a peer-to-peer investigation. He plead guilty to sexual exploitation of a minor. Following a sentencing hearing the court imposed probation with specific restrictive terms, including attending additional psychosexual evaluation and treatment with the use of penile plethysmograph and a polygraph as well as restrictions on his Internet usage. The reviewing court determined that the Internet restrictions were reasonably related to his sentence and not unduly restrictive of his liberty. However, the reviewing court struck the requirements of the additional evaluation, polygraphy and penile plethysmograph testing. The court found that based on the initial assessment by a psychologist there was no evidence that these additional requirements would assist the defendant's rehabilitation.