

CSE Case Law Update

November 2009

Smith v. Indiana, 915 N.E.2d 1037 (Ind. App. Nov. 3, 2009).

- Sufficiency of Evidence

Defendant appealed his conviction for sexual misconduct with a minor claiming there was insufficient evidence. Defendant claimed that there was no evidence to support that his touching of the victim on her inner thigh and playing with the strap of her bathing suit was done with the intent to arouse or to satisfy sexual interests. The court disagreed, ruling that based on the defendant closing what he described as “pop-ups” on his computer of adult pornography, a jury could reasonably conclude the intent of defendant’s touching.

California v. Ciccarelli, No. H032864, 2009 Cal. App. Unpub. LEXIS 8819 (Cal. Ct. App. Nov. 4, 2009).

- Motion To Suppress Statements: Miranda Violation
- Jury Instructions

Defendant was convicted of possession of child pornography, one count of oral copulation of a minor, and one count of sodomy of a minor. Defendant claimed the trial court erred in admitting his statement to police officers during the booking process where he admitted the victim gave him the photos. The court rejected defendant’s contention and ruled that he impliedly waived his *Miranda* rights by reinitiating the conversation after being advised of the charges. The court rejected defendant’s claim that the trial court erred by failing to give a unanimity instruction. The court held that because there could only be possible uncertainty with regard to whether defendant was guilty of a single act of possessing child pornography, rather than multiple discrete crimes, i.e., seven discrete acts of possessing child pornography, the court was not required to give a unanimity instruction.

Turner v. Virginia, 685 S.E.2d 665 (Va. Nov. 5, 2009).

- Probation Revocation Hearing
 - Admissibility of Evidence
 - Polygraph Evidence

Defendant was granted a new sentencing hearing based on the admission of the polygraph examiner’s conclusion that defendant appeared deceptive during the test. The Supreme Court of Virginia concluded that any voluntary statements or admissions made during the course of a polygraph examination are admissible. Defendant admitted to

additional violations of his terms of probation, but was entitled to a new penalty phase of his sentencing hearing.

Renfrow v. Mississippi, 34 So. 3d 617 (Miss. Ct. App. Nov. 10, 2009).

- Search and Seizure
 - Motion to Suppress Evidence
 - Motion to Suppress Statements
- Vagueness of Statute
- Sufficiency of Evidence
 - Other Acts Evidence

Defendant was convicted of one count of possession of child pornography. The charges stemmed from children's disclosure of seeing child pornography on defendant's computer. Defendant filed a Motion to Suppress Evidence, claiming that the state infected his computer with a virus, as well as for staleness and chain of custody. On the staleness issue the court detailed great language on children delaying their disclosure through force, coercion or shame. Ultimately, the court rejected the staleness issue, finding that the passage of 9-10 months, when an image may be forensically recovered, was not untimely. Likewise, the court rejected defendant's claim that a virus added the child pornography while the computer was in the custody of the state as purely speculative. Defendant also challenged his statement on the grounds of voluntariness, that defendant never signed the statement, and that it was the police officer's recollection of the defendant's statement, so it was not defendant's statement. Defendant challenged the underlying criminal statute for possession under a vagueness theory. The court concluded that the statute did not have a *mens rea* requirement, but because of the way the indictment was drafted, which included a knowingly *mens rea*, the charges against the defendant were appropriate and not vague. Finally, in denying defendant's sufficiency of evidence motion the court tacitly approved the use of emails detailing child abuse as evidence of defendant's intent.

Colorado v. Buerge, No. 07CA2393, 2009 Colo. App. LEXIS 1890 (Colo. App. Nov. 12, 2009).

- Statutory Construction
 - Definition of Victim

Defendant was charged with enticement of a child, Internet luring of a child with intent to exploit, attempted sexual assault on a child under fifteen, and promotion of obscenity. Defendant pleaded guilty to attempted sexual assault of a child under fifteen. Defendant challenged the classification at the sentencing hearing that he was a sexually dangerous person because there was no "victim" in the case. Defendant claimed that because the victim was really a fictitious character created by an undercover officer in an Internet sting, no victim existed. The court disagreed because it was an attempt charge: because attempt could be proven by demonstrating a substantial step toward the completion of the crime was taken by defendant, a known victim need not be identified. The court

concluded that since the legislature included attempt crimes under the sexually dangerous person statute, it intended to include those offenders in the classification.

California v. Conklin, No. B208383, 2009 Cal. App. Unpub. LEXIS 8978 (Cal. Ct. App. Nov. 12, 2009).

- Vagueness
- Insufficient Evidence
- Jury Instructions
- Other Acts Evidence
 - Prior conviction for sexual assault
- Equal Protection Violation
 - Punishment
 - Cruel and Unusual Punishment
- Abstract of Judgment Incorrect

Defendant was convicted of violation of the sex offender registration act and possession of child pornography. Defendant's first series of claims related to his knowledge of the requirement in the sex offender registration act that he re-register within five days of his birthday. The court rejected defendant's claims of both the vagueness of the statute arguments and jury instructions. Defendant also claimed that the admission of his prior conviction for sexual assault was improperly admitted. The court focused on the change in the language of Evidence Code section 1108, which removed the prohibition against using character evidence in sex offense cases. The court concluded that defendant's propensity to be interested in children was certainly relevant to whether he was the person who downloaded child pornography. The court cited several decisions and great language from the Attorney General on the process of grooming and the link between pedophilia and child pornography. Finally, the court rejected defendant's multiple claims of error based on the sentence he received.

Wisconsin v. King, 778 N.W.2d 171 (Wis. Ct. App. Nov. 12, 2009).

- Other Acts Evidence
 - Prior Conviction
 - Possession of Child Pornography

Defendant was convicted of one count of use of a computer to facilitate a sex crime. Defendant alleged that it was improper to admit his prior offense for sexual assault and evidence that he was in possession of child pornography. Defendant had filed a motion *in limine* to bar evidence of either the prior conviction or the possession of child pornography. The trial court never expressly ruled on defendant's motion based on the prosecution's statement that they would only bring up that evidence if defendant opened the door. Defendant testified and opened the door when he discussed his knowledge about what sexual activities children engage in. The court ruled that the prior conviction was properly admitted under the *Sullivan* test. However, the court ruled that the child pornography was improperly admitted as it was not tied to impeaching defendant;

however, its introduction was harmless error in light of the other evidence of defendant's guilt.

Kelly v. Georgia, 686 S.E.2d 810 (Ga. Ct. App. Nov. 13, 2009).

- Sufficiency of Evidence
- Jury Instructions

Defendant was convicted of enticing a child for indecent purposes and solicitation of sodomy. Defendant claimed that there was insufficient evidence and improper jury instructions given on the issues of asportation, or the carrying away of the victim. Defendant alleged that the state did not present evidence of this element or that the court instructed the jury on that issue. In reviewing the multitude of facts from the case the court concluded there was plenty of evidence presented that defendant solicited and enticed the victim to engage in sex acts, satisfying the asportation requirement. Likewise, the court rejected defendant's contention that the term asportation required a separate jury instruction.

Kansas v. Waddell, 218 P.3d 1197 (Kan. Ct. App. Nov. 13, 2009).

- Other Acts Evidence
 - Pornographic Magazines
 - Grooming

Defendant was convicted of several sexual crimes against children. Defendant claimed that the admission of three pornographic magazines was error. The court disagreed, ruling that a child testified that defendant showed her a magazine, and the prosecutors used a detective to explain how pornographic magazines may be used to groom a victim.

State v. Howe, 986 A.2d 631 (N.H. Nov. 17, 2009).

- Search and Seizure
 - Abandoned Property
- Other Acts Evidence
- Admissibility of Evidence
 - Fingerprint Card

Defendant was convicted of six counts of possession of child pornography. The case stemmed from the defendant renting a room at a house. Shockingly, defendant failed to pay rent and was kicked out. He was given a week to remove his belongings. He came back two times during that week to remove items. Approximately five days after the week expired the owner and her sister cleaned out the room. They removed the remainder of the defendant's items left behind. Included in those items was a manila envelope containing approximately twenty-three images from a computer, two were of adult pornography and twenty-one were of children in sexually explicit poses. During the same time frame, defendant stayed with another family. Additionally there were CD-ROM's in

the envelope, one of which contained six videos of child pornography. The CD was labeled “PTHC-Vicky”. Defendant was interviewed and denied possessing the images.

The Supreme Court of New Hampshire considered the three main arguments defendant raised in appealing his conviction. First, defendant claimed the police violated his 4th Amendment rights when they searched the envelope and the CD-ROM without his consent or a warrant. The New Hampshire Supreme Court rejected this argument ruling that the defendant abandoned the property, and thus any privacy interest, when he moved out of the home. Secondly, the defendant argued that evidence from a fingerprint card from an earlier arrest should have been excluded because it was hearsay and the proper foundation had not been laid for it to be admitted. Again the New Hampshire Supreme Court rejected defendant’s contention finding that the proper foundation had been laid under the business record exception to hearsay. Finally, the Court also rejected defendant’s final claim of error: that other acts evidence was impermissibly admitted at trial. Defendant claimed that the thirty pages of images from the computer where he admitted to downloading the adult pornography should not have been admitted. The Court went through the three factors under N.H.R.Ev. 404(b): evidence must be relevant for a purpose other than proving defendant’s character; clear proof defendant committed the act and evidence must not be substantially outweighed by prejudicial value. The Court determined that when reviewing these factors the other acts evidence was admissible and no error occurred.

Montana v. Gaither, 220 P.3d 640 (Mont. Nov. 17, 2009).

- Statutory Construction
 - Definition of Attempt
- Jury Instructions Attempt
- Prior Bad Acts
 - Grooming
- Sentencing

Defendant was convicted of felony endangerment and attempted sexual abuse of children. He was sentenced to 10 years for the endangerment count and 85 years on the attempt count. Additionally, he was sentenced as a persistent felony offender (PFO), receiving an additional 50-year sentence. The court disagreed with defendant’s first contention that in order to prove attempt the prosecution had to present evidence of actual sexual conduct between defendant and the victim. Rather, the court held that the prosecution had to prove defendant had the intent to commit the offense and took steps toward commission of the offense. As to the admission of the evidence of other bad acts - defendant showing the victim child pornography - the court ruled it was appropriate evidence of grooming and inextricably linked defendant’s actions to his intent. The court reversed the sentence on the third issue and ruled that the plain language of the PFO statute limited sentences to 100 years. It was remanded for resentencing on that issue.

Louisiana v. Davis, 26 So.3d 802 (La. Ct. App. Nov. 18, 2009).

- Other Acts Evidence
 - Prior Conviction
 - Witness testimony of prior sex acts
 - Computer evidence

Defendant was convicted of aggravated rape of a child and indecent liberties with a child for two victims. At the trial, various other acts evidence was admitted, including testimony about a multitude of acts committed by defendant on one of the victims, defendant's indictment and subsequent conviction for another sex act to a minor (although the conviction was for a non-sexual offense), and that one of the minor victims viewed images of naked and partially-clothed children on defendant's computer. The court affirmed as to the admissibility of each type of other acts evidence.

New Mexico v. Myers, 226 P.3d 673 (N.M. Ct. App. Nov. 18, 2009).

- Statutory Construction
 - Lewd and Lasciviousness
- SORNA

In the ongoing saga of the *Myers* prosecution, defendant was initially charged and convicted of seven counts of sexual exploitation of a minor for producing child pornography. The Appellate Court overturned the decision based on a failure to prove the elements as stated in *State v. Rendleman*, 2003 NMCA 150 (2003). The New Mexico Supreme Court granted *certiorari* and overruled the decision in *Rendleman* which changed the elements of the crime, and remanded to reconsider in light of the changed opinion. The Appellate Court determined that the statute as written at the time defendant was charged was void for vagueness as it was later amended and enlarged. Thus defendant could not have known his actions constituted a crime. Additionally, while defendant was waiting for the appeal, the trial court granted a stay of execution that relieved him of the obligation to register as a sex offender. The prosecution argued that the trial court did not have discretion to order the stay. The Appellate Court disagreed, stating that trial courts do have that power.

Wisconsin v. Carlson, 778 N.W.2d 171 (Wis. Ct. App. Nov. 25, 2009).

- Ineffective Assistance of Counsel
- Newly Discovered Evidence

Defendant was convicted of ten counts of possessing child pornography. Defendant appealed, claiming ineffective assistance of counsel and that he should be granted a new trial based on newly discovered evidence. In *Wisconsin*, to establish ineffective assistance of counsel, defendant must show counsel's representation fell below objective standards of reasonableness. Defense counsel had presented evidence from an expert on computer forensics. Following conviction, defendant found an additional expert who would have testified to additional information about viruses on the computer. The court ruled that an attorney does not have to present the best expert to be effective as counsel.

In citing the *Strickland* standards, the court ruled that based on all the evidence the verdict would not have changed based on the different expert, and the newly discovered evidence provided by the second defense expert would not have changed the outcome of the trial.

California v. Hansen, No. G040619, 2009 Cal.App. Unpub. LEXIS 9420 (Cal. Ct. App. Nov. 25, 2009).

- Other Acts Evidence

Defendant was convicted of possession of child pornography. He was sentenced to 25 years to life based on his prior criminal history. Defendant alleges that other acts evidence from victims from decades earlier was error and that counsel's failure to object to an expert's testimony about defendant's attraction to young boys after his release from prison and his sexually violent person commitment was ineffective. The other acts witnesses testified to the different forms of pictures and magazines defendant would use to groom them for sex acts. Defendant argued that the act of assaulting a child and possessing a videotape were far too divergent to be admissible at trial. The court rejected defendant's contention, holding that the nature of the past acts was sufficiently similar to prove defendant's interest or motive in possessing the videotape.