STATE OF MINNESOTA
IN COURT OF APPEALS
A10-2114

State of Minnesota,
Respondent,

vs.

Curtis John Voit,
Appellant.

Filed September 12, 2011
Affirmed
Ross, Judge

Benton County District Court
File No. 05-CR-09-2117

Lori Swanson, Attorney General, Kelly O'Neill Moller, Assistant Attorney General, St. Paul, Minnesota; and

Robert J. Raupp, Benton County Attorney, Foley, Minnesota (for respondent)

John D. Ellenbecker, St. Cloud, Minnesota (for appellant)

Considered and decided by Stauber, Presiding Judge; Stoneburner, Judge; and Ross, Judge.

U N P U B L I S H E D O P I N I O N

ROSS, Judge

Curtis Voit was convicted of possessing child pornography after a search of his apartment revealed hundreds of digital photographs and videos containing sexually

explicit images of nude children. In this appeal from that conviction, Voit challenges only the district court's pretrial ruling that the warrant to search his apartment was supported by probable cause. He claims that the warrant application, describing images downloadable from his computer as "depict[ing] apparent minors appearing nude" and "child pornographic in nature," provided insufficient detail for the issuing judge to independently discern whether the images constituted child pornography. Because the issuing judge had sufficient information from the application as a whole from which to surmise that the described images contained child pornography as defined by statute, the district court properly found that probable cause supported the warrant. We affirm.

FACTS

While executing a search warrant on Curtis Voit's apartment, police seized DVDs, CDs, computer hard drives, floppy disks, and a laptop computer. On at least one of the computer disks, police found hundreds of photographs and videos of nude children engaging in sexual acts. The state charged Voit with possessing child pornography under Minnesota Statutes section 617.247, subdivision 4(a) (2010). Before his trial, Voit moved the district court to suppress the digital evidence on the ground that the search warrant lacked enough detail to create probable cause to believe that he was engaging in criminal activity.

Police applied for the warrant because of suspicious files discovered during an investigation by the Minnesota Cyber Crimes Task Force. Neither the files nor a detailed description of them were attached to the warrant application. But the application did explain how they were discovered: a task force member had accessed an online publicly

available peer-to-peer file-sharing program and conducted an online search for child pornography using known child-pornography associated search terms. The employee found and downloaded twenty-six files that, according to his assessment, "appeared to be child pornographic in nature." Further investigation by the task force revealed that the files were available from Voit's computer. The application also stated that FBI agent Ryan Williams also viewed the images and confirmed that they "depict apparent minors appearing nude."

The district court denied Voit's suppression motion, concluding that the warrant application contained enough information for the issuing judge to have determined that probable cause existed to authorize the search of Voit's apartment. Voit stipulated to the prosecution's case under Minnesota Rules of Criminal Procedure 26.01, subdivision 4, so he could preserve for appeal only the pretrial suppression-motion ruling. In addition to the stipulation, five representative photographs were submitted to the reviewing district court, all of them obviously pornographic. *See* Minn. Stat. § 617.246, subd. 1(f)(2)(i) (2010) (defining "pornographic work" of minors to include images using "minor[s] to depict actual or simulated sexual conduct"). The district court found Voit guilty of possessing child pornography and sentenced him to five years of probation. Voit appeals only from the district court's pretrial order denying his motion to suppress the evidence seized by police who searched his apartment.

D E C I S I O N

The only question on appeal is whether the district court properly denied Voit's pretrial suppression motion. The answer depends on whether probable cause supports the search warrant. We hold that it does.

No search warrant may be issued except upon probable cause. Minn. Stat. § 626.08 (2010); *see* U.S. Const. amend. IV; Minn. Const. art. 1, § 10. The warrant-issuing judge must determine, based on the totality of the circumstances set forth in an affidavit, whether there is a "fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332 (1983); *State v. Harris*, 589 N.W.2d 782, 788 (Minn. 1999). The affidavit must provide enough details for the issuing judge to be able to independently discern whether probable cause exists. *State v. Souto*, 578 N.W.2d 744, 749 (Minn. 1998).

When reviewing whether a search warrant is supported by probable cause, we afford great deference to the issuing judge, *Harris*, 589 N.W.2d at 787, recognizing that he may "draw common-sense and reasonable inferences from the facts and circumstances set forth in an affidavit," *State v. Brennan*, 674 N.W.2d 200, 204 (Minn. App. 2004) (quotation omitted), *review denied* (Minn. Apr. 20, 2004). We limit our inquiry to whether, viewing the affidavit as a whole, *State v. McCloskey*, 453 N.W.2d 700, 703 (Minn. 1990), the issuing judge "had a substantial basis for concluding that probable cause existed." *Harris*, 589 N.W.2d at 788 (quotations omitted).

Voit argues that the issuing judge was not provided with a detailed enough description of the recovered internet files to independently conclude that they contained

images that constituted child pornography. He contends that the warrant was issued based only on conclusory statements that the images were "pornographic in nature" and "depict apparent minors appearing nude." And he correctly points out that images of minors appearing nude are not necessarily pornographic. *See, e.g.*, *State v. Johnson*, 775 N.W.2d 377, 382 (Minn. App. 2009) (concluding that an image of a minor female with her arms crossed below her bare breasts was not child pornography), *review denied* (Minn. Feb. 16, 2010).

Voit's argument fails because it relies exclusively on obscenity (not child pornography) cases, which hold that warrants cannot be issued based solely on conclusory statements that material is obscene. *See Marcus v. Search Warrants of Property*, 367 U.S. 717, 731–32, 81 S. Ct. 1708, 1716 (1961). For a thing to be obscene, the trier of fact must determine that it appeals to the prurient interest, "depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law," and, taken as a whole, "lacks serious literary, artistic, political, or scientific value." *Miller v. California*, 413 U.S. 15, 24, 93 S. Ct. 2607, 2614 (1973). So for a warrant-issuing judge to determine that an image is obscene, the judge must have more information than a conclusory statement merely that it is obscene. *See New York v. P.J. Video, Inc.*, 475 U.S. 868, 873–74, 106 S. Ct. 1610, 1614 (1986).

Voit reasons that a conclusory statement that an image is "pornographic" carries the same reliability problems as one that it is "obscene." But child pornography and obscenity are materially different. *See New York v. Ferber*, 458 U.S. 747, 764, 102 S. Ct. 3348, 3358 (1982) ("The test for child pornography is separate from the obscenity

standard enunciated in *Miller*."). In child pornography cases, "[a] trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole." *Id*. All that is relevant in a child-pornography inquiry is whether the image depicts material that is *defined by statute* to be child pornography. The relevant statute imposes an objective bright-line standard that the images portray minors engaging in sexual conduct. *See* Minn. Stat. § 617.246, subd. 1(f) (2010).

Giving great deference to the issuing judge and allowing him to draw common-sense inferences from the facts and circumstances in the affidavit, we conclude that a fair probability existed that evidence of child pornography, not images of children innocently appearing nude, would be found in Voit's apartment. The affidavit included a statement that an experienced internet-crimes investigator and an FBI agent considered the images to be pornographic. With this information, the issuing judge could have drawn the logical conclusion that those experts were applying the statute's objective definition of child pornography. The issuing judge may also have inferred that the nude images of children were sexual in nature from the fact that the search terms used to uncover the images were known to be associated with child pornography, not merely child nudity. Because these assumptions by the issuing judge were reasonable, his conclusion that probable cause existed was sound.

Our holding should not, of course, discourage law-enforcement professionals from taking the better approach and describing the conduct depicted in the supporting images

or attaching a representative sample of them to the warrant application. This would obviate the need for the issuing judge and reviewing courts to engage in inductive reasoning.

Affirmed.