STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2017AP185-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RONALD LEE BARIC,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND ORDERS DENYING MOTIONS TO SUPPRESS EVIDENCE, ENTERED IN THE OUTAGAMIE COUNTY CIRCUIT COURT, THE HONORABLE JOHN A. DES JARDINS, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Did the circuit court correctly rule that Ronald Lee Baric had no reasonable expectation of privacy in child pornography that he was offering for download on a file-sharing computer network, and thus a detective lawfully found that pornography?

The circuit court answered yes by denying Baric's suppression motion.

2. Did Baric freely consent to a search of his computer when special agents talked with him in his home?

The circuit court answered yes.

STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The State requests publication because, although courts around the country have uniformly held that a person has no reasonable expectation of privacy in peer-to-peer file sharing on the Internet, no published Wisconsin case has addressed this issue. The State does not request oral argument because the briefs should adequately set forth the facts and applicable precedent.

INTRODUCTION

Baric seeks suppression of child pornography evidence found on his computer. A detective learned that a computer in Wisconsin was offering child pornography for download on a file-sharing network. Police traced the computer to Baric's home. Special agents went there and talked with Baric, his sister, and his brother-in-law. Baric consented to a search of his computer, and a forensic analyst found child pornography on it. Baric filed two suppression motions. He argued in one that the detective unlawfully found the child pornography that Baric had made available for download.

He argued in the other that he did not freely consent to allow the forensic analyst to search his computer. The circuit court denied both motions.

This Court should affirm both rulings. First, the detective lawfully saw that Baric was offering child pornography for download on a file-sharing network. Baric had no reasonable expectation of privacy in those files once he made them publicly available for download on the Internet. The detective thus did not violate Baric's constitutional right against unreasonable searches. Second, the forensic analyst lawfully searched Baric's computer devices because Baric freely consented to the search. Baric's consent was voluntary because the agents had a congenial and honest talk with him in his home, the agents did not coerce him, the agents repeatedly told him that he could refuse to allow the search, and he was highly educated and very knowledgeable about computers.

STATEMENT OF THE CASE

In February 2010, Shawano County Detective John Kowaleski began investigating child pornography on peer-to-peer file-sharing networks on the Internet. (R. 32:5.) Computers on a file-sharing network have peer-to-peer software installed on them. (R. 32:5, 9.) This software allows people to share files with other "users around the world." (R. 32:5.) The "whole purpose" of using this kind of software is to share files. (R. 59:13.)

Peer-to-peer shared files have alphanumeric algorithms known as hash values. (R. 59:6.) Detective Kowaleski used Child Protection System (CPS) software to search on file-sharing networks for hash values of known child pornography. (R. 32:6; 59:8–9.) This software is not publicly available. (R. 59:8–9.)

If Detective Kowaleski found a match, he would use publicly available software to get a list of computers that were making the files available for download. (R. 32:6.) Doing so would allow him to learn the Internet Protocol (IP) addresses of the computers. (R. 32:6–7.) An IP address is a unique number that is assigned to each computer on the Internet. (R. 32:6–7.)

Detective Kowaleski would then use software, which was designed for law enforcement use only, to locate the computers based on their IP addresses. (R. 32:7; 59:9.) If a computer was nearby, it would show up on a map. (R. 59:9.) Using Web sites called "Whois" and "MaxMind," the detective could learn the identity of the Internet service provider for a specific IP address. (R. 32:7.) If the computer was in his jurisdiction, he could seek a warrant or subpoena to compel the Internet service provider to reveal the identity of the registered subscriber of the IP address. (R. 32:10; 59:6.)

In October 2014, Detective Kowaleski found that a particular computer in Wisconsin had ten files of child pornography available for download. (R. 32:7, 9.) The computer was using "eMule" peer-to-peer software to share the files on a file-sharing network called "eDonkey." (R. 32:7, 9; 59:5, 12.) The eMule software does not allow a user to keep his or her files private, and it warns the user that the files he or she downloads are shared. (R. 59:13.) Based on the computer's IP address, Detective Kowaleski's software said that the computer was located in Marion, then it said Shawano, and finally it said Hortonville. (R. 59:6–7.) The detective then used the "Whois" and "MaxMind" Web sites to learn that Charter Communications, Inc., was the computer's Internet service provider. (R. 32:7.) The FBI had deputized Detective Kowaleski to investigate child

pornography. (R. 59:10.) He generally works with an FBI agent but he did not in this case. (R. 59:10.)

In January 2015, Detective Kowaleski sought a subpoena to compel Charter to disclose the personal information of the IP address's registered subscriber. (R. 32:12–13.) The Shawano County Circuit Court issued the subpoena. (R. 32:14–16.) Later in January 2015, Charter responded by saying that the registered subscriber was John Schultz, who lived at a particular address in Hortonville. (R. 32:18–19.)

Special Agent Jed Roffers of the Wisconsin Department of Justice made a list of possible suspects. (R. 58:15, R-App. 170.) One of them was Michael Schultz, a registered sex offender. (R. 58:16, R-App. 171.) The agent learned that Michael's mother Susan Schultz ran an in-home day care at the Hortonville address. (R. 58:16, R-App. 171.) The agent then tried to talk to Michael at his Kaukauna home but he was not there, so the agent talked to Michael's wife. (R. 58:17, R-App. 172.) The agent told her about his investigation. (R. 58:17, R-App. 172.) She told the agent that Ronald Lee Baric lived in the basement of the Hortonville home. (R. 58:17, R-App. 172.) The agent decided to speak with Baric. (R. 58:17, R-App. 172.)

On Thursday, February 19, 2015, Special Agents Jed Roffers and Chad Racine went to the Hortonville address. (R. 20:1; 58:4–5, 29–30, 46; R-App. 101, 159–60, 184–85, 201.) They arrived just before 8:00 p.m. and were in plain clothes. (R. 20:1; 58:5, 16; R-App. 101, 160, 171.) They spoke to Baric's brother Chris Schultz outside, identified themselves, and confirmed that Baric lived there. (R. 20:1–3, R-App. 101–03.) The agents then knocked on a door, and Baric's sister Susan Schultz let them inside. (R. 58:20, 29–

30, R-App. 175, 184–85.)[1] The agents identified themselves to Susan and her husband John Schultz. (R. 20:3–4, R-App. 103.) A forensic analyst and two backup agents waited outside, out of sight. (R. 58:16, 21, R-App. 171, 176.)

Baric was in his bedroom when the agents arrived. (R. 58:20, R-App. 175.) Agents Roffers and Racine waited in the dining room while Susan went downstairs to ask Baric to come upstairs. (R. 20:4; 58:21, 31, R-App. 103, 176, 186.) Baric went upstairs and met with Susan, John, and the two agents in the kitchen. (R. 58:21–22, 31, 37, R-App. 176–77, 186, 192.) Baric did not seem to have any issues with physical or mental health. (R. 58:12, R-App. 167.) The agents identified themselves to Baric and said that they did Internet-type investigations. (R. 20:8–9, R-App. 105–06.)

Baric said that he was 27 years old and that he had a laptop downstairs. (R. 20:8–9, 15, R-App. 105–06, 109.) He also said that on a scale of one to ten, "with 10 being Bill Gates," his knowledge of computers was an eight. (R. 20:9, R-App. 106.)

Agent Roffers said that because they might talk about personal matters, Baric might feel more comfortable talking in private. (R. 20:12, R-App. 107.) Agent Roffers reiterated that the agents were performing an Internet-type investigation and that they hoped Baric could provide some information for them. (R. 20:14, R-App. 108.) Agent Roffers asked Baric whether he used any peer-to-peer file-sharing programs, and Baric said that he used torrents for downloading music. (R. 20:16–18, R-App. 109–10.) Agent Roffers said that he was not investigating illegal music

[1] Susan said that Baric is her adopted brother. (R. 58:28, R-App. 183.) But Chris said that he and Baric lived in "our mom and dad's house." (R. 20:3, R-App. 103.)

downloads. (R. 20:18, R-App. 110.) Agent Roffers then asked Baric whether he downloaded videos, and Baric said that he did but not often. (R. 20:19, R-App. 111.) Baric also said that he had a college degree in computer science and a full-time job. (R. 20:21–22, R-App. 112.)

Agent Roffers then said that he and his partner performed a lot of investigations into "children on the Internet and exploitation-type stuff." (R. 20:23, R-App. 113.) He asked Baric whether the agents could look at Baric's computer to see if it had anything "related to children or exploitation." (R. 20:23, R-App. 113.) Baric said, "If you wanted to, yeah." (R. 20:23, R-App. 113.)

Agent Roffers said that a computer forensic analyst would "preview" the computer." (R. 20:24, R-App. 113.) He again asked Baric if he would "be okay with that." (R. 20:24, R-App. 113.) Baric said, "[I]f you have to." (R. 20:24, R-App. 113.) The agent said, "It's completely up to you." (R. 20:24, R-App. 113.) Baric then said, "I would rather not, no." (R. 20:24, R-App. 113.)

Agent Roffers said that he thought there might be something on Baric's computer that was concerning, especially because Susan ran an in-home day care. (R. 20:25, R-App. 114.) The agent said that Baric might know what he was talking about, and Baric said, "I have an idea, yeah." (R. 20:25, R-App. 114.) The agent then asked Baric if he wanted to talk in private, and Baric said, "Yeah." (R. 20:25, R-App. 114.) Susan and John left the room. (R. 20:25, R-App. 114.)[2]

[2] The record sometimes refers to John Schultz as "Scott." Scott is his middle name. (R. 32:34, 40–43.)

Agent Roffers told Baric that he was "not in any trouble at all with us right now," "not under arrest," and "not in custody." (R. 20:25, R-App. 114.) The agent said that he had performed a background check on Baric and learned that he was not a criminal. (R. 20:26, R-App. 114.) He reassured Baric that "[w]e know you're a good guy." (R. 20:26, R-App. 114.) He said that agents could have applied for a search warrant, and then "we could have came here with guns drawn and bust down the door and all that. We didn't want to do that, based off the circumstances." (R. 20:26, R-App. 114.) Agent Roffers said that he wanted to help Baric if he had a problem, but he could not help Baric unless he admitted to having a problem. (R. 20:26, R-App. 114.)

Baric said that he thought the agents were investigating pornography. (R. 20:27, R-App. 115.) Agent Roffers said that they were investigating child pornography. (R. 20:27, R-App. 115.) Baric said that he might have viewed child pornography with "teenagers," "like 16 and up." (R. 20:27, R-App. 115.) Baric then said that he might have seen pornography with children as young as 14 or 15. (R. 20:28, R-App. 115.) Baric said that he had looked at child pornography out of "curiosity" but that he did not have a problem. (R. 20:29, R-App. 116.) Agent Roffers said that although Baric had no criminal history, the agent was concerned because children were often in Baric's house. (R. 20:32, R-App. 117.) Baric then said that he had viewed "pre-teen" pornography with children who were "not developed," and it disturbed him. (R. 20:32, R-App. 117.) He said that the children were as young as 13, but he did not purposely look for it. (R. 20:33, R-App. 118.) Baric said that he maybe still had child pornography on his computer but not the pornography that disturbed him. (R. 20:33-34, R-App. 118.)

Agent Roffers said that Baric likely knew what "the right thing to do" was, and Baric said, "Cooperating as much as I can." (R. 20:35, R-App. 119.) Agent Roffers said that the criminal justice system is usually more lenient with people who are cooperative and accept responsibility. (R. 20:35–36, R-App. 119.) Baric said, "I'm just scared, I guess." (R. 20:36, R-App. 119.)

Agent Racine said that he wanted to "corroborate" what Baric had said about child pornography on his computer, but "this isn't something that you have to do." (R. 20:37, R-App. 120.) Agent Roffers asked Baric if he would take the two agents to his bedroom. (R. 20:38, R-App. 120.) Baric said that he wanted to "cooperate," "I think I need help," and "I know it's wrong." (R. 20:38, R-App. 120.) Baric said that the agents would "find things" saved to the desktop. (R. 20:38, R-App. 120.) Baric again confirmed that he would allow the agents into his bedroom. (R. 20:39, R-App. 121.) Baric took the agents downstairs to his bedroom. (R. 20:40; 58:23–24; R-App. 121, 178–79.)

Agent Roffers chatted with Baric about video games and other topics in his bedroom. (R. 20:41–51, R-App. 121–27.) Baric chuckled multiple times when Agent Roffers commented on Baric's e-mail address and outdated cell phone. (R. 20:45, 50, R-App. 124, 126.) Agent Roffers did not threaten Baric in any way. (R. 58:11–12, R-App. 166–67.)

Baric then signed a consent form allowing the agents to take and search his computer devices. (R. 20:51; 58:9–11; R-App. 127, 164–66.) On the form, Baric acknowledged that he could refuse to allow the search, he had been informed of that right, he was giving consent out of his "own free will," and anything discovered could be used against him in a criminal proceeding. (R. 47:1.) The agents took two computers and three hard drives. (R. 1:9.) The agents did not

give Baric a *Miranda*[3] warning before taking his computer devices.

The forensic analyst who had been waiting outside performed "an onsite preview" of the devices and found child pornography on them. (R. 1:6–7; 5:7.) Some of the pornography showed a girl who had committed suicide in 2012 after being the victim of online sexual extortion and cyber bullying. (R. 1:7; 5:7.)

Agent Roffers applied for a warrant to search the devices. (R. 1.) The Outagamie County Circuit Court issued the warrant. (R. 3.) The forensic analyst more thoroughly searched the devices and found more child pornography. (R. 5:8–11.)

In August 2015, the State charged Baric with 11 counts of possession of child pornography. (R. 5.) In October 2015, Baric filed a suppression motion in which he argued that he had been coerced into consenting to the search of his computer devices. (R. 12.) The circuit court held a hearing on the motion in January 2016. (R. 58, R-App. 156–208.) Agent Roffers, Baric, and Susan Schultz testified. (R. 58:3–45, R-App. 158–200.) Agent Roffers testified that during his conversation with Baric, he believed that he could have gotten a warrant. (R. 58:25–26, R-App. 180–81.) Baric testified that he signed the consent form after speaking with the agents for about 70 minutes. (R. 58:40, R-App. 195.) The circuit court made findings of fact, including a finding that Agent Roffers had credibly testified about his ability to get a warrant. (R. 58:46–49, R-App. 201–02.) The circuit court did not determine how long Baric's conversation with the agents lasted, due to discrepancies in testimony on that issue. (R. 58:48, R-App. 203.) The court found the length of the

[3] *Miranda v. Arizona*, 384 U.S. 436 (1966).

conversation insignificant because the agents had engaged in "gentle questioning." (R. 58:48, R-App. 203.) Baric and the State filed briefs on the motion. (R. 18; 19.) The circuit court denied the motion in a written decision in April 2016. (R. 21.)

In June 2016, Baric filed a suppression motion in which he argued that the detective had performed an illegal search by viewing the child pornography that Baric was offering for download on a file-sharing network. (R. 32.) The State filed a response brief. (R. 33.) The circuit court held a hearing on the motion in June 2016. (R. 59.) The court denied the motion because Baric had no reasonable expectation of privacy in the files that he was offering for download. (R. 59:17.)

In August 2016, Baric pled no contest to two counts based on a plea agreement. (R. 60:2–3.) The Outagamie County Circuit Court dismissed and read-in the other nine counts. (R. 60:3.) The court gave him concurrent sentences of three years of initial confinement and four years of extended supervision. (R. 61:13.)

Baric appeals his judgment of conviction. (R. 49.)

SUMMARY OF ARGUMENT

I. Detective Kowaleski lawfully found child pornography that Baric had made available for Internet users to download on a file-sharing network. Baric had no property interest in the file-sharing network and had no right to prevent others from seeing the pornography that he was offering for download. He thus had no reasonable expectation of privacy in that pornography. Courts around the country have uniformly reached this conclusion in similar cases.

II. Baric freely consented to allow special agents to search his computer devices. The agents had a congenial and honest talk with Baric at his home, and his relatives were present until he asked to speak with the agents privately. The agents did not threaten, intimidate, or punish Baric. They told Baric several times that he could refuse to allow them to search his computer. Baric was highly educated and very knowledgeable about computers.

STANDARD OF REVIEW

When reviewing a decision on a motion to suppress evidence, this Court upholds the circuit court's factual findings unless they are clearly erroneous, but it independently applies constitutional principles to the facts. *State v. Lonkoski*, 2013 WI 30, ¶ 21, 346 Wis. 2d 523, 828 N.W.2d 552.

ARGUMENT

I. A detective lawfully found child pornography that Baric was offering for download on a file-sharing network because Baric had no reasonable expectation of privacy.

A. Controlling legal principles.

The Fourth Amendment to the U.S. Constitution "generally requires police to secure a warrant before conducting a search." *State v. Marquardt*, 2001 WI App 219, ¶ 30, 247 Wis. 2d 765, 635 N.W.2d 188 (citation omitted). "In order for the Fourth Amendment's warrant requirement to apply, the defendant must first have a reasonable expectation of privacy in the property or location." *State v. Guard*, 2012 WI App 8, ¶ 16, 338 Wis. 2d 385, 808 N.W.2d 718 (citation omitted).

For a defendant to show that he had a reasonable expectation of privacy, he must show that he had a subjective expectation of privacy and that "society is prepared to recognize [the expectation] as legitimate." *State v. Yakes*, 226 Wis. 2d 425, 430, 595 N.W.2d 108 (Ct. App. 1999) (citation omitted). "In other words, the defendant must show that he or she had a subjective expectation of privacy that was objectively reasonable." *Id.* (citation omitted). The defendant must show both prongs by a preponderance of the evidence. *Guard*, 338 Wis. 2d 385, ¶ 17.

Under the reasonableness prong, a court considers the totality of the circumstances. *State v. Tentoni*, 2015 WI App 77, ¶ 7, 365 Wis. 2d 211, 871 N.W.2d 285, *review denied*, 2016 WI 16, 367 Wis. 2d 127, 876 N.W.2d 512. Several factors may guide the reasonableness analysis: (1) "Whether the person had a property interest in the premises," (2) "Whether the person was legitimately on the premises," (3) "Whether the person had complete dominion and control and the right to exclude others," (4) "Whether the person took precautions customarily taken by those seeking privacy," (5) "Whether the person put the property to some private use," and (6) "Whether the claim of privacy is consistent with historical notions of privacy." *Id.* (citation omitted). "These factors are not controlling, and the list is not exclusive." *Id.* (citation omitted). This test can apply to digital content. *Id.* ¶ 7 n.3.

B. The circuit court correctly held that Baric had no reasonable expectation of privacy when using a file-sharing network.

Under the first prong of the test, Baric has not shown by a preponderance of the evidence that he had a subjective expectation of privacy when he used a file-sharing network, nor can he. Detective Kowaleski found that a computer with Baric's IP address was using "eMule" peer-to-peer software

to share or offer to share ten files of child pornography on a file-sharing network called "eDonkey." (R. 32:7, 9; 59:5, 12.) Computers on a file-sharing network have peer-to-peer software installed on them. (R. 32:5, 9.) This software allows people to share files with other "users around the world." (R. 32:5.) The "whole purpose" of using this kind of software is to share files. (R. 59:13.) The eMule software does not allow a user to keep his or her files private, and it warns the user that the files he or she downloads are shared. (R. 59:13.) The detective did not search Baric's hard drive or computer. (R. 59:7, 13.) He merely viewed the files that Baric's computer had available for sharing. (R. 32:7–9.) Under these facts, Baric did not have a subjective expectation of privacy in files that he was offering to share with people around the world.

Under the second prong of the test, Baric has not shown by a preponderance of the evidence that he had a reasonable expectation of privacy, nor can he. He did not have a property interest in the file-sharing network that he was using. He was unable to prevent law enforcement officers or anyone else from viewing the files that he offered to share. He did not put his child pornography to solely private use but instead offered to share it with people around the world. And society would not see a legitimate expectation of privacy here. "[F]ree people" do not expect a harmful communication to remain private. *See State v. Duchow*, 2008 WI 57, ¶ 34, 310 Wis. 2d 1, 749 N.W.2d 913 (finding no reasonable expectation of privacy in a threat to harm someone). "The serious harms associated with the distribution of child pornography are well known." *State v. Bowser*, 2009 WI App 114, ¶ 16, 321 Wis. 2d 221, 772 N.W.2d 666 (citations omitted). Child pornography has historically been illegal because of its harm to children. *See United States v. Stevens*, 559 U.S. 460, 471 (2010). Its harm has only increased with the recent ability to share child pornography on the Internet. *Bowser*, 321 Wis. 2d 221, ¶ 16.

Baric thus did not have a reasonable expectation of privacy in the child pornography that he was publicly offering to share on the Internet.

Tentoni is instructive. In *Tentoni*, a police officer responded to a call about a death and found the victim's body. *Tentoni*, 365 Wis. 2d 211, ¶ 2. He searched the victim's cell phone and found text messages between the victim and Tentoni, which implicated Tentoni in the death. *Id.* ¶ 3. This Court concluded that Tentoni had no reasonable expectation of privacy in the text messages on the victim's phone. *Id.* ¶ 8. It noted that Tentoni did not have a property interest in the victim's phone. *Id.* And the "key" factors were that Tentoni had no control over what happened to the text messages after he sent them and that he lacked a right to exclude others from reading them. *Id.* ¶ 11.

Here, similarly, Baric had no reasonable expectation of privacy. Like Tentoni's lack of a property interest in the victim's phone, Baric had no property interest in the file-sharing network that he was using. And the same two key factors are present here. Baric had no control over what happened to the child pornography once he offered it for download on a file-sharing network, and he had no right to exclude anyone from accessing the network and viewing the files that he was offering to share.

Indeed, courts in other jurisdictions would conclude that Detective Kowaleski did not violate Baric's Fourth Amendment rights. In child-pornography cases, state and federal courts around the country have held that a person has no reasonable expectation of privacy in peer-to-peer file sharing. *United States v. Hill*, 750 F.3d 982, 986 (8th Cir. 2014); *United States v. Conner*, 521 F. App'x 493, 497–98 (6th Cir. 2013); *United States v. Norman*, 448 F. App'x 895, 897 (11th Cir. 2011) (per curiam); *United States v. Borowy*, 595 F.3d 1045, 1047–48 (9th Cir. 2010) (per curiam); *United*

States v. Perrine, 518 F.3d 1196, 1205 (10th Cir. 2008); *State v. Combest*, 350 P.3d 222, 231–33 (Or. Ct. App.), *review denied*, 363 P.3d 501 (Or. 2015); *State v. Aguilar*, 437 S.W.3d 889, 901 (Tenn. Crim. App. 2013); *State v. Roberts*, 345 P.3d 1226, 1236 (Utah 2015); *State v. Peppin*, 347 P.3d 906, 908–10 (Wash. Ct. App.), *review denied*, 360 P.3d 817 (Wash. 2015). The federal circuit courts that have addressed this issue have "uniformly" reached this conclusion. *Conner*, 521 F. App'x at 498 (collecting cases).

This Court should follow that uniform rule. It has followed other jurisdictions in similar cases. *See, e.g.*, *Tentoni*, 365 Wis. 2d 211, ¶¶ 9–10 (following other courts' holding that a person has no reasonable expectation of privacy in a communication that he or she sends). Under this firmly established rule, Baric had no reasonable expectation of privacy in his peer-to-peer file sharing.

C. Baric's contrary arguments have no merit.

Baric argues that Detective Kowaleski acted illegally under *Kyllo v. United States*, 533 U.S. 27 (2001), because he used software that was not publicly available. (Baric Br. 7–15.) *Kyllo* is very different than Baric's case. In *Kyllo*, law enforcement officers used a thermal imager to scan Kyllo's home to see whether it was emitting a large amount of heat consistent with the use of heat lamps for growing marijuana. *Kyllo*, 533 U.S. at 29–30. The Supreme Court held that where "the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant." *Id.* at 40. It emphasized that the thermal imager invaded the interior of a home, which is entitled to special protection under the Fourth Amendment. *Id.* at 34, 40.

By contrast, Detective Kowaleski did not look into Baric's home but instead merely saw files that Baric was publicly offering to share in cyberspace. Unlike the officers in *Kyllo*, Detective Kowaleski did not see anything in which Baric had a reasonable expectation of privacy. *Kyllo* thus does not control here. Courts have reached the same conclusion in cases where law enforcement officers used peer-to-peer software to learn that the defendants had child pornography on their computers. *See, e.g.*, *Norman*, 448 F. App'x at 897; *Roberts*, 345 P.3d at 1236; *see also Peppin*, 347 P.3d at 911 (distinguishing a state case with the same holding as *Kyllo*).

Baric also argues that Detective Kowaleski performed an illegal search when he used Child Protection System (CPS) software to look for files with hash values of known child pornography. (Baric Br. 8, 10, 11, 12.) That argument has no merit. CPS software merely sorts through and searches for files that an ordinary user of peer-to-peer software could find and access. *United States v. Dodson*, 960 F. Supp. 2d 689, 695–96 (W.D. Tex. 2013). And because a person has no reasonable expectation of privacy in files that are publicly available on a file-sharing network, a law enforcement officer does not violate the Fourth Amendment by using software to look for child pornography on such a network. *See, e.g.*, *Borowy*, 595 F.3d at 1048; *Roberts*, 345 P.3d at 1236. As already explained, Baric had no reasonable expectation of privacy in the child pornography that he made publicly available for download. Detective Kowaleski thus did not violate Baric's Fourth Amendment rights by searching for child pornography.

Baric further argues that Detective Kowaleski performed an illegal search by using software to determine Baric's geographic location. (Baric Br. 11–12.) Besides being undeveloped, that argument fails on the merits. So-called

"geolocation services" "enable anyone to estimate the location of Internet users based on their IP addresses. Such services cost very little or are even free." *AF Holdings, LLC v. Does 1-1058*, 752 F.3d 990, 996 (D.C. Cir. 2014) (citations omitted). Because any person using the same file-sharing network as Baric could have used his IP address to find his geographic location, Detective Kowaleski's geolocation software did not invade a reasonable expectation of Baric's privacy. Baric has not shown otherwise by a preponderance of the evidence.

To be sure, people "have a legitimate expectation of privacy in the contents of their electronic devices." (Baric Br. 12 (citations omitted).) But Detective Kowaleski did not search Baric's computer. (R. 59:7, 13.) Instead, he viewed child pornography that Baric was offering for download on a file-sharing network. (R. 32:7–9.) Baric did not have a reasonable expectation of privacy in the child pornography after he made it available for download on the Internet.

Baric argues that Detective Kowaleski acted outside of his jurisdiction and exceeded the scope of his deputization to search for child pornography because he was not working with an FBI agent. (Baric Br. 7, 8, 12.) This Court should ignore those arguments because it generally does not consider undeveloped arguments. *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). Besides, those arguments fail on the merits. Even if an officer exceeds his or her jurisdiction, suppression is not required unless the officer obtained evidence "in violation of a constitutional right or in violation of a statute providing suppression as a remedy." *State v. Keith*, 2003 WI App 47, ¶ 9, 260 Wis. 2d 592, 659 N.W.2d 403 (citation omitted). Baric does not allege a statutory violation. And because Baric had no reasonable expectation of privacy, Detective Kowaleski did not violate the Constitution by viewing the child pornography that

Baric was offering for download. Baric thus is not entitled to suppression, regardless of whether Detective Kowaleski acted outside of his jurisdiction.

In sum, the circuit court correctly ruled that Detective Kowaleski lawfully found the child pornography that Baric was offering to share on the Internet.

II. The special agents lawfully searched Baric's computer devices with his voluntary consent.

A. Controlling legal principles.

A warrantless search is unreasonable under the Fourth Amendment unless an exception to the warrant requirement applies. *State v. Rome*, 2000 WI App 243, ¶ 10, 239 Wis. 2d 491, 620 N.W.2d 225. Consent is one exception. *Id.* ¶ 11.

To determine if consent justified a search, a court must determine whether a suspect in fact gave consent and, if so, whether the consent was voluntary. *State v. Artic*, 2010 WI 83, ¶ 30, 327 Wis. 2d 392, 786 N.W.2d 430. This Court upholds a circuit court's finding of consent unless it was clearly erroneous. *Id.* ¶¶ 30–31. The State must prove by clear and convincing evidence that consent was voluntary. *Id.* ¶ 32.

A court looks at the totality of the circumstances to determine whether consent was voluntary. *Id.* Courts consider several "non-exclusive factors": "(1) whether the police used deception, trickery, or misrepresentation in their dialogue with the defendant to persuade him to consent"; "(2) whether the police threatened or physically intimidated the defendant or 'punished' him by the deprivation of something like food or sleep"; "(3) whether the conditions attending the request to search were congenial, non-threatening, and cooperative, or the opposite"; "(4) how the

defendant responded to the request to search"; "(5) what characteristics the defendant had as to age, intelligence, education, physical and emotional condition, and prior experience with the police"; and "(6) whether the police informed the defendant that he could refuse consent." *Id.* ¶ 33 (citations omitted).[4]

B. Baric gave voluntary consent to a search of his computer devices.

Under the first step of the analysis, Baric gave consent for the special agents to search his computer devices. The circuit court found that he consented. (R. 58:47, R-App. 202.) This finding is correct because Baric signed a consent form. (R. 47.) He does not argue otherwise.

Under the second step, Baric's consent was voluntary. Turning to the first factor, the special agents did not use deception, trickery, or misrepresentation. The agents identified themselves to Baric and his family and said that they were investigating Internet activity at the family's house. (R. 20:2–4, 7–8, 14, R-App. 101–03, 105, 108.) Moments later, the agents honestly explained that they did many investigations into "children on the Internet and exploitation-type stuff." (R. 20:23, R-App. 113.) Before talking about child pornography, the agents asked Baric whether he wanted to talk in private, and he said yes. (R. 20:25, R-App. 114.) After Baric's sister and brother-in-law left the room, the agents and Baric talked candidly about child pornography. (R. 20:25–34, R-App. 114–18.) Multiple

[4] This brief and Baric's brief cite to some cases that dealt with whether a defendant's *statements* were voluntary. (Baric Br. 6, 16, 18–19, 27.) To be clear, the issue here is whether Baric's consent to the search was voluntary, not whether his statements to the special agents were voluntary. (*See* Baric Br. 15–27; *see* also R. 18; 19; 21.)

times during the conversation, the agents honestly said that Baric was not in trouble at that point. (R. 20:6, 25, R-App. 104, 114.) Agent Roffers suggested, but did not promise, that Baric's cooperation could result in leniency. (R. 20:35–36, R-App. 119.) And even a truthful promise of leniency that later comes to fruition does not render consent involuntary. *See State v. Lemoine*, 2013 WI 5, ¶¶ 27–29, 345 Wis. 2d 171, 827 N.W.2d 589. Agent Roffers' suggestion of leniency was honest and came to fruition because Baric accepted a plea agreement that resulted in the dismissal of 9 out of 11 charges. (R. 60:2–3.) Agent Roffers also honestly indicated that he did not have a search warrant. (R. 20:26, R-App. 114.) Being forthright about not having a warrant weighs in favor of voluntariness. *See Artic*, 327 Wis. 2d 392, ¶ 36. The first factor supports the voluntariness of Baric's consent.

Moving onto the second factor, the agents did not threaten, intimidate, or punish Baric. There is no evidence that they deprived him of food or water. They spoke to Baric in his kitchen with his sister and brother-in-law present until Baric said that he wanted to speak with the agents in private. (R. 20:6–25; 58:21–22, 31, 37; R-App. 101–14, 176–77, 186, 192.) Agent Roffers testified that he did not threaten Baric in any way. (R. 58:11–12, R-App. 166–67.) And Agent Roffers' reference to a search warrant bolstered the voluntariness of Baric's consent. When a law enforcement officer genuinely says that he or she could get a search warrant, the officer enhances the voluntariness of consent. *Artic*, 327 Wis. 2d 392, ¶¶ 41–42. Agent Roffers told Baric that he could have applied for a warrant and then "bust[ed]" into Baric's house, but he chose not to because Baric did not have a criminal history. (R. 20:26, R-App. 114.) Agent Roffers testified that he believed that he could have gotten a warrant before he went to Baric's house. (R. 58:25–26, R-App. 180–81.) The circuit court found that testimony credible. (R. 58:47, R-App. 202.) Thus the second factor,

including Agent Roffers' genuine implication that he could come back with a warrant, weighs in favor of voluntariness.

Turning to the third factor, the conditions were congenial and cooperative. The agents did not barge into Baric's home or bedroom. Instead, they knocked on a door and then Baric's sister let them into the house. (R. 58:20, 29–30, R-App. 175, 184–85.) The agents waited in the dining room while Baric's sister went downstairs to get him. (R. 20:4; 58:21, 31; R-App. 103, 176, 186.) The agents spoke with Baric, his sister, and his brother-in-law in the kitchen until Baric said that he wanted to speak privately with the agents. (R. 20:6–25; 58:21–22, 31, 37; R-App. 101–04, 176–77, 186, 192.) Agent Roffers told Baric that he was "not under arrest" and "not in custody." (R. 20:25, R-App. 114.) The agents engaged in "gentle questioning." (R. 58:48, R-App. 203.) Baric said that cooperating was the right thing to do and that he wanted to cooperate. (R. 20:35, 38, R-App. 119, 120.) And he then did cooperate. He told the agents that they would "find things" saved to his computer desktop, and he then led the agents to his basement bedroom to take his computer devices. (R. 20:38–40; 58:23–24; R-App. 120–21, 178–79.) When a consenting person leads police to contraband, the cooperation weighs in favor of voluntariness. *See State v. Nehls*, 111 Wis. 2d 594, 599, 331 N.W.2d 603 (Ct. App. 1983). Baric also chuckled multiple times while chatting in his bedroom with Agent Roffers. (R. 20:45, 50, R-App. 124, 126.) Even if Baric correctly testified that he consented after talking to the agents for 70 minutes, a conversation that long is not coercive in a noncustodial setting. *See Lemoine*, 345 Wis. 2d 171, ¶ 24. Baric's interaction with the agents was congenial and cooperative, so the third factor weighs in favor of voluntariness.

Moving onto the fourth factor, Baric initially consented to a search of his computer. (R. 20:23, R-App. 113.) Moments later, he said that Agent Roffers could search the computer if he had to do so. (R. 20:24, R-App. 113.) Agent Roffers responded, "It's completely up to you." (R. 20:24, R-App. 113.) Baric then said, "I would rather not, no." (R. 20:24, R-App. 113.) Baric's turnabout falls far short of negating his later consent.

Turning to the fifth factor, Baric's traits heavily weigh in favor of voluntariness. He was 27 years old at the time of the search. (R. 20:8, R-App. 105.) He did not seem to have any issues with physical or mental health. (R. 58:12, R-App. 167.) He had a college degree in computer science and a full-time job. (R. 20:21–22, R-App. 112.) On a scale of one to ten, "with 10 being Bill Gates," Baric said his knowledge of computers was an eight. (R. 20:9, R-App. 106.) His vast knowledge of computers strongly suggested that he knew what a search of his computer devices would entail. This fifth factor strongly supports the voluntariness of his consent.

Moving onto the sixth factor, the agents told Baric several times that he could refuse to allow them to search his computer. When Agent Roffers first asked for consent, he said to Baric, "It's completely up to you." (R. 20:24, R-App. 113.) Baric then showed that he understood his right to refuse by saying, "I would rather not, no." (R. 20:24, R-App. 113.) Agent Racine later said that he wanted to "corroborate" what Baric had said about having child pornography on his computer, but "this isn't something that [Baric had] to do." (R. 20:37, R-App. 120.) Baric later signed a consent form allowing the agents to take and search his computer devices. (R. 20:51; 58:9–11; R-App. 127, 164–66.) On the form, Baric acknowledged that he could refuse to allow the search and that he had been informed of this right. (R. 47:1.) Although

the agents did not give Baric a *Miranda* warning, this omission is not dispositive but rather is merely one of many factors. *Lemoine*, 345 Wis. 2d 171, ¶ 33. Because the agents repeatedly informed Baric of his right to refuse, this factor weighs in favor of voluntariness.

In sum, the circuit court correctly held that Baric freely consented to a search of his computer devices, making the search lawful.

CONCLUSION

The State respectfully asks this Court to affirm Baric's judgment of conviction and the circuit court's orders denying his two suppression motions.

Dated: June 22, 2017.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 6532 words.

_____
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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. § 809.19(12).

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

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Dated: June 22, 2017.

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