

CSE Case Law Update

September 2009

STATE SUPREME COURTS

Howard v. State, No. 391, 2008, 2009 Del. LEXIS 494 (Del. Sept. 22, 2009).

- Indictment
- Constitutionality of Statute
- Sufficiency of Evidence

Defendant appealed his conviction for multiple counts of sexual solicitation of a child, unlawful sexual contact and indecent exposure. The reviewing court determined that the defendant waived any issues as to the sufficiency of the indictment by not filing a pre-trial motion. As to the second issue, the defendant challenged the statute's constitutionality on two grounds: it criminalized protected speech and the statute was void based on vagueness grounds. The reviewing court again cited to the defendant's lack of filing a pre-trial motion and ruled that the prosecutor's explanation of the case controlled. It held that, based on that fact pattern, the defendant lacked standing to challenge the constitutionality of the statute. The reviewing court rejected the defendant's last contention. The defendant was charged for making inappropriate bets with the boys involving nudity. The court determined that based on the testimony of the boys as to the bets there was sufficient evidence to support the conviction.

In re Care and Treatment of Sporn, 215 P.3d 615 (Kan. 2009).

- Sexually Violent Predator Act

The state appealed the trial court's dismissal of its petition under the Sexually Violent Predator Act. The Supreme Court of Kansas upheld the trial court's determination ruling that *res judicata* barred the second petition filed by the state. The state had previously filed a petition in 2005 where a jury had ultimately ruled in the defendant's favor. While he was on supervision following his release from prison, the defendant violated the terms of his release by visiting pornography and sexually explicit websites. The defendant was returned to prison following the violation and the state filed a second petition under the Act. The Supreme Court applied the four-part test for determining *res judicata* and ruled that the second petition filed by the state failed to plead a material change in defendant's mental status or recidivism risk and as such was subject to dismissal. The Court never addressed whether the Act provided for the filing of multiple petitions against the same defendant within the same sentence.

COURTS OF APPEAL

Ferrick v. State, No. A-9976, 2009 Alas. App. LEXIS 140 (Alaska App. Ct. Sept. 18, 2009).

- Search Warrant
- Constitutionality of Child Pornography Statute

Defendant appealed conviction for possession of child pornography. Defendant raised two main arguments. The first was that the search warrant in the case lacked probable cause because it did not contain language indicating that the images contained real children. The second was that the child pornography statute was unconstitutionally vague because under the defendant's extraordinarily convoluted reasoning it was possible that a person could be convicted of possessing virtual child pornography. The Appellate Court rejected both of the defendant's assertions. As to the first, the reviewing court determined that a search warrant only establishes probable cause, it does not defeat every possible innocent explanation. As to the second issue, the Appellate Court created a two part test as to the knowingly element of the charge including that a defendant knowingly possess the material, and that a defendant must act knowingly with respect to the use of real children to create the child pornography.

Mason v. State, No. CACR 09-298, 2009 Ark. App. LEXIS 740 (Alaska Ct. App. Sept. 16, 2009).

- Search and Seizure
- Severance of Charges
- Other Acts Evidence
- Jury Instructions

Defendant was convicted of rape, sexual indecency with a child and possessing matter depicting sexually explicit conduct involving a child. Defendant claimed the search warrant was improper based on staleness issues. However, the trial court and Appellate Court both found that the interviews supporting the affidavit referred to the storage of the images happening in the present tense and were disclosed within eight hours of the affidavit being prepared. The Appellate Court also upheld the denial of defendant's motion to sever based on possibility of the different charges going to the defendant's underlying scheme and that the evidence would have been admissible under a theory of other acts evidence. The reviewing court also dismissed defendant's claim that the admission of the pictures of other children in explicit poses was a violation of Arkansas Rule of Evidence 404(b). The Court determined that not only did the evidence fit into the "pedophile exception" to the rule but also rejected the defendant's argument that the exception was limited to testimony only and did not allow for the admission of photographs. Finally, the Appellate Court rejected the defendant's last argument, holding that sexual assault in the second degree was not a lesser-included offense to the charge of

rape by engaging in sexual intercourse or deviate sexual activity with a person less than fourteen years old.

People v. Toth, No. B210283, 2009 Cal. App. Unpub. LEXIS 7900 (Cal. Ct. App. Sept. 30, 2009).

- Search and Seizure
 - Staleness
 - Nexus

Defendant entered plea of guilty to one felony count of child pornography following the trial court's denial of his motion to quash the search warrant based on issues of lack of probable cause. The defendant argued that because the affiant did not sign each of the statements in the complaint for the search warrant and because the affidavit was only incorporated by reference, staleness and lack of a nexus between the place to be searched existed. The Appellate Court rejected each contention. The court focused on the defendant's prior conviction for child sexual crimes in ruling that it would be likely that a pedophile would not lose the urge to offend against children and thus it would be likely that the defendant's actions would constitute a continuing course of conduct.

People v. Abel, No. A121299, 2009 Cal. App Unpub. LEXIS 7787 (Cal. Ct. App. Sept. 29, 2009).

- Other Acts Evidence

Defendant was convicted of two charges of continuous sexual abuse of a child. Defendant appeals the admission of evidence relating to his visiting websites that contained child erotica. The prosecution conceded that the evidence was improperly admitted based on lack of proper foundation. However the Appellate Court ruled that the admission was harmless error. The Court did engage in an interesting discussion about the admissibility of computer forensic testimony under a Crawford analysis, but ultimately did not rule on the issue on that ground.

State v. Lash, No. 33958, 2009 Ida. App. Unpub. LEXIS 313 (Idaho. Ct. App. Sept. 17, 2009).

- Sentencing

Defendant challenged his sentence for multiple counts of lewd conduct with a minor and multiple counts of sexual battery with a minor. Defendant claimed that the sentencing court improperly considered his first pre-sentence report that did not comply with Estrada v. State, 143 Idaho 558 (2006) where defendant was not admonished of his right against self-incrimination. The Appellate Court determined that while the sentencing court

mentioned the first report it did not consider the substance of it in determining the defendant's sentence. Likewise, the Appellate Court rejected defendant's contention that his sentence was excessive in that the defendant failed to establish an abuse of discretion.

Brown v. State, 912 N.E.2d 881 (Ind. Ct. App. Sept. 10, 2009).

- Indictment Amendment
- Double Jeopardy
- Prosecutorial Misconduct
- Sentencing

Defendant was convicted of three counts of child exploitation, class C felonies, and five counts of possession of child pornography, class D felonies. Defendant raised multiple challenges to his conviction. The Appellate Court rejected each challenge. First, defendant claimed that he was denied a fair trial because the prosecution was allowed to amend the charges within days of the trial. The Appellate Court ruled that the change to the statute allowing for the amendment was properly retroactively applied to defendant. The Appellate Court also rejected defendant's claim that the dissemination and possession charges were barred by double jeopardy. The Appellate Court writes a fantastic review of legislative intent for crimes of dissemination and possession of child pornography and applying the Blockburger test, rejects defendant's contention that all images should be in one charge. The court cites great language about the insidiousness of the crime of child pornography. The Court uses the same the analysis when considering the defendant's claim of improper sentencing. The Court did agree that the prosecutor's conduct of contacting a witness and informing him of testimony from the trial was improper, however, it was harmless error considering the overwhelming evidence of the defendant's guilt.

State v. Allen, No. WD70295, 2009 Mo. App. LEXIS 1310 (Mo. Ct. App. Sept. 22, 2009).

- Motion to Suppress Statements

The State of Missouri filed interlocutory appeal of circuit court's decision granting defendant's motion to suppress statement. The Appellate Court dismissed the appeal based on timeliness. The Appellate Court focused on the prosecutors failing to file the appeal within five days from the final decision of the trial court.

State v. Thorton, 2009 Ohio 5125, 2009 Ohio App. LEXIS 4332 (Ohio Ct. App. Sept. 29, 2009).

- Search and Seizure
 - Privacy Rights Peer-to-Peer

- ECPA violation

Defendant appealed conviction for child pornography offenses after his motion to suppress evidence was denied. Defendant claimed that the police conducted an illegal search of his computer and that the police illegally obtained information from Time Warner regarding his IP address. In rejecting the defendant's first contention, the Appellate Court ruled that the defendant has no expectation of privacy in materials defendant knowingly exposes to the public, in this case through Lime Wire Peer-to-Peer software. The court ultimately sidesteps the defendant's second claim that Time Warner violated the Electronics Communication Privacy Act in ruling that even assuming that they had, the defendant's remedy was not suppression but civil damages.

Commonwealth v. Houtz, 982 A.2d 537 (Pa. Super. Ct. 2009).

- Sentencing
 - Probation Conditions

Defendant appealed sentencing court's decision to impose Internet restrictions as condition of defendant's probation. Appellate Court agreed that there was no nexus to the conditions based on the defendant's conviction for a contact offense against a minor. There was no record that defendant had used a computer to either entice the minor or facilitate the crime.

Nickels v. State, No. 29A05-0905-CR-297, 2009 Ind. App. Unpub. LEXIS 1600 (Ind. Ct. App. Sept. 28, 2009).

- Sentencing

Defendant appealed his ten-year sentence for a child solicitation, a class C felony. Defendant's sentence was enhanced based on a prior offense. Defendant claimed that the trial court erred three different ways: 1) failure to give a reasonably detailed sentencing statement; 2) failure to recognize mitigating circumstances; 3) sentencing judge did not adequately consider his character and the nature of the offense. The Appellate reviewed and rejected each of the defendant's contentions.

State v. Gallegos, 2009 Colo. App. LEXIS 1673 (Cal. Ct. App. Sept. 17, 2009).

- Sexually Violent Person

Defendant who had pleaded guilty to the offense of attempted sexual assault on a child appealed the sentencing court's determination that he was a sexually violent person. The main basis for the finding was that the defendant established the relationship with the victim for the sole purpose of sexual victimization. The Appellate Court agreed with the

defendant that because he was the father of her half-sister and because of the prior living arrangements there was no evidence that the primary purpose of the relationship was to sexually victimize the child.

State v. Arave, 220 P.3d 182 (Utah Ct. App. 2009).

- Sufficiency of Evidence
- Shondel Doctrine

Defendant appealed his conviction by a jury of attempted sodomy of a child. Defendant contended that the elements of the attempted sodomy of a child charge were the same as the elements of solicitation of a child. Defendant contended that since they were the same he was entitled to the lesser offense of solicitation. The Appellate Court disagreed concluding the elements were not exactly the same. Secondly, the Appellate court rejected defendant's contention that the evidence presented at trial was insufficient.