

SEX CRIMES/CHILD ABUSE CASE LAW UPDATES FOR AUGUST 2011

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Failure to Register As Sex Offender

State v. Marcel, 2011 WL 3820700 (Fla.App. 3 Dist.)

Eighteen-year-old defendant who was convicted of having sex with a fourteen-year old victim sought to have his sex offender registration status removed under the Romeo and Juliet law. One of the criteria for relief is that the defendant be “not more than four years older than the victim of the violation who was fourteen years of age or older but not more than seventeen years of age at the time the person committed the violation.” The defendant asked the court to interpret “not more than four years older” to mean that he was not yet five years older. The appellate court used the birthday rule and said since the defendant was four years and three months older than the victim; he was more than four years older and cannot have his registration status removed.

Andrews v. State, 2011 WL 3558148 (Fla.App. 1 Dist.):

State provided sufficient evidence to prove registered sexual offender was using his girlfriend’s apartment as a temporary address: witnesses testified that his vehicles was parked there regularly and the defendant told them he lived there.

Convictions on two counts of failure to register based upon failing to register at two three-month intervals did not violate double jeopardy.

Two consecutive ten-year sentences did not constitute cruel and unusual punishment.

Tyler v. State, 2011 WL 3300165 (Fla.App. 2 Dist.):

Proving that defendant could not afford an attorney fell far short of proving that he could not afford to update his driver's license for purposes of statute requiring defendant to register as a sexual offender by obtaining updated driver's license after changing his residence.

In the absence of evidence demonstrating its application to defendant's particular circumstances, statute, requiring defendant to register as a sexual offender by obtaining updated driver's license after changing his residence, was facially valid; there was no showing that defendant had made an effort to update his license, but

was unable to do so because he could not pay the associated fee despite his reasonable efforts.

Sexual offenders are legally compelled by statute to obtain driver's license or identification card every time they change their residences, and they are expressly required to pay for it.

Child Hearsay

Rodriguez v. State, 2011 WL 3586154 (Fla.App. 3 Dist.)

Trial court did not abuse its discretion in prosecution for sexual battery on a person less than 12 years of age by concluding that child victim's hearsay statements were reliable, so as to be admissible pursuant to the child sexual abuse hearsay exception; trial court found that child provided a detailed account of the assaults, that child's reports to various witnesses were consistent, that questions posed to child were open-ended and not leading, that child's answers used words consistent with her age, that there was no evidence the statements or the method of obtaining them were untrustworthy, and that child had no motive to lie and there was no evidence she was coached.

For a child's hearsay statements to be admissible under the child sexual abuse hearsay exception, the reliability of the statements must be determined independent of any corroborating evidence.

Elghomari v. State, 2011 WL 3476877 (Fla.App. 4 Dist.):

Trial court complied with statute that required it to make specific findings of fact regarding basis for allowing admission of seven-year-old's testimony under child victim exception to hearsay rule and, thus, testimony was admissible in prosecution for sexual battery and lewd molestation; trial court made all requisite findings of reliability and set them out in detail, including that victim understood difference between truth and lie, right and wrong, described crimes in age appropriate language but, with significant detail that would not otherwise be available to typical seven-year-old concerning sex acts and bodily fluids.

State committed no discovery violation when it described during its opening statement two incidents of molestation that, although charged in the information, were not previously referenced or identified in the victim's statements provided as part of the discovery process; statements were oral, defendant was charged with the incidents, information was filed well before the victim's deposition, and defense counsel had the opportunity to ask specific questions about those two counts.

Discovery rules do not require state to disclose unrecorded oral statements.

Trial court abused its discretion in admitting irrelevant testimony by the victim's mother regarding the weakening of mother's sexual relationship with defendant around the time he abused the victim in prosecution for sexual battery and lewd molestation.

Error in admission of testimony by the victim's mother regarding the weakening of mother's sexual relationship with defendant around the time he abused the victim was harmless, where testimony was an insignificant part of the trial, and State made only brief, isolated references to the testimony during closing argument.

Obscenity

Austin v. State, 2011 WL 3452939 (Fla.App. 1 Dist.):

Defendant charged with showing obscene material to a minor was not entitled to modify jury instruction on obscenity to include a “reasonable person” standard; trial court correctly instructed jurors to apply contemporary community standards only to the prurient interest and patent offensiveness prongs of obscenity test, and instruction did not refer to community standards in explaining what to consider in determining whether the material had literary, artistic, political scientific value.

Child Pornography

Bussell v. State, 2011 WL 3331272 (Fla.App. 1 Dist.):

The testimony of a single witness, even if uncorroborated and contradicted by other State witnesses, is sufficient to sustain a conviction.

In prosecution of defendant for possessing child pornography, State presented sufficient circumstantial evidence to establish that defendant had constructive possession over the illicit computer images so as to warrant submission of charges to jury; defendant's wife and son both testified they did not download the pornography, defendant worked offshore and admitted he was not working on the days the pornography was downloaded, county investigator testified no illegal material was downloaded when defendant was away working, and both parties' experts testified it was very unlikely someone could have searched for and downloaded the files in question without intending to download child pornography.

Constructive possession exists where the accused does not have physical possession of the contraband, but knows of its presence and can maintain dominion and control over it.

State is not required, in order to survive motion for acquittal in circumstantial evidence case, to rebut conclusively every possible variation of events that could be inferred from the evidence, but only to introduce competent evidence that is inconsistent with the defendant's theory of events, and once the State introduces such evidence, it becomes the jury's duty to determine whether the evidence is sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt.

Downward Departure

State v. Sweeney, 2011 WL 3364831 (Fla.App. 2 Dist.)

While the record supported the trial court's finding that defendant was remorseful, there was no evidence that the offense was unsophisticated or that this was a single, isolated incident, and thus, evidence did not support downward departure on basis that the offense was committed in an unsophisticated manner and that it was an isolated incident for which defendant had shown remorse; record revealed that defendant had previously downloaded child pornography and traded the disks with other individuals.

While cooperation with law enforcement was a valid basis for a downward departure sentence, defendant's actions did not rise to the level of cooperation that would support a downward departure because his assistance did not result in solving any crimes or lead to the arrest of other persons.

Other

Roberts v. State, 2011 WL 3300163 (Fla.App. 4 Dist.):

During deliberations in prosecution of defendant for lewd molestation of his daughter, juror's note, disclosing that she had child who would be attending the same school as victim and she felt the matter was too close to home, raised suggestion of bias which demanded an adequate inquiry from the trial court, and trial court erred by refusing to conduct inquiry to determine whether juror could remain fair and impartial or might have tainted the remaining jury panel; fact that juror brought it upon herself to send the note to trial judge suggested that she might have felt that she could no longer be fair and impartial juror, and judge's only reason for refusing to question juror during trial was that the judge had already excused the alternate juror.

Prosecutor's closing argument was improper because it was replete with comments which offered prosecutor's opinion as to defendant's guilt, shifted the burden of proof, appealed to sympathy for the accuser, vouched for the accuser's

credibility, and invited the jury to base its verdict on which witness the jury thought was most credible.