STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL PATRICK RYAN,

Defendant-Appellant.

UNPUBLISHED
August 26, 2021

No. 354031
Ionia Circuit Court
LC No. 2019-017881-FH

Before: RONAYNE KRAUSE, P.J., and BECKERING and BOONSTRA, JJ.

RONAYNE KRAUSE, P.J. *(dissenting)*

I respectfully dissent, because I conclude that, under the specific circumstances of this case, the good-faith exception should not apply to the search of defendant's cellphone, pursuant to a defective warrant, for materials other than text messages.

I agree with the majority that there was probable cause to search for text messages on defendant's phone, that there was no probable cause to search for photographs or videos, and that, as the trial court correctly found, the search warrant was improperly overbroad. Furthermore, I accept that the evidence showed a complete forensic extraction of all data on the phone to be the best way to minimize alterations to data on the phone while performing a search, and a forensic extraction was "all or nothing." The only testimony regarding forensic extractions came from Detective Philip Hesche, who was not qualified as an expert but was tacitly treated as one. He explained that a forensic extraction meant "you do get all of it . . . and then it's up to the individual analyst to go through and try to find the information that's relevant to that particular exam." He explained that even when searching for text messages, "sometimes the images are where you're going to find the information you're looking for" because the phone might have saved a photographic screenshot of a deleted message. However, he conceded that there was no evidence indicating that defendant had attempted to delete or hide the fact that he was texting with the victim. He also conceded that there was no evidence that any photographs had ever been attached to any text messages between defendant and the victim. Finally, Hesche's testimony indicated that images would be stored in a particular directory on the phone, and he strongly implied that images would be recognizable as images.

"[G]eneral Fourth Amendment principles apply with equal force to the digital contents of a cell phone." *People v Hughes*, 506 Mich 512, 527; 958 NW2d 98 (2020). Hesche provided the affidavit underlying the search warrant that he then executed. This does not preclude applicability of the good-faith exception to an improper search warrant. *People v Adams*, 485 Mich 1039, 1039; 776 NW2d 908 (2010). However, a magistrate's independent evaluation of an affidavit underlying a warrant should not be deferred to blindly or absolutely. *United States v Leon*, 468 US 897, 913-916; 104 S Ct 3405; 82 L Ed 2d 677 (1984). The fact that Hesche provided the affidavit reduces the extent to which he could simply trust the magistrate's determination that the warrant was proper. See *Groh v Ramirez*, 540 US 556, 563-564; 124 S Ct 1284; 157 L Ed 2d 1068 (2004).

In particular, Hesche knew that the charge was criminal sexual conduct, the purpose of the search was to retrieve evidence of a particular incident of criminal sexual conduct, and the target of the search was text messages. He nevertheless sought a warrant to search the entirety of the phone for evidence "pertaining to Criminal Sexual Conduct and Child Sexually Abusive Materials." Defendant was not, at the time, charged with or suspected of the latter offense. Hesche's affidavit extensively discussed the text message conversation between defendant and the victim, and it extensively discussed numerous acts of criminal sexual conduct that defendant committed against not only the victim but also his daughters. However, critically, Hesche's affidavit offered not the slightest suggestion that defendant might have ever taken photographs while committing those acts, or indeed photographs of the victim or his daughters at all. Indeed, Hesche's affidavit did not even say anything to the effect that, for example, in his experience or research, perpetrators of criminal sexual conduct involving children commonly also stored child sexually abusive photographs on their phones.[1]

It was therefore blatantly and objectively clear from the face of the affidavit that Hesche deliberately sought an improperly overbroad warrant. The affidavit provided no scintilla of a basis for finding probable cause to believe that child pornography would be found on defendant's phone. Therefore, the magistrate "wholly abandoned" the magistrate's judicial role, and the affidavit could not reasonably be believed, so the good-faith exception is inapplicable. *Leon*, 468 US 897, 913-916, 923; *People v Goldston*, 470 Mich 523, 531; 682 NW2d 479 (2004).

Our Supreme Court has acknowledged that the "plain-view exception" to the prohibition against warrantless searches "would likely apply" where "the officer was reasonably reviewing data for evidence of" the charged offense "and happened to view data implicating [the] defendant in other criminal activity." *Hughes*, 506 Mich at 550. However, the plain-view exception cannot be invoked if the officer happened to view the incidentally-implicating data while already exceeding the bounds of lawfulness or reasonableness. *Id*. at 550-551; *Collins v Virginia*, ___ US ___, ___; 138 S Ct 1663, 1672; 201 L Ed 2d 4324 (2018); *Arizona v Hicks*, 480 US 321, 324-328; 107 S Ct 1149; 94 L Ed 2d 347 (1987). The fact that it may be reasonable to seize the entirety of a defendant's phone data does not establish that it is reasonable to search the entirety of that data,

[1] I express no opinion whether the inclusion of such a statement would have cured the defects in the affidavit and the warrant. However, such a statement would at least have constituted an attempt to justify a search that was obviously beyond the scope of the charged offense and the then-available evidence of what might be found.

and any search of the data must be constrained to the extent validly authorized by a search warrant. *Hughes*, 506 Mich at 529, 535-537.

As noted, Hesche's testimony indicates that images are stored in a separate and dedicated directory, so searching through images was a deliberate choice. Furthermore, it was not strictly necessary for Hesche to look through that directory when searching for text messages. Hesche pointed out that it might be necessary to review all of those images to find evidence of a deleted text conversation or to find a particular image that had been attached to a text conversation. Had there been any evidence that defendant deleted any text conversations, or that he sent or received any images attached to any text conversations, then it is conceivable that a hunt for a text conversation might have necessitated looking through images, and it might have been impossible to find a particular image without individually looking through all of the images. In other words, "practical necessities" might possibly have justified such a search. See *Hicks*, 480 US at 327. However, there was no such evidence, as Hesche conceded. He therefore had no business searching through images. *Hughes*, 506 Mich at 535-537.

I would therefore vacate defendant's convictions, affirm the trial court's order denying the motion to suppress defendant's statements, reverse the trial court's order denying the motion to suppress the images found on defendant's phone, and remand for further proceedings.

/s/ Amy Ronayne Krause