RECEIVED
09-03-2019
CLERK OF COURT OF APPEALS
OF WISCONSIN

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2019AP826-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KEVIN M. JERECZEK,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT ENTERED IN BROWN COUNTY CASE 2016CF906, THE HONORABLE JUDGE JOHN P. ZAKOWSKI PRESIDING.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ATTORNEY ERICA L. BAUER
State Bar No. 1049684

103 W. College Ave, Ste. 410
Appleton, WI 54911
Phone (920) 364-0326
erica@bauerfarrislaw.com

Attorney for the Defendant-Appellant

TABLE OF CONTENTS

CASES CITED

STATEMENT OF ISSUE

Was Jereczek's constitutional right against unlawful searches violated when law enforcement searched the recycle bin on Jereczek's computer when Jereczek gave limited consent only for law enforcement to search his son's user account?

The trial court answered no.

STATEMENT ON ORAL ARGUMENT

Oral argument is not requested because the facts and legal analysis can be sufficiently developed in writing.

STATEMENT ON PUBLICATION

Publication is requested because the facts of this case are not so unique that they are unlikely to recur. The issue presented in this case has the potential to establish valuable precedent related to searches conducted by law enforcement on electronic devices. With the increase of technology, developing case law in relation to the issues presented in this case is likely to provide guidance to lower courts when reviewing constitutionality challenges in such a context.

STATEMENT OF THE CASE

Kevin M. Jereczek ("Jereczek") was charged with eleven counts of Possession of Child Pornography, contrary to sec. 948.12(1m) and (3)(a), Wis. Stats. R. 1; R. 3. According to the criminal complaint, law enforcement was investigating Jereczek's son, N.J., regarding his involvement

in a sexual assault. R. 1-7. In the context of that investigation, law enforcement sought to search Jereczek's computer, which N.J. had access to. Jereczek consented to have law enforcement search Jereczek's computer, but limited the scope of his consent to only permit a search of N.J.'s user account or profile on the computer. Law enforcement subsequently searched Jereczek's computer and located numerous images and videos allegedly depicting child pornography on the computer. As a result, Jereczek was charged with the eleven counts of Possession of Child Pornography filed in this case.

Jereczek filed a motion to suppress the child pornography discovered on his computer and all derivative evidence. R. 10. Jereczek's motion alleged that he had an expectation to privacy as to the contents of his computer. R. 10-1 to 10-2. Jereczek's motion also alleged that Jereczek gave law enforcement "limited permission or authority to search his computer for evidence related to his son's case." R. 10-2. Therefore, Jereczek alleged that law enforcement illegally exceeded the scope of consent given to search the computer and in doing so, illegally discovered the child pornography. Jereczek sought to suppress the child pornography found on his computer entirely.

The motion to suppress was heard by the trial court on April 6, 2017. R. 69; App. 4-53. At that time, the State stipulated that Jereczek had given limited consent, only authorizing a search of his son's user account or profile. R. 69-5 to 69-7; App. 4-6. The stipulation was accepted by the trial court. R. 69-8; App. 7.

The trial court heard testimony from Officer Tyler Behling, the law enforcement officer who conducted the search of Jereczek's computer.

The trial court issued a written decision, denying Jereczek's motion to suppress the images and videos of child pornography. R. 19; App. 67-71. The trial court found that law enforcement did not exceed the scope of the search, consented to by Jereczek. R. 19-4; App. 70. Furthermore, the trial court made a finding that if law enforcement did exceed the permissible scope of the search that law enforcement would have eventually found the child pornography through alternate lawful means and therefore, the evidence should not be suppressed under the doctrine of inevitable discovery. R. 19-5; App. 71.

Jereczek was subsequently convicted of one count of Possession of Child Pornography. The trial court sentenced Jereczek to serve an eight-year sentence with three years initial confinement, followed by five years of extended supervision. R. 44.

STATEMENT OF RELEVANT FACTS

The State stipulated to the fact that Jereczek gave limited authority or consent, only for a search of his son, N.J.'s user account or profile, on Jereczek's computer. R. 69-5 to 69-7; App. 4-6. The trial court accepted that stipulation and made findings consistent with that stipulation. R. 69-8; App. 7.

Officer Tyler Behling testified regarding his search of Jereczek's computer. R. 69; App. 4-53. Officer Behling testified that he was directed to examine N.J.'s user account. Specifically, Officer Behling testified that he was aware that Jereczek consented only to a search of his son's user account or profile. R. 69-41; App. 40.

Officer Behling acknowledged that the software he was using, En Case, was capable of being used to limit where data is viewed so as "to view the file system and the data structure" of the hard drive on Jereczek's computer. R. 69-23; App. 22. Officer Behling acknowledged that a "user account is part of the file structure" and therefore, En Case could have been used to limit examination of Jereczek's computer so as to only view N.J.'s user account. R. 69-24; App. 23; R. 69-44; App. 43. However, Officer Behling did not utilize the software to limit his examination of Jereczek's computer to only view N.J.'s user account and profile. R. 69-24; App. 23.

Rather, Officer Behling began by directly examining the contents of the recycle bin on a computer. R. 69-35; App. 34. Officer Behling testified that he did so because the contents of the recycle bin would be the most likely place he would expect to find illegal contents, such as child pornography. R. 69-19 to 69-20; App. 18-19.

Officer Behling testified that there was not a way to limit examination of the recycle bin and only examine contents relevant to one user account. R. 69-35; App. 34. Therefore, by examining the recycle bin, Officer Behling acknowledged that he was searching a shared portion of the computer that would contain deleted data from all users.

According to Officer Behling, a personal computer is by default, a multi-user operating system where the recycle bin is shared among all users for the computer. R. 69-17; App. 16; R. 69-33; App. 32. Therefore, it is impossible to search the recycle bin and only examine one user profile within that portion of a hard drive. R. 69-35; App. 34.

Later in the hearing, Officer Behling was again asked to clarify the accessibility of the recycle bin in relation to the

search. The trial court asked Officer Behling what the software would allow him to limit, as far as his examination of user accounts and profiles, and Officer Behling testified:

> You could you select to only view all the user data under a single profile, but that would not include any of the contents of the recycle bin."

R. 69-47; App. 46. Officer Behling acknowledged and agreed that he could have limited the scope of the computer itself in totality by only examining N.J.'s user account. R. 69-36; App. 35.

After examining the contents of the recycle bin, Officer Behling located a file believed to contain child pornography. At that point, Officer Behling stopped his search, to seek a warrant to examine the remaining files within the recycle bin.

Officer Behling did not use forensic software to limit his examination of Jereczek's computer to focus on N.J.'s user account or profile. Rather, Officer Behling went immediately to the recycle bin, where he expected to find data, files and contents that had been deleted by any person who accessed the computer, including users with accounts other than N.J. R. 69-47; App. 46.

The trial court found that Jereczek gave limited authority to law enforcement to search s son's user account on the computer. However, the trial court found that law enforcement did not exceed the scope of consent given by Jereczek. R. 19-4; App. 70. In doing so, the trial court found that law enforcement had consent to examine N.J.'s user account and therefore would have eventually ended up examining the recycle bin. The trial court additionally found that if law enforcement did exceed the scope of Jereczek's

consent, that law enforcement eventually would have found the child pornography because they would have eventually searched the recycle bin. R. 19-5; App. 71.

Jereczek now appeals from the trial court's ruling.

ARGUMENT

Jereczek's Fourth Amendment right against unlawful searches was violated when law enforcement searched a shared file on Jereczek's computer because Jereczek only consented to have law enforcement search his son's user account, not his user account or other general areas of the computer.

The Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution protect Jereczek from unreasonable searches. *See* State v. Artic, 2010 WI 83, ¶ 28, 327 Wis. 2d 392, 786 N.W.2d 430; *see also* State v. Young, 2006 WI 98, ¶ 30, 294 Wis. 2d 1, 717 N.W.2d 729.

Whether Jereczek's constitutional right against an unreasonable, unlawful search was violated presents a question of constitutional fact. State v. Anderson, 165 Wis. 2d 441, 447, 477 N.W.2d 277 (1991). Questions of constitutional fact are reviewed independently. *Id.* Deference is given to the trial court's findings of fact, unless they are clearly erroneous. State v. Griffith, 2000 WI 72, ¶ 2-3, 236 Wis. 2d 48, 613 N.W.2d 72; *see also* State v. Arias, 2008 WI 84, ¶ 12, 311 Wis. 2d 358, 752 N.W.2d 748. Whether the facts of a case pass constitutional muster is independently reviewed. *Id.*

Jereczek has a reasonable expectation of privacy in the contents of his personal computer. *See* State v. Trecroci,

2001 WI App 126, ¶ 36, 246 Wis. 2d 261, 630 N.W.2d 555. The State did not contest that fact at the trial level.

The State did not have a warrant to search Jereczek's computer. Therefore, the search of his computer was presumptively unreasonable. *See* State v. Matejka, 2001 WI 5, ¶ 17, 241 Wis. 2d 52, 621 N.W.2d 891; *see also* State v. Phillips, 218 Wis. 2d 180, 196, 577 N.W.2d 794 (1998).

To overcome that presumption, the State must prove by clear and convincing evidence that Jereczek's gave consent and also that the search did not exceed the scope of consent given. State v. Tomlinson, 2002 WI 91, ¶ 21, 254 Wis. 2d 502, 647 N.W.2d 177; State v. Payano-Roman, 2006 WI 47, ¶ 30, 290 Wis. 2d 380, 714 N.W.2d 548; Florida v. Jimeno, 500 U.S. 248, 251 (1991); *se*e *also* State v. Rogers, 148 Wis. 2d 243, 248, 435 N.W.2d 275, 277 (Wis. App., 1988).

In this case, the State and Jereczek stipulated that consent was given, but stipulated that consent was limited only to authorize law enforcement to search Jereczek's son's user account. The issue on appeal is whether law enforcement exceeded the scope of their search of Jereczek's computer.

Therefore, the factual focus in this case should be where the search was conducted and how the search was conducted. Arias, 2008 WI 84 at ¶ 31; *citing* Terry v. Ohio, 392 U.S. 1, 19, 88 S. Ct. 1868, 20 L.Ed.2d 889 (1968). The invasiveness of a search is measured by where and how the search was conducted. *Id.* The State has the burden of demonstrating that law enforcement searched within the boundaries of Jereczek's consent, or that law enforcement searched only the son's user account.

Jereczek gave only partial consent to a search of his computer; he limited the scope of his consent to a specific portion of his computer – his son's account. Jereczek did not consent to have law enforcement rummage through the entire computer, to look for evidence of a crime. The State conceded that fact. The trial court adopted that fact and entered findings accordingly.

Law enforcement's search exceeded the scope of Jereczek's consent. The State did not meet its burden of demonstrating that law enforcement's search was limited to the consent given and the trial court's findings of fact and law were erroneous.

Consistent with Jereczek's limited consent, Officer Behling was directed to look at the son's user account. R. 69-12 to 69-15; App. 11-14. Officer Behling testified that law enforcement was capable of utilizing software to limit an examination of Jereczek's computer. R. 69-23; App. 22; R. 69-26; App. 25; R. 69-44; App. 43; R. 69-47; App. 46. Officer Behling acknowledged that he could have set search parameters within the software used to examine Jereczek's computer and only examine his son's user account. However, he did not do that. R. 69-24; App. 23.

Rather, Officer Behling acknowledged that he immediately began opening files on a shared portion of the computer, the recycle bin. R. 69-15; App. 14; R. 69-33; App. 32. Officer Behling knew that the recycle bin would contain evidence relating to more than the son's user account. R. 69-19; App. 18. In fact, Officer Behling testified that it is impossible to examine the recycle bin and limit his search only to the son's user account. R. 69-35; App. 34.

Officer Behling was aware that by opening files contained in the recycle bin, he was opening files that did not

belong to the son's user account. The recycle bin was an area of the computer that was not limited to the son's user account; rather that part of the computer contained data and files that were removed from the files housed within each user account and deposited into a shared area.

Officer Behling did not have consent to search Jereczek's user account. Therefore, he should not have searched files, by opening and examining them, that were not identifiable within the son's user account. By rummaging through the files in the recycle bin, Officer Behling exceeded the scope of consent. Doing so was a flagrant disregard for Jereczek's right to privacy because the search exceeded the scope of the consent given.

The trial court made several findings inconsistent with Officer Behling's testimony.

Officer Behling testified that he followed his normal protocol in trying to locate child pornography on Jereczek's computer. The trial court relied heavily upon that testimony, finding that because he followed his normal protocol, law enforcement did not act in bad faith. The trial court's determination that law enforcement did not act in bad faith is erroneous.

Officer Behling gave more specific testimony regarding what his typical, standard protocol involves. R. 69-11 to 69-15; App. 10-14. Officer Behling acknowledged that each examination in a case is done independently and that each examination has different aspects that make them slightly different. R. 69-11; App. 10. In other words, there is no standard protocol for exactly how data on a computer is analyzed.

The only commonality that Officer Behling testified to, was the fact that he would expect to find child pornography in a recycle bin. Therefore, he testified that he "typically" begins by examining the recycle bin. R. 69-15; App. 14. The fact that Officer Behling has a desire to look in a recycle bin does not mean he has consent or lawful authority to do so.

Law enforcement testified that if software was used to strictly examine the son's user account, that the contents of the recycle bin would not have been visible. Rather, in order to explore the recycle bin without also examining other user data, a search warrant was needed. However, law enforcement did not seek a search warrant before searching the recycle bin. The search of the recycle bin was an unreasonable, warrantless search that violated Jereczek's privacy interest in his personal computer.

The trial court also found that Officer Behling would have ended up in the recycle bin even if he had limited his search to the son's user account. R. 19; App. 67-71. Therefore, the trial court found that Officer Behling was not capable of limiting his search to fit with Jereczek's consent because he would not have been able to locate the evidence. *Id.* Both findings are erroneous finding of fact.

Officer Behling testified that he was capable of using software to only view the file system and data contents therein, for a particular user. R. 69-23 to 69-24; App. 22-23; R. 69-26; App. 25. However, Officer Behling chose not to do so because he *wanted* to look in the recycle bin instead because he knew he would find what he was looking for there. Officer Behling specifically testified that it was not possible to examine the son's user account without also searching Jereczek's user account alongside it, within the

contents of the recycle bin. That limitation on law enforcement's capacity to search the computer does not change the authority they have to search.

Without consent to search Jereczek's files, law enforcement did not have legal authority to examine them. The technical difficulties created by limited consent required law enforcement to obtain a search warrant for the entire computer. It does not follow that law enforcement would have inevitably examined the recycle bin. The State offered no evidence to show that they had any probable cause to secure a warrant for the computer. The State did not seek or obtain a warrant to search the entire computer until after law enforcement violated Jereczek's right to privacy.

The ends do not justify the means for conducting a search. If law enforcement were given consent to search only one room of a house and law enforcement anticipated that evidence of a crime were located elsewhere in a house, that would not thereby extend their authority to search beyond the room for which consent was given. Rather, under that example, law enforcement would be required to obtain a search warrant for the remainder of the home, if consent for the entire premises was withheld.

Officer Behling testified that it is not possible to examine all files associated with a user account, without also examining files outside of the user account. R. 69-34 to 69-35; App. 33-34. Officer Behling testified that by examining only one user account on a personal computer, it is not possible to see what is in the recycle bin, even if data in the recycle bin was placed there by the user in question. *Id.* The only way to examine all of the data associated with one user profile would be to examine the entire computer. *Id.* That is why Officer Behling simply began examining the computer

as a whole, rather than limiting his search to the son's user account. However, in doing so, he exceeded the consent granted to search the computer. In doing so, he violated Jereczek's privacy interest in his own user account.

In United States v. Carey, the United States Court of Appeals for the10th circuit held that it was unlawful and beyond the scope of a search warrant to examine all files on a computer. Unites States v. Carey, 172 F.3d 1268, 1276 (1999). The facts of that case are very similar to the facts of this case, in that law enforcement did not have authority to examine the entire computer. *Id.* In Carey, law enforcement was authorized, by a search warrant, to examine records on the computer relevant to drug activity. *Id.* at 1270-71. The Court of Appeals held that the defendant constitutional right against unreasonable searches required law enforcement to limit their review of the hard drive to only examine files that were identifiable as having relevancy to the drug investigation. *Id.* at 1276. The Court held that law enforcement was prohibited from rummaging through all the files on the computer to locate the evidence relevant to their drug investigation. Therefore, the Court ruled that child pornography located on that defendant's computer must be suppressed.

The search conducted of Jereczek's computer was an illegal and unreasonable search that violated his Fourth Amendment right. The trial court should have suppressed the evidence entirely.

The first child pornography image located on Jereczek's computer was discovered as a direct result of the unreasonable, unlawful search. The remaining child pornography images and videos discovered on Jereczek's computer are fruits of the poisonous tree. Wong Sun v.

United States, 371 U.S. 471, 487-88 (1963); State v. Smith, 131 Wis. 2d 220, 240-41, 338 N.W.2d 601 (1986).

The first child pornography image located in the recycle bin was used to secure a search warrant to search the entire computer which resulted in law enforcement locating the remaining ten images. Without the discovery of the first image in the recycle bin, the State would not have had probable cause to search Jereczek's files.

The files not contained within the son's user account were not inevitably discoverable. Jereczek himself was not the subject of investigation. Furthermore, the State offered no facts to demonstrate why the son was specifically under investigation. Therefore, there is no factual basis within the record to find that the State would have ultimately discovered the files deleted within Jereczek's user account or profile if law enforcement had properly searched only the contents of the computer held within the son's user account file structure.

CONCLUSION

Jereczek only gave consent for law enforcement to search his son's user account on the computer. Law enforcement violated Jereczek's constitutional rights by conducting an unlawful search, by searching files and contents on the computer which contained Jereczek's files. The evidence discovered was not inevitably discoverable. Therefore, Jereczek respectfully requests that this Court reverse the trial court's order denying his motion to suppress the fruits of the illegal search and enter an order suppressing the child pornography found through the illegal search.

In addition, Jereczek also respectfully requests that the judgment be reversed. Without the evidence located on

Jereczek's computer, law enforcement had no probable cause basis to charge Jereczek.

Dated this 28th day of August, 2019.

Respectfully submitted,

ATTORNEY ERICA L. BAUER
State Bar No. 1049684

103 W. College Ave, Ste. 410
Appleton, WI 54911
Phone (920) 364-0326
erica@bauerfarrislaw.com

Attorney for the 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 3,526 words.

Dated this 28th day of August, 2019.

Signed:

ATTORNEY ERICA L. BAUER
State Bar No. 1049684

103 W. College Ave, Ste. 410
Appleton, WI 54911
Phone (920) 364-0326
erica@bauerfarrislaw.com

Attorney for the Defendant-Appellant

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 28th day of August, 2019.

Signed:

ATTORNEY ERICA L. BAUER
State Bar No. 1049684

103 W. College Ave, Ste. 410
Appleton, WI 54911
Phone (920) 364-0326
erica@bauerfarrislaw.com

Attorney for the Defendant-Appellant

A P P E N D I X

I N D E X
T O
A P P E N D I X

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; and (3) 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 first names and last initials 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.

Dated this 28th day of August, 2019.

Signed:

ATTORNEY ERICA L. BAUER
State Bar No. 1049684

103 W. College Ave, Ste. 410
Appleton, WI 54911
Phone (920) 364-0326
erica@bauerfarrislaw.com

Attorney for the Defendant-Appellant@