IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

RYAN GALAL VAN DYCK,
Appellant.

No. 2 CA-CR 2019-0156
Filed September 2, 2021

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Appeal from the Superior Court in Pima County
No. CR20143891001
The Honorable Javier Chon-Lopez, Judge
The Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

COUNSEL

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MEMORANDUM DECISION

Presiding Judge Eppich authored the decision of the Court, in which Chief Judge Vásquez and Judge Brearcliffe concurred.

E P P I C H, Presiding Judge:

¶1 Ryan Van Dyck appeals from his convictions and sentences for twenty counts of sexual exploitation of a minor under fifteen. He contends the trial court erred in denying his motions to suppress evidence because (1) officers, without a warrant, opened an image attached to an email forwarded to them; (2) officers obtained his subscriber information without a warrant; and (3) the warrant used to search his home was based on stale probable cause, obtained with false information, and executed past the permissible statutory period. He also contends that his twenty consecutive ten-year prison terms totaling 200 years' imprisonment violate his constitutional right to be free from cruel and unusual punishment. For the following reasons, we affirm Van Dyck'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. Fristoe*, 251 Ariz. 255, ¶ 2 (App. 2021) (quoting *State v. Teagle*, 217 Ariz. 17, ¶ 2 (App. 2007)). In March 2014, AOL Inc. reported to the National Center for Missing and Exploited Children (NCMEC) that it had discovered an email with the subject line "Re: trade" with an image attached that "appear[ed] to contain child pornography." After determining the general location of the IP address, NCMEC subsequently forwarded the information to the Arizona Internet Crimes Against Children's task force in April.

¶3 Officers viewed the image attached to the email, confirmed it was child pornography, and, in May, subpoenaed the internet service provider (ISP), which provided subscriber information for a business

located at Van Dyck's home address. On September 3, officers obtained a search warrant for Van Dyck's home. On September 8, an officer applied for, and was granted, an extension to execute the warrant. As a result of executing the search warrant on September 9, officers discovered "at least hundreds of images that were child porn." Additionally, during the execution of the warrant, Van Dyck admitted to possessing and distributing child pornography over several years.

¶4 In July 2015, Van Dyck filed a motion to suppress the evidence obtained as a result of a search warrant of his home, asserting, among other things, that the information supporting probable cause for the warrant was stale. He also asserted that the affidavit contained false information to support the warrant extension because despite representations that Van Dyck would be out of town during the original deadline to execute the warrant, he was, in fact, in town. At the suppression hearing, the trial court denied the motion, concluding there was probable cause to support the warrant even if certain information was removed from the affidavit, but not specifically addressing the allegations of false information related to the extension.

¶5 In January 2017, Van Dyck and similarly situated defendants collectively asserted that the state's violation of the grand jury subpoena statute required suppression of evidence. The trial court rejected that argument, concluding, in part, that the defendants did not have a reasonable expectation of privacy in their IP addresses or subscriber information under either the United States or Arizona Constitutions.

¶6 In March 2019, relying, in part, on a hearing transcript from a related federal proceeding in which the warrant executed on September 9 was discussed, Van Dyck filed a supplemental motion to suppress. He contended that since his July 2015 motion "significant facts regarding the conduct of the [officers had] been discovered and clarified and new case law ha[d] emerged" requiring suppression. He asserted that he had a reasonable expectation of privacy in his subscriber information held by his ISP and in his email communications and that the opening of the image unconstitutionally violated his reasonable expectation of privacy or alternatively was a trespass on a constitutionally protected thing. The trial court held a suppression hearing on the motion and subsequently denied the motion to suppress because Van Dyck "did not maintain a reasonable expectation of privacy on the internet after he violated the AOL Terms of Service."

¶7 After a bench trial, Van Dyck was convicted and sentenced as described above. This appeal followed. We have jurisdiction pursuant to article VI, § 9 of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Warrantless Search of Subscriber Information and Image

Subscriber Information

¶8 Relying on our prior opinion in *State v. Mixton*, 247 Ariz. 212, ¶¶ 27, 38-39 (App. 2019), Van Dyck asserts on appeal that the trial court should have granted his motions to suppress because he had a reasonable expectation of privacy in his IP address and subscriber information, officers did not have a search warrant to obtain his subscriber information from his ISP, and the good-faith exception did not apply here, as it did in *Mixton*.

¶9 However, while this appeal was pending, our supreme court vacated our opinion in *Mixton* and concluded that under both the United States and Arizona constitutions, a search warrant is not required to obtain this information. *State v. Mixton*, 250 Ariz. 282, ¶¶ 53, 75, 77 (2021) (no reasonable expectation of privacy in an IP address and ISP subscriber information). Accordingly, Van Dyck has not established error, and we need not consider the good-faith exception because it only applies when there is error. *See id.* ¶¶ 75-77.

Image

¶10 On appeal, Van Dyck appears to again assert that a warrant was legally required for the officers to view the image sent to them by NCMEC, and thus the trial court erred in denying his 2019 motion to suppress. The state argues Van Dyck has waived review of this issue because he has not adequately developed his argument on appeal. We agree.

¶11 "In Arizona, opening briefs must present significant arguments, supported by authority, setting forth an appellant's position on the issues raised. Failure to argue a claim usually constitutes abandonment and waiver of that claim." *State v. Moody*, 208 Ariz. 424, n.9 (2004) (quoting *State v. Carver*, 160 Ariz. 167, 175 (1989)). In his opening brief, Van Dyck does not challenge the trial court's conclusion that he had no reasonable expectation of privacy in the image, but instead assumes, without explanation, that a warrant was required. *See State v. Blakely*, 226 Ariz. 25,

¶ 6 (App. 2010) (subject to exceptions, a warrant is required if there is a reasonable expectation of privacy in the thing to be searched).

¶12 Moreover, Van Dyck cites no legal authority supporting his position. *See* Ariz. R. Crim. P. 31.10(a)(7) (appellant's opening brief must provide "supporting reasons for each contention" and "citations of legal authorities"). He only cites the general principle that "[a]ny incriminating material seized as a result of an illegal search must be suppressed." *Wong Sun v. United States*, 371 U.S. 471, 491-92 (1963). Although he further develops this argument in his reply brief, we do not consider it. *Cf. State v. Brown*, 233 Ariz. 153, ¶ 28 (App. 2013) (waiving arguments raised for the first time in reply); *see also* 5 Am. Jur. 2d *Appellate Review* § 481 (2021) ("[W]hen the appellant merely mentions an issue in the initial brief without arguing it, the claim has been abandoned, and discussion in the reply brief will not resuscitate it."). Accordingly, his argument that the court erred in denying his motion to suppress due to the warrantless viewing of the image is waived on appeal. *See State v. Johnson*, 247 Ariz. 166, ¶ 13 (2019) (waiving argument not developed on appeal).

Propriety of Search Warrant for the Home

Stale Probable Cause

¶13 On appeal, Van Dyck renews his argument that the probable cause supporting the warrant to search his home was stale. He asserts that because officers waited until September to obtain the search warrant and there was "no evidence of continuous activity; the tip from AOL was based on a single email containing a single item of suspected contraband," the trial court should have granted his motion to suppress. The state responds that despite the five-month gap, the warrant was not stale because the affidavit detailed "why additional images may have been found despite the delay." We review the denial of a motion to suppress for an abuse of discretion, but review the legal determination of probable cause de novo. *State v. Goudeau*, 239 Ariz. 421, ¶ 26 (2016).

¶14 "No search warrant shall be issued except on probable cause." *State v. Adamson*, 136 Ariz. 250, 257 (1983); *see also* A.R.S. § 13-3913. Probable cause exists if "a reasonably prudent person, based upon the facts known by the officer, would be justified in concluding that the items sought are connected with the criminal activity and that they would be found at the place to be searched." *State v. Buccini*, 167 Ariz. 550, 556 (1991) (quoting *State v. Carter*, 145 Ariz. 101, 110 (1985)); *see Illinois v. Gates*, 462 U.S. 213, 238 (1983) (probable cause is evaluated under the "totality-of-the-

circumstances"). "[A]n affidavit used to support a search warrant 'must speak as of the time of the issue of that warrant'. There is, however, no arbitrary time limit on how old the information contained in an affidavit may be." *State v. Kasold*, 110 Ariz. 563, 566 (1974) (citations omitted) (quoting *United States v. Guinn*, 454 F.2d 29, 36 (5th Cir. 1972)). The question of staleness is more dependent on the nature of the illegal activity rather than the time specified. *See State v. Smith*, 122 Ariz. 58, 60 (1979).

¶15 Van Dyck does not contest that probable cause initially existed, only that it had gone stale by the time the officers sought the warrant. Even though the warrant was sought approximately five months after officers received the information from NCMEC, the trial court did not err because a reasonable, prudent person would be justified in concluding child pornography would still be found in Van Dyck's residence despite the passage of time. *See Buccini*, 167 Ariz. at 556.

¶16 In the affidavit supporting the warrant, the officer avowed that he had been an officer for fourteen years, working as a detective in the Internet Crimes Against Children unit since 2011. He noted that he had "received over 300 hours of training relating to investigation of internet crimes against children." The officer stated that the email message forwarded from NCMEC had the subject "'Re' please trade,'" and he provided a detailed description of the image attached to the message which was "of a male child that was sexually exploitive in nature." He described the process in which officers had connected the email message to the IP address at Van Dyck's residence. The officer stated that based on his own knowledge, training, and experience, "[c]hild pornography collectors typically retain [child pornography material] for many years" and may maintain the material "in the privacy and security of their home or some other secure location, such as a private office," and with technology advancement, many collectors have "turned to storing digital media in online locations." He further avowed that "[c]ollectors of child pornography prefer not to be *without their child pornography for any prolonged time period*."[1]

[1]The affidavit supporting the warrant also stated that Van Dyck had "previously been investigated for having an inappropriate relationship with a 13 year-old girl in 2011," and, in 2005, officers had found "erotic photos of prepubescent children" under his bed. Van Dyck challenged below whether these instances were appropriate for the magistrate to consider. The trial court observed that even if this information had been

¶17 A court can consider an officer's experience in determining probable cause. *See State v. Olson*, 134 Ariz. 114, 117 (App. 1982). And consistent with the officer's assertions in this case that child pornography collectors "typically retain [child pornography material] for many years" and "prefer not to be *without their child pornography for any prolonged time period*," caselaw supports that child pornography is not the type of evidence "which would likely be consumed or thrown away in . . . five months." *Kasold*, 110 Ariz. at 565-66 (probable cause information not stale where more than five months had elapsed where allegations were that defendant was in possession of "pictures, books, and written stories" of sexual activities with minors); *see also United States v. Seiver*, 692 F.3d 774, 777 (7th Cir. 2012) (describing staleness as "rarely relevant" with computer file because such evidence does not rapidly dissipate or degrade and also concluding that seven months is too short to reduce probability that computer search will be fruitful to level at which probable cause has evaporated); *United States v. Elbe*, 774 F.3d 885, 890-91 (6th Cir. 2014) (concluding time limitations on warrants do not control in child pornography because it "is not a fleeting crime" and citing federal cases where the probable cause information was not stale, the longest being sixteen months (quoting *United States v. Frechette*, 583 F.3d 374, 378 (6th Cir. 2009)). Accordingly, because a reasonable, prudent person would be justified in concluding child pornography would still be found in Van Dyck's residence despite the lapse of time, *see Buccini*, 167 Ariz. at 556, the court did not err in denying Van Dyck's 2015 motion to suppress due to stale probable cause.[2]

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removed from the affidavit, probable cause still existed. Because we conclude probable cause existed absent that information, we need not reach whether it was proper for the court to consider, or excise, that information in addressing the motion to suppress.

[2] Although it does not affect our analysis, as explained above, Van Dyck was also charged with child pornography in federal court, and challenged the same search warrant. As to that warrant, he raised this same argument in federal court and the district court found it without merit. *See United States v. VanDyck*, No. CR 15-742-TUC-CKJ, *2-5, 2016 WL 2909870 (D. Ariz. May 19, 2016). It does not appear Van Dyck reasserted an argument of staleness on appeal of that decision, but the United States Court of Appeals for the Ninth Circuit affirmed the district court's decision and the United States Supreme Court denied certiorari. *See United States v. VanDyck*, 776 Fed. App'x 495, 495-98 (9th Cir. 2019), *cert. denied*, ___ U.S. ___, 141 S. Ct. 295 (2020).

Warrant Expiration and False Information to Obtain Extension

¶18 For the first time on appeal, Van Dyck contends the warrant to search his home had expired at the time the officer sought the extension, and thus it was void. *See* A.R.S. § 13-3918(A) ("A search warrant shall be executed within five calendar days from its issuance . . . [u]pon expiration of the five day period, the warrant is void unless the time is extended by a magistrate."). Additionally, citing *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978), he also argues, for the first time, the trial court should have granted his motion to suppress because the officers submitted false information in obtaining the warrant extension as demonstrated by a hearing transcript from his prosecution in federal court referencing the same search warrant.[3]

¶19 Van Dyck did not raise these arguments to the trial court, and therefore we would review for fundamental, prejudicial error only. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20 (2005). However, Van Dyck has not asserted that fundamental, prejudicial error occurred, and, accordingly, these issues are waived. *See State v. Vargas*, 249 Ariz. 186, ¶¶ 21-22 (2020); *State v. Starks*, No. 2 CA-CR 2019-0288, ¶ 6, n.1, 2021 WL 2154043 (Ariz. App. May 27, 2021); *see also Henderson*, 210 Ariz. 561, ¶ 19 (defendant's burden to show fundamental error).

[3] Although Van Dyck argued in his first motion to suppress that police provided false information to obtain an extension because he was not out of town as the officer claimed—his argument on appeal is different. He now asserts the transcript of a hearing from his prosecution in federal court, which took place after the trial court denied his first motion to suppress, proved that the officers *knew* Van Dyck was in town when they requested the extension. Although Van Dyck attached the federal court hearing transcript to his 2019 supplemental motion to suppress, in that motion, he did not raise concerns about the federal court testimony as it related to the warrant extension, only as it related to officers opening of the image. Therefore, he has not preserved the issue. *See Moody*, 208 Ariz. 424, ¶ 39 ("The motion or objection must state specific grounds in order to preserve the issue for appeal."); *see also State v. Granados*, 235 Ariz. 321, ¶ 19 (App. 2014) (grounds for objections generally must be specific to permit the adverse party's response and allow the court the opportunity to rule and avoid error).

Sentencing

¶20 Van Dyck also argues that his twenty consecutive ten-year prison terms totaling 200 years violate his constitutional right to be free from cruel and unusual punishment. *See* U.S. Const. amend. VIII; Ariz. Const. art. II, § 15.[4] We review this issue de novo. *See State v. Soto-Fong*, 250 Ariz. 1, ¶ 6 (2020) (constitutional interpretation of sentencing matters reviewed de novo).

¶21 As explained above, Van Dyck was convicted of twenty counts of sexual exploitation of a minor under fifteen. His convictions qualified for the dangerous crimes against children sentence enhancement. *See* A.R.S. §§ 13-705(Q)(1)(g), 13-3553(A), (C). The trial court was required by statute to impose consecutive sentences for each offense, and each sentence carries a minimum prison term of ten years. § 13-705(D), (M); *see also State v. Berger*, 212 Ariz. 473, ¶¶ 3, 6, 51 (2006). Thus, Van Dyck's twenty consecutive sentences of ten years each was the minimum available to the court.

¶22 Van Dyck contends his sentence is disproportionate under the United States Supreme Court's framework in *Solem v. Helm*, 463 U.S. 277, 292 (1983), and its modification in *Harmelin v. Michigan*, 501 U.S. 957, 1005 (1991) (Kennedy, J. concurring), because he is serving a "much longer term than he would as compared to second-degree murder." However, as the state correctly points out, in 2006, in *State v. Berger*, the Arizona Supreme Court considered this proportionality argument and rejected it. 212 Ariz. 473, ¶¶ 8-36. *Berger* compels our conclusion here.

¶23 In *Berger*, the defendant was convicted and sentenced just as Van Dyck, and he challenged his sentences under the Eighth Amendment's prohibition against cruel and unusual punishment. *See id.* ¶ 1 (twenty

[4]Although Van Dyck asserts his sentences violate both the United States and Arizona Constitutions, the caselaw he cites only interprets the Eighth Amendment. Because he has developed no argument why the Arizona Constitution would permit him relief, any argument regarding its protections is waived. *See State v. Sanchez*, 200 Ariz. 163, ¶ 8 (App. 2001) (failure to develop argument waives issue on appeal); *see also* Ariz. R. Crim. P. 31.10(a)(7). And, in any event, our supreme court has not interpreted article II, § 15 of the Arizona Constitution to "afford broader protection than its federal counterpart." *State v. Soto-Fong*, 250 Ariz. 1, ¶ 43 (2020); *see State v. Davis*, 206 Ariz. 377, ¶ 12 (2003).

separate convictions of sexual exploitation of a minor under fifteen, sentenced to twenty consecutive ten-year prison terms). Our supreme court applied the framework from the concurrence in *Harmelin* and determined Berger's sentences were not grossly disproportionate to his crimes, distinguishing *Solem*. *Id.* ¶¶ 11-17, 24-33. It reasoned that, in *Solem*, the conviction did not involve a mandatory sentence, and thus that case "did not implicate the 'traditional deference' that courts must afford to legislative policy choices when reviewing statutorily mandated sentences." *Id.* ¶ 32 (quoting *Ewing v. California*, 538 U.S. 11, 25 (2003)). "In light of the legislature's intent to deter and punish those who participate in the child pornography industry, and Berger's commission of twenty separate offenses," the court held that "[Berger's] twenty consecutive ten-year sentences are not grossly disproportionate to his crimes." *Id.* ¶ 51.

¶24 Van Dyck makes no argument as to why his case should be afforded different treatment from *Berger* despite the same sentences being imposed. He did not discuss *Berger* in his opening brief, and he did not respond in his reply brief to the state's assertion that it controls here. Accordingly, we apply *Berger* and conclude Van Dyck's sentences do not violate the Eighth Amendment's prohibition against cruel and unusual punishment. *See id.* ¶¶ 50-51; *see also State v. Smyers*, 207 Ariz. 314, ¶ 5 (court of appeals cannot disregard established Arizona Supreme Court precedent).

Disposition

¶25 For the foregoing reasons, we affirm Van Dyck's convictions and sentences.