

2011 IL App (2d) 100728-U
No. 2-10-0728
Order filed December 8, 2011

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Du Page County.
)	
Plaintiff-Appellant,)	
)	
v.)	No. 09—CF—2923
)	
TERRANCE E. SIGL,)	Honorable
)	Blanche Hill Fawell,
Defendant-Appellee.)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Bowman concurred in the judgment.

ORDER

Held: The trial court committed reversible error when it granted defendant's motion to quash a search warrant and suppress evidence where the good-faith exception would preclude excluding the evidence obtained during the search warrant's execution. We reverse and remand.

¶ 1 The State appeals the trial court's order quashing a search warrant and suppressing the evidence obtained after a search of defendant's, Terrance E. Sigl, residence and personal computer. The State contends that the trial court committed reversible error when it quashed the search warrant and suppressed the evidence because the search warrant affidavit stated sufficient probable cause that

defendant was in possession of child pornography. In the alternative, the State contends that the trial court failed to correctly apply the good-faith exception. We reverse and remand.

¶ 2 On November 24, 2009, computer technician, Ronald C. Grundy, and Glendale Heights police detective, Charles May, appeared before the trial court as affiants seeking a search warrant. In his affidavit, Grundy averred that he was familiar with defendant because defendant was a routine customer of his; Grundy averred that on October 20, 2009, defendant contacted him to perform some repairs on his computer and to install a new operating system. On October 28, 2009, defendant contacted Grundy again to arrange payment for prior work and asked Grundy to look into some additional problems he was having with his computer.

¶ 3 On October 30, 2009, Grundy went to defendant's residence to collect payment and to perform additional work on defendant's computer. Defendant was not home at the time, but defendant's roommate allowed Grundy into the residence and showed him to defendant's computer. Defendant had previously provided Grundy with the computer's password, and Grundy began working on defendant's computer. Grundy "accessed the 'documents' folder, looking for computer viruses in executable files." Grundy's observations of the contents of defendant's computer led him to contact police. Grundy further averred:

"I opened a photo file and observed the contents were of a female child, approximately 6 years old, completely naked and displaying their [sic] breasts and vagina. I opened a second photo file and observed it contained a similar photo of a female child, approximately 6 years of age, displaying her breasts and vagina. I opened a third photo file located in the 'documents' folder, and observed it contained a photo of 2 female children, approximately 6 years of age, displaying their breasts and vaginas."

¶ 4 Grundy averred that, as he was working on defendant's computer, defendant returned to the residence, and told Grundy that there were no more problems with his computer. Defendant paid Grundy, and Grundy left defendant's residence. Grundy averred that he "did not know what to do about the material [that he] observed on [defendant's] machine." Grundy averred that the material "upset" him.

¶ 5 Grundy further averred that, on November 6, 2009, he was injured in a motorcycle accident and spent the next 15 days recovering from the injuries he sustained. On November, 22, 2009, Grundy called Glendale Heights police detective Michael Pentecost and left him a voicemail message. Grundy averred that, on November 23, 2009, he spoke with Detective Pentecost and related what he had observed on defendant's computer.

¶ 6 Detective May's affidavit listed his law enforcement background including his present membership on the Illinois Attorney General's Internet Crimes Against Children task force. May described with particularity defendant's residence as the address to be searched and defendant's computer and any and all related digital media devices as the items to be seized pursuant to the warrant.

¶ 7 May's affidavit reiterates Grundy's account of the images on defendant's computer as presented to the police and further averred that prior to the motorcycle accident, Grundy "did not know what to do about the material he observed on [defendant's] machine, as it 'freaked him out.' " May's affidavit recalled Grundy's motorcycle accident, recovery, and the details of his contact with the police department. May's affidavit also stated that Grundy "has agreed to appear in front of a judge to swear to and sign an affidavit and answer any questions the presiding Judge deems appropriate."

¶ 8 At 9:40 a.m. on November 24, 2009, the trial court signed the authorization for the search warrant. At 1:46 p.m. on November 24, 2009, May signed the search warrant return. On November 24, 2009, following the execution of the search warrant, defendant was charged by felony complaint with possession of child pornography (720 ILCS 5/11-20.1(a)(6) (West 2008)), possession of drug paraphernalia (720 ILCS 600/3.5 (West 2008)), unlawful possession of cannabis (720 ILCS 550/4(b) (West 2008)), and unlawful use of a weapon (720 ILCS 5/24-1(a)(1) (West 2008)). On November 24, 2009, defendant was arrested at his residence.

¶ 9 On December 9, 2009, a grand jury returned a true bill of indictment charging defendant with possession of child pornography in violation of section 11-20.1(a)(6), a class 3 felony. On February 9, 2010, defendant filed a motion to quash the search warrant, quash arrest, and suppress the evidence. On February 10, 2010, defendant filed a motion to suppress a confession he allegedly offered following his arrest. On June 14, 2010, the State filed its written response to defendant's motion to quash the search warrant.

¶ 10 On June 17, 2010, the trial court held a hearing on defendant's motion to quash the search warrant and the evidence. At the hearing, the trial court stated:

“I think when I read this search warrant that the only thing in the warrant is the language that it is a six-year-old girl – there is three photographs, six-year-old females displaying breasts and vagina. And there is no adjectives describing that, and the picture that comes to mind is a six-year-old girl running through a sprinkler. So I just don't see where just looking at the four corners of the warrant there is any allegation that these pictures were pornographic.”

¶ 11 The State argued that the standard for executing the search warrant was fair probability and not proof beyond a reasonable doubt. The State further asserted that the images “created such a visceral reaction in [Grundy] that it upset him and he went to law enforcement.” The trial court disagreed, stating:

“You know why I don’t buy that is because this allegedly – he allegedly examined the computer on October 30th. And then he is in the motorcycle accident on November 6th, so there is a whole week that goes by where if he was so consumed with angst and dismay over these photographs, I think he would have walked out of the house and [dialed] 911. So that is why – and the fact that the only words in here is, it upset me. If I were to issue search warrants on every person that says I’m upset, it would be endless.”

¶ 12 The State argued that whether Grundy failed to contact police within a reasonable time frame was an issue to be determined at trial. The trial court responded:

“I just find that the affidavit is so lacking in indicia of probable cause that its just not valid. I think there just has to be more. *** [T]here is just no allegations of child pornography here, and the strongest thing is that someone is upset. And I just can’t understand if they’re as upset as you’re trying to portray, they wouldn’t have waited a week. *** [H]e had a week between the accident and when he allegedly was dismayed by these pictures. So I don’t find that there is any probable cause for the warrant, and I’m going to grant the defendant’s motion.”

The trial court’s written order granted defendant’s motion for the reasons stated on the record. On July 12, 2010, the State timely filed its notice of appeal and its certificate of impairment.

¶ 13 As an initial matter, on March 4, 2011, the State filed a motion to cite an additional authority. Specifically, the State requests to cite *People v. Knebel*, No. 2-09-0550, slip op. (Ill. App. March 1, 2011). We grant the State's motion.

¶ 14 On appeal, the State contends that the trial court committed reversible error when it quashed the search warrant and suppressed the resulting evidence because the search warrant stated sufficient probable cause that defendant was in possession of child pornography. Defendant responds that the trial court correctly found that the search warrant was invalid because insufficient information was provided to allow the trial court to determine whether probable cause existed.

¶ 15 The existence of probable cause depends on the totality of the circumstances. *People v. Tisler*, 103 Ill. 2d 226, 237-38 (1984). The standard of review of a probable-cause determination is whether the trial court had a substantial basis for concluding that a search would uncover evidence of wrongdoing. *Illinois v. Gates*, 462 U.S. 213, 236 (1983). It is the probability of criminal activity, and not a *prima facie* showing or proof beyond a reasonable doubt, which is the standard for probable cause. *People v. Stewart*, 104 Ill. 2d 463, 475-76 (1984).

¶ 16 There is a well-settled "presumption of validity with respect to the affidavit supporting the search warrant." *Franks v. Delaware*, 438 U.S. 154, 171 (1978). At the search warrant-affidavit stage, "probable cause does not even demand a showing that the belief that the suspect had committed a crime be more likely true than false." *People v. Wear*, 229 Ill. 2d 545, 564 (2008). Relevant considerations with respect to the validity of search warrants include the reliability of the affiant, the credibility of the affiant's information, the reasonable belief that evidence of conduct remains in the places to be searched, the specificity of the places to be searched and the items to be

seized. *Gates*, 462 U.S. at 213. A reviewing court reviews *de novo* the ultimate question of a legal challenge of a motion to suppress. *People v. Sutherland*, 223 Ill. 2d 187, 196-97 (2006).

¶ 17 It is unlawful to possess “any film, videotape, photograph or other similar visual reproduction or depiction by computer of any child *** whom the person knows or reasonably should know to be under the age of 18 *** engaged in any one of several activities such as sexual penetration, sexual stimulation, or lewd exhibition.” 720 ILCS 5/11-20.1(a)(6) (West 2008). In making a determination of whether a photograph is “lewd” for purposes of the child pornography statute, the following factors are relevant:

“(1) [W]hether the focal point of the visual depiction is on the child’s genitals; (2) whether the setting of the visual depiction is sexually suggestive, *i.e.*, in a place or pose generally associated with sexual activity; (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child; (4) whether the child is fully or partially clothed, or nude; (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; and (6) whether the visual depiction is intended to elicit a sexual response in the viewer.” *Knebel*, slip op. at 1-2.

¶ 18 In the current matter, we determine that the issuing court did not have a substantial basis for concluding that a search would uncover evidence of wrong doing. Here, Grundy’s affidavit alleged that defendant’s computer contained pictures of several six-year-old girls “displaying their breasts and vaginas” in a manner that upset him. The information set forth in the affidavit, by itself, did not show that there was a fair probability child pornography would be found on defendant’s computer. *People v. Hickey*, 178 Ill. 2d 256, 285 (1997).

¶ 19 We determine that this case is more akin to *United States v. Battershell*, 457 F. 3d 1048 (9th Cir. 2006), than it is to the juxtaposed *United States v. Griesbach*, 540 F. 3d 654 (7th Cir. 2008). In *Battershell*, an officer described a photograph as “a young female [] naked in a bathtub” and the court found the description insufficient to establish probable cause as a “lascivious exhibition of the genitals or pubic area” because it was conclusory and inherently subjective. *Id.* at 1051. By contrast, in *Griebach*, the court held that a search warrant affidavit by a police officer provided sufficient probable cause, where the affiant described the photograph as “a naked female exposing her vagina. The female is lying on her back and her vagina is the primary focus.” *Id.* at 656. In its holding, the court noted that the verbal description was sufficient because the primary focus of the photograph was on the girl’s vagina and because the photograph was part of a known pornography series.

¶ 20 Here, Grundy’s affidavit did not offer any evidence that the photographs were lewd. At a probable cause hearing, the trial court’s task is to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Hickey*, 178 Ill. 2d at 285. The information provided by Grundy lacked the necessary specificity. Thus, the trial court, after hearing Grundy’s averments could not determine whether the focal point of the photographs were on the children’s genitals, whether the photographs were sexually suggestive, whether the children were depicted in unnatural poses, whether the children appeared sexually coy, or whether the depictions were intended to elicit a sexual response from the viewer.

¶ 21 As lewdness is an element of the alleged offense, some evidence that the photographs are lewd is required before a trial court can correctly determine that, given all the circumstances set forth in the affidavit, there is a fair probability that contraband or evidence of a crime will be found in a

particular place. *Hickey*, 178 Ill. 2d at 285. Here, Grundy's description of "upsetting" images of nude six-year-old girls displaying their breasts and vaginas is, without more, not indicative that a crime was committed. See *Gates*, 462 U.S. at 238.

¶22 Defendant asserts that the State's argument that search warrants should be issued in situations where an affiant was simply upset by nude photographs of minors yields absurd results. Defendant asserts that, under this standard, a trial court would have sufficient probable cause to issue search warrants in a number of scenarios that do not involve criminal activity, but instead touch upon individual constitutional and statutory protections. Defendant argues that the description of the pictures given by Grundy in his affidavit could apply to any of following innocent material: medical records from a pediatrician's office, nudist living magazines, innocent family photographs of children being bathed by their parents or frolicking through a sprinkler, and photographs depicting minors' genitals for educational purposes. Although defendant fails to consider that the commonsense, totality-of-the-circumstances approach that has traditionally informed probable cause determinations acts as a safeguard to prevent haphazard searches in many of the scenarios offered by defendant, here, Grundy's description could easily apply to innocent material. See *Smith*, 372 Ill. App. 3d at 184 (whether there is probable cause to issue a search warrant depends upon the totality of the circumstances). Thus, we determine that there was no substantial basis for concluding that a search would uncover evidence of wrongdoing.

¶23 The State next contends that the good-faith exception should apply. Defendant responds that the good-faith exception is inapplicable where, as here, the search warrant affidavit lacks averments to lewdness.

¶ 24 Not every violation of the Fourth Amendment requires that evidence be suppressed. See *United States v. Leon*, 468 U.S. 897, 906-07 (1984) (holding that the exclusionary rule would not be applied where the evidence was obtained by officers acting in reasonable reliance on a search warrant issued by a detached, neutral magistrate although the search warrant was subsequently found to be unsupported by probable cause). The “good-faith” exception to the exclusionary rule is codified by Illinois law by requiring trial courts to refrain from suppressing evidence if it finds that the evidence was seized “pursuant to a search warrant ***obtained from a neutral and detached judge, which warrant is free from obvious defects *** and the officer reasonably believed the warrant to be valid.” 725 ILCS 114-12(b)(2)(i) (West 2008). Even if an affidavit wants for particularity, the executing agent’s reasonable, good faith belief, although possibly mistaken, that the search was authorized under a valid warrant, insulate the search from a motion to suppress. *People v. Bryant*, 389 Ill. App. 3d 500, 524 (2009). As articulated in *Leon*, the good-faith exception to the exclusionary rule applies so long as:

“(1) the magistrate or judge issuing the warrant was not misled by information in an affidavit that the affiant knew was false or would have known was false except for his or her reckless disregard for the truth; (2) the issuing magistrate has not wholly abandoned his or her judicial role where in such circumstances, no reasonably well trained officer should rely on the warrant; (3) the affidavit is not so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable and; (4) a warrant is so facially deficient in failing to particularize the place to be searched or the things to be seized that the executing officers cannot reasonably presume it to be valid.” *Leon*, 468 U.S. at 923.

¶ 25 The purpose behind the exclusionary rule is to deter wilful or negligent misconduct by law enforcement authorities that deprives an individual of some right, however; the purpose of the rule was never to punish the errors of judges. *Leon*, 468 U.S. at 919, *Davis v. U.S.*, 564 U.S. ___, 7-9 (June 16, 2011). Exclusion of evidence serves no purpose where it is in response to objectively good-faith conduct on the part of law enforcement. *Leon*, 468 U.S. at 918. Whether the good-faith exception to the exclusionary rule applies depends upon whether an objective review of the search warrant affidavit from the perspective of one with the same level as experience and knowledge as the executing law enforcement officers could have rendered a reasonable belief that the affidavit furnished probable cause. *Leon*, 468 U.S. at 920. Whether the good-faith exception to the exclusionary rule applies is purely a legal question which we review *de novo*. *People v. Turnage*, 162 Ill. 2d 299, 305 (1994).

¶ 26 The State argues that although, in this case, the trial court found that the search warrant affidavit failed to meet the third *Leon* standard, the trial court's application of the third *Leon* standard is without historical support. Specifically, the State asserts that the language in the third *Leon* exception comes directly from Justice Powell's concurrence in *Brown v. Illinois* (422 U.S. 590, 610-11 (1975), and that "when viewed in an accurate historical context, the straight-faced, earnest, arguable probable cause, as occurred in *Gates* and in the case at bar, plays obvious counterpoint to the galling police conduct that occurred in *Brown*." Simply put, the State argues that the good-faith exception should apply, despite the third *Leon* standard because, here, the search warrant was not so lacking in indicia of probable cause that it was entirely unreasonable to believe that there was any criminal evidence at defendant's residence where Grundy told the trial court that he saw three photographs of naked six-year-old girls "displaying their breasts and vaginas" that "upset" him.

¶ 27 Defendant responds that it was unreasonable for someone with the expertise of May to conclude that a witness's statement that he observed pictures of nude children displaying genitals on defendant's computer was enough to ensure probable cause to support a search warrant because there with no information regarding the context of those pictures. According to defendant, by failing to investigate the required lewdness element of child pornography, May failed to use his expertise and commonsense in relation to his presumed knowledge of the law. *Leon*, 468 U.S. at 920. This, defendant argues, is exactly the type of situation which the exclusionary remedy was designed to prevent.

¶ 28 Because we determine that the good-faith exception applies, we reverse the determination that the trial court lacked probable cause to issue a valid search warrant. In the current matter, May promptly executed the search warrant, which he believed to be valid. Moreover, there is no evidence that May believed that the information offered by Grundy was false; that the issuing trial court had wholly abandoned its role, that the affidavit was so lacking in indicia of probable cause that May's belief that he was executing a valid search warrant was entirely unreasonable; or that the warrant failed to particularize the place to be searched. Although defendant argues that May failed to investigate the required lewdness element of child pornography, the record reflects that May contacted a state's attorney regarding the issue. May need not be dissuaded from executing search warrants that he believed in good faith to be valid, as in the present case.

¶ 29 Here, we specifically disagree with the trial court finding that the affidavit was so lacking in indicia of probable cause that May's belief that he was executing a valid search warrant was entirely unreasonable. The good-faith exception is meant to save an otherwise deficient warrant. It,

therefore, seems that the trial court collapsed its analysis regarding the sufficiency of the warrant with its consideration of the exception.

¶ 30 In making this finding, the trial court stated,

“I just find that the affidavit is so lacking in indicia of probable cause that its just not valid. I think there just has to be more. *** [T]here is just no allegations of child pornography here, and the strongest thing is that someone is upset. And I just can’t understand if they’re as upset as you’re trying to portray, they wouldn’t have waited a week. *** [H]e had a week between the accident and when he allegedly was dismayed by these pictures. So I don’t find that there is any probable cause for the warrant, and I’m going to grant the defendant’s motion.”

¶ 31 We disagree with the trial court’s reasoning that an affiant being “upset” by images of six-year-old- girls “displaying their breasts and vaginas” is not enough to make May’s belief that he is executing a valid search warrant reasonable. The warrant in this case was limited to defendant’s computer and other media storage equipment in his home. Although the warrant was later determined to have lacked descriptive words specifying that the images were lewd, a police officer could reasonably infer that Grundy would not have described innocent pictures in this manner and would not have contacted police regarding innocent images.

¶ 32 Moreover, although the trial court took issue with the 23 days it took Grundy to contact police, we do not agree that this rendered the information unreliable. In *People v. Rehkopf*, the police relied on a federal warrant issued upon information that was over a year old. *People v. Rehkopf*, 153 Ill. App. 3d 819 (1987). The trial court determined that although the officers had relied in good faith on the search warrant, the 13-month period between when the information was given

and the issuance of the warrant rendered the information stale; the trial court quashed the warrant. *Rehkopf*, 153 Ill. App. 3d at 821-22. This court disagreed and reversed on good-faith grounds, finding that although the information in the warrant was over a year old, the affiant had indicated that the type of evidence located in the area to be searched, in this case handgun silencer components, was the type that would usually remain in the suspect's control for a long period of time. The current case is similar in this respect.

¶ 33 Here, May indicated that in his experience working with child pornography, suspects would often store pornographic images of children for long periods of time. Moreover, in the current matter, Grundy explained the reason for his delay in contacting law enforcement. Defendant was Grundy's client; thus Grundy may have been conflicted as to whether he should involve his client in a police investigation. Furthermore, Grundy spent 15 of the 23 days recovering from a motorcycle accident. While Grundy did delay reporting the incident, his delay was not so egregious as to render the information unreliable.

¶ 34 Acknowledging that this case is close, we are further persuaded by the Supreme Court's shift in its application of the exclusionary rule from rigid to more relaxed. See *Davis*, 564 U.S. ___, pages 7-9 (June 16, 2011) (dicta explaining the history of the rule in the courts). Where police conduct a search in objectively reasonable reliance on a warrant later held invalid, the error rests with the issuing magistrate and not the police officer. *Davis*, slip op. at 8. Here, the officer sought advice from the State's Attorney, sought approval from the judge for the warrant, had an affidavit from Grundy with information that reasonably indicated that defendant had pornographic images of children on his computer, and executed the warrant within its limits. May should not now be

punished for the magistrate's error in approving the warrant without more detail regarding the nature of the photographs.

¶ 35 Thus, we determine that the affidavit was not so overly broad that it was unreasonable for officers to assume that they were conducting their search based on a valid warrant. As such, we determine that, although there was no substantial basis for granting the search warrant, the good-faith exception would apply in the present matter. Thus, we reverse the trial court's judgment.

¶ 36 For the forgoing reasons, we reverse the judgment of the circuit court of Du Page County and remand for further proceedings consistent with this order.

¶ 37 Reversed and remanded.