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Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000763-MR

RYAN S. HUBBARD APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANGELA MCCORMICK BISIG, JUDGE
ACTION NO. 15-CR-000810

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CALDWELL, JONES, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Ryan S. Hubbard brings this appeal from a May 1, 2019, judgment of the Jefferson Circuit Court upon a conditional guilty plea, pursuant to *Alford v. North Carolina*, 400 U.S. 25 (1970), to the criminal offense of distribution of matter portraying sexual performance by a minor. We affirm.

After the Kentucky State Police received a tip from the National Center for Missing and Exploited Children, State Police Detective Craig Miller

began a criminal investigation of Hubbard for allegedly possessing and/or distributing videos portraying sexual performance by a minor. The pertinent steps in Detective Miller's investigation were outlined in his affidavit for a search warrant, as follows:

> On Monday, February 23, 2015[,] at 1530 hours, Sgt. Mike Bowling gave me a Cyber Tip. Sgt. Bowling advised the Cyber Tip was from the National Center for Missing and Exploited Children [NCMEC]. I began reviewing the Cyber tip. The Cyber tip was submitted by Omegle.comLLC [sic] Leif K-Brooks. In the cyber tip it had information received by the company.
>
> The company information said [O]megle's chat system automatically captures snapshots from webcam video streams. These snapshots are reviewed by a moderation team. When a moderator flags a snapshot as containing apparent child pornography, Omegle reports it to the Cyber Tipline. Multiple files may be attached. In that case, the first file is the one which was specifically flagged. Additional files were captured from the same IP address and/or ID cookie in other chat sessions, and were present in the moderation system at the time the first file was flagged. A single file may contain multiple snapshots. These snapshots were captured in rapid succession within the same chat session. . . .
>
> . . . .
>
> I reviewed the files submitted to NCMEC from Omegle. In several of the images it appeared there was a very young child [who] appeared to be under the age of 12 based on muscle development and features. It appeared there was a mask covering the child's face. It appeared the child was engaged in lewd sexual activity with an adult male. There were [sic] also a screen shot of

> the potential offender involved in the lewd sexual activity with the juvenile.
>
> On Monday, February 23, 2015[,] I obtained and served a subpoena to both Omegle and Time Warner [C]able. I served the Subpoena to Omegle to obtain IP addresses used. I served a subpoena to Time Warner [C]able for user subscriber information.
>
> On Tuesday, February 24, 2015[,] I petitioned for a search warrant through Franklin County District Court. The search warrant was signed and served via email to Leif K-Brooks[.] I sent the search warrant to email address eurlief@gmail.com.
>
> On Wednesday, February 25, 2015[,] I received the return from Time Warner Cable. The return had the user subscribed as Ryan Hubbard with an address of 2709 [Parklawn] Dr., Louisville, KY, 40217.
>
> On Friday, February 27, 2015[,] I gave the information to Shayla Burris an intel anaylyst [sic] with the Kentucky State Police.
>
> On Friday, February 27, 2015[,] I received [an] email from Mr. Brooks with Omegle[.] Mr. Brooks advised he had sent out an encrypted disc with the images I requested from the account associated with this complaint. (IP 74.128.244.178[)].
>
> On Monday, March 2, 2015[,] Mrs. Burris advised she found an Ohio drivers [sic] license for Mr. Hubbard. I reviewed the screen shots [O]megle provided in the cyber tip and identified the person in one of the screen shots as Mr. Hubbard. . . .

Detective Miller's Affidavit at 4-5. Based upon Detective Miller's affidavit, a search warrant was issued for Hubbard's residence and any vehicles located

thereupon. The search warrant was executed by police. The police seized electronic storage devices, camera, cell phone, web camera, and a laptop computer.

On March 23, 2015, the Jefferson County Grand Jury indicted Hubbard upon four counts of distribution of matter portraying sexual performance by a minor (Kentucky Revised Statutes (KRS) 531.340) and four counts of possession of matter portraying sexual performance by a minor (KRS 531.335). It was alleged that these offenses all occurred on January 31, 2015, and pertained to images of a child involved in sexual activity with an adult male.

Thereafter, Hubbard filed a motion to suppress evidence seized from execution of the search warrant. Hubbard argued that the search warrant affidavit was deficient and failed to demonstrate probable cause that evidence of the indicated offenses would be found at his residence or motor vehicle. The Commonwealth then filed a Notice pursuant to Kentucky Rules of Evidence (KRE) 404(b) of its intent to introduce:

> 1. Skype chats found on [Hubbard's] phone and computer which discuss child sexual exploitation and the transfer and/or sharing of child sexual exploitation images to others.

July 19, 2016, Commonwealth Notice and Memorandum at 1. In his response, Hubbard asserts that the Skype chats were irrelevant and highly prejudicial.

By order entered September 20, 2016, the circuit court denied Hubbard's motion to suppress evidence seized at his residence and in his motor

vehicle. The circuit court also concluded that the Skype chats were admissible to demonstrate Hubbard's knowledge and intent to possess child pornography and the absence of mistake. The circuit court also determined that any prejudicial effect of the chats was substantially outweighed by their probative value.

Eventually, the Commonwealth and Hubbard reached a plea agreement. Under its terms, Hubbard would enter a conditional guilty plea pursuant to *Alford*, 400 U.S. 25 to one count of distribution of matter portraying a sexual performance by a minor. Kentucky Rules of Criminal Procedure (RCr) 8.09. The Commonwealth also agreed to a one-year term of imprisonment and to not object to probation. The circuit court accepted Hubbard's conditional guilty plea pursuant to *Alford* and noted that Hubbard preserved issues relating to the court's pretrial rulings for appeal. By amended judgment entered May 1, 2019, the circuit court sentenced Hubbard to one-year imprisonment probated for a period of five years. This appeal follows.

Hubbard initially contends that KRS 531.330 and KRS 531.340 violate Sections 2, 11, 28, and 124 of the Kentucky Constitution. Hubbard admits that this issue was not raised before the circuit court. He urges this Court to review the issues under RCr 10.26, the palpable error rule. We decline to do so for the reasons hereinafter set forth.

The Kentucky Supreme Court held that the following issues may be considered on appeal from a conditional guilty plea:

> (1) [The issues] involve a claim that the indictment did not charge an offense or the sentence imposed by the trial court was manifestly infirm, or (2) the issues upon which appellate review are sought were expressly set forth in the conditional plea documents or in a colloquy with the trial court, or (3) if the issues upon which appellate review is sought were brought to the trial court's attention before the entry of the conditional guilty plea even if the issues are not specifically reiterated in the guilty plea documents or plea colloquy.

Dickerson v. Commonwealth, 278 S.W.3d 145, 149 (Ky. 2009).

Having reviewed the circuit court record and particularly the guilty plea colloquy, it is clear that issues concerning the validity or constitutionality of KRS 531.330 and/or KRS 531.340 were not brought to the circuit court's attention and were not expressly preserved pursuant to the conditional plea documents or guilty plea colloquy. Additionally, the issue concerning the constitutionality of KRS 531.330 and KRS 531.340 does not result in a "manifestly infirm[ed]" sentence. *Dickerson*, 278 S.W.3d at 149. We further question whether the attorney general was properly notified of Hubbard's claim that KRS 531.330 and KRS 531.340 are unconstitutional. KRS 418.075; *Benet v. Commonwealth*, 253 S.W.3d 528, 532 (Ky. 2008); *Prickett v. Commonwealth*, 427 S.W.3d 812, 814 (Ky. App. 2013). As a result, we do not believe the constitutionality of KRS 531.330 and KRS 531.340 is properly preserved for our review in this appeal.

Hubbard further asserts that the circuit court erroneously denied his motion to suppress evidence seized at his residence and in his motor vehicle under the search warrant. Specifically, Hubbard argues that the affidavit fails to establish probable cause that evidence of the indicted offenses would be found at his residence or motor vehicle and failed to allege criminal activity with sufficient specificity. In particular, Hubbard argues:

> On February 23, 2015, Detective Miller received information that the IP address later determined to be that of [Hubbard] was involved in child sexual exploitation. The information consisted of 11 images captured by Omegle on January 31, 2015. The search warrant was obtained and executed on March 17, 2015.
>
> In the penultimate paragraph of the Affidavit, the Detective wrote that, based on the information provided, he had probable cause to believe that he would find "evidence; fruits and instrumentalities of those violations previously mentioned" (i.e., Chapter 531) and that they were located at 2709 [Parklawn] Dr., Louisville, Ky.[,] 40217.
>
> But it was unreasonable to conclude that any further information about the January 31st offenses would be found at the Parklawn house. The only record of those chats, apparently, would be the screenshots taken by Omegle. On February 27, 2015, the Detective received an encrypted disc from Omegle. It contained images from the account associated with Mr. Hubbard. The Detective did not say what was on that disc. Surely if something useful or important was on the disc he would have mentioned it in his Affidavit. The chances of finding anything related to the charged offenses on Mr. Hubbard's computer or phone were remote, to say the least.

. . . .

> The Affidavit indicated that the detective suspected violations of KRS Chapter 531. These statutes proscribe sexual exploitation of minors. An application for a warrant seeking evidence must necessarily advise the magistrate of facts showing a possible violation of these statutes. It must allege a factual basis upon which a judge can conclude that a violation may have occurred. The affidavit in this case did not do so.
>
> The Affidavit contained a recitation of the detective's investigation including review of the materials contained in the cyber tip. As to the sexual nature of the images, Detective Miller wrote:
>
> > "It appeared the child was engaged in lewd sexual activity with an adult male."
>
> This was the extent of information about sex activity. . . .

Hubbard's Brief at 16-19 (citations omitted).

It is well-established that a search warrant must be "based upon facts given under oath, establishing probable cause, and 'particularly describing the place to be searched and the persons or things to be seized.'" *Howard v. Commonwealth*, 362 S.W.3d 333, 336 (Ky. App. 2011) (quoting *Maryland v. Garrison*, 480 U.S. 79, 84 (1987)). To issue a search warrant, there must be presented in the affidavit sufficient information establishing a fair probability that evidence of a crime will be discovered in a particular location. *Minks v. Commonwealth*, 427 S.W.3d 802, 808 (Ky. 2014) (citing *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). On appellate review, we must determine based upon the totality

of circumstances "whether there was a substantial basis for concluding that probable cause existed." *Minks*, 427 S.W.3d at 810 (citing *Commonwealth v. Pride*, 302 S.W.3d 43, 48-49 (Ky. 2010)).

In this case, the affidavit stated that several files were discovered and flagged by Omegle.com LLC as possibly containing child pornography.[1] These files contained eleven images, and some of the images were of a young child under twelve years old with a mask covering his face engaged in sexual activity with an adult male. The affidavit stated that the images were traced to Hubbard's IP address and that the IP address was located at his residence in Louisville, Kentucky, which was the subject of the search warrant.

In denying the motion to suppress, the circuit court reasoned:

> Reviewing the facts alleged in the affidavit, the Court finds that the facts alleged by the affiant police officer establish probable cause to search 2709 Parklawn Drive. The affidavit describes the source of the tip as Omegle and explains how the company's system detects child pornography. The tip was not anonymous but came from an identified source. The tip also included multiple photos, one of which is Hubbard, as corroborated by evidence from Time Warner Cable, KSP, and the Ohio Bureau of Motor Vehicles. Based on the totality of the circumstances, the Court finds that there was sufficient indicia of reliability accompanying the tip to provide probable cause. No further identification or explanation of the source of the tip was required in the affidavit.

[1] Omegle.com LLC submitted a cyber tip to the National Center for Missing and Exploited Children, which was the originating source for the affiant's investigation.

> Next, the Court finds that the description of the contraband was sufficient because it alleged that images of a child under twelve years of age engaged in lewd sexual activity with an adult male were linked to an IP address at 2709 Parklawn Drive. It is irrelevant whether the images were photos, pre-recorded videos, or live-stream because each is a felony and would provide a magistrate with probable cause to conclude that a search warrant would uncover evidence of wrongdoing. Hubbard asserts that the words "it appeared" demonstrate a lack of certainty on the part of the detective. The Court does not find that the word choice creates a level of uncertainty so as to remove any basis for probable cause. Reading the affidavit as a whole makes clear that the tip included reports of child pornography.
>
> Hubbard argues that the affidavit described the photo of him as engaging in sexual activity with a minor when in fact he is sitting in a chair alone. The Commonwealth argues that the affidavit says that child pornography was a part of a video chat session and that a screenshot from that same or related chat session is of Hubbard. The Court agrees with Hubbard that the word choice in the affidavit is somewhat misleading, as it seems to indicate that the photo is of Hubbard actively engaging in sexual activity with a minor. However, this one poorly worded sentence does not detract from the rest of the facts alleged in the affidavit which establish probable cause. Even if the affidavit clearly stated, as the Commonwealth alleges, that child pornography was transmitted during a video chat session and in the same or a related session and a screenshot of Hubbard was taken, this still would have provided the magistrate with sufficient probable cause to determine that a search would uncover evidence of wrongdoing based on the totality of the circumstances.

September 20, 2016, Order at 6-7. We agree with the circuit court's reasoning.

The mere act of possessing or distributing images of a minor child engaged in sexual activity with an adult constitutes a crime in Kentucky. KRS 531.335; KRS 531.340. Thus, the affidavit set forth the offenses with the required specificity. And, considering the discovery of images of a child engaging in sexual relations with an adult male, the linking of Hubbard's IP address to those images, and Hubbard being identified in one of the images, the affidavit set forth compelling and incriminating facts. Moreover, Hubbard's IP address was at his residence, which was the premises specified to be searched in the warrant. Based upon the totality of the circumstances, we believe that a substantial basis existed for the circuit court to conclude that there was a fair probability that evidence of Hubbard's criminal activity would be located at his residence and in his motor vehicle. *See Minks*, 427 S.W.3d at 808, 810.

Hubbard next asserts that the circuit court erred by denying his motion to suppress evidence seized from his motor vehicle through execution of the search warrant. Hubbard argues that the affidavit fails to establish probable cause to search his motor vehicle:

> On the front of the AOC-335 form Detective Miller did type "Any and all vehicles on the premises." And the Warrant authorized a search of "Any and all vehicles on the premises." But there is nothing – nothing at all – in the Affidavit to suggest that any of the items sought would be found in a motor vehicle. To the contrary, Detective Miller gave his expert opinion that persons involved in child pornography "almost always maintain

> and possess their materials in the privacy and security of their homes."
>
> A fair-minded and prudent magistrate would conclude from the Affiant's affirmative representation that the sought items would be hidden in the "privacy and security" of the home, and that it was unreasonable to expect to find any of the sought items in a car. . . .
>
> . . . .
>
> The Affidavit did not afford a substantial basis as to the car. Instead, the Affidavit established that nothing was likely to be found there. To the extent that the warrant authorized a search of "any and all vehicles on the premises" it was a general warrant. General searches are prohibited by the 4th Amendment and §10 of the Constitution, both of which require probable cause to search anywhere or anything. All items seized from the vehicle should have been excluded from evidence.

Hubbard's Brief at 15-16 (citations omitted).

In its order denying Hubbard's motion to suppress, the circuit court concluded:

> [T]he Court finds that the search of the vehicle was constitutionally valid. The warrant sufficiently described the premises and included within its scope any vehicles located on the premises at 2709 Parklawn Drive. Hubbard's vehicle was parked beside his home in the driveway at the place to be searched. The Court finds that the warrant was specific enough to include the vehicle parked in the driveway next to the home. Additionally, even if the description was too vague, the Court finds that the officers who executed the search acted in good faith, believing that they had probable cause to search the vehicle because it was located on the premises described in the warrant. Because there was a

> valid warrant to search the vehicle, any items seized during the search of Hubbard's vehicle were constitutionally seized and the evidence shall not be suppressed.

September 20, 2016, Order at 8. As found by the circuit court, Hubbard's vehicle was located in the driveway of his residence at the time the search warrant was executed. Generally, our courts permit the search of a motor vehicle if it is owned and controlled by the owner of the premises to be searched. *McCissell v. Commonwealth*, 305 S.W.2d 756 (Ky. 1957); *see also United States v. Percival*, 756 F.2d 600, 612 (7th Cir. 1985). And, there was a substantial basis to conclude a fair probability existed that evidence of Hubbard's criminal activity would be located in his motor vehicle. The affidavit particularly indicated that computers, cell phones, data storage devices, and cameras were items to be seized. It is reasonable that such items could be stored or hidden in Hubbard's motor vehicle. Thus, we cannot conclude that the circuit court erred by denying Hubbard's motion to suppress evidence seized from his motor vehicle.

Hubbard also contends that the circuit court erroneously denied his motion to exclude evidence of Skype chats found on his computer and cell phone. Hubbard concedes that the Skype chats "met the minimal standard of relevance defined by KRE 401." Hubbard's Brief at 24. However, Hubbard argues that the Commonwealth failed to sufficiently demonstrate that he actually authored Skype chats under the name "chicagoshane10." Hubbard also points out that the Skype

chats occurred days before the charged offenses; consequently, the chats were not relevant. And, Hubbard maintains that the prejudicial effect of admitting the Skype chats far outweighs the probative value.

In ruling upon the Skype chats, the circuit court thoroughly set forth its reasoning:

> The Commonwealth seeks to introduce evidence of Skype chats found on Hubbard's phone and computer which discuss child sexual exploitation and the transfer and/or sharing of child sexual exploitation images to others. First the Court will analyze this issue under the first inquiry in *Bell* [*v. Commonwealth*, 875 S.W.2d 882, 889 (Ky. 1994)] and consider whether evidence of the chats is relevant for some purpose other than to prove the criminal disposition of the accused. The Commonwealth has argued that this evidence will be used to show Hubbard's knowledge and intent to possess and distribute child pornography, as well as lack of mistake or accident. The Court agrees with the Commonwealth that evidence of the [S]kype chats may be used to show that Hubbard knowingly possessed the images and videos and intended to share them with others. The chats contain discussion of videos and statements by Hubbard that he will send videos to the person with whom he was chatting. If, as the Commonwealth suspects, Hubbard's defense involves his state of mind at the time of the acts in question, the evidence may be used to show that Hubbard intended to possess and distribute child sexual exploitation files, and that possession and/or distribution was not a mistake or accident. The evidence is not to be used to show that Hubbard has a propensity to possess or distribute child pornography, but to show that he had knowledge of his possession, intent to distribute the material, and that possession and/or distribution were not by mistake or accident. As such, the evidence is relevant for some

purposes other than to prove the criminal disposition of the accused.

The second inquiry set out in *Bell* is whether the evidence of the other acts is sufficiently probative of its commission by the accused to warrant its introduction into evidence. The Commonwealth has stated that it intends to introduce the testimony of Det. Miller, who will testify that the [S]kype chat name, "chicagoshane10," is Hubbard because Shane is Hubbard's middle name and there is evidence that Hubbard lived in Chicago at one time. The Commonwealth also intends to introduce the testimony of Det. Viergutz, who will testify as to how he forensically examined Hubbard's electronics and found the [S]kype chats on both Hubbard's phone and computer. The Court agrees with the Commonwealth that such evidence will be sufficient for a jury to reasonably infer that Hubbard committed the prior acts. Therefore, the evidence of the chats and testimony by the detectives are sufficiently probative of the acts' commission by Hubbard to warrant the introduction into evidence.

The third inquiry in *Bell* is whether the potential for prejudice from the use of other acts' evidence substantially outweigh its probative value. The Court in *Bell* held that "[e]ven if other crimes evidence is determined to be relevant for a proper purpose and is sufficiently probative of the defendant's guilt, it may still be excluded on this third ground." *Bell*, 875 S.W.2d at 890. It also noted that evidence of other crimes and wrongful acts is "inherently and highly prejudicial to a defendant." *Id.*

The Court acknowledges that the evidence of Hubbard's chat conversations will be prejudicial, but such prejudice is outweighed by the probative value in using evidence to show Hubbard's knowledge and intent.

> The Court will permit the Commonwealth to use evidence of the chats for this purpose. . . .

September 20, 2016, Order at 11-12.

Under KRE 404(b), evidence of "other crimes, wrongs, or acts" may be admissible to demonstrate intent, knowledge, or absence of mistake. Hubbard was indicted upon the offense of distribution of matter portraying sexual performance by a minor (KRS 531.340) and possession of matter portraying sexual performance by a minor (KRS 531.335).

KRS 531.340 provides, in part:

> (1) A person is guilty of distribution of matter portraying a sexual performance by a minor when, having knowledge of its content and character, he or she:
>
> (a) Sends or causes to be sent into this state for sale or distribution; or
>
> (b) Brings or causes to be brought into this state for sale or distribution; or
>
> (c) In this state, he or she:
>
> 1. Exhibits for profit or gain; or
>
> 2. Distributes; or
>
> 3. Offers to distribute; or
>
> 4. Has in his or her possession with intent to distribute, exhibit for profit or gain or offer to distribute, any matter portraying a sexual performance by a minor.

And, KRS 531.335 provides, in part:

> (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.

The Skype chats were found on Hubbard's cell phone and computer. The chats began on January 20, 2015, and ended on January 28, 2015. It appears that these chats discuss obtaining video portraying sexual performances by a child. And, it was the screen shots of a child involved in sexual activity, uploaded on January 31, 2015, that served as the basis for the underlying criminal charges. Upon the whole, we agree with the circuit court that the Skype chats demonstrated Hubbard's intent to distribute matter portraying sexual performance by a child under KRS 531.340, his knowledge that he possessed matter visually depicting sexual performance by a child under KRS 531.335(1)(a), and his intent to view a matter depicting sexual performance by a child under KRS 531.335(1)(b). We also believe the facts sufficiently demonstrated that Hubbard used the name "chicagoshane10" in the chats. Upon the whole, the circuit court did not abuse its discretion by determining that the probative value of the Skype chats outweighed

any prejudicial effect thereof. *See Bell v. Commonwealth*, 875 S.W.2d 882, 890 (Ky. 1994). Hence, we conclude that the circuit court did not commit reversible error by denying Hubbard's motion to exclude the Skype chats.

We view any remaining contentions of error as moot or without merit.

In sum, we hold that the circuit court did not err by denying Hubbard's motion to suppress evidence or motion to exclude evidence of the Skype chats.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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