CSE Case Law Report
September 2011

September 1 – 4, 2011

State Supreme Courts

State v. Race, 259 P.3d 707 (Kan. September 2, 2011).

- Hearsay
- Sufficient evidence
- Jurors observing the Defendant in handcuffs
- Jury instructions

The Defendant, Jared Race, was convicted of two counts of rape, three counts of aggravated criminal sodomy and four counts of aggravated indecent liberties with a child. The charges stem from the Defendant's sexual abuse of his daughter, step-daughters and niece.

The charges came to the attention of the authorities after one of the girls complained about the Defendant's behavior to her mother. The Defendant's ex-wife and her sister immediately confronted the Defendant, spoke to the girls and contacted the police. At trial, the Court allowed, over his objection, the Defendant's ex-wife to testify about the conversation she had with her sister about the disclosure. Also, one of the jurors observed the Defendant in handcuffs walking down the hallway. In addition, the State was allowed to admit and publish to the jury 10 images of child pornography found in the Defendant's possessions and on his computer.

On appeal the Defendant claimed that the Trial Court erred by allowing the ex-wife to testify about what her sister told her over the phone, admitting the images of child pornography, for not granting his request for mistrial after the juror saw him in handcuffs and that there was not sufficient evidence to support his conviction.

The Court held that the conversation between the ex-wife and her sister was properly admitted for the non-hearsay purpose of explaining her reaction to receiving the news of her daughter and niece being sexually abused. The Court also held that because the Defendant did not object to the admission of the photographs he could not now object. The evidence to support the charges was sufficient. Finally the Court found that there was no error in the Trial Court's denial of the Defendant's two motions for mistrial. After holding a hearing the Trial Court determined that the juror who observed did not impact his ability to be a fair and impartial juror. The Court also determined that the time the jury deliberated while that juror was in the courtroom for the hearing was just a few minutes and was not grounds for mistrial.

State Courts of Appeal

Edwards v. State, 952 N.E.2d 862 (Ind. Ct. of App. September 2, 2011).

● Sexually Violent Predator

Pursuant to a plea agreement the Defendant, Kirby Edwards, pled guilty, to three counts of Possession of Child Pornography with an agreement for a 5 year cap to his sentence. The State filed a motion for a hearing to determine if the Defendant is a sexually violent predator, pursuant to Indiana Code § 35-38-1-7.5(c).

The Trial Court assigned two psychologists to interview the Defendant. The Defendant was also assigned his own psychologist to evaluate him. These two doctors interviewed the Defendant at the same time, but provided the Court with separate reports. In addition, during the preparation of the pre-sentence investigation report the Defendant admitted to prior investigations of sexually abusing young children and that he had downloaded and was aroused by images of children being sexually abused.

At the SVP hearing, the two psychologist for the state opined that the Defendant was a SVP. The psychologist appointed for the Defendant did not. The Trial Court found that the Defendant was a SVP.

On appeal the Defendant claims that the Trial Court erred because the evidence presented during the hearing was not sufficient to support the finding and that he was not afforded two evaluations as required by the statute. The Court rejected his arguments finding that the evidence was sufficient to support the finding that he was a SVP. The Court also held that while the two doctors for the state interviewed the Defendant together they submitted independent reports based on their own evaluations.

September 5 – 11, 2011

State Supreme Courts

*State v. Flege*l, 261 P.3d 519 (Idaho September 6, 2011).

● Lesser included offenses

The Defendant was charged by the grand jury, with one count of lewd conduct with a child under sixteen years of age, in violation of Idaho Code § 18-1508. At the conclusion of trial the court instructed the jury on the charged offense as well as sexual abuse of a child under sixteen years of age, in violation of Idaho Code § 18-1506, as a lesser included offense. The jury found the Defendant not guilty of the lewd conduct charge, but hung on the sexual abuse charge.

The State, without submitting to the grand jury amended the indictment. The Defendant was convicted of that crime following a jury trial.

The Defendant appealed claiming that the State should have resubmitted the case to the grand jury and was not legally allowed to amend the indictment on its own. The Court held that the sexual abuse charge was not a lesser include crime of the lewd conduct charge. The Trial Court should not have instructed the jury on it and the State should have submitted the amended complaint to the grand jury.

State v. Jones, 2011 WL 4031519 (La. September 7, 2011).

● Statutory Construction

The Defendant, Todd Jones, was charged with two counts of forceable rape and one count of indecent behavior with a child. Following a jury trial, the Defendant was convicted on a sole count of attempted indecent behavior with a child. The Defendant appealed his conviction and the Court of Appeals reversed the conviction finding that the Defendant had made no overt acts to satisfy the elements of attempt.

The Defendant, an assistant police chief, engaged in a conversation with the Victim, a 15 year old male. During the conversation, which took place in a bedroom with another individual present, the Defendant asked the Victim to engage in oral sex in return for providing him with a ride to the store. The Defendant did not do anything other than request the Victim engage in this behavior. The Victim reported the matter to his mother.

The Court held that given the circumstances, the Defendant's request was sufficient to satisfy the attempt elements of indecent behavior with a child. The Court held that the fact that the Defendant "was the Assistant Chief of Police, and made this sexual request to the teenage victim in the bedroom of and in the presence of a known transvestite who also had made lurid sexual comments to the victim" was an overt act.

Unpublished Opinions

State v. Williams, 2011 WL 3962604 (N.J. Super. Ct. App. Div. September 9, 2011).

● Search and Seizure
● Sentencing

The Defendant Dennis Williams, pled guilty to second-degree possession of a weapon by a felon, in violation of N.J.S.A. 2C:39-7b. The Defendant was sentenced to 8 years in prison with five years of parole.

Prior to entering his plea, the Defendant had filed a motion seeking to suppress evidence located in his home during the execution of a search warrant. The Defendant's home was searched by federal and local officials pursuant to an investigation into the possession of child pornography. During the search of the home, the Defendant shared with his brother, officers located a number

of firearms and pieces of ammunition in a locked gun locker. The gun locker was in the Defendant's bedroom.

The Defendant claims on appeal that the search warrant did not authorize search of the locked gun cabinet. The Defendant also claims that the Trial Court sentenced him improperly.

The Court held that the search was proper in that images of child pornography can be hidden in almost any location within a house, including a locked gun cabinet. The Court found that the search warrant clearly allowed for the search of locked containers. The Court also found that the Defendant's sentence was proper.

September 12 – 18, 2011

Unpublished Opinions

Heddings v. State, No. DA 10–0055, 362 Mont. 90 (Mont. September 14, 2011).

- Double jeopardy
- Ineffective assistance of counsel

The Defendant, Scott Heddings, pled guilty to one count of incest and was sentenced to 20 years in prison with 16 years suspended. The Defendant was also charged in Federal Court with multiple counts of receipt and possession of child pornography and received a sentence of 240 months in prison. The Defendant's federal sentence took into account the fact that he had been charged with incest in the state system

The charges stem from sexual abuse the Defendant committed on his step-daughter in 2000. During the course of the investigation, authorities discovered that he also had a collection of child pornography, to which he confessed.

The Defendant claims on appeal that he was denied effective counsel because his attorney failed to object to his state prosecution on grounds of double jeopardy. The Defendant claimed that it was double jeopardy because his state incest charges were used to enhance his federal penalty.

The Court rejected the Defendant's claim of ineffective assistance of counsel after finding that there was no basis for that attorney to object to his state prosecution on double jeopardy grounds. The behaviors in the state case, hands on incest, and the federal case, possession of child pornography, were different in scope and time, thus were not subject to double jeopardy.

Mayes v. State, No. PD–1633–10, 2011 WL 4436579 (Tex. Crim. App. September 14, 2011).

- Sentencing

The Defendant, James Mayes, was convicted following jury trial of sexual assault; a second degree felony. The Defendant was then sentenced by the jury to 5 years in prison and five years of probation.

The Defendant was a teacher who engaged in a sexual relationship with a 16 year old student. The crime for which he was convicted carried a sentence of 2 to 20 years and potential community service for a minimum of 5 years. Initially, the jury returned a sentence of 2 years in prison with 5 years of probation. The Trial Court rejected this verdict claiming that it was illegal.

The Court held that the jury's sentence was not illegal. Because the jury's verdict was within the range of 2 to 20 years and did not recommend community service, the original sentence should have been accepted.

State v. Shields, No. G043124, 131 Cal.Rptr.3d 82 (Cal. Ct. App. September 16, 2011).
–Certified for Partial Publication—

- Equal Protection
- Statutory Construction
- Sentencing
- Substitution of Court Appointed Counsel

The Defendant, Terry Shields, was convicted following a jury trial of ten felony charges involving the sexual abuse of multiple children as well as the possession and production of child pornography. Three of the convictions were for using a minor to produce child pornography in violation of California Penal Code § 311.4(c).

The charges stem from the Defendant's behavior with a number of children he was either babysitting or driving on his school bus. The Defendant was also observed at an internet cafe looking at child pornography. When questioned by law enforcement, the Defendant claimed that the images were pop-ups and that he was saving them to show the police. A search warrant of the Defendant's car, storage units, and residence uncovered thousands of images of child pornography, pictures and videos. Among the items discovered during the execution of the search warrants were images the Defendant had created.

The Defendant claimed that it was a violation of the state and federal equal protection clause for him to be charged with three violations of § 311.4 because the statute does not allow for separate charges. The Defendant also claimed that the Trial Court erred in his sentencing.

The Court rejected the Defendant's claim that § 311.4 did not allow him to be charged with three separate charges for the images that he produced of the three different girls. The Court found that the State of California had a legitimate reason for allowing separate charges in such situations. In addition, the Court held that his equal protection rights were not violated.

In re Martin, No. 104,826, 2011 WL 4357844 (Kan. Ct. App. September 16, 2011).

● Sexually Violent Predator

The Petitioner, Eddie Martin, originally pled guilty to two counts of attempted aggravated indecent solicitation of a child. While on probation for these offenses, the Defendant was accused and convicted of attempted aggravated indecent solicitation of a child, for sexually abusing his step-daughter, and sentenced to prison.

Prior to his release date in 2009, the Petitioner was evaluated by psychologist Dr. Kohrs about his sexual history. The State then filed a motion to have the Defendant classified as a sexually violent predator. He was evaluated by a psychologist for the State and his own psychologist. Dr. Kohrs did not testify at the hearing and her report was not admitted into evidence. Her report was read and mentioned by the psychologist for the State. Following the hearing the Petitioner was found to be a sexually violent perpetrator and committed to the state for treatment.

The Petitioner appealed finding that the Hearing Court improperly considered his sexual orientation when making its decision. The Petitioner also claimed that the evidence was insufficient to support the SVP finding as it was based in part on the evaluation by Dr. Kohrs.

The Court found that the references to the Petitioner's sexual orientation was not a factor in the SVP determination. Also the Court found that there was sufficient evidence to support the SVP finding. The Court found that the Hearing Court properly relied heavily on the findings of the State's psychologist after determining that the Petitioner's psychologist gave his opinion without all the necessary information.

September 19 – 25, 2011

State Supreme Courts

Fuson v. State, 2011 WL 4396945 (Ark. September 22, 2011).

● Suppression
● Search and Seizure

The Defendant, David Wayne Fuson, was convicted following a jury trial of computer child pornography, in violation of Ark. Code Ann. § 5-27-603(a)(2). The Defendant was sentenced to 20 years in prison.

The charge stems from the Defendant's attempt to meet with an individual he believed to be a 14 year old girl. The Defendant was actually speaking with an undercover officer posing as a child. The Defendant arrived at the "victim's" house and was arrested. Upon his arrest the Defendant's truck was impounded. The Defendant was advised of his "*Miranda*" rights and admitted that he was there to meet and have sex with a 14 year old girl. Upon searching the Defendant's vehicle they found condoms and lubricating jelly.

The Court found that the officer who interviewed the Defendant was not made promises of leniency that caused him to waive his "*Miranda*" rights. The officer's statement about clearing things up and telling him that his cooperation would look better for him were not unambiguous promises of leniency. In addition, the Court held that the items found in his vehicle were properly admitted as an impound search.

State Courts of Appeal

Halliday v. State, 2011 Ark. App. 544 (Ark. Ct. App. September 21, 2011).

- Sufficiency of Evidence
- Position of Authority/Temporary Caretaker
- Jury Instructions/Lesser Included Offenses

The Defendant, Charles Halliday, was convicted following a jury trial of sexual assault in the first degree and sexual indecency with a child. He was sentenced to 15 years in prison.

The Defendant worked at a horse farm where the Victim came to learn horse riding. The Defendant was her teacher. The Defendant would pick the Victim up before training and take her home after they were finished.

The Defendant claims that the evidence could not support his convictions because he was not either in a position of authority over the victim nor was he a temporary care taker. The Defendant also claims that the jury should not have been instructed on sexual indecency with a child as a lesser included offense of sexual assault in the first degree.

The Court held that the evidence was sufficient to establish that the Defendant was in fact either in a position of authority over the Victim or was her temporary caretaker. The Court found that the testimony presented at trial clearly established that the Victim's parents placed their 14 year old daughter in his care and that he was at minimum her chaperone and thus in a position of authority. The Court also found that the evidence established that because the Defendant drove the child to and from training he was in the position of a temporary caretaker, similar to a babysitter. Lastly, the Court found that the Defendant had not properly preserved the jury instruction issue.

Unpublished Opinions

State v. Morton, No. 103,193, 2011 WL 4440187 (Kan. Ct. App., September 23, 2011).

- Other Bad Acts
- Sufficient Evidence
- Elements of Indecent Solicitation
- Mistrial for Jurors Seeing Defendant in Handcuffs

The Defendant, Mark Morton, was convicted following a jury trial of two counts of aggravated solicitation of a child and two counts of lewd and lascivious behavior. The Defendant was sentenced to 68 months in prison.

The charges in this case arise out of the Defendant's actions with a 13 year old child in 2008. The Defendant was friends with the Victim's father. On multiple occasions the Defendant encouraged the Victim to masturbate with him while they were together. At trial, a number of other teen boys testified to conduct similar to that which the Victim had alleged.

On appeal the Defendant claimed the Trial Court should not have admitted testimony about other acts, that the evidence was not sufficient to convict him on the lewd and lascivious charges and that the aggravated indecent solicitation relied on the acts in the lewd and lascivious charge. Finally the Defendant claims that the Trial Court should have granted his motion for mistrial after a juror saw him in handcuffs.

The Court found that the admission of the other bad acts evidence, if wrong, was harmless given the strength of the evidence presented by the Victim. The Court also held that there was sufficient evidence to support all of the convictions. Finally the Court held that the juror(s) seeing the Defendant in handcuffs was not of the length of time that would impact their ability to be fair and impartial.

September 26 – 30, 2011

State Supreme Courts

State v. Hart, 28 A.3d 898 (Pa. September 28, 2011).

- Sufficiency of Evidence
- Elements of Attempted Luring

The Defendant, Walter Hart, III, was convicted following a bench trial of two counts of attempted luring of a child into a motor vehicle. The Defendant was sentenced to probation and 10 years of sex offender registration. No evidence was presented during trial that showed the Defendant had any malicious intent toward the victim he offered a ride in his car.

The Defendant appealed and his conviction was affirmed in the Court of Appeals. The Appellate Court found that the crime for which the Defendant was convicted was a per se offense and that no malicious harm was necessary.

The Court found that attempted luring of a child into a motor vehicle required some evidence of malicious intent. The Court stated that "[t]he evidence showed only that the [Defendant] twice offered a ride to two children, and did not additionally provide any temptation or enticement for the boys to enter his vehicle, the mere act of offering the ride, standing alone, did not fall within

the common, ordinary, and accepted meaning of lure." The Defendant's conviction was overturned.

State v. Hughes, 261 P. 3d 1067, (Nev. September 29, 2011).

● Vagueness of Minor in Statutory Language

The Defendant, Aaron Hughes, was charged with child pornography, in violation of NRS 200.710. The Defendant filed a motion to dismiss which was granted. The Trial Court held that the statute was vague and that it only applied to production of pornography involving individuals under 16 years of age.

The Court reversed the holding of the Trial Court. The Court held that "minor" in the statute was not unconstitutionally vague "because it has a well-settled and ordinarily understood meaning: an individual under 18 years of age". The Court also found that there was a valid reason for the legislature to set the age of sexual consent at 16 while the age of consent for pornography is 18.

Unpublished Opinions

Parker v. State, No. 2D09–3230, 2011 WL 4467635 (Fla. Dist. Ct. App. September 28, 2011).

● Obscenity

The Defendant, Danny Parker, pled guilty pursuant to a plea agreement to 10 counts of possession of child pornography, in violation of Fla. Stat. § 755.0847, 827.071(5). He reserved the right to appeal the denial of his motion to dismiss.

The Defendant was a Sunday school teacher. While in that position he took photographs of many of his students. The Defendant would then place the heads of those children on the bodies of adult women engaged in various sexual acts. The Defendant filed a motion to dismiss the charges as the images were not child pornography. This motion was denied.
The Court agreed with the Defendant and reversed his convictions. The Court found that the statute requires that the images must be of children and these images in the instant case are not children.