

CSE Case Law Update June 2010

STATE SUPREME COURTS

People v. Simmonds, 902 N.Y.S.2d 256 (N.Y. App. Div. June 10, 2010)

- Sex offender risk assessment
- Grooming
- Continuing course of sexual contact

40 year-old defendant began a relationship over the internet with a female living in Missouri whom he believed was 18 years-old. For two-months the two individuals exchanged frequent phone and e-mail conversations. After this period, the victim informed defendant she was 15 years-old; in fact, she was then only 12 years-old. Under the impression that the victim was 15 years-old, defendant arranged to meet her, and thereafter subjected her to multiple sexual acts. Defendant plead guilty in Missouri to statutory rape in the first degree and statutory sodomy in the first degree. Upon his release from prison, defendant relocated to Broome County, New York, whereupon the Board of Examiners of Sex Offenders prepared a risk assessment instrument in which defendant was assigned 80 points, classifying him as a risk level II sex offender. He was then assigned an additional 20 points for engaging in a continuing course of sexual contact. Defendant appealed this 20 point addition and 20 points assigned at the initial assessment for “grooming” the victim. Defendant’s admission that he performed multiple sexual acts with the victim over the course of two days and the court found this admission, coupled with the victim’s statements, was sufficient evidence to establish a continued course of sexual contact by clear and convincing evidence. The 20 points assessed for grooming required that the crime “was directed at a stranger or a person with whom a relationship had been established or promoted for the primary purpose of victimization.” Here, defendant and the victim met in an on-line chat room intended for adults, victim represented to defendant she was 18 years-old, the conversations under this guise did not discuss sexual matters, victim had sent defendant a picture- claiming it was herself- depicting a mature, adult woman, and defendant only traveled to Missouri after the victim falsely described her circumstances to appear that she need to escape her household. The bare assertion that defendant was “grooming” the victim because he ultimately believed her to be 15 years-old does not constitute clear and convincing evidence to support the assessment of the 20 points.

Midkiff v. Commonwealth, 694 S.E.2d 576 (Va. June 10, 2010)

- Child Pornography
- Best-evidence rule
- Copy of hard drive and images/videos from copied hard drive

The Supreme Court of Virginia affirmed the court of appeals decision to not extend the best evidence rule to DVD copies and photograph copies of images of child pornography

from a “bit for bit copy” of defendant’s hard drives. Defendant argued that because there was no evidence that the hard drives themselves were not available, under the best evidence rule, the still images and video recordings should not be admitted into evidence. Further, defendant argues that digital images are subject to manipulation and the court should extend the best evidence rule to these images to “ensure the integrity of a criminal conviction.” The court was satisfied with the forensic digital evidence expert testimony that a bit for bit copy of a hard drive is considered forensically to be an original and that she herself made the copied. The investigating officer testified that he produced the photographs from the data DVD he received from the digital evidence expert and the digital evidence expert confirmed that they were indeed accurate representations of the child pornography she viewed on the digital reproductions of defendant’s hard drives. The court concluded that the printed pictures and video recordings were reliable representations of the child pornography found on defendant’s computer hard drives and affirmed the judgment of the Court of Appeals.

State v. Grenning, 234 P.3d 169 (Wash. June 17, 2010).

Defendant was convicted, *inter alia*, of 20 counts of possession of child pornography. His pre-trial discovery motion under Wash. Super. Ct. Crim. R. 4.7(a)(1)(v) to enable a defense expert to examine a mirror image of defendant’s computer hard drive was denied after a protective order granting access to the hard drive at the police station under limited circumstances was granted. The court found that defendant’s constitutional right to present a defense was violated when he was prevented from accessing potentially critical exculpatory evidence due to what it found a minimal risk of improper dissemination of the child pornography. The court found the trial court had abused its discretion by analyzing the motion under Rule 4.7(e), which gives trial courts the discretion to grant or deny reasonable requests for material and relevant evidence and the authority to condition disclosure to protect against certain risks, since the hard drive belonged to the defendant and thus fell under Rule 4.7(a)(1)(v).

People v. Holt, 233 P.3d 1194 (Colo. June 21, 2010)

- *Miranda* and custodial interrogation

The prosecution appealed the trial court’s determination that the defendant, who had not been provided *Miranda* warnings, was “in custody” during an interrogation in which he confessed to possessing child pornography. The Court of Appeals affirmed the suppression. Police had executed a search warrant in the defendant’s home, where they entered en masse with guns drawn, handcuffed the defendant, and asked whether he would cooperate with an interview. The defendant agreed and was escorted to a police van. He then sat in the open van with his legs hanging outside and provided a confession to the detective. He was not provided *Miranda* warnings. The Colorado Supreme Court held that the defendant was indeed “in custody” for the purposes of *Miranda*, and the statement was thus properly excluded by the trial court. The court noted the officers degree of force used when entering the apartment, fact that the defendant was handcuffed

and told he was not free to leave, and also that the defendant appeared to be the prime suspect and had every reason to believe he would be arrested.

Dissent: The dissent emphasized how the majority continually conflates the custody required for the *Miranda* analysis with the Sixth Amendment analysis. The dissent also noted that the majority improperly relies on factors found illegitimate by the US Supreme Court; specifically, whether the defendant appeared to be the prime suspect and believed he would ultimately be arrested. These factors would suggest that *Miranda* warnings are required any time a suspect believes that, at some point in the future, he will be subject to arrest, which is far from the coercive environment contemplated by *Miranda*.

State v. Merrill, No. 2009-811, 2010 N.H. LEXIS 69 (N.H. June 30, 2010)

- Probation requirements – authority to impose, due process

The defendant was convicted of possession of child pornography and challenged a probation requirement that he have no computer access except for work purposes. The requirement was imposed by the defendant's probation officer, not directly by the court, and the defendant argued that this violated the separation of powers doctrine. However, N.H. Super. Ct. R. 107(1) expressly allows probation officers to set conditions, which are still reviewable by the sentencing court. Given the clear authorization by court rule and statute, the court on appeal held that probation officers were permitted to set conditions and this arrangement did not violate the separation of powers doctrine, as non-judicial branches may play a role in sentencing (e.g., the legislature sets standard ranges). The defendant next argued that the requirement limiting his access to computers violated his due process rights. The court stated that his due process rights were limited to the sentencing court informing him at the time of the sentencing (a) what punishment it is imposing, (b) the extent to which the court retains discretion to impose it at a later date, and (c) under what conditions it can be modified. The sentencing court had told the defendant that he was sentenced to three years probation "upon the usual terms of probation and any special terms determined by the [probation officer]." As a result, the court held that the defendant's rights were not violated. Because the initial appellate court had found that the probation requirement was unlawful, the N.H. Supreme Court reversed and remanded the case.

COURTS OF APPEAL

Commonwealth v. Abraham, 996 A.2d 1090 (Pa. Super. Ct. June 8, 2010)

- Ineffective Assistance of Counsel
- Unknowing and involuntary guilty plea

Abraham appealed the order denying his petition for relief filed pursuant to the Post Conviction Relief Act. His petition claimed his trial counsel was ineffective for failing to

inform him a guilty plea to indecent assault would result in the loss of his vested pension rights thereby rendering his guilty plea unknowing and involuntary. At Trial, Abraham pled guilty to one count of corruption of minors and one count of indecent assault. Abraham was a teacher and offered \$300 to a student to have sex with him and also touched her buttocks. Indecent assault triggers the application of the Public Employee Pension Forfeiture Act. In ruling on Abraham's ineffective assistance of counsel claim, the court found that the loss of pension rights was a direct consequence of the guilty plea and counsel was obligated to warn him of the consequence of the plea. Abraham then was required to demonstrate that it was reasonably probable that, but for the errors of counsel, he would not have pled guilty and would have gone to trial. Abraham submitted a signed and notarized declaration with his PCRA petition, stating that had counsel informed him of the pension forfeiture, he would have either sought to plead guilty to any other charge but indecent assault, or gone to trial. Because the petition was dismissed without a hearing, there was no record on this issue and the court could not rule in the first instance on the reasonable probability of Abraham going to trial but for counsel's error. The court remanded for hearing to determine what prejudice Abraham suffered.

In the Matter of C.J.E., 232 P.3d 887 (Kan. Ct. App. June 25, 2010)

- Sentencing – Placement on sex offender registry

The defendant appealed the placement of his name on an open sex offender registry upon his juvenile adjudication for aggravated indecent solicitation of a child. The defendant, who was nearly 17 at the time, had intercourse with a girl who had just turned 12. The court held that the sentencing court did not abuse its discretion because the record revealed that the judge had carefully considered the facts and arguments of both sides. This included the defendant's lack of criminal history, as well as his troubled childhood, mental health needs, age disparity between him and victim, and his answers to specific test questions that were considered high risk (e.g., women get raped because they "sleep around").

People v. Tompkins, 110 Cal. Rptr. 3d 918 (Cal. Ct. App. June 23, 2010)

- Corpus delicti – corroboration required when numerous counts
- Sufficiency of the evidence
- Section 311.4(c) – allowing child to engage in production of sexual conduct
- Qualifying witness as an expert
- Sentencing – reliance on aggravating factors without jury findings

The defendant was convicted of 11 counts of lewd and lascivious acts with a minor under 14, two counts of penetration of a person under the age of 18 with a foreign object, one count of using a minor to perform prohibited acts, and four counts of lewd and lascivious acts with a minor under the age of 16 and more than 10 years younger than the defendant. All of the counts stemmed from the defendant molesting his daughter on numerous occasions over a two year span, which he fully admitted to during a police investigation.

On appeal, the defendant claimed that his statements should have been suppressed under the corpus delicti rule, which requires the prosecution to provide at least slight evidence of guilt other than the defendant's own statements. The defendant argued that the corroborating evidence was required for each individual count. The court noted that precedent merely required separate evidence that multiple molestations took place, and the victims' and investigator's testimony amply met that standard. In a corollary argument, the defendant argued that the victim's generic testimony regarding the specificity and number of molestations was not sufficient to support his convictions. The court held that the victim's testimony, when coupled with the defendant's admissions, were sufficient to establish guilt. Next the defendant argued that section 311.4(c), which prohibits knowingly allowing a minor under your control to engage in a sexual performance, required evidence that he personally filmed his daughter. The court, looking at the express language of the statute, rejected that argument and held that permitting a minor to engage in the performance is sufficient. Because the defendant gave his daughter a dildo and encouraged her to use it to masturbate for men on the Internet using a webcam, he clearly violated the statute. The defendant also argued that the trial court abused its discretion in allowing the investigator to testify as an expert witness on the topic of whether long-term child molestation victims have difficulty remembering and distinguishing incidents. The court held that the investigator's experience with child molestation victims was sufficient to qualify him as an expert, despite not having the academic credentials. Moreover, the court held that any error, if it occurred, would be harmless. Lastly, the defendant claimed and the State conceded that the judge improperly considered aggravating factors that the defendant committed the crime with sophistication and callousness, without a jury finding. The court held that the defendant forfeited the claim by not making a proper objection. Nonetheless, the court found the error harmless because it "conclude[d], beyond a reasonable doubt, that the jury, applying the beyond-a-reasonable-doubt standard, unquestionably would have found true at least a single aggravating circumstance had it been submitted to the jury."

State v. Furseth, 233 P.3d 902 (Wash. Ct. App. June 21, 2010)

- Unanimity instruction – Requirement to elect specific act for conviction

The defendant was charged with one count of possession of child pornography. At trial the State introduced multiple images of child pornography found on the defendant's computer, and did not elect a particular image on which it relied for conviction, nor did the defendant or court request a unanimity instruction. On appeal, the defendant challenged his conviction for lacking such a unanimity instruction. The court noted that "[w]here the evidence indicates that more than one distinct criminal act has been committed but the defendant is charged with only one count of criminal conduct, the jury must be unanimous as to which act or incident constitutes the charged crime." If multiple acts are alleged that could individually constitute the crime, the State must elect which act it is relying on or the court must issue a unanimity instruction. Because the WA Supreme Court recently held that the unit of prosecution for possession of child pornography is per possession (as oppose to per image, or per child depicted), the court

held that a unanimity instruction was not required, as the State could not have charged more than one count regardless.

McFadden v. State, No. CR-07-1923, 2010 Ala. Crim. App. LEXIS 48 (Ala. Crim. App. June 25, 2010).

- Sufficiency of the evidence
- First Amendment – Freedom of speech
- First Amendment – Overbreadth doctrine
- Admissibility of evidence – ER 401, 403, 404(b)

The defendant challenged his conviction for one count of possession of obscene matter containing a visual reproduction of a person under the age of 17 years, and one count of production of obscene matter containing a visual reproduction of a person less than 17 years. The defendant had collected nude and clothed images of children and juxtaposed adult nude genitalia, often engaged in sex acts, around the children. The defendant positioned some of the images to appear as if the children were engaged in sexual conduct with the adults. The defendant argued that the material qualified as neither “matter” nor “obscene” because the acts were not a live performance – specifically, not “visual sexual conduct.” The court rejected the arguments; as the material depicted photographs of nude children, it constituted both under a plain reading of the statute. The defendant next argued that his collage was entitled to free speech protections under the First Amendment. The court chronicled the Supreme Court’s extensive obscenity law precedent, and held that although these children were not actually engaged in sex acts with adults, it was nonetheless child pornography, which the First Amendment does not protect. In a corollary argument, the defendant challenged the statute under which he was convicted for constitutional overbreadth. The court found that the statute did not overreach into protected speech; the requirement that the material be “obscene” resolves any First Amendment issues. Finally, the defendant challenged the admissibility of the montages and several items related to children, including children’s underwear, clothing, books, toys, and news clippings of children being kidnapped and/or murdered. The court upheld the decision of the trial court, finding the materials relevant to show the jurors context and knowledge/intent under 404(b). This was necessary to prove the defendant knowingly possessed the child pornography, which was hotly contested at trial.

UNPUBLISHED CASES

Fitts v. State, Nos. 05-08-00584-CR, 05-08-00585-CR, 05-08-00586-CR, 2010 Tex. App. LEXIS 4329 (Tex. App. June 10, 2010)

- Sufficiency of the evidence
- Judicial confession
- Ineffective assistance of counsel

Defendant appealed his conviction for indecency with a child, possession of child pornography, and aggravated assault of a child under fourteen years of age. Appellant plead guilty to the three. Appellant asserted that the evidence was legally and factually insufficient to establish the corpus delicti for aggravated sexual assault because there was no evidence corroborating appellant's confession. A Judicial Confession was admitted into evidence without objection at the guilty-plea hearing. The confession was signed by the appellant, and signed and approved by appellant's trial counsel, the assistant district attorney, and the trial court. Under Texas code of criminal procedure, when a person pleads guilty before the trial court they shall not be convicted upon their plea without sufficient evidence to support the plea. Appellant's judicial confession embraced all of the elements of the offense and therefore was sufficient evidence to support his guilty plea. Appellant then contended his guilty plea were involuntary because they were not entered knowingly due to the ineffective assistance of his trial counsel. Appellant based his argument on his motion for new trial supported by his affidavit. In his motion of new trial, appellant asserted his trial counsel failed to explain appellant's rights to him so that he could understand him. Appellant subsequently withdrew the motion after the trial court began a hearing on his motion, heard evidence, and continued the hearing. Because appellant withdrew his motion for new trial, there is no evidence to rebut the presumption his pleas were voluntary. Further, Appellant contended he lacked effective assistance of counsel. He was unable to prove any conduct of his trial counsel did not fall within the wide range of reasonable, professional assistance. The court found no evidence of any conduct lacking sound trial strategy.

People v. Hart, No. 288216, 2010 Mich. App. LEXIS 1049 (Mich. Ct. App. June 8, 2010)

- Law of the case doctrine
- De novo review

Defendant argued that the court of appeals of Michigan erred when it reversed the lower court's suppression of evidence. Defendant argued that the suppression of his computer and two disks that contained evidence of child pornography was proper because the evidence was seized in violation of the Fourth Amendment. Upon review, the court applied the law of the case doctrine. The law of the case doctrine holds that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals with respect to that issue. The court ruled on the validity of the search and seizure of the evidence and reversed the trial court's order suppressing the evidence. Defendant's avenue for redress from that order was to apply for rehearing or appeal to the Michigan Supreme Court. Defendant does not argue that the Court previously failed to consider relevant facts relating to the search and seizure or the facts or law have changed. The court is bound by its previous decision.

Nava v. State, No. 08-08-00197-CR, 2010 Tex. App. LEXIS 4514 (Tex. App. June 6, 2010)

Appellant was convicted of sexual assault of a child (count I), sexual performance by a child (count II), and possession of child pornography (count III). On appeal, appellant contended the trial court violated procedural rules when it responded to a note sent by the jury saying they had reached a decision as to Count III, but were deadlocked as to Counts I and II with a written response to continue deliberating prior to Appellant or counsel returning to the courtroom. The trial court is required to use reasonable diligence to secure the presence of the defendant and his counsel prior to responding to any communications from the jury during its deliberations. The court found that this communication did not relate to the law or fact and did not constitute additional instruction. All other issues raised by appellant were overruled for failure to appropriately show the trial court's error.

Pittman v. State, No. 14-08-00710-CR, 2010 Tex. App. LEXIS 4504 (Tex. App. 14th Dist. June 17, 2010).

Defendant was part of a sex ring that trained children to perform sexual acts at a club in front of adults, and was charged with and convicted of one count of aggravated sexual assault for forcing two children to perform sexual acts with each other. The trial court admitted testimony from other children regarding their own victimization, which did not relate to the single count for which he was being tried. The prosecution argued the testimony was relevant and probative of a scheme or plan to sexually assault the children, while defendant argued it was admitted to prove conduct or behavior in conformity with character. The court ruled that the trial court abused its discretion in overruling defendant's Rule 403 objections to the admission of the extraneous evidence. It also found the evidence to be extremely prejudicial, having a substantial and injurious effect or influence in determining the jury's verdict.

People v. Jordan, No. C061767, 2010 Cal. App. Unpub. LEXIS 4426 (Cal. App. 3d Dist. June 14, 2010).

Defendant was found guilty of continuous sexual abuse of a child under age 14 (his stepdaughter, Jane Doe, whom he had adopted) and with committing a lewd act on her when she was 14 or 15 years old. Defendant contended, *inter alia*, that there was insufficient evidence to support his convictions and the court erred by allowing testimony about pornography and incest-themed literature. The court found that the victim's testimony that defendant rubbed his penis on her while she slept between him and her mother was not improbable or incredible: simply because defendant found the testimony hard to believe did not mean a jury could not have reasonably credited it. Although the victim was unable to recall discrete instances with sufficient precision to prove multiple counts of sexual abuse, the crime of continuous sexual abuse of a child under age 14 was enacted because of problems of proof that can arise where the molester resides in the same house as the child and the child recalls she was molested repeatedly over a period of time. Defendant's argument that incest literature and pornography are protected free speech had no bearing on the admissibility of testimony on them since both were used to prove intent and to corroborate the victim's testimony that defendant made her look at pornography.

State v. Sabourin, No. 1D10-483, 2010 Fla. App. LEXIS 8940 (Fla. Dist. Ct. App. 1st Dist. June 21, 2010)

- Search and seizure – warrant deficiency

The defendant took nude pictures of a seven-year-old girl during a car ride; the girl's friend, defendant's niece, remarked that he took pictures of her "all the time." Evidence of the child pornography was suppressed when the trial court found the warrant lacked probable cause and defendant's confession was obtained as a result of the illegal search. Defendant alleged the supporting affidavit failed to establish a nexus between the evidence sought and the defendant's residence, and the failure to provide a date the offense occurred rendered the warrant void. Since possessing child pornography is a "solitary and secretive crime," it was reasonable for the county judge to determine there was a fair probability that a search of defendant's residence would uncover digital cameras containing child pornography. Based on the nature of the offense as possibly ongoing, it was also reasonable for the county judge to conclude the warrant was not stale. Since it was reasonable for an officer to believe the warrant was valid, the resulting search was valid and the confession should not have been suppressed as fruit of the poisonous tree.

People v. Anderson, No. 3-08-0664, 2010 Ill. App. LEXIS 630 (Ill. App. Ct. 3d Dist. June 22, 2010)

- Sentencing – length of probation
- Sentencing – amount of fines

The defendant pled guilty to two counts of aggravated criminal sexual abuse, which stemmed from the same incident – the defendant having sexual relations with a minor who was at least 13 years old. The defendant subsequently challenged the length of his probation and the amount of fines imposed for the convictions. The court imposed two fines under the sexual assault fine statute, 730 ILCS 5/5-9-1.7(b)(1), and also imposed two fines under the Violent Crime Victims Assistance Act, 725 ILCS 240/10 (2006). The court looked at the language of the fine for a sexual assault, which did not limit the trial court to the imposition of one fine per case, just per sexual assault. As the defendant pled to two counts, the court held that the trial court did not abuse its discretion. The court did vacate the second fine under the Victims Assistance Act, as the State conceded that the trial court did not have the discretion to impose the two fines and it was a matter of plain error. Next the defendant argued that he was improperly sentenced to two terms of probation ("mandatory supervised release") because the two counts arose from the same incident. The discretion to order two terms of probation was based on 730 ILCS 5/5-8-1(d)(5), which provided a probationary enhancement "for a second or subsequent offense of ... sexual abuse." The court looked to prior case law interpreting similar language, which found that "the requirement that the offense on which the subsequent enhancement is predicated must first be reduced to a conviction." As the predicate offense here was concurrent, and had not already been reduced to a conviction, the court held that trial court abused its discretion.

Holloway v. State, No. 49A05-0911-CR-649, 2010 Ind. App. Unpub. LEXIS 877 (Ind. Ct. App. June 29, 2010)

- Excluding testimony of defense witness
- Sufficiency of the evidence

The defendant was convicted of child solicitation for an internet sting operation in which an investigator posed as a 15 year-old boy. The defendant challenged the trial court's decision to exclude a proffered defense expert, a certified psychologist and sexologist, who would have testified that the defendant was merely "role playing" while soliciting the apparent 15 year-old. Finding no abuse of discretion, the court noted that the expert (a) had failed to even interview the defendant, (b) acknowledged his limited knowledge of internet chat rooms, (c) conceded he was not published on the topic, and (d) effectively offered an opinion on guilt or innocence. The defendant next challenged the sufficiency of the evidence, claiming the State did not prove he believed he was chatting with a 15 year-old. The court found ample evidence in the chat logs indicating the boy claimed to be 15; the court then stated it would decline to reweigh the evidence, affirming the conviction.