

## CSE Case Law Update June 2009

### STATE SUPREME COURTS

State v. Pollard, 908 N.E.2d 1145 (Ind. June 30, 2009).

- Sex Offender Registration
  - Constitutionality
    - Ex Post Facto

Defendant was convicted of a violation of the sex offender residency requirement statute. The Indiana Supreme Court overturned the conviction on the basis that the purpose of the sex offender registration statute was punitive based on a review of the Mendoza-Martinez factors. Accordingly, the Court held that since the law changed, allowing additional punishments, following the defendant's conviction the Ex Post Facto clause of the Indiana Constitution prohibited it from applying to the defendant.

State v. Byrne, 972 A.2d 633 (R.I., June 19, 2009).

- Search and Seizure
  - Nexus

Trial court granted defendant's motion to suppress evidence based on a search warrant of his home. Defendant, while at work in a store open to the public, aimed a digital camera up the skirt of an underage girl. Police secured search warrant for digital cameras and storage devices from defendant's business or home. Trial court granted defendant's motion to suppress evidence found at defendant's home from the camera because a lack of nexus between the evidence and the place to be searched. The Rhode Island Supreme Court reversed the trial court's decision. They relied upon cases from Massachusetts and determined that based on the facts, a reasonable inference could be drawn that the defendant would take the camera home. The Court noted that it could not come up with any additional information, barring eyewitness testimony that could be included in the affidavit to support facts connecting the camera being taken to the defendant's home. However, considering the nature and circumstances of the underlying offense it was not unreasonable to believe defendant would take the camera to his home since viewing and possessing child pornography is a secretive and solitary crime.

State v. Jennings, 973 A.2d 340 (N.H. June 12, 2009).

- Statutory Construction

The Supreme Court of New Hampshire rejected defendant's appeal of his conviction for prohibited uses of computer services. Defendant argued that the evidence presented at trial was insufficient to show that he utilized a computer service to entice, lure or solicit a child, when he accessed a website to show a pornographic movie to his daughter while he digitally penetrated her. The Supreme Court used the plain and ordinary meaning of the word utilize in the statute to rule that the defendant's conduct was within the statutorily prohibited conduct. The Court reviews several federal cases that support its ultimate finding.

Blanchard v. State, 2009 Ark. 335 (Ark. June 4, 2009).

- Other Crimes Evidence

Supreme Court of Arkansas reversed the Appellate Court of Arkansas ruling overturning a conviction for sexual assault. The issue was the admission of approximately 1022 images of pornography that the victim in the case said the defendant showed her. The Supreme Court ruled that the defendant failed to properly object to the admission of the images and therefore the objection was waived and the Court could not consider the defendant's claim.

### COURTS OF APPEAL

King v. State, 908 N.E.2 673 (Ind. Ct. App. June 30, 2009).

- Sufficiency of Evidence
  - Corpus Delicti
  - Admission of Evidence
- Impossibility Defense

Defendant was convicted of two counts of child solicitation and one count of attempted dissemination of harmful matter to a minor. Defendant challenged conviction on three grounds. The first was that the trial court erred in admitting the affidavit of Yahoo! regarding the email account since Yahoo! did not verify the accuracy of the account holder information. The Appellate Court agreed that it was error to admit the document, but found that it was harmless error. Secondly, the defendant claimed that since it was an undercover officer and not a child who received the harmful material and solicitation, the defendant could not be convicted of the offense. The Appellate Court rejected this contention, ruling that the relevant issue was whether the defendant believed it was a child receiving the material or solicitation. Finally, the Appellate Court rejected defendant's corpus delicti argument ruling that the admission of certain exhibits in addition to defendant's confession satisfied the requirement of the offense.

Midkiff v. Commonwealth, 678 S.E.2d 287 (Va. Ct. App. June 30, 2009).

- Search and Seizure
  - Staleness
  - Nexus

Defendant challenged the search warrant following a jury conviction on multiple counts of possession of child pornography. Defendant claimed that the warrant was stale and was lacking a nexus for the place to be searched. Appellate Court ruled that while the information forming the basis of the search warrant may have been stale, the officers had a good faith belief based on their knowledge of how a collector of child pornography keeps his collection which extended the probable cause. The Court also rejected defendant's second contention that there was no nexus between the IP address in the warrant and the defendant's home. While the Court noted that there was no date range for the IP address included in the warrant, it still established a slight nexus to support the warrant.

People v. Tartaglia, 2009 Cal.App.Unpub. LEXIS 5196 (Cal. Ct. App. June 26, 2009).

- Ineffective Assistance of Counsel

Defendant was convicted for multiple counts of oral copulation with a person under 16 years of age and possession of child pornography. On appeal, defendant claimed ineffective assistance of counsel regarding the admission of testimony from an expert witness on Child Sex Abuse Accommodation Syndrome and failure to ask for a limiting jury instruction as to the expert's testimony. The Appellate Court rejected defendant's first claim, ruling that it was trial strategy to not cross the expert witness. The Court agreed with the defendant that it was error not to ask for the limiting instruction, however, given the overwhelming evidence of guilt, the error was harmless.

Wenger v. State, 292 S.W.3d 191(Tex. App. June 25, 2009).

- Sufficiency of Evidence
  - Definition of Dissemination
- Admissibility of Evidence
  - Absence of mistake or accident

Defendant was convicted of multiple counts of promotion of child pornography and possession of child pornography. Police officer downloaded movie files from defendant's IP address through file sharing program (peer-to-peer). Defendant challenged conviction that use of the P2P software met state definition of dissemination. Appellate court ruled that use of P2P software met the state statutory guidelines for dissemination. Additionally, the Appellate Court ruled that it was not error to admit an exhibit at trial

showing a list of subfolders and 900 files names from the defendant's computer's file structure to demonstrate lack of mistake or accident.

Verges v. State, 13 So.3d 525 (Fla. Dist. Ct. App. June 24, 2009).

- Search and Seizure
  - Consent

In a factually specific case, police go to defendant's home to search for marijuana based on a tip. Police see marijuana and drug paraphernalia in plain view. Defendant consents to search in writing. Prior to signing the consent form, defendant tries to hide some papers. Police speak with defendant's lawyer on the phone and tell him they are going to be searching for more "contraband." Ultimately, police find the child pornography. Appellate Court agrees with trial court that defendant's earlier attempt to hide the papers does not invalidate consent.

Noland v. State, 2009 Tex.App. LEXIS 4817 (Tex. App. June 24, 2009).

- Search and Seizure

Defendant argues on appeal from conviction of possession of child pornography that the search by the computer repairman and subsequent search by police was in violation of Texas law. Appellate Court rejects defendant's contention, ruling that the defendant did not make the argument in trial court and therefore, did not preserve the issue for appeal. The Appellate Court also rejected the defendant's contention that the search warrant contained improper information as to his statement to the computer repairman that the pornography found on the computer was illegal.

People v. Allen, 2009 Cal.App.Unpub. LEXIS 4898 (Cal. Ct. App. June 18, 2009).

- Statute of Limitations
- Improper Admission of Evidence

Defendant's main argument in this case was that six of the nine charges against him were barred by the statute of limitations. Within that argument defendant claimed that any amendments extending the statute of limitations were unconstitutional Ex Post Facto laws as applied to him. The Appellate Court rejected defendant's arguments ruling that all six challenged charges fell within the statute of limitations. Additionally, the Court ruled that the police officer's testimony as to the age of the victim was error, but was harmless. Finally, as to the age of the victims depicted in the child pornography the court ruled that it was a question of fact for the jury.

Wisconsin v. Luchinski, 771 N.W.2d 928 (Wis. Ct. App. June 17, 2009).

- Discovery Violation

Defendant was convicted of three counts of repeated sexual assault of a child. Defendant claimed error based on the prosecutor's not turning over copies of the computer forensic report and audio tapes from the jail. The Appellate Court disagreed and ruled that since the evidence was not exculpatory, the prosecution had no obligation to turn over the information.

Loveday v. State, 908 N.E.2d 1277 (Ind. Ct. App. June 16, 2009).

- Sentencing
  - Factors in Aggravation and Mitigation
  - Inappropriate Sentence

Defendant plead guilty to multiple charges including child pornography. He was ultimately sentenced to 39 years, as several of the sentences were to run consecutively. Defendant argued abuse of discretion as to the factors in mitigation and that the sentence was inappropriate in that it was too long. The Appellate Court agreed with the defendant that the trial court incorrectly applied several factors in aggravation and mitigation. However, the Court ruled that his sentence was not inappropriate.

State of Idaho v. Rossignol, 215 P.3d 538 (Idaho Ct. App. June 12, 2009).

- Other Crimes Evidence
  - Flight
  - Other Pornographic Materials

Defendant was convicted of multiple counts of lewd conduct with a minor under sixteen, sex abuse of a child and a being a persistent offender. Defendant was arrested and released on recognizance bond. Prosecutors found more information during investigation and moved to increase defendant's bond. Defendant fled from the jurisdiction. Ultimately, defendant was arrested and the trial court allowed evidence of flight into the trial. Trial court also allowed evidence of additional pornography on defendant's computer, as it corroborated the victim's outcry statement that the defendant showed her pornography on his computer prior to and during the abuse. The trial court also allowed the prosecutor to present evidence of incest stories from the defendant's computer to demonstrate intent and motive. The Appellate Court ruled that there was no error by the trial court. The court did not allow all 800 additional movies and 18,000 images, but only a handful of them. Additionally, the trial court limited the prosecution to presenting only three of the eleven incest stories found on the computer.

State v. Dent, 208 P.3d 808 (Kan. Ct. App. June 12, 2009).

- Sufficiency of Evidence

Defendant was convicted of aggravated indecent solicitation of a child. Defendant appealed his guilty plea on the basis that his comment, “wouldn’t it be cool if I had sex with you?” was not intended as an offer to the minor, but just talk about a hypothetical situation. The Appellate Court disagreed and upheld the conviction.

Dunder v. State, 2009 Alas.App. LEXIS 83 (Alaska Ct. App. June 10, 2009)(Memorandum Opinion).

- Sentencing
  - Probation Conditions

Defendant was sentenced to prison and 25 years of probation for sex abuse of a minor and distribution of child pornography. Sentencing court entered condition of probation prohibiting defendant from possessing devices capable of accessing the Internet, storing movies or with wireless capabilities. Appellate Court ruled that there was a nexus between the underlying offense and the probation conditions; however, the probation conditions could have been more narrowly drawn to allow defendant access to Internet with supervision and monitoring by probation.

People v. Samarron, 2009 Cal.App.Unpub. LEXIS 4503 (Cal. Ct. App. June 9, 2009).

- Sufficiency of Evidence
  - Lewd or Lascivious

In an unpublished opinion, Appellate Court rejects defendant’s assertion that the three pictures found on his nightstand do not rise to level of child pornography. Court relies upon the Dost factors as explained in People v. Kongs, 37 Cal.Rptr.2d 327 Cal. Ct. App. 1994). Additionally, the Court notes that the context of the photos should be considered as well as the child’s age and whether the exhibition of the child’s genitals are for the purpose of satisfying the viewer. The Court ruled that the three pictures that were found satisfy those factors.

State v. Durrett, 208 P.3d 1174 (Wash. Ct. App. June 1, 2009).

- Sex Offender Registration
  - Statutory Construction
    - Double Jeopardy

Defendant appealed conviction for two counts of failure to register as sex offender. Defendant was homeless and was thus required to report to the sheriff's office on a weekly basis. Defendant failed to report over a period of ten weeks. Defendant was charged and convicted on two counts of failure to register. Defendant claimed that the two separate convictions violated double jeopardy as there was only one act. The Appellate Court agreed since the language of the statute was for failure to comply with "any" portion of the act; multiple acts fell within the meaning of the word, "any". The reviewing court ruled that defendant's conduct could be considered a continuing course of conduct and only one act within the statutory prohibitions.