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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
Appeal No. 2022AP002060-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOHN J. DRACHENBERG,

Defendant-Appellant.

On Appeal from the Judgment of Conviction Entered in the
Circuit Court for Wood County, the Honorable Todd P. Wolf,
Presiding

BRIEF OF
DEFENDANT-APPELLANT

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ISSUE PRESENTED

If the search of a computer, pursuant to a search warrant issued under Wis. Stat. § 968.12, is not completed within five days after the date of issuance pursuant to Wis. Stat. § 968.15(1), is the search warrant void under Wis. Stat. § 968.15(2)?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested. However, publication may be warranted, as no published Wisconsin case has expressly defined the term “executed” as it is used in 968.15.

STATEMENT OF THE CASE AND FACTS

Criminal Complaint

A criminal complaint was filed on April 20, 2021 charging John Drachenberg with seven counts of child exploitation, three counts of possession of child pornography, misdemeanor possession of THC, and possession of drug paraphernalia. (2; App. 101-06) The complaint alleged that on January 25, 2021, the National Center of Missing and Exploited Children (NCMEC) received a tip from the video chat website Omegle.com that a user was broadcasting suspected child pornography to another user. (2:6; App. 106). The IP address was tied to a home where Drachenberg lived. (2:6; App. 106). Pursuant to a search warrant, officers searched the home and a surrounding shed which belonged to Drachenberg. Officers seized several items from the shed, including a desktop computer, smoking devices with burnt marijuana residue, and THC belonging to Drachenberg. (2:6; App. 106; 23; App. 107-124).

The complaint further alleged that upon searching the desktop computer, officers found approximately 272 image files and five video files that were believed to depict child pornography. (2:6; App. 106). Officers also found numerous recordings of video chats that Drachenberg had with other users on Omegle.com between May 2020 and November 2020, in which Drachenberg encouraged prepubescent males to expose their genitals or commit other sexual acts. (2:6; App. 106). The complaint further alleged that three prepubescent males did expose their genitals at Drachenberg's request, which were saved onto the desktop computer. (2:6; App. 106).

Suppression Motions, Hearing, and Circuit Court Ruling

Drachenberg moved to suppress all evidence. (16). Among other arguments,¹ Drachenberg argued that the search of the computer beyond the five-day deadline violates Wis. Stat. § 968.15 and any evidence obtained after that point must be suppressed. (16:12-13).

A hearing on the suppression motion was held on October 25, 2021. (19). At the hearing, Detective Jason Parks testified to the following: a video chat website named Omegle.com had identified a user on their platform who, during a video chat, streamed a video depicting a young girl engaged in sexual activity. (19:7-8). Omegle reported that they captured four still shots of this video, the IP address of the user, and the model of the webcam that was used to broadcast the video. (19:9-10). Omegle forwarded that information to NCMEC on November 5, 2020. (19:10). NCMEC forwarded the cyber tip to the Wisconsin Department of Justice (DOJ) on

¹ Specifically, Drachenberg also argued that: (1) any probable cause was stale by the time the warrant was executed, (2) the warrant did not describe evidence to be seized consistent with the Fourth Amendment particularity requirement, (3) the entry into the home violated the knock and announce requirement, and (4) the search warrant affidavit did not comply with the oath or affirmation requirement. (16). Drachenberg does not pursue these arguments on appeal.

November 24, 2020. (19:31). The DOJ then investigated who the IP address belonged to and determined that it was connected to a home address of 405 North Cherry Avenue in Marshfield, Wisconsin. (19:11). On January 25, 2021, this information was passed on to Detective Jason Parks from the DOJ and he was assigned to the investigation. (19:7).

Detective Parks testified that he applied to Wood County Circuit Court Judge Nicholas Brazeau for a search warrant, which was issued on January 29, 2021. (19:21; App. 127). Specifically, the search warrant included authorization for officers to:

- search the premises and property at 405 North Cherry Avenue in Marshfield, including any storage buildings or outbuildings on the property (23:1; App. 107);
- seize any digital devices found and remove them from the location so they may be searched and analyzed at a later date (23:1; App. 107);
- Obtain copies of the contents of the hard drive(s) and contents of any internal or external storage media (23:11; App. 117).

On February 1, 2021, officers searched the home and outbuildings of the property and removed numerous computers and cell phones from the residence and outbuildings. (19:21-22, 28-29; App. 127-28, 134-35; 2:6; App. 106). Some of those digital devices belonged to the other residents as well as Drachenberg's girlfriend. (19:28-29; App. 134-35).

On the property was a shed that family members said belonged to Drachenberg. (2:6; App. 106; 19:80). Officers seized several items from the shed, including a desktop computer, smoking devices with burnt marijuana residue, and THC. (2:6; App. 106; 19:80). Before the officers removed the

desktop computer from the shed, they found two programs on it that are common for people who do illegal activity online, but Detective Parks did not testify that any actual images of child pornography were found on the computer before they removed it from the property. (2:6; App. 106; 19:25; App. 131). Detective Parks completed a return of officer document on February 1, 2021, which included an inventory sheet of the items he collected from the home. (19:21; App. 127).

On February 1, 2021, Detective Parks began reviewing the digital devices off the premises. (19:26; App. 132). Since some of those devices belonged to the other residents, Detective Parks went through those first so he could clear them of contraband and return them. (19:28-29; App. 134-35). Starting on February 1, 2021, Detective Parks began the process of making a mirror image of Drachenberg's desktop computer, which involved compressing the files and copying them. (19:28, 48; App. 134, 140). He did not know the exact date that he started actually looking at the images from Drachenberg's desktop computer, but he testified that it would have occurred after February 1, 2021 but before March 29, 2021 and it took several weeks. (19:47-49; App. 139-41). When he did look at the images, he found numerous video files that appeared to be child pornography. (19:29; App. 135).

Following the hearing, both parties filed briefs. (27; 28). In an oral ruling on March 21, 2022, the court denied Drachenberg's suppression motion on all bases. (31; App. 143; 47; App. 144-170). The court stated that the search warrant was executed within the timeframe required by statute, as the return on warrant was dated February 1, 2021. (47:11; App. 144).

Following the court's denial of his suppression motion, Drachenberg pled no contest to one count of possession of child pornography contrary to Wis. Stat. § 948.12(1m). (40). Dismissed and read in were seven counts of sexual exploitation of a child – filming, one count of possession of child

pornography, one count of possession of THC, and one count of possession of drug paraphernalia. (40). The court sentenced Drachenberg to thirteen years imprisonment, comprised of three years extended supervision and ten years initial confinement (40). This appeal follows.

ARGUMENT

The search of Drachenberg’s computer files was in violation of Wis. Stat. § 968.15 because it was conducted more than five days after the search warrant was issued. As such, the warrant was void at the time of the search and all evidence from the computer must be suppressed.

Wis. Stat. § 968.15 states that “a search warrant must be executed and returned not more than five days after the date of issuance” and that “any search warrant not executed within the [five-day time period] shall be void and shall be returned to the judge issuing it.”

The search warrant in the instant case was issued on January 29, 2021. (23; App. 107-124). The warrant contained language authorizing officers to remove any digital devices from Drachenberg’s home so that those devices may be “searched and analyzed at a later date.” (23:1; App. 107). On February 1, 2021, police seized numerous computers and cell phones from the home, including Drachenberg’s desktop computer. Detective Parks completed a report on February 1, 2021 which listed the items that were seized from the home. (19:28; App. 134).

Starting on February 1, 2021, Detective Parks began the process of making a mirror image of Drachenberg’s desktop computer, which involved compressing the files and copying them. (19:28, 48; App. 134, 140). Detective Parks did not know the exact date that he started actually looking at the images, but he testified that it would have occurred after February 1, 2021

but before March 29, 2021, and that it went on for several weeks (19:47-49; App. 139-41). Detective Parks completed another report on March 29, 2021, in which he reported his findings from the search of Drachenberg's computer files. As detailed in that report, Detective Parks found numerous files on Drachenberg's computer depicting child pornography, as well as video files of children doing sexually explicit activities. (19:29; App. 135; 24).

Statutory interpretation is a question of law subject to de novo review. *State v. Peters*, 2003 WI 88, ¶ 13, 263 Wis. 2d 475, 665 N.W.2d 171. Statutory interpretation begins with the plain language of the statute. *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 663, 681 N.W.2d 110. Statutory language is given its common, ordinary and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning. *Bruno v. Milwaukee County*, 2003 WI 28, ¶¶ 8, 20, 260 Wis. 2d 633, 660 N.W.2d 656. *Kalal*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633.

Starting with the plain language of the statute, the term “execute” is not defined in the Wisconsin statutes. As such, we must apply its common, ordinary and accepted meaning. The verb “to execute” is defined in Merriam-Webster's Dictionary as “to carry out fully: put completely into effect.” Merriam-Webster's Dictionary, available at <https://www.merriam-webster.com/dictionary/execute> (last accessed 2/2/23). It is defined in Black's Law Dictionary as “to perform or complete.” *Execute*, *Black's Law Dictionary* (10th ed. 2014). Therefore, to “execute” a warrant is to complete the orders for search and seizure that are contained within it. Police have “executed” a search warrant when they have fully carried out all the commands and directives in the warrant.

In the instant case, searching and analyzing the computer files at a separate location was explicitly within the

scope of the search warrant. Specifically, the search warrant directed officers to “seize any digital devices found and remove those from the location so that those devices may be searched and analyzed at a later date.” (23:1; App. 107). Detective Parks searched the computer files for images of child pornography after February 1 but before March 29. (19:47-49; App. 139-41). Thus, he was executing the search warrant (ie: carrying its directives out) during a span of time lasting several weeks, and he had fully carried it out (ie: executed the search warrant) by March 29. Because the execution of the warrant went beyond the five-day time limit in violation of Wis. Stat. § 968.15(1), the warrant was void and any evidence found in the computer files must be suppressed.

To be clear, Drachenberg is not arguing that the search of his computer violated the Fourth Amendment. The Fourth Amendment does not contain specific requirements about when a search or seizure must occur or the duration of the search. Rather, the Fourth Amendment analysis is guided by the reasonableness of the delay in executing the warrant, and courts have consistently found that some delay in the execution of search warrants involving computers is reasonable under the Fourth Amendment. *State v. Plencner*, 2020 WI App 76, 394 Wis. 2d 839, 953 N.W.2d 99 (unpublished).² (App. 171-187). Drachenberg is arguing that the search violated the time limitations in Wis. Stat. § 968.15, which in turn rendered the warrant void under Wisconsin statutory law.

For their persuasive value, Drachenberg directs this Court to two federal cases that consider a warrant “executed” when the government *completes* its review of the electronic evidence, as well as an unpublished Wisconsin case that cites

² *Plencner* meets the criteria for unpublished persuasive authority under Wis. Stat. § 809.23(3)(b), as it is an authored opinion by a single judge under s. 752.31(2)(e), and it was issued after July 1, 2009. A copy of *Plencner*. is included in the appendix.

one of the federal cases and quotes language that supports this definition of execute.

In *United States v. Jarman*, 847 F.3d 259 (5th Cir. 2017), the issue was whether the government violated the Fourth Amendment by taking twenty-three months to finish searching the data from a computer it seized. The Fifth Circuit noted that in the context of a reasonableness analysis under the Fourth Amendment, “[c]ourts have ... consistently permitted some *delay in the execution of search warrants* involving computers because of the complexity of the search...” 847 F.3d 259, 266 (internal citations omitted) (emphasis added). Regarding this delay, the Fifth Circuit noted that a delay of several months or even years “between the seizure of electronic evidence and the *completion of the government’s review* of [it] ... is reasonable under the Fourth Amendment.” *Id.* at 267 (emphasis added). Thus, the Fifth Circuit considers the “execution” of the search warrant to include the time period from the seizure of a computer to the completion of its review.

Notably, the Wisconsin Court of Appeals, District II, has quoted this language from *Jarman* that classifies the delay between the seizure of the computer and the government’s review of it as a delay in the “execution” of the search warrant. *State v. Plencner*, 2020 WI App 76, ¶ 19, 394 Wis. 2d 839, 953 N.W.2d 99 (unpublished). (App. 171-187).

Additionally, the district court in *United States v. Metter*, 860 F.Supp. 2d 205, 215 (E.D.N.Y. 2012) also considers a warrant executed when the government completes its review of electronic evidence that it has seized. In *Metter*, the search warrant authorized officers to search, copy, image and seize a computer, and to conduct an off-site search of the image or hardware. 860 F. Supp. 2d at 208-09. Pursuant to the search warrant, the government seized computer hard drives, created images of the hard drives, and promptly returned the computer hardware to its owners. *Id.* at 210. However, the

government delayed searching the imaged evidence at the off-site location by fifteen months. *Id.* at 211. Metter sought suppression of the evidence on the basis that the government's delay in conducting the off-site search of the imaged hard drives was unreasonable and violated the Fourth Amendment. *Id.* The court held that the fifteen-month delay between when officers seized and imaged the computer and when they searched the imaged evidence was unreasonable and in violation of the Fourth Amendment. *Id.* at 212.

Notably, in its analysis the court stated, "...the Fourth Amendment requires the government to *complete its review, i.e., execute the warrant*, within a 'reasonable' period of time") (emphasis added). *Id.* at 215. The court thus considered a warrant executed when the government completes its review of electronic evidence that it seized.

The fact that the warrant on its face contains language authorizing officers to search Drachenberg's computer at a "later date" does not cure the defect; if the "later date" implies a time period of more than five days, then that directive is itself in violation of Wis. Stat. § 968.15 and the warrant cannot override a statutory rule.

An order denying a motion to suppress evidence may be reviewed on appeal notwithstanding a no contest of guilty plea. Wis. Stat. § 971.31(10). When a defendant enters a plea following the circuit court's denial of a suppression motion, and a reviewing court determines that the circuit court erred, the defendant should be allowed to withdraw his plea unless the state can prove that there was no reasonable probability that the court's error contributed to the plea. *State v. Semrau*, 2000 WI App 54, ¶ 36, 233 Wis. 2d 508, 608 N.W.2d 376. Here, the state cannot meet this test because granting suppression of the desktop computer files would have eliminated the state's evidence against Drachenberg to which he pled, and all of his dismissed and read in crimes except for two misdemeanors.

The remedy for a violation of the five-day execution period in Wis. Stat. § 968.15 could not be more clear. The legislature has declared that a warrant that is not executed within that time frame “shall be void.” When the directives of the search warrant cannot be fully carried out within five-day statutory time limit, the solution is simple: the officers can get a new warrant. Because the officers did not do so here and searched the computer files beyond the five-day timeline, that evidence must be suppressed.

CONCLUSION

WHEREFORE, for the reasons stated above, Drachenberg respectfully asks this Court to remand with directions to grant suppression of evidence found on Drachenberg’s desktop computer and to allow Drachenberg to withdraw his plea.

Dated this 9th day of February, 2023.

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CERTIFICATION AS TO FORM AND LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b), (bm) and (c) for a brief

in proportional serif font. The length of the brief is 2,825 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 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 s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules 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 or 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.

Dated this 9th day of February, 2023.

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APPENDIX

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