IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

EDGAR FRISTOE,
Appellant.

No. 2 CA-CR 2019-0064
Filed May 20, 2021

Appeal from the Superior Court in Pima County
No. CR20165308001
The Honorable Sean E. Brearcliffe, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
By Linley Wilson, Deputy Solicitor General/Section Chief of Criminal Appeals, Phoenix
Counsel for Appellee

Joel Feinman, Pima County Public Defender
By Abigail Jensen, Assistant Public Defender, Tucson
Counsel for Appellant

OPINION

Presiding Judge Eppich authored the opinion of the Court, in which Chief Judge Vásquez and Judge Espinosa concurred.

E P P I C H, Presiding Judge:

¶1 Edgar Fristoe appeals from his convictions and sentences for ten counts of sexual exploitation of a minor under fifteen years of age, arguing Google LLC (Google) and the National Center for Missing and Exploited Children (NCMEC) violated his federal and state constitutional rights by searching his "Google+ Photos" account,[1] opening images of child pornography uploaded to his account, and sharing these images with law enforcement. He contends the trial court erred in failing to suppress evidence obtained as a result of that warrantless acquisition and use of these images. Because we conclude the private search doctrine applies, we affirm Fristoe's convictions and sentences.

Factual and Procedural Background

¶2 "In reviewing a trial court's decision on a motion to suppress, we view the facts in the light most favorable to upholding the trial court's ruling and consider only the evidence presented at the suppression hearing." *State v. Teagle*, 217 Ariz. 17, ¶ 2 (App. 2007).[2] In August and September of 2016, Google discovered nineteen images of child pornography in Fristoe's Google+ Photos account. At least one Google employee viewed eighteen of the nineteen images in Fristoe's account and determined they were child pornography. Additionally, the parties stipulated that the one image not viewed by a Google employee was child pornography. Google reported their findings to NCMEC and included the subscriber information in multiple cyber reports.[3]

¶3 NCMEC reviewed the reports, including all the images, and subsequently forwarded the information to the Phoenix Police Department. In November 2016, a Tucson Police Department detective used that

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[1]"Google+ Photos" is a service that allows users to upload photos to a cloud storage account.

[2]Because the only evidence offered at the suppression hearing was the testimony of a single police detective, we also consider the undisputed material facts and documentary evidence submitted in the suppression motions, which the parties also discuss in their briefs. *Cf. State v. Navarro*, 241 Ariz. 19, n.1 (App. 2016) (considering undisputed facts to decide suppression arguments where no hearing held).

[3] The subscriber information included the phone number, email address, and most recent IP addresses associated with the Google account.

information, among other things, to obtain a search warrant for Fristoe's home and cell phone. After executing the warrant, officers found several images of child pornography on Fristoe's phone.

¶4 The state charged Fristoe with fourteen counts of sexual exploitation of a minor (counts 1-14), one count of attempted luring of a minor (count 15), and one count of failing to register as a sex offender (count 16). Fristoe waived his right to a jury trial and proceeded with a bench trial. After a three-day trial, the trial court found Fristoe guilty of counts one through ten [4] and sentenced him to ten terms of seventeen years' imprisonment to be served consecutively.

¶5 Fristoe appealed, and we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Motions to Suppress

¶6 Before trial, Fristoe filed a motion to suppress and an amended motion to suppress arguing the trial court should "suppress all evidence based on a warrantless search by government actor Google and all following evidence being fruit of the poisonous tree." Fristoe conceded that Google was a private entity but argued that it had acted as a "limited purpose government agent" when it searched through his Google+ Photos account and reported the child pornography, requiring a warrant. Specifically, Fristoe argued Google was acting as a government agent because it (1) faced substantial monetary losses and fines if it did not report child pornography, (2) was motivated to cooperate with law enforcement, and (3) was "inexplicably intertwined [with the federal government] in their pursuit of removal of child pornography from Google's servers." He also argued the image associated with count eleven should independently be suppressed because only NCMEC had opened that image and NCMEC was a government actor.

¶7 In response, the state argued, among other things, that there were no constitutional violations because Google had searched Fristoe's account as a private actor—not as an agent of the government. The state contended that Google was not acting as a government agent because (1) it faced fines only if it failed to report child pornography, not if it failed to

[4]The trial court granted a Rule 20, Ariz. R. Crim. P., judgment of acquittal on counts eleven through fourteen and found Fristoe not guilty of count fifteen. It dismissed count sixteen without prejudice.

search for it and (2) it was motivated to search for this illicit material for its private interests. The state also reasoned that even if NCMEC were a government actor, there was no constitutional violation for the image associated with count eleven because NCMEC's search did not expand on Google's searching as a private actor, and the search could "reveal nothing but contraband."

¶8 At the suppression hearing, the police detective who had obtained the warrant to search Fristoe's home and cell phone testified, and the parties largely repeated the arguments from their motions. The trial court denied Fristoe's motion to suppress "for the reasons stated in the State's motion" and expressly stated, "Google is clearly not a state actor, based on what I've heard and read. They're just a private company that had a duty to report once they discovered it and they discovered it. So the motion to suppress is denied."

¶9 On appeal, Fristoe's arguments include that the trial court erred because Google and NCMEC were government agents, therefore the private search doctrine did not exempt them from conducting a search or seizure without a warrant under the Fourth Amendment to the United States Constitution and article II, § 8 of the Arizona Constitution.[5] "We review the denial of a motion to suppress evidence for abuse of discretion, considering the facts in the light most favorable to sustaining the ruling." *State v. Weakland*, 246 Ariz. 67, ¶ 5 (2019) (quoting *State v. Valenzuela*, 239 Ariz. 299, ¶ 9 (2016)). But we review alleged constitutional violations de novo. *State v. Foshay*, 239 Ariz. 271, ¶ 34 (App. 2016).

[5]Fristoe makes arguments related to the private search doctrine in the section of his brief relating to the Arizona Constitution. Because we conclude below that the private search doctrine applies equally under the Fourth Amendment and the Arizona Constitution, and because the trial court concluded the private search doctrine resolved this case, we assume for the purposes of our analysis that Fristoe meant his arguments to apply to both. Furthermore, although Fristoe appeals the court's ruling on several grounds, we need not address all of his arguments because we conclude that the private search doctrine resolves this case. *See Hymer v. Moore*, 18 Ariz. App. 554, 556 (1972) (need not reach questions on appeal when there is a dispositive issue).

¶10 As a preliminary manner, Fristoe argues we should address article II, § 8 before we address the Fourth Amendment. We decline to do so and follow the lead of our supreme court which has addressed the Fourth Amendment first when deciding challenges under both the United States and Arizona constitutions. *See, e.g.*, *State v. Mixton*, 250 Ariz. 282, ¶¶ 10-12, 27 (2021); *State v. Hernandez*, 244 Ariz. 1, ¶¶ 11-23 (2018); *State v. Bolt*, 142 Ariz. 260, 263-65 (1984).

Fourth Amendment to the United States Constitution

¶11 Fristoe argues that Google violated his rights under the Fourth Amendment because no warrant exception applied and it opened and shared the images in his Google+ Photos account with NCMEC, and indirectly with law enforcement, without a warrant. He contends that although Google is a private organization, it should be considered a government agent in this context in light of the government's knowledge "of and acquiesce[nce] in Google's intrusion into user's private files" and Google's intent to assist law enforcement.

¶12 The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Warrantless searches "are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *State v. Dean*, 206 Ariz. 158, ¶ 8 (2003) (emphasis added in *Dean*) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)). Fourth Amendment protections, however, are "wholly inapplicable 'to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any government official.'" *United States v. Jacobsen*, 466 U.S. 109, 113-14 (1984) (quoting *Walter v. United States*, 447 U.S. 649, 662 (1980) (Blackmun, J., dissenting)). "[A] wrongful search or seizure conducted by a private party does not violate the Fourth Amendment and . . . such private wrongdoing does not deprive the government of the right to use evidence that it has acquired lawfully." *Walter*, 447 U.S. at 656; *State v. Weekley*, 200 Ariz. 421, ¶ 16 (App. 2001). The rationale for this rule is that once the private actor has frustrated "the original expectation of privacy," there is no constitutional protection of

"governmental use of the now-nonprivate information." *Jacobsen*, 466 U.S. at 117.[6]

¶13 To determine whether a private party acted as a government agent in an illegal search, courts consider "(1) whether the government knew of and acquiesced in the intrusive conduct, and (2) whether the party performing the search intended to assist law enforcement efforts or to further his own ends." *United States v. Snowadzki*, 723 F.2d 1427, 1429 (9th Cir. 1984) (quoting *United States v. Miller*, 688 F.2d 652, 657 (9th Cir. 1982)); *State v. Martinez*, 221 Ariz. 383, ¶ 31 (App. 2009). The defendant bears the burden of proving a private party acted as a government agent, *United States v. Reed*, 15 F.3d 928, 931 (9th Cir. 1994), and "[i]f either element of this test is not met, then the private citizen was not acting as a [government] agent," *Martinez*, 221 Ariz. 383, ¶ 31.

¶14 Fristoe has not met his burden of showing Google was acting as a government agent. First, Fristoe has not alleged that law enforcement asked Google or knew Google was going to search his particular account. *Cf. United States v. Cameron*, 699 F.3d 621, 628, 637-38 (1st Cir. 2012) (not government agent when law enforcement had no role in instigating or participating in the search of defendant's Yahoo! account when an anonymous tip led Yahoo! to discover child pornography in defendant's Yahoo! photo account). Instead, he argues the federal government acquiesced and "took advantage" of the fact that third parties conduct searches of private files by creating 18 U.S.C. § 2258A, a federal statute that requires third parties, such as Google, to report child pornography to NCMEC. Although § 2258A(a) requires Google to report child pornography if it finds such illicit material, § 2258A(f) expressly does not require companies like Google to search accounts for this material. For this reason, several courts have agreed that § 2258A's reporting requirement does not, by itself, convert a provider, like Google, into a government agent. *See, e.g.*, *United States v. Stevenson*, 727 F.3d 826, 830 (8th Cir. 2013) ("A reporting requirement, standing alone, does not transform an [i]nternet service provider into a government agent whenever it chooses to scan files sent on its network for child pornography."); *United States v. Richardson*, 607 F.3d 357, 367 (4th Cir. 2010) ("We conclude that the statutory provision pursuant to which AOL reported Richardson's activities did not effectively convert AOL into an agent of the Government for Fourth Amendment purposes."); *Cameron*, 699 F.3d at 637-38 ("[S]tatute did not impose any obligation to

[6]For the purposes of this appeal, we assume, without deciding, that Fristoe had a reasonable expectation of privacy in the images at issue.

search for child pornography, merely an obligation to *report* child pornography of which Yahoo! became aware."). Fristoe does not identify any cases reaching the contrary conclusion.

¶15 Second, Fristoe has not shown that Google's search was motivated to assist law enforcement rather than to protect its private business interests. The state filed a notice of supplemental authority with the trial court that included a declaration from Cathy McGoff—the senior manager of Law Enforcement and Information Security at Google. McGoff stated that Google "has a strong business interest" in ensuring its products are "free of illegal content" and monitors its platform to protect its public image and to retain and attract customers. She also stated that Google reports child pornography images to NCMEC because it is required to do so by federal statute. Fristoe argues that because this reporting requirement leads to a steep fine if Google fails to comply, *see* § 2258A(e), this also shows that Google's motivation is to assist law enforcement. But even if Google is motivated to assist law enforcement to some extent, several courts have rejected this argument and found that this mutuality of purpose does not make a private party a state actor. *See United States v. Ringland*, 966 F.3d 731, 736 (8th Cir. 2020) ("Google did not become a government agent merely because it had a mutual interest in eradicating child pornography from its platform."); *Cameron*, 699 F.3d at 638 (Yahoo! can "voluntarily choose to have the same interest" as the government in combating child pornography and "if Yahoo! chose to implement a policy of searching for child pornography, it presumably did so for its own interests."). Once the illicit material is discovered, Google has a duty to report under the statute but that does not necessarily mean that Google's motivation in searching its servers for this material is to assist law enforcement.

¶16 Fristoe also argues that even if Google is a private actor, NCMEC is still a government actor, *see United States v. Ackerman*, 831 F.3d 1292, 1295-1300 (10th Cir. 2016), so NCMEC needed a warrant to open, review, and send the images to law enforcement. Assuming without deciding, that NCMEC is a government actor, there was still no violation if the search by NCMEC did not expand the scope of the private search. *See Jacobsen*, 466 U.S. at 115-18 ("The additional invasions of respondents' privacy by the government agent must be tested by the degree to which they exceeded the scope of the private search."). Here, Google, acting of its own accord, was the first to search Fristoe's Google+ Photos account and discover the pornographic images in question. Because these invasions of Fristoe's claimed expectation of privacy were committed by a private party and not through state action, they did not violate the Fourth Amendment. *See id.* at 115. The images NCMEC relied on were the same ones Google

had viewed.[7] *See id.* at 117 ("The Fourth Amendment is implicated only if the authorities use information with respect to which the expectation of privacy has not already been frustrated."). Therefore, NCMEC did not violate Fristoe's Fourth Amendment rights because it did not exceed the scope of Google's private searching when it opened, reviewed, and sent the images, already viewed and identified as child pornography by Google, to police.

¶17 In sum, Fristoe has not established that Google was acting as a government agent subject to the Fourth Amendment warrant requirement. *See Reed*, 15 F.3d at 931 (defendant's burden to prove private party acted as government agent). Accordingly, the trial court did not err in concluding that Google's search of Fristoe's Google+ Photos account was a private one not subject to the warrant requirement. Further, even if NCMEC was a government actor, there was still no violation because NCMEC did not expand the scope of the private search.

Article II, § 8 of the Arizona Constitution

¶18 For the first time on appeal, Fristoe argues the private search doctrine should not apply under Arizona's Private Affairs Clause because it does not apply under Washington's Private Affairs Clause. *See State v. Eisfeldt*, 185 P.3d 580, ¶¶ 11–17 (Wash. 2008). Fristoe contends that because the two clauses are identical, and neither include the word "reasonable," the analysis should be the same. *Compare* Ariz. Const. art. II, § 8 *with* Wash. Const. art. I, § 7. We review this issue for fundamental, prejudicial error only. *See State v. Henderson*, 210 Ariz. 561, ¶ 19 (2005).

¶19 In *Eisfeldt*, the Washington Supreme Court reasoned that its state constitution provides greater protections from state action than the Fourth Amendment because the latter is focused on reasonableness,

[7] Below, Fristoe argued the image associated with count eleven should be analyzed differently because Google did not view this image before sending it to NCMEC. To the extent Fristoe repeats this argument on appeal, it is moot and Fristoe is precluded from raising it because he was acquitted of count eleven. *Cf. State v. LeMaster*, 137 Ariz. 159, 165 (App. 1983) (unnecessary to address argument that court erred in denying motion for judgment of acquittal when jury acquitted defendant); *State v. Linden*, 136 Ariz. 129, 136 (App. 1983) (defendant precluded from raising claim on appeal that court erred in denying directed verdict when acquitted).

whereas article I, § 7 of the Washington Constitution is not because it does not contain the word "reasonable." 185 P.3d 580, ¶¶ 8-9, 13. Because the Fourth Amendment's rationale did not apply to Washington's state constitutional protections, the court adopted a bright line rule holding the private search doctrine is inapplicable under Washington's constitution. *Id.* ¶¶ 16-17.

¶20 Our supreme court, however, recently rejected the argument that Arizona courts should ignore the reasonableness of citizens' expectations of privacy when addressing challenges under article II, § 8 of the Arizona Constitution. *See Mixton*, 250 Ariz. 282, ¶¶ 39–41, 48–51 (considering the reasonableness of citizen's expectation of privacy in the context of the third-party doctrine under Arizona's Private Affairs Clause). We see no principled reason to depart from that precedent here because our supreme court has been reluctant to "expand the Private Affairs Clause's protections beyond the Fourth Amendment's reach, except in cases involving warrantless home entries." *Id.* ¶ 32. As a result, we conclude that the private search doctrine applies under Arizona's Private Affairs Clause.

¶21 Because Google acted as a private actor in this case, its actions are not subject to article II, § 8 of the Arizona Constitution. *See Hart v. Seven Resorts Inc.*, 190 Ariz. 272, 278 (App. 1997) ("Article 2, § 8 of the Arizona constitution does not restrict any private individual's actions. . . ."); *Fiesta Mall Venture v. Mecham Recall Comm.*, 159 Ariz. 371, 373 (App. 1988) (recognizing article II, § 8 "expressly requires state action"). Therefore, as explained above, Google's searching of Fristoe's Google+ Photos account was a private search not subject to the warrant requirement.

Disposition

¶22 For the foregoing reasons, we affirm Fristoe's convictions and sentences.