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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2022 AP 002051 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

JACOB R. BEYER,

Defendant-Appellant.

REPLY BRIEF OF DEFENDANT-APPELLANT

On Appeal from Orders of the Court Denying Defendant's Pretrial Motions and from the Judgment of Conviction and Sentence dated July 23, 2019, in the Circuit Court for Dane County, the Honorable William E. Hanrahan Presiding, Trial Court Case No 17-CF-2831, and from the Judgment of Conviction entered after a trial to the Court on August 30, 2022, in the Circuit Court for Dane County, the Honorable Mario D. White Presiding, Case No. 17-CF-2831

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ARGUMENT

Beyer seeks relief from this Court on three separate bases asserting (1) that the trial court erred in denying his discovery request for forensic analysis of the State's investigative computer in contravention of his right to due process; (2) that suppression was warranted in this case because the search warrant application at issue failed to establish probable cause; and (3) there was insufficient evidence from which the trier of fact could conclude Beyer was guilty beyond a reasonable doubt of the one count charged in the Information. In response, the State contends that the trial court did not err in its discovery ruling and that Beyer's constitutional arguments lack merit. The State also asserts that the warrant application supported a finding of probable cause and that Beyer's contrary protestations regarding its myriad deficiencies are unavailing. Finally, the State argues that there was sufficient evidence for the fact finder to conclude beyond a reasonable doubt that Beyer was guilty of knowingly possessing/accessing child pornography.

In reply, Beyer would submit that this Court should take a dubious view of the State's persistent, concerted effort to shield its undercover investigative software ("UIS") from any meaningful scrutiny by electing not to issue charges based on the original illicit material allegedly detected by the UIS– which in turn comprised the substantive basis for the warrant application. Beyer believes that this sort of systematic manipulation of evidence is inimical to due process and fairness insofar as the pursuit of truth is concerned. Beyer has argued that in these types of cases, the State often uses an allegation as to the existence of certain evidence to get approval for a warrant, but then refuses to use that evidence "at trial" so as to

effectively prevent an offender in Beyer's position from ever being able to ascertain whether the inceptive detection leading to his prosecution was authentic or lawful. This, Beyer submits, is a cynical circumvention of discovery rules lacking any comportment with fundamental fairness or due process which ought to be addressed and rectified in the matter at hand by way of requiring the State to demonstrate that its UIS indeed functions in the limited manner in which claims.

Insofar as his suppression motion is concerned, Beyer submits that he has challenged the trial court's decision on the whole, including its credibility determinations in light of the rest of the relevant adduced evidence. He would reiterate his belief that the scant evidence of a crime cited in the warrant application, the misleading information contained therein about the propensities of offenders and about him personally, along with the omitted information about the true recovery rate of illicit material, all amounted to a defective warrant requiring suppression.

Finally, Beyer submits that the State's interpretation of federal law is inapplicable to this case, as the standard is different to convict someone in State Court. In Wisconsin, the State must prove guilt beyond a reasonable doubt for each and every image/video charged, whereas in Federal Court the Government need not prove guilt as to each image, but only that the defendant knowingly possessed/accessed child pornography. In this case, Beyer believes that the State failed to meet its burden under Wisconsin law because it produced no evidence which confirmed that Beyer knowingly possessed/accessed the specific file of concern to the single count in the Information.

I. DUE PROCESS REQUIRES THE DISCOVERY DISCLOSURES BEYER SOUGHT AS HE HAS ESTABLISHED THEIR MATERIALITY TO A PRE-TRIAL PROCEEDING ESSENTIAL TO HIS DEFENSE.[1]

Beyer does not have much to add to the arguments set forth in his initial brief given his own acknowledgment of a dearth of immediately applicable precedent on the matter as well as the precedential inconsistencies and ambiguities referenced by the State. He firmly believes that the broad right to discovery endorsed in *State v. Maday*, 179 Wis.2d 346, 507 N.W.2d 365 (Ct. App. 1993), is most consistent with the fundamental guarantees of due process, however, and would urge this Court to apply that reasoning here to allow for discovery material to a pretrial proceeding which, for all practical intents and purposes, offers him his sole opportunity to present a defense against the charges levied against him.[2] While the State admits the Constitution mandates the disclosure of evidence that is both favorable to the accused and material to guilt or punishment and

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1 See *Lefkowitz v. Newsome*: "[m]any defendants recognize that they cannot prevail at trial unless they succeed in suppressing either evidence seized by the police or an allegedly involuntary confession." 420 U.S. 283, 292, 95 S. Ct. 886, 43 L. Ed.2d 196 (1975).

2 Beyer raises two issues on appeal of which there is substantial overlap between the two and expects that the discovery he seeks would also be consequential with respect to his motion to suppress.

includes both exculpatory and impeachment evidence (State's Br. 22), it contends that these mandates only apply to discoverable evidence which the State intends to offer at trial. Moreover, the State ignores that the information Beyer seeks would have been useful to impeach Lenzner at both the preliminary proceeding *and* at trial, and was otherwise material to preparing a defense. Beyer maintains that he should be afforded the chance to interrogate whether the State's UIS actually functioned as it claims rather than being forced to accept the *ipse dixit* testimony of its agents.

As he has been heretofore deprived of that chance, Beyer would submit that State has skirted the due process underpinnings of the rules of discovery in this case, just as it has in many other similar cases, in deftly avoiding any audit or close review of its relevant UIS systems by simply electing not to issue any charges based on the specific evidence purportedly detected by the UIS so as to ostensibly justify the issuance of a search warrant. As long as the eventuating search turns up other prosecutable evidence for use at trial, the State can wholly avoid scrutiny of the process that begat the search. As Beyer noted in his initial brief, the State is presently permitted to represent that a single file of illicit material was detected through some inscrutable process in order to obtain a warrant, but never required to effectively demonstrate that said detection ever actually occurred despite apparently having the technological wherewithal to do so. This seems at odds with the discussion in *Maday* and *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed. 2d 481 (1985), as well as any reasonable notion of fundamental fairness.

The State's implicit position on its strategic maneuvering in UIS-initiated investigations and the virtual impunity that selective charging affords it essentially boils down to "the ends not only justify, but also prove, the means," which would seem to be an untenable rationale in any analogous investigative context and otherwise antithetical to any reasonable notion of fair play and due process. The fact that a search ultimately yields contraband does not inherently validate that search from a constitutional standpoint and the fact of the yield itself should not operate to shield the warrant-application process from scrutiny that could ensure that constitutional protections have not been compromised.[3] For those reasons, as well as those set forth in his initial brief, Beyer submits that he should have been allowed to conduct an analysis to ascertain whether the warrant authorizing the search which led to his criminal prosecution was premised on authentic, verifiable information especially since the State has offered no evidence of the scientific reliability of the UIS.

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[3] Defendants are entitled to seek records concerning the reliability of contraband sniffing dogs to ensure the dog is properly trained making it reliable. See *State v. Miller*, 2002 WI App 150, 12, 256 Wis. 2d 80, 89, 647 N.W.2d 348, 352; *Illinois v. Caballes*, 543 U.S. 405, 125 S. Ct. 834, 160 L. Ed. 2d 842 (2005). Scientific methods not recognized as acceptable in the scientific discipline as accurate do not enjoy the presumption of accuracy. *State v. Busch*, 217 Wis. 2d 429, 444, 576 N.W.2d 904, 910 (1998). Nowhere is there any research on the reliability of the State's UIS, and the State has not provided any proof thereof either.

II. THE ERRONEOUS INFORMATION AND MATERIAL OMISSIONS IN THE SEARCH WARRANT APPLICATION SHOULD PRECLUDE A FINDING THAT THE WARRANT WAS SUPPORTED BY PROBABLE CAUSE.

The State argues that the search warrant adequately stated probable cause through reasonable inference from the totality of circumstances by simply alleging that Agent Lenzner found child pornography in a publicly shared file named "Sarah Footjob" at an IP address assigned to Beyer and coupling that allegation with "information about the peer-to-peer network and law enforcement's experience therewith." (State's Br. 32). It goes on to emphasize that the affidavit "also provides information regarding the capabilities of computers and the proclivities of those persons interested in child pornography," reciting the affidavit portions indicating that "data related to the possession of a file can be recovered for an extended period of time" and that "individuals who have an interest in child pornography...tend to retain any images or videos they obtain that depict such activity." (State's Br. 32-33).

The State eventually concludes that what really "matters is law enforcement's direct detection of child pornography...on a device tied to Beyer," and asserts that the information in the warrant affidavit regarding a computer's ability to retain a file even after a user deletes it "alone supports probable cause to believe that evidence of a crime would be found at Beyer's residence." (State's Br. 33-34).

The problem with the State's argument is that the very information that it points to as support for a finding of probable cause was shown to be inaccurate and misleading by the testimony of its very own agent. The whole thrust of Beyer's case is that Agent Lenzner's testimony largely contradicted the boilerplate representations in the warrant application that viewers of child pornographers tended to be "collectors" that retained contraband data. (R.66:22-25). Agent Lenzner admitted that there were different types of offenders and that in reality, files were often not retained, essentially repudiating the dated analysis of *United States v. Seiver*, 692 F.3d 774 (7th Cir. 2012). (R.66:23-24). He implied that the timing between the detection and search was a better indicator as to whether a given file might be recovered than any theoretical propensity to hoard given the different behavior patterns of offenders and in spite of plainly conflicting representations in the warrant. (R.66:23). Moreover, Agent Lenzner also conceded that he had no reason to believe Beyer himself was a collector at the time of application. (R.66:26-27). The trial court, after hearing this testimony, stated that the boilerplate application "seems to be coming up short in terms of the veracity of the affidavit." (R.66:71).

Given that pronouncement, Beyer is challenging the trial court's credibility determination as to Agent Lenzner as part and parcel of his larger claim that suppression was warranted here under *Franks*/*Mann*. (See State's Br. 37). It is logically inconsistent to find a witness credible after being presented with numerous instances wherein the witness has presented inaccurate or misleading information. Beyer is ultimately arguing that, once you remove the false or misleading information about both collectors and Beyer from the affidavit

and incorporate the omitted information about the recoverability rate of illicit material detected by UIS, you are left with little else to base a finding of probable cause upon other than an attestation that a single specific file was detected by UIS from an agent who has been shown to have provided inaccurate information elsewhere in the affidavit. If the Agent could not be relied upon to provide accurate information in other sections of the affidavit, why should his representations pertaining to a purported detection of contraband—the most crucial piece of information contained in the affidavit— be given the benefit of the doubt?[4]

Beyer submits that the trial court's finding that there was "no misconduct" was clearly erroneous given the testimony of Agent Lenzner on record. On balance he believes that the inaccuracies and omissions that he has highlighted—the misrepresentations about the expected tendencies of offenders, the misrepresentation that there was reason to believe that Beyer fell into a certain category offender, and the failure to include

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[4] Again, Beyer would submit that the unreliable information in the affidavit also militates strongly in favor of permitting the discovery he has sought in this case. The fact that the single UIS-detected file was never recovered, and that the individual who vouches for that detection has proven to be incredible on several key points, would seem to bolster Beyer's contention that due process demands more exacting scrutiny of the UIS system at issue. Whether or not an inceptive detection can be authenticated without reliance on a unreliable source seems highly material to whether justice is effectively administrated in this case. Beyer wonders why this type of scientific device is not subject to the same scrutiny under *Daubert* as other scientific evidence. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

critical information about the preeminence of temporal considerations in determining the likelihood of recovering detected contraband—warranted suppression under *Franks*/*Mann*. Accordingly, he asks this Court to find that the trial court erred in denying his motion to suppress.[5]

III. THERE WAS INSUFFICIENT EVIDENCE FROM WHICH THE TRIAL COURT COULD FIND BEYOND A REASONABLE DOUBT THAT BEYER KNOWINGLY POSSESSED OR ACCESSED THE SPECIFIC FILE OF CONCERN IN THE INFORMATION.

The State makes a number of inaccurate conclusions in arguing there was sufficient evidence to prove Beyer knowingly accessed child pornography and uses federal case law to support its position. (State's Br.41). However, federal law is different than Wisconsin law with respect to child pornography convictions. In Wisconsin, knowing possession or access of each and every image/video charged must be proven beyond a reasonable doubt. In the federal system, each and every image/video possessed or accessed need not be proven beyond a reasonable doubt.[6]

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[5] Beyer would reiterate that the good faith exception should be deemed inapplicable here given the nature of the misrepresentations at issue.

[6] See elements in Federal Pattern Jury Instruction 18 U.S.C. § 2252A(a)(5)(B) Possession of or Access with Intent to View Child Pornography in Interstate Commerce:

There is no doubt that Beyer possessed/accessed child pornography as he admitted so to the arresting officer, but he also said that he often received things he was not expecting. In addition, not all of the images/videos he received were child pornography. Moreover, no text based search terms he allegedly used on the peer-to-peer network were introduced into evidence even though the State argues that is how Beyer was able to receive child pornography on that network.(State's Br. 33). Given that, along with the fact that there was no proof Beyer ever saw the image/video as alleged in count one of the Information, it is difficult to comprehend how he could have

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1. The defendant knowingly [possessed; accessed with intent to view] [the material identified in the indictment]; and

2. [The material identified in the indictment] contained child pornography; and

3. The defendant knew both that the material depicted one or more minors and that the minor[s] were engaged in sexually explicit conduct; and

4. [The material identified in the indictment] has been [mailed; shipped or transported using a means or facility of interstate or foreign commerce; shipped or transported in or affecting interstate or foreign commerce by any means, including by computer; produced using materials that have been mailed, or using materials that have been shipped or transported in or affecting interstate or foreign commerce by any means, including by computer].

knowingly accessed it.

The State argues that he must have knowingly accessed it because he admitted he did so with other child pornography images/videos.[7] This is a clear propensity argument which § 904.04(2), Wis. Stats strictly prohibits. *See State v. Sullivan,* 216 Wis. 2d 768, 576 N.W. 2d 30 (1998). It is also the only way the trial court could have found "circumstantial evidence" that Beyer knowingly accessed the image/video as was charged in Count 1 of the Information. Without the propensity argument, the trial court was left with nothing which proved beyond a reasonable doubt that Beyer knowingly viewed/accessed the image/video depicted in Count 1. This Court should so find and reverse that finding of guilt as to that count.

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[7] The State also argues that Agent Sadoff observed hundreds of other images and video files which contained "suspected" child pornography. (States Br. 43). What "suspected" means is unclear–it either is or is not child pornography–but this is also a propensity argument and the State never develops which permissible exception under 904.04(2) applies.

CONCLUSION

For all of the reasons above, as well as all of those set forth in his initial brief, Beyer respectfully asks this Court to find that the decision to deny his request for forensic analysis of the computer which purportedly detected a single, non-recoverable file of alleged pornography so as to justify issuance of a search warrant was constitutionally infirm and otherwise denied him due process. Further, he asks this Court to find that the search warrant application in this case failed to establish probable cause and therefore any evidence seized through the execution of the defective warrant should be suppressed. Finally, he asks this Court to find there was insufficient evidence from which the trial court could find him guilty regarding Count 1 of the information.

Dated this 26th day of May, 2023.

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CERTIFICATION OF BRIEF

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 2,973 words.

Dated this 26th day of May, 2023.

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CERTIFICATION OF E-FILE/SERVICE

I hereby certify that in compliance with §801.18(6), I electronically filed this document with the Clerk of Court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 26th day of May, 2023.

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