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

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REPLY BRIEF OF DEFENDANT-APPELLANT

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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.

The state devotes a substantial amount of its brief arguing that Facebook and Inspector Brettingen are "reliable" informants. (State Br. 7-11). The state misses the point. The issue is not whether Facebook and Inspector Brettingen are reliable enough for the magistrate to conclude that the facts they alleged were probably true and added up to probable cause. The issue is that they did not allege sufficient facts for the magistrate to make the probable cause determination.

In our system of checks and balances, it is up to the judicial branch, not the executive, to determine whether there is probable cause to support a search warrant. Thus, a search warrant "affidavit must provide the magistrate with a substantial basis for determining the existence of probable cause[.]" *Illinois v. Gates*, 462 U.S. 213, 239 (1983). For example, a "sworn statement of an affiant that 'he has cause to suspect and does believe that' liquor illegally brought into the United States is located on certain premises will not do." *Id*. (*quoting Nathanson v. United States*, 290 U.S. 41 (1933)). Instead, "[s]ufficient 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." *Id*. As

noted in German's brief (pp. 8-10), the Supreme Court has repeatedly held that a "mere conclusory statement" cannot support a search warrant. *Id*.

The "reliability" of an informant is relevant only if the informant's allegations actually support probable cause. For example, if an informant alleged that a defendant possessed material that is clearly not child pornography – such as a picture of the defendant's newborn daughter bathing – the warrant would not be supported by probable cause, regardless of the reliability of the informant.

The credibility and reliability of Facebook and Inspector Brettingen are thus irrelevant, because they did not include the facts necessary for the court to make an independent determination of probable cause. Even if they sincerely believe that the images depict Wisconsin's definition of illegal child pornography, the constitution requires the magistrate to make that determination. The magistrate may not outsource to law enforcement or Facebook its constitutional duty to determine whether the facts support probable cause.

The state's attempt to distinguish the obscenity line of cases, requiring a description or copy of the allegedly obscene material before a search warrant may issue, falls short. Specifically, the state seems to be suggesting that the comparison to the obscenity cases is inapt, because while obscene material implicates the First Amendment, child pornography does not. (State Br. at 12-14). The state misunderstands First Amendment jurisprudence.

"Obscenity" and "child pornography" are both categories of speech that fall outside of First Amendment protection. However, "[t]here are, of course, limits on the category of child pornography which, like obscenity, is unprotected by the First Amendment." *New York v. Ferber*, 458 U.S. 747, 764 (1982). For example, "the conduct to be prohibited must be adequately defined by the applicable state law[.]" *Id.* Whether a specific image or video of a naked child is "child pornography" in the technical, First Amendment sense will depend on the conduct and apparent age of the child. *Id.* n. 17.

Contrary to the state's suggestion, the Supreme Court does not state that "obscenity" is "presumptively protected" by the First Amendment. (State br. 12-13). Rather, the Court has said that material, such as books and movies, seized because of their content are "presumptively protected." *New York v. P.J. Video, Inc.*, 475 U.S. 868, 875 (1986).

> We have long recognized that the seizure of films or books on the basis of their content implicates First Amendment concerns not raised by other kinds of seizures. For this reason, we have required that certain special conditions be met before such seizures may be carried out. … [I]n *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636 (1968), we held that a warrant authorizing the seizure of *materials* presumptively protected by the First Amendment may not issue based solely on the conclusory allegations of a police officer that the sought-after materials are obscene, but instead must be supported by affidavits setting forth specific facts in order that the issuing magistrate may "focus searchingly on the question of obscenity."

Id. at 873–74 (emphasis supplied).

The Ninth Circuit case relied upon by the state involved a federal statute that criminalized the production and dissemination of child pornography, but not "mere possession." *United States v. Wiegand*, 812 F.2d 1239, 1243 (9th Cir. 1987). The affidavit in support of the search warrant described an informant viewing films of young children having sexual intercourse, which unquestionably falls within the definition of the "child pornography" First Amendment exception. *Id.* at 1241. The defendant complained that the warrant was overly broad because it allowed the seizure of such child pornography that he "legally" possessed under the federal statutes at the time. *Id*. at 1243. The court noted that the films were described in "graphic terms," and that such "child pornography is *not* presumptively protected by the First Amendment " *Id.* Further, if the government did seize legal child pornography, the "remedy for the wrong would be return of the legal material." *Id.* Here, the warrant application did not describe the content of images, so the magistrate could not determine whether it met the legal definition of child pornography.

The Fourth Amendment requires that before a warrant to search a home is issued, probable cause must be independently determined by a judicial magistrate, not by a police officer and not by Facebook. The warrant application's conclusory allegation that German possessed "child pornography" required the magistrate here to defer its judgment to the judgment of others, in violation of

the Fourth Amendment. Accordingly, the suppression motion should have been granted.

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

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

To argue that the "good faith" exception to the exclusionary rule applies, the state relies upon its argument that the "informants" were reliable. But, as discussed above, however "reliable" Investigator Brettingen and Facebook may be, they provided the magistrate only with the "bare bones," conclusory allegation that the images contained child pornography. *United States v. Leon*, 468 U.S. 897, 926 (1984).

Indeed, the Supreme Court has invalidated warrants based on conclusory allegations of criminal conduct since at least its 1933 decision in *Nathanson*, 290 U.S. 41, and of "obscenity" since its 1961 decision in *Marcus v. Search Warrants of Property at 104 East Tenth St.*, 367 U.S. 717, 730-732 (1961). A "reasonably well-trained officer" would not be aware of the rule against conclusory allegations of criminal conduct in general and "obscenity" in particular, and conclude that a warrant based on a conclusory allegation of "child pornography" would suffice.

The fact that Wisconsin courts have not directly addressed this question is no excuse. Indeed,

it appears that the reason why the courts have not addressed the issue is that Wisconsin law enforcement personnel have long recognized the need to include descriptions of the alleged child pornography, as in every published case involving search warrants for child pornography, the warrant application describes the child pornography. (*See* German Br. 14-16).

The reference to the statutory definition of child pornography is no more availing, as it again requires the magistrate to defer to the police officer's application of the facts to the law. The Fourth Amendment requires the judiciary to make an independent assessment of probable cause.

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

The state failed to meet its burden of proving that it conducted a "significant investigation." *State v. Eason*, 2001 WI 98, ¶3, 245 Wis. 2d 206, 629 N.W.2d 625. Although the affidavit describes multiple law enforcement officials forwarding the "CyperTips," the affidavit only describes Investigator Brettingen actually viewing the images associated with the tips and opining that they indeed contained child pornography. The state tacitly concedes that there was no other investigation into whether the defendant sent the images in question, or otherwise possessed child pornography. Accordingly, the state cannot rely on the "good faith" exception.

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

The state does not dispute that the warrant application was not "review[ed] by … a knowledgeable government attorney." *Eason*, 2001 WI 98, ¶63. Instead, the state relies on Inspector Brettingen's experience investigating child pornography and child sex crimes, as related in the affidavit. (State Br. 18). However, there is no evidence that Brettingen was specifically "trained and knowledgeable in the requirements of probable cause and reasonable suspicion," which are technical, legal determinations independent from the factual investigations Brettingen has experience conducting. The state has thus failed to meet its burden of establishing this *Eason* requirement as well.

CONCLUSION

For the reasons stated above and in his initial brief, 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 15th day of October, 2018.

Respectfully submitted,

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CERTIFICATIONS

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 1,555 words.

I further 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). 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 15th day of October, 2018.

Signed:

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