CSE Case Law Update

January 2010

Strahan v. State, 306 S.W.3d 342 (Tex. App. Jan. 7, 2010)

- Motion to Quash Indictment
- Jury Selection
- Insufficient Evidence
- Improper Argument
- Sentencing

Defendant was convicted of seven counts of possession of child pornography and four counts of aggravated sexual assault. He was sentenced to life imprisonment for the sexual assault charges and consecutive sentences for the possession of child pornography. The defendant appealed for a multitude of reasons. The Appellate Court rejected the majority of the defendant's claims, but did modify his sentencing order.

Hevner v. State, 919 N.E.2d 109 (Ind. Jan. 6, 2010)

- Sex Offender Registration Laws
    - Ex Post Facto

Defendant was charged with and convicted of child pornography stemming from 2005. In 2005, a child pornography offense did not trigger the Indiana Sex Offender Statute. The Supreme Court conducted an intent-effects test to determine whether the 2006 change to the statute turned the requirement into a punishment. The Court reviewed the seven factors set out in *Wallace v. State*, 905 N.E.2d 371(Ind. 2009) and determined that only one factor of the Indiana Sex Offender Registration law was non-punitive. As a result, the Court ruled that the change to the sex offender law in Indiana was a punitive. The Court ruled that it was an Ex Post Facto law as applied to the defendant. The Court ruled that the defendant did not have to register as a sex offender.

People v. Peterson, No. C059207, 2010 Cal. App. Unpub. LEXIS 310 (Cal. Ct. App. Jan. 15, 2010)
(Unpublished Opinion)

- Confessions

Defendant was charged with possession of child pornography, engaging in oral copulation with a child and possessing methamphetamine and marijuana. Initially, defendant pleaded no contest to several of the charges and was sentenced to probation with sex offender treatment as a condition. During the probation defendant met with a counselor and under duress admitted that he had completed the underlying acts. Defendant filed a motion to vacate the underlying plea based on the requirement that he

admit to the acts in order to successfully complete counseling. The Court granted defendant's motion and all of the charges were reinstated. At the defendant's trial the prosecution admitted evidence of the defendant's statements to the counselor during sex offender treatment. The Appellate Court ruled this was in error. The Appellate Court ruled that a state could compel a defendant to answer questions while on probation, but could not use those statements to secure defendant's conviction at a later trial.

Hedden v. State. Hutto v. State, 690 S.E.2d 203 (Ga. Ct. App. Jan. 6, 2010)

- Statutory Construction
- Sentencing

Two defendants were convicted of sexual exploitation of children for possessing images of child sexual exploitation. Both were sentenced to fifteen year sentences, required to serve five years and the remainder of the sentences were probated. Both defendant's appealed based on the trial court departing from the mandatory minimum by a finding a violation of OCGA § 17-10-6.2 (c)(1)(F), which included that a victim not be physically restrained during the commission of the offense. Both defendants possessed images where the children were bound during the commission of the sexual exploitation. The Appellate Court rejected defendants' contention that the children in the images were not victims in their respective cases. The Appellate Court gives great language about these crimes not being victimless cases.

State v. Thunder, 777 N.W.2d 373 (S.D. Jan. 6, 2010)

- Search and Seizure
    - Cell Phone

Defendant was charged and convicted with rape and manufacture of child pornography. Defendant appealed conviction claiming that the search of his cell phone by the arresting officer without consent, a warrant, or exigent circumstances violated his 4th Amendment Rights. The Supreme Court of South Dakota rejected defendant's contention. In reaching their decision the Court relied upon the unique facts of the case that demonstrated the cell phone that was searched did not belong to the defendant, nor did the number of service that was paid for belong to the defendant. The Court ruled that while the defendant may have had a subjective right of privacy in the phone based on his use of it, it was not a right which society was ready to recognize as reasonable. The Court held that because no privacy right was impacted by the search, there was no 4th Amendment violation.

Trice v. State, 2010 Ark. App. 6 (Ark. Ct. App. Jan. 6, 2010)

- Sufficiency of Evidence
    - Age

Defendant was convicted of child pornography, which in Arkansas includes solicitation of a child to engage in sexually explicit conduct. Defendant solicited an undercover officer posing as a 14 year-old female. Defendant solicited several sex acts during the

chat and indicated that he was older. The defendant claimed that the state failed to present enough evidence of the age of the child since she only said her age two times during the conversation. The Appellate Court ruled that there were multiple times in the chat where the victim demonstrated her age and the defendant engaged in sexually explicit conduct.

In re the Detention of Harold G. Brown, 225 P.3d 1028 (Wash. Ct. App. Jan. 11, 2010)

- Sex Offender Commitment

Defendant challenged the finding of the trial court committing him as a sexually violent predator. The Appellate Court agreed with the trial court that the defendant's conviction for possession of child pornography, in light of his history and mental condition, qualified as a recent over act necessary to trigger the sexually violent predator commitment.

People v. McNeeley, No. 283061, 2010 Mich. App. LEXIS 39 (Mich. Ct. App. Jan. 12, 2010)
(Unpublished Opinion)

- Insufficient Evidence
- Joinder/Severance
- Prosecutorial Misconduct
- Confrontation Clause

Defendant appealed his convictions for producing sexually abusive material and possession of child sexually abusive material. The case arose from the defendant inviting his neighbor's 8 year-old daughter to his house to play computer games. Another victim in the case lived across the street from the defendant and would go to his house from the time she was 11 to play games, use the hot tub and pool, and use the computer. The defendant victimized the child when she turned 15. She was able to identify herself in a picture where she was naked and passed-out on the defendant's bed after he gave her alcohol while she used his hot tub. Defendant challenged this photograph as well as two photographs of the other victim as only being child erotica. The Appellate Court disagreed, ruling that the photos had no literary, artistic, educational or scientific value and appeal to prurient interests in sex. In addition to these photographs, defendant was found to have approximately a thousand images on his computer. These were run through a database and two came back as known victims. The police officer testified to this in court and defendant contended that information was hearsay and violated the Confrontation Clause. Interestingly, the Appellate Court rejected the defendant's argument ruling that since it came from a database and not a "person" the confrontation clause did not apply. The Appellate Court specifically rejected the defendant's contention that the database was the equivalent of certificate of analysis. The court ruled that those "alerts" are not testimonial.

State v. Kinsley, 2010 Ohio 116 (Ohio Ct. App. Jan. 15, 2010)

- Joinder/Severance
- Motion to Suppress Evidence
- Real Children
- Sentencing

Defendant appealed his convictions for eight counts of rape of a child under the age thirteen and ten counts of use of a minor in nudity-oriented material after a bench trial. The defendant raised multiple issues on appeal, all of which were rejected by the Appellate Court. Defendant first claimed that the trial court erred in trying all of the counts together. The trial court denied defendant's motion to sever the possession counts versus the rape counts as they would impermissibly bolster the testimony of the victim and suggest that he had a propensity to commit these crimes. The Appellate Court ruled that the charges most likely should have been severed as they were not interrelated and were stronger evidence of the defendant's character then any type of common scheme motive or intent. However, the Appellate Court ruled that since it was a bench trial there was no prejudice to the defendant. Defendant also raised consent issue from his wife on the search of the computers within his home. The Appellate Court rejected defendant's two-fold argument that his wife's consent was involuntary and that she lacked authority to consent because he password protected one of the computers. In determining that the consent was voluntary the Appellate Court sided with the trial court in ruling that the defendant's wife's testimony was contradicted by the other witnesses at the hearing. Likewise, the Court ruled that defendant's trial testimony about a password protection could not be used to support a prior motion to suppress. The Appellate Court also rejected defendant's contention that the State failed to prove the children were real as opposed to virtual. In dismissing this argument the Appellate Court relied upon the testimony of the detective that there was no evidence of morphing or cropping to the photos and relied upon two federal cases: *U.S. v. Halter*, 259 Fed.Appx. 738 (C.A. 6, 2008) and *U.S. v. Farrelly*, 389 F.3d 649 (C.A. 6, 2004), holding that a jury can still distinguish between real and virtual children. Finally, the Appellate Court also denied defendant's final contention that his sentence was excessive in light of the type of conduct the defendant engaged in.

State v. Norman, 2010 R.I.Super LEXIS 21, (Super. Ct. R.I. Jan. 28, 2010)

- Constitutionality
    - Overbreadth
    - Vagueness

Defendant move the court to dismiss an indictment for possession of child pornography in violation of G.L. 1956 § 11-9-1.3. Defendant's main claims that were considered were that the statute was overbroad and vague. The Court conducted a very thorough review of overbreadth arguments relating to child pornography statutes and ultimately concluded that while the term "graphic" within the statute gave them pause, it did not rise to the level where the entire statute should be invalidated. Likewise the Court rejected

defendant’s claim of vagueness to several of the words in the statute referring to how material was possessed.