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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2016AP000500 CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

RICHARD L. KELLER,

Defendant-Respondent.

APPEAL FROM AN ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE, ENTERED IN THE CIRCUIT COURT FOR WASHINGTON COUNTY, THE HONORABLE JAMES K. MUEHLBAUER, PRESIDING

REPLY BRIEF OF PLAINTIFF-APPELLANT

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ARGUMENT

The suppression order should be reversed.

Keller argues that the primary infirmities of the challenged search are that it was technically performed by law enforcement, and was as much motivated by an independent police investigation as it was by Agent Johnson's concern over Keller's clear flouting of his probationary rules. Keller relies on the trial court's stern objections to a DCI analyst performing the search. The trial court, in effect, mandated that if a probation agent wants a computer to be searched, then the agent must perform the search, regardless of how competent and qualified the agent might be to perform the function. Under Keller's reasoning and the trial court's holding, Agent Johnson's only option was to perform the computer search herself with no technical ability to do so properly, because she lacked the probable cause to enlist police assistance through the execution of a search warrant. This conclusion is not a sensible one and is not required by fourth amendment jurisprudence, where reasonableness is the lynchpin.

Keller asserts that he had a reasonable expectation of privacy in his computer, because he had a privacy interest in it consistent with historical notions of privacy, used it for private purposes, and kept it in a locked office in his home. (Keller's Br. 24-25.) This analysis makes more sense for a regular citizen than it does for a probationer who is specifically forbidden from possessing or using a computer in his home. Society benefits from probationary rules governing the behavior of proven offenders who are given the privileged opportunity to integrate into daily life. It is counterintuitive that society would find a probationer's expectation of privacy in a computer that he is not allowed to have, to be reasonable. This is particularly true where, as

here, computers are associated with the criminal activity that spawned the probation.

A. The search in this case, was a lawful probationary search.

This court made clear in its holding in *State v. Devries,* 2012 WI App. 119, 344 Wis.2d 726, 824 N.W.2d 913, that there is no bright-line rule that when the police or its representative perform a search at a probation agent's request, the search is a police search. Keller seeks refuge from *Devries,* by highlighting the factual difference that the *Devries* search took place in the probation office, while the search here took place in the forensic analyst's office. Keller further buttresses his claimed distinction from *Devries*, with the erroneous contentions that the search in this case was not limited, and that it was motivated by an independent police investigation.

In *Devries,* the search, a preliminary breath test, was performed in the probation agent's office because it could be properly performed there. Here, it would be impractical to perform the search in a place other than Analyst Kendrex's lab where there was the necessary equipment to properly and effectively conduct the search. The location of the search can be a factor in determining whether or not a search is a probationary or a police one, but the practical and reasonable considerations present here for performing the search in the analyst's domain should not exclude *Devries* applicability.

Keller reprises the trial court's contention that the search of Keller's computer was vast and untethered as compared to the narrow limited scope of the *Devries* PBT search. While a search of a computer for a child pornography image is more complicated and extensive than a PBT search, the complexity and length of the search does not change the

fact that the search was limited to looking for one kind of item. And when the analyst found the illegal image, Agent Johnson immediately stopped the search. The search of Keller's computer was not an open-ended look for whatever; it was a targeted examination for one example of child pornography.

Keller repeatedly alleges that DCI analyst Kendrex's search of the computer, at the request of Agent Johnson, was part and parcel of an independent police investigation. (Keller's Br. 17-21) This assertion is puzzling, in light of the undisputed fact that the DCI had no investigative interest in Keller before, during, or after Keller's computer was searched. Apparently, Keller is imputing Washington County Detective Walsh's interest in Keller to Analyst Kendrex, though Walsh had no contact with Kendrex prior to the search, and did not ask or imply that Agent Johnson take the computer to Kendrex for searching. Curiously, Keller has no problem imputing Detective Walsh's unexpressed interests to Kendrex, but refuses to factor in Agent Johnson's expressed requests, clear interests, and catalytic activities in starting and ending the search, into a determination of whether the search was a probationary or a police activity.

Keller warns that finding a probation search here would undermine the Fourth Amendment when he writes, "If a search was considered a probation search only because a probation agent 'initiated' the search then law enforcement could conduct all searches involving probation and parole as long as the agent initiated it." (Keller's Br. 21.)

Keller's concern is misplaced because the State is not asking for a bright-line rule stamping all probation-initiated searches as a probation search, just as this Court, in *Devries*, properly eschewed a bright-line rule that when the police

conduct the search it is always a police search. Rather the case law governing probation/police searches embodied in *State v. Griffin,* 131 Wis. 2d 41, 388 N.W.2d 535 (1986), *aff'd Griffin v. Wisconsin,* 483 U.S. 868 (1987); *State v. Hajicek,* 2001 WI 3, 240 Wis. 2d 349, 620 N.W.2d 781 and its progeny, analyzes the issue under the totality of the circumstances. Under a totality of circumstance review, the search here was a probationary one.

B. Keller does not have an expectation of privacy that society would deem reasonable, in a computer he was prohibited from possessing and using under the rules of his probation.

Keller contends that an expectation of privacy in his computer is one that society would deem reasonable. He is wrong. The purposes and nature of probation preclude finding that Keller had a reasonable expectation of privacy. Society's stake in probation depends on the probationer being controlled and discouraged from recidivism, a goal promoted by probationary rules. This incentive for proper behavior should not be undermined by carving out a privacy interest in contraband, which would allow a probationer to avoid the consequences of a rule violation. Here, Keller was placed on probation for possession of child pornography, and ordered not to possess or use a computer at home, as such instruments are typically used to store and transmit child pornography images. For Keller, not only was the child pornography image contraband, but the receptacle for the image, the computer, was also contraband. It is incongruous, under these circumstances, to believe that society would deem Keller's expectation of privacy in the contraband computer as reasonable.

Keller seeks support in his position in *Riley v. California,* 134 S.Ct. 2473 (2014) where the Court found that an arrestee still maintains an expectation of privacy in his cell phone found at the arrest site. The difference, however, is that Riley was entitled to have a cell phone at the time he was arrested, whereas here Keller was not allowed to have a computer at the time it was searched. The computer was contraband, and thus items stored in the contraband are outside the scope of fourth amendment protections.

CONCLUSION

The State submits that the State's brief in chief and this reply refute all claims made by Keller. Respectfully, the order granting Keller's motion to suppress should be reversed.

Dated this 13th day of September, 2016.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 1,256 words.

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DAVID H. PERLMAN
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 13th day of September, 2016.

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DAVID H. PERLMAN
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