

## CSE Case Law Update

October 2009

### COURTS OF APPEAL

People v. Cruz, No. A124231, 2009 Cal. App. Unpub. LEXIS 8558 (Cal. Ct. App. Oct. 27, 2009).

- Probation Modification

Defendant who was charged with multiple offenses ultimately agreed to probation on a charge of a lewd and lascivious act on a child under 14 years of age. During the course of the probation, the probation department requested a modification of defendant's probation to include additional terms common in sex offender probation. The sentencing court agreed and modified the defendant's probation conditions. Defendant appealed. The Appellate Court upheld the modification because based on the type of charge defendant pleaded guilty to, the conditions were either statutorily appropriate or common in cases of sex offenses.

People California v. Hefferenan, No. D054111, 2009 Cal. App. Unpub. LEXIS 8339 (Cal. Ct. App. Oct. 20, 2009).

- Jury Instructions

Defendant was convicted of child pornography and misdemeanor drug paraphernalia possession. Defendant appealed based on trial court's failure to *sua sponte* give a consciousness of guilt jury instruction. Defendant raised two arguments for the error based on his claim that he never made the pre-trial inculpatory statements. The Appellate Court considered and rejected both arguments ruling that if contradictions existed between his in court denials and his pre-trial statements, the error in not giving the consciousness of guilt instruction was harmless.

People v. Higginbotham, No. C057937, 2009 Cal. App. Unpub. LEXIS 8115 (Cal. Ct. App. Oct. 9, 2009).

- Jury Instructions
- Other Crimes Evidence
- Sufficiency of Evidence
- Sentencing

Defendant was convicted of multiple sex offenses against a dependent adult. Defendant first claimed the court erred in not giving a unanimity instruction. The reviewing court

deemed this harmless error as it concluded the jury did not believe the defense raised in the case. Defendant also claimed error in that the court admitted evidence of other crimes, specifically, the admission of child pornography. Defendant's claim was based on a lack of nexus between the child pornography and the underlying charges. In rejecting the defendant's contention, the reviewing court focused on the cognitive ability of the victim (between a 7-8 year old) and ruled that could be enough of a nexus to the defendant's actions. As such, the reviewing court determined that the child pornography evidence could be used to demonstrate motive and intent. The reviewing court did reverse one count of the jury finding, changing the felony conviction of abuse of a dependent adult to a misdemeanor since there was no evidence of great bodily harm. The Court rejected the prosecution's argument that the acts committed could have caused a pregnancy and thus satisfied the great bodily harm requirement. Defendant's final contention of an improper enhancement of his sentence was rejected by the Appellate Court based on the amendment to the California sentencing law and the California Supreme Court's decision in People v. Sandoval, 41 Cal. 4<sup>th</sup> 825 (2007).

People v. Rodriguez, No. B209640, 2009 Cal. App. Unpub. LEXIS 7927 (Cal. Ct. App. Oct. 1, 2009).

- Substitution of Attorney
- Motion to Suppress
- Other Acts Evidence
- Prosecutorial Misconduct
- Sufficiency of Evidence
- Cumulative Error
- Sentencing

Defendant appealed his conviction for oral copulation of a child under the age of 10 and two counts of forcible lewd act on a child. Defendant alleged multiple violations. The Appellate Court rejected defendant's contention that a videotape was seized in violation of plain view. The court determined that based on the nature of the allegations at that time of the investigation, it was probable that the videotape might be useful as evidence. As to the other crimes evidence, the Appellate Court rejected defendant's contention that it was not relevant to the case. The Court reasoned that excerpted video and screen shots corroborated the victim's disclosure that the victim was shown pornographic movies while being abused by the defendant. The reviewing court ruled that there was no requirement, as defendant posited, that the material be exactly what the defendant showed the child. The Court rejected defendant's claim of cumulative error by ruling that it found no error. Finally, the court rejected defendant contention that the imposition of consecutive sentences by the court was improper and should have been imposed by a jury.

State v. Hanson, 117 Conn. App 436, 2009 Conn.App. LEXIS 444 (Conn. App. Ct. 2009).

- Withdraw of Guilty Plea
- Ineffective Assistance of Counsel

Defendant claimed that the trial court erred in not allowing him to withdraw his guilty plea. Defendant claimed that his plea was unknowingly and involuntarily made. Defendant also claimed his counsel was ineffective at the motion to withdraw his guilty plea by not allowing defendant to testify. Defendant was an attorney in Connecticut. Through the defendant's law practice he made contact with two minor female victims. Defendant engaged in sexual activity with both of them and filmed several of the encounters as well as took still pictures which he kept on his computer. Defendant claimed that the plea was made unknowingly because the court failed to give him the minimum and maximum penalty for each charge during his plea. The Appellate Court rejected this argument, indicating the court had substantially complied with the requirement. The court also noted how the defendant was asked and agreed that he understood the sentencing schemes. As to defendant's claim of ineffective assistance of counsel, the Appellate Court ruled that an appeal was not the proper method to raise the issue. The Court determined that the defendant should bring a writ of habeas corpus.

Naylor v. State, No. A09A0835, 2009 Ga. App. LEXIS 1184 (Ga. Ct. App. Oct. 8, 2009).

- Sufficiency of Evidence

Defendant and her husband were convicted by a jury of eight counts of child molestation against their two daughters. The defendant was charged under a theory of accountability for aiding her husband in his abuse. The defendant appealed claiming that she had no knowledge of the abuse prior to her daughter's disclosing to their therapist. However, the Appellate Court ruled that she did have knowledge of the abuse to one daughter as it related to count four of the indictment because the mother admitted that she knew that the daughters frequently took baths with their father and that they often touched his penis, (but that it was part of their family's "nudist lifestyle") and played with his penis to aggravate and tease him. Thus there was evidence of her complicity as to one count.

Howell v. State, No. 49A02-0903-CR-281, 2009 Ind. App. Unpub. LEXIS 1728 (Ind. Ct. App. Oct. 20, 2009).

- Constitutionality of Statute

For first time on appeal, defendant raised issue of constitutionality of the child solicitation statute. The Appellate Court ruled that defendant waived issue of constitutionality by failing to file a motion to dismiss prior to trial. However, the Appellate Court considered his claim that the statute was vague and overbroad. The reviewing court relied upon precedent in rejecting the vagueness challenge. The Court

ruled that defendant's hypothetical situation was not relevant and that the conduct contained in the conversations would not trigger the criminal statute.

Phelps v. State, 914 N.E.2d 283 (Ind. Ct. App. 2009).

- Sexually Violent Predator
- Sentencing
  - Cross Examination of Defendant's Statement in Allocution
  - Aggravating and Mitigating Factors

Defendant entered a blind plea to certain charges of vicarious sexual gratification with a minor. The sentencing court appointed two psychologists to determine if the defendant had characteristics of a sexually violent predator. Both psychologists came back concluding that the defendant did not have such characteristics. The sentencing court determined that several aggravating factors existed and only one mitigating factor. The sentencing court also determined that the defendant met the requirements for a SVP a total of eight years in prison on the three counts. The defendant appealed the sentencing. The Appellate Court agreed with the defendant and reversed the SVP finding and reduced the defendant's sentence to an aggregate of four years. The Court found that the cross-examination of the defendant's statement in allocution was improper, but harmless since the defense failed to object at the time.

State v. Webber, 218 P.3d 1191 (Kan. Ct. App. 2009).

- Ineffective Assistance of Counsel

Defendant was convicted of statutory rape and indecent solicitation and was sentenced to 310 months in prison. Defendant filed a pro-se post-trial motion alleging ineffective assistance of counsel. The trial court held an evidentiary hearing without defendant being present. The Appellate Court reversed and remanded to the sentencing court with instructions on how to proceed.

Pittman v. Commonwealth, No. 2008-CA-001785-MR, 2009 Ky. App. Unpub. LEXIS 873 (Ky. Ct. App. Oct. 16, 2009).

- Constitutionality of Statute

Defendant entered a plea to one count of unlawful use of electronic means to induce a minor to engage in sexual activities following the trial court's denial of defendant's motion to dismiss, which alleged that the Kentucky statute was unconstitutional. Defendant appealed raising the same argument, that the statute was unconstitutional based on free speech since there was no child involved in the chat; it was actually an undercover police officer posing as a child. Based on Williams v. U.S., 128 S.Ct. 1830

(2008) and Filzek v. Com, 2009 Ky. App. LEXIS 164 (Ky. App. 2009) the Court ruled that the conduct defendant engaged in was illegal and thus afforded no protection under a free speech argument.

Rosario v. Commonwealth, No. 2008-CA-002053-MR, 2009 Ky. App. LEXIS 186 (Ky. Ct. App. Oct. 2, 2009)

- Sex Offender Registration
- Timeliness of Appeal

Defendant appealed a denial of a motion to modify probation to vacate an order to register as a sex offender. The prosecution countered that the appeal was not timely. The Court of Appeals denied defendant's motion ruling that the requirement to register as a sex offender was statutorily based and not a condition of sentencing. Secondly, the reviewing court agreed with the prosecution that defendant's appeal was untimely as it was filed significantly after the thirty day deadline.

Estrada v. Commonwealth, No. 2008-CA-000814-MR, 2009 Ky. App. Unpub. LEXIS 844 (Ky. Ct. App. Oct. 2, 2009).

- Jury Instructions
- Voir Dire
- Sufficiency of Evidence

Defendant appealed the finding of guilt by a jury of distribution of matter portraying the sexual performance of a minor. Defendant appealed claiming that the jury was improperly instructed on a unanimity instruction since he could have been convicted under three different theories. The Appellate Court rejected defendant's contention ruling that the evidence would have allowed for a conviction under different theories. Likewise, the reviewing Court rejected defendant's contention that a particular juror should have been stricken for cause because she went and looked to see if the defendant's son attended the elementary school where she worked. The Appellate Court agreed that the juror should not have been dismissed for cause. Finally, the Court also rejected defendant's contention that his motion for a directed finding should have been granted, since defendant's own admissions supported the conviction.

Commonwealth v. Ruddock, 26 Mass. L. Rep. 175, 2009 Mass. Super. LEXIS 262 (Mass. Sup. Oct. 16, 2009).

- Discovery

Trial Court's memorandum opinion regarding defendant's motion for "mirror copy" of forensic examination and Encase copy and prosecution's objection based on Adam Walsh

Act, 18 U.S.C. § 3509 (m). The trial court granted defendant's motion and ordered the turn over of the mirror copy. The court reasoned that the denial of the discovery would unduly burden the right to effective assistance of counsel and the defense expert's review at a government facility might leave traces of what the court describes as metadata, which might risk defendant's rights. The court bases the second rational on a civil case wherein computer discovery issues were determined. The court also relies upon the decision in State v. Boyd, 160 Wash.2d 424, 433-37, 158 P.3d 54 (2007), rejecting the application of 3509(m) in state cases. Interestingly, the court ordered a protective order in the case requiring a forensic wiping for any computer where the mirror image was viewed. If the same process was used at the government facility the court's second issue with protecting the defendant's rights would be assuaged.

People v. Bencheck, No. 285299, 2009 Mich. App. LEXIS 2221 (Mich. Ct. App. Oct. 22, 2009).

- Withdrawal of Guilty Plea
- Search and Seizure
  - Reliability
  - Staleness
- Sentencing

Defendant appealed the jury trial conviction of child sexual abusive activity and fourth-degree criminal sexual conduct as well as his sentence of 160 months to 20 years in prison. In an unusual appeal issue, defendant claimed that he should not have been allowed to withdraw his initial guilty plea and proceed to a jury trial. The appellate court rejected defendant's dual contention that he was not represented by counsel at the time of the withdrawal of his guilty plea and that he should not be given a recourse for agreeing to withdraw his plea. The Appellate Court also agreed with the trial court that there was sufficient probable cause to uphold the search warrant. Specifically as to reliability, the reviewing court focused on the informant's detailed facts that supported a belief of personal knowledge. Likewise, the reviewing court dismissed defendant's staleness argument, focusing on the underlying charge and giving a very good discussion explaining that the year delay between seeing the explicit photographs and the search warrant was reasonable. The Court cited People v. Russo, 439 Mich. 584, 604-605, where six and a half years lapsed between the last viewing of the images and the search warrant. The Appellate Court did find that sentencing court erred during sentencing by considering inappropriate factors in issuing an upward departure from the guidelines. The Appellate Court remanded the case for resentencing.

State v. Roth, No. A-1371-07T4, 2009 N.J. Super. Unpub. LEXIS 2631 (N.J. Super. Ct. App. Div. Oct. 20, 2009).

- Multiplicity- Double Jeopardy
- Prosecutorial Misconduct
- Constitutionality
- Ineffective Assistance of Counsel
- Sentencing

Defendant was convicted of fifteen counts of possession of child pornography arising out of a roommate making a cybertip to NCMEC. Defendant alleged multiple errors by the trial court. The fifteen counts defendant was convicted of were found on a DVD on his desk. Defendant first complained that under double jeopardy he should have only been charged with one count rather than fifteen. The Court rejected this argument ruling that the elements for each count were different, in that the state had to prove each image or picture were on the disk so double jeopardy did not apply. The Appellate Court rejected the defendant's next contention of prosecutorial error for using arguments not supported by the record. The Court ruled that two of the three arguments were supported in the record; while the third was outside of the evidence presented, it did not rise to the level of plain error that would provide an unjust result. Defendant raised on appeal for the first time the constitutional issue of overbreadth of the statute on constitutional grounds under Ashcroft for punishing virtual child pornography. The Appellate Court found no merit to this constitutionality argument. Likewise, the court rejected defendant's claim of ineffective assistance of counsel ruling that the even assuming *arguendo* that defendant's attorney was deficient, there was no actual prejudice to the defendant. Finally, the Appellate Court upheld the sentencing court's consecutive sentencing. The Appellate Court ruled that the sentencing court's application of the Yarborough factors in imposing consecutive sentences for each of the different child victim's in the case was appropriate.

People v. Santos, No. 3747/84, 2009 N.Y. Misc. LEXIS 2768 (N.Y. App. Div. Oct. 6, 2009).

- Sex Offender Registration

Defendant moved the Supreme Court to reduce his Level 3 offender status under the Sex Offender Registration Act. Based on defendant score on the SORNA scale the defendant qualified as a Level 3 registrant. However, the Supreme Court reduced the defendant's status to a Level 2 based on the lack of a sex offense during the 14 years since his release from prison in addition to the history of the case.

State v. Hendricks, 2009 Ohio 5556, 2009 Ohio App. LEXIS 4691 (Ohio. Ct. App. Oct. 22, 2009).

- Search and Seizure
- Multiplicity
- Sex Offender Classification
- Speedy Trial Demand

Defendant was on probation for prior sex offense from 2006. Defendant's probation conditions included search and seizure by probation or a law enforcement officer. The local sheriff's department received a tip that defendant had a laptop containing child pornography. Probation, along with law enforcement, conducted a search of the defendant's home and discovered child pornography. The search revealed two video files and three still images. Defendant was charged with 10 counts, 5 for possession and 5 for possession enhanced by a prior offense. Defendant first alleged that the search of his home was an improper search. The Appellate Court disagreed and ruled that not only did the defendant consent through his probation conditions, but also signed a written consent form the day of the search. The court ruled that the search was not subterfuge for law enforcement as defendant alleged. However, the reviewing court agreed with defendant's second argument that counts one through five should merge with counts six through ten. The Appellate Court conducted a review of the elements of each charge and determined that they should merge when considering that they had a similar animus. However, the Court rejected defendant's contention that he should only be convicted for one count, and ruled that he could be charged for each separate image or movie. The Appellate Court also found no merit to either defendant's speedy trial violation or his claim of an incorrect sex offender classification. The Court remanded the case for resentencing on the merging of the charges.

State v. Phillips, 2009 Ohio 5564, 2009 Ohio. App. LEXIS 4688 (Ohio Ct. App. Oct. 22, 2009).

- Sentencing

The Appellate Court upheld the defendant's sentence on two indictments, 27 counts, of twenty-four years in prison. Defendant claimed that the sentencing court failed to properly weigh the sentencing factors and should have imposed community control instead of prison. The Appellate Court followed the rationale in State v. Foster, 109 Ohio St.3d 1, 2006 Ohio 856, (2006) and determined that the sentencing court conducted a proper sentencing hearing and provided adequate bases for the imposition of the twenty-four year sentence.