CSE Case law Updates

Oct. 1-7, 2010

UNPUBLISHED CASES

Commonwealth v. Raymond Boshears, No. 09-P-1770, 2010 WL 3814858 (Mass. App. Ct. Oct. 1, 2010).

- Child Pornography
- Ineffective assistance of counsel

On appeal from his conviction for possession of child pornography and possession of child pornography with intent to disseminate, defendant argued that (1) insufficient evidence; and that the judge erred in (2) denying his motion for new trial based on ineffective assistance of counsel, (3) admitting in evidence some images seized at his home, and (4) sentencing him. The court found that the evidence of 129 images stored on defendant's computer in folders entitled "Ray's stuff" and "Ray Boshears documents", coupled with lack of evidence that someone remotely accessed defendant's computer, was sufficient. The trial court's denial of his motion for new trial on ineffective assistance of counsel was affirmed because counsel's defense was not unreasonable merely because he did not contest the evidence in the precise manner now suggested by defendant, and defendant did not establish he was deprived of a substantial ground of defense. The admission of images into evidence was appropriate because they were not admitted merely to inflame the jury but to establish that the images met the definition of child pornography and such images would not be found throughout the household without the defendant's knowledge. Contrary to defendant's claims, the judge's statement about sending a "message . . . to people who are going to involve themselves in child trafficking," simply amounted to recognition of the victims of child pornography, not evidence that the judge aimed to punish defendant for any conduct other than that for which he was convicted.

Ohio v. Wild, No. 2009 CA 83, 2010 Ohio App. LEXIS 4020 (Ohio Ct. App. Oct. 1, 2010).

- Child pornography
- Victim Competency to testify

On appeal, defendant challenged several trial court rulings prior to his plea, including its denial of his motion to suppress evidence, its denial of his motion to sever the charges for trial, its denial of his motion to exclude evidence of child pornography that did not involve the victim of the charged offenses, and its finding that the victim, who was six years old, was competent to testify. In denying defendant's motion to sever the rape and gross sexual imposition charges from the 17 counts of illegal use of a minor in nudity oriented material, the trial court found that the victim was depicted in the pictures found on defendant's computer and the pictures were "relevant to show proof of motive or intent with respect to the rape and gross sexual imposition charge" and refute defendant's

claim that his motive for touching the victim's genitals was non-sexual. The appellate court could not review the trial court's liminal ruling on the victim's competence to testify on appeal from defendant's conviction after a no contest plea. The Court found that the trial court's ruling that "unrelated and uncharged pornography pictures" found on defendant's computer could be admitted were extremely prejudicial and should have been denied because the State could have proven that defendant was sexually attracted to your girls through the pictures of the victim alone. However, as with the competence of the witness ruling, the trial courts decision was based on a motion in limine and therefore the appellate court cannot rule on the matter. Defendant contended that the affidavit in support of the warrants to search his house and his computer "lack a nexus between the alleged criminal behavior and the areas/items to be searched." The affidavit of support stated that the victim said that the defendant took photographs of her on a digital camera and defendant was proficient with digital technology computer. Thus, the appellate court concurred with the trial court that it was a permissible inference to draw that he would store the pictures on his computer hard drive.

People v. Naurath, No. F058368, 2010 Cal. App. Unpub. LEXIS 7873 (Cal. Ct. App. Oct. 1, 2010).

- "Chat logs" evidence
- Distribution of obscene matter

Defendant was convicted of one count of distributing obscene matter depicting a person under the age of 18 years engaging in or simulating sexual conduct. On appeal, defendant argued that the trial court abused its discretion in admitting into evidence "chat logs" of defendant's on-line communications with others involving sexual matters. In this case, the obscene matter which was distributed was sent from the same email address as the chat conversations. Appellate Court admitted the chat logs detailing sexually explicit conversations between defendant and underage males, as evidence proving defendant's interest in underage males and it was he who sent the emails containing the images that constituted the obscene material and not someone else.

Melton v. Alabama, CR-08-1767, 2010 Ala Crim. App. LEXIS 85 (Ala. Crim. App. Oct. 1, 2010).

- Child pornography
- Computer Hard-drive
- Expectation of privacy in computer when in hands of technician

Defendant appealed his conviction for possession of obscene matter. Defendant brought his computer to Best Buy to be serviced by the Geek Squad. During the clean-up of defendant's hard drive, files that indicated they contained child pornography were found. The Geek Squad notified the police who then came to the store and were shown the explicit video. Defendant challenged trial courts denial of his motion to suppress evidence the police found pursuant to an allegedly unlawful search of his computer. Defendant contends that because Geek Squad did not open any of the files viewed police exceeded the scope of the search conducted by them when they viewed the contents of the specific files. Defendant voluntarily turned over his computer to the Geek squad and

had no protection or locks on any of the files and so did not have a reasonable expectation of privacy in the contents of his computer. Further, an expectation of privacy in files with explicit names that suggested child pornography was not recognized by society as reasonable. Defendant also argued that the State did not prove venue for the offense and contends that he lived and kept his computer in a county different from the one in which he was prosecuted and where the Best Buy was located. The court found that because defendant possessed the computer when he brought it to the Best Buy store in the neighboring county, venue was proper.

Mummitt v. Del., No. 365, 2010, 2010 Del. LEXIS 502 (Del. Oct. 1, 2010).

- *Crawford*
- Admission of CAC videotapes

Defendant challenged his convictions for the following offenses: continuous sexual abuse of a child, sexual solicitation of a child, rape in the fourth degree, four counts of unlawful sexual contact in the first degree, offensive touching, terroristic threatening, endangering the welfare of a child, assault in the third degree, and two counts of non-compliance with bond conditions. Defendant raised several claims of ineffective assistance of counsel, specifically failure to protect his confrontation rights under *Crawford*. The court concluded that *Crawford* was not implicated because the alleged victims testified at trial and were available for cross-examination. Defendant also claimed that the CAC videotapes of the victims were inadmissible because they included prejudicial third-party statements made by the interviewer. However, defendant failed to identify any particular statements or questions that were prejudicial.

Bollig v. Texas, No. 05-08-01038, 2010 Tex. App. LEXIS 8038 (Tex. Ct. App. Oct. 4, 2010).

- Child Pornography
- Search of home

Where defendant's wife consented to the search of their home, defendant was present when consent was given and raised no objection, and defendant's wife gave the police defendant's CD containing images of child pornography, defendant's fourth amendment rights were not violated. Further, because the wife handed the CD to the police and told them to take it, there was no search which led to the seizure, therefore this evidence was properly admitted.

Wisconsin v. Jensen, No. 2009AP1901-CR, 2010 Wisc.App.LEXIS 798 (Wis. Ct. App. Oct. 5, 2010).

- Rehabilitation
- Sentencing Reasoning

Defendant argued that the trial court erroneously exercised its sentencing discretion and erred by denying his motion for post conviction relief. Defendant pled guilty to twenty-seven charged offenses, and the State recommended consecutive sentences consisting of one and one-half years' initial confinement and two years' extended supervision on seven

of the counts, for a total of ten and one-half years' initial confinement and fourteen years' extended supervision. With respect to the other twenty counts, the State agreed to recommend withheld sentences with three years' probation on each count, concurrent with each other, but consecutive to the prison sentences. The court imposed a sentence consistent with the State's recommendation. Defendant claimed the trial court did not make any findings regarding whether he needed close rehabilitative control. This is not a requirement and is merely a factor the court may consider. Here, the court expressed its skepticism that his deviant sexual interest could be altered. Next, defendant contends the court failed to make any finding that he posed a danger to public safety. The court indicated an intent to protect the public by making "sure that somebody who views these pictures would not act on them given the chance." Defendant also argued the court failed to articulate why the confinement imposed was necessary for the objective of deterrence, and further failed to explain how it balanced deterrence with other factors to be considered at sentencing. The found that Defendant's conduct, resulting in twenty-seven convictions and twenty-six read ins, justified the court's adoption of the State's recommendation in order to deter Defendant and others from similar behavior in the future. Finally, defendant challenged the denial of his post conviction motion for re-sentencing. Because the trial court considered relevant factors and imposed a sentence authorized by law, the Court concluded it properly exercised its sentencing discretion.

Oct. 8-14, 2010

COURTS OF APPEAL

New York v. Kent, 910 N.Y.S.2d 78 (N.Y. App. Div. Oct. 12, 2010).

- "Cache" Evidence
- Files located on hard drive
- Sufficiency of the Evidence

Appeal by the defendant from a judgment convicting him of 2 counts of promoting a sexual performance by minor and 134 counts of possessing a sexual performance by a child. The child pornography was found on defendant's hard drive by an IT employee at defendant's office during a virus scan of defendant's hard drive. The IT employee turned over defendant's hard drive to the police and a forensic analysis was performed. Child pornography files were found under an alternate internet profile which defendant had created to access child pornography as temporary internet files in the Web "cache", an automatic storage mechanism. Defendant contends that the evidence was legally insufficient. He contends that visiting a Web site or viewing a Web page does not constitute procurement of its contents, nor that an act of procurement is committed when a web page is automatically save to the cache without his knowledge, or intentional act of downloading or saving it. Further, defendant contends that he did not knowingly possess the images in the cache because the temporary internet files are automatically created and the People failed to prove that he had knowledge of this function of his computer. The court agreed that the mere existence of an image automatically stored in the cache, standing alone, is legally sufficient to prove either knowing procurement or knowing

possession of child pornography. The court found that a Web page stored in the cache is evidence of past procurement of the images on that page. Whether the defendant knowingly or inadvertently accessed that web page, and whether he knew that the page would contain child pornography when he accessed the site, are issues of fact which require an examination of the totality of the direct and circumstantial evidence. Cache evidence of a patter of visiting child pornography sites, coupled with evidence past deletion of thousands of images by defendant as a showing of his knowledge that the images were illegal, was sufficient evidence to support defendant's conviction of promoting.

The court also concluded that the evidence was sufficient to prove the defendant's knowing possession of the images on that page. While the cache file itself is not the contraband, it is evidence of previous possession of the images. Defendant had dominion and control over the images for the period of time they were resident on his computer screen. Defendant also argued that because he deleted images that were found on a portion of his hard drive only accessible with forensic software, he never intended to possess them. The deletion of the files gives rise to his consciousness of guilt and knowledge of the functioning of his computer in support of the inference that he exercised dominion and control over the images. Therefore there was sufficient evidence to establish defendant's knowing possession of the material.

UNPUBLISHED CASES

New Jersey v. Nandy, No. A-1659-08T4, 2010 N.J. Super. Unpub. LEXIS 2448 (N.J. Oct. 8, 2010).

- Mistake in age
- Internet Chat with police officer posing as minor

Defendant was convicted of second-degree attempted sexual assault, second-degree attempting to lure or entice a child into a motor vehicle to commit a criminal offense, third-degree attempting to endanger the welfare of a child, and fourth-degree attempted sexual contact. On appeal, defendant claimed that he was entrapped and that the statutes under which he was convicted required an actual victim, which there was none. The charges stem from multiple sexually-explicit internet conversations between defendant and a police officer posing as a 13-year-old girl. The court found that an actual victim was not necessary for the attempt statutes, and the defendant was rightly convicted under them because he took substantial steps in having the sexually explicit conversations and arranging and attempting to meet. Because the statutes impose a standard of whether a reasonable person would have believed they were speaking with a child age 12-16, the jury could consider and choose not to accept his defense that he believed he was speaking to an adult.

Salyer v. Kentucky, No. 2009-CA-000439-MR, 2010 Ky. App. Unpub. LEXIS 779 (Ky. Ct. App. Oct. 8, 2010).

- Sex offender registry requirements
- Child pornography

Defendant plead guilty to knowing possession of matter depicting a sexual performance by a minor on his computer. The plea agreement dismissed 14 of the 29 counts, and recommended defendant receive a sentence of five years on each charge, all recommended to run concurrently for a total of five years. At the time of his conviction, the sex offender registration statute did not require he register. The statute was amended while defendant was in custody and as amended the offense to which he pled guilty did qualify as a registry offense. When defendant was released, he was required to register as a sex offender. On appeal, defendant claimed that the amended sex offender registry statute was an additional punishment for specified offenses and cannot be applied retroactively. The court found that while the title of the act alone might imply punishment, this alone is not determinative of the construction of the statutory scheme as a whole. The Kentucky Supreme Court had decided this issue and stated that there was no violation of ex post facto.

Wisconsin v. Harrison, Nos. 2009AP3082-CR, 2009AP3083-CR, 2010 Wisc. App. LEXIS 808 (Wis. Ct. App. Oct. 13, 2010).

- Child Pornography
- Sentencing

Defendant pled guilty to one count of first-degree sexual assault of a child and three counts of possession of child pornography. He appealed his sentence claiming that the trial court did not abide by the "least punishment" principle. At sentencing, the trial court first observed that the crime was "very, very serious and troubling", was calculated and "horrendous" against a trusting ten-year-old neighbor whose mother also trusted him. Further, the trial court factored in his sexual assault of a fifteen-year-old niece thirteen years prior, his fascination with child pornography and daily consumption of alcohol, and his lack on insight. Finally, since this was not his first sexual assault, society must know that his chances of re-offending are eliminated for a significant period of time. The Court found that the trial court provided a rational and explainable basis on the record for why it imposed the sentence it did and defendant is not entitled to further explanation nor to re-sentencing.

Oct. 15-21, 2010

STATE SUPREME COURTS

New Hampshire v. Farr, 7 A.3d 1276 (N.H. 2010).

- Child Pornography
- Double Jeopardy

Defendant challenged his conviction for one count of delivering or providing child pornography and one count of possession of child pornography. Defendant argued that the possession and delivery charges were the same for double jeopardy purposes because the possession charge was a less-included offense of the delivery charge. The court agreed, finding that defendant's possession of the video-clip was uninterrupted and there was nothing to differentiate the possession of the video clip on his compact disc when he delivered it to the undercover officer over the internet and when the police seized the compact disk the next day. Further, there was no evidence the compact disk ever changed locations. Accordingly, defendant's double-jeopardy rights were violated. Defendant then alleged that there is insufficient evidence to support the trial court's finding that the video clip depicted a child under the age of sixteen. Having viewed the video clip, the court found that the clip depicted a child younger than sixteen.

COURTS OF APPEAL

Oregon v. Tropeano, 241 P.3d 1184 (Or. Ct. App. Oct. 20, 2010).

- Search Warrant
- Child pornography

Defendant appealed his convictions on four counts of first-degree encouraging child sexual abuse and three counts of second-degree encouraging child sexual abuse. The court only addressed defendant's argument that the trial court erred in denying his motion to suppress evidence obtained as a result of the execution of a search warrant. Officer received a warrant to search defendant's hotel room based on his sworn affidavit that defendant, a registered sex offender who previously had been convicted of possession of child pornography, had told a sheriff's deputy that he subscribed to a pornographic magazine from Denmark, a country that permitted child pornography, but that the photographs depicted only people of legal age. Defendant challenged that the affidavit was insufficient to establish probable cause that child pornography would be found. Defendant argued that because many inferences could be made from his statement to the sheriff's deputy it was not enough to rise to the level of probably cause. Court found sufficient probable cause based on defendant being a registered sex offender, the pornography coming from a country where child pornography can be legally obtained, the officer's knowledge, based on his training and experience, that the defendant had a laptop in his room which could be used to obtain access to pornographic material, and finally that defendant had forbidden hotel cleaning staff from entering his room without at least 15 minutes' notice because defendant said he needed to clean up first. The issuing magistrate reasonably could have concluded from this affidavit as a whole that evidence of child pornography probably would be found in defendant's hotel room. Accordingly, the trial court's decision not to suppress the evidence was affirmed.

UNPUBLISHED CASES

Hall v. Texas, No. 01-09-00891-CR, 2010 Tex. App. LEXIS 8454 (Tex. Ct. App. 2010).

- Statements made by prosecutor
- Ineffective assistance of counsel

Defendant was convicted of the felony offense of aggravated sexual assault of his eight-year-old daughter. On appeal, defendant argued that the trial court erred in overruling his objection that the state's argument during the punishment phase was outside the scope of the record and that he received ineffective assistance of counsel. The court found that prosecution's comment, "imagine what she had to go through to be going through this thinking—her dad is doing every sex act imaginable on her" was a reasonable deduction from all the evidence (seven separate and distinct sexual acts) produced at trial and were not arguing facts not in the record. Defendant also failed in his ineffective assistance of counsel claim. Defendant failed to show that a line of questioning his counsel chose which solicited answers that may have been prejudicial against defendant in the eyes of the jury did not fall within the wide range of reasonable trial strategy. The questioning which elicited information about defendant's drug use was explained by counsel as an attempt to show the victim's mother's bias and did not below reasonably professional standards.

Oct. 22-31

COURTS OF APPEAL

Conn. v. Shields, 5 A.3d 984 (Conn. App. Ct. Oct. 26, 2010).

- Child Pornography
- IP Address and Warrant

On appeal from the judgment of conviction rendered following his conditional plea of nolo contendere to possession of child pornography in the first degree, defendant claimed that the trial court improperly (1) denied his motion to suppress because the affidavit in support of the search warrant failed to establish probable cause, and (2) determined that the warrant authorized a forensic examination of the evidence. Defendant contends that the trial court improperly denied his first motion to suppress because the warrant affidavit lacked probable cause to believe that child pornography would be found in the residence. He argued that because the affiants failed to link the IP address to the subject residence at the exact time that the incriminating conversation took place, the affidavit could not support a finding of probable cause. Further, defendant argues that the affiants also failed to inform the court that the IP address was most likely dynamic and subject to change. The court found that the affidavit presented to the magistrate included information that a person using defendant's screen name attempted to possess child pornography and was currently residing at the subject address and the magistrate was free to draw upon his commonsense to infer that there was a fair probability that the internet service provider supplied the address of the IP user on the particular date and time of the conversation

because it was the only sensible thing for it to do. Defendant then argued that trial court improperly denied his second motion to suppress because newly discovered evidence showed that the conversation took place on a date other than the date provided in the affidavit. The court found that the exact date was not material to the finding of probable cause. Defendant also failed to show the inaccuracy in the affidavit was intentional or reckless. Finally, defendant argued that even if the warrant was validly executed, it did not extend to cover the forensic search of the computer because the magistrate did not check a box on the face of the warrant that would have specifically authorized the police to submit the computers to laboratory analysis and examination. An attachment which specifically provided that the seized property would undergo investigative examination accompanied the warrant application. Because defendant failed to develop this claim at trial, the record is inadequate for review and therefore the trial court's decision was affirmed.

Chiszar v. Ind., 936 N.E.2d 816 (Ind. Ct. App. Oct. 29, 2010).

- Child pornography
- Probable cause for warrant

Defendant appealed his conviction for among other things three counts of possession of Child Pornography. Police officers executed an affidavit seeking a search warrant after taking the defendant into custody for battery and videotaping him and his girlfriend having sex without her consent. The warrant sought to recover videotapes, video equipment, computers modems, a laptop computer and related equipment from defendant's residence. Affidavit was supported by statement by defendant's girlfriend that she has seen child pornography on his computer.

UNPUBLISHED CASES

Wisconsin v. Sahs, No. 2009AP2913-CR, 2010 Wisc. App. LEXIS 853 (Wis. Ct. App. Oct. 23, 2010).

- Child Pornography
- Probation violation

Defendant appealed from the judgment of conviction entered after he pled guilty to one count of possession of child pornography. Defendant argues that the trial court erred in failing to suppress statements he made to his probation agent and in failing to suppress evidence obtained subsequent to those statements because a probation form he received promised the statements could not be used against him. As a condition of his probation, defendant was required to admit to any viewing of child pornography. Defendant notified his probation agent that he needed to discuss "some things" and at the meeting admitted to viewing child pornography using a computer he kept at a friend's home. The judge ruled that the condition of his probation that he must disclose violations did not qualify the statements he made as having been "compelled." Further, the document that

defendant relies upon in making his assertion that his statements were made under the belief they could not be used against him was not part of the record. The record shows that the defendant requested the meeting and volunteered the information, the statements were not compelled. The Supreme Court has held that "the mere fact that an individual is required to appear and report truthfully to his or her probation (or parole) [agent] is insufficient to establish compulsion."