CSE Case Law Update- January 2011

January 1-8, 2011

State Supreme Courts

Oregon v. Ritchie, 349 Or. 572 (Or. Jan. 6, 2011).

- Possession of Images in Unallocated Space
- Venue

The Defendant, Gregg Bryant Ritchie, was convicted, following a bench trial, of 20 counts of Encouraging Child Abuse in the Second Degree, in violation of ORS 163.686. The Defendant, a school teacher, was interviewed by law enforcement regarding a student. Law enforcement asked for and received permission to search his home and laptop computers. During those searches a large number of sexually exploitive images of children were discovered on both computers. These images were primarily found in the unallocated space of these computes. The Oregon Court of Appeals upheld the 10 convictions relating to the desktop computer. They reversed the 10 counts that related to the Defendant's laptop computer finding that the State had not proven venue beyond a reasonable doubt.

The State argued on appeal to the Supreme Court that "the [D]efendant possessed or controlled the image at issue as long as the image appeared on his computer screen, because he could change the location where the image was displayed, because he had the capacity to save, forward, and manipulate it, and because he controlled it, in the first instance, by taking affirmative steps to bring it to the screen." The Court, as it did in *Oregon v. Barger*, 349 Or. 553 (Or. 2011), rejected this argument.

Oregon v. Barger, 349 Or. 553 (Or. Jan. 6, 2011).

- Possession

The Defendant, Barry Lowell Barger, was charged with eight counts of encouraging child sexual abuse in the second degree, in violation of ORS 163.686. The Defendant was convicted by a jury of all eight counts in the indictment. On appeal the Defendant argues that the evidence was insufficient to establish that he knowingly possessed the images.

The Defendant came to the attention of law enforcement after it was alleged that he had sexually assaulted a child. The Defendant's wife indicated that she had seen weird material on the Defendant's computer. She consented to a search of the computer. A forensic evaluation of the computer located images of child sexual abuse in the "temporary internet file cache".

The question before the Court in this case was "can a computer user be found to have knowingly possessed or controlled digital images of child sexual abuse based solely on evidence showing that, at some time in the past, he intentionally accessed those digital images using his computer's

internet browser and by reasonable inference - looked at them". Here the Court found that it was not sufficient, to establish possession, to show that the Defendant had visited the site without more evidence to show he had viewed the images.

Unreported Cases

California v. Bodnar, No. D056811, 2011 WL 10600 (Ct. App. Jan. 3, 2011).

- Sufficiency of the Evidence
- Entrapment
- Prior Bad Acts

The Defendant, Thomas John Bodnar, was convicted following a jury trial of one count of attempting to commit a lewd and lascivious act on a child under age 14. The Defendant was caught in a sting that was conducted by law enforcement in conjunction with Perverted Justice and *Dateline*. The Defendant engaged in sexually explicit chats and sent nude photos of himself to a child he believed to be 13 years of age.

The Court held that the Defendant's behavior, during his on-line conversations, in sending nude photographs and in showing up for a meeting with the child, was sufficient to establish the basis for the crime. The Court also found that the trial court correctly refused to read the entrapment instruction to the jury; reasoning that the state, through Perverted Justice, did not entice the Defendant to act in a manner he would have not chosen but for law enforcement behavior. Finally the Court held that it was not an abuse of discretion by the trial court to admit evidence of the Defendant's prior bad acts with children 27 years ago.

Arizona v. Higgins, No. 2 CA-CR 2009-0374, 2011 WL 181221 (Ct. App. Jan. 7, 2011).

- Sufficiency of Evidence
- Jury Instructions

The Defendant, Robert Dale Higgins, was charged with multiple counts of child molestation, indecent exposure in the presence of a minor, tampering with evidence and sexual exploitation of a minor. The Defendant's girlfriend located videos of the Defendant sexually abusing her 4 year old daughter. The girlfriend recorded a phone call with the Defendant where he acknowledged touching and abusing her daughter. The Defendant was located in a hotel with his desk top computer, however the hard drive had been removed and thrown away.

The Court found that the evidence was sufficient to support his conviction. The Court also found that the supplemental jury instruction was supported by the evidence and was not unconstitutionally vague.

January 9-15, 2011

State Supreme Court

Montana v. Hovey, 359 Mont. 100, (Jan. 11, 2011).

- Jury Instructions

The Defendant, Alexander S. Hovey, was charged with 50 counts of sexual abuse of children, in violation of MCA § 45-5-625(1)(c)(e). The Defendant was convicted of 42 counts following a jury trial. On appeal, the Defendant claims that the trial court erred in instructing the jury. The Court found that the jury instructions read by the jury were appropriate.

Unreported Cases

New Hampshire v. Moscone, No. 2009-559, 2011 WL 134895 (N.H. Jan. 13, 2011).

- Mens Rea
- Evidence of Identity
- Consent to Record Electronic Communications

The Defendant, John Moscone, was charged with two counts of using computer services in a manner prohibited by law, in violation of RSA 649-B:4. He was convicted following a jury trial. He claims, on appeal, the trial court erred by instructing the jury on the wrong mental state, allowing evidence of the defendant's identity based on his illegal arrest and for allowing the admission of email conversations the Defendant had with an undercover officer.

The Defendant engaged in a series of email conversations with an undercover officer posing as a 14 year old girl. The Defendant arranged to meet the "girl". An individual the officers believed to be the Defendant approached the meet location, but turned around before making contact with law enforcement. He was subsequently stopped and arrested. The trial court determined that the arrest was illegal and thus any fruits from the stop, such as his driver's license, could not be admitted at trail.

The Court reversed the Defendant's conviction and remanded for a new trial based on the fact that information about the arrest and identification based on the driver's license was admitted at trial. However, the Court did find that the instruction on the knowledge requirement was correct and that the Defendant has in fact consented to have his communications with the undercover officer recorded.

Ohio v. Siber, No. 94882, 2011 WL 198670 (Ct. App. Jan. 13, 2011).

- Sentencing

The Defendant, Fred Shiver, was charged with 55 counts of illegal use of a minor in nudity-oriented material, pandering sexually-oriented matter involving a minor and possession of criminal tools. The defendant pled guilty to 16 of those charges and was sentenced to three years nine months in prison.

On appeal, the Defendant claims that the trial court erred by not sentencing him to community supervision. The Court rejected the Defendant's arguments, finding that the sentence was appropriate and within the law.

January 16-22

Unreported Cases

California v. Lemus, No. B220052, 2011 WL 150168 (Ct. App. Jan. 19, 2011).

- Confidential Informant
- Sentencing Discretion

The Defendant, David Mejia Lemus, was charged with possession of child pornography, possession of a controlled substance, and possession of drug paraphernalia. The Defendant was sentenced to two years in prison. On appeal, The Defendant claims that the trial court erred by not unsealing the name of the confidential informant who was the basis for the search warrant affidavit and in not reducing the charges to a misdemeanor.

The Court held that there was not error in the trial court's decision to seal the search warrant affidavit. The in camera hearing clearly established that the confidential informant's safety would have been put in jeopardy if their identity had been revealed and that the information provided by the confidential informant was accurately portrayed in the affidavit.

January 23-31, 2011

Court of Appeals

Massachusetts v. Amaral, 78 Mass.App.Ct. 671 (Jan. 26, 2011).

- Best Evidence
- Authentication of Business Records

The Defendant, Jeremy Amaral, was convicted of attempted rape of a child and solicitation of a prostitute. The Defendant had a series of conversations with an undercover officer posing as a fifteen year old prostitute. During trial, the Commonwealth admitted two records from Yahoo! Inc.; 1) a copy of a document from Yahoo! linking an online account to the Defendant and 2) electronic correspondence between the Defendant and the undercover officer. Following these conversations, the Defendant showed up as planned. The Court held that the Defendant's actions, in accordance with the communications with the undercover, were sufficient to authenticate the electronic communications. A best evidence rule was satisfied through the use of a copy of the Yahoo! documents indicating who owned the account that sent the electronic correspondence with the undercover officer.

Unreported Cases

Louisiana v. Wright, No. 45,980-KA, 2011 WL 228611 (Ct. App. Jan. 26, 2011).

- Sufficiency of Evidence
- Pre-trail publicity
- Self Representation
- Time Limitations
- Discovery

The Defendant, Benjamin Wright, was charge with 23 counts of possession of child pornography, in violation of La. R.S. 14:81.1(A)(3). Following a jury trial, the Defendant was convicted and sentenced to 20 years in prison.

The Defendant owned a store where it was discovered that he was video recording females trying on clothes in the fitting rooms. During a search of the Defendant's business, computers were seized and searched. Images and videos of child sexually abusive material were found on his computer.

On appeal the Defendant alleges that the trial court erred by refusing to move the trial due to pretrial publicity. The Court found that the Defendant's right to a fair trial was not impacted by media coverage of the case prior to trial. The Court also held that the Defendant never made an unequivocal and clear request to represent himself.

Ohio v. Trotter, No. 94648, 2011 WL 333887 (Ct. App. Jan. 27, 2011).

- Consent Search
- Jurisdiction to Authorize a Search Warrant

The Defendant, David C Trotter, was charged with a variety of charges ranging from rape to kidnapping to crimes involving the possession of child sexually abusive materials. He was convicted following a bench trial. During trial the court asked the parties to brief 1) whether a municipal judge had the jurisdiction to issue a search warrant and 2) whether the Defendant's spouse had given knowing and voluntary consent to search the home computers. The trial court suppressed the evidence found on the computer after finding that the consent was not knowingly and voluntarily given.

The case came to the attention of law enforcement after a middle school student was sexually assaulted in the Defendant's home. During the investigation, officers asked for and received consent, from the Defendant's spouse, to search the family computers. During a search of the computers images of child sexually abusive materials were located after a search warrant was signed by a municipal court judge.

The Court held that the trial court was wrong to suppress the evidence found on the computer. The Court reasoned that law enforcement does not need "a warrant, probable cause or even a reasonable, articulable suspicion to conduct a search when suspect voluntarily gives consent." The Court went on to state the evidence presented at trial clearly established that the Defendant's spouse gave voluntary consent.

Torres v. Texas, No. 13-09-00264-CR, 2011 WL 341556 (Ct. App. Jan. 27, 2011)

- Search Warrants

The Defendant, Samuel Torres, was charged with multiple counts of possession of child pornography. Pursuant to a plea agreement he pled guilty to 5 counts and was sentenced to 4 years in prison. Prior to pleading guilty, the Defendant filed a motion seeking to suppress the search warrant claiming that 1) the magistrate lacked the authority to sign the search warrant and 2) there was no probable cause.

Law enforcement became aware of the Defendant's possession of child sexually abusive materials from two confidential tips regarding the location of the images and the fact that the Defendant was being physically abusive to his wife. After law enforcement obtained a warrant to search the Defendant's residence and seize his computers, they discovered 72 images of images that involved children.

The Court held that since the warrant was not an evidentiary search warrant, pursuant to Tex. Code Crim. Proc. Ann. art. 18.02, the magistrate did have the authority to issue the search warrant. The Court also held that even though the search warrant was based on information received from anonymous callers, there was sufficient indicia of reliability to establish the probable cause to support the issuing of the search warrant.

Ohio v. Robertson, No. 94527, 2011 WL 304575 (Ct. App. Jan. 27, 2011).

- Sufficiency of Evidence
- Other Bad Acts
- Discovery
- Sexually Delinquent Individual

The Defendant, Melvin Robertson, was charged with rape and being a sexually violent predator. He was convicted following a jury trial and sentenced to 18 year to life in prison.

The Defendant became friends with the 17 year old victim via MySpace.com. Had his 16 year old girlfriend bring the victim to his house. The Victim and the Defendant shared a number of text messages. In those text messages the Defendant told the Victim that he wanted to have sex. When the Victim said no, the Defendant came into the living room, told his girlfriend to leave and forced her to have sex. The Victim did not leave that evening and was video recorded singing at the Defendant's home the next morning.

The Court found that the Victim's texts and actions the next morning did not establish consent. The other bad acts evidence did not merit reversal because they were elicited during the cross-examination of the Victim and not by the State. The Court also held that the Defendant's criminal and prison history, which included a prior sexual assault against a minor and numerous sexual assaults while in prison, warranted a finding that he was a sexually delinquent individual.

California v. Hutchens, No. A125580, 2011 WL 264719 (Ct. App. Jan. 27, 2011).

- Effective Assistance of Counsel

The Defendant, Harold Ray Hutchens, was charged with multiple counts from committing lewd acts on a child and possession of child pornography to fraud. He pled guilty and was sentenced to 15 years in prison.

The Defendant's initial sentencing date was adjourned due to his attorney having a scheduling conflict. He was represented at the next sentencing date by stand in attorney. During this sentencing hearing the Defendant asked to withdraw his plea and claimed that his original attorney had not given him appropriate representation. The Defendant's request to withdraw his plea was denied.

The Court held that the denial of the motion to withdraw his plea was properly denied.

Tennessee v. Wendland, No. M2009-01150-CCA-R3-CD, 2011 WL 345846 (Ct. App. Jan. 31, 2011).

- Search and Seizure

The Defendant, Kenneth Wendland, pled guilty to one count of aggravated sexual exploitation of a minor and criminal simulation. He was sentenced to 8 years in prison. The Defendant was

under investigation for counterfeiting ten dollar bills. Law enforcement went to the Defendant's home and were given consent to enter the common areas of the home by his roommate. While in the home they discovered computers, evidence of counterfeiting and possession of sexually abusive images of children. Law enforcement searched the seized computers after obtaining a search warrant. Prior to pleading guilty the Defendant filed a motion to suppress the evidence found during the search of his home. The trial court denied the motion.

The Court found that the computers were properly seized pursuant to the plain view doctrine. The search warrants obtained following the seizure were properly issued.