

CSE Case Law Report October 2011

October 1 – 9, 2011

State Supreme Courts

Stephens v. State, 716 S.E.2d 154 (Ga. Oct. 3, 2011).

- Jury Instructions
- Probation Conditions

Defendant was convicted in the trial court of incest. At the time of sentencing the Court did not specifically address all of the sentencing conditions for probation. Approximately a week later a written order included all of the probationary conditions. The Appellate Court upheld the conviction, but vacated the sentence and remanded the case for re-sentencing. The defendant appealed to the Supreme Court of Georgia. Defendant claimed two errors, first improper jury instructions were given by the trial court on prior consistent statements and the modification of the probation conditions by the sentencing court between the oral statements and the written ones violated his double jeopardy and due process rights.

As to the first issue, the Supreme Court announced that unless special circumstances existed surrounding prior consistent statements, a special jury instruction should not be given as that would emphasize the prior consistent statements. They ruled that the instruction given in the underlying case was harmless error.

The Supreme Court also rejected the defendant's claims regarding his probation. The Court ruled that a sentencing court has the ability to modify probation conditions and that modification in this case did not violate either double jeopardy or the defendant's due process rights.

State Courts of Appeal

Butler v. State, 2011 WL 4599302 (Ga. Ct. App. Oct. 6, 2011).

- Other Acts Evidence

Defendant filed interlocutory appeal following the trial court granting the prosecution's motion to admit similar transaction evidence in the prosecution for child molestation and aggravated sexual batter. Defendant claimed that the proffered evidence was not substantially similar to the crimes charged and the prejudicial effect outweighed the probative value.

The Appellate Court stated that the prosecution has to make three affirmative showings to introduce similar transaction evidence - first: introduce the evidence for an appropriate purpose which has been deemed an exception to the general rule of inadmissibility; second, provide sufficient evidence to demonstrate the defendant committed the independent act; and third,

provide evidence of sufficient similarity between the independent act and the charged crime so that proof of prior act tends to prove current charge. Defendant challenged the third requirement.

The prior act the state sought to introduce was the defendant's convictions from four years prior when he entered a chat room and agreed to meet what he thought was a 14 year-old child to have sex. He included a description of how he wanted the child to dress for the encounter. Two days later he met the undercover officer and was arrested. The Appellate Court held that in sexual offense cases evidence to demonstrate lustful disposition of the defendant or corroborate the victim's testimony is admissible. Additionally, the court stated that evidence of sexual molestation of children or teenagers, is sufficiently similar to make the independent evidence admissible. Finally, the Court ruled that there is no requirement that the evidence of the similar transaction evidence be identical to the underlying charge.

Unpublished Opinions

State v. Royalty, No. 1 CA-CR 10-0527, 2011 WL 4574950 (Ariz. Ct. App. Oct. 4, 2011). (Unpublished Opinion).

- Search and Seizure
- Statutory Construction
- Sentencing

Defendant was convicted of ten counts of sexual exploitation of a minor. Defendant was a tenant at his grandparents. During that time the police were alerted in Florida that an 11 year old girl was sent a video from the father of a 12 year old girl that showed a pre-pubescent female taking a shower and contained repeated close up's of the genitals of the female in the shower. The IP address traced back to the address of the defendant's grandparents. The police executed a search warrant on the grandparents's home and secured a locked briefcase that contained a six-page computer printout that contained 68 images of children being sexually exploited. The defendant made statements to the police regarding his ownership of the briefcase and the defendant had the key to unlock it.

The defendant filed a motion to suppress the search claiming that the search warrant only authorized the search for electronic media. The trial court ruled the defendant's motion was untimely. Additionally, it rejected the defendant's contention that the search warrant was narrowly tailored. The court focused on the description of the video and videotape in the affidavit and ruled that the details established probable cause to believe that someone in the home possessed additional images not located on the computer. The court also ruled that the affidavit was no insufficient because the court relied upon the officer's description of the video, rather than having the judge watch it.

The Appellate Court also rejected the defendant's sufficiency of evidence argument. The court ruled that under the doctrine of constructive possession the evidence that the defendant admitted he owned the locked briefcase in addition to the key for it being found with his other keys and his identification was sufficient to demonstrate his possession of the briefcase and its contents.

Defendant's second challenge under the sufficiency argument raised the issue that he should have only been charged with three counts of sexual exploitation of a minor as the ten

images were found on three pages of the printout. The Appellate Court rejected this argument based on *State v. Berger*, 212 Ariz. 473, 134 P.3d 378 (2006), holding that possession of each image represented a separate offense.

Defendant's two challenges to his sentence were also rejected. Defendant claimed that he was not eligible for an enhanced life sentence based on prior predicate offense convictions. Defendant's tortured argument was based on the belief that the predicate offenses had to be related to a child. The Appellate Court pointed out the four distinct categories of offenses and concluded that the defendant's prior convictions satisfied the predicate offense requirement. Finally, the Court rejected defendant's contention that the consecutive sentences violated due process or double jeopardy.

State v. Mahan, No. 95696, 2011 WL 4600044 (Ohio Ct. App. Oct. 6, 2011).

- Search and Seizure
- Discovery
- Sentencing

Defendant was indicted on 95 counts of pandering sexually-oriented matter involving a minor, illegal use of a minor in nudity-oriented material or performance and possessing criminal tools. On appeal defendant claimed that the trial court incorrectly ruled on his motion to suppress, should have granted his motion to compel discovery, and incorrectly sentenced him.

The defendant raised multiple issues as to the search and seizure in the case. First defendant claimed the use of Peer Specter to conduct searches on peer-to-peer networks was a violation of his Fourth Amendment rights. Second, he argued that the use of information gained from the use of Peer Specter vitiated the search warrant's probable cause. Finally, he argued that the search warrant contained substantive inaccuracies and omissions.

The Appellate Court's opinion contains an excellent review of the transcript of the detective in the case testifying about the use of Peer Specter and how the software simply automates functions that may be accomplished by an individual user. The court rejected defendant's contention that the officer's use of Peer Specter violated defendant's Fourth Amendment, by concluding that the defendant had no reasonable expectation of privacy in the peer-to-peer network.

Likewise the court ruled that the officer's inability to testify as to the functionality of Peer Specter did not defeat probable cause. The court focused on the remainder of the warrant and the actions the officer took to independently corroborate the information that he learned through Peer Specter. The Court ruled that there was enough additional information in the warrant to sustain probable cause.

Defendant also contended that the trial court erred when it denied his motion to compel discovery from the state to provide a mirror image forensic copy of Peer Specter and all instruction-operation manuals as well as Peer Specter's source code. At the trial court level the state introduced an affidavit from William Wiltse the software program creator who averred that the source code is copyrighted, the code is not given out to anyone, and that only trained law enforcement can use Peer Specter. Following the federal court's decision in *United States v. Budziak*, (May 14, 2009,) N.D. Cal. No. CR08-00284, the Appellate Court rejected defendant's argument and upheld the trial court's decision reasoning that since the state did not possess the

source, and one is unable to determine how the program works without the source code, the motion to compel should not be granted.

Defendant also contested the length of his sentence as well as the imposition of consecutive sentences. Defendant was sentenced to the maximum 8 years on two groups of charges and then the court imposed consecutive sentences making the defendant's total sentence 16 years. The Appellate Court rejected defendant's contention that the trial court was required to make specific findings on the rationale for imposing either the maximum or consecutive sentences. The Court also rejected defendant's attempt to claim that his sentence was inconsistent with other sentences imposed in child pornography cases. The Court indicated that while it may not have imposed 16 years for an otherwise law abiding sentence the sentence was certainly lower than what it could have been had the defendant been sentenced on 95 convictions. The Court also noted the continuing harm to victims of this type of crime, as their images and movies are continually circulating on the internet.

October 10 – 16, 2011

Unpublished Opinions

State v. Hartman, No. 1 CA–CR 10–0273, 2011 WL 4795375 (Ariz. Ct. App. October 11, 2011).

- Sufficiency of Evidence
- Double Jeopardy
- Sentencing

Defendant appealed his conviction and sentence after being found guilty of eleven counts of sexual exploitation of a minor under 15 years of age. Factually, the defendant lost his phone. Three days later the phone was turned into the police by a third party who informed the police the phone contained child pornography. The police discovered that between midnight and 12:30 a.m. ten images of child pornography were downloaded to the phone. Police executed a search warrant for the defendant's home and seized a computer that a forensic examination revealed one of the images from the phone had been deleted and was in unallocated space.

Defendant argued that there was no evidence on the phone that he obtained the images from the cell phone memory other than by inadvertence. The Appellate Court rejected this contention citing the defendant's statement to police that the phone was only in his possession and any downloads were most likely his. The prosecution also presented evidence that the one image from the computer matched what was on the phone in addition to showing that internet searches on the computer generated to several of the images on the phone. Also the police officer in the case testified that child pornography does not just "pop-up", but must be sought out. The Appellate Court ruled this was enough evidence for a jury to believe defendant knowingly possessed the ten images.

Likewise the court reviewed the evidence related to the image found in the unallocated space on the computer and ruled the jury could have rejected defendant's arguments that a computer virus or inadvertent download was responsible or defendant's final contention that the hard drive that he had purchased months before was pre-loaded with the images. The court ruled that the officer's testimony about the internet searches, the 1, 500 images of child erotica, and 30

other images of child pornography found deleted on the computer was enough evidence to support the jury's decision.

Defendant claimed his rights to be free from double jeopardy were violated when he was convicted of ten counts for the images on the phone and as those were downloaded in one session he should only face one count. The Appellate Court disagreed, citing existing Arizona law that the possession of each image is separate offense. (See *State v. Berger*, 212 Ariz. 473, 474, 134 P.3d 378 (2006) interpreting A.R.S § 13-3553(A)(2)).

Finally, defendant raised two issues as to his sentencing. First he claimed that the imposition of consecutive sentences for the charges for the ten images on his cell phone should have been merged into one. However, based on the finding of defendant's double jeopardy claim the Appellate Court ruled the defendant should receive consecutive sentences as each images represents a separate act. The Appellate Court also rejected defendant cruel and unusual punishment argument for the imposition of his 110 year prison sentence. Relying upon *Berger*, the Court reasoned defendant's conduct fell squarely within the statute, and declined to conduct a proportionality test.

October 17 – 23, 2011

State Courts of Appeal

James v. State, 2011 WL 4923620, (Ga. Ct. App. Oct. 18, 2011).

- Search and Seizure

Defendant was convicted after a bench trial of 26 counts of sexual exploitation of children. Defendant contends on appeal that the search warrant affidavit generated in his case did not contain probable cause but relied on hearsay and that the affidavit contained omissions and misleading statements.

Factually, the case arose from a cyber-tip report from the National Center for Missing and Exploited Children (NCMEC) that a resident of the county posted child pornography to an internet web-site. Upon receiving the report an agent of Georgia Bureau of Investigation (GBI) reviewed the report generated pursuant to federal statute by Google. Based on the information in the complaint the GBI agent commenced his investigation that included requesting a court order to obtain the subscriber information from Charter Communication, the listed internet service provider on the NCMEC referral based on a WHOIS lookup. The agent listed this in his affidavit once the subscriber information came back to the defendant. Armed with this information the agent reviewed the cyber-tip report for the dates and times of the upload and posting of child pornography to Google. The agent then did more background investigation into the defendant, confirming his employment and educational background, as well as a drive-by surveillance of the offender's home.

The defendant challenged the reliance on the information in the cyber-tip, that the GBI agent did not contact the Google representative to confirm the information in the report. [Author's note] - The Appellate Court missed the opportunity to note that the agent from Google would be unable to speak with the agent about the report without a search warrant without violating the ECPA. The Appellate Court did reject the defendant's contention that the hearsay

information in the affidavit did not support probable cause. The Court noted that NCMEC is basically a through way for the information from ISP's to law enforcement. The Court concluded that because the warrant contained the identity of the Google worker, and the basis of their knowledge, the warrant was supported by probable cause.

Likewise the Court rejected defendant's second claim that the GBI agent failed to include the NCMEC disclaimer on all cyber-tip reports that NCMEC does not do anything to verify the information in the tip. The defendant argued this omission, coupled with the averment in the affidavit that NCMEC "confirms" the existence of the child pornography on the website, defeated the probable cause of the warrant. However, the Appellate Court ruled that the inclusion of the disclaimer would not have significantly clarified NCMEC's role in the cyber-tip process. Moreover, the court ruled that based on the remainder of information in the affidavit, as well as the testimony of the agent at the hearing, a substantial basis providing probable cause still existed.

State v. Brown, 2011 WL 5008551, (Mich. Ct. App. Oct. 20, 2011).

- Prosecutorial Error
- Ineffective Assistance of Counsel
- Sentencing

Defendant was convicted of one count of criminal sexual conduct in the first degree and was sentenced to life in prison. Defendant's first two challenges are inter-related. Defendant argued that several statements made by the prosecutor were improper as was the prosecutor's attempt to introduce certain prior bad acts of the defendant. Defendant also alleged that his counsel was ineffective for failure to object to the prosecutor's comments and conduct. Defendant additionally claimed that his punishment of life in prison, without the possibility of parole, was cruel and unusual or in the alternative, an impermissible departure from the guidelines.

As to the first two issues, the court reviewed the statement made by the prosecutor and the related information about the possibility of a federal investigation of the defendant for child pornography. The court ruled that while it was irrelevant, the defendant did not demonstrate the prosecutor was acting in bad faith. The Court also ruled that the prosecutor's attempt to introduce other acts evidence was not bad faith, but rather an attempt to introduce what he thought was relevant evidence. The attempt to introduce evidence is not in and of itself error and does not rise to the level of prosecutorial error. Because the prosecutor's conduct did not rise to the level of misconduct, the defendant could not have received ineffective assistance of counsel for his counsel's failure to object at trial.

The Court also rejected the defendant's final contentions regarding his sentence. The Court concluded that the sentence the defendant received was statutorily authorized. The defendant had a prior conviction of a sex offense against a child under the age of thirteen. Based on that, the sentencing statutes in Michigan mandated a life sentence. The Court indicated that there was no issue in the sentencing scheme because the Supreme Court of Michigan has accepted graduated punishments under the sentencing scheme. The Court also looked at multiple other state statutes to confirm that the penalty was proportional.

October 24 – 31, 2011

State Supreme Courts

Shaffer v. State, 72 So.3d 1070 (Miss. Oct 27, 2011).

- Statutory Construction

Defendant's conviction for exploitation of a child, arising out of an undercover operation with a police officer posing as a child, was overturned by the Appellate Court. The Supreme Court of Mississippi reversed the Appellate Court. In a case of first impression, the Supreme Court concluded that attempted child exploitation was not a crime in Mississippi. The Court determined that the child exploitation statute is violated when a defendant attempts to exploit a child. Additionally, the Court reasoned that the solicitation of a child was enough to form the basis of a criminal act.