CSE Case Law Report
November 2011

November 1 – 6, 2011

Unpublished Opinions

Michigan v. Schwartzenberger, 2011 Mich. App. LEXIS 1947, 2011 WL 5299454 (Mich. Ct. App. Nov. 3, 2011) (Unpublished Opinion)

● Discovery

Defendant was convicted of four counts of indecent exposure. The case arose out of two children within the defendant's neighborhood. The victims testified that the defendant forced contact with the defendant's genitals and made her watch pornographic videos. Approximately two weeks before trial defense counsel found out the victim's father had been convicted of child pornography. He found out the prosecutor knew about the conviction and did not turn it over in discovery and claimed it was a *Brady* violation. The defense counsel argued that he could not obtain the conviction because he did not know the name of the father. The reviewing court rejected this contention finding that the defense counsel never asked for the information in discovery.

November 7 – 13, 2011

Unpublished Opinions

Louisiana v. Boudreaux, 2011 WL 5394577 (La. Ct. App. Nov. 9, 2011) (Unpublished Opinion)

● Other Acts Evidence
● Sentencing

Defendant was found guilty of fifty-one counts of possession of child pornography and attempted possession of child pornography. Defendant complained that the trial court improperly admitted other acts evidence and the imposition of the maximum sentence was unjust. Defendant was the target of a federal investigation regarding child pornography websites. The charged images in the case were from a computer in his living room at the time of the search warrant. The defendant also admitted to having a damaged laptop in his bedroom. The 'other acts' evidence consisted of images from the damaged laptop. The reviewing court agreed with the trial court that while the uncharged images were prejudicial, they were not unduly prejudicial and were relevant based on the "lustful disposition" statute. Defendant argued that he did not intend on downloading child pornography. The court ruled that child pornography being found on two computers was highly probative of his intent. The reviewing court also found that the court's

imposition of the maximum sentences based on the defendant's "damn near being a principal to the crime" was not grossly disproportionate in upholding the sentence.

Lo v. Texas, 2011 Tex. App. LEXIS 8936, 2011 WL 5429061 (Tex. Crim. App., Nov. 10, 2011) (Unpublished Opinion)

- Constitutional Claim
    - Overbroad
    - Vagueness
    - Dormant Commerce Clause

Defendant was convicted of online solicitation of a minor. Defendant claimed that Texas statute was unconstitutionally overbroad and thus facially invalid and a violation of the Dormant Commerce Clause. Under the overbroad claim the defendant argued the statute restricted harmless speech between adults. The court rejected the defendant's contention as it found that the statute required a scienter that an adult must have the intent to arouse or gratify a sexual desire. Because of that requirement the statute was limited to a select class seeking to engage in sexually explicit conduct with children. The court found that those elements created a legitimate goal that far exceeded any unlawful application of the statute. The second claim by the defendant that the phrase "sexually explicit" within the statute was vague was likewise rejected. The court determined it was sufficiently clear. The court also rejected defendant's third claim that the statute violated the Dormant Commerce Clause because it attempted to restrict the entirety of the Internet. The court ruled that the Commerce Clause does not preclude states from criminalizing the online solicitation of minors.

Kansas v. Johnson, 236 P.3d 222, 2011 Kan. App. Unpub. LEXIS 927, 2011 WL 5526567 (Kan. Ct. App. Nov. 10, 2011) (Unpublished Opinion)

- Sentencing

This was an appeal by the state relating to the trial court's imposition of a downward departure at sentencing as well as allowing the defendant to present evidence to support the downward departure. Defendant was initially charged with two counts electronic solicitation of a child. He made an agreed plea where one charge was dismissed and there was going to be a recommended sentence of 55 months prison. At the first sentencing date the trial court informed the parties that it was going to engage in a *suasponte* downward departure and sentence the defendant to probation. The court gave 13 reasons for the departure, many contained within the reports of two psychologists. The state was given the ability to cross-examine the psychologists. The state's main objection was that the reports were prepared to support an entrapment defense, not as mitigation for sentencing. The court ruled that in order to be successful the state had to present evidence that the court engaged in a durational departure and not a dispositional departure. After reviewing the trial court's actions, the court ruled that it was a dispositional departure and thus the state could not support its argument. As to the second argument that that court improperly

considered the reports the reviewing court determined that in Kansas the appeal rights of the state are very limited and they had no jurisdiction to consider the state's appeal.

November 14 – 20, 2011

State Courts of Appeal

Manzione v. Georgia, 719 S.E.2d 533 (Ga. Ct. App. Nov. 16, 2011)

● Search Warrant Affidavit

The Defendant, Elton Manzione, was convicted following a bench trial of twenty counts of sexual exploitation of children.

The Defendant came to the attention of law enforcement after they received a cyber-tip from the National Center for Missing and Exploited Children ("NCMEC"). The Defendant had uploaded three images of child pornography to a Yahoo! group board. Yahoo! forwarded the information they had on the IP address to NCMEC who in turn forwarded the information along to the Georgia Bureau of Investigations ("GBI"). Using the information from the cyber-tip and their own investigation, investigators obtained a search warrant for the Defendant's home authorizing them to search computers, digital devices and any digital storage devices.

The Defendant challenged the affidavit for the search warrant before the Trial Court. He claimed that the affidavit was based on hearsay that was not reliable and the affidavit contained a misleading statement that invalidated the affidavit.

The Court rejected the Defendant's arguments. The Court held that "hearsay can be the basis for issuance of a warrant so long as there is a substantial basis for crediting the hearsay". Here the information supplied to GBI by Yahoo! through NCMEC was credible based on a totality of the circumstances. Secondly, the misleading statement did not invalidate the credibility of the affiant or the affidavit.

California v. Sample, 25 Cal. Rptr. 2d 76 (Cal. Ct. App. Nov. 17, 2011)

● Number of Charges
● Prior Convictions

The Defendant was convicted of three counts of receiving stolen property, in violation of Pen. Code § 496(a), two counts of identity theft, in violation Pen. Code § 530.5(a), three counts of possessing of child pornography, in violation of Pen. Code § 311.11(a), six counts of residential burglary, in violation of Pen. Code § 459.460(a), and one count of burglary, in violation of Pen. Code § 459. The Defendant was sentenced to 42 years in prison.

The Defendant was arrested for breaking into a home. Pursuant to this arrest officers seized his backpack and searched his home and storage shed. Officers found a computer in his backpack and another computer and an external hard drive in the storage shed. Forensic examinations of the items uncovered images of child pornography on each. The three counts of possessing child pornography reflect the items found on the backpack computer, the computer in the storage shed and the external hard drive.

The Defendant, on appeal, claims that pursuant to California law he could only be convicted on one of the possessing child pornography counts and that his Florida conviction was insufficient to establish a strike.

The Court held that the Defendant could be convicted of two counts of possessing child pornography. California clearly holds that a defendant cannot be charged and convicted of multiple counts of possession of child pornography for items found in the same location, even if they are stored on different devices. The Court found that the two charges that stem from the items found in the storage shed could only count for one conviction. However, the items found on the items in the storage shed and in the backpack could form two separate counts.

The Court also held that the Florida conviction was sufficient to count as a strike against the Defendant. The statement of facts made at the Florida conviction, where the Defendant pled no contest to burglary of an occupied dwelling, was an adopted admission.

New York v. Deprospero, 932 N.Y.S.2d 789, 2011 N.Y. Slip Op. 08421 (N.Y. App. Div. Nov. 18, 2011)

- Search and Seizure
- Double Jeopardy

The Defendant, Stephan Deprospero, pled guilty to predatory sexual assault against a child, in violation of Penal Law § 130.96.

The instant case arose out of an undercover peer to peer investigation in 2009. The investigation, part of a larger target of P2P child pornography activity, discovered that the Defendant had downloaded three images of child pornography. Investigators obtained a search warrant for the Defendant's home, computer and other devices. A preview of the Defendant's computer revealed a single image of child pornography; no other examination of the objects seized at the house was conducted at that time. The Defendant then pled guilty to a single count of possessing a sexual performance by a child, in violation of Penal Law § 263.16, and was sentenced to 6 months in jail.

After sentencing in 2010, the Defendant requested return of the items seized pursuant to the search warrant. Prior to returning the items, the district attorney requested that law enforcement examine the items to insure that no contraband was on any of the items. This search found numerous images and videos depicting children being sexually assaulted, including one video of the Defendant forcing a 12 year old autistic child to perform oral sex.

The Defendant moved to have the indictment dismissed pursuant to a double jeopardy argument and to have the items found during the 2010 search suppressed. The Trial Court rejected the Defendant's arguments.

On appeal, the Defendant makes the same arguments. The Court rejected his claims and affirmed his conviction. The Court found that the 2009 and 2010 charges stemmed from separate criminal transactions and were therefore not double jeopardy. The Court went on to hold that there is no time limit for the completion of the forensic examination and analysis.

Unpublished Opinions

Missouri v. Roggenbuck, ---S.W.3d ---, 2011 Mo. App. LEXIS 1520, 2011 WL 5525340 (Mo. Ct. App. Nov. 15, 2011) (Not Yet Published)

- Search Warrant: Affidavit Probable Cause
- Double Jeopardy
- Proof of Residence or Control

The Defendant, Robin Roggenbuck, was convicted following a jury trial of five counts of possession of child pornography. The Defendant was sentence to 7 years in prison for each count to be served consecutively.

The Defendant came to the attention of law enforcement after receiving a complaint that he had sexually abused children. This individual told officers that the Defendant had displayed images of young children on his computer. Following execution of the search warrant and subsequent forensic examination, five separate images of child pornography were discovered.

The Defendant filed a motion to suppress the search warrant claiming that the warrant lacked probable cause. The Trial Court rejected his argument. On appeal, the Defendant again argues that the search warrant affidavit lacked probable cause. He also argues that the five counts constituted double jeopardy and that the admission of his resume, found on the same computer with the images, was improper hearsay.

The Court rejected all of the Defendant's arguments. They found that the affidavit in support of the search warrant was not conclusive and did set forth criminal activity. Secondly, the Court held that the five counts of possession of child pornography did not constitute double jeopardy. The Court reasoned that they were separate acts of downloading the images at different times. Finally the Court held that the resume was not impermissible hearsay, but was evidence offered to establish the Defendant's dominion and control over the computer.

Texas v. Duran, 2011 Tex. App. LEXIS 9097, 2011 WL 5569497 (Tex. Crim. App. Nov. 16, 2011) (Unpublished Opinion)

● Search Warrant: Apparent Authority to Consent

The Defendant, Arturo Julian Duran, was a seventeen year old high school freshman living in a detached garage at his father's home. During the course of an undercover Peer to Peer investigation officers discovered that images of child pornography was being downloaded to an IP address associated with the Defendant's Father's home. Investigators obtained a search warrant for the house, but did not reference the detached garage.

Execution of the search warrant failed to uncover any child pornography in the father's home. Investigators then discovered the detached garage, which had been fixed to use as a residence, where the Defendant resided. The Defendant's father gave investigators permission to search the garage. Investigators then discovered multiple images of child pornography.

The Defendant, before the Trial Court, filed a motion to suppress the evidence obtained pursuant to the search warrant. The Trial Court found that the search warrant did not reference the garage and was therefore illegally searched. The evidence was suppressed. The State appealed.

On appeal, the Court found that the Trial Court was correct in finding that the search warrant did not allow for search of the detached garage. However, the Court held that the evidence was admissible because the Defendant's father had the apparent authority to consent to a search of the detached garage. Given the Defendant's age and status at school, it was reasonable for the officers to reasonable believe that his father had the authority to consent to the search of his room.

November 21 – 30, 2011

State Courts of Appeal

Oregon v. Volynets-Vasylchenko, 267 P.3d 206 (Or. Ct. App. Nov. 23, 2011)

● Admissibility of Expert Testimony

The Defendant, Vladyslav Volynets-Vasychenko, was charged with sexually abusing children at a home daycare. Following a jury trial, the Defendant was convicted.

During trial, the State called a physician who had reviewed the records concerning the Victim. On direct exam, the physician testified about the treatment recommendations. The Defendant objected at trial and was overruled.

On appeal, the Defendant claims that the admission of the testimony regarding the treatment recommendations was plain error and not harmless. The Court agreed and reversed his conviction.

Unpublished Opinions

Louisiana v. Williams, --- So.3d ---, 2011 La. App. LEXIS 1431, 2011 WL 5983290 (La. Ct. App. Nov. 29, 2011) (Not Yet Published)

- Sufficiency of the Evidence
- Entrapment

The Defendant, Joseph Williams, was convicted following a bench trial on computer-aided solicitation of a minor, in violation of LSA-R.S. 14:81.3. The Defendant was then sentenced to two years hard labor.

The charge against the Defendant stems from an undercover investigation where law enforcement portrayed themselves on-line as a 14 year old girl. The Defendant engaged in on-line conversations with the officer using two different Yahoo! I.D.s. During those conversations the Defendant asked the officer about sex and proposed meeting for sex. The Defendant failed to appear at the meeting. However, when the officer texted the Defendant he indicated that he was at a different location and the "child" should come there. He was then arrested and acknowledged that he was the one speaking with the undercover officer.

On appeal, the Defendant claims that the evidence did not support the conviction and that the actions of law enforcement entrapped him. The Court rejected these arguments finding that the evidence clearly supported his conviction. Finally the Court rejected the Defendant's entrapment argument. The Court held that considering the incident as a whole the officer's texting the Defendant after he failed to show for their meeting was not entrapment.