IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

In the Matter of:

SW2017-011592

JAMES D. HAMBERLIN, D.D.S., *Plaintiff/Appellee*,

v.

STATE OF ARIZONA, by and through the ARIZONA GAME AND FISH DEPARTMENT, *Defendant/Appellant*.

No. 1 CA-CV 18-0435
FILED 4-28-2020

Appeal from the Superior Court in Maricopa County
No. SW2017-011592
The Honorable Sam J. Myers, Judge

AFFIRMED

COUNSEL

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OPINION

Judge Kent E. Cattani delivered the opinion of the Court, in which Presiding Judge Maria Elena Cruz and Judge David D. Weinzweig joined.

C A T T A N I, Judge:

¶1 This opinion addresses the superior court's authority to impose injunctive relief after determining that a search warrant issued during a criminal investigation lacked probable cause.

¶2 As part of an investigation into alleged wildlife misdemeanor offenses, the Arizona Game and Fish Department executed a search warrant on James Hamberlin's residence, seizing thousands of dollars' worth of equipment and electronic devices. Hamberlin filed a motion to controvert the warrant under A.R.S. § 13-3922(A), which provides for the return of property seized without probable cause. The State returned the seized items to Hamberlin but kept digital copies of data from the electronic devices. After conducting a hearing, the superior court found that the warrant was not supported by probable cause and ordered the State to turn over the digital copies it had made of data from the devices.

¶3 We affirm. As detailed below, the warrant affidavit failed to establish the probable cause necessary to support the search warrant. Moreover, although the remedy expressly authorized by the controversion statute extends only to restoration of property seized, the superior court properly exercised its injunctive power to order the State to turn over digital copies of data derived from the electronic devices.

FACTS AND PROCEDURAL BACKGROUND

¶4 In September 2017, Game and Fish received a report that Shane Koury was using a paraplane (a motorized parachute device) in the Superstition Mountains to locate bighorn sheep for a big game hunt in violation of Game and Fish regulations. The reporting party suggested that Koury had been hired to serve as a hunting guide for Shane Rhoton, who had purchased a bighorn sheep license tag at auction.

¶5 Witnesses told Game and Fish Officer Kriselle Colvin that the paraplane had been carrying a pilot and a passenger with a large camera equipped with a telephoto lens. Based on that information, Officer Colvin suspected that Hamberlin, a well-known wildlife photographer, and Tim Downs, a licensed guide previously hired by Koury, were involved. Officer Colvin then discovered Hamberlin had posted several photographs of bighorn sheep on social media during the period the paraplane had been seen over the Superstitions.

¶6 Using this information, Officer Colvin obtained search warrants to review Koury's, Hamberlin's, and Downs's phone records, but those records did not reflect any contacts between Hamberlin and Koury or Rhoton. Officer Colvin later determined that Koury had not been hired by Rhoton and could not have been in the paraplane.

¶7 In late October 2017, Rhoton shot and killed a bighorn sheep in the Superstitions known as "Elvis." The day after Elvis was killed, Officer Colvin saw Hamberlin flying over the Superstitions in a paraplane similar to the one described in the original report. Officer Colvin spoke with Hamberlin after he landed, and Hamberlin stated that he had "thousands" of photographs of Elvis, including photos taken during the hunt in which the sheep was killed.

¶8 On this basis, Officer Colvin suspected that Hamberlin had assisted a big game tag holder by using an aircraft to locate wildlife immediately before or during an open big game hunt, and had harassed wildlife with an aircraft, both in violation of Game and Fish regulations. Officer Colvin then sought a warrant to search Hamberlin's home, based on an affidavit that included the information contained in the previous warrant affidavits but that failed to acknowledge that much of the original information, particularly information implicating Koury, was incorrect.

¶9 After a magistrate issued the warrant, eight Game and Fish agents seized over $70,000 worth of equipment and electronics, including Hamberlin's paraplane, camcorders, cameras, computers, cell phones, and external hard drives. The State then made digital copies of the data on the devices, intending to subject it to forensic analysis.

¶10 Five months later and before the State filed misdemeanor criminal charges against him, Hamberlin filed a motion to controvert the grounds for the search warrant and secure the return of his seized property. *See* A.R.S. § 13-3922(A). In response, the State asserted that the warrant was based on probable cause, but noted that it had returned the seized items,

while keeping the digital copies of data from Hamberlin's electronic devices. After a hearing to address Hamberlin's assertion that the State was not entitled to keep the digital copies, the court determined that the warrant was not supported by probable cause and ordered the State to turn over the digital copies to Hamberlin.

¶11 The State timely appealed, and we have jurisdiction under A.R.S. § 12-2101(A)(1). *See Greehling v. State*, 135 Ariz. 498, 500 (1982).

DISCUSSION

¶12 Arizona's controversion statute allows an individual whose property has been seized pursuant to a search warrant to challenge the grounds for the warrant and seek the return of the property:

> If an owner of seized property controverts the grounds on which the warrant was issued, the magistrate shall proceed to take testimony relative thereto unless a [forfeiture proceeding] is or has been initiated relating to the same property interest. . . . If it appears . . . that probable cause does not exist for believing the items are subject to seizure, the magistrate shall cause the property to be restored to the person from whom it was taken if the property is not such that any interest in it is subject to forfeiture or its possession would constitute a criminal offense.

A.R.S. § 13-3922(A).

¶13 Here, the State challenges the superior court's controversion ruling in two respects. First, the State contends that the court erred by determining that the warrant was not based on probable cause. Second, the State asserts that the remedy the superior court crafted—requiring it to turn over digital copies of data extracted from the seized property—exceeded the court's authority under A.R.S. § 13-3922. Both contentions are unavailing.

I. Probable Cause.

¶14 An affidavit seeking authorization for a search must show probable cause by setting forth circumstances demonstrating "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 (1983); *State v. Buccini*, 167 Ariz. 550, 556 (1991). On review of a challenge to the existence of probable cause supporting issuance of the warrant, we defer to the superior

court's factual findings made after an evidentiary hearing, *cf. State v. Goudeau*, 239 Ariz. 421, 439, ¶ 26 (2016) (as amended), but consider de novo the mixed question of law and fact of whether the facts presented established probable cause. *Buccini*, 167 Ariz. at 555; *see also State v. Sisco*, 239 Ariz. 532, 535, ¶ 7 (2016).

¶15 Here, the warrant affidavit alleged that Game and Fish had grounds to believe that a search of Hamberlin's residence would reveal evidence that, "on or about August 2017, on September 2, 2017, [and] on September 4, 2017," Hamberlin had committed two misdemeanor wildlife offenses: (1) using an aircraft to assist a big game hunter in locating wildlife beginning 48 hours before and during a hunting season and (2) harassing wildlife with an aircraft. *See* A.A.C. R12-4-319(C), -320(A); *see also* A.R.S. § 17-309(B). We agree with the superior court that the facts set forth in the warrant affidavit did not establish probable cause to search for evidence relating to either offense.

¶16 As to using an aircraft to locate wildlife, the facts asserted in the warrant affidavit linked Hamberlin to a paraplane flying over the Superstition Mountains on September 2 and September 4, 2017, recited that Hamberlin and Downs often spoke by phone, and asserted that Hamberlin was with Rhoton and Downs on October 21, 2017, when Rhoton killed the bighorn sheep Elvis. But the affidavit gave no information about Hamberlin's activities during the weeks after his flights in early September and before Rhoton killed the bighorn sheep in late October.

¶17 As Officer Colvin acknowledged, it was not illegal for Hamberlin to photograph bighorn sheep from his paraplane. Although using the paraplane to assist Rhoton or Downs in locating bighorn sheep for hunting purposes would have been a violation, the warrant affidavit offered no basis to believe that bighorn sheep remain in the same location over a more than 7-week period. Hamberlin's activities on September 2 and September 4 were simply too remote in time from the October 21 hunt to support a probable cause finding that he used his paraplane to assist Rhoton in locating and hunting Elvis. And although Hamberlin's phone records show that he often spoke to Downs, this alone was insufficient to link Hamberlin's early-September paraplane flights to Rhoton's hunt. Accordingly, the superior court did not err by determining that the warrant was not supported by probable cause relating to the first alleged misdemeanor violation.

¶18 As to harassing wildlife with an aircraft, the only basis for this allegation was that one of Hamberlin's photographs depicted sheep

gathered together in an allegedly "defensive grouping." But Officer Colvin testified that she could not tell whether the photograph had been taken from an aircraft or from the ground. And neither Officer Colvin nor the reporting party witnessed Hamberlin harassing wildlife from an aircraft. The superior court thus did not err by determining that the warrant lacked probable cause to show that Hamberlin harassed bighorn sheep with an aircraft.

¶19 Accordingly, we affirm the superior court's determination that "probable cause [did] not exist for believing [Hamberlin's] items [were] subject to seizure," *see* A.R.S. § 13-3922(A), meaning Hamberlin successfully controverted the search warrant.[1]

II. Relinquishment of Digital Copies.

¶20 The State argues that, lack of probable cause notwithstanding, the superior court erred by ordering it to turn over the copies it had made of data found on Hamberlin's electronic devices. The State notes that the controversion statute only authorizes an order that property seized without probable cause "be restored to the person from whom it was taken." A.R.S. § 13-3922(A). Relying on *State ex rel. Milstead v. Melvin*, 140 Ariz. 402 (1984), the State argues that because it had already returned all of Hamberlin's property to him, the superior court exceeded its remedial authority under A.R.S. § 13-3922 by ordering the State to turn over the copies it made of Hamberlin's data.

¶21 In *Milstead*, Arizona law enforcement officers executing search warrants on two individuals' residences seized items and photographed the items and the premises. 140 Ariz. at 403–04. The individuals then moved in justice court to controvert the search warrants, seeking the return of their property. *Id.* at 404. The justice court agreed that

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[1] The parties dispute whether and how the principles set forth in *Franks v. Delaware*, 438 U.S. 154 (1978), should apply to controversion proceedings. *Franks* governs suppression proceedings based on alleged material falsehoods in a warrant affidavit, permitting reformation of the warrant affidavit to omit false information that the affiant included deliberately or with reckless disregard for its truth, and authorizing suppression should the reformed affidavit fail to establish probable cause. *Id.* at 171–72. We need not reach that issue, however, because suppression of evidence is not at issue here, and the warrant affidavit—with or without the inaccurate information—was insufficient to establish probable cause.

the warrants were not supported by probable cause and ordered the State to return the items seized and to destroy all photographs taken while executing the warrants. *Id.*

¶22 The State returned the items but sought appellate review of the order to destroy the photographs. The Arizona Supreme Court reversed, holding that § 13-3922 only authorized "restoration of property in which the owners had a right to possession immediately prior to the execution of the warrant." *Id.* at 406. Because the photographs had not been "taken" from the individuals but rather were "created" by law enforcement officers while they executed the warrant, the controversion statute did not authorize the order to destroy the photographs. *Id.* Additionally, noting that "[t]he power to issue injunctions is vested in the superior court and . . . has not been conferred upon the justice court," the supreme court held that the justice court lacked authority to direct the "equitable remedy" of ordering that the photographs be destroyed. *Id.*

¶23 The State argues that, as with the photographs in *Milstead*, the copies the State made of digital data it extracted from Hamberlin's electronic devices did not exist before the search, so the superior court could not order the copies "restored" to Hamberlin under the controversion statute. But even assuming the controversion statute does not contemplate restoring copies of seized items, the State's argument overlooks the fact that the superior court, unlike a justice court, has the power to order injunctive relief. *See* A.R.S. § 12-1801.

¶24 The superior court's injunctive authority allows it discretion to craft an equitable remedy to promote fairness between the parties in any appropriate case. *Scholten v. Blackhawk Partners*, 184 Ariz. 326, 331 (App. 1995). "Equitable considerations include the relative hardships and injustice; the public interest; misconduct of the parties, if any; delay on the part of the plaintiff; and the adequacy of other remedies." *Ahwatukee Custom Estates Mgmt. Ass'n, Inc. v. Turner*, 196 Ariz. 631, 635, ¶ 9 (App. 2000).

¶25 Here, the superior court had ample reason to order the State to give Hamberlin the copies it had made of his digital data. Although the State asserts that it should be able to retain and search the copies—notwithstanding that it lacked probable cause to seize the devices from which it derived those copies—the superior court's contrary conclusion is consistent with United States Supreme Court and Arizona Supreme Court jurisprudence making clear that data derived from electronic devices cannot be searched without a warrant.

¶26 In *Riley v. California*, 573 U.S. 373 (2014), the United States Supreme Court recognized the breadth and depth of privacy interests implicated by searches of cell phones or other digital devices. The Court acknowledged that electronic devices such as cell phones "differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person," meaning that a search of such a device effects a much broader intrusion on privacy. *Id.* at 393–94. Such devices often contain "[t]he sum of an individual's private life," including information about a person's health and finances, as well as a wealth of detail about a person's familial, political, professional, religious, and sexual associations. *Id.* at 394–96. The Court thus held that, absent a showing of exigent circumstances, "[o]ur answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant." *Id.* at 402–03.

¶27 The Arizona Supreme Court has been similarly mindful of the privacy interests implicated by a search of information on digital devices. *See State v. Peoples*, 240 Ariz. 244, 248–49, ¶¶ 11–16 (2016) (upholding suppression of evidence derived from a warrantless search of a cell phone). Noting *Riley*'s recognition of "a uniquely broad expectation of privacy in cell phones because they essentially serve as their owners' digital alter egos," *id.* at 248, ¶ 11, our supreme court in *Peoples* vindicated the device owner's legitimate expectation of privacy as "no less worthy of protection when [the device] is outside a person's immediate control." *Id.* at 248–49, ¶¶ 13, 16.

¶28 Here, the superior court appropriately applied the principles reflected in *Riley* and *Peoples* by protecting Hamberlin's privacy interests without unduly prejudicing the interests of the State. Given that *Riley* proscribes a warrantless search of the contents of even a properly seized cell phone, the superior court was justified in preventing the State from keeping and searching the contents of electronic data derived from *improperly seized* electronic equipment. If the State wants to search the data, it must first develop evidence sufficient to establish probable cause and then get a warrant. *See Riley*, 573 U.S. at 403.

¶29 The State contends that § 13-3922 "cannot be used to suppress evidence in an upcoming criminal trial" and asserts that the superior court's order to turn over the digital copies "was effectively an anticipatory suppression order" that would prevent use of the data as evidence in a criminal proceeding against Hamberlin. But the superior court's order says nothing about suppressing evidence, and a ruling under § 13-3922 does not operate as a suppression ruling. *State v. Joachim*, 202 Ariz. 566, 569, ¶ 14

(App. 2002). Although the superior court's ruling required the State to relinquish the improperly obtained evidence, nothing in that ruling prevents the State from developing probable cause, if it can, for a warrant to seize the property and its contents, search the data, and ultimately present it as evidence in a criminal proceeding.

CONCLUSION

¶30 The superior court acted within its authority by requiring the State to turn over digital copies of data extracted from electronic equipment seized without probable cause. Accordingly, we affirm the judgment.

AMY M. WOOD • Clerk of the Court
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