

**CSE Case Law Update
September 1-3, 2010**

UNPUBLISHED OPINIONS

State v. Arellano, 2010 N.J. Super. Unpub. LEXIS 2188 (N.J. Super. Ct. App. Div., Sept 1, 2010).

- Entrapment
- Severance of charges – luring and possession of child pornography

The court considered multiple challenges raised by the defendant arising from his convictions for luring a child, attempted child endangerment, and endangering the welfare of a minor, for initiating sexual conversations with a detective posing as a 12 year-old girl, and then attempting to meet the girl for sexual activity at an arranged location. The court found that the defendant was not entitled to a due process entrapment defense because he directed the planning and commission of the crime – he was not lured into any conversation or encouraged to remain online against his will, and he was the first party to bring up sex. The defendant also argued that his conviction of possession of child pornography, which stemmed from him having child pornography stored on his computer, should have been severed at trial. The court did not agree, finding that the child pornography evidence would have been admissible under ER 404(b) regardless. The evidence was relevant to show his intent to have sex with a minor, so there was no additional prejudice from the jury hearing evidence of both charges.

**CSE Case Law Update
September 5-11, 2010**

COURT OF APPEALS

Black v. State, 2010 Ga. App. LEXIS 843 (Ga. Ct. App., Sept 10, 2010).

- Failure to give curative instruction
- Lustful disposition – admitting child pornography for molestation charge

The defendant was convicted of child molestation for sexually abusing his 11 year-old granddaughter. The defendant first challenged the trial court's failure to issue a curative instruction after a State witness disclosed that the granddaughter was possibly not the only victim of the defendant. The court held that the defendant failed to preserve the issue as he did not object at trial, and he himself testified about the circumstances of the other complaint on direct examination. The defendant also argued that the jury should not have been told that he showed his granddaughter child pornography. The court found the argument meritless because Texas case law did not clearly prohibit the admission of oral testimony regarding a defendant's possession of pornographic materials (as opposed

to the admission of the actual materials, which was not permitted). Even more important to the court was that the defendant again did not object at trial.

Bishop v. State, 2010 Fla. App. LEXIS 13422 (Fla. Dist. Ct. App., Sept. 10, 2010).

- Sufficiency of evidence – kidnapping without force or threat of force
- Sufficiency of evidence – child in a sexual performance without video evidence
- Double jeopardy – same conduct basis for higher degree of offense and separate offense
- Double jeopardy – lewd and lascivious conduct and molestation

The defendant raised several arguments stemming from his convictions for kidnapping a child under the age of 13, lewd or lascivious molestation, conduct, and exhibition, and use of a child in a sexual performance. The defendant challenged the sufficiency of the evidence to support the kidnapping charge, when there was no allegation that he used any force or the threat of force to induce the eight year-old victim to follow him from the public pool to the woods, in order to molest and videotape her. The court noted that kidnapping can be accomplished “forcibly, secretly, or by threat” and the term “secretly” means that the abduction or confinement is intended by the defendant to isolate or insulate the intended victim from meaningful contact or meaningful communication with the public. The court found defendant’s conduct met the above definition and thus rejected his argument. The defendant also raised a sufficiency challenge to the use of a child in a sexual performance charge, arguing that the charge cannot be proved without the State establishing that the acts were actually caught on his video. The victim had testified the camera appeared to be on. A third party stated that the defendant was pointing the camera at the victim’s “privates.” And a lifeguard – who chased the defendant after being told about the activity in the woods – testified that the defendant kept pressing various buttons on the camera after he was caught. Considering the above, the court found that there was sufficient evidence to support the sexual performance charge. The court also reiterated prior holdings that the performance charge can be satisfied even where the video tape of the child’s engagement in sexual conduct is not shown to third persons. The necessary “audience” can consist of solely the defendant. The defendant also argued that the lewd and lascivious conduct and molestation convictions, which also served to enhance the kidnapping conviction from a first degree felony to a life felony, violated double jeopardy. The court stated that double jeopardy does not prevent separate punishments based on the same conduct, but instead “is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense.” Because the legislature made its intent “crystal clear” that the enhanced kidnapping charge and the lewd and lascivious charges be separate, the court held that a double jeopardy violation did not occur on those grounds. However, because the legislature was not so clear that the lewd and lascivious molestation and lewd and lascivious conduct charges were separate, and because these two convictions were based on essentially the same conduct, the court held that double jeopardy precluded one of those convictions. The court thus instructed the trial court to vacate the lewd and lascivious conduct charge.

UNPUBLISHED OPINIONS

Bonner v. State, 2010 Tex. App. LEXIS 7440 (Tex. App., Sept. 8, 2010).

- Sufficiency of the evidence
- ER 403, 404(b) – admission of extraneous-offense evidence
- Ineffective assistance of counsel

The defendant challenged his multiple convictions for aggravated sexual assault of a child, indecency with a child, and inducing a child to engage in sexual conduct or a sexual performance. With slight discussion, the court found that the evidence, which touched on every element, was sufficient to support the convictions, and that any discrepancies among the witnesses' testimony would have been for the jurors to decide, as appellate courts do not resolve credibility issues. The defendant also challenged the admission of extraneous-offense evidence of (1) a marijuana grow operation in his home, which was the impetus for the initial police investigation, (2) child pornography found on his computer, and (3) evidence of his wife's use of methamphetamine. Because the defendant failed to preserve objections to the marijuana and methamphetamine at trial, the court refused to hear those arguments. The court did hold that the child pornography evidence was properly admitted to establish same-transaction-contextual evidence (*res gestae*), because the child victims testified that the defendant forced them to watch and reenact the pornography. The court noted that the video was clearly prejudicial, but it could not say that the probative value of two 30 second segments shown to the jury was substantially outweighed by the danger of unfair prejudice. Lastly, the defendant raised and the court rejected twenty claims of ineffective assistance of counsel, which were all either attributable to trial strategy or not found to be prejudicial.

State v. Barber, 2010 Kan. App. Unpub. LEXIS 645 (Kan. Ct. App., Sept. 10, 2010).

- Out of state conviction comparability
- *Apprendi* – out of state conviction used for enhancement

The defendant challenged whether his prior Arkansas rape conviction qualified as comparable sexually violent conviction under the Kansas persistent sex offender statute. That is, whether it was comparable to a Kansas conviction for rape, indecent liberties with a child, aggravated indecent liberties with a child, or attempt, conspiracy, or criminal solicitation to commit the above. Because there was no conceivable set of facts in which the defendant could have been convicted of rape in Arkansas at the time without the crime also being a sexually violent crime under Kansas law, the court found the out-of-state conviction comparable and sufficient to score as a prior under the Kansas persistent sex offender statute. Citing *Apprendi v. New Jersey*, the defendant also argued that to support the proposition that an out-of-state conviction was sexually motivated required a factual determination that must be made by a jury before it may be used as the basis for a sentence enhancement. However, the court held that the legislature had already found that the crime was defined as sexually violent, and the only trial court-

finding remaining was a factual determination that the conviction existed, which does not violate *Apprendi*.

CSE Case Law Update September 12-18, 2010

STATE SUPREME COURTS

State v. Perfetto, 2010 N.H. LEXIS 102, (N.H., Sept. 17, 2010).

- Right to religious freedom – impact of prohibition on contact with minors

After pleading guilty to 61 counts of child pornography, and serving six years in prison, the defendant challenged his probation requirement that he have no contact with minors. He argued that the requirement infringed upon his fundamental right to freedom of religion, as he could not attend meetings of his religious group, which included many children. The court presumed that the defendant had a fundamental right at stake. The court also presumed that the right was infringed by the probation requirement, and thus the government had to establish a compelling interest to warrant the infringement. The court noted it will not strike down conditions of release, even if they implicate fundamental rights, provided such conditions are reasonably related to the ends of rehabilitation and protection of the public from recidivism. The court declined to require a compelling interest because the probation requirement was facially neutral – it did not target any particular religion or religion in general. The court held that the suspension condition was reasonably related to the rehabilitation and supervision of the defendant. Prohibiting him from having contact with children provided protection to the class of individuals exploited by him and furthered his rehabilitation by limiting the circumstances that could lead to him re-offending.

COURT OF APPEALS

Shaffer v. State, 2010 Miss. App. LEXIS 501, (Miss. Ct. App., Sept. 14, 2010).

- Sufficiency of the evidence – Exploitation of a child with no actual child
- Authentication of internet chat logs
- Right to confrontation
- Failure of judge to recuse
- Rule of leniency – sentenced under the lesser punishment when conduct violates two statutes

The defendant was convicted of exploitation of a child by solicitation for the purpose of engaging in sexually explicit conduct for initiating sexual conversations with a 29 year-old Perverted Justice volunteer posing as a 13 year-old girl, and then attempting to meet the fictitious girl for sexual activity at an arranged location. The defendant challenged, among other things, the sufficiency of the evidence, arguing that a conviction could not be supported where there was no true child actually involved in his conduct. In 2007, the Mississippi legislature amended the exploitation statutes to explicitly permit undercover operatives to pose as children in such internet sting operations, but no such authorization existed in 2006, when the defendant had been charged. As such, the court stated it could not find that the defendant committed the completed offense, as there was no child involved, but did find that there was sufficient evidence proving the defendant guilty of attempted child exploitation. The defendant also argued that the chat logs were not properly authenticated at trial because the person that printed them out did not testify. The court found that the Perverted Justice volunteer, who testified in detail as to how the logs were preserved and claimed that they were “absolutely” a true and accurate copy, satisfied the low standard of authenticity – that the logs were what they purported to be. As a corollary argument, the defendant claimed that his right to confrontation was violated because he was unable to question the person responsible for maintaining the proxy server. The court dismissed the argument as it was not properly preserved at trial, but also noted that his right to confrontation was not violated when he was able to question the volunteer who was qualified to authenticate the chat log. The defendant next argued that the trial court judge erred by failing to recuse herself when she had presided over the defendant’s prior murder trial, which resulted in a conviction that was reversed on appeal, and she allegedly uttered prejudicial judicial comments about the defendant after the reversal. The court looked at the few transcripts provided by the defendant and found no demonstrated bias; instead, the trial judge merely acknowledged her familiarity with the defendant and the difficulty his family has had with him. Thus the court held that the defendant failed to provide sufficient evidence to rebut the presumption that the trial court judge was not biased against the defendant. Lastly, the defendant argued that his conviction for child exploitation could have also violated the lesser crime of computer luring, which was subject to a lesser punishment, and he therefore should only be sentenced under the computer luring statute. Because the defendant was provided clear notice of the exploitation charge, and did not request the lesser-included computer luring, the court held that he was properly convicted and sentenced under the more serious charge.

Fuson v. State, 2010 Ark. App. 593, 2010 Ark. App. LEXIS 632 (Ark. Ct. App. Sept. 15, 2010).

- Admissibility of custodial statement – Effect of promises made to suspect
- Search and Seizure – Search of car incident to arrest

The defendant was convicted of computer child pornography and challenged the admissibility of his statement, alleging that the interviewing detective made a promise of leniency that induced his confession, as well as the seizure of evidence found in his

vehicle incident to his arrest. The detective testified that he told the defendant at the beginning of the interview that they “need[ed] to get this cleared up tonight,” but he did not intend for that statement to be a promise. The court found that this statement was not an unambiguous promise of leniency, which would result in the defendant’s statement being suppressed as involuntary. However, because the statement could theoretically be construed as a promise, it was technically ambiguous, and as such the court turned to examining the defendant’s vulnerability. Based on his education, age, the length of the interview, and the fact that he was provided his Miranda warnings at the outset, the court held that the detective’s statement could not reasonably be interpreted as a false promise that induced the defendant to confess. Regarding the seizure challenge, the court noted that the defendant had left the vehicle across the street from the address provided by the officer posing as a minor female and he was arrested when he walked onto the front porch of the residence. An officer had also testified that in her experience persons arrested for the same crime usually carried items connected to the offense in their vehicle. Under these circumstances, the court held that at the time of the arrest the accused was in the immediate vicinity of a vehicle of which is was in apparent control, and the arresting officer had a reasonable belief that the vehicle contained things connected with the offense for which the arrest was made. As a result, the court held that the search of the defendant’s vehicle was lawful.

State v. Willis, 2010 Tenn. Crim. App. LEXIS 769 (Tenn. Crim. App., Sept. 15, 2010).

- Sentencing – post-plea request for judicial diversion

The defendant claimed that the sentencing judge erred by not granting his request for judicial diversion after he pled guilty to unlawful photographing in violation of privacy, a misdemeanor. The defendant argued that the State violated its agreement to not oppose the diversion by asking the trial court to consider the victim impact statement, in which the victim was adamantly opposed to diversion. Finding nothing to support such an agreement on the record, the court did not address this argument. The defendant also argued that the sentencing judge improperly considered the factors relevant for diversion. The sentencing judge explained on the record why he agreed with the victim that this case was not appropriate for diversion – namely, that the defendant could easily have faced more serious charges – but did not provide an on-the-record assessment of all of the necessary factors. As a result, the court reversed and remanded the case for re-sentencing to allow the sentencing judge to provide an adequate record.

UNPUBLISHED OPINIONS

State v. Hartwell, 2010 Kan. App. Unpub. LEXIS 656 (Kan. Ct. App., Sept. 17, 2010).

- Sentencing – discretion to not impose prison-alternative sentence

The defendant entered an Alford plea to aggravated indecent solicitation and challenged the sentencing judge’s decision to deny a prison-alternative sentence and instead impose

an aggravated sentence without a jury finding that aggravating factors exist. The court noted that the aggravated sentence was the statutory presumptive sentence. The court held that it lacks jurisdiction to review “any sentence that is within the presumptive sentence for the crime.” Regardless, a jury finding was not needed to support the aggravating factor because, again, it was already the presumptive sentence and was not necessary to depart from the standard range.

CSE Case Law Update September 19-25, 2010

STATE SUPREME COURTS

Dougherty v. State, 2010 WY 127, 2010 Wyo. LEXIS 135 (Wyo., Sept. 21, 2010).

- Void for vagueness – Child endangerment statute
- Jury instructions – Variance / constructive amendment from charging document
- Jury instructions – Sufficiency of definition of necessary element

The defendant argued that his conviction for child endangerment was unlawful based on the statute being unconstitutionally vague, both on its face and as applied. The statute made it a crime to knowingly “commit any indecent or obscene act in the presence of a child.” The defendant claimed that the words “indecent” and “obscene” are ambiguous and do not provide a fixed standard. He argued that socially unpleasant but not clearly criminal activities, such as nose picking and public displays of affection, could fall within the statute. The court stated that a challenger must do more than point to hypothetical applications of the law, and must demonstrate that the law is impermissibly vague “in all of its applications.” The court held that, when read in context with the knowledge element, the child endangerment statute gave sufficient notice of what conduct was prohibited and was thus not facially void. The defendant also claimed that the statute was vague as applied to his specific conduct, which was following an 8 year-old girl around a store while masturbating. The defendant claimed that he was only touching his genitals over his clothes. However, because he was found guilty by a jury, the court analyzed his conduct in the light most favorable to the state, which clearly qualified as indecent. Next the defendant argued that the charging language, which described his alleged conduct, and the jury instructions, which did not, were impermissibly varied and constituted a constructive amendment. The court noted that the state’s theory of the case remained consistent throughout, there was no possibility of an alternative offense, and therefore no possibility that he was convicted of an offense not included in the charging document. Lastly, the defendant contended that the jury was improperly instructed on the definition of “obscene,” which did not state that the conduct must relate to sexual matters as the definition does in other states. Given the lack of such a requirement in Wyoming’s statute, and the defendant’s clearly sexual conduct, the court held that the judge did not violate a clear and unequivocal rule of law with its instructions.

Concurring opinion: Agreed with the majority on basis of *stare decisis* regarding the vagueness challenge, but was troubled that it is left up to juries to point out, after the fact, what conduct is criminal when that is a legislative task.

People v. Clendenin, 2010 Ill. LEXIS 1071 (Ill., Sept. 23, 2010).

- Search and seizure – Warrantless search of evidence obtained by non-state actor
- Ineffective assistance of counsel – Consent to stipulated bench trial

After losing his motion to suppress compact discs that contained child pornography, the defendant was convicted of possessing child pornography by way of a stipulated bench trial. The defendant's girlfriend, who had access to his house, searched his compact discs and found the pornography. She turned the discs over to police and police viewed them without first seeking a warrant. The court held that the police viewing the discs was not improper because the girlfriend, who was not a state actor, had "already frustrated defendant's expectation of privacy." The police search merely confirmed the results of the private search, and was thus proper. The defendant also claimed that his trial counsel did not share the contents of the stipulated facts with him, and was thus deficient under *Strickland v. Washington*. The court recited cases that provided that, subject to five decisions that belong exclusively to the defendant, the defense attorney has "the right to make the ultimate decision with respect to matters of tactics and strategy after consulting with his client." Thus the waiver of the right to confrontation "does not belong exclusively to a defendant." As such, the court noted it would uphold an evidentiary stipulation where, as here, (1) the defendant does not object at the time of stipulation, and (2) the decision is a matter of trial tactics and strategy. The sole exception, however, is where a stipulation is tantamount to a guilty plea because either (a) the State's entire case is presented and the defendant fails to preserve a defense, or (b) the stipulation concedes the sufficiency of the evidence to support a conviction. Because the stipulation here neither failed to preserve a defense nor conceded the sufficiency of the evidence, the court held that the defense attorney's performance was not deficient. The court overruled the lower appellate court that held that—in all instances—the record must reflect that the defense attorney informed the defendant of the specific contents of the stipulation.

COURT OF APPEALS

State v. Moon, 2010 Ohio 4483, 2010 Ohio App. LEXIS 3766 (Ohio Ct. App., Sept. 23, 2010).

- Ineffective assistance of counsel
- Sentencing – allowable considerations
- Sentencing – length of postrelease control

The defendant pled to multiple counts of illegal use of a minor in nudity-oriented material, stemming from law enforcement's discovery of 500 pictures of child pornography belonging to the defendant. Airport screeners initially found child

pornography in the defendant's luggage. Law enforcement then obtained a search warrant for the defendant's home and found computer disks with more such pornography, although his computer was conspicuously missing. The defendant argued that his attorney was deficient for not requesting to view the unsealed search warrant. Using the *Strickland v. Washington* standard, the court found that the defendant could not show actual prejudice by a purely speculative claim that the warrant may have been deficient. The defendant also argued that the judge improperly considered the missing computer in his sentence. The court quickly rejected the claim, noting that the defendant first brought up the computer by claiming he was not involved in any file-sharing networks, which could not be confirmed without the computer. The defendant also raised several challenges to his sentence, which was 20 years in prison. Contrary to the defendant's claims, the court found that the judge considered all of the necessary statutory factors, imposed a similar sentence to cases with similar facts (more importantly, reached his conclusion using the same factors), and the sentence would not "shock the conscience" so as to be cruel and unusual. Lastly, the defendant successfully challenged the length of his postrelease control, which the judge ordered to be five years on each count. Two of the counts – for simple possession – were limited to only three years of postrelease control, and the court remanded the case to the sentencing judge for resentencing on those two counts only.

UNPUBLISHED OPINIONS

Keim v. Commonwealth, 2010 Ky. Unpub. LEXIS 87 (Ky., Sept. 23, 2010).

- Violating motion in limine – prohibited res gestae evidence

The defendant was found guilty of multiple counts of child sexual abuse, stemming from incidents where he had three minors perform sex acts on him and each other. In many of these encounters, he showed the minors pornography while providing them alcohol. The trial judge, with essentially a concession from the state, granted the defendant's request to prohibit state witnesses from referring to the pornography, as the defendant was not charged with any counts related to the pornography. Nonetheless, several State witnesses referred to the pornography in their testimony. The trial judge would sustain the defendant's objection but deny his request for a mistrial; instead, the judge offered to provide the jury with an admonishment, and the defendant declined. On appeal, the court ruled that the trial judge was correct that a mistrial was not merited. The reason being, however, was that the evidence should have been admitted by the trial judge. The court held that evidence that the defendant had showed the minors pornography was "necessary for the jury to see the entire picture" and as such would have been admissible under ER 404(b). The court also held that the evidence was clearly relevant and "almost benign" under ER 403 when compared to the other graphic testimony of sexual conduct admitted at trial.

September 26-30, 2010

COURT OF APPEALS

Casady v. State, 2010 Ind. App. LEXIS 1796 (Ind. Ct. App., Sept. 28, 2010).

- Filing additional charges – Timing before trial
- Sufficiency of the evidence
- Search and seizure – Probable cause to support warrants
- Sentencing

The defendant was originally charged with one count of voyeurism and one count of possession of child pornography for videotaping numerous individuals urinating and showering in a men's locker-room. A week prior to trial, the state filed sixteen additional counts of voyeurism under a different cause number. The judge denied the state's request for consolidation. As a result, the state decided to dismiss the original case with two counts and proceed solely on the newly filed case, which led to a conviction after a jury trial. On appeal, the defendant argued that the sixteen counts under the new case should have been dismissed because amendments in Indiana must be made 30 days before the omnibus date. The court disagreed, noting that the new counts, based on separate acts of voyeurism, were charged under a new cause number, not added to the original case. The court also acknowledged that the state did not attempt to file the new charges after unsuccessfully attempting to amend the original charge. Instead, the new case was filed and the state later tried to consolidate. As a result the court held that the filing of the new charges was not improper. The defendant also argued that the evidence was insufficient to convict him at trial. He specifically contended that he was not "secretly peeping" into areas where people could "be expected to disrobe." Finding otherwise, the court held that him holding the camera by his waist and repeatedly peeking around the shower door constituted peeping, and bathrooms and showers were clearly places people could expect to disrobe – and each were in fact explicitly noted in the statute. Next the defendant challenged whether probable cause existed to support the warrants to search his camera and home. Given the witness's description of the defendant videotaping him in the shower, the defendant's admissions to police that they had "got him" and his "life was over," and the video camera in his bag, the court held there was sufficient probable cause. Lastly, the defendant claimed that his sentence – six years in prison, with 12 suspended – was too long given his lack of criminal history and no indication he had shared the videos with anyone else. Because he failed to cite any authority, the court considered the argument waived (as it did for the defendant's claim that the video evidence was unfairly prejudicial).