COURT OF APPEALS
DECISION
DATED AND FILED

August 14, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1506-CR **Cir. Ct. No. 2009CF154**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THEODORE DENORMANDIE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: BARBARA A. KLUKA and JASON A. ROSSELL, Judges. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 PER CURIAM. Theodore DeNormandie appeals from a judgment convicting him of possession of child pornography on his no contest plea[1] and from an order denying his postconviction motion seeking sentence modification.[2] On appeal, DeNormandie argues that the search warrant was not supported by probable cause, and his sentence should have been modified because the circuit court relied upon inaccurate information at sentencing. We disagree and affirm.

¶2 DeNormandie moved to suppress evidence relating to the child pornography found on his computer because the search warrant did not establish probable cause and it was premised on stale information. In executing the search warrant, law enforcement recovered two computer CPUs with hard drives, another five computer hard drives, various homemade compact disks, and various documents.

¶3 The February 2009 affidavit in support of the search warrant sought all types of computer equipment and computer-related evidence depicting possible exploitation of children. The affidavit related the experience of Special Agent Matthews, who has training and many years of experience investigating computer crimes and conducting forensic examinations of computers and computer media. The affidavit alleged:

> Based upon his training and experience Agent Matthews knows that persons who have sexual desires for children frequently possess, trade, and collect sexually explicit images and movies of children. Agent Matthews is also aware from training and experience that persons who possess and collect child pornography are unlikely to ever voluntarily dispose of those images, as the images represent

[1] The judgment was entered by Judge Barbara Kluka.

[2] The order was entered by Judge Jason Rossell.

> a great value in the minds of these individuals. Agent Matthews has recovered contraband images from numerous computers that were many years old.

¶4 Through his investigation, Matthews determined in September 2008 that a computer at an IP address later determined to be associated with the home of DeNormandie's companion had accessed a website frequently used to exchange child pornography. The affidavit further alleged that this computer offered to participate in the distribution of child pornography and contained a list of child pornography files available for sharing. Therefore, the computer possessed, contributed or offered to contribute to the distribution of child pornography.

¶5 In late January and early February 2009, law enforcement connected DeNormandie's companion, with whom he lived, to the suspect IP address and suspect residence. Law enforcement also confirmed that the electric company account for the residence was also in the companion's name.

¶6 The affidavit alleged that "due to unavoidable investigative delays," Matthews often obtained warrants for computer equipment based on evidence gathered several months earlier. "In almost every instance Agent Matthews has found that evidence related to the crime of possession of child pornography observed on computer equipment at a given location remained within the computer equipment regardless of its later location, or the subsequent availability of internet access."

¶7 In support of his motion to suppress evidence located during the search, DeNormandie argued that the affidavit in support of the search warrant did not establish probable cause because it contained the unsupported generalization "that persons who possess and collect [child pornography] are unlikely to ever dispose of those images." DeNormandie also argued that while the computer

allegedly contained child pornography, "there was no showing when said files were downloaded, if they still remained in the computer, or whether they were ever opened." Finally, DeNormandie alleged that the information in the February 2009 affidavit was gathered in September 2008, five months before, rendering the allegations stale and the affidavit insufficient to establish probable cause.

¶8 In denying DeNormandie's motion to suppress, the circuit court applied ***State v. Gralinski***, 2007 WI App 233, 306 Wis. 2d 101, 743 N.W.2d 448, and concluded that the affidavit established probable cause. The court did not find the five-month gap between the collection of the forensic evidence and the execution of the warrant to be an undue passage of time. The affidavit permitted "an honest belief in a reasonable mind that the objects sought are linked with the commission of a crime and that the objects sought will be found in the place to be searched." The court further concluded that the affidavit was not based on stale information.

¶9 On appeal, DeNormandie argues that the circuit court should have granted his motion to suppress. When we review a circuit court's ruling on a motion to suppress, we will affirm findings of fact and inferences from those facts unless they are clearly erroneous. ***Id.***, ¶13. The circuit court's application of constitutional principles to the facts presents a question of law that we review independently. ***Id.***

¶10 A search warrant only issues upon probable cause. ***Id.***, ¶14. Probable cause exists if the magistrate is "apprised of sufficient facts to excite an honest belief in a reasonable mind that the objects sought are linked with the commission of a crime, and that the objects sought will be found in the place to be

searched." ***Id.*** (citation omitted). A defendant challenging a search warrant bears the burden of showing insufficient probable cause. ***Id.***

¶11 Probable cause is determined on a case-by-case basis considering the totality of the circumstances and applying a common-sense test. ***Id.*** ¶15. The warrant-issuing court may consider "both the experience and special knowledge of police officers who are applying for search warrants." ***Id.***, ¶16 (citation omitted). Law enforcement officers may rely upon "the usual inferences that reasonable individuals may draw from evidence." ***Id.***, ¶15 (citation omitted).

¶12 The ***Gralinski*** search warrant affidavit was similar to the affidavit in this case. Gralinski's credit card was used in March 2003 to purchase a membership to a website that offered child pornography websites. ***Id.***, ¶5. Investigators verified the content of the websites. ***Id.*** The September 2005 affidavit alleged Gralinski's connection to the website and further alleged that based on the special agent's training and experience, "individuals who are involved with child pornography are unlikely to ever voluntarily dispose of the images they possess, as those images are viewed as prized and valuable materials." ***Id.***, ¶8.

¶13 We held in ***Gralinski*** that the affidavit stated probable cause. ***Id.***, ¶25. Gralinski's "use of a credit card … to purchase a membership to websites containing child pornography, together with [Gralinski's] customer records … result in the inference that there was a fair probability that Gralinski had, in fact, received or downloaded images." ***Id.***, ¶24. The alleged computer habits of individuals who access child pornography strengthened this inference. ***Id.***

¶14 In DeNormandie's case, the affidavit specifically connected the targeted computer to DeNormandie's residence and a child pornography website.

The affidavit further alleged that this computer offered to participate in the distribution of child pornography and contained a list of child pornography files available for sharing. Considering the totality of the circumstances, this evidence, in combination with the experience and training of the involved law enforcement officers, permitted a probable cause finding.

¶15 DeNormandie complains that the affidavit was based on stale, five-month-old information. Whether probable cause is stale is not determined merely by counting the months "between the occurrence of the facts relied upon and the issuance of the warrant." ***Id.***, ¶27 (citation omitted). We review "the underlying circumstances, whether the activity is of a protracted or continuous nature, the nature of the criminal activity under investigation, and the nature of what is being sought." ***Id.***, ¶28 (citation omitted). The tendencies of computer users to retain child pornography images are relevant to this inquiry. ***Id.***, ¶30.

> Because possession of child pornography on one's computer differs from possession of other contraband in the sense that the images remain even after they have been deleted, and, given the proclivity of pedophiles to retain this kind of information, as set forth in the affidavit supporting the request for the search warrant, there was a fair probability that Gralinski's computer had these images on it at the time the search warrant was issued and executed.

Id., ¶31. In ***Gralinski***, the court held that the affidavit was not stale even though it was offered two and one-half years after Gralinski was first identified through the use of his credit card on a website.

¶16 In DeNormandie's case, only five months passed from the time DeNormandie's computer was identified to the warrant application. The internet account through which the computer was found was still open five months after it was first discovered. ***Gralinski*** clearly states that possessing child pornography

permits an inference that such images will be kept. ***Id.***, ¶31. The affidavit need not have conclusively demonstrated actual possession of child pornography. ***Id.***, ¶32. The affidavit permitted a reasonable inference that the computer was used to download and retain illegal images and the illegal images would be found on the computer five months later.

¶17 We conclude that DeNormandie did not meet his burden to show that the facts in the affidavit were insufficient to support probable cause. The issuing magistrate had a basis to conclude that probable cause existed. Therefore, the circuit court properly denied DeNormandie's motion to suppress.

¶18 DeNormandie argues that the circuit court should have modified his sentence because the court relied on inaccurate information at sentencing. Specifically, DeNormandie alleged that the circuit court believed that he purchased child pornography when he only downloaded images without purchasing them.

¶19 At sentencing, the prosecutor highlighted that DeNormandie had downloaded child pornography and that the children featured in such depictions have been horribly victimized. The prosecutor argued that "[b]y downloading this disgusting child pornography he's keeping all of the other [purveyors] in business, and he is insuring that these children are revictimized every time these videos are downloaded." The prosecutor noted that the videos, whose titles indicated that children were depicted, were shared via downloads.

¶20 Among other sentencing remarks, defense counsel argued that while DeNormandie used a website to share child pornography, "[h]e wasn't paying or collecting or fueling the economy or that underground economy and business and that demand for child pornography."

¶21 In its sentencing remarks, the court found that DeNormandie minimized his conduct and did not completely accept responsibility for his conduct. The court remarked upon the victims of child pornography.

> But, the victims are all of the children, not just the ones involved in the child pornography that you possessed, but all children who are used[,] abused, degraded, humiliated, deprived of their innocence for the rest of their lives.… It is—it is depravity by those who engage in the production of this type of material that is almost beyond description to think that one would do this to a child.
>
> *And so, certainly those individuals continue to be victimized because people purchase the product; that is what you did in this case.* You did not share it apparently. There's no evidence of that or attempt to make any profit off of it yourself.

(Emphasis added.) The court sentenced DeNormandie to three years of initial confinement and five years of extended supervision.

¶22 Postconviction, DeNormandie sought resentencing because the circuit court inaccurately relied upon an assertion that DeNormandie purchased child pornography. The postconviction court, the successor to the sentencing court, reviewed the sentencing transcript and determined that the court did not clearly rely upon this assertion at sentencing. The postconviction court declined to resentence DeNormandie.

¶23 A defendant has a "due process right to be sentenced upon accurate information." ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. When a defendant seeks resentencing, the defendant must establish that the circuit court actually relied upon inaccurate information. ***Id.***, ¶31. A defendant must establish this claim by clear and convincing evidence. ***State v. Harris***, 2010 WI 79, ¶34, 326 Wis. 2d 685, 786 N.W.2d 409. DeNormandie had to establish that it is "'highly probable or reasonably certain'" that the circuit court relied on

inaccurate information at sentencing. *See* ***id.***, ¶35 (citation omitted). We independently review a defendant's due process challenge to the sentence. ***Tiepelman***, 291 Wis. 2d 179, ¶9.

¶24 We are in the same position as the postconviction court: we must determine the sentencing court's views based on the sentencing transcript. The focus at sentencing was DeNormandie's downloading of child pornography; the circuit court mentioned this conduct in its remarks. Placed in context, the sentencing court's remark, "[a]nd so, certainly those individuals continue to be victimized because people purchase the product; that is what you did in this case," most likely refers to DeNormandie's victimization of children not to purchasing child pornography. DeNormandie did not establish that it is "highly probable or reasonably certain" that the circuit court relied on inaccurate information at sentencing. ***Harris***, 326 Wis. 2d 685, ¶35. The circuit court properly denied DeNormandie's sentence modification motion.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.