March CSE Case Law Update

March 1-4, 2011

Courts of Appeals

Louisiana v. Whitmore, 58 So. 3d 583 (La. Ct. App. Mar. 2, 2011).

- Computer Solicitation
- Lack of evidence
- First Amendment Violation

Defendant was charged and convicted of two counts of indecent behavior with a juvenile and four counts of computer-aided solicitation of a minor. Defendant participated in internet chats, text messages and phone calls with a police officer he believed to be a 12-year-old girl. On appeal, defendant contends that insufficient evidence existed to convict him of computer-aided solicitation of a minor and therefore the trial court erred in denying his motion for post-verdict judgment of acquittal. Defendant argued that the word "presence" of the statute required physical presence of the other person. The court found that in spite of this argument the defendant violated the statute when he sent textual communication with the intention of enticing the alleged child to masturbate, an activity undoubtedly falling into the category of "sexual conduct". The court also found that physical "presence" has no bearing on the offending act and merely describes the eventual hoped-for conduct. Defendant then argued that the Louisiana statute was unconstitutional under the first amendment due to being overbroad. The language of the statute states that it is not a defense that a person who actually receives the transmission is under the age of seventeen and in order to convict a person under the statute, the state must prove that the offender intended on sending obscene material to a juvenile under the age of seventeen, through electronic or textual transmission, in order to gratify his, or the child's, sexual desires. The state still must prove all elements of the crime and thus the statute is not overbroad. Next, defendant urged that the statute is unconstitutional as it impinges upon his First Amendment rights. Defendant argued that the Child Pornography Prevention Act (CPPA) of 1996, a federal statute that was declared unconstitutional for violating free speech is analogous to Louisiana's computer-aided solicitation statute. Specifically, defendant points out the CPPA criminalized the production of "virtual minors" for use in child pornography, while this statute criminalizes speech with "virtual minors" for sex solicitation. The court noted that it is illegal to solicit a child for sex and such conduct "is not shielded from criminal liability when the pedophile hides behind a computer screen." Offers to engage in illegal transactions are categorically excluded from First Amendment protection. Appellate court affirmed trial courts decision.

Unpublished Decisions

Wise v. Texas, No. 02-09-00267-CR, 2011 WL 754415 (Tex. Ct. App. Mar. 3, 2011).

- Child pornography
- Digital Evidence

Defendant appealed his conviction for four counts of sexual assault, one count of indecency with a child, and eleven counts of child pornography. Defendant engaged in a sexual relationship with the 16 year-old victim. Defendant had the victim photograph herself naked on a digital camera and on defendant's cell phone. When police learned of the relationship, the victim agreed to let the police record a phone call she had with defendant. During the call details of there sexual acts were discussed. Pursuant to a warrant, defendant's home was searched and officers seized a digital camera that contained a pornographic image of the victim, pornographic DVDs, a laptop computer, and a Gateway desktop computer tower. The eleven counts of child pornography that defendant was convicted of were based on the single image of the defendant and ten imaged stored on the Gateway tower. Defendant contended that the facts recited in the search warrant affidavit were insufficient from the totality of the circumstances to show probable cause for seizing the computers at his home. The affidavit recited details about defendant's sexual assaults of the victim, it explained that defendant had digital pictures of victim on two devices, that he had saved some of those pictures on a memory card, that he had a desktop computer at his house, and he threatened to post the pictures of victim on the internet, which would likely have required the photos to be stored or transferred to a computer. Given these details, the court found that a magistrate could reasonably conclude that the police had probable cause to believe child pornography existed on defendant's computer. Defendant successfully argued that the State failed to prove that he intentionally and knowingly possessed the child pornography stored on the Gateway tower. State's forensic examiner testified that the images were found in the computer's free space, where files go upon deletion. The examiner explained that there is no way to know where the image files came from, how they were placed on the computer, or when they were created, modified, or viewed. The tower contained many viruses and some viruses could store pornography on the computer without the user's knowledge. Defendant's brother testified that defendant purchased the computer at a flea market. The court found that this evidence could not lead a rational jury to find that defendant intentionally or knowingly possessed the child pornography images found in the free space of his computer and therefore the evidence was insufficient to support defendant's convictions on the ten counts of possession based on these files.

March 7-11, 2010

Courts of Appeals

Miller v. Texas, 335 S.W.3d 847 (Tex. App. Mar. 9, 2011).

- Child Pornography
- Consent to search

A personal thumb drive, later discovered to belong to Miller, was found plugged into the computer in the patrol room of the Elgin Police Department. This computer was

accessible to all the patrol officers, all Elgin PD employees, dispatch, law enforcement officers, the media, and animal-control personnel. The officer who found the thumb drive opened some files in an attempt to identify the owner and return the drive. Child pornography was found on the thumb drive and the officer removed the thumb drive and gave it to his supervisor. During an initial interview of Miller, he gave verbal and written consent to perform a "full forensic search" of the thumb drive and also permission to go to Miller's home to search his laptop and desktop computers. Miller was informed at the beginning of the interview that he was not under arrest, that he was free to leave at any time, did not have to talk to the officers, and he wasn't under any indictment. Miller asserts that his rights were violated under the Fourth Amendment. He claimed a reasonable expectation of privacy in the thumb drive. The court found that there was no expectation of privacy because Miller left the thumb drive unattended in an area freely accessed by other law enforcement officers, animal control personnel, and citizens accompanied by officers. He did not label the thumb drive, password protect it, encrypt the data, or place the drive in a locked case. The court also found that, assuming Miller had exhibited a subjective expectation of privacy in the drive, such expectation was not reasonable. He did not exercise complete dominion or control over the drive, did not take precautions to maintain his expectation of privacy, and used the drive to store police activity reports which was not private use.

Miller then challenged that he did not voluntarily consent to the search of his thumb drive and home laptop and PC. He argued that had he not consented they would have obtained a search warrant. The court found that transcripts indicated he was not subject to any sort of coercion, duress, or physical force during the interview. He was told at the beginning of the interview he was free to leave. Further, Miller was a 22-year veteran of the department and the court reasonably could have inferred that he knew he was not required to sign the consent forms.

Hesrick v. Georgia, 707 S.E.2d 574 (Ga. Ct. App. Mar. 10, 2011).

- Motion to Suppress evidence
- Warrantless search of home

Defendant appealed his conviction of sexual exploitation of children. Police responded to defendant's home pursuant to a domestic dispute between defendant and a man living in his home. Officers spoke with one man out on the front lawn and then knocked on the front door. Defendant answered the door and let the officers into the house. Officers then returned outside to speak with defendant's roommate who then informed the officer that the two men got into a fight because he had seen defendant looking at child pornography. He then told the officers that defendant had removed the computer's external hard-drive and put it in a shed when he learned the police had been called and that defendant would destroy the evidence if the police asked him about child pornography. The officers again knocked on the front door and were let into the home by defendant. When they questioned him about child pornography "he said he did not have that on his computer and that he had been looking at it." The officers then seized a laptop and desktop computer that were in plain view. A search warrant was then obtained for all

digital data storage devices. Defendant contends the trial court erred in denying his motion to suppress the items seized from his home without a warrant or his consent. Viewing this evidence from the perspective of the officers at the time of the seizure, the court found no error with the trial court's conclusion that the warrantless seizure of the computers was authorized but exigent circumstances, specifically, the objectively reasonable concern that the seizure was necessary to prevent defendant's imminent destruction of the computer images of child pornography, images that were vulnerable to quick destruction, irreplaceable, and essential to proving the crime had been committed.

Unpublished Decisions

Arizona v. Weber, No. 1 CA-CR 09-0931, 2011 WL 846232 (Ariz. Ct. App. Mar. 10, 2011).

- Child Pornography

Defendant, Keith Weber, appealed his conviction on eleven counts of Sexual Exploitation of a minor. Weber's counsel was unable to find an arguable, non frivolous question of law and now asks the court to independently review the record for fundamental error. Counsel also filed a supplemental brief. After reviewing the record and considering the issues raised in Weber's brief, the court found no error.

March 14-18

Courts of Appeals

O'Brien v. Florida, 56 So. 3d 884 (Fla. Dist. Ct. App. Mar. 16, 2011).

- Sexual Assault
- Child Pornography

O'Brien appeals his conviction for sexual battery on a child less than 12 years old. He argued that the trial court erred in admitting into evidence his confession, his laptop and testimony about child pornography saved on his laptop. When O'Brien was arrested he read his *Miranda* rights and unequivocally indicated his desire to have an attorney present during questioning. Forty minutes later a Sheriff began speaking with O'Brien and during the conversation persuaded him to speak with an officer at the station before his attorney arrived. O'Brien consented and later confessed to the sexual battery. O'Brien contends that the waiver of his right to have an attorney present during questioning was involuntary. The Appellate Court agreed, finding that the Sheriff invited Appellant to reconsider waiting for counsel and instead talk to a detective at the station. Accordingly, the trial court should have suppressed O'Brien's confession. Further, the appellate court found that this was not a harmless error. The State primarily relied on the confession to corroborate the victim's account of what happened.

Logan v. Georgia, 709 S.E.2d 302 (Ga. Ct. App. Mar. 17, 2011).

- Luring
- Attempt

Logan was convicted of one count of violating the Computer or Electronic Pornography and Child Exploitation Prevention Act of 2007 by utilizing the internet to seduce, solicit, lure, or entice a child or another person believed by such person to be a child to commit an illegal sex act; attempted aggravated child molestation; and attempted child molestation. On appeal, Logan claimed he was entrapped by law enforcement. Logan responded via email to a Craig's List advertisement that appeared to be from a young female willing to have casual sexual relationships with interested men. A police officer posing as the female responded via email with Logan on multiple occasions, informing Logan that she was only 14 years old. Logan initiated many conversations that were sexual in nature, provided a picture of himself, and agreed to a meeting place. Logan arrived at the meeting place in a car and was stopped by police officers. He was told by the police that they were with the task force for internet crimes against children and immediately responded that he was there to counsel a 14-year-old girl, who he named as the female the officer was posing as, about the dangers of meeting men from the internet. In Logan's car was a cell phone which matched the brand that the officer received emails from, and the phone contained the email address used by Logan. Logan also had a condom.

The court found that entrapment did not occur given that Logan continued to converse with the female and did not report her to Craig's List after learning she was 14-years-old, he initiated the explicit nature of the conversations, initiated the conversation during which the meeting was arranged and he arrived at the park with condoms on his person.

Logan also claimed that there was insufficient evidence to show attempt to solicit. The court found that the above facts were sufficient steps toward committing child molestation.

<u>Unpublished Decisions</u>

California v. Artieres, No. A123661, 2011 WL 901985 (Cal. Ct. App. Mar. 16, 2011).

- Child Pornography
- Sexual Assault

Defendant challenged the trial court's refusal to sever a child pornography charge from charges of sexually assaulting an underage victim as an abuse of the trial court's discretion. Defendant was convicted of sexually assaulting a 14-year-old girl, and possessing child pornography. The sexual assaults were alleged to have occurred on August 25, 2005. The child pornography was found on defendant's computer seized during a search of defendant's home July 23, 2005. At trial, defendant argued that presenting the child pornography to the jury during the sexual assault trial would create

an overwhelming amount of loathing and contempt which would destroy the possibility of an objectively fair trial. The court found that the intent element in the underlying sexual assault count was essentially the same as the intent in the possession of child pornography count. With regard to cross-admissibility, the court the court reasoned that to the extent some of the child pornography photos and videos dealt with children the age of the sexual assault accuser, it was relevant to the defendant's mental state and intent in the child sexual assault counts. Further, the defendant failed to show any actual prejudice on the sexual assault charges by the child pornography evidence. The prosecutor only noted the child pornography evidence in connection with the sexual assault as proof of defendant's intent and motive and the jury acquitted defendant on three of the seven charges against him.

March 21-25

Unpublished Decisions

Hensley v. Texas, No. 10-09-00049-CR, 2011 WL 1049314 (Tex. App. Mar. 23, 2011).

- Child Pornography
- Search and Seizure

Hensley was arrested and his home was searched pursuant to an arrest and search warrant based on threats he made concerning hand grenades and possibly bringing weapons to the community college he attended and pictures on his MySpace account of Hensley in body armor and handling firearms. During the execution of the search warrant, two desktop computer and seven CD-ROMs labeled "pics" were seized. Hensley was arrested at his place of employment and his car was impounded and its contents inventoried. Inside the vehicle the police found a laptop case with a laptop inside, along with seven CD-ROMs.

After a police officer previewed the seven CDs that had the title of "pics" on them, the officer found contraband not on the initial search warrant. A second search warrant for child pornography was obtained and included all of the computer and media that had been seized from Hensley's residence and car.

Hensley was charged and indicted with ten counts of possession of child pornography. He filed a motion to suppress which was denied by the trial court. Pursuant to a plea bargain, Hensley plead guilty to two counts of the indictment and the subsequent counts were waived. On appeal, Hensley contends that the trial court erred in denying his motion to suppress the impounding of his vehicle because it was an illegal seizure. The state responded that the evidence from the vehicle was immaterial because the evidence shows that the CD-ROMs containing the child pornography were found in his home. The court assumed that the impounding of Hensley's vehicle was an illegal seizure, but found that it was harmless error because the evidence that formed the basis for Hensley's indictment and eventual plea resulted solely from the search of his home.

Ohio v. Tarbay, No. 10AP-551, 2011 WL 1048962 (Ohio Ct. App. Mar. 24, 2011).

- Luring
- Internet Solicitation

Tarbay appealed the judgment finding him guilty of two counts of importuning. Tarbay contends that his conviction was not supported by the sufficiency of the evidence in violation of the due process clause. His conviction was supported by conversations Tarbay had with a deputy sheriff posing as a 13-year-old-girl. The conversations on two occasions turned sexual in nature. Tarbay did not dispute that he engaged in telecommunications with an undercover officer, posing as a 13-year-old-girl, and that he was at least four years older that the "girl."

The court rejected Tarbay's contention that the conversations reflected a fantasy world with no intent to follow through on the activities discusses. Whether or not he intended to follow through was immaterial, the offense of importuning is based on solicitation, not consummation. The court found that the nature of the chats, even if seen to be phrased in a hypothetical verb tense, readily allowed the court to find Tarbay was soliciting the 13-year-old-girl for sexual activity.

March 27-30

Courts of Appeals

Granger v. Indiana, 946 N.E.2d 1209 (Ind. Ct. App. Mar. 30, 2011).

- Child Molestation
- Solicitation
- Search and Seizure

Granger appealed her convictions on five counts of Child Molesting, as Class A felonies, three counts of Child Molesting, as class C felonies, and one count of Child Solicitation, as a Class D felony. Granger engaged in multiple sexual encounters with two pre-teen boys. A warrant for Granger's arrest was issued, as were search warrants for Granger's home and for photographs of tattoos and other physical characteristics of her body. Items seized from the search of her home were a "Manual of Sexual Positions"; some hand-written notes; three playing cards depicting nude figures, on of which was using a sex toy; four vibrators; condoms; and item called a "Tongue Joy Turbo Pack"; and an E.P.T. Home Pregnancy Test Kit. Granger filed a motion to suppress the items seized, claiming they were outside the scope of the search warrant. She also filed a motion to exclude much of this evidence at trial as unfairly prejudicial and/or evidence bearing on Granger's character. The trial court denied each motion.

Granger challenged numerous of the trial court's decisions. Granger challenged the admission of items not specifically enumerated in the search warrant. The warrant authorized the seizure of "Evidence pertaining to the crime of child molesting and child solicitation to wit but not limited to a vibrator, nuva ring contraceptive device and

condoms." Granger argues that the unlisted items that were seized were not contraband, and therefore their incriminating nature could not have been immediately apparent and thus admission of these items into evidence at trial was unconstitutional. The testimony of the investigating officer stated that she was looking for "sex toys, a pregnancy test possibly and other items" that had been described to her during her interview process with the victims. The court found all items within the scope of the warrant under the probable cause requirement of the "immediately apparent" prong of the plain view test except for the explicit playing cards, as there was no indication in the officer's testimony or the probably cause affidavit that such items were at issue in the investigation. Granger also challenged the relevance of the admitted items as well as the photographs of her body. Granger claimed that no effort was made by the State to establish that the items were relevant to the crimes charged. While the court found that the evidence lacked proper foundation, and the State should have been required to explain how the items would be connected to the charged offenses later in the trial, Granger failed to move to strike the evidence and thus the trial courts error was waived. The court found that the erroneous admission of evidence amounted to harmless error.

Unpublished Decisions

Ohio v. Keck, No. 09CA50, 2011 WL 1233196 (Ohio Ct. App. Mar. 30, 2011).

- Child Pornography
- Sixth Amendment
- Grooming

In 1993, Keck became involved with the "Royal Rangers", the "Christian" equivalent of the Boy Scouts. This led to contact with many teen and pre-teen boys, whom he tried to mentor. In January 2009, on of those boys confided in his mother that Keck had engaged him in anal sex. The mother contacted the police which led to a search warrant on Keck's residence. Upon executing the warrant, two other boys were on the premises and the search of the home and computer yielded videos and images of underage nude boys, either by themselves or engaged in some form of sexual activity. At trial, several boys testified to instances of sexual abuse at Keck's home, as well as other parts of Ohio and, in one instance, Honduras. Further testimony revealed that Keck invented various sexual games. Several criminal investigation agents related how various chemical tests linked some of the victims' DNA to appellant's DNA. The defense countered with testimony from neighbors that they trusted Keck with their children and observed nothing untoward in Keck's behavior toward the children. One alleged victim testified that Keck did not molest him and the police forced him to accuse Keck.

After hearing all the evidence, the jury found appellant guilty on twenty-nine counts. On six other counts, the jury returned "not guilty" verdicts. The trial court ordered forfeiture of Keck's computer, a digital camera and his residence, valued at $89,090. The total prison sentence resulted in a "definite period of seventy-one years" imprisonment.

On appeal, Keck alleged six errors which the court reviewed. Keck asserts that he was

denied his rights under the Sixth Amendment to confront an adverse witness against him when agent who testified at trial as to the DNA evidence was not the agent who took the samples. The court found that it was the testifying agent's analysis that provided the nexus between the accused and the crimes. The agent at the scene collected the samples, ran them "through a series of scientific steps and a profile, a piece of paper readout, printout" was generated at the end. The agent did not analysis and therefore no confrontation clauses violation occurs when raw data generated from a machine is introduced into evidence at trial even though the technician who operated the machine is not in court to testify.

Keck argued that the trial court erred in ordering many of his sentences to be served consecutively. The appellate court disagreed, stating that the trial court cited a number of reasons in their decision to justify their order.

Next, Keck argued that the forfeiture of his home was grossly disproportionate to the magnitude of the crimes and constituted an "excessive fine." Ohio law allowed for fines up to $20,000 for every first degree felony and in this case allowed for a total fine of $120,000. Keck's home was valued at $89,090 and therefore was not excessive. This fact, coupled with the harm to the victims, the number of offenses and the fact that the home was used to lure the victims, Keck's argument was overruled.

In his fourth and fifth arguments of error, Keck stated that there was insufficient evidence for the kidnapping convictions. Keck argues that there was no evidence that he took the child on the trips with the specific purpose of engaging in sexual activity with him. Here, there was sufficient evidence that Keck was attracted to young boys and the trial court could have reasonably determined that appellant intended to engage in sexual activity at other locations.

Keck also failed in his ineffective assistance of counsel claim

Bethards v. Texas, No. 10-09-00016-CR, 2011 WL 1166655 (Tex. App. Mar. 30, 2011).

- Child Pornography
- Consent to Search

Bethards appealed the jury verdict finding him guilty of fourteen counts of child pornography. Police received a report that Bethards may have had child pornography and began the process of obtaining the search warrant. Police learned that Bethards was aware of the report and went to Bethards's home to prevent destruction of any potential evidence. Bethards answered the door and was explained the circumstances. He refused to consent to a search and the police informed him that until the search warrant was either granted or denied, Bethards would not be allowed to go back into the house because it was necessary to preserve the electronic evidence. Bethards then let the officers inside his house and told them they could take the computer. Two computers were taken and Bethards affirmed his consent to take each computer individually. The next day Bethards again gave consent to the search at the police station and was informed that the

computers were being taken to be analyzed. Again, Bethards affirmed his consent.

Bethards first contended that his consent to search was involuntary. Bethards testified that when he told that he was going to be kept out of his home, he felt he no longer had any choice but to consent. He argued that he believed he had been constructively evicted from his home for an indefinite period of time and law enforcement had a less restrictive restrain available to them but chose not to employ it. The court concluded that Bethards' consent was voluntary because he was informed more than once of his right to refuse to allow the search and the officers explained that they were only temporarily going to disallow him from going into the house until the search warrant was either granted or denied.

In his second issue, Bethards contended that the trial court abused its discretion in admitting testimony about voluminous pornographic images found on his computer because the probative value of such evidence was substantially outweighed by unfair prejudice. A Secret Service agent testified that he found more than 1,200 child pornographic images on Bethards's computer. The court found this testimony probative because it assisted the jury in determining that the images did not arrive there by accident or mistake. The court found the evidence necessary to rebut the defensive theory of Bethards. Further, the jury was only *told* that 1200 images were found on the computer and there was no evidence that the jury was confused or applied undue weight to this evidence. For these reasons the court overruled Bethards's second issue.

Lastly, Bethards argued that the evidence was insufficient to support his conviction because the state did not prove he intentionally or knowingly possessed. Texas had previously accepted that images stored as temporary files can amount to possession by the user of the computer. The secret service agent testified that from July 23 to July 24, 2007, Bethards's computer was used to visit over 400 websites containing child pornography images and to make over 115 searches for child pornography. There was ample evidence to conclude that the images did not appear on his computer by default.