STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2022AP000146-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

THOR S. LANCIAL,

Defendant-Appellant.

On Appeal from a Judgment and an Order
Entered in the Dunn County Circuit Court,
the Honorable Rod W. Smeltzer, Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

Law enforcement exceeded the scope of the premises warrant they obtained for Richard Lancial's residence and conducted an unconstitutional, warrantless search of Thor Lancial's phone. The search revealed ten images of child pornography in the cache folder of the gallery application of the phone. The state charged Mr. Lancial with knowingly possessing those ten images on July 9, 2019 – the date the search was conducted.

At trial, the state's witnesses admitted that they had no information about when, where, or how those ten images got on the phone. (144:41-43, 54-57, 64, 100-104). They also admitted that the cache folder of the gallery application, the only place the images were located, is a hidden folder that is inaccessible to the user of the phone. (144:90, 93-94). The state failed to prove knowing possession beyond a reasonable doubt; it didn't present any evidence that, on July 9, 2019, Mr. Lancial took any affirmative acts to obtain, or had access to and intended to exercise control over, the ten images for which he was convicted.

Mr. Lancial's convictions must be vacated and the case remanded for either judgments of acquittal or an order suppressing evidence to be entered.

I. The evidence presented at trial was insufficient.

The state failed to present sufficient evidence beyond a reasonable doubt that, on *July 9, 2019*, Mr. Lancial knowingly possessed the ten specific images of child pornography for which he was convicted. Its argument to the contrary, while compelling, fails to address the date Mr. Lancial was found to have committed the crimes.

The state's position at trial was that Mr. Lancial was guilty because, on July 9, 2019, ten images of child pornography were found in the cache folder of the gallery application on his phone, and that was the evidence it presented. (144:170). The state's own witness, however, acknowledged that this cache folder could not be seen or accessed by Mr. Lancial. (144:90, 93-94). In other words, on July 9th, Mr. Lancial could not see or control the images.

On appeal, the state fails to explain how the existence of these images in a location that Mr. Lancial could not access proves beyond a reasonable doubt that he had actual physical control of them or that they were in an area over which he had control and he intended to exercise control over them. *See* WIS JI-CRIMINAL 2146A. For that reason, the state's arguments regarding *State v. Mercer*, 2010 WI App 47, 324 Wis. 2d 506, 782 N.W.2d 125, VPN's, and evidence of consciousness of guilt, miss the mark.

First, *Mercer* does not control the outcome of this case; the facts and legal question presented in that case are easily distinguishable. Mercer was convicted of fourteen counts of child pornography. *Mercer*, 2010 WI App 47 at ¶¶6, 12. The charges "stemmed from the use of his work computer on May 28, 2004." *Id*. At trial, the state presented evidence from the software log of Mercer's work computer which showed that, on May 28, 2004, Mercer visited specific websites and clicked on various links that allowed him to access the specific images he was charged with possessing. *Id.*, ¶¶6-7. This court viewed the issue as "whether a person can knowingly possess images of child pornography he or she views while browsing the internet if there is no evidence that the images viewed were in the computer hard drive." *Id.*, ¶17. The court reviewed prior cases and concluded "that an individual knowingly possesses child pornography when he or she affirmatively pulls up images of child pornography on the Internet and views those images knowing that they contain child pornography." *Id.*, ¶31.

Mr. Lancial agrees that, under *Mercer*, "even if the actual child pornography is inaccessible, evidence of a defendant's affirmative acts" may be sufficient to prove possession of child pornography. (Response Br. 19). He argues, however, that because, unlike *Mercer*, there was no evidence in this case that he took any affirmative acts to access child pornography on July 9th (the date he was convicted of knowingly possessing child pornography), the evidence that those images were in an inaccessible folder on that date was insufficient.

Here, there was no evidence presented that, on July 9, 2019, Mr. Lancial viewed any child pornography on the Internet or through any other means, let alone the ten images for which he was convicted. There was no search history. (144:98). No metadata associated with the images. (144:108). Nothing to establish when, where, or how the ten images got to be on the phone or in the cache gallery folder. (144:54-55, 64, 100-103). To reiterate, there was no evidence presented to the jury that, on July 9, 2019, Mr. Lancial "affirmatively reached out for and obtained the images" for which he was convicted. *Id.*, ¶29. The only evidence presented was that the images were located in a hidden, inaccessible area of Mr. Lancial's phone on that date.

The record simply does not support a reasonable inference that, on July 9, 2019, Mr. Lancial knowingly possessed the ten images for which he was convicted. Again, the images were not in an area over which he had control and he did not intend to exercise control over them. On July 9th, the images had been deleted and were no longer accessible. A person does not intend to exercise control over items that he or she deletes. Nor could he exercise control over them, as they only existed in a hidden location he could not access.

Evidence that no one else admitted to putting the images on Mr. Lancial's phone, and of consciousness of guilt, is irrelevant to the question presented by this case. As is the assertion that child pornography had been uploaded using

Richard Lancial's IP address in the spring of 2019. Mr. Lancial was not charged with knowingly possessing child pornography in the spring of 2019, nor with knowingly possessing the images associated with the cyber tips. (144:54-57). He was charged and convicted of knowingly possessing ten specific images on the date of the search, July 9, 2019.

Moreover, while the jury heard general testimony about how images end up in a cache folder of the gallery application, there was no evidence of any affirmative acts taken by Mr. Lancial to access child pornography – no search history and no data associated with the images showing when or how they were obtained. The images could have been sent to Mr. Lancial via text or email without any request being made. More to the point, however, there was no evidence that, on July 9, 2019, Mr. Lancial took any affirmative acts to obtain the ten images for which he was convicted. The state fails to argue otherwise.[1]

Finally, it does not matter why the state did not have metadata from the images or search history from Mr. Lancial's phone. The fact that it could possibly explain why certain evidence did not exist does not relieve the state of its burden of presenting evidence

[1] While the state argues that *United States v. Flyer*, 633 F.3d 911, 919 (9th Cir. 2011) is distinguishable because in that case "there was no evidence presented at trial how the defendant 'accessed, enlarged, or manipulated' any of the images nor was there evidence that he viewed the images in the charged timeframe," it fails to identify any evidence of the same presented at trial in this case. (Response Br. 21, fn 9).

establishing guilt beyond a reasonable doubt. The fact is, the state provided the jury with no evidence supporting knowing possession on the date alleged – July 9, 2019. There was no evidence that Mr. Lancial took any affirmative acts to obtain the ten images of child pornography on that date and no evidence that Mr. Lancial had actual or constructive possession of the images on that date.

Viewing the evidence presented at trial, no trier of fact, acting reasonably, could have been convinced beyond a reasonable doubt that Mr. Lancial knowingly possessed child pornography on July 9, 2019. *See Mercer*, 2010 WI App 47, ¶13. Mr. Lancial's convictions must be vacated.

II. The search was unconstitutional.

The warrantless search of Mr. Lancial's phone was unconstitutional and the evidence obtained should have been suppressed. Law enforcement's search of Mr. Lancial's phone exceeded the scope of the warrant and the good faith exception neither applies, nor was met in this case.

A. The warrant did not authorize the search of Mr. Lancial's cell phone.

The parties agree that warrants must contain "a particularized description of the place to be searched and items to be seized." *State v. Sveum*, 2010 WI 92, ¶20, 328 Wis. 2d 369, 787 N.W.2d 317. They part ways on whether the warrant in this case authorized the search of cell phone data. It did not. Consequently,

Investigator Zassenhaus's search of Mr. Lancial's phone was a warrantless, unconstitutional search.

The state asserts that the warrant explicitly authorized the search of phones found at the residence, hanging it's hat on the line which states, "search said premise[s] and/or phones for said things." (Response Br. 27). In doing so, the state ignores the language in the rest of that sentence, as well as the context in which it is made, and twists the issue into one about the particularity of the language in the warrant. Mr. Lancial, however, has not argued that the warrant lacked sufficient particularity. He argues that the warrant did not authorize the search of his, or any phone, located at the residence.

The plain language of the warrant authorized the search of the premises (2255 Wilson Street, Lot #37) for the things alleged to be located there – "laptops, tablets, or any electronic device that has user generated data…" (57:1). While the warrant does state that Zassenhaus "prayed that a search warrant be issued to search said premises or phones for said things," that language is not relevant. (57:1) It doesn't matter what Zassenhaus asked for. To determine whether she exceeded the scope of the warrant, the controlling language is in the court's actual order. In this case, the court's order was clear:

> NOW, THEREFORE, in the name of the State of Wisconsin, you are commanded forthwith to search the said premises, vehicle and persons for said things….

(57:1). The court did not authorize the search of any cell phones; it authorized the search of the premises, vehicles, and persons, for certain electronic devices – laptops, tablets, or any electronic device containing user generated data.

The language in the affidavit does not change this. Again, it doesn't matter what Zassenhaus was requesting to do; what matters is what the court actually authorized her to do. The warrant does not "lack[] sufficient specificity;" it simply fails to authorize the search of any cell phones seized from the residence. (Response Br. 28)(57:1). For that reason, the legal authority relied on by the state – *Castle News Co. v. Cahill*, 461 F. Supp. 174 (E.D. Wis. 1978)(holding that a warrant's general description of items to be seized can be narrowed by references to the affidavit in order to render it valid) and Wis. Stat. § 968.22 – is inapplicable. The warrant's description of the items to be seized was sufficiently particular – the affidavit does nothing to narrow it.

Further, to the extent the state's citation to § 968.22 is an argument that there was a clerical error or technical irregularity in the warrant, that argument is woefully undeveloped. The state does not identify any error or explain why such error is simply a technical irregularity not affecting Mr. Lancial's substantial rights. *See* Wis. Stat. § 968.22. If the error is a failure to state that law enforcement could search cell phones seized from the residence for data, that would certainly be a material error affecting Mr. Lancial's rights.

Perhaps recognizing that the warrant does not authorize the search of cell phones found at the residence, the state also appears to argue that the cell phone could be searched under "the general principle that a premises warrant also authorizes the search of items that are plausible receptacles of the objects of the search." (Response Br. 28). In doing so, the state fails to directly address Mr. Lancial's arguments to the contrary, instead relying on inapplicable case law and an assumption that the warrant here authorized the search.

The state asserts that this court's decision in *State v. Schaefer*, 2003 WI App 164, 266 Wis. 2d 719, 668 N.W.2d 760, governs this case. However, as set forth in the initial brief, in light of the United States Supreme Court's decision in *Riley v. California*, 573 U.S. 373 (2014), *Schaefer*, and other cases related to the search of items seized during the execution of a premises search warrant, no longer apply to cell phones. *Schaefer* was decided prior to *Riley* and involved a computer, not a cell phone – a device which has been recognized to hold "the privacies of life." *Riley*, 573 U.S. at 403. It does not control the outcome of this case.

Finally, the state argues that Mr. Lancial's reliance on *Riley*, *State v. Burch*, 2021 WI 68, 398 Wis. 2d 1, 961 N.W.2d 314, and *State v. Russo*, 336 P.3d 232 (Idaho 2014), is misplaced, as those cases involve warrantless searches of cell phones. The state seems to ignore Mr. Lancial's entire argument – that the search of his phone was a warrantless search as it

was not authorized by the premises warrant. It also failed to address Mr. Lancial's argument that, in light *Riley's* holding that a "warrant is generally required before" the search of a cell phone, the warrantless search of his phone was unconstitutional. *Riley*, 573 U.S. at 401.

The state did not contest Justice Dallet's conclusion that "[i]n the Fourth Amendment context…cell phone data is in an evidence class of its own.'" *Burch*, 2021 WI 68, ¶72 (Dallet, J., concurring in part, dissenting in part). Nor did it explain why, in light of the "unique and heightened expectation of privacy" that people have in their cell phone data, the court should continue to treat a cell phone the same as any other physical object seized during a premises search. *See Id.*

The search of Mr. Lancial's cell phone was neither explicitly authorized by the warrant, nor was it allowed under the general rule applicable to premises warrants. It was warrantless and unconstitutional. Mr. Lancial's suppression motion should have been granted.

B. The good-faith doctrine does not apply.

The good-faith doctrine does not preclude application of the exclusionary rule in this case. The premises warrant was not "flawed." (*See* Response Br. 31). The constitutional violation here arose when law enforcement exceeded the scope of that warrant and conducted an unauthorized search of Mr. Lancial's phone.

Because the warrant was not flawed, the state's reliance on *State v. Eason*, 2001 WI 98, 245 Wis. 2d 206, 629 N.W.2d 625, and the good-faith exception to the exclusionary rule established therein, is misplaced. Under *Eason*, the good-faith exception prevents exclusion of evidence when officers acted in objectively reasonable reliance on a facially valid warrant that was later invalided. *Eason*, 2001 WI 98, ¶3. It does not apply when officers act outside the scope of a valid warrant.

Further, according to *Eason*, in order for the good-faith exception to apply, the state must show that in obtaining the warrant, it: 1) conducted a significant investigation and, 2) that there was review of the warrant application by an officer trained in the requirements of probable cause, or a government attorney. *Id*. In this case, the state made no argument, and presented no evidence, that the warrant application had been reviewed by another, appropriately trained officer, or an attorney. It failed to meet the *Eason* requirements.

To the extent that the state argues that the exclusionary rule should not apply because Zassenhaus acted "with an objectively reasonable good-faith belief that [her] conduct [was] lawful," it fails to develop an argument to support such a claim. *Burch*, 2021 WI at ¶17. The state points only to Zassenhaus' testimony that she believed she had authority to search the phone's data. A claim by the officer that she thought she had the legal authority to conduct the search, however, cannot be enough to save

an unconstitutional search, especially in a case such as this.

The language of the warrant was clear. It specifically stated what was to be searched and the items that could be seized. It contained no language authorizing the search of data on any cell phone seized from the residence, and the decision in *Riley*, clarifying that a warrant was required for such a search, had been issued four years prior. A reasonably well-trained officer, reading the search warrant, would have known that she had no authority to search the contents of Mr. Lancial's phone.

Further, the purposes of the exclusionary rule would be served by granting suppression in this case. The exclusionary rule is meant to deter Fourth Amendment violations and, therefore, "exclusion is warranted only where there is some present police misconduct, and where suppression will appreciably deter that type of misconduct in the future." *Burch*, 2021 WI 68, ¶17. The misconduct that occurred in this case is self-evident – Zassenhaus conducted an unauthorized, warrantless search of Mr. Lancial's phone. This conduct was either deliberate or reckless; it was not done in reliance on a facially valid warrant or then binding law. Zassenhaus simply exceeded the scope of authority granted to her by a court order and conducted a search she was not authorized to conduct. Suppression would significantly deter officers from engaging in such misconduct in the future; officers would have no incentive to conduct searches outside of the scope of

the warrant if the fruits of those searches will not be used in court.

Under the circumstances, suppression is the appropriate remedy for the warrantless and unconstitutional search of Mr. Lancial's phone.

CONCLUSION

For the reasons stated above, as well as in the initial brief, Mr. Lancial respectfully requests that this court reverse the judgment of conviction and sentence in this case.

Dated this 19th day of July, 2022.

Respectfully submitted,

Electronically signed by
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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 2,999 words.

Dated this 19th day of July, 2022.

Signed:
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