

CSE Case Law Update
November 1 – 5, 2010

COURT OF APPEALS

Illinois v. Carter, 2010 Ill. App. LEXIS 1165 (Appellate Court of Illinois, 1st District, 1st Division, November 1, 2010)

- Jury instructions
- Improper closing argument
- Ineffective assistance

Following a jury trial that resulted in his conviction for indecent solicitation, the defendant appealed arguing that the judge improperly failed to instruct the jury on his (a) specific intent to commit the offense and (b) knowledge that the victim was less than 17 years old. The State conceded that the jury instructions omitted the above mens rea elements required by statute, but claimed that the defendant forfeited the issue by failing to object at or soon after trial. The court analyzed whether the omission was of a sufficient magnitude to qualify as plain error, which occurs where the evidence was closely balanced that the outcome could have been different, or where the error was so fundamental as to deny the defendant a fair trial. The court found that the evidence of the defendant's intent was "overwhelming," where the 13 year-old victim had testified that the defendant had talked about sex and wanted to show him his "dick.," had obtained the victim's address and readily drove to his house, and had followed the victim to his room, took off his pants, and had the victim perform oral sex on him—the latter of which was interrupted and witnessed by the victim's grandmother. The victim had also testified that he told the defendant he was only 13 years-old, and the state had submitted a photo of the victim at the time that showed a very youthful looking boy; even the defendant had admitted that the victim looked very young and was "55 pounds soaking wet." Because the existence of neither mens rea element was highly questionable, the court found the instructions were harmless. The defendant also argued that the State improperly argued in closing that the grandmother provided the police a story consistent with her testimony, when the substance of her conversation with police was not elicited for the jury (because they were inadmissible prior consistent statements). The court found the State's argument to be vague yet improper, but, in light of all the other evidence, harmless. Lastly, the court rejected the defendant's claim for ineffective assistance based on the above because the defendant's guilt was overwhelming and he was thus not prejudiced by any deficient performance.

Florida v. Williams, 2010 Fla. App. LEXIS 16611, 35 Fla. L. Weekly D 2440 (Court of Appeal of Florida, November 2, 2010)

- Probable cause to search

During pre-trial motions, the defendant successfully challenged the search warrant that led to the discovery of his collection of child pornography videos. The judge found the

warrant deficient because (a) the accompanying affidavit did not establish the times and dates that the defendant accessed the material, and (b) the general term “suspected child pornography” contained in the affidavit was not sufficiently specific. The court subsequently declined to apply the good faith exception to the exclusionary rule. The state appealed, and the appellate court reversed. Noting that it had previously recognized that child pornographers tend to retain their illicit material, and that the defendant’s computer had collected the videos on at least 123 separate occasions – for two of which the timing was specifically documented – the court found that the required commission element in the affidavit was satisfied and the warrant was not stale. The court also held that, regardless of the above, the trial court erred in finding that the good faith exception did not apply. A good faith exception to the exclusionary rule precludes suppression of evidence secured as a consequence of an invalid warrant when the officer who conducts the search does so in objectively reasonable reliance upon the validity of the warrant. Here, there was no indication that the issuing judge was anything but neutral, nor was there any reason why the searching police officer should have doubted the validity of the judge’s determination. As a result, even if the warrant was invalid, which it was not, the court held that the good faith exception would apply.

State v. Newell, 238 Ore. App; 2010 Ore. App. LEXIS 1286 (Court of Appeals of Oregon November 3, 2010)

- Probation Revocation Sanctions

The Defendant, Richard Andrew Newell, was charged with and pled guilty to four counts of second degree child sexual abuse, in violation of ORS 163,686. The charges stem from the Defendant’s possession of images of child pornography. In September, 2006, he was given three years probation. At the time of sentencing the court did not make findings in support of consecutive sentencing, as required by ORS 137.123. In April, 2008, the court revoked the Defendant’s probation after the Defendant admitted that he had committed five probation violations. The court then sentenced the Defendant to a total of 48 months in prison by stacking his sentences for the four counts consecutive to each other. The Defendant appeals this decision.

The Defendant claims on appeal that the court could not impose consecutive sentences because it had failed to make findings in support at the time of the original sentencing. The Court held that the trial court correctly imposed consecutive sentences after finding that the Defendant had committed multiple violations of his probation. This finding satisfied the statute allowing for consecutive sentencing.

UNPUBLISHED OPINIONS

Washington v. Kang, 2010 Wash. App. LEXIS 2454, (Wash. Court of Appeals, November 2, 2010)

- Sufficiency of the evidence
- Unconstitutional vagueness and free speech

- Post-confinement conditions of release
- Ineffective assistance

The defendant was convicted of two counts of Communicating with a Minor for Immoral Purposes. On appeal, he challenged, among other things, the sufficiency of the evidence, arguing the State neither proved that he subjectively believed the individuals he was communicating with were minors nor that he intended to involve them in sexual misconduct. Looking at the evidence in the light most favorable to the State, the court noted that the chat logs, coupled with the defendant's admissions and child pornography found on his computer, clearly provided sufficient evidence that the defendant knew he was dealing with minors and was trying to engage them in sexual misconduct. The defendant failed to properly raise a vagueness challenge as applied; because the defendant was convicted by a jury, an as applied challenge was necessary so the court did not consider the argument. The defendant also argued that some of his post-confinement conditions of release should be vacated as not reasonably related to his crime. The State conceded that a prohibition on alcohol and plethysmograph testing were not statutorily warranted and the court so held. The defendant also challenged the sentencing court's prohibition on him possessing or seeking pornography. The court held, consistent with the state supreme court, that a blanket reference to pornography is vague and does not provide ascertainable standards. The court stated, however, that the prohibition of "depictions of anyone, minor or adult, engaged in sexually explicit conduct, as defined in RCW 9.68A.011 [the statute that defines pornography]" did provide ascertainable standards. The court remanded on this issue for the sentencing court to impose conditions consistent with the above. Lastly, the court rejected the defendant's ineffective assistance claim, which was based on his attorney not seeking a computer expert, when there was no showing that such an expert could have benefited his case.

West v. Texas, 2010 Tex. App. LEXIS 8890 (Court of Appeals of Texas, November 4, 2010)

- Sufficiency of the evidence – variance between indictment and proof at trial

After a bench trial, the defendant was convicted of possession of child pornography. A total of 115,000 photos of child pornography were found downloaded to the defendant's work computer. On appeal, he argued that the evidence at trial was legally and factually insufficient to satisfy the elements contained in the indictment. The defendant argued that the indictment only referred to "film" images, of which the defendant had none. The court noted that a variance between the working of an indictment and the evidence presented at trial is fatal only if it is material – that is, fails to provide the defendant of notice of the charges or subjects him to later prosecution for the same offense – and this error prejudices the defendant's substantial rights. Because the defendant was not surprised by the evidence produced at trial, made the same argument to the trial judge, and could not possibly be subjected to prosecution for the same offense, the court held that any such variance did not render the evidence insufficient to support his conviction.

CSE Case Law Update
November 8 – 12, 2010

COURT OF APPEALS

New York v. Blackman, 2010 NY Slip Op 8082, 2010 N.Y. App. Div. LEXIS 8285
(Supreme Court of New York, November 9, 2010)

- Sentencing – Registration as sex offender

The defendant pled guilty to attempted dissemination of indecent material to minors in the first degree and possession of an obscene sexual performance of a child. He appealed the sentencing judge's denial of his request to order the defendant register as a level-1 sex offender, as opposed to level-2. The court noted that while the sentencing has discretion to depart from the presumptive Sex Offender Registration Act ("SORA") Risk Assessment, "in most cases . . . departures will be the exception—not the rule." Further, the defendant must show by clear and convincing evidence that mitigation is appropriate. The court found that whether the defendant was related to the victims in the pornography counts (which, if not, arguably could be a mitigating factor based on the dicta of a previous published decision) was not relevant when he also reached out to a stranger he believed to be a 15 year-old boy in order to have sexual relations. The court also found that the defendant did not present any other mitigating factor that was not already considered by the SORA guidelines. As a result, the court did not find a basis to disturb the sentencing judge's designation of the defendant as a level-2 sex offender.

In the matter of S.J.F., 2010 Ohio 5514, 2010 Ohio App. LEXIS 4652, (Court of Appeals of Ohio, Eleventh Appellate District, Nov. 12, 2010)

- Sufficiency of the evidence

The juvenile respondent was adjudicated and found guilty of one charge of Disseminating Matter Harmful to a Juvenile. The respondent, on appeal, argued there was insufficient evidence to support his adjudication and that the verdict was against the "manifest weight" of the evidence. The dissemination charge provides that "[n]o person, with knowledge of its character or content, shall recklessly . . . directly sell, deliver, furnish, disseminate, provide, exhibit, rent, or present to a juvenile . . . any material or performance that is obscene or harmful to juveniles." The respondent, a 14 year-old male, had pressured a 12 year-old girl to send him a nude picture. She ultimately – and according to her, reluctantly – sent him a topless picture. The court found that the solicitation of the photograph, which was fully described but not admitted at trial, and which the respondent conceded seeking from the young girl, was sufficient to support the charge. The respondent argued that the 12 year-old's testimony was unreliable because she was an accomplice; however, the appellate court deferred to the trial court for credibility determinations and found no error. The court also noted that the respondent's own testimony supported the young girl's testimony. The dissent, bothered that some of the police officer's testimony was not included in his report, would have reversed. The

dissent also argued that the charge requires a “prurient,” or shameful interest in sex, not a normal interest, and the 14 year-old, in her view, was only expressing a normal sexual interest in the 12 year-old girl.

Ohio v. Dolman, 2010 Ohio 5505, 2010 Ohio App. LEXIS 4641 (Court of Appeals of Ohio, Sixth Appellate District, Nov. 12, 2010)

- Other acts evidence – Admission of prior conviction
- Other acts evidence – Admission of photographs
- Jury instructions
- Specificity of the indictment
- Manifest weight of the evidence
- Failing to excuse potentially prejudicial juror
- Cruel and unusual punishment
- Failing to declare a mistrial

The defendant was convicted of multiple counts of possessing or viewing material or a performance showing a child, not his own, in a state of nudity. The defendant had young girls, who were friends with his 12 year-old son, try on costumes and swim in a make-shift indoor pool while he photographed them in various states of undress, including fully nude. A search warrant revealed that the defendant had numerous photos of children in sexual positions, partially or fully nude, on his computer’s hard drive. The defendant was convicted, sentenced to 52 years in prison, and then raised eight issues on appeal. First, the defendant challenged the admission of his prior conviction for gross sexual imposition with a child under the age of 13, claiming it was too similar and thus too prejudicial. The court found no error, since it was admitted to show motive and intent and the trial judge included a proper limiting instruction. The court similarly held that the admission of 49 photographs of nude children taken from his computer’s hard drive showed his motive, intent, and plan to photograph his son’s friends nude. The defendant also objected to the trial court omitted examples of “prurient” and “material” as defined in the jury instructions. The court found these omissions, which included secretion and newspapers, respectively, were not relevant to the case at hand and thus properly excluded from the jury instructions. The defendant also challenged the indictment, arguing that it did not define nudity as a “lewd exhibition or a graphic focus on the genitals.” Because the indictment cited to the relevant statutes and included the term nudity, the court found that the indictment provided the defendant sufficient notice. The court rejected another Ohio appellate court’s analysis of a similar issue that required the “lewd exhibition or graphic focus” language, citing that only the legislature “has the power to engraft or enact additional elements’ of an offense.” After viewing the nude photographs of children and sitting as the “13th juror,” the court also held that the verdicts were not against the manifest weight of the evidence. The defendant also challenged the trial court’s refusal to dismiss a juror for cause, which forced the defendant to exercise a preemptory challenge. The juror, a small-town chief of police, admitted that he was biased in favor of the police, and felt that if police had enough evidence to bring the matter to court, the defendant was “probably guilty.” The juror also stated, however, that he would go forward “on even grounds,” the defendant would have

a “clean slate,” and that he “without a doubt” would be able to decide guilt based upon the evidence at trial and the instructions given by the judge. Based on this record, the court held that it could not say that the trial court abused its discretion in denying the for cause challenge. Next, the defendant argued his 52 year sentence constituted cruel and unusual punishment. The prison term represented the aggregate of all the consecutive sentences for each count. The court noted that no violation exists “[w]here none of the individual sentences imposed on an offender are [sic] not grossly disproportionate to their respective offenses. Here, with the range for each felony being two to eight years, the trial court imposed six years for each violation. The court found that, considering the extent of child pornography on the defendant’s computer, the individual sentences were not grossly disproportionate. Lastly, the defendant argued that the trial judge erred in failing to declare a mistrial after observing a juror sleeping, which is a form of juror misconduct. The judge, in the presence of the defendant’s attorney and prosecutor, spoke with the juror in his chambers, where he stated that he had his eyes closed but was not sleeping and was listening. Based on that, the court here held that it could not say that the lower court’s decision to not excuse the juror was “arbitrary, unreasonable, or unconscionable.” As a result, the defendant’s convictions were upheld.

**CSE Case Law Update
November 15 – 19, 2010**

COURT OF APPEALS

State v. Enyart, 2010 Ohio 5623, 2010 Ohio App. LEXIS 4740 (Court of Appeals of Ohio, Tenth Appellate District, Franklin County November 18, 2010)

- Exigent Circumstances
- Search Warrant Affidavit

The Defendant, Richard E. Enyhart, was convicted following a plea of no contest to twelve counts of gross sexual imposition, four counts of illegal use of a minor in nudity orientated material or performance, twelve counts of rape and six counts of pandering sexually orientated material involving a minor. This case came about as a result of the two neighborhood girls discovering a camera hidden in the a bathroom in the Defendant’s home. Upon discovering the camera, the girls returned home and called their mother who called the police. When officers arrived at the Defendant’s home and announced their presence, he refused to open the door. The officers forced entry and took the Defendant into custody to prevent him from destroying evidence. During a subsequent search, pursuant to a search warrant, officers found numerous pieces of media that contained images of child pornography, including a video of the defendant engaged in sexual contact with a six year old child.

On appeal the Defendant claims the trial court erred in denying his motions to suppress evidence found during the execution of the search warrant. The Defendant’s appeal was rejects. The Court found that exigent circumstances existed that required officers to enter

the Defendant's home without a warrant. Next the Defendant claims that the search warrant was invalid because the affidavit lacked probable cause, was based on the search conducted during the exigent circumstance entry and the warrant was overly broad. These claims were rejected; as the Court found that the affidavit had sufficient probable cause, was not based on the exigent entry and was sufficiently narrow.

UNPUBLISHED OPINIONS

People v. Cash, 2010 Cal. App. Unpub. LEXIS 9054 (Court of Appeal of California, Fourth Appellate District, Division One November 15, 2010)

- Distribution
- Evidence of Witness Tampering

The Defendant, Marc Jay Cash, was convicted of eight felony counts; including five counts of distributing harmful materials to a minor, distributing harmful material with the intent to seduce a minor, possessing a deadly weapon and resisting an officer. The Victim, the Defendant's step-daughter, was 8 years old at the time that the defendant sexually assaulted her. She testified that on a number of occasions the Defendant made her watch "nasty movies" on his laptop computer and that on those occasions he would touch her body. This touching included his hands on her vagina, his penis touching her vagina and her mouth on his penis. During the pendency of the trial, the Victim's mother and the Defendant's wife spoke with the child on the phone while she was at a friend's home. During these conversations the child became visibly upset. During the second conversation, the friend's mother listened to the conversation on a second line and heard the Victim's mother tell her that she was lying about the Defendant and demanding that she recant the allegations. On appeal, the Defendant claims that the trial court erred by allowing the testimony of the friend's mother to be admitted, admitting evidence of adult pornography found on the Defendant's laptop and that the evidence was insufficient to establish distribution.

The appellate court found that the testimony of the Victim's friend's mother was appropriately admitted. Because the Defense made the Victim's motivation for making the complaint an issue, the testimony of what the Defendant's wife told the Victim was probative. The Court also rejected the Defendant's argument that he distributed "harmful" material to the Victim. They held that when the Defendant showed the Victim images of what he called a father having sex with a daughter; the images that the Defendant displayed for the Victim was harmful and within the meaning of the statute.

**CSE Case Law Update
November 22 – 26, 2010**

STATE SUPREME COURT

State v. Moore, 2010 Ida. LEXIS 190 (Idaho Supreme Court November 24, 2010)

- Sentencing

The Defendant, Walter Moore, was charged Lew Conduct with a Child under Sixteen Years. The indictment indicated that the Defendant had engaged in sexual contact with a six-year old boy. Following his plea the Defendant submitted to a psychosexual examination and a presentence investigation report was filed with the court. The Defendant pled guilty and was given a sentence of 15 years to life. At the conclusion of the sentencing, the Defendant's PSI was sent to the Idaho Department of Corrections. The Defendant appealed his sentence and it was vacated due to ineffective assistance of counsel relating to the psychosexual examination. The Defendant demanded that the new sentencing court order the return of the initial PSI from the Department of Corrections. At resentencing, by a new judge, the Court refused to order the return of the PSI on the grounds that he lacked the authority. The Defendant was given a sentence of 13 years to life.

On appeal to the Idaho Supreme Court, the Defendant alleges that the resentencing court erred by failing to order the return of the PSI and abused its discretion in imposing his sentence. The Idaho Supreme Court found that the district court was not in error by denying the Defendant's motion for the return of the PSI. The separation of powers doctrine allow for the judicial branch to dictate to a part of the executive branch how they should retain and maintain documents used in the execution of their duties. The Defendant's second allegation of error claims that the second sentence, of 13 years to life, was "excessively harsh" and an abuse of discretion. This argument was reject by the Supreme Court, who found the Defendant's actions during the crime and his victim blaming warranted the sentence he received.

UNPUBLISHED OPINIONS

Kellison v. Commonwealth of Virginia, 2010 Va. App. LEXIS 455 (Court of Appeals of Virginia November 23, 2010)

- Burden of Proof

The Defendant, Donald Kellison, was charged with three counts of passion of child pornography, in violation of Code § 18.2-374.1:1(A). The Defendant was convicted following a bench trial. He appeals alleging that the images that formed the basis of his conviction did not meet the "lewd exhibition of nudity" requirement as defined in Code § 18.2-374.1(A).

The Defendant, who was 21 at the time of the crimes, had taken three photographs of his then girlfriend. The girlfriend was seventeen years ten months at the time the photos were taken. These photos showed the girlfriend's exposed breasts. The Virginia Court of Appeals found that the district court was not plainly wrong to find that the images of the girlfriend were lewd. The Court supported the trial courts finding that the images were of a sexual nature and not just mere photos of the child's breasts.

Anders v. Texas, 2010 Tex. App. LEXIS 9395 (Court of Appeals of Texas, Tenth District, Waco November 24, 2010)

- Knowledge
- Possession

The Defendant, Kevin Wayne Anders, was convicted, following a jury trial of ten counts of possession of child pornography. The Defendant was then sentenced to ten years on each count to run consecutively. This case came to light while officers were at the Defendant's home investigating another matter. During their search of the home, officers found papers on the Defendant's desk referring to websites that feature child pornography. The computer was seized and a forensic search found 180 images of child pornography on the hard drive.

The Defendant claims on appeal that the State was not able to prove that he was the only person with access to the computer and affirmatively link him to the images of child pornography on the computer. The Court rejected this argument finding that the evidence presented establishing that the images in question were downloaded at a time when only the Defendant used the computer, that the Defendant had changed the internet access password near the time that the child pornography websites were accessed, the forensic evidence and the testimony of the other residents in the house that they did not view the images was sufficient to establish that the Defendant possessed the images. The Defendant next argues that the State did not establish that he knew the images of child pornography were on his computer. The Court held that the location where the images were located and the Defendant's account ownership and exclusive accesses to the account at the time the images were downloaded was sufficient for a rational trier of fact to find that the Defendant knowingly possessed child pornography.

People v. Crisler, 2010 Cal. App. Unpub. LEXIS 9353 (Court of Appeal of California, Fifth Appellate District November 24, 2010)

- Conditions of Probation

The Defendant, Donny Lynn Crisler, pled no contest to one count of possession of child pornography. He was placed on probation for three years. As part of his probation, the Defendant was ordered to have no contact with any children under 14 years of age with out a person 21 years of age or older present and he was not to possess any pornographic materials depicting minors. The Defendant appeals these conditions.

The Defendant alleges that these conditions require a knowledge requirement, this argument was ceded by the prosecution and the Court ordered the probation to be amended to reflect this.

COURT OF APPEALS

State v. Lyons, 2010 N.J. Super. LEXIS 227 (Superior Court of New Jersey, Appellate Division November 30, 2010)

- Intent to Distribute Child Sexually Abusive Material

The Defendant, Richard Lyon, was charged with three counts of possessing, offering and distributing child pornography, in violation of N.J.S.A. 2C:24-4(b)(5)(a). These charges stem from an undercover investigation where images and video recordings of child pornography were downloaded from the Defendant's computer through the use of LimeWire and Gnutella. The Defendant files a motion before the trial court seeking to have the charges relating to distribution dismissed, claiming that he did not knowingly engage in any overt acts to distribute child pornography. The Defendant's motion was granted.

The Court reversed the finding of the trial court and reinstated the original charges. The court found that the Defendant was not passive, but instead acted affirmatively when he downloaded LimeWire, searched for child pornography and placed those items in his shared folder knowing that they were available to others to view and upload. The Court wrote "[t]hat the individual is not physically present to 'affirmatively' offer the materials to those passing by or to seek a taker and 'affirmatively' hand him or her an item does not change the core nature of the individual's knowing conduct.

UNPUBLISHED OPINIONS

People v. Masley, 2010 Cal. App. Unpub. LEXIS 9510 (Court of Appeal of California, Third Appellate District November 30, 2010)

- Sentencing

The Defendant, Mark Wayne Mosley, was convicted following a jury trial of possession of child pornography, in violation of Pen. Code, § 311.11. The charges stemmed from allegations by a child who lived in his home that the Defendant had shown him images of child pornography on his laptop computer. Following the execution of a search warrant, the Defendant's computer was seized and forensically searched. The Defendant admitted to officers that he had looked at images of child pornography, referring to them as "child art". At trial, the Defendant claimed that he possessed the child pornography found on his computer in an effort to "help out [his] sister who was molested . . . ". The Defendant was sentenced to two years state prison.

On appeal, the Defendant claims that the court abused its discretion when it failed to give him probation and sentenced him to a middle term of imprisonment. The appellate court upheld the sentence finding that based on the age of the victims, the vulnerability of the victims, the number of images of child pornography, his lack of remorse and his previous

record provided the trial court with sufficient reason to deny the Defendant probation. Further the Court held that the trial court had sufficient reasons to give the Defendant to a middle-term sentence.

People v. Horan, 2010 Mich. App. LEXIS 2289 (Court of Appeals of Michigan, November 30, 2010)

- Search & Seizure
- Other Acts
- Consecutive Sentences

The Defendant, Nicholas John Horan, was convicted of three counts of possession of child sexually abusive material, in violation of MCL 750.145c(4), and three counts of using a computer to commit a crime, in violation of MCL 752.797(3)(f). The sentences that he received for the using a computer convictions were consecutive to those for the possession of child sexually abusive material. The case came to the light of the Michigan State Police after they had received information that someone in her home may have been sexually abuse. The police seized the Defendant's computer after with his wife's consent and after she indicated that he looked at pornography on the computer. Search of the computer found multiple images of child pornography on the hard drive. On appeal, the Defendant alleges a number of errors including the validity of the search, the admission of other acts evidence, the consecutive sentences and the scoring of his offense variables.

The Defendant initially argues that his wife did not voluntarily give her consent to the seizure, because the consent was obtained through police and child protective services coercion. The trial court's finding that the consent was not the product of coercion was upheld. The Defendant next argues that the police violated the scope of his wife's consent. The Court found that it was reasonable for the wife to assume that she was giving consent to search the computer given the information she had provided and the information given to her by the Michigan State Police prior to giving consent.

At trial the State admitted evidence that the Defendant had sexually assaulted a family member. The trial court admitted this evidence, pursuant to MRE 404(b)(1). The evidence was admitted to help establish the Defendant's identity as the individual who had downloaded the child pornography. The Court of Appeals upheld this decision finding that the evidence was admitted for a proper purpose and was not substantially more prejudicial than probative.

The Defendant also appealed the imposition of consecutive sentences. Here the Defendant sentences for using a computer to commit a crime are consecutive to the sentences for possession of child sexually abusive material. The Defendant alleges that the trial court inappropriately imposed the consecutive sentences because it was shocked by the nature of the material on the Defendant's computer. The Appellate Court found that "it is not inappropriate for a trial court to take into consideration the increasing degree of indecency or vulgarity when deciding whether to impose a consecutive sentence."

