

CSE Case Law Update

May 2010

STATE SUPREME COURTS

State v. Fielding, 994 A.2d 96 (Conn. May 4, 2010).

- Discovery of child pornography

In September, 2006, the state charged the defendant by information with possession of child pornography in the third degree in violation of General Statutes § 53a-196f. Thereafter, in February, 2007, the defendant filed a motion requesting that the state be ordered to provide him with copies of all of the alleged pornographic materials seized from his home that formed the basis of his prosecution. The defendant claimed that such disclosure was necessary to allow his forensic experts to evaluate the evidence and to prepare a defense. At the hearing on the motion in April, 2007, the trial court questioned the defendant about whether such disclosure was prohibited by statute. The defendant acknowledged that there is a federal law that bars the disclosure of copies of child pornography to a federal criminal defendant; see 18 U.S.C. § 3509 (m); but argued that this law did not apply in a state criminal prosecution. Additionally, although he recognized that legislation patterned after the federal law had been proposed and was pending in the General Assembly; see House Bill No. 7269, 2007 Sess. (H.B. 7269); the defendant argued that this bill, even if it were to be enacted into law, would not take effect until October, 2007. In response, the state argued that the court should view the federal law as persuasive authority and expressed the belief that the distribution of copies of child pornography to the defendant unnecessarily risked repeating the victimization of the children depicted in the alleged pornographic material.

The court upheld the trial court's ruling on procedural grounds.

Sexton v. Commonwealth, 2010 Ky. LEXIS 108 (Ky. May 20, 2010)

- Sentencing – Repeat Felony Offender

Defendant was reported to police by parents of children swimming in a public pool. Defendant was allegedly videotaping the children and, when confronted, left the scene. A police officer investigated at his house and requested to view the videotape that was in the camera. Finding no evidence on the tape that the defendant had in fact videotaped the children, the officer left. An arrest warrant and a search warrant were later issued. The search of the defendant's house did not uncover the tape that the officer had viewed earlier. The defendant was charged with disorderly conduct and destruction of evidence.

The Supreme Court of Kentucky overturned his destruction of the evidence conviction as there was no physical evidence that the Appellant allegedly tampered with. The

Commonwealth failed to produce any evidence that Appellant was actually videotaping anyone or anything at the pool that day.

INTERMEDIATE STATE COURTS OF APPEAL

People v. Roberson, 927 N.E.2d 1277 (Ill. App. May 13, 2010)

- Trial Procedure
- Evidence of Prior Convictions
- Sentencing

The Sangamon County Circuit Court (Illinois) entered final judgments of conviction after a jury found defendant of aggravated criminal sexual abuse and indecent solicitation of a child. It then sentenced him to concurrent terms of two years of probation with 180 days in jail on each conviction. Defendant appealed.

Defendant allegedly made sexual advances at an underage girl. After a trial at which he testified, he was convicted of both aggravated criminal sexual abuse and indecent solicitation of a child. The oral pronouncement of sentence varied from the written sentencing order. He argued on appeal, inter alia, that the trial court in not questioning the venire about his decision not to testify, in barring prior false-accusation evidence, in allowing evidence of an alleged prior sexual assault, that the State failed to prove the age-difference element of aggravated criminal sexual abuse, and that the sentencing order needed to be corrected. The appellate court found that (1) the trial court did so err regarding questioning the venire about his decision not to testify, but the error was harmless since he testified; (2) exclusion of the false-accusation evidence was proper since the allegations were not connected to a bias against him; (3) the prior offense evidence had a sufficient factual similarity to the charged offenses; (4) the evidence showed he was five years older than the victim; and (5) the oral sentencing pronouncement controlled over the written sentencing judgment.

The appellate court affirmed the trial court's judgment, but modified that judgment to reflect that fact that trial court sentenced defendant to concurrent terms of two years of probation, according to the trial court's oral pronouncement of his sentence, and not four years as indicated in the written judgment. It then remanded the case with directions for trial court to issue a modified written judgment order.

Sloan v. Indiana, 926 N.E.2d 1095 (Ind. App. May 17, 2010)

- Statute of Limitations
- Sentencing

Defendant was charged with: (1) felony child molesting for intentionally performing deviate sexual conduct with a minor; and (2) felony child molesting for intentionally performing fondling or touching of a minor. Before the start of the trial, Defendant filed a

motion to dismiss Count II on the basis that it was filed sixteen years after the date of the commission of the alleged offense and thus was beyond the applicable five-year statute of limitations. The trial court conducted a hearing, where the State asserted that the statute of limitations had not run because of acts of concealment by Sloan. Following the conclusion of evidence the next day, the trial court denied Sloan's motion to dismiss.

The jury found defendant guilty as charged. The trial court sentenced him to forty years for the Class A felony conviction and six years for the Class C felony conviction and ordered the sentences to be served consecutively.

Defendant contends that the trial court erred when it denied his motion to dismiss felony child molesting charge. Sloan argues that the trial court should have dismissed the felony child molesting charge, because the charge was filed well beyond the applicable statute of limitations. The appellate court held that the applicable five-year limitation period would therefore have expired in 1996; consequently, the appellate court found that the trial court erred when it denied Sloan's motion to dismiss.

Conviction of a Class A felony results in a sentence between twenty and fifty years, with the advisory sentence being thirty years. Defendant asked the court to revise the forty-year sentence that he received on the Class A felony child molesting conviction. The nature of the offense and the character of the offender supported the trial court's imposition of a forty-year sentence on the Class A felony child molesting conviction and, therefore, the appellate court upheld the forty year sentence.

Shaffer v. State, 2010 Tex. App. LEXIS 3921 (Tex. App. May 25, 2010)

- Sufficiency of the Evidence

Defendant challenged an order from the 249th District Court, Johnson County which convicted him of three counts of aggravated sexual assault of a child, two counts of indecency with a child and two counts of online solicitation of a minor.

Defendant was convicted of three counts of aggravated sexual assault of a child, two counts of indecency with a child, and two counts of online solicitation of a minor. At the time of the incidents, the victim was 13 years old and defendant was 26 years old. On appeal, the court found that the evidence was sufficient to support the convictions for the two counts of aggravated sexual assault of a child that alleged digital penetration. The victim testified that defendant penetrated her sexual organ with his finger on more than one occasion. Under Tex. Code Crim. Proc. Ann. art. 38.07(a), (b)(1) (2005), the victim's testimony alone was sufficient to support the convictions. The victim also testified that defendant had sexual intercourse with her and touched her breast one more than one occasion. A witness testified that he saw defendant touch the victim's "breast area." A rational trier of fact could have found that defendant was the one who, through a commercial online service, knowingly solicited the victim to meet him with the intent that she would engage in deviate sexual intercourse with him. The court affirmed the judgment of the trial court.

State v. Ramage, 2010 Wisc. App. LEXIS 364 (Wisc. App. May 7, 2010)

- Warrantless Searches

Defendant appeals a judgment entered on guilty pleas convicting him of eight counts of unlawfully possessing child pornography and the order denying his motion for reconsideration. According to the criminal complaint, which was used as the factual bases for defendant's pleas, the child pornography was on two computers that he owned. He contends that they were seized and searched unlawfully.

A cohabitant of the defendant's residence, who had access to the two computers, gave police permission to conduct a warrantless search on the computer. The cohabitant had access to both computers. The detective took the computers to the police department where law enforcement discovered child pornography. The police did not have a search warrant, either at the apartment or when they later accessed the computers. The court upheld the warrantless searches of the computers on the consent exception to a warrantless search.

State v. Holt, 2010 Utah App. LEXIS 142 (Utah App. May 27, 2010)

- Sentencing Conditions

The State charged Defendant with ten counts of sexual exploitation of a minor, which are second degree felonies, after Defendant was found in possession of child pornography. Following plea negotiations, Defendant pled guilty to two counts of sexual exploitation of a minor. In exchange, the State dropped the other eight counts and "agree[d] to a two-level reduction of the offenses from a second degree felony to a Class A misdemeanor, pursuant to" the 2003 reduction statute that was then in effect, and which did not preclude reductions for convictions requiring sex offender registration.

Defendant first claims his due process rights were violated under the Utah and United States constitutions when the district court determined that the 2006 reduction statute, which Defendant urges is an ex post facto law, applied and precluded the court from granting his motion to reduce. Second, Defendant asserts that in applying the 2006 reduction statute, and in therefore not requiring the State to fulfill the promises it made in the plea agreement, the 2006 reduction statute impaired the obligation of contracts in violation of the Utah and United States constitutions.

The court found that the 2006 reduction statute was not an ex post facto law for two reasons. First, the amendments did not aggravate the crime or increase the criminal penalty--as those terms have been construed--for which Defendant was convicted. And second, there was no retroactive application of a new law to Defendant given that case law existing at the time of Defendant's plea provided that it is the reduction statute in effect at the time a probationer moves to reduce that is applicable.

The court also did not accept Defendant's theory that applying the 2006 reduction statute to him violated his rights under the state and federal Impairment of Contracts clauses. The state and federal impairment of contracts clauses "do not establish a right of parties to make contracts that are illegal and against public policy. They merely prevent 'impairment' by a changing of the laws *after* the contract has been made."

Lancaster v. State, 2010 Tex. App. LEXIS 3958 (Tex. App. May 26, 2010)

- Double Jeopardy

Defendant pled guilty to criminal solicitation of a minor, indecency with a child by exposure, and indecency with a child by contact. In a separate trial, a jury of the 272nd District Court, Brazos County, Texas, convicted him of two counts of promotion of child pornography. Defendant appealed.

The court of appeals held that defendant's conviction and punishment for multiple counts of indecency by contact and promotion of child pornography did not violate the Double Jeopardy Clause. At least seven separate incidents of the alleged conduct with one child were shown on a DVD. Although the incidents all occurred in relatively brief period of time, while the child's mother was shopping, defendant could be prosecuted for each discrete sex crime committed against the child during the same criminal episode. The depictions on the DVD included defendant touching the child's genitals and breast while seated in a recliner, doing the same thing in a bath tub, two other instances of touching her genitals, and two separate instances of uncovering her genitals and making a close up recording. Further, because the evidence established the commission of at least seven distinct and separate offenses, the conduct relied on to prove the challenged offenses was not subsumed by the conduct relied on to prove one count of indecency by contact. The court affirmed the judgments.

State v. Cooper, 2010 Ohio App. LEXIS 1643 (Ohio App. May 6, 2010)

- Due Process
- Sentencing

Defendant entered a plea of guilty in the Cuyahoga County Court of Common Pleas to four counts of pandering sexually-oriented matter involving a minor and one count of possessing criminal tools, to wit. Each count contained a forfeiture specification. The court sentenced defendant to an aggregate prison sentence. Defendant appealed.

Two separate movie files of child pornography were found on defendant's computer. Defendant admitted to visiting a child pornography website and to entering search terms and receiving videos of young children being physically and sexually abused by adults. On appeal, the court found that defendant was not denied due process of law because (1) by entering a plea of guilty to the offenses, defendant waived any alleged errors in the indictment; (2) the record sufficiently demonstrated that defendant understood that, by entering a guilty plea, he admitted to committing the charged offenses; (3) the trial court

did not improperly consider evidence of defendant's uncharged conduct when sentencing him; (4) the trial court at sentencing considered the proper factors and did not abuse its discretion; (5) the trial court was not required to make findings when imposing the consecutive sentences; and (6) multiple convictions were allowed for each individual image because a separate animus existed every time a separate image or file was downloaded and saved. Additionally, defendant failed to show ineffective assistance of counsel. The judgment was affirmed.

State v. Hale, 2010 Ohio App. LEXIS 1975 (Ohio App. May 28, 2010)

- Search Warrant – Probable Cause, Staleness, and Lack of Particularity

Defendant sought review of the judgment which convicted him on sixteen counts of pandering obscenity involving a minor. Defendant contended that the trial court erred in overruling his motion to suppress evidence seized from his home computer because the warrant and affidavit were defective on grounds of lack of probable cause, staleness, and lack of particularity in the warrant.

Upon learning that defendant had subscribed to a child pornography site, police requested that a warrant be issued permitting them to search defendant's home for computers and financial records connected with the crime. The court held that the issuing judge had a substantial basis for concluding that probable cause existed as the factors, including an investigation conducted by a federal agency, defendant's choice to pay for a subscription to a child pornography site, and the investigating officer's verification that defendant still lived at the same address from which payment was made, led to a fair probability that evidence of illegal images would be found at defendant's home. Though a substantial period of time elapsed between defendant's purchase of the subscription and the issuance of the warrant, the information in the affidavit was not stale as defendant still lived at the same address and as pornographic images could be stored on computers or computer related-items for long periods of time. Finally, the warrant was not overbroad as the search was limited to computer hardware and software and financial items related to the offense of pandering obscenity involving a minor. The court affirmed the judgment of the common pleas court.

In re Children of B.L.P., Parent, 2010 Minn. App. Upub. LEXIS 431 (Minn. App. May 11, 2010)

- Termination of Parental Rights

Defendant pled guilty to one count of producing child pornography and was sentenced to 198 months incarceration. A petition to terminate appellant's parental rights was filed. The district court found that there was substantial evidence to support a finding of egregious harm. The appellate court agreed.

State v. Maxwell, 2010 La. App. LEXIS 677 (La. App. May 5, 2010)

- Search Warrants
- Leon Good Faith

Law enforcement prepared an affidavit for a search warrant of the defendant's home to search for computers or other portable data-storage devices. The warrant was signed by a district court judge and executed by law enforcement. In connection with his original motion to suppress, the defendant argued the warrant was defective because it did not describe the items to be seized with particularity. Herein, the warrant does not contain a description of the items to be seized, but it does refer back to an affidavit, and the warrant identifies one police officer as the affiant. The entire affidavit, including the descriptive list, was later made available to the defendant.

Accordingly, the appellate court found that the trial court erred in concluding the warrant issued for the search of the defendant's home was facially invalid. While they did not condone the State's omission of a list of the items to be seized in the warrant, a detailed description of the items to be seized was listed in the affidavit, the officers confined their search to those items, and the warrant specifically referred to the affidavit. In any event, the court further agreed with the State's contention that even if the warrant were found to be deficient, the seized evidence may nevertheless be admissible under the good-faith exception of *Leon*.

In re Maria R., 185 Cal. App. 4th 48 (Cal. App. 4th Dist. May 27, 2010).

- Dependency Proceeding – Removal

In a dependency proceeding initiated by plaintiff health and human services agency, the Superior Court of San Diego County, California, found under Welf. & Inst. Code, § 300, subds. (d), (j), that two older daughters had been sexually abused, that two younger siblings (a girl and a boy) were at substantial risk of being sexually abused by the father, and that removal was necessary. Defendant mother appealed.

The court of appeal concluded that there was substantial evidence to support findings that the father sexually abused the two older daughters; the evidence included reports of vaginal touching by both girls and testimony from the father's adult daughters from a previous marriage, establishing a pattern of sexually assaulting his daughters over a period of more than 20 years. That evidence was sufficient to show a substantial risk of being sexually abused as to the younger daughter but not the son. Although the evidence did not support a finding that the son was at risk of sexual abuse, the sexual abuse findings about his sisters were prima facie evidence that he was at substantial risk of other abuse or neglect.

The court affirmed the judgments as to the three daughters, and, as to the son, reversed the jurisdiction order, vacated the disposition order and all subsequent orders, and directed the trial court to detain the son and order a forensic interview and any other evaluation necessary to ensure his safety and well-being.

People v. Nguyen, 184 Cal. App. 4th 1096 (Cal. App. 4th Dist. 2010).

- Ineffective Assistance of Counsel
- Admissibility of Sexual Conduct Evidence

Defendant appealed a judgment from the Superior Court of Orange County (California), which, in a jury trial, convicted him of forcible rape and committing a lewd act on a child under age 14. The jury found true that defendant committed sex offenses against more than one victim.

The offenses took place in two counties. The trial court denied defendant's motion to sever and dismiss the offense from a different county and admitted evidence of uncharged conduct. The court found no abuse of discretion in permitting joinder of the offenses under Pen. Code, § 784.7, subd. (a), because the requirements for joinder in Pen. Code, § 954, were met and no prejudice was shown; moreover, defendant's vicinage rights under Cal. Const., art. I, § 16, were not violated. Evidence of uncharged sexual offenses was properly admitted under Evid. Code, § 1108, to show a propensity for non-consensual sex acts. The trial court reasonably exercised its discretion under Evid. Code, § 352, in balancing the probative value of the propensity evidence against its prejudicial and time-consuming effects. The admission of evidence of nonsexual uncharged conduct, which was inadmissible character evidence under Evid. Code, § 1101, subd. (a), was harmless error under Cal. Const., art. VI, § 13, because the prosecution's evidence was very strong. A claim of ineffective assistance regarding counsel's failure to object to a detective's testimony lacked merit because no prejudice was shown. The court affirmed the judgment of the trial court.

State v. Lambdin, 231 P.3d 587 (Kan. App. Unpub. May 21, 2010).

- Psychological Evaluation
- Jury Instruction on the Lesser Included Offence
- Jury Instruction for Sexual Exploitation of a Child
- Sentencing

In May 2006, J.L. discovered her brother, Michael Lambdin, and his 7-year-old daughter, M.L., bathing and sleeping nude together. When J.L. questioned M.L. about the incident, M.L. indicated that there had been sexual contact between her father and herself. J.L. also discovered approximately 50 computer CDs in Lambdin's bedroom that contained what she suspected to be hardcore pornography. J.L. reported this information to Kansas Social and Rehabilitation Services. Police executed a search warrant at Lambdin's house and discovered 180 separate images of child pornography on his computer hard drive. Based on this evidence, the State charged Lambdin with three counts of rape and one count each of sexual exploitation of a child, aggravated indecent liberties with a child, and aggravated intimidation of a witness.

On appeal, Lambdin claims the district court erred when it denied his motion for a psychological evaluation of a minor witness against him. In determining whether a

defendant presented compelling reasons for a psychological evaluation, the district court should consider:

"(1) whether the victim demonstrates mental instability, (2) whether the victim demonstrates a lack of veracity, (3) whether similar charges by the victim against others have been proven to be false, (4) whether the defendant's motion for a psychological evaluation of the victim appeared to be a fishing expedition, (5) whether there are any other reasons why the victim should be evaluated, and (6) whether anything unusual results following the questioning of the victim's understanding of telling the truth."

In determining whether the defendant is entitled to instructions on his lesser included offense claim, this court must view the evidence in the light most favorable to the defendant. On appeal, Lambdin claims the jury could have reasonably convicted him of the lesser offense of attempted rape under K.S.A. 21-3301(a) (Furse) and K.S.A. 2005 Supp. 21-3502(a)(2). Lambdin argues that with A.O.'s trial testimony about him touching the "outside" of her privates, the jury could have found he intended to rape A.O. but failed to complete the crime.

State v. Harding, 2010 Ill. App. LEXIS 487 (Ill. App. May 26, 2010).

- Sentencing

Defendant pled guilty to incest and attempted rape of a child. In accordance to his plea agreement, the trial court sentenced the defendant to twenty four years of incarceration. On appeal the defendant contends that the trial court erred in denying him a sentence of split confinement. The appeals court stated that the following considerations provide guidance regarding review of a sentence: (a) the evidence adduced at the trial and the sentencing hearing; (b) the pre-sentence report; (c) the principles of sentencing and arguments as to sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) evidence and information offered by the parties on the enhancement and mitigating factors. Based on a factual analysis, the appellate court determined that the trial court properly considered all applicable principles of sentencing and found no error in its decision that the defendant failed to provide sufficient evidence that he was a favorable candidate for alternative sentencing.

Commonwealth v. Santarpio, 2010 Mass. App. Unpub. LEXIS 484 (Mass. App. May 4, 2010).

- Due Process and Equal Protection
- Sufficiency of the Evidence

The petitioner appealed from a judgment and order of the Superior Court finding him a sexually dangerous person and committing him to the Massachusetts Treatment Center. On appeal, he claims that (1) G. L. c. 123A, as applied in his case, failed to comport with the requirements of due process and equal protection, and (2) the evidence failed to

establish that he was sexually dangerous because it was insufficient to prove that he suffers from a mental abnormality

The court declined to hear the petitioner's constitutional claims because he failed to preserve them for appeal. On the sufficiency of the evidence claim, the court found that due to the appellant's six prior convictions for sexual offenses and three experts diagnosing the appellant with pedophilia, the trial judge did not err when he found the appellant was sexually dangerous.

STATE TRIAL COURTS

People v. Barber, No. 51032U, slip op. (N.Y. Misc. May 11, 2010).

- Petition for relief of duty to register as a sex offender
- Petition for downward modification of sex offender level

The defendant pled guilty to the crimes of Promoting an Obscene Sexual Performance by a Child, in violation of Penal Law § 263.10, and Attempted Disseminating Indecent Material to Minors in the first degree. The defendant was then designated to be a Level Two sex offender upon the application of the New York sentencing guidelines, which resulted from this Court's upward departure from the presumptive Level One designation.

Due to the fact that the defendant had been a registered Level Two sex offender for a period of less than 6 years the Court was precluded from relieving him of his continuing duty to register under SORA until he had been registered for an additional twenty-four year period. Accordingly, the defendant's application to be relieved of his duty to comply with his registration and verification obligations as a sex offender under SORA was denied. His petition to modify his sex offender level downward to Level One sex offender was granted, due to the defendant's physical disabilities and stable familial relationships.

State v. Coriander, 2010 R.I. Super. LEXIS 79 (R.I. Super. May 18, 2010)

- Virtual Pornography

Defendant filed a motion to dismiss an indictment charging him with possessing child pornography (§ 11-9-1.3).

Defendant admitted to police that his "jump" drive contained pornographic images of children. A forensic inspection of his computer yielded images depicting infants and prepubescent boys and girls engaged in sexual intercourse and other sexual activities. Defendant argued that § 11-9-1.3 violated the First Amendment, by criminalizing "virtual child pornography," i.e., computer-generated images appearing to depict minor children engaged in sexually explicit conduct and that it impermissibly allocated the burden of proof to the accused to prove that the material was not "real" child pornography. The

court disagreed. Under § 11-9-1.3, the State had to prove beyond a reasonable doubt that the visual depiction possessed by an accused involved the use of a real child. While not obligated to do so, a defendant could present evidence about how the offending depiction could have been made without using real children; this did not constitute shifting the burden of proof. Thus, § 11-9-1.3, was not unconstitutionally overbroad or otherwise infirm due to an impermissible shifting of the burden of proof to the defendant.