STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2016AP1464-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SAMUEL SILVERSTEIN,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF CONVICTION ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE ELLEN R. BROSTROM, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

BRAD D. SCHIMEL
Wisconsin Attorney General

TIFFANY M. WINTER
Assistant Attorney General
State Bar #1065853

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-9487
(608) 266-9594 (Fax)
wintertm@doj.state.wi.us

TABLE OF CONTENTS

TABLE OF AUTHORITES

Cases

Page(s)

Statutes

STATEMENT OF THE ISSUES

1. Did the search warrant affidavit contain sufficient information to verify the veracity of Tumblr and to conclude that there was a fair probability that evidence relating to the possession of child pornography would be found in Silverstein's home?

   The circuit court answered yes.

2. Is Wis. Stat. § 939.617 sufficiently vague that the circuit court's correct application of the statute violated Silverstein's right to due process?[1]

   The circuit court answered no.

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[1] At the time Silverstein's brief was filed in this case, a petition for review was pending in *State v. Holcomb,* Case No. 2015AP996-CR. This Court concluded in *Holcomb* that, pursuant to Wis. Stat. § 939.617, a circuit court must impose a bifurcated sentence of not less than three years of initial confinement for each conviction of possession of child pornography unless the defendant is not more than forty-eight months older than the victim. *State v. Holcomb*, 2016 WI App 70, 371 Wis. 2d 647, 886 N.W.2d 100. Silverstein concedes that he is *not* amongst the class of defendants less than forty-eight months older than the victim. (Silverstein's Br. 23.) However, he preserved arguments challenging the validity of this Court's holding in *Holcomb* since a petition for review was pending. (Silverstein's Br. 1 n.1)

Our supreme court has since denied that petition for review. Thus, the only remaining issue relating to Silverstein's sentence is whether Wis. Stat. § 939.617 is sufficiently vague that the circuit court's correct application of the statute violated Silverstein's right to due process. *See Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997) (The court of appeals cannot overrule, modify, or withdraw language from a prior published opinion.). And the State has redefined the issue accordingly.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument. Publication may be appropriate to develop the law regarding how a warrant-issuing magistrate should evaluate a search warrant affidavit that relies on information contained within a report from the National Center for Missing and Exploited Children (NCMEC).

SUPPLEMENTAL STATEMENT OF THE CASE

Samuel Silverstein, the defendant-appellant, was charged with ten counts of possession of child pornography, contrary to Wis. Stat. § 948.12(1m) and (3)(a). (1:1–5.) Law enforcement executed a search warrant on Silverstein's residence after receiving two reports from NCMEC that still images and a video of suspected child pornography were posted to a Tumblr[2] blog connected to Silverstein. (1:6.)

Pursuant to the warrant, law enforcement seized a red Verbatim flash drive found in Silverstein's home. (1:6.) Silverstein admitted that the flash drive contained videos that he downloaded from Kik.[3] Silverstein also admitted that he "may" have posted screen captures from those videos to his Tumblr blog. (1:6.)

Law enforcement conducted a preview search of the flash drive and discovered that it contained twelve videos.

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[2] Tumblr is a social media website that allows people to create, share, or exchange information, pictures, and videos in virtual communities or networks via blogs. *See What is Tumblr?*, https://www.tumblr.com (last visited Dec. 16, 2016).

[3] Kik is a smart-phone messaging application. *See About*, https://www.kik.com/about/ (last visited Dec. 16, 2016).

(1:6.) Ten of those videos corresponded to the ten counts of possession of child pornography. (1:6–7.) Two of the ten videos corresponded to three of the still images found on Silverstein's Tumblr blog. (1:7.)

Silverstein moved to suppress any evidence linked to the search of his home on the ground that the search warrant affidavit did not establish probable cause. (8.) The circuit court denied his motion after a hearing. (11:1.)

Silverstein also moved the court for a "determination as to whether Wis. Stat. § 939.617 requires a minimum three-year term of initial confinement" as applied to Silverstein. (14.) The circuit court concluded that the statute did require a minimum three-year term of initial confinement for each count of possession of child pornography, that the court could order the sentences to run concurrent, and that the application of the statute did not violate Silverstein's due process rights. (17.)

Silverstein pled guilty to three counts of possession of child pornography; the remaining counts were dismissed and read-in. (18, 27.) The court sentenced Silverstein to three years of initial confinement and four years of extended supervision on each count, sentences to run concurrent. (27.)

Silverstein now appeals. Additional facts will be discussed in the argument section below.

ARGUMENT

I. In its assessment of probable cause to search, the warrant-issuing magistrate properly relied on the affiant's statements attributed to Tumblr's two tips to the National Center for Missing and Exploited Children.

"The Fourth Amendment of the United States Constitution guarantees that persons shall be secure from unreasonable searches and seizures and sets forth the manner in which warrants shall issue." *State v. Sveum*, 2010 WI 92, ¶ 18, 328 Wis. 2d 369, 787 N.W.2d 317 (quotation omitted). A valid warrant must be based upon "oath or affirmation that there is probable cause to believe that evidence sought will aid in a particular conviction for a particular offense." *Id.* ¶ 20.

"In deciding whether probable cause exists for the issuance of a search warrant, the reviewing court examines the totality of the circumstances presented to the warrant-issuing [magistrate] to determine whether the warrant-issuing [magistrate] had a substantial basis for concluding that there was a fair probability that a search of the specified premises would uncover evidence of wrongdoing." *State v. Romero*, 2009 WI 32, ¶ 3, 317 Wis. 2d 12, 765 N.W.2d 756 (citation omitted).

The warrant-issuing magistrate reviews the facts before it and makes a "practical, common-sense decision." *Id.* ¶ 19 (quotation omitted). To do so, the magistrate considers "all the circumstances set forth in the affidavit, including the veracity and basis of knowledge of persons supplying hearsay information." *Id.* (quotation omitted).

The veracity and basis of knowledge of persons supplying hearsay information is "highly relevant in

determining the value of his report" but not a separate and independent requirement that must be "rigidly exacted" in every case. *Id.* ¶ 20 (quotation omitted). Instead, the magistrate considers these elements as "closely intertwined issues that may usefully illuminate the commonsense, practical question whether there is probable cause to believe that contraband or evidence is located in a particular place." *Id*. (quotation omitted).

"This court accords great deference to the warrant-issuing [magistrate's] determination of probable cause, and that determination will stand unless the defendant establishes that the facts are clearly insufficient to support a finding of probable cause." *Id.* ¶ 18 (quotation omitted). "This deferential standard of review is appropriate to further the Fourth Amendment's strong preference for searches conducted pursuant to a warrant." *Id.* (quotation omitted).

A. Additional facts relevant to the issue of probable cause to search Silverstein's home.

Silverstein moved to suppress any evidence linked to the search of his home on the ground that the search warrant affidavit did not establish probable cause that Silverstein's home would contain evidence of a crime. (8.) The search warrant affidavit contained hearsay statements accredited to Tumblr, and Silverstein argued that the affidavit did not contain sufficient information to verify the veracity of that information. (8:13–20.) Silverstein also argued that the search warrant affidavit failed to contain documentation that the affiant swore was attached, and thus, any statements connected to those alleged documents were "misrepresentations." (8:11.)

Relating to the hearsay statements, the search warrant affidavit contained the following:

> 5. On July 9th, 2015 the Bayside Police Department received two Cybertips from the National Center for Missing and Exploited Children (NCMEC). The NCMEC Cybertips were numbered 5034297 and 5044912. These tips reported photos and video of underage females exposing their breasts and genitals posted to 'tumblr.com', a social media site, originating from an IP address of 99.185.140.72 from the Internet Service Provider AT&T U-Verse.
>
> 6. Bayside Police Officer Ryan Bowe, a member of the Wisconsin Internet Crimes against Children Task Force (ICAC), received and reviewed the above tips from NCMEC. The NCMEC Cybertip included explicit photographs which PO BOWE viewed. The images consisted of eight photos and one video file which were posted to Tumblr.com using account name 'famousenemyland'. The posts were made primarily from IP Address 99.185.140.72, which was created using the email address ssilver58@.att.net.
>
> . . . .
>
> 11. The NCMEC Cybertip listed the reporting agency was Tumblr. Said report indicated on 06/01/15 at about 17:45:00 UTC, Tumblr created a report regarding 'Child Pornography' related to URL: 'famousenemyland.tumblr.com' with email ssilver58@att.net and IP Address 99.185.140.72.
>
> 12. Attached is a copy of the NCMEC Cybertip, 5044912.

(8:24–27.)

Relating to the officer's investigation, the search warrant affidavit contained the following:

> 7. Through subpoenas and search warrants regarding the IP Address (attached), Officer Bowe was able to determine that the subscriber using the above IP address as Sam Silverstein of 6898 N. Seville Ave in Glendale, WI.
>
> 8. Attached is a copy of the Bayside Police Department's Affidavit and Subpoena for Documents which is used as a basis for this search warrant.
>
> 9. A check of WI DOT records showed that a Samuel Silverstein . . . resides at 6898 N. Seville Ave in Glendale.
>
> 10. The image and video content provided by the NCMEC Cybertip as described by PO BOWE is as follows:
>
> [Descriptions intentionally omitted]

(8:25.)

The affiant did attach CyberTipline Report 5034297 and 5044912 to the affidavit, but attached only the odd numbered pages. (8:29–39.) The affiant did not attach a copy of the Bayside Police Department's Affidavit and Subpoena for Documents.

After a hearing, the circuit court concluded that Silverstein's arguments were without merit. (31:13.) The court reasoned that law enforcement did everything it was supposed to do. (31:13.) The officers reviewed the reports from NCMEC, confirmed that the files attached contained depictions of child pornography, verified the subscriber and location associated with the IP address through a previous warrant, and then applied for the search warrant for

Silverstein's home. (31:13, 15.) The court also concluded that the officers, and the warrant-issuing magistrate, could rely on the tip from Tumblr because Tumblr is "oblig[ed] under the law" to report child pornography and NCMEC corroborates details of the tips like the association of the IP address and email address. (31:15, 17.) The court reasoned that in addition to the inherent veracity of the NCMEC reports, law enforcement did an independent investigation to associate Silverstein with the IP address. (31:17.) The court concluded that the affidavit was illustrative of "due process in action," and the court denied Silverstein's motion. (11; 31:13.)

Silverstein raises the same arguments on appeal. Like the circuit court, this Court should conclude that Silverstein's arguments are without merit because there was sufficient information within the warrant application to establish probable cause to search Silverstein's home.

B. Tumblr is a reliable informant akin to a citizen informant.

"To demonstrate a declarant's veracity, facts must be brought to the warrant-issuing [magistrate's] attention to enable the [magistrate] to evaluate either the credibility of the declarant or the reliability of the particular information furnished." *Romero*, 317 Wis. 2d 12, ¶ 21.

Silverstein contends that the warrant affidavit relied on two layers of hearsay: what Tumblr reported to NCMEC and what NCMEC reported to law enforcement. (Silverstein's Br. 11–13.) He argues that because the affidavit was based on two layers of hearsay, the warrant affidavit had to provide a basis for the magistrate to conclude that both Tumblr and NCMEC were reliable sources. (Silverstein's Br. 11–13.) Silverstein does not

appear to challenge NCMEC's veracity. Rather he argues that the warrant affidavit is insufficient to establish probably cause because it relied upon Tumblr's "incredible, uncorroborated hearsay." (Silverstein's Br. 13–15.)

Silverstein's assertion that Tumblr is the informant is correct. NCMEC has been characterized as "nothing more than a pass-through entity" between the electronic service provider (ESP)[4] and law enforcement. *See Manzione v. State*, 719 S.E.2d 533, 537 (Ga. Ct. App. 2011). While NCMEC generates reports for law enforcement, the relevant information originates from the ESP, not NCMEC. *See State v. Woldridge*, 958 So.2d 455, 459 (Fla. Dist. Ct. App. 2007).

For context, NCMEC is a non-profit organization that receives an annual grant from Congress to act as a clearing house for information related to missing and exploited children. *United States v. Ackerman*, 831 F.3d 1292, 1296 (10th Cir. 2016), *reh'g denied* (Oct. 4, 2016). NCMEC's primary authorizing statutes are 18 U.S.C. § 2258A and 42 U.S.C. § 5773(b). *See Ackerman*, 831 F.3d at 1296. Those statutes mandate NCMEC's collaboration with law enforcement in over a dozen different ways. *Id.* Relevant to this case, NCMEC is statutorily obliged to operate its "CyberTipline" as a means of combating Internet child sexual exploitation. *Id.* (citing 42 U.S.C. § 5773(b)).

Under the federal statutory scheme, an ESP like Tumblr is required to report any known child pornography violations to NCMEC. *Id.* If an ESP fails to comply with this obligation, it faces substantial civil and criminal penalties.

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[4] "Electronic service provider" means an "electronic communication service" provider, as defined in 18 U.S.C. § 2510(15) or a "remote computing service" provider as defined in 18 U.S.C. § 2711(2).

Id. at 1296-97 (citations omitted). NCMEC, in turn, must forward every report it receives through its CyberTipline to federal law enforcement agencies and is permitted to also forward those reports to state and local law enforcement. *Id.* at 1296 (citing 18 U.S.C. § 2258A(c)).

Before forwarding reports to law enforcement, NCMEC queries the reported IP address using open source search engines to attempt to identify the suspect's geographic location and the Internet Service Provider (ISP) that the suspect uses to access the Internet. *United States v. Keith*, 980 F. Supp. 2d 33, 37 (D. Mass. 2013). As a practical matter, this aids NCMEC in determining who NCMEC should forward the tip to. The relevant geographic and ISP information is added to the report, which is available only to law enforcement agencies. *Id.*

Beyond the general geographic and ISP information, NCMEC forwards the information it receives from ESPs to law enforcement as a pass-through entity and there is no reason to doubt that it does so accurately. *James v. State*, 717 S.E.2d 713, 716 (Ga. Ct. App. 2011). Thus, when considering whether a NCMEC report can contribute to a probable cause determination, it is the veracity of the ESP that is at issue. *Id., see also State v. Sisson*, 883 A.2d 868, 880–81 (Del. Super. Ct. 2005), *aff'd*, 903 A.2d 288 (Del. 2006).

Here, the ESP is Tumblr. Silverstein asserts that Tumblr is an anonymous informant and thus should not be considered reliable unless law enforcement can corroborate the information provided through an independent investigation. (Silverstein's Br. 14–23.) Silverstein is incorrect. Tumblr is not an anonymous informant.

There are three basic types of informants: citizen, confidential, and anonymous. A citizen informant is "someone who happens upon a crime or suspicious activity and reports it to police." *State v. Miller*, 2012 WI 61, ¶ 31 n.18, 341 Wis. 2d 307, 815 N.W.2d 349 (citation omitted). A confidential informant is someone "often with a criminal past him-or her-self, who assists the police in identifying and catching criminals." *Id*. And finally, an anonymous informant is someone "whose identity is unknown even to the police." *Id*.

The NCMEC reports identify the name and contact information for the person working at Tumblr who submitted the tips. (8:30, 37.) Thus, the identity of the informant is not unknown to police. Nonetheless, Silverstein argues that the identity of the submitter is of no consequence, because it is unclear if the person who submitted the report was the same person who discovered that Silverstein's blog contained child pornography. (Silverstein's Br. 14–15.) Silverstein's argument assumes that a person must be involved in the discovery of child pornography. That is not always the case. *See Keith*, 980 F. Supp. 2d at 37 (explaining the automated process used by AOL).

Thus, courts have concluded that an ESP like Tumblr, as an entity, is more akin to a citizen informant than to a confidential or anonymous informant. This is due in part to the statutory scheme that requires an ESP to report any known child pornography violations to NCMEC, and that imposes substantial civil and criminal penalties for failing to do so. *See, e.g., People v. Pierre*, 29 N.Y.S.3d 110, 117 (N.Y. Sup. Ct. 2016) (Google was not acting as a confidential informant when it reported suspected child pornography to NCMEC – and generally there is no skepticism toward the reliability and basis of knowledge for such a report); *James*,

717 S.E.2d at 716 (employee was witness to a possible crime and was acting in the role of concerned citizen when disclosing suspected child pornography to NCMEC); *Woldridge*, 958 So.2d at 458–59 (AOL's compliance with federal law mandating that it report child pornography to NCMEC provided presumption of reliability akin to that afforded to a citizen informant); *Sisson*, 883 A.2d at 879–81 (AOL is not an anonymous source; it is a recognized, well-established Internet provider, and "essentially a citizen witness to a crime").

From the State's research, it appears to be well accepted that an ESP's tip of suspected child pornography is reliable. *See, e.g., People v. Rabes*, 258 P.3d 937, 941 (Colo. App. 2010), *as modified on denial of reh'g* (Feb. 3, 2011) (tips of suspected child pornography resulting from federally mandated reporting requirements are reliable); *United States v. Cameron,* 652 F. Supp. 2d 74, 82 (D. Me. 2009) (accepting the assertion that information coming from Yahoo! and the NCMEC carries significant indicia of reliability). Wisconsin should follow suit, and this Court should conclude that when assessing veracity of hearsay statements, an ESP's tip of suspected child pornography is akin to a citizen informant's tip of witnessed criminal activity.

C. The search warrant affidavit contained sufficient information to assess Tumblr's veracity.

Silverstein argues that the search warrant affidavit did not provide sufficient information to assess Tumblr's veracity because the attached NCMEC reports did not corroborate what the affiant alleged to be contained within the reports, and the affiant did not provide sufficient details

regarding the processes by which Tumblr detects and reports suspected child pornography. (Silverstein's Br. 16–23.)

As an initial matter, the affiant did not need to attach documentation to corroborate the hearsay statements. A "search warrant may be based on hearsay information as long as it is shown that the information is substantially reliable." *State v. Benoit*, 83 Wis. 2d 389, 394–95, 265 N.W.2d 298 (1978) (citation omitted). As addressed above, in the context of a NCMEC report, Tumblr, and the information it provides, is substantially reliable. Furthermore, it is clear from the record that the NCMEC reports attached to the warrant application contained only the odd numbered pages of those reports. (8:29–39.) NCMEC provides the reports by VPN (virtual private network) access (8:35), thus there is no reason to conclude that law enforcement did not have the full reports. It appears that there was simply a copying error when the reports were reproduced for the warrant application.

Courts attach a presumption of validity with respect to an affidavit supporting a search warrant. *See Franks v. Delaware*, 438 U.S. 154, 171 (1978); *State v. Anderson*, 138 Wis. 2d 451, 463, 406 N.W.2d 398 (1987). Thus, this Court presumes that the *actual* NCMEC reports contained the information that the affiant alleged was included in those reports. It is Silverstein's burden to show otherwise, and he has not attempted to do so.

To challenge "the veracity of statements in support of a search warrant, the defendant must first make a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit and that the allegedly false statement is necessary

to the finding of probable cause." *Anderson*, 138 Wis. 2d at 462 (citing *Franks*, 438 U.S. at 155–56).

"To make a substantial preliminary showing '[t]here must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons.'" *Id.* (quoting *Franks*, 438 U.S. at 171).

Silverstein has not made a substantial preliminary showing that the affiant made false statements. Rather he asks that this Court deem the affiant's statements false if not supported by attached documentation. That is not the standard, and there is no meritorious argument that can be made that the affiant speculated as to the information contained within the reports, or that the affiant made *any* false or misrepresented statements. Similarly, there is no meritorious argument that the affiant lied when he alleged that, through subpoenas and search warrants, law enforcement determined that the identified IP address was registered to Silverstein.

Furthermore, a fair assessment of Tumblr's veracity would result in the conclusion that Tumblr, in its tips to NCMEC, was reliable. Wisconsin has adopted the relaxed test of "observational reliability" for assessing the veracity of a citizen informant like Tumblr. *See State v. Kolk*, 2006 WI App 261, ¶ 13, 298 Wis. 2d 99, 726 N.W.2d 337 (citation omitted). Observational reliability is evaluated from the nature of the report, the opportunity to hear and see the matters reported, and the extent to which the report can be verified by independent police work. *Id.*

Here, the warrant affidavit specified that Tumblr reported suspected child pornography associated with a specific blog. (8:27.) The report contained image and video files flagged as child pornography and the username, email address, and IP address associated with the blog. (8:24, 27.)

The warrant-issuing magistrate was entitled to use common sense in assessing Tumblr's observational reliability, and anyone who has signed up for an Internet-based service understands that (a) an ESP collects identifying information and (b) information posted in a public forum is assessable to anyone, including the forum's moderator. While the affidavit did not specify as much, all of the information that Tumblr reported was information that it collects. *See Privacy Policy* (last modified Jan. 27, 2014), https://www.tumblr.com/policy/en/privacy (last visited Dec. 16, 2016). Tumblr, as an ESP, has a basis of knowledge regarding its subscribers and the contents contained within its systems. This basis of knowledge affords Tumblr a strong indicia of reliability.

Tumblr's tips were not rumor or speculation. Rather, the tips were based on the discovery of multiple image files and one video file depicting child pornography. Thus, the affiant did not need to include details of how Tumblr discovered the child pornography in order for the magistrate to conclude that Tumblr, and the information it provided, was reliable. While the affiant could have bolstered an assessment of reliability by alleging additional facts about Tumblr's processes and procedures, the fact remains that Tumblr was in possession of evidence of a crime and it disclosed that evidence as required by law. The warrant-issuing magistrate could rely on the information provided by Tumblr even though other indicia of reliability had yet to be established. *See State v. Williams,* 2001 WI 21, ¶ 36, 241 Wis. 2d 631, 623 N.W.2d 106.

Further supporting Tumblr's observational reliability was law enforcement's investigation of Tumblr's tips. The investigating officer was able to corroborate some of the information provided before applying for the search warrant. (31:13, 17.) The officer viewed the image and video files provided and confirmed that the files contained child pornography. (8:24, 25–27.) The officer also confirmed that the IP address was associated with Silverstein's home. (8:25.)[5] By viewing the files, the officer corroborated Tumblr's assessment that the images and video at issue were child pornography. And by investigating the IP address, the officer connected the IP address used to upload those files to Silverstein's home. This independent investigation enhanced the indicia of reliability as to the other information provided by Tumblr. *See State v. Robinson*, 2010 WI 80, ¶ 27, 327 Wis. 2d 302, 786 N.W.2d 463.

Tumblr's tips were not vague, and nor were the tips based on rumor or speculation. Tumblr identified and provided the actual files suspected to be child pornography. (8:24–27.) It supplied the specific username, email address, and IP address associated with the blog where the files were found. (8:24–25.) And contrary to Silverstein's assertion, Tumblr was not an unreliable informant simply because it withheld information that it could not legally disclose without a subpoena. (Silverstein's Br. 22.) Based on a common-sense assessment of the totality of the information

[5] Silverstein argues that the affidavit indicates that the pornographic files were uploaded from multiple IP addresses, and law enforcement needed to verify that each IP address was associated with Silverstein's home. (Silverstein's Br. 22.) Silverstein's argument is without merit because the warrant-issuing magistrate needed to determine only that there was a fair probability that some, not all, evidence of the crime will be found in the home.

provided in the warrant application, the warrant-issuing magistrate could conclude that Tumblr was a reliable informant. Therefore, the magistrate could rely on the information alleged to be in Tumblr's tips to NCMEC.

D. The warrant application contained sufficient details for the warrant-issuing magistrate to conclude that evidence of a crime would be found in Silverstein's home at the time the warrant was issued.

In a conclusory argument, Silverstein submits that the warrant affidavit was insufficient because it did not identify *when* Silverstein posted the pornographic images to his Tumblr blog. (Silverstein's Br. 22.) The State calls out this argument because what Silverstein is actually asserting, without expressly arguing, is that there is a staleness issue that precludes the magistrate from finding probable cause.

There is a distinction between stale information and stale probable cause. *State v. Multaler*, 2002 WI 35, ¶ 36, 252 Wis. 2d 54, 643 N.W.2d 437. "Stale probable cause, so called, is probable cause that would have justified a warrant at some earlier moment that has already passed by the time the warrant is sought." *Id.* (quotation omitted). "If old information in a warrant affidavit contributes to an inference that probable cause exists at the time of the application for the warrant, the age of the information is no taint." *Id.* (citation omitted). "[S]taleness is not so much an independent bar to a determination of probable cause as it is a function of the essence of the probable cause determination." *Id.* ¶ 38.

A warrant-issuing magistrate is entitled to rely on practical knowledge and to make common-sense inferences from the information provided in the affidavit. *Romero*, 317

Wis. 2d 12, ¶ 19. Here, a part of that practical knowledge is that Wisconsin courts have concluded that the possession of child pornography is a crime of a protracted and continuous nature, and thus, the passage of time diminishes in significance when it comes to the assessment of staleness. *See State v. Schaefer*, 2003 WI App 164, ¶ 19, 266 Wis. 2d 719, 668 N.W.2d 760 (quotation omitted); *State v. Gralinski*, 2007 WI App 233, ¶ 31, 306 Wis. 2d 101, 743 N.W.2d 448. The magistrate's practical knowledge would also include the fact that Tumblr is required by law to report that it discovered child pornography "as soon as reasonably possible." 18 U.S.C. § 2258A(a)(1).

The warrant affidavit established that Tumblr reported the suspected child pornography to NCMEC on June 1, 2015. (8:27.) The warrant affidavit also established that Tumblr had possession of the pornographic images. (8:24, 30.) Thus, this was not a report that someone saw the images at one point in time. Tumblr had the actual files. Therefore, the warrant-issuing magistrate could reasonably infer that the pornography was still associated with Silverstein's blog on the date that Tumblr submitted its tips to NCMEC. Law enforcement applied for the warrant less than three months from the date that Tumblr submitted the tips and by that measure, probable cause was not stale.

Therefore, the question is whether the warrant application contained enough detail for the warrant-issuing magistrate to conclude that there was a fair probability that evidence of the crime of possession of child pornography would be found in Silverstein's home. *Romero*, 317 Wis. 2d 12, ¶ 3. Based upon the warrant application, the warrant-issuing magistrate knew that Tumblr informed NCMEC that suspected child pornography was found on a specific Tumblr blog. (8:24, 27.) The magistrate knew the content of the files flagged to be child pornography. (8:25–27.) And that

someone named Sam Silverstein, residing at the address identified, was the subscriber using the IP address associated with the identified Tumblr blog. (8:24–25.)

The magistrate could infer that, to upload the images and video, the possessor of pornography possessed electronic files. And the application established that electronic files could be stored on various mediums that could be found in the home. (8:27–28.) The application also established that evidence further linking Silverstein to the specified Tumblr blog, i.e., evidence of his username and password, could be written down and stored somewhere within the home. (8:28.) Based upon the totality of the facts before it, the magistrate could conclude that there was a fair probability that evidence relating to the crime of possession of child pornography would be found in Silverstein's home.

It was Silverstein's burden to establish that the warrant affidavit was clearly insufficient to establish probable cause. *Romero*, 317 Wis. 2d 12, ¶ 18. Silverstein has not met his burden, and this Court should affirm his judgment of conviction.[6]

II. Due process does not require the circuit court or this Court to misinterpret and misapply Wis. Stat. § 939.617.

Silverstein argues that Wis. Stat. § 939.617 is so vague that it is fundamentally unfair to require the circuit court to comply with the statute. (Silverstein's Br. 31–33.) In other

[6] If this Court disagrees and concludes that the warrant affidavit did not establish probable case, the State asks that the case be remanded for an evidentiary hearing on the issue of good faith. *See State v. Eason*, 2001 WI 98, ¶ 74, 245 Wis. 2d 206, 629 N.W.2d 625.

words, Silverstein argues that even though the circuit court correctly interpreted Wis. Stat. § 939.617, he has a due process right to have the circuit court misapply the statute. (Silverstein's Br. 33.)

"The Fourteenth Amendment of the United States Constitution assures that no person shall be deprived of 'life, liberty, or property without due process of law." *State v. Neumann*, 2013 WI 58, ¶ 32, 348 Wis. 2d 455, 832 N.W.2d 560. "Whether state action constitutes a violation of due process presents a question of law, which this court decides independently of the circuit court but benefiting from its analysis." *Id.*

Silverstein asserts that he was denied due process because the sentencing statute was not definite enough to provide him with a fair warning about the penalty he faced. (Silverstein's Br. 33.) Due process, however, requires that "the applicable statutes are definite enough to provide a *standard of conduct* for those whose *activities* are proscribed." *Neumann*, 348 Wis. 2d 455, ¶ 33 (emphasis added). "A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."*Id.* (quotation omitted).

Even though Wis. Stat. § 939.617 has nothing to do with conduct, this Court can easily conclude that Silverstein was not deprived of due process. "A challenged statute need not define with absolute clarity and precision what is and is not unlawful conduct." *Neumann*, 348 Wis. 2d 455, ¶ 34 (quotation omitted). "A certain amount of vagueness and indefiniteness is inherent in all language and, if not permitted, nearly all penal statutes would be void." *Id.* (quotation omitted).

A statute will not be declared unconstitutionally vague if its language has "any reasonable and practical construction." *State v. Thomas*, 2004 WI App 115, ¶ 14, 274 Wis. 2d 513, 683 N.W.2d 497 (citation omitted). In *Holcomb,* this Court concluded that Wis. Stat. § 939.617 has a reasonable and practical construction. In fact, the Court concluded that "Wisconsin Stat. § 939.617 has a *plain and unambiguous* meaning." *State v. Holcomb*, 2016 WI App 70, 371 Wis. 2d 647, ¶ 15, 886 N.W.2d 100 (emphasis added).

Thus, Silverstein's effort to create vagueness by citing cases in which circuit courts had misinterpreted Wis. Stat. § 939.617 is unpersuasive. (Silverstein's Br. 32–33.) Silverstein has no due process right to have either the circuit court or this Court misinterpret and misapply the statute. Therefore, there is no basis upon which to remand this case for resentencing.

CONCLUSION

For the foregoing reasons, this Court should affirm Silverstein's judgment of conviction.

Dated this 22nd day of December, 2016.

Respectfully submitted,

BRAD D. SCHIMEL
Wisconsin Attorney General

TIFFANY M. WINTER
Assistant Attorney General
State Bar #1065853

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-9487
(608) 266-9594 (Fax)
wintertm@doj.state.wi.us

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 5096 words.

_____
TIFFANY M. WINTER
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 22nd day of December, 2016.

_____
TIFFANY M. WINTER
Assistant Attorney General