NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

DAVID GOESEL, Appellant, v. STATE OF FLORIDA, Appellee.	)	Case No. 2D19-2730

Opinion filed October 30, 2020.

Appeal from the Circuit Court for Sarasota County; Stephen Walker, Judge.

Andrea Flynn Mogensen of Law Office of Andrea Flynn Mogensen, P.A., Sarasota, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Katherine Coombs Cline, Assistant Attorney General, Tampa, for Appellee.

NORTHCUTT, Judge.

Following his no contest plea while reserving the right to appeal the denial of his dispositive motion to suppress, David Goesel was convicted of charges related to the possession and distribution of child pornography. Goesel contends that his convictions must be set aside because the evidence against him was seized from his

home pursuant to a search warrant that was not supported by probable cause. He is correct.

This case began in October 2017, when the National Center for Missing and Exploited Children (NCMEC) received an automated transmission from Chatstep, an anonymous online chat room service, reporting that a single image of possible child pornography had been uploaded to one of its chat rooms. The report included the image file and the IP address from which it had been sent. NCMEC forwarded the report to the Sarasota County Sheriff's Office, where, in February 2018, Detective Eric Ellis reviewed the image and decided that it depicted illegal child pornography. Ellis ascertained from the internet service provider that the IP address identified in the report was registered to the street address of a home owned by Goesel. During his investigation, Ellis also learned that in August 2016 the sheriff's office had received a similar tip from NCMEC about an image uploaded to Chatstep from an IP address registered to the same location. But the detectives who examined that earlier image had determined that it was not pornographic, and so they had not begun a criminal investigation.

Based on this information, Ellis prepared the affidavit and application that led to the issuance of the warrant to search Goesel's home. Ellis's affidavit described the chain of transmission of the report from Chatstep to NCMEC to the sheriff's office. Although the affidavit described in detail the nonpornographic photo that Chatstep had reported in 2016, including the apparent age, state of dress, and physical positioning of the photo's subject, it contained no description whatever of the October 2017 photo, nor was the photo attached to the application. Rather, the affidavit simply declared that

"[y]our Affiant viewed the photo and it was determined that it did in fact depict child pornography."

In his motion to suppress and in this appeal, Goesel has raised numerous objections to the sufficiency of Ellis's affidavit. When reviewing the denial of a motion to suppress evidence seized pursuant to a search warrant, our undertaking "consists of 'a legal examination of the evidence in the affidavit to determine whether it establishes probable cause—with a presumption of correctness given to the trial court, which in turn gave great deference to the magistrate.' " Coronado v. State, 148 So. 3d 502, 505 (Fla. 2d DCA 2014) (quoting Barrentine v. State, 107 So. 3d 483, 484 (Fla. 2d DCA 2013)).

When assessing whether there is probable cause to justify a search, "the trial court must make a judgment, based on the totality of the circumstances, as to whether from the information contained in the warrant there is a reasonable probability that contraband will be found at a particular place and time." Pagan v. State, 830 So. 2d 792, 806 (Fla. 2002). "This determination must be made by examination of the four corners of the affidavit." Id.

Judged accordingly, the affidavit in Goesel's case was sorely lacking in two respects. First, it contained nothing to support the detective's conclusory assertion that the photo at issue qualified as child pornography. It is well established that such conclusory statements are insufficient to support the issuance of a search warrant. Rather, "[s]ufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others." Illinois v. Gates, 462 U.S. 213, 239 (1983) (emphasis added); see also Aguilar v. Texas, 378 U.S. 108, 114–16 (1964) (holding that an affidavit was

insufficient to support a finding of probable cause when it failed to inform the magistrate of the underlying circumstances on which the affiant reached his conclusion); Nathanson v. United States, 290 U.S. 41, 47 (1933) (holding that a search warrant cannot rest on "mere affirmance of suspicion or belief without disclosure of supporting facts or circumstances"); Burnett v. State, 848 So. 2d 1170, 1173 (Fla. 2d DCA 2003) ("[W]holly conclusory statements fail to meet the probable cause requirement; the reviewing magistrate cannot abdicate his or her duty and become a mere ratifier of the bare conclusions of others.").

Section 933.18, Florida Statutes (2017), which sets forth the requirements for issuing a warrant to search a private dwelling, likewise states that no such warrant shall be issued unless it is supported by a sworn affidavit that "shall set forth the facts" on which the claim of probable cause is based. Here, there simply was no information from which the magistrate could independently verify the detective's conclusion that the photo was illegal child pornography, as opposed to lawful, nonobscene nudity. See generally Schmitt v. State, 590 So. 2d 404, 409–10 (Fla. 1991) (noting the distinction between First Amendment-protected nudity and unlawful pornography). By authorizing the search of Goesel's home in blind reliance on Ellis's unsupported claim that there was probable cause to do so, the magistrate plainly violated the Fourth Amendment's requirement that justification for a search be independently verified by a neutral magistrate. See Johnson v. United States, 333 U.S. 10, 13–14 (1948) ("The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a

neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. . . . When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent.").

This sole reliance on Ellis's bare conclusion was even more problematic when considering the affidavit's second flaw, which was that it did not demonstrate that Ellis had any training or expertise in identifying child pornography. Ellis stated that he had at that point served with the sheriff's office for nine years and was at that time assigned to the office's intelligence section, conducting criminal investigations and digital forensic examinations. The affidavit recited some history of involvement in child pornography investigations, stating that the detective was a member of the Central Florida Internet Crimes Against Children task force, that he had "conducted investigations involving the possession and transmission of child pornography," and that he had "participated in numerous search warrants involving the detection of child pornography and child enticement."

However, all of the training listed in Ellis's affidavit had been technology-related, i.e., he had completed over one hundred hours of digital forensic investigation training, including courses in data recovery and analysis, encryption, identifying and seizing electronic evidence, peer-to-peer file sharing networks, and many other similar topics. He also stated that he had "been involved in a number of investigations into persons sharing child pornography via Peer to Peer (P2P) file sharing networks." The affidavit did not indicate that Ellis had been involved in analyzing the legality of images

or that he was otherwise trained, either in a classroom or on the job, to identify child pornography and distinguish it from legal images of simple nudity.

In short, Ellis's background and experience added no weight to his unsupported conclusion that the image at issue was unlawful child pornography. See Burnett, 848 So. 2d at 1174 (holding that an affiant's conclusions regarding the likely presence of child pornography were insufficient to establish probable cause in part because the affiant "failed to describe any personal experience with child pornography from which her conclusions concerning [the defendant] were derived").

The State asserts that, even if the affidavit failed to establish probable cause in this case, we should affirm Goesel's convictions based on a good-faith exception to the exclusionary rule. However, if "an objectively reasonable officer would have known that the affidavit was insufficient to establish probable cause for the search, the good faith exception does not apply." Gonzalez v. State, 38 So. 3d 226, 230 (Fla. 2d DCA 2010); see also Coronado, 148 So. 3d at 507. Such is the case here. An objectively reasonable officer would have known that an officer's conclusory assertion of criminality without any supporting details and without any demonstrated expertise on the subject would be insufficient to establish probable cause for a search. See § 933.18; Gates, 462 U.S. at 239; Burnett, 848 So. 2d at 1174. The good-faith exception simply does not apply in this case. As a matter of law, the evidence obtained pursuant to the search warrant founded on Ellis's affidavit should have been suppressed.

Accordingly, we reverse Goesel's convictions and remand for him to be discharged.

Reversed and remanded.

MORRIS and ROTHSTEIN-YOUAKIM, JJ., Concur.