STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2018AP000078-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GARRETT A. GERMAN,

Defendant-Appellant.

On Appeal From Denial of a Suppression Motion,
Judge Steven Cray, Presiding and from the Judgment of
Conviction Entered in Chippewa County Circuit Court,
Judge James M. Isaacson, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

THOMAS B. AQUINO
Assistant State Public Defender
State Bar No. 1066516

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-1971
aquinot@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

STATEMENT OF THE ISSUES

The only evidence to support a warrant to search the defendant's computer for child pornography was the affiant's averment that the defendant had posted images containing "child pornography." The affidavit neither attached the images nor described their contents.

1. Does a conclusory statement that an image contains "child pornography" provide probable cause for a search warrant, in light of Supreme Court precedent that "conclusory" statements that images are "obscene" do not support probable cause? ***New York v. P.J. Video, Inc.***, 475 U.S. 868, 887, n. 5 (1986).

The circuit court assumed that the warrant was not supported by probable cause.

2. Did the state meet its burden of proving that the good faith exception to the exclusionary rule applies under ***United States v. Leon***, 468 U.S. 897, 926 (1984) and ***State v. Eason***, 2001 WI 98, ¶3, 245 Wis. 2d 206, 629 N.W.2d 625?

The circuit court ruled that the good faith exception applied.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Defendant-Appellant Garrett A. German does not believe that oral argument or publication is necessary, as the appeal involves straightforward applications of existing case law.

STATEMENT OF THE FACTS AND CASE

Introduction

This appeal concerns a suppression issue first litigated in federal court. On February 12, 2016, District Judge William M. Conley, Western District of Wisconsin, held that the warrant to search German's home was not supported by probable cause, and suppressed all evidence gathered pursuant to the warrant. (11:2-25; App. 152-175). The supporting affidavit alleged that German transmitted "child pornography," without describing or attaching the offending images. (11:9; App. 159). Judge Conley reasoned that the affidavit failed to give the warrant-issuing magistrate sufficient facts to determine whether the images contained criminal or legal depictions of children. (11:9-12; App. 159-162). Judge Conley further held that the good faith exception did not apply because any misunderstanding about what was required in the warrant was "*not* objectively reasonable given the case law." (11:24; App. 174) (emphasis in original).

The federal government did not appeal the decision. The State of Wisconsin, however, filed this criminal action. (1). As detailed below, the state court denied German's motion to suppress evidence obtained under the warrant (36, 68) and German plead no contest to two counts of possessing child pornography, Wis. Stat. § 948.12. (50).

The State Applies For A Search Warrant

On May 11, 2015, the Chippewa County District Attorney's Office applied for a warrant to search German's home. (74). The application was supported by an affidavit of Investigator Deborah Brettingen of the Chippewa Falls Police Department. (74:4-14; App. 176-186).

After detailing the items sought, Brettingen's affidavit recounts her training and experience investigating internet child pornography. (74:5-6; App. 177-178). The affidavit then profiles users of child pornography, and explains how law enforcement investigates child pornography. (74:6-12; App. 178-184).

Brettingen's affidavit next describes the investigation that led to the warrant application. In January 2015, the National Center for Missing and Exploited Children ("NCMEC") generated three "CyberTips" that were then investigated by Special Agent Matt Joy of the Wisconsin Department of Justice. (74:13, ¶¶2-3; App. 185). Joy forwarded his report and the tips to Deputy Jeff Nocchi of the Eau Claire Sheriff's Department on February 12, 2015, and Nocchi forwarded them on to Brettingen on April 29, 2015. (*Id*.)

Two of the CyberTip reports indicated that on both the 19th and 25th of January, 2015, an image that "appeared to depict child pornography …was uploaded" on to a Facebook account with the user name "Garrett German." (74:13, ¶¶3, 5; App. 185). Each report included the suspected image, and for each Brettingen "did observe the image," and concluded that "it does appear to be an image of child pornography." (*Id*.). The third CyberTip included the phone number, birthday, and email address of "Garrett German." (74:13, ¶4; App. 185). The CyberTips included the ISP addresses used to log into the "Garrett German" account, which investigators were able to use to determine the physical address of the user who uploaded the images. (74:13-14, ¶¶6-8; App. 185-186).

German Is Charged In Federal Court
And Moves To Suppress

On August 5, 2015, federal officials filed an indictment charging German with two counts of unlawfully creating child pornography. (11:2; App. 150).[1] German filed a motion to suppress, arguing that the warrant was not supported by probable cause and any evidence obtained as a result of the deficient warrant should be suppressed. (*Id*.)

The federal district court, Judge William M. Conley presiding, granted German's motion to suppress on February 12, 2016, ruling that the warrant was not supported by probable cause because it included neither a detailed description of the images nor a copy of the actual images. (11; App. 152). Judge Conley reasoned that:

> neither Deputy Nocchi nor Investigator Brettingen provided the state court with enough information to establish probable cause for their requested warrants. Indeed, each affidavit states nothing more than that each of the two images forwarded by Facebook "appears to be an image of child pornography."

(11:9; App. 159). Judge Conley observed that all but one federal circuit court to address the issue has agreed that a conclusory statement that an image contains "child pornography" is not by itself enough to create probable cause.

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[1] German asks this court to take judicial notice of the docket entries for ***United States v. Garrett A. German***, United States District Court for the Western District of Wisconsin, 15-cr-00101, the relevant portions of which are reproduced in the appendix. (App. 187-191). Wis. Stat. § 902.01. *See* ***Kirk v. Credit Acceptance Corp.***, 2013 WI App 32, ¶¶5, 19-20, n. 1, 346 Wis. 2d 635, 829 N.W.2d 522 (taking judicial notice of CCAP records).

(11:19; App. 169). The good faith exception to the exclusionary rule did not apply because an "inexplicable ignorance of established law" could not result in the government benefitting from the doctrine. (11:21; App. 171).

The federal district court granted the federal government's motion to dismiss the federal charges against German on March 4, 2016. (App. 191).

German Is Charged In State Court And Moves To Suppress

On April 26, 2016, the state filed a criminal complaint charging 12 counts of Possession of Child Pornography, contrary to Wis. Stat. § 948.12(1m) and (3)(a). (1:1-12).

German filed a motion to suppress on June 24, 2016, relying on Judge Conley's decision. (11). The court, Judge Cray, presiding, heard the motion on September 2, 2016. (68; App. 101-125). Judge Cray noted that he issued the warrant (68:20; 74:3; App. 120), but assumed for the purposes of the suppression hearing that it was not supported by probable cause. (68:15; App. 115).

However, Judge Cray held that the good faith exception to the exclusionary rule applied, relying primarily on his view that the inadequacy of conclusory opinions about whether an image was "child pornography" was not "established law." (68:18-21; App. 118-121). Judge Cray also held, albeit without reference to specific facts in the record, that there was no showing that the issuing magistrate (*i.e.*, Judge Cray himself) abandoned his neutral and detached function, that the affidavit had "sufficient indicia of probable cause to render a belief its existence was reasonable," that there was no showing that affidavit contained misinformation or reckless disregard for the truth, that there had been enough investigation by the officer, who was knowledgeable on

probable cause and reasonable suspicion, and that a "reasonably well-trained officer would not have known that the search warrant was not compliant with the constitutional requirements despite the judicial authorization." (68: 21-22; App. 121-122).

German subsequently retained private counsel, who filed a "Motion To Suppress Evidence And Statements Or To Reconsider." (28). The motion asserted that the initial decision was void, as it was issued prior to the information being filed. Wis. Stat. § 971.31(5)(b) (A "...motion to suppress evidence...shall not be made ...until an information has been filed."). (28:4). Alternatively, if the initial decision was not void, German asked the court to reconsider that decision. German included with his motion the actual affidavits from two Wisconsin cases cited in Judge Cray's ruling, ***State v. Gralinski***, 2007 WI App 233, ¶1, 306 Wis. 2d 101, 743 N.W.2d 448, 451 and ***State v. Park***, 2009 WI App 141, 321 Wis. 2d 477, 774 N.W.2d 476 (unpublished opinion) (App. 192-201) to demonstrate these warrants actually contained more detailed descriptions of the images than Judge Cray had understood from reading the opinions.[2]

The state's response argued that the motion to reconsider should be dismissed, as Judge Cray's decision was valid and the proper remedy for German was an appeal. (32:1-2).

The motion was heard by a new judge assigned to the case, the Honorable James M. Isaacson, presiding. (71). Judge Isaacson heard the motion and ruled that the original

[2] The ***Park*** affidavit is found at 30:17-29 and the ***Gralinski*** affidavit at 31:5-19. Both affidavits happen to be signed by the same affiant.

motion was not untimely and Judge Cray's decision, therefore, was not void. (71:15; App. 140). The court further reasoned that in order to prevail on a motion for reconsideration, the party has to show "either newly discovered evidence or establish a manifest error of law or fact." (71:23; App. 148). Judge Isaacson denied the motion to reconsider for lack of either new evidence or an error in law. (70:24; App. 149).

German's Plea And Sentencing

German pled to 2 counts of possession of child pornography on April 7, 2017. (72). At sentencing on July 28, 2017, Judge Isaacson sentenced German to 8 years imprisonment, consisting of 4 years initial confinement and 4 years of extended supervision. (50; 73).

German timely filed a notice of appeal, and this appeal follows.

ARGUMENT

I. The Evidence Obtained In This Case Should Have Been Suppressed, As The Warrant Was Deficient And The State Failed To Show The Good Faith Exception Applied In This Case.

A. Standard of review.

The Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution protect against unreasonable searches and seizures. ***State v. Dearborn***, 2010 WI 84, ¶14, 327 Wis. 2d 252, 786 N.W.2d 97. "It is axiomatic that 'the physical entry of the home is the chief evil against which the

wording of the Fourth Amendment is directed.'" ***Welsh v. Wisconsin***, 466 U.S. 740, 748 (1984).

"Search warrants may issue only upon 'a finding of probable cause by a neutral and detached magistrate.'" ***State v. Ward***, 2000 WI 3, ¶21, 231 Wis. 2d 723, 604 N.W.2d 517 (quoting ***State v. Higginbotham***, 162 Wis. 2d 978, 989, 471 N.W.2d 24 (1991)); Wis. Stat. § 968.12(1). This court "accord[s] great deference to the determination made by the warrant-issuing magistrate." ***Ward***, 231 Wis. 2d 723, ¶21.

To support a determination that probable cause exists, the magistrate must be "apprised of sufficient facts to excite an honest belief in a reasonable mind that the objects sought are linked with the commission of a crime, and that the objects sought will be found in the place to be searched." ***Higginbotham***, 162 Wis. 2d at 989. The standard is whether there is a "fair probability" that evidence of a crime will be located. ***Illinois v. Gates***, 462 U.S. 213, 238 (1983).

"[E]very probable cause determination must be made on a case-by-case basis, looking at the totality of the circumstances." ***State v. Multaler***, 2002 WI 35, ¶34, 252 Wis. 2d 54, 643 N.W.2d 437. "[A] search based upon an invalid search warrant is per se unreasonable" and thus unlawful. *See* ***State v. Eason***, 2001 WI 98, ¶2, 245 Wis. 2d 206, 629 N.W.2d 625.

This court reviews those legal questions de novo. *See* ***State v. Eskridge***, 2002 WI App 158, ¶9, 256 Wis. 2d 314, 647 N.W.2d 434; ***State v. Richardson***, 156 Wis. 2d 128, 137-138, 456 N.W.2d 830 (1990) (when reviewing a decision on a motion to suppress, this court upholds the circuit court's fact-findings unless clearly erroneous but reviews independently whether those facts establish a constitutional violation).

B. The search warrant was not supported by probable cause because the affidavit lacked the details necessary to distinguish legal images from illegal child pornography.

The Supreme Court has made plain that for a search warrant to be a meaningful check on executive power, the supporting affidavit cannot be "a mere conclusory statement that gives the magistrate virtually no basis at all for making a judgment regarding probable cause." ***Illinois v. Gates***, 462 U.S. 213, 239 (1983). Judge Conley, in accord with all but one federal circuit court to consider the issue, correctly held that the warrant affiant's conclusory statement that each suspect image "does appear to be an image of child pornography" failed to provide the magistrate with an independent basis for determining whether the image was illegal child pornography and not an otherwise legal image of a child.

1. The Fourth Amendment requires judges, not police officers, to determine whether there is probable cause to support a search warrant.

The warrant requirement puts a "neutral and detached magistrate" between the police and their target.

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Johnson v. United States, 333 U.S. 10, 13–14 (1948).

The Court has thus repeatedly invalidated warrants when the magistrate has done little more than rubber stamp an officer's conclusory opinion that a warrant was needed. In ***Nathanson v. United States***, 290 U.S. 41 (1933), the Court quashed a warrant that relied on the affiant's declaration "he has cause to suspect and does believe" that the defendant illegally possessed alcohol in his home. In ***Aguilar v. Texas***, 378 U.S. 108 (1964) the Court held that an officer's declaration that law enforcement had "received reliable information from a credible person and believe" that heroin was warehoused in the defendant's home was insufficient to support a warrant. The magistrate, not the officers, is to determine whether the informant is sufficiently reliable under the circumstances. "Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others." ***Gates***, 462 U.S. at 239.

But most fatal to the warrant here is the line of Supreme Court cases holding that a warrant to seize "obscene" books or movies cannot be based on an officer's "conclusory" determination that such material was obscene. ***New York v. P.J. Video, Inc.***, 475 U.S. 868, 887, n. 5 (1986); ***Lee Art Theatre, Inc. v. Virginia***, 392 U.S. 636 (1968); ***Marcus v. Search Warrants of Property at 104 East Tenth St.***, 367 U.S. 717, 730-732 (1961). The Court "recognized the complexity of the test of obscenity ... and the vital necessity in its application of safeguards to prevent" punishment for speech protected by the First Amendment. ***Marcus***, 367 U.S. at 731. When a "warrant [is] issued solely upon the conclusory assertions of the police officer without any inquiry by the justice of the peace into the factual basis for the officer's conclusions ... [it falls] short of constitutional requirements demanding necessary sensitivity to freedom of expression." ***Lee Art Theatre***, 392 U.S. at 637.

While probable cause may be established by submitting the allegedly obscene material to the court, an affidavit that adequately describes the contents of the material may suffice. ***P.J. Video***, 475 U.S. at 887, n. 5. Similarly, the Wisconsin Supreme Court has held that a complaint for obscenity stated probable cause when the complainant described the images in the magazines giving rise to the complaint. ***State v. Simpson***, 56 Wis. 2d 27, 32, 201 N.W.2d 558, 561 (1972).

2. Warrants to search for child pornography must include descriptions of the alleged images or attach a copy of the image itself so the magistrate can make an independent determination of probable cause.

The Supreme Court has not specifically addressed whether "conclusory assertions" that material is "child pornography" are, like conclusory allegations that material is "obscene," inadequate to support a search warrant. However, the Court has long recognized that child pornography, like the broader category of obscenity, requires a technical definition distinguishing illegal material and speech protected by the First Amendment. ***New York v. Ferber***, 458 U.S. 747, 764 (1982) (comparing child pornography First Amendment exception to obscenity exception); *see also* ***Osborne v. Ohio***, 495 U.S. 103, 113 (1990). Laws against child pornography must "be limited to works that visually depict sexual conduct by children below a specified age. The category of 'sexual conduct' proscribed must also be suitably limited and described." ***Ferber***, 458 U.S. at 764.

The Wisconsin Statutes accordingly provide a detailed definition of "child pornography." Wis. Stat. § 948.12. "Mere nudity is not enough" to constitute child pornography. ***State v. Petrone***, 161 Wis. 2d 530, 561, 468 N.W.2d 676, 688 (1991) (citing ***Ferber***, 458 U.S. at 765), *overruled on other grounds by* ***State v. Greve***, 2004 WI 69, ¶31 n. 7, 272 Wis. 2d 444, 681 N.W.2d 479.

Federal circuit courts have explicitly required that affidavits for child pornography search warrants include "submission of the images themselves or a detailed description of them," ***United States v. Clark,*** 668 F.3d 934 (7th Cir. 2012), in some instances relying upon the "obscenity" line of Supreme Court cases noted above. *See, e.g.*, ***United States v. Brunette,*** 256 F.3d 14, 19 (1st Cir. 2001) ("[i]t was error to issue the [search] warrant absent some independent review of the images, or at least some assessment based on a reasonably specific description."); ***United States v. Pavulak***, 700 F.3d 651, 662 (3rd Cir. 2012); ***United States v. Doyle***, 650 F.3d 460, 474 (4th Cir. 2011); ***United States v. Battershell***, 457 F.3d 1048, 1051-53 (9th Cir. 2006). The only "outlier," as Judge Conley put it, is a 2-1 decision by the Eighth Circuit finding probable cause based on the conclusory statement of a computer technician. ***United States v. Grant***, 490 F.3d 627 (8th Cir. 2007).

Although this court reviews this issue de novo, it is worth noting that the circuit court, in denying the suppression motion, misreads several federal court of appeals cases as finding probable cause based on conclusory opinions that the images contained child pornography. (68:6-14; App. 106-114). In ***United States v. Elbe***, 774 F.3d 885, 889 (6th Cir. 2014), the court makes no indication of whether the affidavit described the alleged child pornography, as the defendant trained his guns on other aspects of the warrant: the use of

boilerplate language to describe the typical behavior of persons interested in child pornography, and the staleness of the information in the warrant. ***Id***. So while the opinion notes that the affidavit included evidence that the defendant was "sharing child pornography images from a hotel," the opinion does not purport to be *quoting* the affidavit. ***Id***. The court is likely using the generic term "child pornography" because there was no dispute that the actual affidavit sufficiently described the images.

In ***United States v. Simpson***, 152 F.3d 1241 (10th Cir. 1998), probable cause was supported by an agreement struck between the defendant and an undercover officer while the two were in an Internet chat room labeled "sexpicshare" and "kidssexpics," whereby they would exchange pictures and videos of "prepubescent children under the age of thirteen." Unlike the case here, ***Simpson*** was not based entirely on the content of the images.

Finally, in ***United States v. Smith***, 795 F.2d 841, 848-849 (9th Cir. 1986), the affidavit stated that the relevant photographs included "sexually explicit conduct" of three juvenile girls. The court rejected the argument that the affidavit had to further describe the sexually explicit acts, as the depiction of *any* sexually explicit act by a juvenile would violate the child pornography statute. ***Id***; *see also* ***Battershell***, 457 F.3d at 1051-53 (discussing ***Smith***). As discussed above, the term "child pornography" is more vague and includes legal depictions of children. In addition, the ***Smith*** affidavit included evidence beyond the descriptions of the photographs; it included statements by the defendant and the girls who had posed for his pictures. ***Smith***, 795 F.2d at 849.

Only a handful of Wisconsin cases address the adequacy of a warrant to search for child pornography, and none support the notion that the warrant may be based solely on law enforcement's *ipse dixit*. In all of the cases, the warrant affidavit describes the sexual nature of the images in that made it child pornography under Wisconsin law. The attack on probable cause was rooted in some other aspect of the affidavit.

In ***State v. Bruckner***, 151 Wis. 2d 833, 860, 447 N.W.2d 376, 387–88 (Ct. App. 1989), the affidavit described the images of alleged child pornography in a magazine as "photographs of adolescent children engaged in a variety of … sexual acts with themselves and children, including masturbation, fellatio, lewd exhibition of the genitals, and anal/genital intercourse[.]" The defendant was arguing that the affidavit lacked probable cause that he possessed that magazine. ***Id*** at 862-863.

State v. Steadman, 152 Wis. 2d 293, 299-301, 448 N.W.2d 267 (1989), involved a sting operation conducted by federal and Canadian officials. The agents created a fake child pornography distributor, sent the defendant an advertisement listing child pornography for sale (the officials had obtained the defendant's name from a mailing list of an actual child pornography distributor), and then sent the defendant the items he ordered. Officials then obtained an affidavit, using detailed descriptions of the child pornography sent to the defendant. ***Id***. at 303 n. 8. Steadman's probable cause argument centered on whether there was sufficient evidence that he *imported* certain material, a fact relevant to the statutes at the time. ***Id.*** at 305-306.

In ***State v. Schaefer***, 2003 WI App 164, ¶8, 266 Wis. 2d 719, 732, 668 N.W.2d 760, 767, the affidavit "described the numerous sexually explicit materials featuring juvenile males" previously seized from the defendant. The issue in the case was whether this information was too "stale" to support a warrant, not that the information was insufficiently detailed. ***Id.***, ¶16.

In ***State v. Gralinski***, 2007 WI App 233, ¶¶ 26-31, 306 Wis. 2d 101, 743 N.W.2d 448, the court focused on the question of whether the defendant's purchase of a membership to a website that distributed child pornography supplied probable cause, given the amount of time that had elapsed between the purchase and execution of the warrant. That the website indeed contained "child pornography" in the legal sense was not disputed. The opinion noted that the website contained "images of what appeared to be children engaging in ... sexually explicit conduct with other children and with adults." ***Id***., ¶ 3. The warrant affidavit in ***Gralinski*** was made a part of the record in this case, and it contains graphic descriptions of the "sexually explicit conduct" referred to by the court in its opinion. (31:16).

The court below relied on an unpublished case, ***Park***, 2009 WI App 141, that like ***Gralinski*** involved a staleness challenge based on the amount of time that had elapsed since the defendant's purchase of a membership to a child pornography website. ***Id***. at ¶¶ 45-55. (App. 199-200). The ***Park*** opinion specifically notes that the affidavit described three images on the website. ***Id***. at ¶¶ 32-33.

Finally, this court recently rejected a challenge to the reliability of a tip that child pornography originated from the defendant's computer. ***State v. Silverstein***, 2017 WI App 64, ¶24, 378 Wis. 2d 42, 60, 902 N.W.2d 550, 559, *review*

denied, 2018 WI 5, ¶24, 379 Wis. 2d 53, 906 N.W.2d 452. The court observed that the affidavit contained probable cause in part because "it described the images discovered." ***Id***.

3. The warrant here was not supported by probable cause because it was based solely on conclusory allegations that the suspect images depicted "child pornography."

The circuit court was correct in assuming that the affidavit in support of the warrant to search German's house was deficient. (68:15; App. 115). The affidavit is supported only by the officer's conclusory opinion that the images appeared to depict child pornography. It contains no other information that could support probable cause, such as German soliciting child pornography from a distributor, as in ***Steadman***, 152 Wis. 2d at 299-301, or being a member of a child pornography website, as in ***Gralinski***, 2007 WI App 233. All that was included in the warrant was Brettingen's opinion that the images depicted child pornography. However, the Fourth Amendment demands that this legal conclusion be made by the judiciary, not an officer acting through the executive branch.

II. The State Failed To Meet Its Burden Of Proving That The Good Faith Exception To The Exclusionary Rule Applied.

The search of German's possessions based on the invalid warrant cannot be saved by the good faith exception to the exclusionary rule, for any of three reasons. ***United States v. Leon***, 468 U.S. 897, 926 (1984); ***State v. Eason***, 2001 WI 98, ¶3, 245 Wis. 2d 206, 629 N.W.2d 625. First, the warrant so lacked any indicia of probable cause that

Brettingen's reliance upon it was unreasonable. ***Leon***, 468 U.S. at 926. Second, the state failed to show that it engaged in "a significant investigation." ***Eason***, 2001 WI 98, ¶¶3, 63. Third, the state failed to show that the warrant application was "review[ed] by either a police officer trained and knowledgeable in the requirements of probable cause and reasonable suspicion, or a knowledgeable government attorney." ***Id***.

A. The conclusory allegation that the target images were illegal child pornography is insufficient to make reliance upon the warrant reasonable.

Even if a warrant is determined to be invalid because it lacks probable cause, the evidence obtained as a result of the search may survive a challenge if the officers relied on the issuance of the warrant in good faith. ***Leon***, 468 U.S. at 922-926. Good faith is an objective test, however, and "an officer [would not] manifest objective good faith in relying on a warrant based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." ***Id***. at 926 (quotation marks and citation omitted).

Courts have found sufficient "indicia of probable cause" when the affidavit describes fact-intensive investigations suggesting that the target is engaged in criminal activity, and reasonable minds may differ as to whether the facts described add up to probable cause. For example, in ***Leon*** the affidavits detailed: (1) tips from "a confidential informant of unproven reliability" claiming that cocaine and other drugs were being dealt from various residences, and (2) police investigations at least partially corroborating the informant's claims of criminal activity. Lower courts, including a divided Ninth Circuit panel,

disagreed about whether those specific facts amounted to probable cause. The Supreme Court concluded that it was objectively reasonable for an officer to rely on that warrant in those circumstances. Similarly, in ***State v. Marquardt***, 2005 WI 157, ¶¶37-44, 286 Wis. 2d 204, 705 N.W.2d 878 there was evidence suggesting that the murder victim was killed by a family member, and the victim's son went missing for two days after her death. This was sufficient indicia of probable cause to apply the good faith exception to a warrant to search the son's cabin for the murder weapon. ***Id***.

The good faith exception is not a good fit when the *only* basis for probable cause is the content of an image, yet the affidavit does not describe or attach the image. The good faith exception might apply when the affidavit describes the images, but reasonable people may disagree whether the descriptions meet the legal definition of child pornography. The exception may also apply where there is other circumstantial evidence suggesting that child pornography may be found in the area sought to be searched. See (membership with child pornography website sufficient probable cause to search computer). Here, however, there are no indicia of probable cause. The affiant offered *only* conclusory assertions that the images depicted child pornography, the kind of "bare bones" assertions that fall outside of the good faith exception. ***Leon***, 468 U.S. at 926.

Further, it has long been the law of the land that warrants for the search and seizure of "obscenity" must be based on more than the affiant's say-so: the affidavit must include the image or describe its contents. It is totally unreasonable for an officer to understand that a conclusory allegation that an image is "obscene" would support a warrant to search for obscene materials under Wis. Stat. § 944.21, but to believe that a conclusory allegation that material is "child

pornography" would support a warrant to search for child pornography.

Indeed, Wisconsin law enforcement officials clearly understand that a warrant cannot rely on conclusory allegations of child pornography. In every published Wisconsin case where probable cause to search for child pornography is at issue, the warrant affidavit includes a detailed description of the image. (*See supra* at pp. 14-16).

B. The state failed to meet its burden of establishing that it had conducted a "significant investigation."

In ***Eason***, the Wisconsin Supreme Court held that the Wisconsin Constitution demanded a narrower good faith exception than the one allowed in ***Leon***. The court added two requirements to ***Leon***: that the "state show that [1] the process used in obtaining the search warrant included a significant investigation and [2] a review by either a police officer trained and knowledgeable in the requirements of probable cause and reasonable suspicion, or a knowledgeable government attorney." ***State v. Eason***, 2001 WI 98, ¶3, 245 Wis. 2d 206, 629 N.W.2d 625 (emphasis added).

A "significant investigation" occurs when the state takes "multiple steps" to corroborate or otherwise investigate an accusation against the defendant. ***State v. Scull***, 2015 WI 22, ¶¶39-41, 361 Wis. 2d 288, 307–09, 862 N.W.2d 562, 571–72. In ***Scull***, police officers corroborated aspects of a previously reliable informant's claim that the defendant had been dealing cocaine, such as by confirming the defendant's address and vehicle, and a drug-sniffing dog's indication that it detected the odor of illegal drugs outside the defendant's front door. ***Id***. In ***Marquardt***, the investigation included multiple witness interviews, the execution of a search warrant

for another location, and an autopsy. 2005 WI 157, ¶¶48-51, 286 Wis. 2d 204, 226–28, 705 N.W.2d 878, 889.

At the suppression hearing below, the state did not introduce any evidence of its investigation. The court, for its part, stated conclusorily that the investigation was "substantial" – not "significant," as ***Eason*** requires – without explaining its rationale. (68:21; App. 121). The investigation recounted in the affidavit itself consists of how private companies provided law enforcement with the "CyberTips," and how law enforcement determined a physical address for the computer that sent the images at issue. However, there was no other investigation into whether the defendant sent the images in question, or otherwise suggesting that the defendant possessed child pornography. The state failed to meet its burden.

C. The state also failed to meet ***Eason***'s review requirement.

The warrant application was not "review[ed] by either a police officer trained and knowledgeable in the requirements of probable cause and reasonable suspicion, or a knowledgeable government attorney." ***Eason***, 2001 WI 98, ¶63. In ***Marquardt***, this requirement was met because "[t]estimony at the good faith hearing … established that an experienced district attorney had met with officers and had drafted the warrant application." 2005 WI 157, ¶46. Here, the state presented no evidence that a prosecutor had drafted the warrant application.

In ***Scull***, the requirement was met by looking at the affidavit itself, which included an averment that the affidavit was "reviewed and approved" by an assistant district attorney. 2015 WI 22, ¶42. There is no such averment here. The affidavit was "subscribed and sworn to before" an assistant

district attorney acting as a notary. (74:14; App. 186). However, there is no indication that the assistant district attorney had a hand in drafting and/or reviewing the substance of the affidavit, or otherwise acted beyond the scope of any other notary attesting to the signature on an affidavit.

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The state had the burden of establishing that it met all three requirements for the good faith exception under ***Leon*** and ***Eason***. It failed to do so. Accordingly, the suppression motion should have been granted.

CONCLUSION

For the reasons stated above, German respectfully requests that this court reverse the order denying German's suppression motion, reverse the judgment of conviction, and remand the case to the circuit court for further proceedings consistent with this court's decision.

Dated this 6th day of June, 2018.

Respectfully submitted,

THOMAS B. AQUINO
Assistant State Public Defender
State Bar No. 1066516

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-1971
aquinot@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 5,230 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 6th day of June, 2018.

Signed:

THOMAS B. AQUINO
Assistant State Public Defender
State Bar No. 1066516

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-1971
aquinot@opd.wi.gov

Attorney for Defendant-Appellant

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Page

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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Signed:

THOMAS B. AQUINO
Assistant State Public Defender
State Bar No. 1066516

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-1971
aquinot@opd.wi.gov

Attorney for Defendant-Appellant