CSE Case Law Update

March 2010

STATE SUPREME COURTS

Armstrong v. Tanaka, No. S-13311, 2010 Alas. LEXIS 29 (Alaska Mar. 19, 2010).

- Stay of Civil Proceedings to Protect Right Against Self-Incrimination

The court announced a new rule: when a defendant is defending himself in a criminal case as well as bringing a civil suit in a related case, the trial court must conduct a balancing test to determine whether he is entitled to a stay of the civil case in order to protect his right against self-incrimination in the criminal case. The defendant was ordered to answer certain questions during a deposition in the civil case during which he invoked his Fifth Amendment privilege. These questions overlapped with a pending criminal case. The defendant repeatedly refused to appear at depositions, citing the Fifth Amendment, and refused to file a motion showing cause. Eventually the trial court dismissed his civil case and awarded attorneys fees to his adversary. The Alaska Supreme Court held that an individual's right to access the courts as a plaintiff in a civil suit is constitutionally protected. Therefore, both an individual's due process and his Fifth Amendment rights are implicated. The court must also consider, however, the rights of the defendant in the civil case to defend himself and to timely resolution of the case. This balancing test must be done explicitly by the balancing court.

Dabney v. Delaware, No. 512,2009, 2010 Del. LEXIS 89 (Del. Mar. 1, 2010).

- Ineffective Assistance of Counsel
- Speedy Trial Violation

The defendant was convicted of second degree rape, three counts of sexual exploitation of a child, and three counts of possession of child pornography. He alleged a speedy trial violation. His counsel, however, only appealed the second degree rape charge, though it is established that usually when a court decides a speedy trial violation occurred it dismisses the entire indictment. There was evidence here that the defendant instructed his counsel to appeal only that count and that he expressed remorse for and admitted to the other counts. Specifically, his attorney referred to this "remarkable decision" at oral argument and again at resentencing. Because of this evidence, the defendant could not claim ineffective assistance of counsel for not appealing the other charges.

King v. State, 921 N.E.2d 1288 (Ind. Mar. 2, 2010).

- Attempt Crimes
- Dissemination of Matter Harmful to Minors – Police Officers

The defendant was convicted of attempted dissemination of matter harmful to minors after he sent proscribed matter over the Internet to a police officer posing as a minor. He argued that because the statute proscribing dissemination of matter harmful to minors requires actual dissemination to a minor, not just to a person believed to be a minor, he could not be prosecuted under the attempt statute either. The court held that he could be prosecuted for Attempted Dissemination because the distinction between an attempted crime and a completed crime is that an attempted crime is missing one of the key elements of the completed crime. In this case, that element was actual dissemination to a minor. The defendant, therefore, could be convicted under the attempt statute for taking a substantial step towards commission of the crime with the requisite intent to commit that crime.

State v. Hazelrigg, 225 P.3d 1194 (Kan. Mar. 12, 2010).

- Sentencing
    - Use of Criminal History
    - Consecutive Sentencing

The defendant argued that using his criminal history at sentencing was unlawful because it was not first put to a jury and proven beyond a reasonable doubt. He argued that this use increased the maximum possible penalty for his primary offense – indecent solicitation of a child. The court, citing another Kansas case, held that the lower court did not err in using this criminal history without first putting it to a jury. The court held that it was without jurisdiction to consider the second sentencing issue because the imposition of consecutive sentences is not a sentencing departure.

Hummel v. Commonwealth, No. 2008-SC-000801-MR, 2010 Ky. LEXIS 51 (Ky. Mar. 18, 2010).

- Self-Representation

This case deals primarily with whether a defendant is competent to represent himself. The appellate court held that the trial court did not err in holding that the defendant could not represent himself because he was unwilling or unable to abide by courtroom protocol, given his previously disruptive behavior in court. It also held that a defendant's request for self-representation cannot be denied on the grounds either that he is not skilled enough to represent himself or that the court feels it would not be in his best interest. The case discusses child pornography in that during one of the defendant's outbursts he accused his trial counsel of providing him with the child pornography with which corrections officers had found him in his cell.

State v. Bailey, 989 A.2d 716 (Me. Mar. 4, 2010).

- Fourth Amendment Search

The court held that the search conducted of the defendant's computer violated the Fourth Amendment because the officer exceeded the scope of consent to search. A police officer entered the defendant's home and searched his computer after telling the defendant that he was looking for anyone who had the "issue" of others accessing his wireless network. When searching the defendant's computer files, the officer found child pornography located in a folder that was shared on a peer-to-peer network. The court found that the defendant's actions in leading the officer to the computer and assisting him in waking it up amounted to an expression of consent to search. The court also held that the officer's ambiguous statements about this "issue" he was investigating were not affirmatively misleading and the defendant's consent was not void for this reason. The court agreed with the defendant, however, that the officer's search of all the video files on the defendant's computer for child pornography exceeded the implied scope of the search, which was limited to evidence that someone had been accessing the defendant's computer without his permission.

State v. Talley, No. M2007-01905-SC-R11-CD, 2010 Tenn. LEXIS 147 (Tenn. Mar. 19, 2010).

- Search and Seizure
- Locked Hallways
- Child Pornography

The police entered a locked common area of a privately-owned condominium building without a search warrant. After performing a knock and announce procedure at the defendant's condo, the defendant's girlfriend gave them consent to search the apartment, during which search they found drugs and child pornography. They obtained a warrant to search further and to search the defendant's place of business, where they found further evidence. The defendant challenged the search on Fourth Amendment grounds, arguing that the police had no right to enter the building's common areas in the first place. The court held that the totality of the circumstances rule should determine whether the defendant had a reasonable expectation of privacy in the common areas of his locked building. In this situation, the defendant did not have a reasonable expectation of privacy because anyone could let people into the building (including the man who opened the door to the police) and because the residents had provided the police department as well as others with an access code they could use at their discretion. Therefore the court found the lower courts were right in denying the motion to suppress.

Wisconsin v. Smith, 780 N.W.2d 90 (Wis. Mar. 19, 2010).

- False Imprisonment of a Minor
- Sex Offender Registration

The defendant challenged the application of a Wisconsin statute that requires anyone convicted of false imprisonment of a minor to register as a sex offender, regardless of whether the false imprisonment is sexual in nature. He claimed the application of the statute to him, when his underlying false imprisonment conviction did not have a sexual nature, violated his due process and equal protection rights. Because he does not allege that the statute implicates a fundamental right or disadvantages a suspect class, it is subject only to rational basis review and noted that the review under rational basis scrutiny for equal protection and substantive due process claims is much the same. The court held that requiring someone convicted of false imprisonment of a minor is rationally related to legitimate state interests, including protecting the public and assisting law enforcement. This rational relation exists even when the offense is not sexual in nature because of the link between false imprisonment and crimes against children, which might have led the legislature to believe that an abduction could be a precursor to a sexual offense. In addition, it is rational because a sexual motive might be difficult to discern and prove in the context of false imprisonment, and because the crime places the child in a uniquely vulnerable position vis a vis his captor. The court noted that the legislature could have carved out an exception for people in the defendant's position, but it chose not to, and the court should defer to the legislature's words under a rational basis analysis. Finally, it noted that adding a requirement that the false imprisonment be sexual in nature would effectively eliminate the need for the false imprisonment provision, because the same people would likely have to register under the child assault provision.

COURTS OF APPEAL

Pearson v. Alabama Dep't of Corrections, No. CR-08-1732, 2010 Ala. Crim. App. LEXIS 11 (Crim. App. Mar. 5, 2010).

- Good Time Credit

The defendant argued that his inmate summary was incorrect in that it reflected that the defendant had been convicted of a crime carrying a higher sentence than the crime for which he was actually convicted. He argued that under conviction he was entitled to good time credit, but he was not receiving it because a sentence for the crime shown in his inmate summary will not be affected by good time. The court held that the inmate summary was incorrect because the minute entries on the case-action summary were also incorrect. The defendant was entitled to a remand for a hearing on good time credit.

State v. Windsor, No. 2 CA-CR 2009-0090, 2010 Ariz. App. LEXIS 41 (Ct. App. Mar. 30, 2010).

- Child Pornography/Sexual Exploitation of Children
- Receiving v. Duplicating

The defendant downloaded images of child pornography onto a public computer at the University of Arizona. He was convicted under a statute that prohibits the duplication of images of a minor engaged in sexual contact. There is another statute in Arizona which prohibits electronically transmitting these images, as well as other things, but the defendant was not charged under that statute. On appeal, he contended that there was insufficient evidence to convict him under the duplication statute. The court held, however, that downloading an image is duplicating it. In order to download, one must make a copy of the image that is stored on a computer's hard drive. The court was unconcerned that the defendant could have been found to both possess (under the one statute) and duplicate (under the other statute) the image, as it makes sense that possession is a lesser included offense of duplication. Because there was no question whether the defendant downloaded the images, there was sufficient evidence that he duplicated them.

Whiteside v. State, No. CACR 09-1068, 2010 Ark. App. LEXIS 239 (Ct. App. Mar. 10, 2010).

- Sexually Explicit Conduct – Definition
- Lewdness

The appellant was convicted of two counts of distributing, possessing, or viewing matter depicting sexually explicit conduct involving a child. He contends that the images that provided the basis of these convictions, two pictures of naked 11-year-old girls standing by a bathtub, were not sexually explicit. Under the statutory definition of sexually explicit conduct, this included "lewd exhibition of the genitals of pubic area of any person of the breast of a female." The court held that lewdness was a broader concept than obscenity and that these pictures constituted a lewd exhibition. The court considered the context in which the pictures were found (among child pornography) and the fact that the defendant had hosted parties for minor teenagers at his home, and concluded that the trial court was correct in dismissing the defendant's motion for a directed verdict.

People v. Marokity, No. B213631, 2010 Cal. App. Unpub. LEXIS 1667 (Ct. App. Mar. 9, 2010).

- Lesser Included Offenses
    - Assault and Battery
    - Lewd and Lascivious Act
- Uncharged Bad Acts – Child Pornography

The court held that assault and battery are not lesser included offenses of committing a lewd and lascivious act upon a child under the age of 14. A lewd act can be committed

without committing a battery or attempted battery (assault). The defendant also claimed that the trial court erred in admitting evidence that the defendant had pornographic movies at home because his possession of adult pornography and of pornography depicting people that looked like children was irrelevant to the issue at bar: whether he inappropriately touched his young children. The court found no error in the admission of evidence that the defendant possessed adult pornography because its widespread use would have prohibited it from prejudicing the jury too much against the defendant. The court viewed the evidence of child pornography as other acts evidence and therefore generally prohibited unless it fit into one of the exceptions. Here, the defendant's intent was in issue. The court held that the charged act and the other act where similar enough to show that the defendant had the same intent in both circumstances because both "reflect an inappropriate and deviant sexual interest in children." Therefore, the trial court did not abuse its discretion in admitting the evidence of child pornography. The court further held that the defendant did not receive ineffective assistance of counsel when his attorney failed to raise hearsay and confrontation clause objections to testimony about one of the child victim's statements who did not testify at trial because there was substantial other evidence of the offenses.

People v. Brown, No. G041063, 2010 Cal. App. Unpub. LEXIS 1671 (Ct. App. Mar. 9, 2010).

- Fourth Amendment Search and Seizure (Motion to Suppress)
    - Statements
- Other Bad Acts – Sexual Offenses

During the defendant's trial for attempting to commit a lewd act on a child, the defendant made a motion to suppress statements he made to a police detective in his home on the grounds that he had not been Mirandized first. The court held the defendant was not in custody during the interview because he had invited the officers into his home, the officers spoke in a conversational tone, only one officer asked questions, and the defendant controlled the location of the interview. The defendant also moved to suppress evidence of a photograph found on his computer depicting an adult male sodomizing a young female on the grounds that it was highly prejudicial propensity evidence. The California Rules of Evidence generally prohibit the admission of character evidence to prove propensity. They do allow, however, in a criminal case when a defendant is accused of a sexual offense, character evidence of the defendant's commission of another sexual offense or offenses, as long as its probative value is not substantially outweighed by its prejudicial effect. This is because of the secretive nature of sexual crimes which often leads to a credibility contest at trial. The court held here that the trial court did not err in admitting the photograph because it was also relevant to show the "defendant's commission of another sexual offense . . . and thus his propensity to engage in sexual misconduct with young females." It was also admissible because it was probative of the defendant's intent. The trial court carefully balanced the probative value and prejudicial effect when it altered the picture to cover the genitalia with a black box and when it

rejected the prosecution's request to admit other pornographic images and only allowed a single representative image.

People v. Price, No. C060081, 2010 Cal. App. Unpub. LEXIS 1511 (Ct. App. Mar. 2, 2010).

- Fourth Amendment Search and Seizure
    - Cell Phone Search
- Separate Punishments for Multiple Criminal Objectives

The defendant was convicted of sixteen different sexual crimes resulting from his liaison with a fourteen-year-old girl. At trial, he moved to suppress evidence of pictures found in his cell phone depicting the minor with her breasts exposed. The officer had found the pictures on the phone while executing a search warrant the allowed him to search "one cellular telephone." A second search warrant was issued on the basis only of what the officer knew before he found the pictures, which allowed him to search for those pictures. The court found the evidence was admissible without the second warrant because the first search warrant allowed him to search the phone's media galley, which was part of the electronically stored information on the phone. The defendant also claimed that his conviction for child molestation should have been stayed because there was no substantial evidence that the underlying act (giving hickeys) was separate from sexual intercourse. The court noted, however, that if the defendant had multiple criminal objectives for different specific acts, they could be punished separately where one was not necessary for the other. Here, giving hickeys was not necessary for or incidental to sexual intercourse and the trial court could have found that the defendant had separate criminal objectives for each act.

People v. Hitchner, No. D054345, 2010 Cal. App. Unpub. LEXIS 1473 (Ct. App. Mar. 2, 2010).

- Guilty Plea Withdrawal After Probation
- Hearsay in Probation Reports

A statute in California provides that if a defendant pleaded guilty and has successfully completed his probation and, upon completion, is not on probation for or charged with any new offense, he can withdraw his original guilty plea and enter a plea of not guilty in its place. The defendant applied under this statute to withdraw his original plea and the trial court rejected his application. The trial court relied on the probation report of the San Diego County Probation Department and held that it was not hearsay due to the documentary evidence rule. The appellate court, however, rejected this holding. The report that was admitted contained summarized statements from a probation officer in Maryland. Therefore, it did not contain the indicia of reliability supplied by a reporting officer's firsthand knowledge, which underlies the documentary evidence rule. Further, the defendant's own testimony and the Department's investigative reports contradicted

these hearsay statements. The trial court further abused its discretion in applying a good faith rather than a preponderance of the evidence standard to whether or not the defendant complied with the terms of probation.

State v. Duhadaway, No. Cr.A. No. S01-06-0396, 1423, 2010 Del. Super. LEXIS 131 (Super. Ct. Mar. 31, 2010).

- Ineffective Assistance of Counsel
- Waiver of Right to Appeal

The defendant filed a motion for post-conviction relief alleging ineffective assistance of counsel because the attorney failed to advise the defendant of his right to file an appeal after he entered his guilty plea. The court found that, though this was true, the defendant waived his right to appeal by pleading guilty and that the defendant understood this waiver at the time he entered the plea. The motion was denied.

King v. State, No. 09X-07-024-JOH, 2010 Del. Super. LEXIS 133 (Super. Ct. Mar. 25, 2010).

- Nolle Prosequi
- Expungement
- Distinct Charges

The defendant was arrested on twenty charges of unlawfully dealing in material depicting a child engaged in a prohibited sexual act, (which were later converted into forty-two obscenity charges when the defendant was re-indicted), two charges of first degree unlawful sexual contact, one of drug paraphernalia, and one of marijuana possession. He pled guilty to the two marijuana charges and the state entered a nolle prosequi on the other charges. He moved to have the nol prossed charges expunged. The state alleged that the two charges of unlawful sexual contact are related to the marijuana charges for which he entered the guilty pleas and therefore those records should not be expunged. The court found that the two charges to which the defendant pled were sufficiently distinct from the other offenses and did not constitute a "case" that could properly be joined for prosecution. Therefore, the court ordered expungement.

State v. Kelley, No. A09A2402, 2010 Ga. App. LEXIS 247 (Ct. App. Mar. 16, 2010).

- Temporary Assistance Order Requirements

A judge in a child pornography case stated that he felt uncomfortable signing off on a warrant to search the defendant's computer. The court then issued an order appointing another judge to sign the search warrant. This temporary assistance order, however, did not indicate the scope of the assignment, the case to which the judge is assigned, or the time period covered. Therefore the judge lacked authority to issue the search warrant he

signed and therefore the trial court did not err in granting the defendant's motion to dismiss the evidence seized pursuant to that warrant.

Watson v. State, No. A09A2212, 2010 Ga. App. LEXIS 195 (Ct. App. Mar. 4, 2010).

- Fourth Amendment Search and Seizure

The defendant moved to suppress evidence seized from his home based on the fact that the officer conducted a warrantless search in violation of the Fourth Amendment. The police went to the defendant's trailer to search for a missing girl. They performed a knock and announce procedure and, when no one answered, proceeded to open the door and enter the trailer. The court held that there was no probable cause to believe the victim was in the defendant's trailer and no evidence of exigent circumstances to warrant the officers opening the trailer door when no one answered it. The defendant's later apparent consent to search the trailer was not voluntary because he only consented after the officers implied they had the authority to search anyway. Therefore, the trial court should have granted the defendant's motion to suppress the discovery of the victim hiding in the defendant's closet. Her subsequent statements and the evidence obtained pursuant to the search warrant obtained later were, however, not excluded as tainted fruits of the illegal search and seizure. They were admissible under both the independent source and inevitable discovery doctrines.

Akard v. State, 924 N.E.2d 202 (Ind. Ct. App. Mar. 30, 2010).

- Evidence of Child Pornography
- Post-Arrest, Pre-Miranda Silence
- Sentencing

The defendant was convicted of rape, criminal deviate conduct, criminal confinement, and battery. He argued that the trial court abused its discretion in admitting certain pornographic images found on his computer because they were unduly prejudicial because some depicted young girls. The court held they were admissible 404(b) evidence because the pictures showed a high degree of similarity to what the victim alleged actually happened. The pictures depicted girls bound and gagged in much the same way the victim alleged she was bound and gagged. The court held a picture of adults urinating on each other was inadmissible because none of the charges resulted from the alleged act of the defendant urinating on the victim and therefore the picture was irrelevant. The defendant also alleged that the court erred in allowing the State to use his post-arrest, pre-Miranda silence against him in its case-in-chief. The court found that this constituted a Fifth Amendment violation. However, the court found it was not fundamental error such that it created the impossibility of a fair trial. Finally, the defendant objected to his ninety-four-year sentence as inappropriate. The court had the power to revise a sentence upwards, and did so in this case, due primarily to the nature of the offense and the character of the offender. The court found that he had been motivated

to rape the victim precisely because she had childlike characteristics. It emphasized that the pornographic images on the defendant's computer established his "prurient interest toward children."

Bradley v. State, 225 P.3d 1211 (Kan. Ct. App. Mar. 5, 2010).

- Speedy Trial Violations

The defendant filed, under a Kansas statute providing a one-year limitation, an untimely motion for review of his conviction. Because his motion was not timely, he bore the burden of demonstrating a manifest injustice would ensure from a refusal to consider the motion. He attempted to show this by showing that the district court was deprived of jurisdiction because of a speedy trial violation. The court held that a speedy trial violation does not deprive a court of jurisdiction. The court held, further, that he should have raised the speedy trial issue at court or filed a direct appeal on the issue instead of filing a motion for review after appeal. The court affirmed the district court's summary dismissal of the motion.

State v. Sampognaro, No. 09-KA-671, 2010 La. App. LEXIS 411 (Ct. App. Mar. 23, 2010).

- Attempted Possession of Child Pornography
- Sentencing

The defendant was originally charged with twenty-one counts of possession of child pornography. The state amended the sentence to one count of attempted possession in exchange for the defendant's guilty plea. The court held the defendant was made no promises as to sentencing at the time he entered his plea. He was sentenced to five years suspended in favor of five years probation. In his application for post-conviction relief, he was re-sentenced to one year of jail time without parole, probation, or suspension. The defendant claimed that the one year of jail time was excessive and imposed in retaliation for his appeal. The court noted that the range of sentence for attempted possession of child pornography is zero to five years. The court also noted the benefit the defendant already received with the amended sentence and the fact that possession of child pornography, and even attempted possession, is a serious crime with numerous unnamed victims. The court held the one-year sentence was proper.

Commonwealth v. Sullivan, No. 08-P-514, 2010 Mass. App. Unpub. LEXIS 302 (App. Ct. Mar. 19, 2010).

- Sentencing/Re-Sentencing
- Subsequent Bad Acts

The defendant pled guilty to possession of child pornography and posing or exhibiting a child in a state of nudity. He was sentenced to two consecutive sentences – two and a half years of jail time with all but sixty days suspended, followed by ten years' probation to begin after the jail time ended. Later, a second judge determined that he had violated his conditions of probation (after spending the sixty days in jail) and ordered him to serve the balance of the two and a half years in jail and re-sentenced him to ten years probation. The appellate court held this was proper because it was consistent with the original sentence. After serving the remainder of the sentence, the defendant did not report to probation. Later, he was found accessing child pornography on a library computer. At his probation surrender hearing, a third judge imposed a longer sentence. At the hearing the judge commented that other websites the defendant was accessing along with the child pornography indicated that he had a plan greater than just viewing the images. The court held this was proper evidence in imposing a sentence because it was during a probation revocation hearing and the judge could consider this new evidence even though the events occurred after the original crime and sentence.

State v. Breathette, 690 S.E.2d 1 (N.C. Ct. App. Mar. 2, 2010).

- Mistake of Age as Defense
- Indecent Liberties With a Minor

The court held that mistake of age is not a defense to indecent liberties. The minor indicated on a social networking site that she did not want to share her age by claiming that she was ninety-nine. She told the defendant she was seventeen, when her actual age was thirteen. The minor was also on a website that prohibited use by persons under 18. The defendant requested a jury instruction on mistake of age for the charge of indecent liberties, which the court denied. The court held this denial was not in error because the defense in applicable. The court noted that the statute contains no mens rea requirement as to the victim's age and that legislative policy indicates a preference for providing broad protection to children from adults' sexual conduct. The defendant also requested that the court instruct the jury that willful means more than just intention to commit the offense, but purposely and designed in violation of law. The court held the instruction of "purposely and without justification or excuse" was substantially similar to the requested instruction so the court committed no error.

State v. Tome, No. A-3451-08T4, 2010 N.J. Super. Unpub. LEXIS 483 (Super. Ct. App. Div. Mar. 8, 2010).

- Ineffective Assistance of Counsel
    - Right to Testify
    - Guilty Pleas

The defendant argued that his trial counsel was ineffective because he failed to advise him of his right to testify at trail and advised him to plead guilty on a lesser count and

proceed to trial on a greater count. At trial, the defendant pled guilty to possession and viewing of child pornography and went to trial on the charge of knowingly offering an image through the Internet and second-degree endangering the welfare of a child, both of which carried more serious penalties than the possession charge. He did not present any witnesses and did not testify, and he was convicted on the endangering charge. The court held that the defendant did not make a prima facie case of ineffective assistance because trial counsel and the defendant discussed his right to testify as well as the advantages and disadvantages of doing so, and the defendant made a conscious decision not to. In addition, the court noted that the defendant's testimony would have presented problems for the overall defensive trial strategy. The court also held that trial counsel made strategic decisions on whether to plead to possession and whether to call an expert witness. Therefore the court denied the defendant's claim.

State v. Hughes, No. 2425, 5560/05, 2010 N.Y. App. Div. LEXIS 2440 (App. Div. Mar. 25, 2010).

- Sentencing
    - Character of Offender
    - Seriousness of Conduct

Even though the defendant presumptively had a level-one risk factor, the court held that the trial court properly assessed him as a level-two offender. The court held that the presumptive risk level did not account for the grave danger the defendant posed to children. It took into account the defendant's affinity for child pornography as well as the seriousness of the conduct, involving an undercover officer posing as a 13-year-old.

State v. Poling, No. 2008-A-0071, 2010 Ohio App. LEXIS 958 (Ct. App. Mar. 19, 2010).

- Grooming
- Bad Acts Evidence

The defendant objected to testimony that, prior to sexually abusing his girlfriend's granddaughter, he had shown her a pornographic movie. The court overruled his objection and the defendant appealed, arguing that admission of this evidence of an unrelated bad act harmed him. The appeals court held that showing these movies was part of the act of grooming the child for sexual abuse and therefore relevant to show preparation and planning. The court also held that the grooming expert, who was a physician with specialty training, was qualified to testify about grooming behaviors and to testify that some of the defendant's behaviors were part of the grooming process. The court held that he had been exposed to mental processes of adults and children and behavioral aspects of child abuse victims, which qualified him.

State v. Rader, No. CA2009-07-185, 2010 Ohio App. LEXIS 824 (Ct. App. Mar. 15, 2010).

- Motion to Suppress
- Fourth Amendment Search and Seizure

The defendant moved to suppress evidence seized from his home during a search based on the allegation that the affidavit supporting the search warrant lacked both probable cause and specificity. Specifically, he claimed that the affidavit contained hearsay and double-hearsay and therefore lacked probable cause. The court noted that hearsay statements are acceptable in an affidavit supporting a warrant if the magistrate considers the basis of knowledge and the veracity of the affiant. The court held that the informant, someone who had seen the child pornography in the defendant's home, had given specific enough information to the police officer, which was incorporated into the affidavit. It also held that the affidavit did not have to contain additional information about the informant's veracity because he was a citizen and not a confidential informant. As for the warrant's specificity, the court held that it was specific enough even though it contained the incorrect zip code and listed the street as a "street" and not a "drive." It was specific enough to allow the executing officer to identify the correct location with reasonable effort. Therefore, the court below did not err in denying the defendant's motion to suppress the evidence seized from his home.

State v. Schlief, No. E2008-02147-CCA-R3-CD, 2010 Tenn. Crim. App. LEXIS 231 (Crim. App., Mar. 15, 2010).

- Brady Violations

The two child victims made statements to CAC prior to trial. Though the defendant never made a Rule 16 request for those statements, he claimed that he was entitled to see them pretrial under Brady, because the statements were clearly exculpatory in that they showed contradictions in the two children's statements and in that the female victim denied several of the alleged acts had ever occurred. The statements were provided to the defendant at different times during the trial, but not beforehand. The court held the statements were exculpatory and, pursuant to Brady, should have been provided before trial. The court held that the defendant was not prejudiced, however, because the statements were disclosed at trial and the defendant was able to cross-examine the victim witnesses. The court also held that, though two different prosecutors made inappropriate and inflammatory remarks in closing argument, the defendant was not entitled to relief. Because the defendant did not make a contemporaneous objection, the court's review was limited to plain error review and the court found no plain error. In addition, the court ruled that the evidence was sufficient to support the convictions because, though the child victims' testimonies differed in several respects, the jury was entitled to give more weight to one than to the other. Finally, the court held the defendant was not entitled to have a specific letter written by one of the victims entered into evidence when its contents were extremely prejudicial and when there were other handwriting samples available.

Harrington v. State, No. 2-08-423-CR, 2010 Tex. App. LEXIS 2138 (App. Mar. 25, 2010).

- Other Bad Acts (Unadjudicated Extraneous Offense) Evidence
- Punishment Phase

The defendant, after being convicted of possession of child pornography, argued on appeal that the trial court erred in admitting evidence that he had molested his minor daughter. While the court agreed that the incidents must be proven beyond a reasonable doubt, it held that there is a presumption that it was when the trial court says nothing about the standard of proof either way. It also presumes that the court did not rely on improper evidence in reaching its sentencing conclusions. It further held that even if the court did consider this evidence and it was not proven beyond a reasonable doubt, the admission was harmless because there was enough other evidence of the primary crimes to justify the defendant's sentence without the unadjudicated extraneous offense evidence. Finally, the court held that the trial court did not err in excluding defense evidence that the defendant's brother, and not the defendant, molested the defendant's daughter. The proffered testimony from a clinical social worker would have constituted hearsay and the defendant had not established that it was covered by the mental health exception to hearsay based on the exception for statements made for the purpose of medical diagnosis or treatment.

Paulea v. State, No. 04-09-00293-CR, 2010 Tex. App. LEXIS 2215 (App. Mar. 24, 2010).

- Fourth Amendment Search and Seizure

The defendant contended that police officers performed an illegal search of his hotel room and computer. He was detained outside his hotel room and then allowed the officers to enter and search the room. He provided the officers with a password to his computer, which they brought back to the station. The defendant argues that when he was first stopped outside the room and then when he was handcuffed he was subject to a warrantless arrest, which tainted the subsequent search. The court held, however, that it was a reasonable investigatory stop under the circumstances because the officer had found someone in the hallway doing lewd things and in possession of a key to the defendant's room and because when the defendant first opened the door, the officer viewed evidence of drug activity and handcuffed the defendant for the officer's safety. Therefore, this seizure could not have tainted the subsequent search of the defendant's hotel room and computer. The court further held that the defendant voluntarily consented to the search of his hotel room because he said "sure" in response to the officers asking whether they could enter, because the officers advised the defendant he did not have to consent to a search, and because one of the officers Mirandized the defendant. Finally, the court found that the defendant consented to the search of his computer. The officers informed him of his right to consent, explained they would have to take the computer

away for testing, refrained from repetitive questioning, and refrained from the use of physical punishment.

In re Marten, No. 61923-3-I, 2010 Wash. App. LEXIS 382 (Ct. App. Mar. 1, 2010).

- Recent Overt Act Requirement

The defendant challenged his commitment after characterization as a sexually violent predator. He alleged that he had not met the requirement of a recent overt act – he must have recently committed "any act or threat that has either caused harm of a sexually violent nature of creates a reasonable apprehension of such harm in the mind of an objective person . . ." The court held that he had met the requirement because he had engaged in high risk behavior that is part of his offense cycle. Even though recently he had not actually touched any of the women, he had targeted and isolated them and provided them with false identifying information, which previously had led up to his offending. The court analogized this to a recent case where viewing child pornography was enough to satisfy the recent overt act requirement because the defendant's offense cycle included viewing child pornography just before actually targeting a child.

State v. Mercer, No. 2008AP1763-CR, 2010 Wisc. App. LEXIS 240 (Ct. App. Mar. 31, 2010).

- Child Pornography Viewing
    - What Constitutes Control

The defendant challenges the application of the child pornography possession statute to him. In this case, evidence of child pornography was found by software that tracked Internet use, and was not saved on the defendant's computer's hard drive. The court held that pornography does not have to be stored on a computer's hard drive in order for the user to be in knowing possession of that pornography. While many cases have that fact in common, the idea underlying those cases is that the defendant had actual physical control of the item. The evidence in this case showed that the defendant pulled images from the Internet and had physical control over them in that he directed how long they were on the screen as well as whether to download them, print them, or otherwise copy them. Further, evidence suggested that the defendant had deleted the files from his cache, whereas in other cases the defendant had simply not done so. The court held that the facts were legally sufficient to show this sort of constructive possession, and therefore the defendant could be prosecuted under the child pornography possession statute.

State v. Pask, No. 2009AP559-CR, 2010 Wisc. App. LEXIS 242 (Ct. App. Mar. 31, 2010).

- Child Enticement/Luring

- Secluded Place

The defendant challenges, through an ineffective assistance of counsel claim, the jury instructions on what constitutes a "secluded place" in his trial for child enticement. One of the methods by which someone can violate the statute is by causing or attempting to cause any child under 18 to go into a secluded place. The defendant urged that the jury instructions should have required that he completely "remove" the victim from the public's protection in order to be convicted, rather than just preventing the public from viewing the activity from one vantage point. The court noted that the statute's purpose is to deter and punish those who intend to remove children from the protection that the general public provides. Therefore, anywhere where a child would be less likely to be detected by the public is a "secluded place." The court held that the jury instructions were actually more helpful to the defendant (the appellant) because they provided a narrower definition of "secluded place" than the statute requires, though it was broader than the instructions the defendant had requested. Because the defense attorney advocated for this limited definition, the court denied the defendant's ineffective assistance of counsel claim.