STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Case No. 2018AP78-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GARRETT A. GERMAN,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CHIPPEWA COUNTY CIRCUIT COURT, THE HONORABLE JAMES M. ISAACSON, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Was the warrant affidavit in this case sufficient to establish a fair probability that a search of the specified premises would uncover evidence of possession of child pornography?

The circuit court assumed without deciding that the affidavit was insufficient.

This Court should conclude that the affidavit was sufficient.

2. If the warrant affidavit was insufficient, did the officers reasonably rely upon the warrant in good faith?

The circuit court concluded that the good faith exception to the exclusionary rule applied.

This Court should conclude the same.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication.

INTRODUCTION

Garrett German was convicted of possessing child pornography. He challenges his conviction on the ground that the warrant to search his home issued without probable cause. He asserts that the warrant application, which was based on information that Facebook supplied law enforcement that German uploaded child pornography to his Facebook account, was infirm because it did not include a description of the images he uploaded.

German is wrong. Facebook is a reliable informant, and the investigating officer, specially trained in the investigation of child pornography, personally observed the images and concluded that the images appeared to be child

pornography. That is sufficient to meet the low probable-cause-to-search standard. But even if there was not probable cause, the good-faith exception to the exclusionary rule applies. This Court may affirm the circuit court on either basis.

SUPPLEMENTAL STATEMENT OF THE CASE

The warrant application and affidavit.

In May 2015,[1] the State sought and received a warrant to search German's home and electronic devices for child pornography. (R. 74:1–3, 14–15.) Deborah Brettingen, a Sensitive Crimes Investigator for the Chippewa Falls Police Department, was the investigating officer who applied for the warrant. (R. 74:14.)

The warrant affidavit referenced the statute, Wis. Stat. § 948.12, which outlaws the possession of media depicting children engaged in sexually explicit conduct. (R. 74:5.)

The application also indicated that the National Center for Missing and Exploited Children (NCMEC) had referred to the Wisconsin Department of Justice three CyberTips related to German's Facebook activity. (R. 74:13.) In two of those tips—tip numbers 3593919 and 3692234—

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[1] There is a scrivener's error in two of the date lines on page three of the warrant. (R. 74:3.) Two date lines indicate that the warrant was issued on January 11, 2015, and executed on January 12, 2015. (R. 74:3.) However, the order for non-disclosure and sealing of the warrant, on the same page, contains the date line of May 11, 2015. (R. 74:3.) All of the information in the affidavit postdates January 11, 2015. (R. 74:12–14.) And the date lines associated with the affidavit and warrant return indicate that the warrant was applied for on May 11, 2015, and returned May 14, 2015. (R. 74:14–15.) Thus, the January dates appear to be a scrivener's error.

Facebook reported that German had uploaded suspected child pornography to his Facebook account. (R. 74:13.) The CyberTips contained the image files of the suspected child pornography. (R. 74:12.) Special Agent Matt Joy investigated the CyberTips. (R. 74:13.) He produced a report, and transferred that report, CyberTips, and the images to Deputy Jeff Nocchi of the Eau Claire Sheriff's Department for further investigation. (R. 74:13.)

Deputy Nocchi investigated the CyberTips and confirmed that one of the IP addresses associated with the upload of suspected child pornography was linked to the address 510 1/2 North Bridge Street in Chippewa Falls. (R. 74:13.) Deputy Nocchi referred the case to Investigator Brettingen. (R. 74:13.) He transferred Agent Joy's report, the CyberTips, and the image files. (R. 74:13.)

Investigator Brettingen reviewed the reports and viewed both images of suspected child pornography. (R. 74:13.) She independently observed what appeared to be child pornography. (R. 74:13.)

The warrant affidavit included information about Investigator Brettingen's background. (R. 74:5–12.) At the time of the warrant application, Brettingen had been a police officer for over 18 years. (R. 74:5.) Her assignment as a Sensitive Crimes Investigator required her to conduct child pornography investigations as a part of the Wisconsin Internet Crimes Against Children Task Force. (R. 74:5–6.) The primary responsibility of that task force was to investigate sexual crimes committed against children by the use of a computer or the internet. (R. 74:6.)

Investigator Brettingen averred that she had received hundreds of hours of formal education and training that included training on "theories, procedures, and practices associated with criminal investigations and the application of state and federal statutes." (R. 74:6.) She also averred

that she completed "64 hours of training in the investigation of computer facilitated exploitation of children, and 23 hours of training involving human trafficking and the commercial sexual exploitation of children." (R. 74:6.)

The execution of the warrant and state criminal charges.

Police executed the warrant and discovered 10 additional images of child pornography, as described in the criminal complaint. (R. 1:10–12.) The images primarily depicted very young children, some as young as three to five years old. (R. 1:10–12.)

The State charged German with 12 counts of possession of child pornography. (R. 1:1–6.) The probable cause portion of the criminal complaint contained a description of the images provided by Facebook that were used to establish probable cause for the warrant. (R. 1:7.)

The image associated with CyberTip 3593919 was an image of a female toddler, two or three years old, who was standing near a white man with an erect penis. (R. 1:7.) The man's erect penis was near the mouth of the child. (R. 1:7.) The child was wearing a diaper and a pink shirt that was unbuttoned to expose her chest. (R. 1:7.) The image appeared to be taken from above, possibly by the man who was standing in front of the child with an erect penis. (R. 1:7.)

The image associated with CyberTip 3692234 was an image of a female child, five to seven years old, who was standing near a white male with an erect penis. (R. 1:7.) The image captured what appeared to be the man ejaculating in the child's mouth. (R. 1:7.) A white substance consistent with ejaculate was on the child's tongue and dripping from her lips. (R. 1:7.)

German's federal proceedings and challenges in state circuit court to the warrant.

Before being charged in state court, German was indicted in federal court on two counts of unlawfully creating child pornography. (R. 29:1.) In the Western District of Wisconsin, German successfully litigated a motion to quash the search warrant and suppress the evidence on the ground that the warrant affidavit was insufficient to establish probable cause. (*See* R. 29.) The district court concluded that "under unambiguous Seventh Circuit case law," an affiant must do more than allege that the image was suspected child pornography. (R. 29:1, 8–19.) The court also concluded that the good faith exception could not apply because "[w]hile there is *no* evidence that Deputy Nocchi or Investigator Brettingen acted in *subjective* bad faith, any misunderstanding was not *objectively* reasonable given the case law in this circuit." (R. 29:23.)

After he was charged in state court, German sought suppression of the evidence on the ground that the federal district court concluded that the affidavit failed to establish probable cause and the good faith exception did not apply. (R. 11.)

The circuit court, Judge Steven R. Cray, presiding, assumed that the warrant affidavit was deficient, because "Wisconsin appellate courts have [not] specifically ruled on this matter," and only considered whether "the good-faith exception to the exclusionary rule should be applied here." (R. 68:15.) The court concluded the good faith exception applied and denied the motion:

> There has been no showing that the judge, in issuing the warrant, abandoned his judicial role or failed to perform his neutral and detached function.
>
> Second, that the supporting affidavit had sufficient indicia of probable cause to render a belief its existence was reasonable.

> Third, that there was no showing that the issuing judge was misled by information by the affiant and that there's no indication that the affiant knew anything in the affidavit was false or recklessly disregarded the truth.
>
> Fourth, the warrant was preceded by a substantial investigation by Officer Brettingen as noted in her affidavit.
>
> Five, the warrant was received by a police officer and was signed by the officer who is trained and knowledgeable in the requirements of probable cause and reasonable suspicion based on her affidavit.
>
> Six, a reasonably well-trained officer would not have known that the search warrant was not compliant with the constitutional requirements despite the judicial authorization.
>
> Again, I believe that officers here in Wisconsin can rely on Wisconsin law when they are analyzing a situation, and there is no guidance to an officer based on Wisconsin law, that there would be noncompliance with the constitutional requirements.

(R. 68:21–22.)

The case was then reassigned, and German sought reconsideration of Judge Cray's ruling with the new court. (R. 27–31.) During the motion hearing, German characterized the issue as one of issue preclusion, since the issue was fully litigated in federal court. (R. 71:3–4.) He also argued the merits of the probable cause and good faith issues. (R. 71:4–9.) The circuit court, Judge James Isaacson, presiding, denied reconsideration, concluding that German did not provide the court with any new evidence, and did not establish a manifest error of law. (R. 71:23–24.)

German pled no contest to two counts of possession of child pornography, and was sentenced to eight years' imprisonment. (R. 50:1.)

German appeals.

STANDARD OF REVIEW

This Court applies a two-step standard of review when it reviews a motion to suppress. *State v. Eason*, 2001 WI 98, ¶ 9, 245 Wis. 2d 206, 629 N.W.2d 625. First, it will uphold the circuit court's findings of historical fact unless they are clearly erroneous. *Id.* Second, it independently reviews the application of the constitutional principles to the facts. *Id.* However, "[t]his court 'accords great deference to the warrant-issuing judge'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.'" *State v. Romero*, 2009 WI 32, ¶ 18, 317 Wis. 2d 12, 765 N.W.2d 756 (citation omitted).

ARGUMENT

I. The affidavit in support of the warrant to search German's home established probable cause.

A. Probable cause to support a warrant is a low standard.

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." *State v. Sveum*, 2010 WI 92, ¶ 20, 328 Wis. 2d 369, 787 N.W.2d 317. "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 [judge] to determine whether the warrant-issuing [judge] had a substantial basis for concluding that there was a fair probability that a search of the specified premises would uncover evidence of wrongdoing." *Romero*, 317 Wis. 2d 12, ¶ 3 (citation omitted).

"[T]he well-established test for probable cause is that it is 'flexible,' and is 'a practical commonsense decision.'" *State v. Silverstein*, 2017 WI App 64, ¶ 22, 378 Wis. 2d 42,

902 N.W.2d 550 (citations omitted). "Prove-up of every detail is not required in a warrant affidavit, as is consistent with the policy that is designed to encourage law enforcement to obtain search warrants in the first place." *Id.* (citation omitted).

Here, the question is whether the warrant affidavit 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 German's home. *See Romero*, 317 Wis. 2d 12, ¶ 3. The quantum of evidence required to establish probable cause is "less than that required to support bindover for trial at the preliminary examination," *State v. Higginbotham*, 162 Wis. 2d 978, 989, 471 N.W.2d 24 (1991), and simply must be enough to lead a reasonable person "to believe in the circumstances that particular evidence or contraband may be located at a place sought to be searched." *State v. Tompkins*, 144 Wis. 2d 116, 125, 423 N.W.2d 823 (1988).

B. The warrant application provided probable cause to believe that evidence of the possession of child pornography would be found in German's home.

Investigator Brettingen's affidavit contained sufficient facts to establish probable cause, and German has not established otherwise.

To start, the affidavit referenced two CyberTips from Facebook to NCMEC. (R. 74:12–13.) Specifically, the affidavit indicated that Facebook reported suspected child pornography was uploaded to German's account. (R. 74:13.) The reports contained the image files flagged as child pornography and the username, email address, and IP address associated with the uploads, and German's date of birth and cell phone number. (R. 74:13.)

The magistrate was entitled to find Facebook's CyberTips reliable. As this Court has recently recognized, these CyberTips are reliable based, in part, on the legal obligation imposed on internet service providers to report suspected child pornography and NCMEC's role in directing that information to appropriate law enforcement agencies for investigation. *Silverstein*, 378 Wis. 2d 42, ¶¶ 5, 19. An internet service provider, like Facebook, is akin to a citizen informant because it is a "named, traceable entity that is reporting a crime in furtherance of public safety . . . gains nothing from making the tip . . . [and] is under federal mandate to report suspected child abuse to NCMEC." *Id.* ¶ 19.

Wisconsin has adopted the relaxed test of "observational reliability" for assessing the veracity of a citizen informant like Facebook. *Silverstein*, 378 Wis. 2d 42, ¶¶ 19–26; *see also State v. Kolk*, 2006 WI App 261, ¶ 13, 298 Wis. 2d 99, 726 N.W.2d 337 ("Our courts recognize the importance of citizen informants and accordingly apply a relaxed test of reliability that shifts from a question of 'personal reliability' to one of 'observational reliability.'") (citation omitted). Courts assess observational reliability from the nature of the report, the opportunity for the reporter to hear and see the matters reported, and the extent to which independent police work can verify the report. *Id.*

Here, the details in the warrant affidavit satisfied the relaxed test of observational reliability, and the warrant-issuing magistrate was entitled to rely on details associated with Facebook's CyberTips. First, the nature of the reports from Facebook to NCMEC were not rumor or speculation. Rather, the tips were based on the discovery of image files depicting child pornography. Facebook was in possession of evidence of suspected criminal activity and it disclosed that evidence as required by law. Facebook's CyberTips were

specific: they identified German, providing multiple personal identifiers, and provided the actual files suspected to be child pornography. (R. 74:13.)

Second, Facebook was in the position to see the activity that it reported. Anyone who has signed up for an internet-based service like Facebook understands that the service collects identifying information and monitors information posted in its forums. While the affidavit here did not specify as much, it did not need to. All of the information that Facebook reported was information that it collects. See Data Policy (last modified April 19, 2018), https://www.facebook.com/policy.php (last visited Sept. 18, 2018). Facebook has a basis of knowledge regarding its users and the contents contained within its systems. This basis of knowledge affords Facebook a strong indicia of reliability.

Third, independent police work verified the reports from Facebook. The first investigating officer was Special Agent Joy of the Wisconsin Department of Justice. Agent Joy reviewed the CyberTips, prepared a report, and forwarded his reports, the CyberTips, and the images to a local law enforcement agency, the Eau Claire Sherriff's Department. (R. 74:13.)

Deputy Nocchi of the Eau Claire Sheriff's Department investigated the CyberTips and confirmed that the IP address associated with one of the image uploads was registered to an address in Chippewa Falls. (R. 74:13.) Deputy Nocchi forwarded Special Agent Joy's reports, the CyberTips, the images, and the results of his investigation to the Chippewa Falls Police Department. (R. 74:5, 13.)

Sensitive Crimes Investigator Brettingen with the Chippewa Falls Police Department, reviewed the reports and the investigation completed by Deputy Nocchi. (R. 74:13–14.) She also independently viewed the images and

independently concluded that the images depicted child pornography. (R. 74:13.)

Investigator Brettingen's assignment as a Sensitive Crimes Investigator required her to conduct child pornography investigations as a part of the Wisconsin Internet Crimes Against Children Task Force. (R. 74:5–6.) She averred that she had received hundreds of hours of formal education and training that included training on "theories, procedures, and practices associated with criminal investigations and the application of state and federal statutes." (R. 74:6.) The warrant application also included a reference to Wisconsin's statute prohibiting the possession of child pornography (R. 74:5), which supports the inference that Brettingen based her assessment of the images on the statutory definition of child pornography. Thus, a law enforcement officer, specially assigned and trained to investigate internet crimes against children, viewed the images and corroborated Facebook's report. (R. 74:5–6, 13.)

In all, the information in the affidavit satisfied the less stringent test of observational reliability. The warrant-issuing magistrate could rely on the information provided by Facebook. *See Silverstein*, 378 Wis. 2d 42, ¶¶ 19–26. And, under the totality of the circumstances, the magistrate was entitled to find probable cause that the reported images probably contained child pornography based on Facebook's CyberTips and Investigator Brettingen's sworn affidavit telling the magistrate that she also concluded that the images were child pornography. To be sure, it may be a better practice for an affiant to include a description of the images suspected to be child pornography in the search warrant affidavit. But the lack of that description here was not fatal. The information in the affidavit was sufficient to meet the low probable-cause-to-search standard.

C. German's arguments are not persuasive.

German disregards the low probable-cause standard by his claim that the affidavit necessarily had to include more than observational assessments that the images constituted child pornography. (German's Br. 7–16.) Again, the question here is whether the affidavit provided probable cause to search, not probable cause to bind over for trial. *Higginbotham*, 162 Wis. 2d at 989. As argued above, the information in the affidavits was sufficient to lead a reasonable person "to believe in the circumstances that" child pornography "may be located" in German's home and computers. *See Tompkins*, 144 Wis. 2d at 125.

German's reliance on *New York v. P.J. Video, Inc.*, 475 U.S. 868 (1986), is unpersuasive. (German's Br. 1, 10–11.) Specifically, German argues that, under *P.J. Video*, a warrant to search for child pornography in an individual's home must contain a description of the pornography. (German's Br. 10–11.) But *P.J. Video* discusses the information required for a magistrate to issue a warrant to seize allegedly obscene materials from a distributor. *P.J. Video*, 475 U.S. at 873. That case does not address warrants to search for child pornography, let alone stand for the proposition that an affiant's probable cause showing to get a search warrant for child pornography is any different from the showing required to obtain a search warrant for other forms of contraband. *See id.* at 870–71, 874–75 (retreating from language in prior cases that a court must act with "scrupulous exactitude" in such circumstances) (citing *Stanford v. Texas*, 379 U.S. 476 (1965)).

Furthermore, *P.J. Video* involved a situation where the seizure of materials implicated the First Amendment. 475 U.S. at 873. Specifically, when the *P.J. Video* Court referred to conclusory statements being insufficient to establish probable cause to seize obscene materials, it cited

Lee Art Theatre, Inc. v. Virginia, 392 U.S. 636 (1968) (per curiam). *Lee Art Theatre* and *P.J. Video* both concern the seizure of materials "presumptively protected by the First Amendment," such as adult pornography. *See P.J. Video*, 475 U.S. at 873–74. In contrast, "[c]hild pornography is *not* presumptively protected by the First Amendment; it is almost completely outside its protection." *United States v. Wiegand*, 812 F.2d 1239, 1242–43 (9th Cir. 1987) (citing *New York v. Ferber*, 458 U.S. 747, 763 (1982)); *see also United States v. Moore*, 215 F.3d 681, 686 (7th Cir. 2000.) ("However, the concern with chilling protected speech by regulating arguably obscene material, which is presumptively protected . . . is outweighed by the compelling state interests in protecting children in the case of child pornography.").

German's reliance on case law from federal circuit courts is equally unavailing. (German's Br. 12–13.) No case upon which he relies deals with a magistrate's probable cause assessment of a NCMEC CyberTip. Further, all of the state cases he relies on (German's Br. 14–15) predate *Silverstein*, which, as discussed above, favors affirmance. While German acknowledges that this Court concluded in *Silverstein* that an internet service provider's (Tumblr) CyberTip was reliable, he suggests that that was so because the warrant affidavit included a description of the images. (German's Br. 15–16.) But Silverstein's challenge to Tumblr's credibility failed for a multitude of reasons, not simply because the affidavit described the images. *Silverstein,* 378 Wis. 2d 42, ¶ 24. In short, *Silverstein* does not stand for the proposition that a warrant to search for child pornography must contain a description of the images upon which the probable cause is based: "[t]he establishment of probable cause is not defeated by the absence of further detail." *Id.*

In sum, given the totality of circumstances and the highly deferential standard of review to the warrant-issuing magistrate, this Court should conclude that German failed to meet his burden to establish that the warrant affidavit was clearly insufficient to establish probable cause. The affiant alleged 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." *State v. Gralinski*, 2007 WI App 233, ¶ 32, 306 Wis. 2d 101, 743 N.W.2d 448 (citation omitted). The warrant-issuing court was only required to assess whether it was reasonable "to believe in the circumstances that particular evidence or contraband may be located at a place sought to be searched." *Tompkins*, 144 Wis. 2d at 125. Thus, contrary to German's arguments, Investigator Brettingen did not need to allege facts sufficient to establish certainty that German possessed child pornography to meet the low burden of probable cause for a search warrant.

This Court should affirm.

II. Alternatively, the good faith exception applies.

The Fourth Amendment to the United States Constitution "contains no provision expressly precluding the use of evidence obtained in violation of its commands." *See Arizona v. Evans*, 514 U.S. 1, 10 (1995) (citation omitted). Rather, courts exclude such evidence pursuant to a judicially created rule designed to deter future Fourth Amendment violations. *See id.*

Since the creation of the exclusionary rule, the Supreme Court has limited the rule's application to situations that further the rule's primary purpose of deterring police misconduct. *See Evans*, 514 U.S. at 11–15. To that end, the exclusionary rule is not generally applicable to judicial errors because a judicial officer has no stake in

the outcome of any particular case. *United States v. Leon*, 468 U.S. 897, 917 (1984). "Thus, the threat of exclusion of evidence could not be expected to deter such individuals from improperly issuing warrants, and a judicial ruling that a warrant was defective [is] sufficient to inform the judicial officer of the error made." *Illinois v. Krull*, 480 U.S. 340, 348 (1987).

The Court derived the "good-faith" exception to the exclusionary rule from these principles. *Leon*, 468 U.S. at 922 & n.23. In its simplest form, the good-faith exception provides that the exclusionary rule does not apply when the police act with "objectively reasonable reliance" on a warrant that is later determined to be invalid. *See Leon*, 468 U.S. at 922. The exception is not without its limits. Courts should not apply the good-faith exception if: 1) the magistrate "was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth"; 2) the "magistrate wholly abandoned his judicial role in the manner condemned in *Lo–Ji Sales, Inc. v. New York*, 442 U.S. 319, 99 S.Ct. 2319, 60 L.Ed.2d 920 (1979)"; 3) "no reasonably well trained officer should rely on the warrant" because the affidavit is "so lacking in indicia of probable cause"; or 4) the warrant is "so facially deficient" "that the executing officers cannot reasonably presume it to be valid." *Leon*, 468 U.S. at 923 (citations omitted). "[U]nder *Leon's* good-faith exception, [the Court has] 'never applied' the exclusionary rule to suppress evidence obtained as a result of nonculpable, innocent police conduct." *Davis v. United States*, 564 U.S. 229, 240 (2011) (citation omitted).

Wisconsin first adopted the good-faith exception to the exclusionary rule in *State v. Ward*, 2000 WI 3, 231 Wis. 2d 723, 604 N.W.2d 517, and first addressed *Leon* in *State v. Eason*, 2001 WI 98, 245 Wis. 2d 206, 629 N.W.2d 625. In recognizing a good-faith exception to the exclusionary rule

under article I, section 11 of the Wisconsin Constitution, the court adopted *Leon's* limitations on the exception and added two additional requirements. *Eason*, 245 Wis. 2d 206, ¶¶ 63, 74. First, "the State must show that the process used attendant to obtaining the search warrant included a significant investigation and a review by a police officer trained in, or very knowledgeable of, the legal vagaries of probable cause and reasonable suspicion, or a knowledgeable government attorney." *Id.* ¶ 63. In deciding to apply the good faith exception, the court also considered "whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization, [such that it] would render the officer's reliance on the warrant unreasonable." *State v. Scull*, 2015 WI 22, ¶ 37, 361 Wis. 2d 288, 862 N.W.2d 562 (citation omitted).

Here, none of the four *Leon* factors apply and the State can satisfy both additional *Eason* requirements. First, as for the *Leon* factors, the warrant-issuing judge was not misled by information in an affidavit that the affiant knew was false. *Leon*, 468 U.S. at 923. This is not a case in which the police sought a warrant and attempted to hide from the court that the probable cause determination was questionable.

Rather, it is beyond dispute that the images associated with the two CyberTips constitute child pornography. The image associated with CyberTip 3593919 showed a girl, two to three years old, who was standing near a man with an erect penis near her mouth. (R. 1:7.) The image associated with CyberTip 3692234 was an image of a girl, five to seven years old, who appeared to have ejaculate on her mouth and who was standing near a man with an erect penis. (R. 1:7.) Thus, Investigator Brettingen's averment that the images were child pornography cannot have been meant to mislead the judge. The images were clearly, undisputedly, child pornography.

Second, there is nothing to indicate that the judge wholly abandoned his judicial role in the manner condemned in *New York v. Lo-Ji Sales*, 442 U.S. 319 (1979). *Leon*, 468 U.S. at 923. In *Lo-Ji Sales*, the warrant-issuing magistrate became a member, if not the leader, of the search party that executed the warrant. *Id.* at 327. Nothing even remotely comparable to that occurred here.

Third, the affidavit was not so lacking in indicia of probable cause that a reasonably well-trained officer could not rely on the warrant. *Leon*, 468 U.S. at 923. As explained in Part I, *supra*, the affidavit detailed the CyberTips, the investigation by multiple law enforcement agencies, and the averment of Investigator Brettingen that the images appeared to be child pornography. (R. 74:13.) The warrant application also included reference to Wisconsin's statute prohibiting the possession of child pornography. (R. 74:5.) A reasonably well-trained officer would not view the affidavit as so lacking in probable cause that the warrant was unreliable.

Fourth, the warrant was not facially deficient. *Leon*, 468 U.S. at 923. It was issued by a neutral and detached magistrate. It described the premises, the possessions within the premises to be searched, and the objection of the search. Even if the totality of the facts did not amount to probable cause to believe the images in the CyberTips were actually child pornography, the warrant and affidavit gave police no reason to question its validity.

The State can also satisfy the two additional *Eason* requirements, and can establish that the officer's reliance on the warrant was reasonable. First, law enforcement engaged in a significant investigative process in seeking the warrant. *Eason*, 245 Wis. 2d 206, ¶ 63. Again, multiple agencies reviewed the CyberTips, trained law enforcement officers investigated and confirmed the details in the tips, and Investigator Brettingen, who was specially trained in the

investigation of internet crimes against children, personally viewed the images. (R. 74:6, 13.)

Second, Investigator Brettingen was trained in, or at least very knowledgeable of, the legal vagaries of probable cause. *Eason*, 245 Wis. 2d 206, ¶ 63. She had been a police officer for over 18 years. (R. 74:5.) She was a sensitive crimes investigator who conducted child pornography investigations. (R. 74:5–6.) She received hundreds of hours of education and training, including training on "theories, procedures, and practices associated with criminal investigations and the application of state and federal statutes." (R. 74:6.) She also completed "64 hours of training in the investigation of computer facilitated exploitation of children, and 23 hours of training involving human trafficking and the commercial sexual exploitation of children." (R. 74:6.)

Finally, a reasonable well-trained officer would not have known that the search was illegal despite the magistrate's issuance of the warrant. *Scull*, 361 Wis. 2d 288, ¶ 37. Again, as explained in Part I *supra*, the affidavit detailed the CyberTips, the investigation by multiple law enforcement agencies, and the averment of Investigator Brettingen that the images appeared to be child pornography, based on the statutory definition. (R. 74:13.)

German fails to persuade that good faith should not apply here. First, he argues "[t]he good faith exception is not a 'good fit'" when a child pornography search warrant affidavit does not describe the images supporting probable cause. (German's Br. 18.) The basis of his argument is that, like obscene materials, reasonable people may disagree on what constitutes child pornography. (German's Br. 18–19.) Again, a warrant to search for evidence of possession of child pornography in an individual's home is not analogous to a warrant to seize allegedly obscene materials from a distributor. And again, the issue here is not whether the

images were actually child pornography, but whether there were 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." *Gralinski*, 306 Wis. 2d 101, ¶ 32. Again, the CyberTips combined with law enforcement's independent investigation and observations excited that honest belief. (R. 74:13.) There is no reason for this Court to conclude, as a matter of policy, that good-faith is "not a good fit," particularly where the State has satisfied the *Leon* and *Eason* factors.

Second, German fails to develop his assertion that law enforcement should have known that a warrant must describe the image. (German's Br. 19.) He asserts only that, since Wisconsin case law involves warrants that do include a description of the images, a description of the images is required. (German's Br. 19.) That argument is circular and self-serving. There is no case law in Wisconsin that would put law enforcement on notice that a warrant based on a citizen informant's tip, and law enforcement's corroboration, is clearly insufficient. To the contrary, as addressed in Part I *supra*, there is no heightened requirement for a warrant to search for child pornography. And Wisconsin courts have upheld search warrants based on observations of reliable informants.

Third, German's argument that the State cannot meet *Eason*'s significant investigation requirement fails (German's Br. 19–20) for the same reason his "not a good fit" argument fails. He assumes that law enforcement had to confirm with certainty that German possessed child pornography to establish probable cause, but as discussed above, no authorities justify that assumption.

Fourth, German bases his argument that the State cannot meet *Eason*'s review requirement on a misunderstanding of the law. (German's Br. 20–21.) He

suggests that the State can satisfy this requirement only if the warrant application is reviewed and approved by an attorney. (German's Br. 20–21.) That is not true. The requirement is: "review by a *police officer* trained in, or very knowledgeable of, the legal vagaries of probable cause and reasonable suspicion, *or* a knowledgeable government attorney." *Eason*, 245 Wis. 2d 206, ¶ 63 (emphasis added). Here, as discussed above, the affidavit included sufficient facts to establish that Investigator Brettingen was trained in, or very knowledgeable of, the legal vagaries of probable cause.

In sum, probable cause supported the issuance of the warrant. But even if there was not probable cause, the good-faith exception to the exclusionary rule should apply. This Court may affirm the circuit court on either basis.

CONCLUSION

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

Dated this 27th day of September, 2018.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,465 words.

Dated this 27th day of September, 2018.

_____
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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. § 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.

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 27th day of September, 2018.

_____
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