

## CSE Case Law Update

May 2009

### STATE SUPREME COURTS

State of Wisconsin v. Hoppe, 765 N.W.2d 794 (Wis. May 29, 2009).

- Guilty Plea

Defendant entered a guilty plea to twelve counts of possession of child pornography. The Supreme Court of Wisconsin upheld the Court of Appeals decision denying defendant's Motion to Withdraw Guilty Plea based on his being under the influence of pain medication at the time of the plea. The Court ruled that the defendant's ingestion of pain medication prior to the plea had no effect on his understanding of the possible maximum penalties.

Commonwealth of Pennsylvania v. Diodoro, 970 A.2d 1100 (Pa. May 26, 2009).

- Sufficiency of Evidence
- Statutory construction

The Supreme Court of Pennsylvania upheld the superior court's order decision affirming defendant's conviction for sexual abuse of children. The issue in the case was whether the defendant had "control" of child pornography under Pennsylvania statutes. In upholding the underlying court's ruling the Supreme Court noted, "an individual manifests such control of child pornography when he purposefully searches it out on the internet and intentionally views it on his computer....Such conduct is clearly exercising power and/or influence over the separate images of child pornography because the viewer may, *inter alia*, manipulate, download, copy, print, save or e-mail the images." *Id.* at 970 A.2d 1107.

### COURTS OF APPEAL

State of Ohio v. Marler, 2009 Ohio App. LEXIS 2050 (Ohio Ct. App. May 22, 2009).

- Search and seizure
  - No probable cause
  - Staleness
  - Actual v. virtual children
- Constitutional (virtual v. actual children)(Dean Boland defense)
- Discovery-fair trial

Defendant was represented by Dean Boland who filed multiple motions to dismiss and suppress. Included in those motions was the standard of no probable cause because of staleness, that there were no descriptions of the images in the search warrant and the somewhat novel Boland defense of the judge who signed the search warrant not being able to tell whether the children were virtual or real. The trial court and appellate court rejected all of these issues. Additionally, Boland tried to raise the fair trial-discovery issue because of fear of federal prosecution for a defense attorney or expert who had a copy of the images. The Court also rejected this argument relying upon State v. Brady, 119 Ohio St.3d 375, (2008) holding that the discovery restrictions in child pornography cases were constitutional as the defense attorney and his expert could review the images at the police department.

Worden v. State of Alaska, 213 P.3d 144 (Alaska Ct. App. May 22, 2009).

- Sufficiency of Evidence
  - Cache file case
- Sentencing

Defendant was convicted of multiple counts of sexual abuse of a minor and possession of child pornography. Appellate Court reversed defendant's child pornography convictions ruling that Alaska's statutes required action beyond the viewing of child pornography on a website to constitute possession. The Court distinguished other state statutes and case law supporting such a finding, by ruling that the Alaska statute was more narrowly drawn. The Court focused on the lack of evidence or testimony that the defendant knew the cache files, where the child pornography was found, existed. It is unclear from the record if any evidence or testimony was presented about a person's ability to manipulate, control, copy or disseminate an image while it is on a computer screen. Additionally, based on the reversal of the child pornography convictions the case was remanded for a new sentencing hearing.

State of Oregon v. Ritchie, 228 Or.App. 412 (Or. Ct. App. May 20, 2009).

- Sufficiency of Evidence
- Venue

Defendant challenged conviction on twenty counts of encouraging child abuse in the second degree. The basis of defendant's conviction was the recovery of multiple images of child pornography on a desk top and laptop computer that belonged to the defendant. The Appellate Court ruled that as to the images on the desk top there was sufficient evidence to demonstrate the defendant "controlled" the images. However, as to the images on the laptop the Court ruled that since the computer forensics examiner could not demonstrate when the images were downloaded, or where the defendant was when the downloading took place, the State failed to prove venue. Ultimately the Appellate Court reversed the defendant's convictions for all of the images from the laptop.

State of Tennessee v. Burda, No. E2009-00733-COA-R3-PT, 2009 Tenn.App. LEXIS 391 (Tenn. Crim. App. May 4, 2009).

- Sufficiency of Evidence
- Multiplicity
- Search and Seizure
- Corroboration of Victim Statement
- Sentencing
  - Grooming evidence

Defendant appealed his guilty conviction for one count of solicitation of a minor and six counts of especially aggravated sexual exploitation of a minor. Factually the case arose out of the on-line relationship between the defendant and the sixteen year old victim wherein defendant groomed victim and encouraged her to send naked pictures of herself to him. The Appellate Court rejected the defendant's contention that the evidence was insufficient to demonstrate he promoted, employed, used, assisted or permitted the victim's photographs. Specifically, the Appellate Court agreed with the trial court that the defendant did the exact opposite. Likewise the Appellate Court rejected defendant's contention that the search warrant lacked particularity and a nexus to the place being searched because of staleness. Interestingly, under Tennessee law a minor who is between the ages of twelve and seventeen can be considered an accessory in a child sexual abuse case. If that fact pattern is present the state must provide corroborating evidence of the "accessory's" statement to meet a reasonable doubt standard. In this case, the Court concluded that the victim was not an accessory, but even if she had been, there was corroboration through the digital evidence that supported the conviction. Finally, the Court remanded the case for a new sentencing hearing based on a Blakely violation. The Court extended the defendant's sentence based in part on evidence of grooming of the victim by the defendant. The Court ruled that those facts had to be found by a jury in order to be the basis for the defendant's extended sentence.

#### **DISTRICT COURTS**

People v. Price, 873 N.Y.S.2d 327 (N.Y. App. Div. Feb 10, 2009).

- Speedy Trial

State appealed Trial Court decision to grant defendant's motion to dismiss based on a speedy trial violation. Defendant was arrested and charged with attempted disseminating of indecent material to a minor. Following the defendant's arrest a case with very similar facts was decided in favor of a defendant and the State believed the ruling in that case barred prosecution in this case. Ultimately, the other case was resolved in favor of the state, holding that the statute did not require nude or sexual images as part of the charge. However, the Trial Court, and the Appellate Court agreed, that the time during the appeal

on the other case was attributable to the State and thus the speedy trial time period elapsed. The Court held that it did not fall into an exceptional circumstance provision nor did the State request a continuance based on the other case.