

CSE Case Law Update

July 2009

STATE SUPREME COURTS

State v. Anderson, 211 P.3d 584 (Cal. 2009).

- Double Jeopardy

Defendant was initially charged with multiple offenses. Following conclusion of evidence at trial, first jury found the defendant guilty of some of the charges and was hung as to the remainder of the charges. Second jury trial was conducted and defendant was convicted of remaining charges. Defendant appealed on grounds of double jeopardy. The Supreme Court of California ruled that the manifest necessity rule allowed for the second trial in a case where a retrial followed a partial verdict. The Court ruled that the prosecution was limited to those charges and sentencing ranges that were included in the first trial but ended in the mistrial.

State v. White, 211 P.3d 805 (Kan. 2009).

- Withdraw of Guilty Plea

Defendant appealed trial court's denial of his motion to withdraw guilty plea to one count of aggravated indecent liberties with a child under the age of 14. Defendant tried to withdraw his guilty plea because his defense attorney failed to inform him of the proper sentencing range, specifically, the maximum range. The Supreme Court of Kansas reversed and remanded the case for further proceedings. The Supreme Court focused on the plea paperwork that the defendant signed which limited the defendant's maximum sentence at 25 years, rather than the possibility of a life sentence. The Supreme Court reviewed both the written plea agreement and the plea colloquy and determined that it was impossible to determine based on the record whether the defendant's plea intelligently made.

In re C.P.W., 213 P.3d 413 (Kan. 2009).

- Juvenile Sex Offender Registration

The issue that was decided in the case was whether a violation of the Kansas Offender Registration Act (KORA) was a specific intent crime or a general intent crime. After reviewing the statute the Kansas Supreme Court concluded that there was no specific intent written into the statute.

Hood v. State, 17 So. 3d 548 (Miss. July 30, 2009).

- Admissibility of Testimony
 - Spousal privilege
- Definition of Sexually Explicit Conduct

Defendant was convicted of exploitation of children under Mississippi law. The Supreme Court ruled that the defendant's argument that his wife was incompetent to testify because of spousal privilege was without merit for two reasons. First, when a crime is committed against a child there is an exception to the marital privilege statute. Second, at the time the defendant made the statements there was a third person in the room. The presence of another person vitiated the marital privilege. Additionally, the Supreme Court rejected the defendant's assertion that the children involved in the video were not in a sexually explicit state. The Court noted that prior to this decision it had not implemented a test to determine what constituted lascivious exhibition of genitals. The Court then adopted the factors laid out in U.S. v. Dost, 636 F.Supp. 828 (S.D. Cal 1986).

State v. Hilton, 212 P.3d 1063(Mont. 2009).

- Double Jeopardy

The defendant was initially charged in state court in Montana with the offense of sexual intercourse with a minor. Defendant subsequently pleaded guilty in federal court to sexual exploitation of children and possession of child pornography. Following his plea, the defendant moved to dismiss his state indictment on the grounds of double jeopardy. The trial court agreed and dismissed defendant's indictment. The State appealed the trial court's decision. The Montana Supreme Court affirmed the trial court's decision. The basis of the decision was that the Supreme Court held that the state crime of sexual intercourse with a minor without consent, while not identical, was equivalent to the federal charge of sexual exploitation of a minor and that the defendant had the same criminal objective under both charges.

State v. Finesmith, 974 A.2d 438 (N.J. 2009).

- Search and Seizure

The defendant was charged with possession and dissemination of child pornography. During the course of the investigation the State moved for a communications data warrant. The trial court granted the warrant but limited the time frame to two weeks. The State appealed and the Appellate Court ruled since the State sought to show a pattern of

the defendant's internet usage, a one year period was a reasonable time limitation for the warrant.

State v. Harrison, 912 N.E.2d 1106 (Ohio 2009).

- Double Jeopardy

In a very fact specific case, the Ohio Supreme Court reversed a defendant's re-trial and resentencing. Defendant was a city police chief who was charged with child pornography. He ultimately pleaded guilty and entered an agreed sentence. During the sentencing he was incorrectly admonished of the term of supervised release following his incarceration. He served his time and then the prosecution tried to have him resentenced to serve the supervised release. Rather than enter the corrected mittimus, the defendant chose to withdraw his guilty plea. The prosecutor then re-charged the defendant and ultimately re-tried the defendant on the new charges. The defendant was convicted and resentenced to include the supervised release. The Supreme Court rejected the chain of errors and ultimately ruled that the Court no longer had jurisdiction to enter the change in the terms of the sentencing once the defendant had served his jail time. The Supreme Court held that double jeopardy barred the second prosecution.

People of the V.I. v. John, S. Ct. Crim. No. 2008-091, 2009 V.I. Supreme LEXIS 35 (V.I. July 1, 2009).

- Search and Seizure
 - Probable Cause
 - Good Faith Exception

Defendant who was a teacher was accused of molesting multiple students. As a part of the investigation the police secured a search warrant for the defendant's home for child pornography. The trial court suppressed 10 notebooks seized during the search on the ground that the search violated the 4th Amendment. The Supreme Court of the Virgin Islands agreed with the trial court holding that the warrant lacked probable cause establishing a nexus between the act of molestation and the collection of child pornography. The Supreme Court continued in their ruling by stating that even the good faith exception could not save the warrant.

COURTS OF APPEAL

Peole v. Doran, No. A122143, 2009 Cal. App. Unpub. LEXIS 6027 (Cal. Ct. App. July 27, 2009).

- Search and Seizure
 - Staleness

- Nexus

Evidence demonstrated that defendant used credit card to purchase a subscription to a web site offering child pornography. During the course of the investigation, defendant moved to a new address in a different state. Defendant appealed trial court's denial of his motion to suppress evidence based on staleness and lack of a nexus. The appellate court upheld the trial court's decision as to both issues. The 10 month delay in a child pornography case was acceptable as the warrant contained information about collectors of child pornography as well as how deleted information on computers can often be recovered. Additionally, the appellate court upheld the trial court as to the nexus, holding that it was not an unreasonable assumption on the part of the trial court that a person who used a computer to download child pornography would take that computer with them when they moved, as people usually take important items with them when they move locations.

People v. Trevizo, Crim. No. B204187, 2009 Cal. App. Unpub. LEXIS 5782 (Cal. Ct. App. July 20, 2009).

- Sufficiency of Evidence
- Other Acts Evidence
- Ineffective Assistance of Counsel
- Sentencing

Defendant was ultimately convicted of six counts of committing lewd acts on a minor. The Appellate Court rejected the eight different arguments defendant made regarding his trial. Related to CSE, the Appellate Court rejected defendant's argument that the trial court erred in allowing evidence that the defendant possessed adult pornography. The reviewing court wrote that a trial court could admit such evidence if it conducted the proper balancing test as to the evidence. Likewise the Court rejected the remainder of the defendant's challenges both to his conviction and sentence.

State v. Law, Crim. No. B207589, 2009 Cal. App. Unpub. LEXIS 5721 (Cal. Ct. App. July 16, 2009).

- Other Acts Evidence
- Expert Witness

Defendant was convicted of two counts of committing lewd acts on a child. He appealed based on the admission of other acts evidence and the court's refusal of allowing an expert witness for the defense. The appellate court concluded that the trial courts admission of a CD-ROM containing a sexually explicit video of a child was permissible to demonstrate the defendant's intent. The Appellate Court held that a jury could reasonably conclude that the defendant's possession of such material inferred a predisposition of sexual attraction to children and infer that the defendant intended on

committing the act against the victim. The Appellate Court also ruled that the proffered defense expert was unqualified to render an opinion as to wireless internet security.

Peterson v. State, 909 N.E.2d 494 (Ind. Ct. App. 2009).

- Probation Revocation

Defendant previously pleaded guilty to child molestation charge. Defendant was sentenced to seven years with three years probation. The defendant's probation conditions included a requirement the defendant refrain from viewing pornography. At issue was reliability of defendant's polygraph during probation. Defendant argued that it was not reliable. The court rejected defendant's argument based in part on it being highly unlikely that the defendant could fool his long standing counselor who had treated him for two years. The court also focused on the defendant's answers in the video, which established that he had viewed pornography on multiple occasions. The Appellate Court affirmed the defendant's probation revocation.

State v. Yates, 15 So. 3d 1260 (La. Ct. App. 2009).

- Insufficient Evidence
 - Age Defense
- Sentencing

Defendant was convicted of indecent behavior with juveniles for soliciting an under cover detective who was posing as a 15 year old girl. Defendant appealed claiming that there was insufficient evidence to convict him since the chat room required participants to be 18 years of age. The Appellate Court rejected defendant's claim and indicated that it was a question of fact for the jury and they could choose to believe or disbelieve defendant's claim that he thought he was conversing with someone over 18 years of age. The Court also rejected defendant's contention that his sentence was excessive considering his prior conviction for child pornography.

Argo v. State, 13 So.3d 849 (Miss. Ct. App. 2009).

- Jury Instructions
- Sufficiency of Evidence

Defendant was convicted of 14 counts of exploitation of children under Mississippi statute. Defendant claimed errors in sufficiency of evidence and refusal by trial court to give circumstantial evidence instruction. Appellate Court denied defendant's challenges. The reviewing court determined that based on the facts of the case, the defendant was not entitled to a circumstantial evidence instruction. Additionally, the court reviewed the

evidence presented, including the defendant's admission to the offense, and ruled that there was sufficient evidence.

State v. McClary, 679 S.E.2d 414 (N.C. Ct. App. 2009).

- Sufficiency of Evidence
- Other Acts Evidence

Defendant was convicted for taking indecent liberty with a child by giving her a letter wherein he offered to pay her ten dollars for having intercourse and oral sex with him. The Appellate Court agreed with the trial court that the explicit language of the letter supported a conviction as it would fall into the large category of behavior that the majority of society would find indecent. The Appellate Court also rejected the defendant's claimed error of the admission of testimony about another letter from the defendant to a second child. This evidence came in through the testimony of the police officer recounting the victim's statement about a second letter. The Appellate Court ruled that this was error but did not rise to the level of plain error and that the defendant failed to demonstrate that the jury would have reached a contrary result absent the testimony about the second letter.

State v. Robinson, 2009 Ohio 3673 (Ohio Ct. App. 2009).

- Constitutionality

The defendant was charged with importuning and sexual imposition. Defendant filed a motion to dismiss the charges on constitutional grounds. Following the denial of his motion, defendant pleaded no contest to the charges. Subsequently, defendant filed an appeal claiming that the statute violated his constitutional rights under theories of due process, equal protection and free speech. The Appellate Court rejected all of the defendant's arguments ruling that the statute was narrowly tailored to fulfill the compelling state interest of protecting children, and it did not violate free speech as it was drawn to protect youth from adults using the anonymity of the Internet to take advantage of them, and finally, it did not treat people differently on an arbitrary basis.

Fritz v. State, No. 2-08-432-CR, 2009 Tex.App. LEXIS 5508 (Tex. App. July 16, 2009).

- Amendment of Indictment
- Motion to Quash Indictment

Defendant appealed his conviction after pleading to five counts of online solicitation of a minor. The defendant raised two main errors, the amendment of the indictment from "in a sexually explicit manner" to "sexually explicit material" and that the indictment lacked specificity as to the charge. The Appellate Court rejected both of defendant's arguments. For the first basis, the Appellate Court ruled that changing the word "manner" to

“material” did not change the focus of the indictment causing a new offense to be charged. As to the second error, the Appellate Court ruled that the ultimate issues related to the specificity of an indictment are whether the defendant has notice of the offense and whether indictment properly explains the offense charged. The Appellate Court ruled that the defendant’s motion to quash failed to allege how the indictment was deficient under either issue.

State v. Mercer, No. 2008AP1763-CR, 2009 Wisc. App. LEXIS 471 (Wis. Ct. App. July 1, 2009).

- Statutory Construction

Defendant was found guilty of fourteen counts of possession of child pornography. The evidence supporting the conviction was based on computer logs and recreated images from the websites in the computer logs. The trial court found the defendant guilty of all 14 counts. The defendant appealed arguing that he had not knowingly possessed the images. Rather than deciding the issue, the Appellate Court certified it and forwarded it to the Wisconsin Supreme Court for a decision. The question as framed by the Appellate Court was whether a person knowingly possessed child pornography when he or she simply viewed a digital image of child pornography. The Appellate Court reviewed several cases from other jurisdictions that dealt with temporary internet files and web cache cases but distinguished those from the instant case in that there were no files found on the defendant’s computer.

State v. Bowser, 772 N.W.2d 666 (Wis. Ct. App. 2009).

- Discovery

Defendant appealed ruling of trial court granting a protective order of a hard drive in a child pornography case. The trial court refused to allow the defense a copy of the hard drive and instead allowed the defense access to the hard drive at a state facility. The Appellate Court rejected the defense reasoning and upheld the trial court’s protective order based on the serious harms associated with child pornography and the fluidity of transferring images of child pornography electronically.

State v. Kaczmariski, 772 N.W.2d 702 (Wis. Ct. App. 2009).

- Deferred Prosecution

Defendant entered agreement with prosecutor for deferment of second-degree sexual assault of a person who had not attained 16 years of age. By the terms of the agreement the prosecutor was limited to the time of the deferment period to bring the original charges. The time period of the deferral was to end the last day of October in 2005. The

prosecutor informed the defendant that he was being investigated for a new crime the last week of October 2005. The prosecutor waited until after the deferred period expired before bringing charges on the original offense. The Appellate Court reversed the trial court's denial of the defendant's motion to dismiss for failure to prosecute within the deferred time period. The Appellate Court relied upon the unambiguous language of the deferment agreement that limited the timeframe for filing charges to the deferment period.