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STATE OF WISCONSIN

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

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.

REPLY BRIEF OF DEFENDANT-APPELLANT

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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 profile account. *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.

The State does not contest that Jereczek has a reasonable expectation of privacy in the contents of his personal computer. In addition, the State concedes that the only basis upon which the search of Jereczek's computer was lawful, is if law enforcement's search fell within the boundaries of the consent given by Jereczek. However, the State argues that the scope of consent given was broader than it was.

The State argues that "police were authorized to search shared areas of the computer." *St. Br.* at p. 2. Jereczek disagrees.

At the trial level, the State and defense stipulated that "authorities had limited consent" to search Jereczek's computer. App. 6. Specifically, the State stipulated that law enforcement had consent to search "his son's account or whatever profile would have been involved with his - - his son." App. 7.

At the pretrial motion hearing, the examining officer testified that it was possible to search only a user profile or account on a computer because a "user account is part of the file structure." App. 24. The reason the officer didn't limit the scope of his search to the user profile was because he wanted

to find evidence of a crime and he knew it would be in the recycle bin. App. 19-20. Even though the officer acknowledged that the recycle bin is not a part of the user profile or user account, he started there anyway to find the evidence he was looking for. App. 35. In doing so, he admittedly searched beyond the scope of consent given by Jereczek.

Now, the State argues that by consenting to a search of his son's user profile, that Jereczek consented to a search of the entire computer wherever data associated with his son's profile may be located. *St. Br.* at p. 5. That is not accurate, and the State cites to no factual findings or testimony in support of that position. Nothing in the record, by way of testimony or findings by the trial court, supports the State's argument that Jereczek consented to a search of his entire computer.

The State not only argues that Jereczek consented to a search of his entire computer, wherever data may be located relevant to his son's user profile, but the State insinuates that Jereczek has stipulated to that. No such stipulation or concession exists in this record. The State's argument that "there is no dispute that Jereczek consented to a law enforcement search for materials associated with his son's user profile" is an overstatement of the facts before this Court. Jereczek has never agreed that he consented to *a search for materials associated with his son's account*.

The entire subject matter before the trial court was the dispute regarding whether law enforcement exceeded the scope of the search. R. 69. Jereczek vehemently contested that matter. The same disputes are now raised for this Court to decide.

In pretrial litigation, the State stipulated that law enforcement was authorized to look "under his son's account

or whatever profile" was associated with Jereczek's son. App. 6-7. Jereczek agreed that he gave consent for law enforcement to search his son's user profile or account. In doing so, Jereczek contested law enforcement's authority to search the entire computer to locate user data associated with his son's account.

On appeal, Jereczek agrees that the scope of consent given is measured by the objective standard of reasonableness; that is "what would the typical reasonable person have understood by the exchange between the officer and the suspect?" Florida v. Jimeno, 500 U.S. 248, 251. The scope of a search is "generally defined by its expressed object." *Id.*

The *expressed object* that Jereczek consented to a search of was *his son's user profile*, not the entire computer. The only reasonable, objective interpretation of Jereczek's consent to search his son's user profile or account is that Jereczek was limiting his consent to that specific *portion* of his computer.

In litigation, the State stipulated that Jereczek gave limited consent, not full consent. App. 6-7. The State's argument, that Jereczek gave consent for the State to search the entire computer in order to find his son's user *data* would mean that Jereczek gave full consent to search the computer *for* a specific type of data. That argument is flawed and incorrect. Such consent would not be limited. It would be full consent for law enforcement to look at the entire computer for a limited *purpose*.

The object sought to be searched by law enforcement was the computer. Jereczek did not give full consent to search the entire computer. Rather, Jereczek gave consent for law enforcement to search his son's user account or profile, a small

portion of the computer. The object authorized to be searched was the user profile not the entire computer.

In support of the State's argument, the State cites to several cases which held that when a defendant gives consent for law enforcement to search a vehicle, that all contents of the vehicle may be searched including containers therein. *See* Florida v. Jimeno, 500 U.S. at 249; *see also* State v. Matejka, 2001 WI 5, ¶ 41, 241 Wis. 2d 52, 621 N.W.2d 891; and State v. Schroeder, 2000 WI App 128, ¶ 14, 237 Wis. 2d 575, 613 N.W.2d 911. In doing so, the State argues that the recycle bin was inside the computer and was thus within the purview of a search of the entire computer because it was a part of the computer where evidence may have been hidden.

If Jereczek had given consent for law enforcement to search his entire computer to look at data associated with his son's user account, then and only then, were they lawfully permitted to look in the recycle bin. However, Jereczek gave no such consent.

The State also cites to several cases involving a forensic search of a computer, where a warrant authorized examination of the computer to seek out certain evidence. *See* Schroeder, 2000 WI App 128 at ¶ 14; *see also* United States v. Carey, 172 F.3d 1268 (10th Cir. 1999). Those cases involved authorization to examine the entire computer. Here, no such broad, full consent was given.

Jereczek does not dispute that if law enforcement had consent to look in the recycle bin, that the child pornography located there was in plain view. Whether law enforcement previewed the contents of the recycle bin or opened each file up one by one is irrelevant. By previewing the contents, a search of the recycle bin was performed. The real dispute is

that Jereczek does not agree that law enforcement lawfully searched the recycle bin.

The Plain View Doctrine provides that law enforcement legally discovers evidence in plain view when three conditions are satisfied: (1) the evidence discovered was in plain view; (2) law enforcement was justified by being in the position they were to see it in plain view; and (3) there was probable cause to believe that the evidence was related to criminal conduct. Schroeder, 2000 WI App 128 at ¶ 13.

If law enforcement was lawfully searching the recycle bin, the evidence was in plain view. However, law enforcement was not lawfully searching the recycle bin.

Law enforcement testified in this case that if he limited his search to only the son's user profile on Jereczek's computer, he would not be able to see anything in the recycle bin. App. 47. Therefore, the child pornography located in the recycle bin was not in plain view from a search of the son's user profile. Because if law enforcement had limited the scope of their search to only look at the son's user profile, as Jereczek consented to, they never would have looked in the recycle bin. App. 47.

Law enforcement was not lawfully justified to look in the recycle bin. Jereczek limited his consent to a search of his son's user profile or account, not the entire computer. The trial court found that a search of only the user profile folder would not reveal the contents of the recycle bin. App. 47. Therefore, law enforcement was not lawfully looking in the recycle bin.

Once again, the State has essentially argued that the ends here justified the means. The State argues that law enforcement's interpretation of the scope of consent was reasonable because law enforcement would not expect to file

the evidence they sought if they only searched the son's user profile account. That is why the State should have secured a full search warrant for Jereczek's computer. The State failed to do that.

This Court's examination centers on "what would a typical reasonable person have understood by the exchange between the officer and the suspect?" The State's interpretation, that law enforcement wouldn't be able to find what they were looking for if they only looked in the user profile is not an objective, reasonable view. It is a goal-driven, one-sided view.

A reasonable person would not limit or restrict the scope of a search unless they wanted to limit what law enforcement was going to examine. It is not reasonable to interpret from Jereczek's exchange with officers that he restricted his consent to his son's user profile but also gave law enforcement authority to look anywhere they wanted to find data related to his son's activities.

CONCLUSION

Jereczek gave consent for law enforcement to search his son's user account, not consent for law enforcement to search the entire computer for data associated with his son. Any other interpretation of the facts in this case is not objectively reasonable. Therefore, law enforcement exceeded the scope of consent, violating Jereczek's fourth amendment right against unreasonable searches. 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 used against him at trial.

Dated this 13th day of December, 2019.

Respectfully submitted,

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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 1,703 words.

Dated this 13th day of December, 2019.

Signed:

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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 13th day of December, 2019.

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