

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 31, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2011AP1873-CR

Cir. Ct. No. 2010CF313

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROGER P. GARCIA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County:
DONALD R. ZUIDMULDER, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Roger Garcia appeals a conviction for possession of child pornography. He argues he was entitled to a *Franks/Mann* hearing regarding his claim that a search warrant omitted information that would have

defeated probable cause.¹ We conclude Garcia failed to make the substantial preliminary showing necessary to obtain such a hearing. Garcia also argues the affidavit in support of the warrant failed to set forth probable cause. We also reject this argument and affirm.

¶2 On September 14, 2006, Green Bay police officer Terry Tyler submitted an affidavit in support of a warrant to search a residence at 660 Dost Court. Tyler averred that the San Bernardino, California Sheriff's Department contacted the Green Bay Police Department concerning an ongoing nationwide internet child pornography investigation. The investigation stemmed from a mother in Yucaipa, California returning home to discover her thirteen-year-old son masturbating while an older male videotaped him. The older male ran from the residence with the video camera, but a suspect was later arrested and admitted being at the victim's home and videotaping him masturbating.

¶3 San Bernardino police recovered ninety-two email addresses from the suspect's home. After a search warrant was issued to AOL Internet service, officers learned that one of the email addresses sending and receiving suspected child pornography was "Freddy1357@aol.com." A subsequent search warrant revealed the customer name and address connected with "Freddy1357" was Roger Garcia of 660 Dost Court in Green Bay. The owner of the property at 660 Dost Court informed investigators that Garcia resided at that address and that he was employed as a computer programmer.

¹ Referring to *Franks v. Delaware*, 438 U.S. 154 (1978), and *State v. Mann*, 123 Wis. 2d 375, 367 N.W.2d 209 (1985).

¶4 Green Bay police recovered extensive evidence from Garcia's residence pursuant to a search warrant. Among the evidence was a leather briefcase containing a binder with thirty-five images of nude juvenile boys in graphic and obscene poses and nine photos of juvenile boys in underwear. The briefcase also contained six pairs of underwear of various sizes which appeared to be soiled. A full-size envelope contained cut-out photos of juvenile males.

¶5 Garcia was subsequently arrested. The circuit court denied a motion to suppress under *Franks/Mann* and also contending the warrant affidavit failed to establish probable cause to believe the items sought would in fact be found in Garcia's residence. Garcia pled no contest to possession of child pornography and the court imposed and stayed a sentence consisting of five years' initial confinement and five years' extended supervision. This appeal follows.

¶6 Garcia argues he was entitled to a *Franks/Mann* hearing regarding his claim that the search warrant omitted information that would have defeated probable cause. Specifically, he asserts it was common for AOL users to allow other persons to use their screen name and email addresses. Garcia argues "an e-mail address being linked to a physical address, without more, is not enough" and the search warrant affidavit omitted the Internet Protocol (IP) address from which the child pornography had been sent.

¶7 Garcia misunderstands the law. In *Mann*, the court held that the omission set forth by a defendant must be an "undisputed fact" and its absence from the affidavit must prevent the judge from fairly and impartially making a probable cause determination. See *State v. Mann*, 123 Wis. 2d 375, 388, 367 N.W.2d 209 (1985). To require a hearing, a defendant must show that if this undisputed, but omitted, fact had been in the affidavit, the judge could not have

found probable cause to support the warrant. *Id.* Here, the omission of an IP address in the affidavit did not defeat the judge's finding of probable cause to support the search warrant.

¶8 Garcia also contends investigatory governmental agencies are now instructing their law enforcement personnel to connect an IP address with a physical address in search warrant affidavits. In this regard, Garcia cites a United States Department of Justice manual entitled, "SEARCHING AND SEIZING COMPUTERS AND OBTAINING ELECTRONIC EVIDENCE IN CRIMINAL INVESTIGATIONS (July 2002)." However, Garcia's own citation to the manual indicates an "affidavit must show a connection between the IP address *or* the internet account at use and the physical address sought to be searched." *See* SEARCHING AND SEIZING, *supra*, at 67-69. Moreover, an updated version of the manual makes it clear that a computer's IP address is just one way to establish probable cause for a search warrant. Another way is to use online account information, as was done in this case.

¶9 Garcia insists the affidavit in support of the warrant failed to establish probable cause that the items sought to be found would actually be found in his residence. In this regard, Garcia insists it cannot reasonably be inferred that he was sending or receiving images of child pornography simply because his name and address were tied to an email address.

¶10 Garcia mistakes the probable cause standard. An affidavit does not require that every innocent explanation be excluded, or that guilt is more likely than not. *State v. Mitchell*, 167 Wis. 2d 672, 681-82, 482 N.W.2d 364 (1992). Rather, all that is required is a showing of a fair probability that evidence of a

crime will be found at a specific place. *See State v. Ward*, 2000 WI 3, ¶26, 231 Wis. 2d 723, 604 N.W.2d 517.

¶11 Contrary to Garcia’s perception, this case involved more than simply an email address linked to a physical address. Probable cause existed to believe that evidence of child pornography would be found at Garcia’s residence. The affidavit in support of the search warrant averred that officers learned one of the email addresses that sent and received suspected child pornographic images was “Freddy1357@aol.com.” AOL records revealed the customer name and address connected with that email address was Roger Garcia of 660 Dost Court in Green Bay, and a telephone number and credit card number were also attached to Garcia’s AOL account. Records obtained from the Green Bay postmaster revealed that Roger Garcia currently resided at 660 Dost Court. The property owner informed investigators that Garcia lived at that address and that he was employed as a computer programmer. This is more than enough to establish a fair probability that child pornography would be found at 660 Dost Court.

¶12 Garcia’s assertion that someone other than himself may have used his email address to send and receive child pornography does not defeat probable cause. There was no need for the affidavit to establish that no one other than Garcia had access to his email account. It was sufficient to establish an email account registered to Garcia, at his address, was used for the purpose of receiving and distributing child pornography.

By the Court.—Judgment affirmed.

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

