



PUTTING RESTRAINTS ON KIDNAPPING PROSECUTIONS

Confinement must now
be act of 'independent
criminal significance'

By **PROLOY K. DAS**

The Supreme Court has issued more than three dozen decisions in the last 12 months shaping our criminal law jurisprudence in a variety of different areas. Here are the highlights, starting with three significant appeals from kidnapping convictions.

The kidnapping statute does not provide any minimum time or distance specifications with respect to the restraint of the victim. Thus, if a person threw an individual to the ground in order to punch her, or held someone down for the purpose of committing a sexual assault, he was also guilty of kidnapping. The court had reaffirmed this rule numerous times since 1977, most recently in *State v. Luurtsema*, 262 Conn. 179 (2002). With the penalties for kidnapping being more severe than those for assault, sexual assault, and robbery, prosecutors would frequently charge kidnapping in any case involving one of these crimes. No more. In *State v. Salamon*, 287 Conn. 509 (2008), and *State v. Sanseverino*, 287 Conn. 608 (2008), both released on the same day, the court overruled its prior decisions and held that, in order for a defendant to be convicted of kidnapping, the victim must have been "moved or confined in a way that has independent criminal significance, that is, the victim was restrained to an extent

exceeding that which was necessary to accomplish or complete the other crime."

Determination of whether the restraint was not merely incidental to the commission of some other crime is a factual question for the jury to decide. The prosecutor's charging decision cannot sidestep the requirement of independent criminal significance. Thus, even if a defendant is charged only with kidnapping and not assault, if the restraint imposed on the victim is merely incidental to the uncharged assault, he is not guilty of kidnapping. The future applicability of the *Salamon/Sanseverino* rule remains to be seen but, in applying *Salamon* to *Sanseverino*, the court made clear that that retroactive application of this construction of the kidnapping statutes is appropriate in "pending cases." However, as the dissent noted, there is no constitutional bar to applying the rule in prior cases.

In *State v. DeJesus*, 288 Conn. 418 (2008), the first case to apply the rule, the court resolved a tension between the cases and held that the appropriate remedy for a *Salamon/Sanseverino* error is a remand for a new trial, with appropriate instructions to the jury on the need for restraint beyond that necessary to commit the other crime. But ultimately, *DeJesus* will be best known for its philosophical debate about the authority of the court to develop and change the rules of evidence after the adoption of the Evidence Code in 2000. Overruling its decision in

State v. Sawyer, 279 Conn. 331 (2006), the court held that that the code was adopted for ease and convenience, and that it did not divest the Supreme Court of its authority to develop and change law of evidence. The

court then adopted an exception to the code, allowing for the admission of prior misconduct evidence to establish propensity in sex-related cases. The general rule that prior misconduct evidence in non-sex crime cases is inadmissible, except in a few limited circumstances, remains intact as evidenced by *State v. Randolph*, 284 Conn. 328 (2007). There, the court reversed a robbery conviction because evidence of the commission of a different robbery was improperly admitted because it was not

sufficiently similar to the charged robbery to prove a common scheme. However, in *State v. Griggs*, 288 Conn. 116 (2008), the admission of the defendant's four prior domestic violence convictions in an attempted murder trial was not erroneous where the defendant had opened the door by testifying on direct examination to having "a couple domestics with the wives" and the trial court instructed the jury against using that evidence for propensity.

Sex Offenders

On the topic of sex crimes, in *State v. Arthur H.*, 288 Conn. 582 (2008), the court held that a finding that a defendant



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committed a felony for a sexual purpose, without a further finding of public danger, is not sufficient to require the defendant to register as a sex offender. In *State v. Boyle*, 287 Conn. 462 (2008), the court vacated for mootness and eliminated the precedential value of an Appellate Court decision that had held the imposition of sex offender evaluation and treatment for a defendant convicted of a DUI to be improper. The court held in *State v. T.R.D.*, 286 Conn. 191 (2008),

that the crime of failing to comply with the sex offender registry requirements is a strict liability offense, though it ultimately reversed the defendant's conviction because the trial court failure to apprise the defendant of the possible term of incarceration rendered his waiver of counsel inadequate.

Other Crimes

Kidnapping was not the only crime to receive the court's attention. In *State v. Cook*, 287 Conn. 237 (2008), the court held that an elderly man who had waved a table leg at his roommate and threatened him with it could not be convicted of carrying

a dangerous weapon unless the jury found his threat to be a "true threat" (unprotected speech), rather than simply idle talk or banter. *State v. Lynch*, 287 Conn. 464 (2008), affirmed the defendant's conviction for failure to pay wages and clarified that, although an agreement to defer the accrual of future wages until an employer receives income is not contrary to public policy, an agreement to defer back wages does violate public policy and, therefore, is not a valid defense to the crime.

The court also issued some noteworthy decisions in the area of search and seizure. In *State v. Grant*, 286 Conn. 499 (2008), the court held there is no constitutional requirement that all potentially exculpatory evidence be included in a search warrant affidavit. The defendant in *State v. Kalphat*, 285 Conn. 367 (2008), did not have any expectation of privacy in a box containing marijuana that had been shipped through and partially opened by a shipping facility because it was addressed to another person. He therefore lacked standing, and the court did not have to address the defendant's

claim that the shipping company employees were acting as agents of the police. However, in *State v. Betts*, 286 Conn. 88 (2008), the court rejected the defendant's claim that his fiancée was acting as an agent for the state when, at the request of a police officer, she looked for and found, in the bedroom she shared with the defendant, an incriminating letter that he had written to her daughter. The fiancé had been given the letter by her daughter before the defendant had taken and hidden it from her. Finally, in *State v. Johnson*, 288 Conn. 236 (2008), the court held that police officers do not have an affirmative duty to create evidence and, thus, they are not constitutionally required to take notes or otherwise record communications with witnesses.

The past year saw the further development of search and seizure jurisprudence and interpretation of a number of criminal statutes. But the impact of the 2007-08 year on criminal jurisprudence will be remembered for its scholarly majority, concurring, and dissenting opinions in *Salamon*, *Sanseverino*, and *DeJesus*, where the court changed the crime of kidnapping and retained its authority over the law of evidence. ■

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