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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000637-MR

MATTHEW R. TIPTON APPELLANT

v.

APPEAL FROM BOURBON CIRCUIT COURT
HONORABLE MICHAEL DEAN, SPECIAL JUDGE
ACTION NO. 15-CR-00095

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MAZE, TAYLOR, AND THOMPSON, JUDGES.

MAZE, JUDGE: Matthew R. Tipton appeals from a judgment of the Bourbon Circuit Court convicting him of twenty counts of possession of matter portraying a sexual performance by a minor. He argues that his conviction for the multiple counts violates his rights against double jeopardy, and that the trial court erred in holding that his conviction requires him to register as a sexual offender upon his release. Tipton further challenges the trial court's rulings regarding the admission

of a statement he gave to police at the time of his arrest and the validity of the search warrant. We find no error or abuse of discretion as to any of these issues. Hence, we affirm.

I. Facts and Procedural History

On October 6, 2015, a Bourbon County grand jury returned an indictment charging Tipton with one hundred counts of possession of matter portraying a sexual performance by a minor and one count of distribution of matter portraying a sexual performance by a minor, first offense. The charges arose following an investigation conducted by the Office of the Attorney General's Cyber Crimes Unit. On July 2, 2015, Investigator Mike Littrell, using BitTorrent software, sent a request to an indexing computer, known as the ultra peer, asking if there was any child pornography being shared. The ultra peer identified the IP address[1] 69.23.235.213 as sharing child pornography. The IP address was registered to Time Warner Cable.

Investigator Littrell downloaded 103 files, including fourteen complete files, from the IP address. He later verified that the images contained child pornography. Investigator Littrell also sent a subpoena to Time Warner Cable to obtain the name of the person leasing the IP address. The leasing information revealed that Tipton's mother, Christine Smits, owned the account. The address on the bill was 107 Pineview Drive in Paris, Kentucky.

[1] An Internet Protocol (IP) address is a unique string of numbers separated by periods that identifies each computer using the Internet Protocol to communicate over a network.

After verifying the address, Investigator Littrell obtained a warrant to search the residence. He went to the address during the morning of September 23, 2015, accompanied by three other investigators from the Attorney General's Office and a uniformed State Trooper. The officers knocked on the door of the apartment, but there was no answer. Investigator Littrell obtained a key to the apartment from the landlord, entered, and found Tipton asleep on the couch. On further questioning, Tipton made statements indicating that he had knowledge of the child pornography files on the computer. The officers seized two computers and several external hard drives from the residence. A forensic examination of the computers revealed child pornography images and videos on one of the computers and two hard drive units.

After the indictment was returned, Tipton filed a motion to suppress evidence seized, arguing that the warrant and affidavit were defective on their face. Following a hearing, the trial court denied the motion, concluding that the warrant and affidavit were sufficient and established probable cause for the search. Tipton filed a second motion challenging the warrant, which the trial court denied as untimely.

Prior to trial, the Commonwealth filed a motion pursuant to KRE[2] 404(b) stating its intent to introduce portions of Tipton's statement referring to prior and other uncharged acts of possessing child pornography. Over Tipton's objection, the trial court admitted the statement, concluding that the probative

[2] Kentucky Rules of Evidence.

value of the evidence outweighed its prejudicial effect. Thereafter, the Commonwealth moved to dismiss Counts 21-100 of the indictment and proceeded to trial on twenty counts of possession of matter containing a sexual performance by a minor and one count of distribution of matter portraying a sexual performance by a minor.

At the start of trial, Tipton also moved to suppress the statement, arguing that it was not knowingly and voluntarily made. The trial court also denied this motion. At the conclusion of trial, the court granted a directed verdict on the distribution charge and submitted the twenty possession charges to the jury. The jury returned guilty verdicts on all counts. The jury fixed his sentence at one year on each count, with Counts 1-11 to run consecutively and Counts 12-20 to run concurrently for a total of eleven years' imprisonment.

Prior to sentencing, Tipton argued that his conviction for all twenty counts violated double jeopardy because his downloading and possession of the images constituted a single offense. The trial court denied the motion to amend the indictment on this ground. The trial court also denied Tipton's motion that he should not be required to register as a sex offender. The trial court then entered a judgment imposing the jury's sentence. Tipton now appeals. Additional facts will be set forth in this opinion as necessary.

II. Double Jeopardy

Tipton first argues that his convictions on twenty counts of possession of matter portraying a sexual performance by a minor violated his rights against

double jeopardy. The Fifth Amendment to the United States Constitution and § 13 of the Kentucky Constitution each prohibit the Commonwealth from twice placing a person in jeopardy for the same offense. To determine whether convictions violate double jeopardy, Kentucky has adopted the test set out in *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932). *See Dixon v. Commonwealth*, 263 S.W.3d 583, 588-89 (Ky. 2008), and *Beaty v. Commonwealth*, 125 S.W.3d 196, 210 (Ky. 2003), *overruled on other grounds by Gray v. Commonwealth*, 480 S.W.3d 253 (Ky. 2016).

In *Blockburger*, the United States Supreme Court held that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger*, 284 U.S. at 304, 52 S. Ct. 180 (citations omitted). This rule is further explained in KRS[3] 505.020, which allows prosecution for multiple offenses arising from a single course of conduct but prohibits such prosecution if the offense is designed to prohibit a continuing course of conduct; and the defendant's course of conduct was uninterrupted by legal process.

Tipton argues that the downloading and possession of all of the pornographic matter constitutes a single course of conduct. Thus, he contends that he may only be convicted of a single act of possession of such matter. In support of this position, Tipton relies heavily on *United States v. Buchanan*, 485 F.3d 274

[3] Kentucky Revised Statutes.

(5th Cir. 2007), which held that possession of multiple items of child pornography constitutes only a single offense for purposes of double jeopardy. *Id.* at 278-79.

But in *Buchanan*, the defendant was prosecuted under 18 U.S.C.[4] § 2252(a)(2), which requires proof of separate receipts of the contraband material. *Id.* at 282. In the absence of evidence that the defendant downloaded the offending images from more than one website, the Fifth Circuit concluded that multiple counts for a single possession would violate the defendant's rights against double jeopardy. *Id.* at 282-83.

In this case, however, Tipton was charged under KRS 531.335, which provides:

> 1) A person is guilty of possession or viewing of matter portraying a sexual performance by a minor when, having knowledge of its content, character, and that the sexual performance is by a minor, he or she:
>
> (a) Knowingly has in his or her possession or control any matter which visually depicts an actual sexual performance by a minor person; or
>
> (b) Intentionally views any matter which visually depicts an actual sexual performance by a minor person.

KRS 531.300(2) defines "matter" to mean:

> any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, live image transmitted over the Internet or other electronic network, or other pictorial representation or any statue or other figure, or any recording transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines, or materials[.]

[4] United States Code.

The singular form of the words "picture," "drawing," "photograph," "motion picture," and "live image," when read in conjunction with the term "any," clearly indicates that the Legislature intended prosecution for each differing image. (*See Williams v. Commonwealth*, 178 S.W.3d 491, 495 (Ky. 2005)). Thus, unlike the statute at issue in *Buchanan*, KRS 531.335 criminalizes the possession of each image, rather than the single course of conduct of receiving or distributing child pornography.

"Double jeopardy does not occur when a person is charged with two crimes arising from the same course of conduct, as long as each statute 'requires proof of an additional fact which the other does not.'" *Commonwealth v. Burge*, 947 S.W.2d 805, 809 (Ky. 1996) (quoting *Blockburger*, 284 U.S. at 304, 52 S. Ct. at 182)). In this case, each count required proof of a separate picture or image of child pornography. Therefore, Tipton's conviction for twenty counts of possession of child pornography did not violate his rights against double jeopardy.

III. Registration Requirement

Second, Tipton argues that he is not required to register as a sexual offender against a minor. Tipton points to *Griffith v. Commonwealth*, No. 2012-CA-002060-MR, 2015 WL 2156641 (Ky. App. May 8, 2015), in which a panel of this Court distinguished between the requirements for a registrant who is convicted of an offense against a minor and one who is a convicted of a sex offense. *Id.* at *5. The panel in *Griffith* held that, since the definition of "sex crime" in KRS 17.500(8) does not include a conviction under KRS 531.335, then a conviction

under that statute would not subject a registrant to the enhanced restrictions under the Sexual Offender Registration Act. *Id.*

However, in 2014 the General Assembly amended KRS 17.500(8) to specifically include a conviction for possession of matter portraying a sexual performance by a minor. 2014 Ky. Acts, ch. 94 §4 (HB 343). And even prior to 2014, an individual who was convicted of "any offense involving a minor or depictions of a minor, as set forth in KRS Chapter 531" was required to register as a sex offender.[5] *Hamilton-Smith v. Commonwealth*, 285 S.W.3d 307, 309 (Ky. App. 2009). We conclude that any contrary language in *Griffith* has been superseded by the statutory amendment. Therefore, the trial court properly held that Tipton is required to register as a sexual offender.

IV. Admissibility of Statements to Police

Third, Tipton raises several issues relating to the admissibility of the statement he made to police during the search of his residence. He first argues that the statement was not knowingly and voluntarily given. In his pretrial motion, Tipton challenged the sufficiency of the warrant, as well as the admissibility of certain portions of the statement. However, Tipton did not raise any objection to the voluntariness of the statement until after the start of trial. The Commonwealth argues that his motion raising this issue was untimely under RCr[6] 9.22.

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[5] Since the statutory language includes depictions of minors, we find no basis for Tipton's suggestion that the age of the minor at the time he possessed the images is relevant to determine his registration obligations.

[6] Kentucky Rules of Criminal Procedure.

That rule requires a timely and appropriate objection to the admission of evidence in order to preserve an issue for review. *Collett v. Commonwealth*, 686 S.W.2d 822, 823 (Ky. App. 1984). Tipton clearly knew of other grounds to challenge the admissibility of the statement prior to trial, but he offers no explanation for his failure to raise this issue until after trial began. Furthermore, Tipton does not request palpable error review of this issue. Absent extreme circumstances amounting to a substantial miscarriage of justice, an appellate court will not engage in palpable error review pursuant to RCr 10.26 unless such a request is made and briefed by the appellant. *Shepherd v. Commonwealth*, 251 S.W.3d 309, 316 (Ky. 2008). The suppression hearing clearly establishes that Investigator Littrell advised Tipton of his *Miranda*[7] rights before questioning. Therefore, we find no basis to further address the voluntariness of his statement.

Tipton also contends that the probative value of the interview was substantially outweighed by its prejudicial effect. During the interview, Tipton made statements to other acts of downloading child pornography and engaging in role-playing games with respect to his fantasies. As noted above, the trial court overruled Tipton's pretrial objection to the Commonwealth's notice of its intent to introduce evidence of other, uncharged bad acts. He argues that the evidence was unfairly prejudicial and was not relevant to the charged acts relating to his possession of child pornography.

[7] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

KRE 404(b) prohibits the admission of evidence of bad acts other than those charged to show action in conformity therewith. It may, however, be admissible:

> (1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; or
> (2) If so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.

To determine the admissibility of evidence of uncharged bad acts or crimes, the trial court must first determine whether the evidence is relevant for some other purpose than to prove the criminal disposition of the accused. *Bell v. Commonwealth*, 875 S.W.2d 882, 889 (Ky. 1994). Second, the court must determine whether the act "is sufficiently probative of its commission to warrant its introduction into evidence." *Id.* at 890. Finally, the court must balance the evidence's probative value against its potential for unfair prejudice. *Id.* We review the trial court's rulings on admission of evidence for abuse of discretion. *Clark v. Commonwealth*, 223 S.W.3d 90, 95 (Ky. 2007).

In this case, the trial court found that the evidence was relevant and probative to show that Tipton's possession of child pornography was not by mistake or accident. Furthermore, Tipton's reference to other uncharged crimes or bad acts was intertwined with the other statements he made during the interview. We find no abuse of discretion in these determinations.

Tipton primarily argues that the trial court erred in concluding that the probative value of the evidence outweighed its prejudicial effect. In his statement, Tipton referred to downloading pornography when he attended college five years earlier. But while Tipton's statements about downloading child pornography while in college were remote to the current offenses, they clearly demonstrate that he deliberately sought out the downloads in the current case. To this extent, their probative value outweighed the potential for unfair prejudice.

On the other hand, we are not as certain about the probative value of Tipton's statements regarding online role-playing with adults. However, that portion of the interview comprised a very small portion of the evidence. And, as noted above, that portion of the interview was also closely intertwined with admissible matters in the interview. Furthermore, there is no indication that the Commonwealth improperly emphasized that portion of the statement as evidence of his predilection to commit the current crimes. Accordingly, we conclude that any error in admitting this portion of the interview was harmless beyond a reasonable doubt.

V. Validity of Search Warrant

Finally, Tipton argues that the trial court erred in denying his motion to suppress evidence seized pursuant to the search warrant. RCr 8.27 sets out the procedure for conducting a suppression hearing. When the trial court conducts a hearing, our standard of review is two-fold. "First, the factual findings of the court are conclusive if they are supported by substantial evidence [;]" and second, this

Court conducts "a *de novo* review to determine whether the [trial] court's decision is correct as a matter of law." *Stewart v. Commonwealth*, 44 S.W.3d 376, 380 (Ky. App. 2000) (citing *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998)).

Tipton argues that the search warrant and affidavit failed to describe the persons to be searched or to state with particularity the content of the files to be seized. He specifically contends that the affidavit failed to mention him by name, noting that the affidavit stated only that the IP address was leased to his mother. Tipton also asserts that the affidavit failed to set out the basis for Investigator Littrell's conclusion that the computer files contained child pornography.

Under the "totality-of-the circumstances" test, the warrant-issuing judge is not required to attest to the validity of the information provided in the warrant. Rather the judge must make "a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, ... there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Minks v. Commonwealth*, 427 S.W.3d 802, 808 (Ky. 2014) (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332, 76 L. Ed. 2d 527 (1983). *See also Beemer v. Commonwealth*, 665 S.W.2d 912 (Ky. 1984)). We agree with the trial court that the affidavit was sufficient under this test.

In its findings denying the motion to suppress, the trial court noted that the affidavit

> consists of ten pages which particularly identified the Defendant's apartment building, the type of structure, apartment number, GPS coordinates, and a specific list of

> items to be seized. It also sets forth details surrounding the Affiant's investigation which established probable cause to believe that evidence of the alleged crimes were located on the premises. This included a determination that the [IP] address for the computer being investigated was registered to Time Warner Cable, and that through issuance of a subpoena to Time Warner, that the Subscriber for the [IP] address was located at 107 Pineview Drive, which is the address listed in the search warrant.

Contrary to Tipton's argument, Investigator Littrell was not required to specifically name him as a person to be searched, but only to attest to information showing a reasonable basis for his conclusion that evidence of a crime would be found in a particular place. In addition, we note that Investigator Littrell's affidavit set out his basis for concluding that the files downloaded from the IP address contained child pornography. Under the circumstances, we agree with the trial court that the affidavit was sufficient as a matter of law.

Lastly, Tipton asserts that the information supporting the search warrant was stale due to the lapse of time between Investigator Littrell's downloading of the files and the obtaining of the warrant. In his second motion to suppress, filed approximately one month before trial, Tipton briefly asserted that the information supporting the affidavit was stale. The trial court concluded that this motion was untimely, as the issues raised should have been presented in his first motion.

Although the motion was filed approximately one month prior to the start of trial, it was the second motion. Furthermore, as the trial court pointed out,

the additional issues could have been raised in Tipton's first motion to suppress. But even if the motion was timely, we conclude that the information provided in the affidavit was not unconstitutionally stale. Although Investigator Littrell downloaded the files on July 2, 2015, the investigation was ongoing through September 18 when he confirmed that the physical location of the IP address provided by Time Warner Cable. Investigator Littrell's affidavit sets forth a reasonable basis to believe that evidence of child pornography would still be found in Tipton's apartment despite the lapse of time from the original download. Furthermore, the affidavit also supports a conclusion that Investigator Littrell took timely steps to obtain the warrant on September 22, and to serve it on September 23. Therefore, the trial court did not err in finding that the affidavit provided probable cause for the issuance of the search warrant.

VI. Conclusion

Accordingly, we affirm the judgment of conviction by the Bourbon Circuit Court.

ALL CONCUR.

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