

CSE Case Law Update

March 2009

STATE SUPREME COURTS

State of Ohio v. Rivas, 905 N.E.2d 618 (Ohio March 31, 2009).

- Discovery

The Supreme Court of Ohio reversed the Appellate Court's ruling that overturned the trial Court's decision denying the defendant a copy of the hard drive used in defendant's case of importuning and attempted unlawful sexual conduct. The defendant filed a motion to compel disclosure of the hard drive from the prosecutor's office during the discovery phase of the case. The prosecution responded by giving a detailed transcript of the hard drive to the defense. The trial court ruled that was correct. The Appellate Court reversed holding that the defendant was denied a fair trial because he was not able to verify the accuracy of the transcripts of the chats provided by the State. The Supreme Court reversed based on the defendant failing to meet his burden that the transcripts provided by the State were false, incomplete, adulterated or spoliated.

State of Nebraska v. Pischel, 762 N.W.2d 595 (Neb. March 20, 2009).

- Sufficiency of Evidence
- Motion to Suppress Evidence
- Jury Instruction
- Publication of Evidence error

Defendant was convicted of using a computer to entice a child or peach officer believed to be a child for sexual purposes. Defendant claimed the court erred on the following conclusions: not granting his motion to suppress evidence of condoms found in his car at the time of his arrest at the park where he was supposed to meet his 16 year old victim; failing to give an entrapment jury instruction; allowing the jury to have access to the transcripts of chats during deliberations; and that there was insufficient evidence to find him guilty. The Supreme Court held that the failure to grant the motion to suppress was a harmless error as was the fact that the defendant had the condoms was harmless error. The Supreme Court also ruled that there was no evidence of inducement that was presented by the defendant so he would not be entitled to an entrapment defense. Finally, the Court held that the chats themselves were evidence of the crime and that the jury's use of them during deliberations was proper.

COURTS OF APPEAL

Hawaii v. Nicholson, No. 27555, 2009 Haw. App. LEXIS 133 (Haw. Ct. App. March 31, 2009). (Unpublished)

- Mistake of fact
- Entrapment

Defendant was convicted of electronically soliciting a child under a Hawaii statute. Defendant appealed trial court's denial of motion to withdraw guilty plea based on possible meritorious defense. Defendant planned on raising multiple defenses including mistake of fact and entrapment. Court rejected both defenses using records of the chat to show defendant was not entrapped but a willing participant and the state did not have to prove defendant was chatting with an actual child under the Hawaii statute as that fact pattern does not qualify for a mistake of fact defense.

Hevner v. State of Indiana, No. 27A02-0808-CR-717, 2009 Ind. App. Unpub. LEXIS 734 (Ind. Ct. App. March 31, 2009).

- Closing arguments
- Sufficiency of evidence
- Sex offender registration: *ex post facto*

Defendant was convicted of child pornography. Defendant raised three errors from his underlying trial. First, the court rejected defendant's claim that the prosecutor's rebuttal argument was improper, ruling instead that it was a proper response to the defense's closing argument. Next, in ruling that there was sufficient evidence to show defendant knowingly possessed the child pornography the court relied upon the testimony of the forensic expert's search which revealed 4596 hits for Lolita and 3286 hits for pre-teen. The court determined that the number of hits helped establish the defendant's intent. Finally, the court rejected the defendant's challenge to the sex offender registration law ruling that was civil and not punitive.

Texas v. Dawes, No. 05-07-01544-CR, 2009 Tex. App. LEXIS 2114 (Tex. App. March 27, 2009).

- Jury instructions
- Insufficient evidence

Defendant was found guilty of two counts of child pornography. Defendant raised two areas on appeal: jury instructions and legal and factual insufficiency of evidence for a finding of guilt. The Court considered and rejected his claim of error for the jury instructions holding that the word bestiality had a common meaning and did not need additional definition in an instruction. Under defendant's second challenge several points were raised including: the image in question was not lewd, defendant knew victim was under 18, and the image did not contain an act of bestiality. The court rejected defendant's claims based on the nature of the image, the physical characteristics of the child in the image, and the conclusion that even if there was not an actual act of bestiality, the image focused on the child's unclothed genitals which was lewd and thus supported a conviction.

Ex Parte Albert v. Jessep, 281 S.W.3d 675 (Tex. Crim. App. March 17, 2009).

- Habeas Corpus petition
- Indictment error
- Sufficiency of evidence
- Ineffective assistance of counsel

Defendant challenged plea to possession of child pornography claiming that the Indictment in the case was in error. The basis of all of the defendant's claims was that the indictment claimed defendant was in possession of film images of child pornography, but in reality his hard drive contained digital information. The defendant's reliance on a former case from Texas was held to be incorrect and the Texas Court ruled the film images language was proper.

People v. Swan, 2009 Cal. App. Unpub LEXIS 2130 (Cal. Ct. App. March 17, 2009).

- Entrapment
- Jury Instructions

Defendant was convicted of attempted lewd or lascivious acts on a child under 14 years of age. Defendant raised two interrelated issues on appeal: that he was entrapped and that the entrapment instructions the defendant offered were incorrect and prejudicial. Initially, the court rejected the defendant's attempt to apply the federal standard in entrapment cases, a subjective standard, and

instead relied upon California case law which applies an objective standard test. Court reviewed the two different ways entrapment evidence can be demonstrated by a defendant and ruled that the defendant failed to provide proof of either in this case. As to the claim of error of the jury instruction, the court noted that it was the defendant that asked for the specific instruction and thus would not accept a claim of error with that instruction.

Texas v. Knepp, No. 05-08-00002-CR, 2009 Tex. App. LEXIS 1765 (Tex. Crim. App. March 13, 2009).

- Search and seizure
- Venue

Defendant worked as a computer repair technician at a local electronics store. The store had a policy about leaving computers un-secure. Employees were to go on to the computers and change something so the person working on the computer would know it had been tampered with. Defendant brought in his personal laptop and left it unsecured. A co-worker subsequently found images of child pornography. Defendant's computer was turned over to the police who secured a search warrant and found child pornography on the computer. Police also searched defendant's home and found additional child pornography on other computers. The court ruled that search by employee was acceptable based on store policy. Additionally, the court rejected the defendant's venue challenge based on testimony of witnesses regarding what they saw at the store on the defendant's computer.

State v. Aljutily, 202 P.3d 1004 (Wash. Ct. App. March 12, 2009).

- Constitutionality

Defendant was found guilty of communicating with a minor for immoral purposes. Defendant claimed that statute was overbroad and infringed upon protected speech. The court upheld the constitutionality of the statute utilizing a test adopted from State v. McNallie, 120 Wn.2d 925, 846 P.2d 1358 (1993). The court ruled that based on that case the state would have to prove three separate actions about the communication: first that it was immoral in purpose; second that it intended to reach a minor; and, third that it was received by a minor or someone perceived to be a minor. Considering the state was required to prove those elements about the communication, the statute was concluded to not be overbroad and the defendant's claim was rejected.

Wisconsin v. Martinez, 2009 Wisc. App. LEXIS 142 (Wis. Ct. App. March 3, 2009).

- Closing argument

Defendant was convicted of multiple counts of child pornography. Defendant claimed the prosecutor made an improper argument about the evidence as it pertained to the defendant's statement about evidence seized during the execution of a search warrant. The police never showed the defendant the actual disk where the child pornography was found, and defendant said that all of the items found were his at the time. Prosecutor argued that the defendant had admitted to ownership. The court agreed with the prosecutor's remarks holding that they were proper and the jury could infer possession based on the defendant's statement.

State v. Ritter, 201 P.3d 1086 (Wash. Ct. App. February 26, 2009).

- Sufficiency of evidence
- Constitutionality
- Late findings of fact
- Sentencing

Defendant was convicted of first degree sexual misconduct, communication with a minor for immoral purpose and sexual exploitation of a minor. Defendant was youth pastor and teacher. He used a computer to entice one victim to use a webcam to remove her top and expose her breasts. The basis of defendant's sufficiency of evidence challenge was that the image from the webcam did not fit the statutory definition of a photograph. The reviewing court considered the intent of the statute and interpreted the term photograph in the broadest sense holding that the webcam image was within the statutory definition. Similarly, the court held that the statute was not overly broad. The court ruled that there were late findings of fact, but that they mirrored the findings from the record and the defendant did not show any actual prejudice. Finally, the court upheld the sentencing, noting that in consideration of the facts of the case the sentence remained lenient for the applicable sentencing range.

DISTRICT AND LOWER COURTS

New York v. Cohen, 2009 N.Y. Misc. LEXIS 588 (March 5, 2009).

- Sex Offender Registration

Defendant was convicted in Florida of Transmission of Pornography by Electronic Device, Promoting Sexual Performance by a Child, and Transmission of Materials Harmful to Minor by Electronic Device. The question facing the court asked what level of registration was the

defendant required to follow. The court ruled that a defendant could not be given additional points for the age of a victim when the defendant was talking to an undercover police officer. However, the court gave the defendant an upward departure and additional points by focusing on the images the defendant transmitted. The court counted each child per image as a separate victim because the defendant was deceptive in hiding his actual age during the chats and because the chats went on for a long period of time, a six month period. Ultimately, the court used the aggravating factors to require the defendant to register as a tier two offender.