CSE Case Law Report
July 2011

July 1 - 8, 2011

State Supreme Courts

Wisconsin v. Gonzalez, ---N.W.2d, ---, 2011 WL 2657697 (Wisc. S.Ct. July 8, 2011)

- Jury Instructions

The Defendant, Esteban Gonzalez, was convicted of exposing a child to harmful material, in violation of Wis. Stat. § 948.11(2)(a). He was acquitted of intentionally causing a child to view sexually explicit conduct. The charges came about as a result of the Defendant watching and masturbating to a pornographic film while his three and a half year old daughter was present in the room. The Defendant appeals his conviction claiming that the jury was not properly instructed about the requirement that he knowingly exhibited the harmful material to the child. The Court reversed the Defendant's conviction finding that "the jury instruction misled the jury into believing that the State did not have the burden of proving beyond a reasonable doubt that the Defendant knowingly exhibited the harmful material to the child".

State Courts of Appeal

Smith v. Georgia, --- S.E.2d ---, 2011 WL 2585973 (Ga. App., July 1, 2011)

- Jury Instructions

The Defendant, Brenton James Smith, was charged with one count of child molestation, in violation of OCGA § 16-6-4(a), and one count of statutory rape, in violation of OCGA 16-6-3(a). Following a jury trial the Defendant was convicted of the child molestation count only. The Defendant appeals, claiming that the trial court erred in instructing the jury.

The charges stem from an alleged sexual tryst that the Defendant had with a 12 year old girl. A friend of the victim's mother had taken photos of the girl and posted them on the internet. The Defendant became interested and met her at the friend's home. She alleges that they had intercourse; the Defendant denies any sexual activity took place.

The trial court instructed the jury as to the definition of child molestation. The jury sent out a note asking "Can a sexual conversation alone constitute an indecent act?". The trial court responded by telling the jury to refer to the instructions. The Appellate Court found that this may have misled the jury and convicted him of a crime that required an act beyond a mere conversation.

Sikeo v. Alaska, --- P.3d ---, 2011 WL 2611285 (Alaska App., July 1, 2011)

- Sentencing

The Defendant, Xeuy Sikeo, was convicted following a jury trial of first-degree sexual abuse of a minor. Because he had two prior convictions for attempted second-degree sexual abuse of a minor, his sentence was governed by AS 12.35.125(i)(1)(F) which calls for a presumptive sentence of 99 years for a person with two prior sexual felonies.

The charges stem from the Defendant engaging in sexual intercourse with the 11 year old daughter of his girlfriend. The victim became pregnant and DNA indicated that the Defendant was the father of the child.

The Defendant claims that the 99 year presumptive sentence is disproportionate and constitutes "cruel and unusual" punishment. The Court found that the sentence was not "cruel and unusual" as it was not mandatory but presumptive, and the sentencing court considered alternatives but found the mitigating circumstances did not merit a reduction from the presumption.

Smith v. Kansas, 256 P.3d 897, 2011 WL 2694610 (Kan. App. July 8, 2011)

- Sex Offender Registration

In 2001, the Defendant, Michael Smith, was convicted of two counts of solicitation of a child. The Defendant was required to register pursuant to the Kansas Sex Offender Registration Act, K.S.A. 22-4901.

In January 2008, the Defendant was convicted, following a jury trial, of six counts of failing to register. He was then sentenced to 89 months in prison. The Defendant appeals his level 5 felony (person) sentence claiming that there is no person who was a victim for that crime. The Court rejected this argument finding that pursuant to Kansas law there is no requirement that actual harm come to a person for a level 5 felony. The Court also rejected the Defendant's claims that the indictment was defective and that the sentencing court lacked subject matter jurisdiction.

<u>Unpublished Opinions</u>

Iowa v. Iowa District Court for the County of Webster & Hankins v. Iowa, --- N.W.2d. ---, 2011 WL 2652325 (Iowa S. Ct., July 8, 2011) (Unpublished Opinion)

- Sex Offender Therapy

In March 2006, the Defendant, Robert Harkins, was convicted by a jury of third-degree sexual abuse. The Defendant was sentenced to a prison term not to exceed 10 years. Following the

affirmation of his conviction, by the Iowa Court of Appeals, the trial court imposed a special life sentence pursuant to Iowa Code § 903B.1, in addition to his original 10 year sentence.

While in prison the Defendant was placed on the waiting list for the sex offender treatment program. According to Iowa Code § 903A.2(1)(a) an inmate convicted of a sex offense must participate in sex offender treatment before they can receive a good time credit applied to their sentence.

As part of his sex offender treatment program the Defendant was required an "assume full responsibility for [his] offenses and [his] behavior". The Defendant refused and his earned/good time credits were suspended. The Defendant appeals alleging that requiring that he admit his offenses is a violation of his 5th Amendment rights against self incrimination. The State of Iowa appealed the district court's reinstatement of the Defendant's good time credits from July 9, 2008 and March 21, 2009. The Court reasoned that the statute of limitations on perjury for his testimony at trial would have been reached and that requiring him to admit his culpability during treatment would in fact be a violation of his 5th amendment rights.

The Iowa Supreme Court held that there was no 5th amendment violation by requiring the Defendant admit his culpability as part of his sex offender treatment program. The Court explored decisions across the country that considered similar issues and concluded that "requiring the Defendant participate in the sex offender treatment to be eligible for earned time credits was part of 'a fair criminal process'". The Court went on to hold that while the loss of earned time credits involved a loss of liberty the state has a legitimate interest in rehabilitation programs for sex offenders.

California v. Rosales, 2011 WL 2650757 (Cal.App. 6 Dist. July 7, 2011) (Unreported Opinion)

- 404b/Cal. Evidence Code § 1108
- Expert Testimony on Child Sexual Abuse Accommodation Syndrome

The Defendant, Hugo Rosales, was convicted following a jury trial of one count of sexual penetration of a minor 10 years old or younger, in violation of Pen.Code § 288(b) and two counts of forcible lewd conduct with a minor under 14 years of age, in violation of Pen. Code § 288 (b)(1). He was sentenced to 27 years to life in prison.

The allegations came to light when the victim's father caught the Defendant in bed with his 7 year old daughter. The Defendant had been living in the victim's home and was her maternal uncle. The Victim testified to multiple occasions where the Defendant had molested her.

The Defendant claims that the trial court erred by allowing the victim's father to testify about an incident where he observed the victim exit the laundry room, where she had been with the Defendant, with her skirt tucked into her underwear. The evidence was presented as other acts evidence. The Appellate Court found that the evidence was admissible to show a common plan or scheme and that it was not unduly prejudicial.

The Defendant also claims that expert testimony about CSAAS was improperly admitted because it did not meet the standards for scientific evidence. However, the Appellate Court held that testimony about CSAAS has long been admissible in California and the trial court gave the appropriate cautionary instructions to the jury.

New Jersey v. Dellas, 2011 WL 2636998 (N.J. Super, A.D., July 7, 2011) (Unpublished Opinion)

- Terms of Probation

The Defendant, Norman Dellas, Jr., was convicted pursuant to a plea bargain of third degree child endangerment, in violation of N.J.S.A. 2C:24-4a. He was sentenced to five years probation and community supervision for life.

The Defendant's terms of probation prevented him from using a computer with internet access. As part of his probation and pursuant to an amended judgment of conviction, the Defendant was required to place monitoring software on any computer he used. The Defendant did not put the required software on his computer until June 30, 2008. The Defendant did download the required program, but never installed it. Three weeks prior to the termination of his probation, the Defendant's supervising agent discovered the Defendant's non compliance with the terms of his probation. In addition, it was discovered that the Defendant's cell phone had internet access. This was not disclosed to his probation officer. The Defendant was then found guilty of violating the terms of his probation.

The Defendant appeals this claiming that he had complied with the terms of his probation by downloading the monitoring software and that neither his terms of probation nor the statute requiring the computer monitoring also required that he install the program. He additionally claimed that if he were to install the monitoring software he would be then violating his terms of probation.

The Appellate Court dismissed both of the Defendant's arguments. The Court found that the Defendant was advised that he was required to download and install the program. The Court also held that the Defendant's second argument was specious and completely lacked merit.

July 11 - 15, 2011

State Supreme Courts

Ohio v. Williams, ---N.E.2d ---, 2011 WL 2732261 (Ohio S.Ct., July 13, 2011)

- Sex Offender Registration

In 2007, the Defendant George Williams, was convicted of unlawful contact with a minor, in violation of R.C. 2907.04. When the Defendant pled guilty he was told twice by the trial court that he would not be subject to sex offender reporting requirements. After the Defendant pled

guilty, and before sentencing, the Ohio statute on sex offender registration was drastically altered by new legislation. The Defendant moved to be sentenced pursuant to the registration law in effect at the time of his plea. The trial court denied the Defendant's motion and he was required to register as a Tier 2 sex offender under the new law.

The Defendant appealed claiming that retroactive application of the new law was unconstitutional. The Court found that it was an unconstitutional *ex post facto* application of a law and violates Ohio's prohibition against enacting retroactive legislation. Thus, Ohio's new sex offender legislation could only be applied to individuals convicted after the start of 2008.

Nebraska v. Kass, 281 Neb. 892, 799 N.W. 2d. 680 (Neb. S.Ct. July 15, 2011)

- Statutory Construction
- Entrapment
- Sentencing
- Jury Instructions

The Defendant, David Kass, was convicted, following a jury trial on one count of enticement by electronic communications device, in violation of Neb.Rev.Stat. § 28-833. He was sentenced to one year in prison and ordered to register as a sex offender.

The Defendant, a police officer in Omaha, Nebraska, engaged in a series of online and telephone conversations with an individual he believed was a 14 year old girl. The person he was speaking with was in fact an undercover officer. These conversations were sexual in nature.

The Defendant claims that the statute that he was convicted of violating was over-broad. The Court found that, based on its reading of the statute and by applying existing precedent Neb.Rev.Stat. § 28-833, it was not constitutionally over-broad. Next the Defendant argues that the jury instructions failed to provide meaning to the terms "indecent, lewd, lascivious or obscene". The Court rejected this argument finding that the failure to define terms in a statute does not constitute plain error requiring reversal. The Defendant then argues that the evidence presented at trial entitled him to the instruction on entrapment. The Court found that the evidence presented at trial clearly established that it was the Defendant who initiated the sexual conversation with an individual he believed to be a 14 year old girl and the fact that the chat room was restricted to individuals over 18 did not in and of itself show that the officer entrapped the Defendant. Finally the Defendant claims that his one year prison sentence is excessive. The Court held that the sentence was within the sentencing range and, given the Defendant's education and occupation, was entirely appropriate.

<u>State Courts of Appeal</u>

Bolton v. Georgia, --- S.E.2d ---, 2011 WL 2698190 (Ga.App., July 13, 2011)

- Statutory Construction

- Sufficiency of Evidence
- Entrapment

The Defendant, Mohammed Leon Bolton, was convicted of one count of computer pornography and child exploitation, in violation of OCGA § 16-12-100.2(d)(1). The Defendant appeals his conviction claiming that the State did not prove child molestation as required by the statute, that the evidence presented at trial did not support the conviction, and that he was entitled to an entrapment instruction.

The charge stems from online and phone conversations that the Defendant had with who he believed was a 15 year old girl. The person the Defendant was actually communicating with was an undercover officer. During their on-line communications the Defendant engaged in sexually explicit conversation and proposed a meeting for the purpose of having sex. The Defendant went to the established location to meet the "15 year old girl" and was arrested.

The Court held that the statute requires the solicitation of a sexual act and does not require an act of child molestation. The Court also found that the evidence clearly established that the Defendant solicited what he believed was a 15 year old girl to engage in various sex acts and went so far as to go to the location set up for this sexual encounter. Finally, the Court held that the Defendant was not entitled to an entrapment instruction and his counsel was not ineffective for failing to request same.

Kansas v. Lancaster, 253 P.3d 51, 2011 WL 2793230 (Kan. App., July 15, 2011)

- Separate Trials
- Search & Seizure
- Insufficient Evidence

The Defendant, Tony Lancaster, was charged with twenty counts of sexual exploitation of a child, one count of possession of methamphetamine, two counts of possession of drug paraphernalia and one count of possession of a hallucinogenic drug. He was convicted following a jury trial. The drug and child pornography charges were tried together despite the Defendant's motion to have them separated.

The instant case began during the investigation of the apparent suicide of the Defendant's brother. While officers were at the home the Defendant shared with his brother they observed items associated with the manufacture of methamphetamine. They obtained a search warrant for the house and outbuildings. During their search they located what they believed were images of child pornography.

On appeal, the Defendant claims that the trial court erred by failing to separate the drug and child pornography charges, that the search of his property violated his constitutional rights, and that the evidence presented was insufficient to support his conviction.

The Court agreed with the Defendant's first assignment of error and found that the trial court should have separated the drug and child pornography charges. The Court held that there was no connection nor were the crimes of the same character sufficient to establish a tied plan or scheme. Thus the trial court should have granted the Defendant's motion to separate the charges. The Court did find that there was no error in the trial court's denial of the motion to suppress. Given the suspicious nature of the apparent suicide and that the officers found items that are commonly used in the manufacture of methamphetamine they were within their rights to conduct a safety sweep which led to the evidence used to obtain the initial search warrant. The Court also rejected the sufficiency of the evidence.

Olds v. Kansas, 255 P.3d 51, 2011 WL 2796719 (Kan. App. July 15, 2011)

- Ineffective Assistance of Counsel

On June 15, 2007, the Defendant, Alvie Olds pled guilty to one count of promoting obscenity, in violation of K.S.A. 21-4301(f)(1), a class A nonperson misdemeanor. He was given a sentence of 5 months in jail, consecutive to violations of his probation on convictions for indecent liberties with a minor and aggravated sodomy.

The case arose out of an investigation that found images of child pornography on his computer. The Defendant was originally charged with one count of attempted sexual exploitation of a child, but pled to the reduced misdemeanor charge indicated above. The Defendant filed a number of motions to withdraw his plea, which were all denied.

The Defendant filed a pro-se motion pursuant to K.S.A. 60-1507 and was appointed counsel. Among the issues raised by the Defendant was that his trial counsel was ineffective. The district court held a hearing and ruled that the Defendant's trial attorney was not ineffective. The Defendant appealed the district court's ruling claiming did not 1. make findings of fact or conclusions of law to support the ruling in the 60-1507 hearing; 2. that his attorney for that hearing was ineffective; and 3. the evidence did not support the district court's denial of his 60-1507 motion. The Court held that the Defendant's attorney for the 60-1507 hearing was not ineffective, however the district court did not make adequate findings of fact and conclusions of law. Thus the case was remanded for the district court to make the appropriate findings and conclusions.

July 18 - 22, 2011

State Courts of Appeal

California v. Clair, 197 Cal.App. 4th 949, 129 Cal.Rptr.3d. 35 (Cal.App. Div. 5, July 21, 2011)

- Statutory Construction
- Sentencing

The Defendant, George Clair, was convicted following a jury trial of 46 felony counts including committing lewd and lascivious acts with his daughter, in violation of Pen.Code § 288(a), felony child endangerment, in violation of Pen.Code § 273a(a) and distribution of child pornography, in violation of Pen.Code. § 311.2(c). The Defendant was sentenced to 59 years to life in prison.

The Defendant came to the attention of law enforcement after it was discovered that he was sending images of child pornography from his America On-Line ("AOL") account. A search warrant conducted at the Defendant's residence resulted in the seizure of numerous digital storage items. Examination of the items seized found over 600 images of child pornography on the computer hard drive, his digital camera and an external hard drive. Included in the images were photographs of the Defendant sexually assaulting his daughter, who was between the ages of 6 and 9.

On appeal, the Defendant claims that there was insufficient evidence to support his conviction for felony child endangerment because there was no evidence presented to establish that his daughter suffered an injury that resulted in great bodily harm or death. The Court rejected this argument finding that case law and the statute do not require that the victim actually suffer from injuries that cause great bodily harm or death. Here the jury had evidence in the form of photographs of the Defendant penetrating his daughter's vagina with a dildo that given her age could have reasonable caused serious injury.

The Defendant also argues that his sentences on some counts should have been stayed as they were part of the same transaction or occurrence. He claims that since he sent images to the same individuals on the same day in different emails they were all part of the same course of conduct. This argument was also rejected. The Court found that the fact the images were sent to the same individuals was not the sole basis for determining a common transaction. Here the Court found that the time separating the transmissions, anywhere between 10 minutes and 1 hour, was sufficient to establish a separate transaction and thus did not require staying the sentences.

<u>Unpublished Opinions</u>

New Jersey v. Villanueva, 2011 WL 2802267 (N.J.Super.A.D., July 19, 2011) (Unreported Opinion)

- Ineffective Assistance of Counsel

In May 2001, the Defendant, Omar Villanueva, was charged with 6 counts of 2nd degree endangering the welfare of a child, in violation of N.J.S.A. 2C:24-4b(3), 2 counts of 2nd degree causing or permitting a child to engage in a prohibited sexual act, in violation of N.J.S.A. 2C:24-4b(3), and one count of 4th degree possession of child pornography, in violation of N.J.S.A. 2C24-4b(5)(b). The Defendant pled guilty to one count of 3rd degree endangering the welfare of a child, in violation of N.J.S.A. 2C-24-4a. The Defendant was sentenced to 5 years probation and lifetime community supervision.

The Defendant completed his term of probation and started his community supervision. He filed the instant appeal after it became apparent that the terms of his community supervision were "significantly" more restrictive than his terms of probation. The trial court denied the Defendant's request for relief without holding a hearing. The Defendant claims on appeal that his attorney at the plea was ineffective because he did not advise the Defendant about the terms of community supervision, that he had not knowingly entered into his guilty plea, and that he should be entitled to an evidentiary hearing on his claim of ineffective assistance of counsel.

The Court reversed the holding of the trial court and ordered that the Defendant was entitled to a hearing to determine if his counsel at the plea was ineffective. The Court found that there was sufficient evidence presented to establish that the attorney at the plea did not inform the Defendant of the conditions of community supervision.

New Jersey v. Elchin, 2011 WL 2848329 (N.J.Super.A.D., July 20, 2011) (Unreported Opinion)

- Ineffective Assistance of Counsel
- Legal Impossibility

The Defendant, Joseph Elchin, pled guilty to 2nd degree attempted luring or enticing a child by various means, in violation of N.J.S.A. 2C:13-6, 3rd degree attempted endangering the welfare of a child, N.J.S.A. 2C:5-1, and 4th degree purchasing a handgun without first securing a permit to purchase. The Defendant was sentenced to 5 years in prison with 2 ½ years of parole ineligibility.

The Court rejected all of Defendant's arguments on appeal. They found that he was not denied effective counsel.

Bethards v. Texas, 2011 WL 2937875 (Tex.App.-Waco, July 20, 2011) (Unreported Opinion)

- Consent Search
- 404b
- Knowing Possession

The Defendant, David Bethards, was convicted following a jury trial of fourteen counts of possession of child pornography. He was sentenced to ten years in prison.

In July 2007, law enforcement became aware that the Defendant may have images of child pornography on his home computer. They began the process of obtaining a search warrant for the Defendant's home. After learning that the Defendant had been informed of the investigation, two officers went to the Defendant's home. The Defendant exited his home to speak to the officers but denied their request for consent to seize and search his computer. The officers told the Defendant that they were getting a search warrant and told him they would not let him return inside the home. The Defendant then gave consent to take and search the computer. The

Defendant reaffirmed his consent multiple times that day and the next. A forensic search of the computer found over 1,200 images of child pornography.

The Defendant appealed claiming that the court erred in denying his motion to suppress the search as his consent was not voluntary. The Defendant claims that he had been "constructively" evicted from his home and that officers had a less restrictive restraint available. The Court found that given the totality of the circumstances the Defendant's consent was voluntary.

Next the Defendant claims that the trial court erred in admitting other images of the child pornography found on his computer pursuant to 404b. The State admitted twelve additional images for which the Defendant was not indicted. The Court held that the evidence was not unduly prejudicial and was relevant to show that the images were not on the Defendant's computer by error or mistake. The Defendant had claimed that the images were accidentally on his computer and he kept them to show his wife that it was a mistake.

Finally, the Defendant argues that there is no evidence to support a finding that he knowingly possessed the images. The Court found that the evidence supported a conclusion that the Defendant knowingly possessed the items.

July 25 - 29, 2011

Unpublished Opinions

Iowa v. Schooley, 2011 WL 3116983 (Iowa App., July 27, 2011) (Unreported Opinion)

- Knowing Possession

The Defendant, Daniel Schooley, was convicted of sexual exploitation of a minor, in violation of Iowa Code § 728.12(3). He was sentenced to two years in prison with a ten year sentence pursuant to Iowa Code § 903B.2.

The Defendant's nine year old daughter, when she was at his home for visitation, observed the Defendant viewing images of child pornography. The child told her mother and a school counselor. A forensic search of the Defendant's computer discovered many images of adult pornography and four images of child pornography. At trial, the Defendant's daughter testified seeing the Defendant look at four distinct images of girls her age performing sex acts.

The Defendant claims on appeal that there was insufficient evidence to establish that he knowingly possessed the charged images of child pornography. The Court rejected this argument finding that the testimony of his daughter, the fact that the images were downloaded to the Defendant's hard drive ,and his admission that he had searched for images using the terms "teens and Lolita", established knowing possession.