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NOT TO BE PUBLISHED OPINION

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RENDERED: MAY 5, 2016
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2014-SC-000703-MR

HENRY GAIL TAYLOR — APPELLANT

V.

ON APPEAL FROM WARREN CIRCUIT COURT
HONORABLE STEVE ALAN WILSON, JUDGE
NO. 13-CR-00244

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Henry Taylor, appeals from a judgment entered by the Warren Circuit Court pursuant to a conditional guilty plea to fourteen counts of Use of a Minor Less than 16 Years of Age in a Sexual Performance and two counts of Possession of Matter Portraying a Sexual Performance by a Minor. For these crimes, Taylor was sentenced to twenty years' imprisonment. He appeals as a matter of right. Ky. Const. § 110. Taylor alleges that evidence taken from his residence was illegally obtained. For the following reasons, we affirm the judgment and sentence of the Warren Circuit Court.

FACTUAL AND PROCEDURAL BACKGROUND

On September 27, 2012, Sergeant Robert Hansen, Officer Jennifer Willis, and Officer Fuller of the Bowling Green Police Department (BGPD) responded to

the Taylor residence to investigate a report of alleged sexual abuse.[1] The officers had been notified by Rebecca Petty that her nieces, "Melissa" and "Carol" had disclosed to her that they had been sexually abused by their father, Taylor.[2] Officer Willis spoke to the children's mother, Charlotte Taylor, who advised Officer Willis that Melissa had informed her a month prior that Taylor had taken pictures of Melissa wearing lingerie.[3, 4] During a brief interview, Melissa confirmed to Officer Willis that Taylor had taken photos of her in lingerie and video recorded her and Carol while they were bathing.

Consequently, the police obtained consent from Charlotte to search the residence for the video camera that Taylor had allegedly used to record sexually explicit images of their children. Simultaneously, Detective Jason Franks of the BGPD was able to locate Taylor. Taylor informed Detective Franks that he had an argument with Charlotte earlier in the day and that he left the residence as a result. During their conversation, Detective Franks inquired as to whether Taylor owned a video camera. Taylor admitted that he owned a camera and that he believed it was located on a shelf in a closet at home. Subsequently, Detective Franks obtained consent from Taylor to search his residence for the camera.

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[1] Officer Fuller did not testify during the suppression hearing, and his full name is not otherwise contained within the record.

[2] The names of all minors in this opinion have been replaced with pseudonyms to preserve their privacy.

[3] During the suppression hearing, Charlotte contradicted this account by denying that she had informed the police about the disclosures made to her by Melissa.

[4] As Henry and Charlotte Taylor have the last name, we will refer to Charlotte by her first name to avoid confusion.

During the resulting search, the police did not find the video camera, but they did discover other electronic items onto which the photographs or video recordings could have been transferred. Among the items seized were two desktop computers, five cellular telephones, a digital camera, a secure digital (SD) memory card, and a Video Home System (VHS) videotape.

On October 1, 2012, Detective Mike Lemon of the BGPD was assigned the case. During the course of his investigation, Detective Lemon met with Charlotte to obtain permission to examine the seized electronic devices. Charlotte informed Detective Lemon that one of the computers belonged to Taylor and that Detective Lemon would have to speak with him to get permission to examine the computer. Shortly thereafter, Detective Lemon met with Taylor, who declined to permit the computer to be examined, until he had spoken with his attorney. As a result, Detective Lemon obtained a search warrant to examine the seized media. A forensic examination revealed that there were sexually explicit photos of Melissa on the computer that belonged to Taylor.

Subsequently, Taylor was charged with sixteen counts of Use of a Minor in a Sexual Performance. During the pendency of the case, Taylor filed a motion to suppress the evidence seized from his residence claiming that it had been illegally seized. At the suppression hearing, the trial court heard testimony from Officer Willis, Sergeant Hansen, and Detectives Franks and Lemon. Taylor called one witness, Charlotte who testified that she granted police consent to search the residence, but objected to the seizure of the

computer saying that it did not belong to her and that she lacked the authority to let the police take it.[5]

In denying the motion to suppress, the circuit court determined that the computer was lawfully seized pursuant to a valid consensual search of Taylor's residence. Further, the circuit court determined there was sufficient probable cause to support the issuance of the search warrant which led to the forensic examination of the computer.

After the denial of his motion to suppress, Taylor withdrew his plea of not guilty and entered a conditional guilty plea. As noted above, Taylor pled guilty to fourteen counts of Use of a Minor Less than 16 Years of Age in a Sexual Performance and two amended charges of Possession of Matter Portraying a Sexual Performance by a Minor. The Commonwealth recommended a total penalty of twenty years, and the trial court sentenced Taylor accordingly. Taylor now appeals as a matter of right.

ANALYSIS

I. The Trial Court Properly Denied Taylor's Motion to Suppress.

Taylor argues that the circuit court erred in denying his motion to suppress. Initially, he argues that the police lacked consent to seize the computer from his home. Taylor also claims that Detective Lemon's affidavit

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[5] Officer Willis and Sergeant Hansen were asked by Taylor during cross-examination whether Charlotte had objected to the seizure of Taylor's computer. Both Officer Willis and Sergeant Hansen denied recalling any objection regarding the computer. In fact, Sergeant Hansen only recalled Charlotte objecting to the removal of certain cell phones from the home. With Charlotte's permission, those phones were examined by Sergeant Hansen at the residence and left with Charlotte after he completed his review.

for a search warrant was flawed, containing both errors and omissions, and there was not sufficient probable cause for the issuance of a search warrant. We reject all of these arguments.

The standard of appellate review on the circuit court's ruling on a suppression motion following a hearing is twofold. First, the Court examines the circuit court's findings of fact for clear error, upholding findings "supported by substantial evidence." *Peyton v. Commonwealth*, 253 S.W.3d 504, 514 (Ky. 2008) (quoting RCr 9.78; *Adcock v. Commonwealth v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998)).[6] Second, when findings of fact are supported by substantial evidence, the Court engages in a "de novo review of the [circuit] court's application of the laws to those facts." *Guzman v. Commonwealth*, 375 S.W.3d 805 (2012).

Having reviewed the circuit court's factual findings, we conclude that they are supported by substantial evidence. The circuit court entered an extensive ten-page order, which thoroughly recounted the testimony from the suppression hearing. In particular, the circuit court addressed Charlotte's contention that she had objected to the seizure of Taylor's computer to

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[6] At the time of Taylor's plea, Kentucky Rule of Criminal Procedure (RCr) 9.78 governed pretrial motions to suppress evidence. RCr 9.78 provided that "[i]f supported by substantial evidence, the factual findings of the trial court shall be conclusive." Effective January 1, 2015, RCr 9.78 was superseded by RCr 8.27. However, unlike its predecessor, RCr 8.27 does not articulate an appellate standard of review. Nonetheless, the application of Kentucky Rule of Civil Procedure (CR) 52.01, *i.e.*, "[a] finding supported by substantial evidence is not clearly erroneous," results in the identical standard applied under RCr 9.78. *Simpson v. Commonwealth*, 474 S.W.3d 544, 547 (Ky. 2015).

Sergeant Hansen and Officer Willis, despite their having no recollection of it. The circuit court's factual conclusions are supported by the evidence.

A. The Search of the Taylor Residence Was Authorized By Consent.

Having found that the circuit court's factual conclusions are supported by the evidence, we further determine that the circuit court properly applied the law to those facts. It is well established that all warrantless searches are unreasonable unless it can be shown that the search is pursuant to one of the exceptions to the warrant requirement. *Commonwealth v. Hatcher*, 199 S.W.3d 124, 126 (Ky. 2006) (citing *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 514 (1967)). Consent is one of the exceptions to the warrant requirement. *Cook v. Commonwealth*, 826 S.W.2d 329, 331 (Ky. 1992) (citing *United States v. Watson*, 423 U.S. 411, 96 S. Ct. 820 (1976)).

Taylor concedes that the search of the residence occurred after Charlotte gave consent. The police were rightly able to rely on Charlotte's consent to search as she was an inhabitant of the residence. "[I]t is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area be searched." *United States v. Matlock*, 415 U.S. 164, 172 n.7, 94 S. Ct. 988 (1974); *see also Payton v. Commonwealth*, 327 S.W.3d 468 (Ky. 2010) (spouse could consent to search of the martial residence which resulted in seizure of evidence from shared master bedroom). Additionally, there was evidence presented during the suppression hearing that Taylor also granted consent to the police to search the residence.

B. The Seizure of Taylor's Computer Was Supported By Probable Cause.

While the search of the residence was sanctioned by consent, Taylor claims that the resulting seizure of his computer was illegal. "A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interest in that property." *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S. Ct. 1652, 1657 (1984). As a seizure affects only a person's possessory interests, it is generally considered less intrusive than a search which affects a person's privacy interests. *Guzman*, 375 S.W.3d at 810-11 (citing *Segura v. United States*, 468 U.S. 796, 806, 104 S. Ct. 3380, 3368 (1984) (Cunningham, J., concurring)).

In recognition of this, the United States Supreme Court has interpreted the Fourth Amendment to permit seizure of property, pending issuance of a warrant to examine its contents, if law enforcement authorities have probable cause to believe that the container holds contraband or evidence of a crime. *United States v. Place*, 462 U.S. 696, 701, 103 S. Ct. 2637, 2641 (1983). Additionally, "probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *United States v. Wright*, 16 F.3d 1429, 1438 (6th Cir. 1994) (quoting *Illinois v. Gates*, 462 U.S. 213, 244 n.13, 103 S. Ct. 2317, 2335 n.13 (1983)).

In the case at bar, the police were permitted to seize Taylor's computer as they had probable cause to do so. Melissa informed Officer Willis about Taylor's sexual abuse. Her account was supported by Charlotte's statement to

the police that Melissa had previously informed her about the abuse. Additionally, when Taylor was interviewed by the police he admitted to owning a video camera and that it was located inside the residence. While the police were unable to recover the camera during their search, they did locate electronic devices (including Taylor's computer) onto which Taylor could have transferred the photographs and videos.

Based on the statements of Melissa and Charlotte there was probable cause for the police to believe that the computer contained evidence of a crime. As such, the police temporarily seized the computer to examine it a later date and to avoid the destruction of evidence. The temporary seizure of Taylor's computer, while the police obtained a warrant to search it, did not meaningfully interfere with his possessory interests. *See United States v. Mitchell*, 565 F.3d 1347, 1350 (11th Cir. 2009) (seizure of a computer "to ensure that the hard drive was not tampered with before a warrant was obtained" did not violate the Fourth Amendment). As such, the circuit court properly rejected Taylor's argument that the computer was improperly seized.

C. The Search Warrant For Taylor's Computer Was Supported By Probable Cause.

Taylor also alleges that the search warrant was improperly issued. He claims that Detective Lemon's affidavit for a search warrant was flawed, containing both errors and omissions, and that the remaining content of the affidavit was insufficient to establish probable cause.

The Fourth Amendment of the United States Constitution and Section 10 of the Kentucky Constitution mandate that no warrant shall be issued without

probable cause. In reviewing the issuance of a search warrant we "must give great deference to the warrant-issuing judge's findings of probable cause and [that judgment] should not be reversed unless arbitrarily exercised." *Moore v. Commonwealth*, 159 S.W.3d 325, 329 (Ky. 2005), *as modified* (Apr. 21, 2005). "[T]he duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . concluding' that probable cause existed." *Commonwealth v. Pride*, 302 S.W.3d 43 (2010) (quoting *Gates*, 462 U.S. at 238-39).

"To attack a facially sufficient affidavit, it must be shown that (1) the affidavit contains intentionally or recklessly false statements, and (2) the affidavit, purged of its falsities, would not be sufficient to support a finding of probable cause." *Commonwealth v. Smith*, 898 S.W.2d 496, 503 (Ky. Ct. App. 1995), *as modified* (May 12, 1995) (citing *United States v. Sherrell*, 979 F.2d 1315, 1318 (8th Cir. 1992); *State v. Garrison*, 827 P.2d 1388, 1390 (Wash. 1992)). This standard also applies when it is alleged that an affidavit omitted material facts. *Id.*

Taylor begins by arguing that Detective Lemon's affidavit contained intentionally or recklessly false statements regarding Taylor's position on a search of the computer. The portion of the affidavit at issue states as follows:

> The affiant located Henry Taylor at his place of employment. He agreed to talk to the affiant. He advised the affiant that he had previously given officers permission to search his belonging (sic). He advised that he did not object to the search but wanted to talk to his attorney before he allowed a forensic examination of the items located by the officers.

At the suppression hearing, during cross-examination, Detective Lemon explained that Taylor had granted consent for the police to search his residence on September 27, 2012. On October 1, 2012, Detective Lemon was assigned the case and he separately interviewed both Charlotte and Taylor. During their meeting, Taylor explained to Detective Lemon that he had previously granted officers consent to search his residence. However, in response to Detective Lemon's request to examine the computer, Taylor demurred, stating that he would need to speak to his attorney before agreeing.

This recounting by Detective Lemon during the suppression hearing of his interaction with Taylor does not contradict the information contained within the affidavit. The search that was referred to in the affidavit was the previous search of Taylor's belongings (his vehicle and residence) that led to the seizure of his computer. It did not refer to the search — forensic examination — of Taylor's computer, to which Taylor did not consent, necessitating the procurement of a warrant. As Detective Lemon's statement was factually accurate, Taylor is unable to meet his burden under *Smith*.

Additionally, Taylor alleges that Detective Lemon purposefully omitted his conversation with Charlotte during which he sought to obtain her consent to search the computer. At the suppression hearing, Detective Lemon testified that when he asked Charlotte for consent to search the computer, Charlotte declined saying that the computer belonged to Taylor and that only he could give consent. Following this exchange Detective Lemon contacted Taylor for permission to access the computer.

Detective Lemon's omission of his conversation with Charlotte in the affidavit was not error. To begin, it is understood that affidavits prepared in support of search warrants "are normally drafted by nonlawyers in the midst and haste of a criminal investigation." *United States v. Ventresca*, 380 U.S. 102, 108, 85 S. Ct. 741, 746 (1965). Additionally, a law enforcement officer cannot be expected to include in the affidavit every detail of their investigation. *United States v. Colkley*, 899 F.2d 297, 302 (4th Cir. 1990).

Taylor has failed to make the requisite showing that Detective Lemon omitted his conversation with Charlotte with the intention of making the affidavit misleading. Rather, Taylor simply notes that the conversation was omitted from the affidavit, without advancing any additional facts or argument that would explain how this made the affidavit misleading. Further, Taylor is unable to demonstrate that the affidavit supplemented by the omitted information, would not have been sufficient to support a finding of probable cause. The omitted conversation was not material and its inclusion would not have affected the probable cause determination.

Having determined that the errors and omissions in the affidavit alleged by Taylor are insignificant, we review the circuit court's probable cause evaluation. The circuit court correctly adhered to the *Pride* standard in reviewing the issuance of the search warrant. Further, the circuit court properly concluded that the warrant-issuing judge had a substantial basis to issue a warrant due to the facts alleged in the affidavit. The information contained within the affidavit, when examined under the totality of the

circumstances, established probable cause meriting the issuance of the warrant.

CONCLUSION

For the foregoing reasons, we affirm the conviction and sentence of the Warren Circuit Court.

All sitting. All concur.

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