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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

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

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

The exigent circumstances exception to the warrant requirement does not apply here because a reasonable police officer would not have believed evidence would be destroyed before a warrant could be obtained. This is true because Mr. Deen took no action to destroy any evidence in the two months that passed between the time NCMEC received the tip regarding child pornography and when police confronted him. Further, there was no reason for police to believe destruction was imminent at the moment of entry to Mr. Deen's home as he said nothing about destroying evidence and the officers heard and saw nothing that would indicate that was his intention. To the contrary, Mr. Deen indicated his phone was a necessary part of his job indicating it would not be destroyed. Further, evidence that a person accessed and viewed child pornography is not easy to erase again making it unlikely destruction of evidence was imminent or even possible. The police actions in taking only his phone and not his laptop, which he also used to access the internet, also indicate the seizure was based on speculation rather than a reasonable belief evidence would be destroyed before a warrant could be secured. Finally, if this court decides there was a threat of evidence

destruction, it was created by police action and exigent circumstances cannot be based on a situation created by police conduct.

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

The police had no evidence to suggest Mr. Deen 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 devices in the almost two months between when the tip was generated and when police went to his home. To the contrary, Mr. Deen indicated he needed to keep his phone because he used it for work. (61:13). 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.

B. At the moment of entry, there was no evidence to support a reasonable belief that destruction of evidence was imminent.

In addition to knowing that time had passed without incident 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 he 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 (Ct. App. 1997) (citing *United States v. Rivera*, 825 F.2d 152,156 (7th Cir. 1987)) (emphasis added).

The evidence available at the moment of entry into Mr. Deen's house 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, computer or any data. Instead, Mr. Deen's phone was in his pocket. (61:12). The officers did not testify about any tools or software that they believed Mr. Deen had that could have destroyed evidence.

The state ignores that *Kiekhefer* states the relevant inquiry is whether it would be reasonable to believe destruction of evidence was imminent based on the facts "as they appeared at the moment of entry" and instead cites to *Illinois v. McArthur*, 531 U.S. 326, 332 (2001), and federal cases, to support its position that destruction of evidence became imminent after police spoke to Mr. Deen about their investigation. It's reliance on these cases is misplaced. First, the focus of *McArthur* was a seizure of a person, not an item of evidence that could have been destroyed. Specifically, Mr. McArthur's wife told police Mr. McArthur had drugs in his trailer and police prevented Mr. McArthur from going back inside it until they could obtain a warrant about two

hours later. *Id*. at 328-329. The court focused on rules for seizure of a person, namely how the seizure was akin to a *Terry*[1] stop, and on the fact that it was a short seizure lasting only two hours. *Id*. at 331-332. Wisconsin cases that cite to *McArthur* have done so in the context of whether seizures of individuals were illegal or short and akin to a *Terry* stop. They have not applied *McArthur* to a case like this where police seized an object, rather than a person, and kept it for a day before obtaining a warrant. The state could not find one Wisconsin case to cite to support its position that *McArthur* rather than *Kiekhefer* controls the situation here. While it discusses some federal cases to support its position, none of those decisions are binding on this court. Further, the facts of those cases differ from the facts here. The cases the state cited in its brief involve securing premises, rather than seizing items, while waiting for a warrant (*United States v. Perez-Diaz*, 848 F.3d 33, 36 (1st Cir. 2017)) or involve defendants potentially deleting messages or photos from their phones which are easier to destroy than evidence one accessed certain websites (*United States v. Burton*, 756 F. App'x 295, 297 (4th Cir. 2018) and *State v. Deem*, 849 S.E.2d 918, 921 (W.Va. 2020)). A number of them also involved much shorter seizures than the multiple hours the police held Mr. Deen's phone.[2] *See McArthur*, 531 U.S. at 332 (two-hour seizure); *Perez-Diaz*, 848 F.3d at 36 (three-hour seizure). Further, the state ignores the fact that Mr. Deen told police he

[1] *Terry v. Ohio*, 392 U.S. 1 (1968).

[2] Mr. Deen's phone was seized on January 17, 2018 and searched on January 18, 2018 at 10:08 a.m. (1:1, 5).

used his phone for work indicating it was unlikely he would destroy evidence on it by breaking it or disposing of it entirely. This is also true because phones serve new and unprecedented roles in people's lives today as they serve as points of contact with others, entertainment hubs, and personal and work storage sites.

The state attempts to distinguish *State v. Kiekhefer*, in which this court held there were no exigent circumstances and ignores this court's statement in that case that "the presence of contraband without more does not give rise to exigent circumstances." 212 Wis. 2d at 478 (citing *United States v. Rodgers*, 924 F.2d 219, 222 (11th Cir. 1991)). But *Kiekhefer* is relevant here. The court in that case held there were no exigent circumstances because the large quantity of drugs found could not be destroyed easily or quickly and because police saw and heard no evidence of destruction upon their entry. *Id.* at 478-479. The same is true in this case. It is very difficult to destroy all evidence that a person has searched for and/or accessed child pornography. 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). In *State v. Gralinski*, 2007 WI App 233, ¶31, 301 Wis. 2d 101, 743 N.W.2d 448, 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. The court in *Gralinski* explained the process by which evidence

can remain saying that once an individual opens an image of child pornography, the image is saved in his computer (or phone's) "cache" and that images or remnants of images viewed are saved within the hard drive of the electronic device even if the images themselves were deleted. *Id*. Police can also access images and search histories without the phone or electronic device including accessing "the cloud," Google, or other data retrieval applications. They can also do IP address matching which is how they connected the NCMEC tip in this case to Mr. Deen's address.

Given that it would be exceedingly difficult to get rid of all evidence that Mr. Deen viewed child pornography, there were no exigent circumstances requiring police to seize his phone. Further, as in *Kiekhefer*, police saw and heard no evidence that Mr. Deen had attempted to destroy evidence or had a plan to do so after talking with police.

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

The lack of exigency is also apparent from the fact police did not seize Mr. Deen's other electronic devices capable of connecting to the internet and which Mr. Deen told police he used to access the internet. The fact officers took only Mr. Deen's phone, not his laptop, demonstrates 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.

The state responds to this argument by asking this court to assume facts not in evidence. It says that Mr. Deen told officers he had recently bought the laptop and officers would have thus reasonably assumed the computer would not have the same evidence of child pornography as the phone. But the officers never testified to that at the suppression hearing and the state cannot simply assume what the officer's believed in failing to take the laptop. What is established in the record is that officers knew Mr. Deen used his laptop, as well as his phone, to access the internet and they chose not to take it. That decision indicates they did not believe the destruction of evidence was in fact imminent and thus there were no exigent circumstances justifying the seizure of Mr. Deen's phone.

D. 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 or seizure. *Kentucky v. King*, 563 U.S. 452, 462 (2011).

Here, prior to the moment of entry, the police had no evidence 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.

The state says the police in this case did not create an exigency because in *State v. Robinson*, 2010 WI 80, 327 Wis. 2d 302, 786 N.W.2d 463, the Wisconsin Supreme Court stated police do not create exigency merely by knocking on an individual's door and announcing their presence. It also cites *State v. Parisi*, 2014 WI App 129, 359 Wis. 2d 255, 857 N.W.2d 472, to support its assertion. But those two cases are distinguishable. In *Robinson*, police went to an address based on a tip that the defendant was selling marijuana and knocked and announced their presence. 327 Wis. 2d 302, ¶¶4-9. Upon knocking, police heard footsteps running indicating someone inside was likely destroying evidence and fleeing. *Id*. The court held it was the knocking plus the defendant running that created the exigency saying the "choice to run from the door created the exigent circumstance." *Id*. at ¶32. Mr. Deen never took any action indicating he was fleeing or would be destroying evidence. In fact, he politely invited police into his home when they arrived on his doorstep and made no moves to destroy his phone or anything on it while they were there or before their arrival. Further, *Robinson* involved marijuana which that court noted can be easily and quickly destroyed. The same is not true regarding evidence someone accessed child pornography. *Parisi* is distinguishable on the same grounds. There, police smelled burnt marijuana

outside an apartment and believed they heard people inside. *Parisi*, 359 Wis. 2d 255, ¶3. When they knocked, the people inside became quiet which police believed was a sign they were destroying evidence. *Id*. at ¶¶3-6. As in *Robinson*, this court found exigent circumstances based on the fact that small amounts of marijuana are easy to dispose of quickly and completely. *Id*. at ¶10. It acknowledged the situation would be different if the facts were more like those in *Kiekhefer* where the drug amounts were so large it would have been difficult to destroy the evidence before the police secured a warrant. *Id*. at ¶17. Again, Mr. Deen's case is more akin to *Kiekhefer* where it would have been difficult, if not impossible, for Mr. Deen to destroy all evidence he searched and visited websites containing child pornography. Further, all these cases are distinguishable from Mr. Deen's case in that police did not just knock and announce their presence. Instead, police did much more. They came into Mr. Deen's home and confronted him with the NCMEC tip. They asked him questions about his internet service and whether it was password protected, about whether he viewed pornography, whether he had visited "Chatstep," and what devices he used to access the internet. They asked him whether he ever opened problematic files containing child pornography. They frisked him in his own home and removed his phone from his pocket and kept it away from him while continuing to ask him questions. They then took the phone when they left. (1:2-3). If this court concludes there were exigent circumstances, they were created by police conduct and thus there were no valid grounds to seize Mr. Deen's phone without a warrant.

CONCLUSION

For the reasons set forth above and in Mr. Deen's brief-in-chief, 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 this 3rd day of March, 2021.

Respectfully submitted,

Electronically Signed by
Tristan S. Breedlove

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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 2,421 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief of appellant, including the appendix as a separate attachment, if any, which complies with the requirements of Wisconsin Supreme Court Order 19-02: Interim Court Rule Governing Electronic Filing in the Court of Appeals and Supreme Court.

Dated this 3rd day of March, 2021.

Signed:

Electronically Signed by
Tristan S. Breedlove

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