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COURT OF APPEALS

STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT III

Case No. 2020AP001399-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JEREMY J. DEEN,

Defendant-Appellant.

On Appeal from a Judgment of Conviction
Entered in the Eau Claire County Circuit Court,
The Honorable Jon M. Theisen, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

ISSUE PRESENTED

Did the state meet its burden to show that evidence would be destroyed and therefore exigent circumstances allowed officers to seize Mr. Deen's cell phone without a warrant?

The trial court answered: yes.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Neither publication nor oral argument is requested.

STATEMENT OF THE CASE AND FACTS

On November 20, 2017, the National Center for Missing and Exploited Children (NCMEC) received a tip regarding a possible image of child pornography. (61:9; App. 111). Almost two months later, on January 16, 2018, the Eau Claire Police Department received the tip from the NCMEC. (61:9; App. 111). The tip reported that the image of possible child pornography was uploaded through the website "Chatstep" under the username "Josh". (61:11; App. 113). The image was connected to an IP address that was then traced back to a street address in Eau Claire, Wisconsin. (61:10; App. 112).

On January 17, 2018, two police officers went to the home address without a search warrant. (61:11; App. 113). Jeremy Deen answered the door. (61:11; App. 113). After identifying himself, Mr. Deen

gave the officers permission to enter the residence. (61:11; App. 113). The police told Mr. Deen the reason for their visit and questioned him about his internet service. (61:12; App. 114). Mr. Deen indicated that the internet was registered in the name of his ex-girlfriend, Maria Jaramillo. (61:13; App. 115). Mr. Deen and Ms. Jaramillo both lived at the home and used the internet. (61:13; App. 115). The officers did not ask if anyone else had access to the password protected internet. (61:13,16; App. 115,118). The officers did not speak with Ms. Jaramillo, who was upstairs when the police spoke with Mr. Deen. (61:15; App. 117).

The police asked Mr. Deen if he had heard of the website "Chatstep" and whether he viewed pornography. (5:3). Mr. Deen responded that he had heard of the website "Chatstep" but that he had never been on it. (61:12-13; App. 114-115). The police also questioned Mr. Deen about his middle name in an attempt to link Mr. Deen to the NCMEC tip. (61:18; App. 120). Mr. Deen told the police that his middle name was Joshua, and that he primarily viewed adult pornography. (5:3). The police did not ask if there was someone named Josh who lived at the home. (61; App. 103-129).

The police asked Mr. Deen whether he owned electronic devices that could access the internet. (5:3). Mr. Deen told the police that he used his cell phone and laptop computer whenever he accessed the internet. (5:3). When questioned about his internet use and child pornography, Mr. Deen responded that he looked at adult pornography. (5;3). With respect to child pornography, Mr. Deen expressed concern as

the officers were leaving, saying, "What happens if there is…if something somehow got downloaded?" (5:3; 61:14; App. 116). Mr. Deen also informed the police that he was on the Sex Offender Registry for Child Enticement. (5:3).

While the police were talking to Mr. Deen, they noticed a knife in his front pocket and asked that it be removed and placed on a table out of reach from Mr. Deen. (61:12; App. 114). The police conducted a pat frisk of Mr. Deen and located a cell phone in his front right pocket that they also removed and placed on the table. (61:12; App. 114). The police proceeded to question Mr. Deen regarding his cell phone use and whether it was pin locked. (5:3). Mr. Deen responded that it was. (5:3). The police did not arrest Mr. Deen or ask him to come with them for additional questioning. They did, however, take Mr. Deen's cell phone with them when they left. (61:12; App. 114). The police did not have a warrant to seize the cell phone or consent from Mr. Deen. (61:13-14,17; App. 115-116, 119). In fact, Mr. Deen explained to the officers that he needed to keep his phone because he used it for work. (61:13; App. 115).

On January 19, 2017, after obtaining a warrant to search the contents of Mr. Deen's cell phone, the police located four images of child pornography. (5:3). The police arrested Mr. Deen and charged him with four counts of possession of child pornography. (5).

Mr. Deen's defense attorney filed a motion to suppress all evidence obtained in violation of his constitutional rights. Specifically, the defense argued that the police seized Mr. Deen's phone without a

warrant and without exigent circumstances. (12).[1] The court, the Honorable Jon M. Theisen presiding, denied the motion to suppress and found that there were "exigent circumstances to seize the phone, to preserve evidence, and to prevent the destruction thereof." (61:24; App. 126).

Mr. Deen later entered a no contest plea to one count of possession of child pornography, in violation of Wis. Stat. § 948.12(1m). On May 3, 2019, the circuit court sentenced Mr. Deen to three years of initial confinement and ten years of extended supervision. (56:19).

Mr. Deen filed a postconviction motion requesting that the court grant him eligibility for prison programming and to clarify the sentencing court's pronouncement that Mr. Deen is not subject to lifetime supervision. (40). The court granted the motion. (48; 49). The motion also noted that Mr. Deen would raise the suppression issue that was preserved in the circuit court on appeal. (40:1).[2]

Mr. Deen now appeals. (53).

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[1] The motion also raised a challenge to the search warrant, arguing the information supporting the warrant was stale. Mr. Deen is only continuing the challenge to the warrantless seizure of his phone on appeal.

[2] Mr. Deen's suppression claim may be pursued on appeal despite his plea pursuant to Wis. Stat. § 808.03(3)(b).

ARGUMENT

Exigent Circumstances Did Not Justify the Warrantless Seizure of Mr. Deen's Cell Phone.

A. Introduction and Standard of Review.

The Fourth Amendment to the United States Constitution states: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated…" The Wisconsin Constitution contains an identically worded provision. Wis. Const. art. I § 11. In reviewing the legality of a search or seizure, this court considers the question to be one of "constitutional fact." *State v. Pallone*, 2000 WI 77, ¶26, 236 Wis. 2d 162, 613 N.W.2d 536. It applies a deferential standard to the circuit court's finding of facts. *Id.* However, it independently applies constitutional principles to the facts. *Id.*

The prohibition on warrantless searches and seizures is subject to only a few well-delineated exceptions, which are "carefully and jealously drawn." *Welsh v. Wisconsin*, 466 U.S. 740, 749-50 (1984). The state bears the burden of proving the existence of one of these exceptions. *See State v. Ferguson*, 2009 WI 50, ¶20, 317 Wis. 2d 586, 767 N.W.2d 187.

Here, the officers seized Mr. Deen's cell phone without a warrant or consent. The only exemption to the warrant requirement posited by the state and the only exception determined by the circuit court was

that exigent circumstances existed because of the potential for the destruction of evidence. (61:13-14, 24; App. 115-116, 126).

B. The Exigent Circumstances Exception to the Warrant Requirement

A warrantless search or seizure does not violate the Fourth Amendment or the Wisconsin Constitution if the search or seizure is justified by exigent circumstances. *State v. Reed*, 2018 WI 109, ¶7, 384 Wis. 2d 469, 920 N.W.2d 56. The objective test for determining whether exigent circumstances exist is whether a police officer, under the facts as they were known at the time, would reasonably believe that delay in securing a search warrant would cause evidence to be destroyed, endanger the safety of the officers, or greatly enhance the likelihood of the suspect's escape. *Id.*

Here, the only potential applicable exigency was concern for the destruction of evidence. In determining whether a police officer reasonably feared the destruction of evidence, the appropriate inquiry is whether the facts, as they appeared at the moment of entry, would lead a reasonable officer to believe that evidence might be destroyed before a warrant could be obtained. *State v. Kiekhefer*, 212 Wis. 2d 460, 569 N.W.2d 316, 326 (Ct. App. 1997) (quoting *United States v. Rivera*, 825 F.2d 152, 156 (7th Cir. 1987)).

However, exigent circumstances cannot be created by police conduct that violates the Fourth Amendment. *Kentucky v. King*, 563 U.S. 452, 462 (2011). The exigent circumstances rule justifies a

warrantless search when the conduct of the police preceding the exigency is reasonable. *Id.* If the police created the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment, the warrantless search or seizure to prevent the destruction of evidence is unreasonable and thus not allowed. *Id.*

i. The passage of time between when the tip was generated and investigated demonstrates that the destruction of evidence was not imminent.

The first factor that demonstrates that exigent circumstances did not justify the seizure of the cell phone is the passage of time between when the tip was generated and when the police went to Mr. Deen's home. Police went to Mr. Deen's home on January 17, 2018. (61:11; App. 113). At that time, they knew that the NCMEC tip was generated almost two months earlier, on November 20, 2017. (61:9; App. App. 111). The police did not have any information to suggest that Mr. Deen had attempted to get rid of any electronic devices that he used to access the internet, nor any information that he had attempted to delete data off of his phone. (61; App. 103-129). To the contrary, Mr. Deen indicated that he needed to keep his phone because he used it for work. (61:13; App. 115). Thus, it was not reasonable for the police to determine that destruction of evidence was imminent when Mr. Deen had not done anything in the prior months to indicate he might destroy evidence.

ii. At the moment of entry, there was not evidence to support a reasonable belief that destruction of evidence was imminent.

In addition to knowing that time had passed between the tip and the seizure, the police did not observe any evidence at the time they entered Mr. Deen's home to suggest that Mr. Deen was poised to destroy evidence. The standard for determining whether a police officer's belief in the imminent destruction of evidence is reasonable is whether the facts, "*as they appeared at the moment of entry*, would lead a reasonable experienced agent to believe that evidence might be destroyed before a warrant could be secured." *State v. Kiekhefer*, 212 Wis. 2d 460, 478, 560 N.W.2d 316, 326 (Ct. App. 1997) (citing *United States v. Rivera*, 825 F.2d 152,156 (7th Cir. 1987)). (emphasis added).

In *State v. Kiekhefer*, this court determined that agents did not have a reasonable belief that Mr. Kiekhefer was about to destroy evidence at the moment they entered his residence. There, officers had received information that Kiekhefer might be holding a large amount of drugs and some guns for an accomplice. *Kiekhefer*, 212 Wis. 2d. 460, 465. The agents watched Kiekhefer's home and saw a person they believed to be the accomplice enter and leave the home. *Id.* The agents eventually made a warrantless entry into Kiekhefer's bedroom and seized marijuana. *Id.* at 467.

The state argued that the warrantless seizure of the drugs was justified by exigent circumstances.

Specifically, the state argued that the officers could determine that if they did not seize the drugs, either Kiekhefer would destroy them or his accomplice would return to reclaim them. *Id.* at 476. This court rejected that argument for a number of reasons. First, this court explained that "the presence of contraband without more does not give rise to exigent circumstances." *Id.* at 478 (citing *United States v. Rodgers*, 924 F.2d 219, 222 (11th Cir. 1991)). This court also noted that the agents knew that the large amount of drugs they planned to seize could not be destroyed quickly. *Id.* at 478. Finally, the agents did not hear the sounds of destruction when they entered the room. *Id.* at 479. Nor was this a case like *United State v. Frierson*, 299 F.2d 763, 766 (7th Cir. 1962) where the officers heard "get rid of the stuff" before determining exigent circumstances existed.

Mr. Deen's case is similar to *Kiekhefer* in that the evidence at the moment of entry would not lead a reasonable officer to believe that Mr. Deen was poised to destroy evidence or that it would be easy for him to do so. The officers did not hear any conversation or sounds that would have indicated to them that Mr. Deen was about to destroy his phone or computer. Instead, Mr. Deen's phone was in his pocket. (61:12; App. 114). The officers did not testify about any tools or software that they believed Mr. Deen had that could have destroyed evidence.

In addition, like the large quantify of drugs in *Kiekhefer*, data from a cell phone cannot be easily and quickly destroyed. In fact, at the suppression hearing in this case, the state argued that in child pornography cases, people who obtain these images

are likely to retain them and that even if the images are deleted they can be reconstructed. (61:5; App. 107). The state based its argument on *State v. Gralinski*, in which this court noted that child pornography differs from other contraband because the images remain even after they are deleted and because of the proclivity of people who view them to retain them. 2007 WI App 233, ¶31, 301 Wis. 2d 101, 743 N.W.2d 448. This reasoning also does not take into account additional ways the officers may have accessed the images without the phone including accessing "the cloud," Google, or other data retrieval applications. Finally, it was unlikely Mr. Deen would destroy or discard his phone given the important role phones play in people's lives today. Many people's phones include contacts, entertainment and banking information. In addition, Mr. Deen needed his phone for work.

Thus, this is not the type of evidence that the officers could have reasonably believed would have been in danger of imminent destruction.

iii. The officer's failure to seize Mr. Deen's computer demonstrates the lack of exigency.

Furthermore, the lack of exigency is apparent from the non-seizure of the other electronic devices capable of connecting to the internet. When the police arrived at Mr. Deen's home, they questioned him about his internet service and whether he used electronics to access it. (5:3). Mr. Deen indicated that he used his cell phone and laptop computer whenever he accessed the internet. (5:3).

The officer did not explain why the cell phone would be in greater danger of imminent destruction than the laptop. The inconsistency in seizing the phone but not the laptop demonstrates that the seizure was based on speculation rather than a reasonable belief that evidence would be destroyed before a warrant could be secured. The state cannot rely on exigent circumstances as the basis for a warrantless search when police actions indicate no exigency existed. If there were actually exigent circumstances, the police would have taken any and all electronic devices capable of connecting to the internet. Thus, the standard for exigent circumstances was not met here.

iv. Law enforcement conduct that produces exigent circumstances cannot be used to justify the seizure.

Finally, The U.S. Supreme Court has held that police conduct creating exigent circumstances cannot be used to justify a search and seizure. *Kentucky v. King*, 563 U.S. 452, 462 (2011). Any warrantless search and seizure based on exigent circumstances must be supported by a genuine exigency. *Id*. The need to prevent the destruction of evidence is a sufficient justification for a warrantless search, but there are limits. The conduct of the police preceding the exigency must be reasonable. *Id*.

Here, prior to the moment of entry, the police had no evidence to demonstrate that Mr. Deen was about to destroy his phone or his computer. They did not hear him say he would do so, they did not hear

any noise that sounded like the destruction of an electronic device, and when they entered the home they did not observe any tools or any other indication that Mr. Deen was poised to destroy his phone. Therefore, it was not reasonable to seize the phone.

Unreasonable conduct cannot justify the exigency. Therefore, the state cannot now argue that Mr. Deen would have destroyed his phone because he was made aware that the police were going to seize it. Further, Mr. Deen never would have known he was being investigated for possible possession of child pornography if police had not gone to his home and asked him questions related to the tip.

CONCLUSION

For the reasons set forth above, Mr. Deen respectfully requests that the court reverse the decision of the circuit court and suppress all evidence found on Mr. Deen's phone following the warrantless seizure.

Dated and filed by U.S. Mail this 13th day of November, 2020.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,764 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 and filed by U.S. Mail this 13th day of November, 2020.

Signed:

ELLEN J. KRAHN
Assistant State Public Defender

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 § 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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