CSE Case Law Report
June 2011

June 1 -10, 2011

State Courts of Appeal

California v. Gerber, 126 Cal. Rptr. 3d 688 (Cal. Ct. App., June 8, 2011)

- Sufficiency of Evidence
- Statutory Construction

Defendant was convicted of possession of child pornography, molesting a child, furnishing marijuana to a child and furnishing a controlled substance to a child. Defendant appealed. The main argument the defendant raised was that his conviction for possession of child pornography was improper as he used a child's head on the body of another adult engaged in a sexual activity. The reviewing court agreed with the defendant holding that the "morphing" (incorrect term, should have been altered image) of any part of a child to another photograph of one engaged in sexual conduct or activity does not meet the statutory guidelines for child pornography in California. According to the appellate court's review the statute which requires a child be "personally engaging in or simulating" sexual conduct, a real child must be depicted, not just a part of a real child.

Ohio v. Collier, 2011-Ohio-2791 (Ohio Ct. App., June 9, 2011)

- Sentencing
- Ineffective Assistance of Counsel

Defendant was convicted of multiple counts of pandering sexually oriented matter to a child, one count of importuning and one count of possession of criminal tools. Defendant appealed his convictions and sentencing. As to the sentencing the defendant claimed ineffective assistance of counsel. The defendant claimed that since the prosecution filed a written motion requesting a specific sentence and support for that sentence the defense attorney was ineffective since he did not file a motion. The reviewing court disagreed, and pointed out in the transcripts where the defense attorney had specifically countered the written motion through oral argument. The defendant also claimed that the sentencing court failed to make statutory findings when sentencing defendant to consecutive sentences. Again the reviewing court disagreed, ruling State v. Hodge, 128 Ohio t.3d 1 (2010), controlled.

Unpublished Decision

California v. Spruill, 2011 WL 2306052 (Cal. Ct. App., June 10, 2011) (Unpublished Opinion)

- Lesser Included
- Jury instructions

- Sufficiency of the Evidence
- Deleted images

Defendant was found guilty of two counts, distributing matter depicting a minor engaging in or simulating sexual conduct and possession of matter depicting a minor engaging in or simulating sexual conduct. Defendant's initial statement to the FBI, was that he visited multiple sites in order to make prayer cards for all victims of child pornography. Later he changed his story to say he traded them so that people on the internet would send him new pictures. Following his conviction, the defendant's attorney filed a motion indicating he did not see any issues of appeal. The defendant then filed a Pro-Se motion claiming four of his own listed above. The appellate court agreed with the defendant's attorney and found no reasonable issues.

June 13-17, 2011

State Supreme Court

New Hampshire v. Lopez, ___ A.3d ___, 2011 WL 2419009, (N.H, June 15, 2011)

- Sufficiency of Evidence

Defendant appealed his felony conviction for endangering the welfare of a child and seven counts of misdemeanor endangering the welfare of a child. Factually, defendant lived with L.P., the victim, her mother and two other young children. L.P. wanted to be on the show America's Next Top Model. She would often pose as if she were a model. In 2007, defendant began using his cell phone to take digital photographs of L.P. While some were seemingly innocent, many others had L.P. dressed in her mother's clothing or lingerie. L.P. posed in a sexually suggestive manner in some of the photographs. The photographs started out less suggestive and turned more and more sexual at the defendant's request. The defendant argued that the request for naked photographs was not lewd or sexually suggestive. The reviewing court disagreed relying upon the Dost factors. Defendant argued that the review should be limited to just the specific request for the picture and not the surrounding circumstances that were occurring at the time, the number and type of other photos that the defendant was taking of the victim. Ultimately, the New Hampshire Supreme Court determined that the jury could consider the extrinsic facts in determining whether the defendant's conduct was lewd. Defendant also unsuccessfully argued that the solicitation statute required more then just talking to the victim but required an additional action to "entice" a child. Again the court rejected the defendant's contention and ruled that based on the facts of the case there was more than enough evidence for a jury to conclude the defendant enticed a child.

Unpublished Opinions

Belcher v. Texas, 2011 WL 2420869 (Tex. App., June 15, 2011) (Unpublished Opinion)

- Sufficiency of Evidence

Defendant was on parole and resided at a halfway house where the rules included that his property was subject to search at any time. Defendant was given a lockable storage locker where he could keep his property. Defendant placed a lock on his locker. His parole agent contacted the house and asked for a search of defendant's property. Security officers took his storage locker to an office and cut off the lock. Inside they found another locked bag. They cut the lock off the second bag and found an unmarked CD. They took the unmarked CD to a computer and shocking a program ran immediately and played 18 images of nude children. During the search the defendant stopped in at the office and asked why they were searching his things, he also signed, upon being asked a form admitting that he was the owner of the contraband material. Defendant's sole issue was whether he "possessed" the child pornography. The reviewing court ruled that defendant's admissions along with the facts of the case satisfied the requirements under the affirmative links rule.

California v. Simon, 2011 WL 2412909 (Cal. Ct. App., June 16, 2011) (Unpublished Opinion)

- Sufficiency of Evidence

Defendant was convicted of multiple counts of lewd conduct with a child and one count of possession of child pornography. Some of the evidence against the defendant for the lewd conduct with the child under 14 was movies and photographs the defendant created himself of the abuse. Defendant claimed that the movies only showed him lifting the skirt of one of the victim's and that did not satisfy the requirement of lewd conduct under the statute. After reviewing the evidence the appellate court disagreed and rule there was enough evidence for a jury to find the defendant guilty as his hand made contact with her buttocks. Finally, the court did rule that the sentencing court incorrectly applied the one strike rule at sentencing as well as whether the court could impose consecutive sentences under the sentencing statute. The court remanded the case for a new sentencing hearing to determine whether acts were separate or for one purpose.

California v. Eickenhorst, 2011 WL 2436216 (Cal. Ct. App., June 17, 2011) (Unpublished Opinion)

- Sufficiency of Evidence
- Sentencing

Defendant was convicted of committing a lewd act on a child and a misdemeanor count of possession of child pornography. Defendant was studying to be a teacher, and had contact with multiple children of family members or friends, several of whom were disabled. The parents of the children discounted the strange manner in which the defendant interacted with all the children, rationalizing it as part of his wanting to become a better teacher. Ultimately, the children started to disclose sexual conduct by the defendant. A search of defendant's computer showed thumbnail images of child pornography. During the initial forensic acquisition of the defendant's hard drive (which CFE started at end of day and left to run overnight) the hard drive crashed. When the officer came in the next morning he tried to restart the process and heard the hard drive making clicking noises. Approximately half of the drive copied. Within that half, approximately 24 thumbnail images were found. The images were printed out and placed in the

CFE's file. Approximately 6 months later, the CFE erased the digital images, because in his experience those were never charged. Defendant claimed in his appeal that the child pornography charges should be dismissed because the state destroyed the evidence. The trial court disagreed and allowed the case to go to jury. The appellate court agreed with the trial court on two different grounds. As to the initial computer crash, the reviewing court ruled that was inadvertent. As to the second claim, the defense expert hired in the case opined that the drives could have been sent out to an expert to be rebuilt and the materials possibly recovered, so the defendant did not suffer actual prejudice by the CFE deleting the digital images. Additionally, the Court ruled that the use of the printed images was sufficient to sustain a conviction as the jury could have viewed them decided that they represented real children under the age of 18 and that there was no requirement that the prosecution call an additional witness to prove the age. The court also rejected the defendant's claim that his sentence violated the 8Th Amendment's cruel and unusual punishment clause.

June 20-30, 2011

State Court of Appeal

Florida v. Chiquet, ___ So.3d ___, 2011 WL 2462957 (Fla. Dist. Ct. App., June 22, 2011)

- Search and Seizure

State appealed trial court's decision to suppress physical evidence based on a material omission in the search warrant. A juvenile complainant informed the police that the defendant took digital photographs of her while she was nude and stored them on his silver Apple computer. The police who filed out the warrant left out the brand and description of the color of the computer. After the warrant was secured the police seized a dell, black computer at the defendant's residence. During testimony at the motion to suppress, the police said they intentionally left out the information about the type of computer and the color because they didn't know if the defendant was going to have more than one computer at the scene. The trial court ruled the omission was material and granted the defendant's motion to dismiss. The appellate court reversed since the court signed the warrant for any and all digital storage devices even though affidavit contained language about a single computer. Since the magistrate signed the warrant for all seizure and search of all computers the color and/or make of the computer was not a material fact.