COURT OF APPEALS DECISION DATED AND FILED

August 07, 2007

David R. Schanker
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. 2006AP1139-CR

Cir. Ct. No. 2005CF3970

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALEX B. PARK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Reversed and cause remanded with directions*.

Before Wedemeyer, P.J., Curley and Kessler, JJ.

¶1 PER CURIAM. Alex B. Park appeals from an order denying his motion to suppress evidence obtained under a search warrant executed on June 22, 2005, and from his subsequent judgment of conviction. Because we determine

that the affidavit supporting the application for the search warrant may contain statements that were knowingly false or made with reckless disregard for the truth, and that without such statements the remaining content of the warrant affidavit is insufficient to constitute probable cause, we remand for a hearing pursuant to ***Franks v. Delaware***, 438 U.S. 154 (1978).

BACKGROUND

¶2 The genesis of this case lies in a federal investigation of Internet child pornography by the Bureau of Immigration and Customs Enforcement (ICE) entitled "Operation Falcon," which commenced in February 2003. During Operation Falcon, the ICE determined that a member-only website operated by Regpay, www.darkfeeling.com, contained images of what ICE agents believed were pictures of real children engaging in pornographic and sexually explicit behavior with other children and with adults. ICE agents further determined that Regpay directed payment for membership into this website to an account in Florida, and in or about June 2003, ICE agents seized the customer database from the Florida account. Upon review of the database in October 2003, ICE agents determined that Park had purchased a membership to www.darkfeeling.com and that Park's purchasing information, as listed in the database, identified Park as "Alex Park," with an e-mail address, a credit card number, and listed Park's address as 11405 West Oklahoma Avenue, West Allis, Wisconsin.

¶3 Two years later, in June 2005, Wisconsin Department of Justice Senior Special Agent Eric J. Szatkowski filed a complaint and supporting affidavit for a search warrant of Park's home and computer. No reason is given in the complaint or the supporting affidavit for the two-year delay. The affidavit first discusses Szatkowski's qualifications and training. The affidavit next discusses

the ICE Operation Falcon investigation and then contains a section entitled "Background on the Use of Computers for Child Exploitation," which discusses the traits, or profile, of a collector of child pornography. Beginning at paragraph twenty of the affidavit is a section entitled "Summary of Facts Establishing Probable Cause," which specifically discusses Operation Falcon's uncovering of the Regpay company, noting that: Regpay was discovered in February of 2003; it is located in Minsk, Belarus; its customer list was maintained in a Florida account, and the list was obtained by agents of Operation Falcon in June of 2003; that in July and August 2003, agents, acting undercover, purchased memberships to the various Regpay websites and confirmed that these fee-based websites advertised, and did contain, child pornography; and that agents first reviewed in October 2003 the customer lists they obtained in June 2003.

¶4 Park's name first appears at paragraph 24, which reads as follows:

> 24. In or about early October 2003, federal agents reviewed Regpay's customer databases, and discovered that Alex Park was one of Regpay's paying customers. The purchasing information contained on Regpay's customer database for Park includes the following:

Customer Name	**Customer Address**	**Website**	**Purchase Date**
Alex Park, aka Apark477@yahoo.com	11405 West Oklahoma Avenue, West Allis, WI	www.darkfeeling.com	May 14, 2003

¶5 In the following paragraphs of his affidavit, Szatkowski sets forth how Operation Falcon obtained Park's name;[1] his review of the materials sent to him by Operation Falcon regarding darkfeeling.com, the website to which Park purchased a membership;[2] and his own investigation of Park.[3]

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[1]

> 25. During July and August 2003, ICE agents from the ICE Cyber Crimes Center in Virginia, with extensive background in child pornography investigations, visited the above-listed website, to which Park had purchased memberships.

[2]

> 27. On June 16, 2005, [Szatkowski] reviewed ICE reports about the contents of the child pornography website that Park purchased a membership to, and confirmed that the description of images described child pornography as legally defined in the state of Wisconsin.
>
> ….
>
> **Description of Website Purchased by Park**
>
> 29. According to the Regpay records, Park used credit card number [] to purchase a membership to www.darkfeeling.com on or about May 14, 2003.
>
> ….
>
> **E-Mail Address Utilized by Park Associated with Website Membership**
>
> 31. On June 17, 2005, [Szatkowski] reviewed records previously obtained by ICE with a summons issued to Internet service provider (ISP) Yahoo, Inc., Sunnyvale, CA, for e-mail address apark477@yahoo.com. That was the same e-mail address provided by Park to Regpay when he purchased a membership into the child pornography website www.darkfeeling.com. According to Yahoo, the e-mail account is active, and was registered in 2001 by a person identifying himself as Mr. Alex B. Park, 11405 W. Oklahoma Avenue, West Allis, WI 53227.

¶6 Szatkowski also provides two examples of where a search warrant based on stale information has resulted in the discovery of pornography at the subject residences. The first example was of a search warrant based upon an informant's four-year-old information that led to discovery of child pornography on an individual's computer and further led to charges for sexual assault of a child. Szatkowski's second example included the following representation:

> Your affiant has found that the time lapse between the obtaining of child pornography by the suspect and execution of warrants did not result in a lack of evidence, or destruction of all evidence due to the passage of time…. For example, in a Falcon search warrant executed in Waukesha in February of 2005, the suspect, Richard Nelson, admitted to your affiant that about two years ago, he used his credit card to pay a company to access child pornography websites. Nelson essentially stated that he also read various news accounts afterwards about that same company getting busted. Despite that knowledge, Nelson did nothing in response to get rid of the images of child pornography he possessed, and continued to obtain more images.

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[3] **Verification of Park's Residence**

> 32. On June 17, 2005[, Szatkowski] received information from Wisconsin Energies Corporation that Alex Park is an active utilities customer at 11405 W. Oklahoma Avenue, West Allis, WI, and has been so since 2002.
>
> 33. On June 17, 2005, [Szatkowski] reviewed records provided by the Wisconsin Department of Transportation (DOT), which indicated that Park is Alex B. Park, DOB 01/25/1969, of 11405 W. Oklahoma Avenue, West Allis, WI, 53227.
>
> 34. On June 17, 2005, [Szatkowski] reviewed records provided by the U.S. Postal Inspector's Office, which indicated that Alex Park is currently receiving mail at 11405 West Oklahoma Avenue, West Allis, WI, 53227.

¶7 In the final paragraph of the affidavit, entitled "Conclusion," Szatkowski provided the following:

> 35. Based on his training and experience, and the totality of this investigation, [Szatkowski] believes that evidence of child pornography is likely to be at Park's residence, 11405 [W.] Oklahoma Avenue, West Allis, WI. [Szatkowski] believes Park has demonstrated an interest in those materials by meticulously providing detailed personal information, including his name, address, e-mail address, and credit card number to a website trafficking in child pornography. [Szatkowski], therefore, also believes that Park's interest in child pornography has not diminished since his documented online activities with Regpay in 2003, and he is likely to have obtained many additional images of child pornography since he purchased a membership into www.darkfeeling.com.

As can be seen from above, the paragraphs in the affidavit relating specifically to Park discussed Szatkowski's June 16 and 17, 2005 investigation of Park, which consisted of a review of: (1) the pictures from the darkfeeling.com website obtained in 2003, which were provided by ICE; (2) the credit card information ICE obtained from Regpay, again from 2003; (3) the e-mail address information ICE obtained from Yahoo.com in 2003; and (4) Szatkowski's 2005 requests to the Wisconsin DOT, Wisconsin Energies, and the United States Postal Inspector for verification of Park's address.

¶8 Szatkowski swore his affidavit on June 17, 2005, and the search warrant was issued and executed on June 22, 2005. Pursuant to the warrant, Park's home computer was seized and analyzed by a DOJ computer forensic analyst. Approximately forty images of "what appeared to be child pornography" were discovered on Park's computer. On July 13, 2005, Park was charged with

six counts of possessing child pornography, in violation of WIS. STAT. § 948.12 (2005-06).[4] Park pled not guilty and waived a preliminary hearing.

¶9 On October 11, 2005, Park filed a motion to suppress the evidence seized from his home computer. On November 15, 2005, Park filed a second motion to suppress alleging a ***Franks*** violation. In support of his motion to suppress, Park made an offer of proof which included Szatkowski's own interview notes, which stated the following:

> NELSON then said that he had accessed images of children … but that he had deleted the images he thought were illegal right after opening them…. NELSON stated further that he even recently downloaded images he thought were illegal but then deleted them.
>
> NELSON stated he knew specifically that the websites he purchased into under REG PAY were illegal and that he was surprised it took so long for law enforcement to … contact … him.
>
> NELSON stated that the computer seized from his living room area was his personal computer and that he was the original owner and sole user as he lived alone. NELSON stated he purchased the computer new from a local Apple computer store approximately one year ago.

After briefing to the court, the trial court denied Park's motions without a hearing.

¶10 On April 4, 2006, pursuant to a plea negotiation, Park pled guilty to three of the original six counts of possession of child pornography and was sentenced to concurrent fifteen-month sentences of probation. Park's sentence has

[4] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

been stayed pending the outcome of this appeal. Park appeals the denial of his two motions to suppress.[5]

STANDARD OF REVIEW

¶11 "We give great deference to the magistrate's determination that probable cause supports issuing a search warrant." ***State v. Schaefer***, 2003 WI App 164, ¶4, 266 Wis. 2d 719, 668 N.W.2d 760. "We will uphold the determination of probable cause if there is a substantial basis for the warrant-issuing magistrate's decision." ***Id.*** "This deferential standard of review 'further[s] the Fourth Amendment's strong preference for searches conducted pursuant to a warrant.'" ***Id.*** (citation omitted; alteration in original). Our review is limited to the record that was before the warrant-issuing magistrate. ***Id.***, ¶6.

DISCUSSION

¶12 Park argues that Szatkowski's affidavit in support of issuance of the search warrant of Park's residence contained knowingly false or misleading statements without which no probable cause existed for the issuance of the search

[5] Park's brief to this court contained no references to the record in his statement of facts, although in his argument he did reference the three documents in his appendix. Counsel is directed to WIS. STAT. RULE 809.19(1)(d)-(e) and ***Grothe v. Valley Coatings, Inc.***, 2000 WI App 240, ¶6, 239 Wis. 2d 406, 620 N.W.2d 463. RULE 809.19(1)(e) specifically requires parties' briefs contain "citations to the … parts of the record relied on…." Further, "[w]e have held that where a party fails to comply with the rule, 'this court will refuse to consider such an argument ….'" ***Grothe***, 239 Wis. 2d 406, ¶6 (citation omitted). In the past, we have declined to address such unsupported arguments. ***Id.***; *see also* WIS. STAT. RULE 809.83(2) ("NONCOMPLIANCE WITH RULES. Failure of a person to comply with a … requirement of these rules … is grounds for dismissal of the appeal, summary reversal, striking of a paper, imposition of a penalty or costs on a party or counsel, or other action as the court considers appropriate."). While we have chosen to consider Park's arguments in this instance, we remind counsel that "'it is not the duty of this court to sift and glean the record in *extenso* to find facts which will support'" a party's position or argument. ***Grothe***, 239 Wis. 2d 406, ¶6 (citation omitted).

warrant; therefore, Park is entitled to a ***Franks*** hearing. The State argues first that Szatkowski's statements were accurate and not false or misleading. The State argues alternatively that even if the statements were false or misleading, the affidavit contained sufficient evidence without those statements for the court commissioner to find probable cause. Finally, the State argues that should this court determine that the statements were false and that the remaining information in the affidavit was insufficient to establish probable cause, this court should determine that the good faith exception to the exclusionary rules applies to this warrant and, therefore, all evidence seized in the execution of the warrant remains admissible against Park.

I. ***Franks*** *hearing*

¶13 In ***Franks v. Delaware***, the United States Supreme Court considered the issue of whether "a defendant in a criminal proceeding ever [has] the right, under the Fourth and Fourteenth Amendments, subsequent to the ex parte issuance of a search warrant, to challenge the truthfulness of factual statements made in an affidavit supporting the warrant." ***Franks***, 438 U.S. at 155. The Court held that:

> where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request.

Id. at 155-56; *see also* ***State v. Mitchell***, 144 Wis. 2d 596, 604-05, 424 N.W.2d 698 (1988).

¶14 The ***Franks*** Court also "specified the requirements for a [defendant's] post-search challenge to the veracity of statements underlying a

search warrant." ***Mitchell***, 144 Wis. 2d at 605. "First, the defendant's challenge must be 'more than conclusory and must be supported by more than a mere desire to cross-examine.'" ***Id.*** (citation omitted). Second, to make a substantial preliminary showing, "the defendant must allege deliberate falsehood or reckless disregard for the truth, and the allegations must be accompanied by an offer of proof." ***Id.***; *see also* ***State v. Anderson***, 138 Wis. 2d 451, 462, 406 N.W.2d 398 (1987). In order to achieve a substantial preliminary showing, the defendant's allegations "must point out specifically" that part of the affidavit that he or she claims is false, ***Mitchell***, 144 Wis. 2d at 605, "'and they should be accompanied by a statement of supporting reasons,'" ***Anderson***, 138 Wis. 2d at 462 (citation omitted). Next, if the court concludes that the defendant has met both of these requirements, *i.e.*, has made the preliminary showing,

> then the defendant is entitled to a hearing at which the defendant must then prove, by a preponderance of the evidence, that the challenged statement is false, that it was made intentionally or with reckless disregard for the truth, and that absent the challenged statement the affidavit does not provide probable cause."

Anderson, 138 Wis. 2d at 462. However, the defendant is not automatically entitled to a ***Franks*** hearing even if he or she makes a substantial preliminary showing. ***Mitchell***, 144 Wis. 2d at 605. Rather, once a substantial preliminary showing has been made, "the court should excise the alleged false statements" and only if the warrant affidavit is insufficient to support probable cause without the false statements is the defendant entitled to a hearing. *See* ***id.*** (if affidavit is sufficient to support probable cause without false statements, defendant not entitled to a hearing). Finally, if all of the above requirements are met, "the [F]ourth [A]mendment requires that the search warrant be voided and the evidence

discovered pursuant to the warrant be suppressed." ***Anderson***, 138 Wis. 2d at 462-63.

¶15 Park argues that because of Szatkowski's personal involvement in the Nelson case, about which he is making the false representations in his affidavit here, his false and misleading representations must have been made knowingly or in reckless disregard for the truth. As required under ***Franks***, Park provides an offer of proof by comparing Szatkowski's averments in his affidavit to his interview notes in the Nelson case. In his affidavit, Szatkowski first stated:

> Your affiant has found that the time lapse between the obtaining of child pornography by the suspect and execution of warrants did not result in a lack of evidence, or destruction of all evidence due to the passage of time…. For example, in a Falcon search warrant executed in Waukesha in February of 2005, the suspect, Richard Nelson, admitted to your affiant that about two years ago, he used his credit card to pay a company to access child pornography websites. Nelson essentially stated that he also read various news accounts afterwards about that same company getting busted. Despite that knowledge, Nelson did nothing in response to get rid of the images of child pornography he possessed, and continued to obtain more images.

¶16 Szatkowski's own interview notes state the following: "NELSON then said that he had accessed images of children … but that he had deleted the images he thought were illegal right after opening them…. NELSON stated further that he even recently downloaded images he thought were illegal but then deleted them." "NELSON stated he knew specifically that the websites he purchased into under REG PAY were illegal and that he was surprised it took so long for law enforcement to … contact … him." Szatkowski's notes also include the following: "NELSON stated that the computer seized from his living room area was his personal computer and that he was the original owner and sole user as

he lived alone. NELSON stated he purchased the computer new from a local Apple computer store approximately one year ago."

¶17 Based on the above, Park points out that contrary to doing nothing, Szatkowski's interview notes reflect that Nelson told Szatkowski that though he had purchased access to Regpay websites and knew that these websites were being investigated as long ago as two years earlier, Nelson believed he had deleted illegal images from his computer. While Nelson later admits that he did not realize what exactly was illegal, and while his attempts to delete the images he believed to be illegal may have been unsuccessful, the picture painted by Szatkowski in his affidavit was somewhat different, *i.e.*, that Nelson not only did not attempt to delete the illegal images that he knew were the subject of a law enforcement investigation, but rather chose to keep and view the illegal images. Based upon Park's claims of false or misleading statements by Szatkowski, and Park's offer of proof, we determine that he has met the first two requirements for obtaining a ***Franks*** hearing.

II. Probable Cause

¶18 We must next determine whether the information remaining in an affidavit, after the excising of the allegedly false or misleading statements, constitutes insufficient probable cause for the warrant's issuance such that Park is entitled to a ***Franks*** hearing. *See* ***Mitchell***, 144 Wis. 2d at 605. The determination of probable cause for a search warrant must be made on a case-by-case basis, applying the "totality-of-the-circumstances" test adopted by the United States Supreme Court in ***Illinois v. Gates***, 462 U.S. 213, 230-31 (1983). ***Schaefer***, 266 Wis. 2d 719, ¶17 (citation omitted). In ***Gates***, the Court ruled that "[t]he task of the issuing magistrate is simply to make a practical, common-sense decision

whether, given all the circumstances set forth in the affidavit ... a fair probability [exists] that contraband or evidence of a crime will be found in a particular place." ***Id.***, 462 U.S. at 238.

¶19 The Wisconsin Supreme Court has determined that "[p]robable cause exists when a 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.*'" ***State v. Edwards***, 98 Wis. 2d 367, 373, 297 N.W.2d 12 (1980) (quoting ***State v. Starke***, 81 Wis. 2d 399, 408, 260 N.W.2d 739 (1978)) (emphasis added). Probable cause is "more than a possibility, but not a probability, that the conclusion is more likely than not." ***State v. Tompkins***, 144 Wis. 2d 116, 125, 423 N.W.2d 823 (1988). However, "'[p]robable cause to believe that a person has committed a crime does not *automatically* give the police probable cause to search his house for evidence of that crime.'" ***State v. Higginbotham***, 162 Wis. 2d 978, 995, 471 N.W.2d 24 (1991) (citing ***United States v. Freeman***, 685 F.2d 942, 949 (5th Cir. 1982)) (emphasis added).

¶20 The "quantum of evidence necessary to support a determination of probable cause for a search warrant is less than that required for conviction or for bindover following a preliminary examination…. The affidavit is to be read in a commonsense, not a hypertechnical, fashion." ***Ritacca v. Kenosha County Court***, 91 Wis. 2d 72, 77-78, 280 N.W.2d 751 (1979). "Elaborate specificity is not required, and the officers are entitled to the support of the usual inferences which reasonable people draw from facts." ***State v. Marten***, 165 Wis. 2d 70, 75, 477 N.W.2d 304 (Ct. App. 1991). Issuing courts may draw inferences from all the facts presented, including facts of innocent actions. ***Schaefer***, 266 Wis. 2d 719, ¶17.

¶21 The issuing court, when applying the ***Gates*** totality-of-the-circumstances test, must consider “all the circumstances set forth in the affidavit before [it], including the ‘veracity’ and ‘basis of knowledge’ of persons supplying hearsay information….” ***Schaefer***, 266 Wis. 2d 719, ¶4 (quoting ***Gates***, 462 U.S. at 238). If a warrant affidavit contains nothing more than the legal conclusions of the affiant, it is insufficient to establish probable cause. ***Id.***, ¶5; *see also* ***State v. Kerr***, 181 Wis. 2d 372, 378, 511 N.W.2d 586 (1994) (probable cause cannot be upheld if “affidavit provides nothing more than the legal conclusions of the affiant”) (citing ***Higginbotham***, 162 Wis. 2d at 992).

¶22 When challenging a search warrant, the burden is on the defendant to prove insufficient probable cause. ***Schaefer***, 266 Wis. 2d 719, ¶5. Our review is limited to the record that was before the warrant-issuing court, ***id.***, ¶6, and, accordingly, we restrict our review to the affidavit and search warrant submitted by Szatkowski.

¶23 Park argues that the affidavit contains information that is both stale and which is not particularized to him, and, therefore, it cannot support a finding of probable cause. In determining whether probable cause remains in the face of old information, a warrant-issuing court may look to several factors, including: “the nature of 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 the evidence sought.” ***State v. Stank***, 2005 WI App 236, ¶33, 288 Wis. 2d 414, 708 N.W.2d 43 (citing ***State v. Multaler***, 2002 WI 35, ¶37, 252 Wis. 2d 54, 643 N.W.2d 437). The court may also “consider the experience and special knowledge of the police officers applying for a warrant among other relevant factors.” ***Id.*** (citing ***Multaler***, 252 Wis. 2d 54, ¶43).

¶24 In reviewing the affidavit without the allegedly false or misleading statements, an issuing court is left with the following. Operation Falcon was a federal investigation of child pornography websites and other Internet activity. In February 2003, Operation Falcon discovered Regpay websites which were owned in Minsk, Belarus, and which contained pornography depicting real children in lewd poses or performing sex acts with adults or other children. In June 2003, Operation Falcon seized the customer records of Regpay customers through its credit card account provider in Florida. In July and August 2003, undercover agents purchased memberships to Regpay websites, and using those memberships, were able to access and download images of child pornography. In October 2003, ICE agents reviewed the customer list and found that Park (with identifying name, address, credit card number and e-mail address) had purchased a membership to one of Regpay's websites in May 2003, two to three months prior to the agents' accessing of the websites.

¶25 In addition to this Operation Falcon information, the affidavit includes Szatkowski's training and experience, Szatkowski's review of the ICE information and the e-mail, utility, DOT and postal service information which he independently gathered, a general profile of a collector of child pornography, and an example of where a search warrant based upon an informant's four-year-old information led to discovery of child pornography on an individual's computer and further led to charges for sexual assault of a child.

¶26 What is not in the affidavit, however, is more telling, especially when taken in the context of the entire federal investigation and Szatkowski's training and experience as outlined in his affidavit. In his affidavit, Szatkowski *does not* describe what investigation was conducted to determine what type of membership Park purchased in May 2003, *does not* state that Park in fact

downloaded anything, legal or otherwise, from the darkfeeling.com website, *does not* state whether the advertising of the website as containing child pornography was available before purchasing a membership to the website (thereby allowing the inference that Park knew the website contained illegal content), and *does not* provide any information, other than the stricken statements regarding the Nelson case, that Park either still owned the same computer from which he could have accessed the darkfeeling.com website twenty-five months earlier, or that regardless of the computer that he currently possessed, illegal child pornography would still be on Park's current computer. Additionally, the other example Szatkowski provided to support his statement that Park's computer would contain illegal images is a case which included an informant who personally saw the information on the alleged offender's computer approximately four years earlier, and in which the alleged offender had previously been involved in child pornography and child molestation. Szatkowski presents nothing from the ICE or his own investigation that an informant provided information that Park had illegal images on his computer at any time or that Park had ever been accused of any inappropriate sexual conduct with children. While Szatkowski details the profile of a collector of child pornography, he sets forth in his affidavit no facts as to how Park fits this profile, beyond the stricken example.

¶27 Viewing the above in light of the five ***Multaler*** factors, *see* ***Stank***, 288 Wis. 2d 414, ¶33, the affidavit clearly sets forth "the nature of the criminal activity under investigation" (investigation of Internet websites containing child pornography and those individuals who access and download images from them)

and "the nature of the evidence sought."[6] The affidavit also provides the background of Operation Falcon and Szatkowski's training and experience. However, when the "stale" information is viewed in the light of the underlying circumstances, including "whether the activity is of a protracted or continuous nature," the affidavit provides little help for a warrant-issuing court to infer that the evidence sought will be present at the location specified on the warrant. Without evidence showing that Park actually accessed, downloaded, or otherwise possessed illegal images from the darkfeeling.com website, or any specific facts showing how Park matched the profile of a collector of child pornography, an issuing court may not reach the inference that twenty-five months after Park purchased a membership to the darkfeeling.com website, his current computer would contain illegal images, and therefore may not find that there is sufficient probable cause for the issuance of a warrant.

¶28 For the reasons described above, we determine that Park is entitled to a ***Franks*** hearing for a determination of whether the statements by Szatkowski in his affidavit regarding Nelson (the Waukesha case arising out of a similar investigation) were made knowingly false, with reckless disregard for their accuracy, or for the purpose of misleading the court in order to obtain the search warrant.

[6] The first page and a half of the affidavit details what the affiant believes will be found at Park's residence, including: computers and computer peripherals; cameras; films and videocassettes; address books, names and lists of minors who may have been sexually assaulted; diaries, calendars, and other records showing that the individual in question had computer access on the dates and times identified in the affidavit; credit card records; and occupancy or ownership records, all of which would prove that illegal child pornography had been viewed or obtained at this address. Why Szatkowski believes Park will have any such items beyond computer-related equipment is not explained.

III. Good Faith Exception to exclusionary rule

¶29 The State finally argues that even if the court finds that no probable cause existed for the issuance of the search warrant, the good faith exception to the exclusionary rule should apply. Park argues that the State has failed to meet the two requirements for application of the good faith exception.

¶30 The good faith exception is a doctrine that applies to police officers who execute a search warrant in the mistaken belief that it is valid, *see* ***United States v. Leon***, 468 U.S. 897, 918-20 (1984), or who take some other action based on facts the officers believe to be true, although time later proved the belief to be incorrect, *see, e.g.*, ***State v. Collins***, 122 Wis. 2d 320, 325-27, 363 N.W.2d 229 (Ct. App. 1984). In ***State v. Eason***, 2001 WI 98, 245 Wis. 2d 206, 629 N.W.2d 625, the Wisconsin Supreme Court adopted the good faith exception to the exclusionary ruling, holding that "where police officers act in objectively reasonable reliance upon the warrant, which had been issued by a detached and neutral magistrate, a good faith exception to the exclusionary rule applies." ***Id.***, ¶74. This good faith exception is narrower than the good faith exception that exists under the Fourth Amendment, and the ***Eason*** court noted that article I, section 11 of the Wisconsin Constitution guarantees more protection than the Fourth Amendment under which the good faith exception was adopted by the United States Supreme Court in ***Leon***. ***Eason***, 245 Wis. 2d 206, ¶¶60, 63.

¶31 The ***Leon*** court identified four situations in which this good faith exception to the exclusionary rule should not be recognized:

> Suppression … remains an appropriate remedy [1] *if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth*[;] … [2] where the issuing magistrate

> wholly abandoned his judicial role[;] … [3] [where the] warrant [is] based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable"[;] … [and] [4] depending on the circumstances of the particular case, [where] a warrant may be so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid.

Id., 468 U.S. at 923 (citations omitted; emphasis added). Additionally, in Wisconsin, in order for the good faith exception to apply, "the State must show that the process used attendant to obtaining the search warrant included a significant investigation and a review by a police officer trained in, or very knowledgeable of, the legal vagaries of probable cause and reasonable suspicion, or a knowledgeable government attorney." ***Eason***, 245 Wis. 2d 206, ¶63 (footnote omitted).

¶32 The State argues that both of these requirements have been met. Taking the second requirement first, the State argues that this review was done by a highly trained and competent officer, *i.e.*, by Szatkowski. The court in ***Eason*** specifically noted in its decision that this review requirement is not met either by the official issuing the warrant, *see* ***id.***, ¶63 n.29, nor by the affiant, *see* ***id.***, ¶63. Rather, the court, citing a Yale Law Journal article, noted that the affidavit must be reviewed by a knowledgeable police officer or government attorney who is *not* the affiant. *See* ***id.***, ¶63 ("'[w]ell-trained officers would not seek a warrant without … internal screening by a *police superior* or a government lawyer'") (quoting Donald Dripps, *Living With* Leon, 95 YALE L.J. 906, 932 (1986) (footnote omitted; emphasis added)).

¶33 In ***State v. Marquardt***, 2005 WI 157, 286 Wis. 2d 204, 705 N.W.2d 878, the supreme court again addressed the good faith exception standards it set forth in ***Eason***. ***Marquardt***, 286 Wis. 2d 204, ¶26. In ***Marquardt***, the court found

that because the affidavit was prepared by “an experienced district attorney” in consultation with the police officers who were investigating the crime, there was the review required by their decision in ***Eason***. ***Marquardt***, 286 Wis. 2d 204, ¶46. The court concluded that this met the requirement “‘review by … a knowledgeable government attorney.’” ***Id.*** (citation omitted). In the present case, however, there is no evidence in the record that anyone reviewed Szatkowski’s affidavit prior to it being presented to the warrant-issuing court. Rather, the State argues that Szatkowski’s review of Operation Falcon’s investigation satisfies this ***Eason*** requirement. The record does not support the State’s claim that Szatkowski reviewed a significant investigation by ICE of *Park*’s activities, the individual against whom the warrant is directed. The affidavit provides no direct evidence that Operation Falcon had information that Park accessed or downloaded any images from the website, but only that Park’s credit card information, home address and e-mail address were used to purchase an unspecified membership to a website that contained, and advertised that it contained, child pornography. The affidavit contains no information that Szatkowski himself either conducted a significant separate investigation or that he reviewed, with a knowledgeable and critical eye, the investigation materials that specifically related to Park’s actions. Rather, Szatkowski’s review appears to have been limited to determining whether the images which the ICE agents obtained from the Regpay websites constituted child pornography under Wisconsin law, and a review of the e-mail address and credit card information obtained by the ICE in 2003.

¶34 Operation Falcon has been an on-going federal investigation conducted for the purpose of locating websites that contain child pornography and prosecuting the owners and users of these sites. Szatkowski, as a senior special agent of the Wisconsin Department of Justice, as well as a member of the

Wisconsin Internet Crimes Against Children Task Force, also may be knowledgeable about Internet crimes against children. However, his affidavit stated only that in 2005 he reviewed the 2003 information provided to him by the ICE relating to Operation Falcon and its specific information relating to Park. This information, as set forth in the affidavit, contained no direct evidence that Park ever accessed the darkfeeling.com website, only that he purchased an unspecified membership two to three months prior to ICE agents purchasing a membership on the website. As we explained above, that does not establish probable cause to believe that these child pornography images would still be on his computer twenty-five months later.

¶35 Accordingly, should the testimony and evidence presented at the ***Franks*** hearing result in a finding of no probable cause, the trial court's evaluation of whether the good faith exception applies should be done not with respect to Szatkowski's beliefs, but only with respect to anyone who, independent of Szatkowski, executed what they reasonably believed to be a valid warrant.

By the Court.—Judgment and order reversed and cause remanded with directions.

Not recommended for publication in the official reports.