COURT OF APPEALS
DECISION
DATED AND FILED

April 28, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1039-CR **Cir. Ct. No. 2007CF790**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTHONY B. CARDIEL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sheboygan County: JAMES J. BOLGERT, Judge. *Affirmed.*

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

¶1 PER CURIAM. Anthony B. Cardiel appeals from the judgment of conviction entered against him for one count of possession of child pornography. Cardiel argues that the warrant issued for a search of his home was invalid because there was insufficient information to support probable cause and because the

warrant failed to state with sufficient particularity the items to be seized. We conclude that the search warrant was constitutionally valid, and we affirm.

¶2 This case began when Cardiel's son told his probation agent that he had seen child pornography on his father's computer.[1] Based on this information, the police applied for a search warrant to search Cardiel's home. The affidavit in support of the warrant explained that Cardiel's son had seen child pornography on his father's computer. The affidavit then asked for a warrant to search Cardiel's home:

> [B]elieving that said warrant will result in the seizure of electronic storage devices which may contain evidence of the crime of possession of child pornography, contrary to section 948.12 of the Wisconsin Statutes, which evidence may be found in any computer hard drive or electronic digital storage devices, including but not limited to compact discs, memory sticks or zip drives and the contents therein, including but not limited to electronic photographs of naked or partially naked children engaging in sexually explicit conduct.

¶3 The police searched Cardiel's house and seized various items, including six VHS tapes and two mini-videotapes from a camcorder. Cardiel was charged with four counts of possession of child pornography. He moved to suppress the six VHS tapes and the mini-videotapes on the basis that the search warrant was invalid as to those items. The court denied the motion and Cardiel entered a plea of no contest to one count of possession of child pornography.

¶4 The only issue Cardiel raises in this appeal is the validity of the search warrant. Cardiel first argues that the search warrant lacked probable cause

[1] It would have assisted the court if the State had provided a separate statement of the relevant facts and procedural history of the case.

to believe that evidence of a crime would be found on the VHS and mini-videotapes. Specifically, he argues that there was no information in the affidavit that would lead a reasonable person to believe that VHS or mini-videotapes would be found in Cardiel's house, because the only information was that Cardiel's son had seen pornography on Cardiel's computer. He further argues that anyone with knowledge of computers knows that videotapes cannot be played on a computer. Cardiel suggests that if the officer had explained his training and experience in the affidavit in support of the warrant, the magistrate may have been able to make the connection between the computer and the videotapes. But without such an explanation, he concludes, there is nothing in the affidavit to connect the videotapes to the computer. We disagree.

¶5 Determining whether probable cause supports a search warrant involves making "a practical, commonsense decision whether, given all the circumstances set forth in the affidavit … there is a fair probability that contraband or evidence of a crime will be found in a particular place." ***State v. Ward***, 2000 WI 3, ¶23, 231 Wis. 2d 723, 604 N.W.2d 517 (citing ***Illinois v. Gates***, 462 U.S. 213, 238 (1983)). Our review of an affidavit's sufficiency to support the issuance of a search warrant is limited. ***State v. Ehnert***, 160 Wis. 2d 464, 468, 466 N.W.2d 237 (Ct. App. 1991). "We pay great deference to the determination made by the issuing entity. In doubtful or marginal cases, the determination should be governed by the preference to be accorded to warrants." ***Id.*** at 468-69 (citation omitted). When determining whether probable cause exists, we examine the totality of the circumstances. ***Id.*** at 469. "The probable cause standard is a practical, nontechnical one invoking the practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." ***Id.*** (citation omitted).

¶6 We agree with the circuit court that under the totality of the circumstances and applying a practical, commonsense approach, there was probable cause for the warrant. The affidavit stated that Cardiel's son had seen images of children performing sexual acts on his father's computer. It is certainly reasonable to believe that if there were such images on the computer, there might also be images on other electronic storage devices in Cardiel's home.

¶7 We are also not convinced by Cardiel's assertion that the officer should have provided a statement of his experience in the affidavit to establish probable cause. Cardiel notes that in ***State v. Schaefer***, 2003 WI App 164, ¶¶6, 7, 266 Wis. 2d 719, 668 N.W.2d 760, the officer's affidavit included a list of his qualifications and a summary of the traits exhibited by preferential child molesters. There is nothing in that case, however, to suggest that such information is a requirement for all affidavits. In fact, the supreme court has "rejected taking an overly technical and formalistic approach to the contents of an affidavit." ***Ward***, 231 Wis. 2d 723, ¶32. The statement that Cardiel's son reported seeing such images on his father's computer was sufficient.

¶8 Cardiel also argues that the warrant lacked sufficient particularity because it referred to "electronic storage devices" in the context of a computer, and videotapes are not associated with a computer. The Fourth Amendment requires that a search warrant state with particularity "the place to be searched, and the persons or things to be seized." ***State v. Noll***, 116 Wis. 2d 443, 450, 343 N.W.2d 391 (1984). The purpose of this requirement is to prevent "the government from engaging in general exploratory rummaging through a person's papers and effects in search of anything … incriminating." ***Id.*** It also prevents the issuance of warrants on less than probable cause and prevents the seizure of objects when the warrant describes different objects. ***State v. Petrone***, 161

Wis. 2d 530, 540, 468 N.W.2d 676 (1991). The warrant must enable the police to reasonably ascertain and identify the things they are authorized to seize. ***Noll***, 116 Wis. 2d at 450-51. "The use of a generic term or general description is constitutionally acceptable only when a more specific description of the items to be seized is not available." ***Id.*** at 451. A warrant, however, need only be as specific as circumstances permit. ***United States v. Jones***, 54 F.3d 1285, 1291 (7th Cir. 1995). In ***Noll***, we concluded that a warrant was not stated with sufficient particularity when "[a] more particular description of those items could have been provided." ***Noll***, 116 Wis. 2d at 451. In that case, the warrant was searching for specific stolen items, but described those items using very generic terms. ***Id.***

¶9 Cardiel argues that the warrant was not sufficiently particular because it allowed the police to search electronic storage devices other than those associated with a computer. The warrant stated that the officer believed that the search would result in the seizure of electronic storage devices capable of storing photographs or images of naked or partially naked children engaged in sexually explicit conduct. The basis for this belief was the fact that Cardiel's son saw such images on a computer. So we have already stated it is reasonable to believe that if Cardiel had such images stored on a computer, he might also have them stored on other electronic devices. Unlike in ***Noll***, in which the police were searching for specific stolen items, the officers could not have known on which specific devices the images would be stored. Any electronic storage device containing such images of children, however, was illegal. Again, applying a commonsense approach to the warrant, this was sufficiently particular. We agree with the circuit court that the search warrant was valid, and we affirm the judgment of conviction.

¶10 Our affirmance on the merits, however, does not end our discussion. Cardiel's attorney, Corey Chirafisi, certified in his brief-in-chief that he submitted

an appendix in compliance with WIS. STAT. RULE 809.19(2)(a) (2007-08).[2] The rule requires the appendix to contain "relevant trial court record entries, the findings or opinion of the trial court and limited portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues." ***Id.***

¶11 The appendix to Cardiel's brief-in-chief, however, is in flagrant violation of the requirements of that rule. The appendix contains only the search warrant, the affidavit in support of the search warrant, and the return of the search warrant. The appendix does not contain any part of the record showing the trial court's reasoning for denying Cardiel's motion to suppress—the issue he challenges in this appeal.

¶12 For the reasons we explained in ***State v. Bons***, 2007 WI App 124, ¶¶20-25, 301 Wis. 2d 227, 731 N.W.2d 367, the certification Chirafisi filed is false. Filing a false certification is a serious infraction of the rule and violates SCR 20:3:3(a) (2009). *See* ***Bons***, 301 Wis. 2d 227, ¶24. Failure to follow a rule is also grounds for the imposition of a penalty or cost. *See* WIS. STAT. RULE 809.83(2). Consequently, we sanction Chirafisi and direct him to pay $150 to the clerk of this court within thirty days of the release of this opinion. *See* ***Bons***, 301 Wis. 2d 227, ¶25.

By the Court.—Judgment affirmed.

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

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