

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDI MUSTAFA,

Defendant-Appellant.

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UNPUBLISHED

June 17, 2021

No. 355153

Livingston Circuit Court

LC No. 19-025719-FH

Before: JANSEN, P.J., and M. J. KELLY and RONAYNE KRAUSE, JJ.

PER CURIAM.

In this interlocutory appeal, we granted leave<sup>1</sup> to determine whether search warrants directed to Google, T-Mobile, and AT&T were invalid because they failed to satisfy the particularity requirement set forth in the Fourth Amendment to the United States Constitution. We conclude that the warrant directed to T-Mobile is sufficiently particular to satisfy the Fourth Amendment, so we affirm the trial court’s denial of the motion to suppress the evidence derived from that warrant. However, because the search warrants directed to Google failed to constrain the search of the records to evidence of a specific crime, we hold that it failed to satisfy the particularity requirement and is therefore invalid. Likewise, although not raised by Mustafa on appeal,<sup>2</sup> we conclude that a search warrant directed to Samsung for all records pertaining to

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<sup>1</sup> *People v Mustafa*, unpublished order of the Court of Appeals, issued March 8, 2021 (Docket No. 355153).

<sup>2</sup> In the proceedings before the trial court, Mustafa moved to suppress evidence derived from the search warrants directed to Google, T-Mobile, and Samsung. Because the warrants directed to Google and Samsung are virtually identical, it would result in a miscarriage of justice to decline to review both based upon Mustafa’s appellate lawyer’s failure to challenge the warrant directed to Samsung. See *People v Smart*, 304 Mich App 244, 252; 850 NW2d 579 (2014) (recognizing that this Court may review an issue that is not properly raised or addressed if failure to do so would

Mustafa's account from the date of account activation until the date the warrant was issued was also invalid based on its failure to constrain the search to evidence of a specific crime or crimes. Consequently, we reverse the trial court's order denying Mustafa's motion to suppress the evidence derived from the warrants directed to Google and Samsung, and we remand for further proceedings consistent with this opinion. Finally, we conclude that defendant Andi Mustafa's challenge to the search warrant directed to AT&T is not properly before this Court and we decline to consider it further.<sup>3</sup>

## I. BASIC FACTS

Mustafa has been charged with a single count of second-degree home invasion, MCL 750.110a(3).<sup>4</sup> According to the information, on December 2, 2017, he entered a home in

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result in a miscarriage of justice). Moreover, resolution of the issue is a question of law and all the facts necessary for its resolution have been presented. See *id.*

<sup>3</sup> In the proceedings before the trial court, Mustafa did not move to suppress any evidence derived from the warrant directed to AT&T. As a result, a copy of that warrant and its supporting affidavit are not included in the lower court record. Although Mustafa has appended those documents to his appellate brief, a party may not expand the record on appeal. See *People v Nix*, 301 Mich App 195, 203; 836 NW2d 224 (2013).

Moreover, although Mustafa asserts that his phone number, name, and address were listed in the AT&T warrant, he offers no evidence supporting that assertion. Based on our review of the warrant, it is plain that he is not one of the three individuals listed in the search warrant. Further, although the warrant lists two phone numbers that include the notation "associated with Mustafa," the only Mustafa actually identified in the warrant is "Alban Mustafa," who is one of Mustafa's alleged co-conspirators. Finally, although a number of addresses are listed, Mustafa has presented no evidence that any of those addresses related to him as opposed to the three individuals named in the search warrant. "The right to be free from unreasonable searches and seizures is personal, and the right cannot be invoked by a third party." *People v Mahdi*, 317 Mich App 446, 458-459; 894 NW2d 732 (2016) (2017). Therefore, "to attack the propriety of a search and seizure, the defendant must first establish that he or she has standing to challenge the search." *People v Earl*, 297 Mich App 104, 107; 822 NW2d 271 (2012). "Standing exists if, considering the totality of the circumstances, the defendant has a legitimate expectation of privacy in the object of the search and seizure and that expectation is one that society is prepared to recognize as reasonable." *Id.* Here, viewing the totality of the circumstances, there is nothing to support a finding that Mustafa had a legitimate expectation of privacy in the records held by AT&T which did not relate to him, any phone number he has shown is associated with him, or any place that he has established is associated with him. Thus, even if we were to consider the warrant we would hold that he lacks standing to challenge its validity.

<sup>4</sup> Although this case involves only one count of second-degree home invasion in Livingston County, Mustafa has pleaded no contest in Oakland County to nine counts of second-degree home invasion, one count of receiving or concealing stolen property worth more than \$1,000 but less than \$20,000, two counts of first-degree home invasion, one count of identity theft, one count of

Livingston County without permission and committed a felony in that home. In connection with a separate multiple home-invasion investigation in Oakland County, a search warrant for Mustafa's residence was issued and executed on February 15, 2018. That search warrant permitted the seizure of "any cellular phones, laptops, and tablets." It also permitted the seizure of "all computer storage devices . . ." During that search, the police located and seized a Samsung Galaxy Note 8 and a Samsung Tablet, both of which contained two e-mail addresses that appeared to belong to Mustafa.

Related to the issues raised on appeal, on February 20, 2018, Detective Brooke Dolmyer of the West Bloomfield Police Department obtained search warrants directed to Samsung and Google. Both warrants sought the release of "all records" pertaining to Mustafa, the Samsung Galaxy Note 8, the Samsung tablet, and the two e-mail addresses associated with Mustafa. Both warrants explained that once the records were obtained, law enforcement "shall conduct an actual search of the items obtained . . . in order to sort the evidence of the crimes articulated below and specifically sought herein, which may be intermingled with innocent or innocuous documents or records." The warrants specified that they covered all records from "the date of *account activation, through to the date this application was signed and issued.*" Each warrant also included the following statement regarding the issuance of the warrants: "AN AFFIDAVIT having been sworn to by the Affiant, Detective Brooke Dolmyer before me this day, based upon the facts stated therein, probable cause having been found . . . ."

In those affidavits, Detective Dolmyer averred that she was searching for evidence relating to "a massive and in-depth home invasion ring which includes but is not limited to the listed incidents." Both affidavits specifically identify four home invasions occurring on December 13, 2017, December 21, 2017, December 22, 2017, and January 12, 2018. There is nothing in the affidavits indicating a reason to believe that Mustafa was involved in those home invasions. The affidavits, however, identify a fifth home invasion occurring on January 18, 2018, and they state that Mustafa and another individual were observed completing that home invasion.

Subsequently, on March 1, 2018, Detective Dolmyer obtained a search warrant directed to T-Mobil for "[a]ll records held by T-Mobile" that were associated with Mustafa, his phone number, and his primary address. The warrant covered all records between January 1, 2016 until February 14, 2018. Unlike the warrants directed to Google and Samsung, the warrant directed at T-Mobile did not reference any crimes. It did, however, specifically state that an affidavit was "attached" to the warrant.<sup>5</sup>

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possession of burglar's tools, and two counts of conspiracy to commit second-degree home invasion. According to information contained in the lower court record, the above convictions were related to the same home-invasion ring that was being investigated when the search warrants challenged in this case were issued.

<sup>5</sup> Only the warrant directed to T-Mobile refers to the "attached" affidavit. Nevertheless, on appeal, the prosecution provided the following argument:

The attached affidavit stated that all of the records sought “constitutes evidence of a Breaking and Entering/Home Invasion/Forced Entry.” And, like the earlier affidavits, it noted that the affiant was investigating a “massive and in-dept home invasion ring which includes but [is] not limited to the listed incidents.” It identifies the same four home invasions that were listed in the earlier affidavits, i.e., the ones occurring on December 13, 2017, December 21, 2017, December 22, 2017, and January 12, 2018. Unlike the earlier affidavits, it includes information suggesting that Mustafa was involved in those offenses. Specifically, it provides that based on the search of Mustafa’s primary residence, “a plethora of stolen items from home invasions” were linked to Mustafa and two other individuals. It also states that “Twenty-nine (29) home invasions have occurred since 2014 which have been linked to the listed phone number(s), person(s), and places listed.” Finally, like the earlier affidavits, the affidavit attached to the T-Mobile search warrant identifies a home invasion occurring on January 18, 2018 during which Mustafa and another individual were observed completing the home invasion.

Mustafa moved to suppress the evidence derived from the warrants directed at Google, Samsung, and T-Mobile, arguing that they were overbroad because they permitted the police to seize all of his records held by each company and review them with unlimited discretion. In response, the prosecution argued that the scope of the warrants was limited to evidence of the home-invasion ring that was identified in the supporting affidavits. The prosecution also argued that the affidavits were expressly incorporated or cross-referenced in the warrants, so they could be used to satisfy the particularity requirement of the Fourth Amendment. Following oral argument, the trial court denied the motion to suppress.

This interlocutory appeal follows.

## II. MOTION TO SUPPRESS

### A. STANDARD OF REVIEW

Mustafa argues that the trial court erred by denying his motion to suppress the warrants. He contends that by requesting “any and all” records, the search warrants were so overbroad and lacking in particularity that they were general warrants permitting the police to sift through four years of his digital data in an unfettered fishing expedition. This Court reviews for clear error a trial court’s factual findings in a ruling on a motion to suppress, *People v Jenkins*, 472 Mich 26, 31; 691 NW2d 759 (2005), but reviews de novo a trial court’s interpretation of the law or the

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All three warrants expressly referenced their supporting affidavits (“AN [THE ATTACHED] AFFIDAVIT having been sworn to by the Affiant, Detective Brooke Dolmyer before me this day, based upon the facts stated therein, probable cause having been found . . .”). [Footnote omitted.]

In the footnote the prosecution notes that “The T-Mobile warrant stated “THE ATTACHED” in place of “AN.” Although not technically false, we believe that the prosecution’s quotation in the body of its brief on appeal is misleading in that it suggests that the phrases “AN AFFIDAVIT” and “THE ATTACHED AFFIDAVIT” have an interchangeable meaning.

application of a constitutional standard to uncontested facts, *People v Attebury*, 463 Mich 662, 668; 624 NW2d 912 (2001).

## B. ANALYSIS

“The Fourth Amendment of the United States Constitution and its counterpart in the Michigan Constitution guarantee the right of persons to be secure against unreasonable searches and seizures.” *People v Kazmierczak*, 461 Mich 411, 417; 605 NW2d 667 (2000). The primary purpose of the Fourth Amendment “is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.” *Carpenter v United States*, \_\_\_ US \_\_\_, \_\_\_; 138 S Ct 2206, 2213; 201 L Ed 2d 507 (2018) (quotation marks and citation omitted). “As indicated by the Fourth Amendment’s text, ‘reasonableness is always the touchstone of Fourth Amendment analysis.’ ” *People v Hughes*, \_\_\_ Mich \_\_\_, \_\_\_; \_\_\_ NW2d \_\_\_ (2020) (Docket No. 158652); slip op at 9, quoting *Birchfield v North Dakota*, 579 US \_\_\_, \_\_\_; 136 S Ct 2160, 2186; 95 L Ed 2d 560 (2016). “[T]he general rule is that officers must obtain a warrant for a search to be reasonable under the Fourth Amendment.” *Id.* at \_\_\_; slip op at 10.

With regard to searches of digital data, the Fourth Amendment generally requires police to obtain a warrant before searching the digital information stored on a cellular phone, even when the phone is seized incident to arrest. *Riley v California*, 573 US 373, 401; 134 S Ct 2473; 189 L Ed 2d 430 (2014). As noted in *Riley*, “modern cellphones may contain a litany of information, in some cases equivalent to a personal computer.” *United States v Bass*, 785 F3d 1043, 1049 (CA 6, 2015). “Federal courts, however, have rejected most particularity challenges to warrants authorizing the seizure and search of entire personal or business computers, because criminals can—and often do—hide, mislabel, or manipulate files to conceal criminal activity such that a broad, expansive search of the computer may be required.” *Id.* at 1049-1050. Therefore, the mere fact that the warrants at issue in this case broadly permit the seizure of virtually every record held by Google, Samsung, and T-Mobile related to Mustafa, his phone number, his e-mails, and his address is not dispositive.

The Fourth Amendment only allows search warrants “particularly describing the place to be searched, and the persons or things to be seized.” US Const, Am IV. “The purpose of the particularity requirement in the description of items to be seized is to provide reasonable guidance to the executing officers and to prevent their exercise of undirected discretion in determining what is subject to seizure.” *People v Unger*, 278 Mich App 210, 245; 749 NW2d 272 (2008) (quotation marks and citation omitted). Whether a particular warrant satisfied the particularity requirement depends on “the circumstances and the types of items involved.” *Id.* It is “well settled that a search may not stand on a general warrant.” *People v Hellstrom*, 264 Mich App 187, 192; 690 NW2d 293 (2004).

With regard to the particularity requirement, our Supreme Court has recently explained that a search warrant “must state with particularity not only the items to be searched and seized, but also the alleged criminal activity justifying the warrant.” *Hughes*, \_\_\_ Mich at \_\_\_; slip op at 22. See also *Andresen v Maryland*, 427 US 463, 479-480; 96 S Ct 2737; 49 L Ed 2d 627 (1976) (holding that a warrant permitting “the search for and seizure of evidence of any crime” is an impermissible general warrant) and *United States v Galpin*, 720 F3d 436, 445 (CA 2, 2013) (“[A] warrant must identify the specific offense for which the police have established probable cause.”);

and *United States v George*, 975 F2d 72, 75-76 (CA 2, 1992) (holding that a warrant authorizing search for evidence “relating to the commission of a crime” was overbroad because “[n]othing on the face of the warrant tells the searching officer for what crimes the search is being undertaken”).

In this case, the warrants contain no language restricting the officers’ search for and seizure of evidence of a specific crime or crimes for which probable cause has been properly established. Instead, the warrants directed to Google and Samsung made a bare reference to probable cause being established by an affidavit. The crime or crimes for which probable cause was established are not, however, identified anywhere in the warrants. Rather, in the section labeled “property sought,” the warrant includes a single sentence referencing that the search is for “evidence of the crimes articulated below and specifically sought herein, which may be intermingled with innocent or innocuous documents or records.” Given the complete failure to identify the specific offense or offenses for which probable cause justifying the search and seizure exists, the search warrants fail to satisfy the particularity requirement of the Fourth Amendment.

The warrant directed to T-Mobile is even less particular. It notes that probable cause was established in an affidavit, but it does not pretend to be limited to a search for evidence of criminal activity. Instead, it permits a blanket search and seizure of any and all records held by T-Mobile relating to Mustafa, his phone number, and his address. Because of the unfettered scope of the warrant, it permits officers to rummage through Mustafa’s data to search for anything at all. Because the particularity requirement of the Fourth Amendment requires that the search warrant state with particularity the alleged criminal activity justifying the warrant, and because the warrant directed to T-Mobile does not even pretend to do so, it appears facially invalid.

That is not the end of our inquiry, however. Although “[t]he Fourth Amendment by its terms requires particularity in the warrant, not in the supporting documents,” “most Courts of Appeals have held that a court may construe a warrant with reference to a supporting application or affidavit if the warrant uses appropriate words of incorporation, and if the supporting document accompanies the warrant.” *Groh v Ramirez*, 540 US 551, 557-558; 124 S Ct 1284; 157 L Ed 2d 1068 (2004). In that regard, our Supreme Court has stated that “the particularity requirement of the Fourth Amendment can be satisfied by an affidavit that the warrant incorporates by reference.” *Hughes*, \_\_\_ Mich at \_\_\_ (quotation marks and citation omitted); slip op at 27 n 15.

Michigan has not yet determined what constitutes “appropriate words of incorporation.” See *id.* (noting that it is unclear whether the warrant at issue used “appropriate words of incorporation,” but concluding that the issue need not resolve the issue). Nonetheless, as noted in *Groh*, there must be “appropriate words of incorporation” and the supporting document *must* accompany the warrant. *Groh*, 540 US at 557-558. Further, we find persuasive *United States v Szczerba*, 897 F3d 929, 937 (CA 8, 2018). In that case, the United States Court of Appeals for the Eighth Circuit held that “a warrant does not incorporate a supporting affidavit when it merely states that the affidavit establishes probable cause.” Also persuasive is the United States Court of Appeals for the Second Circuit Court, which held “[t]he recitation in the instant warrant that it is ‘issued upon the basis of an application and affidavit[] of [a police officer]’ does not direct the executing officers to refer to the affidavit for guidance concerning the scope of the search and hence does not amount to incorporation by reference.” *George*, 975 F2d at 76 (second alteration added).

Here, the warrants directed to Google and Samsung only noted that the affidavits establish probable cause, but did not otherwise reference the affidavits. There is no language directing the officers executing the warrant to refer to the affidavit for guidance concerning the scope of the search. Moreover, there is no language indicating that the affidavits were attached to or otherwise accompanied the search warrant. As a result, we conclude that the affidavits supporting the warrants directed to Google and Samsung cannot be used to satisfy the particularity requirement of the Fourth Amendment because the affidavits did not accompany the warrants and because the warrants did not use appropriate words of incorporation. Because the warrants are facially invalid and cannot be saved by reference to the affidavits, the trial court erred by finding that the warrants directed to Google and Samsung satisfied the particularity requirement of the Fourth Amendment.

In contrast, the warrant directed to T-Mobile expressly stated that the supporting affidavit was attached. That language expressly indicates that the warrant is to be considered in connection with the attached affidavit. As a result, the affidavit can be considered when determining whether the particularity requirement of the Fourth Amendment was satisfied. Here, fairly read, the affidavit supporting the warrant directed to T-Mobile identifies that the crimes being investigated was a massive and in-depth home invasion ring. Four specific home invasions were identified. The affiant averred that “[a]fter observing the pattern of home invasions which targeted Asian business owner’s and their residences, plain clothes undercover units were used to apprehend the suspects.” Mustafa was apprehended after those officers observed him completing a fifth specifically identified home invasion on January 18, 2018. Thereafter, his primary residence was searched pursuant to a search warrant. The affiant further averred that “[f]ollow up was conducted after the above listed search warrants occurred. These revealed a plethora of stolen items from home invasions which are linked to” Mustafa and two other individuals. The affiant also stated that twenty-nine “home invasions have occurred since 2014 which have been linked to the phone number(s), person(s), and places listed.” Based on the detailed assertions in the affidavit, it is plain that the search of the data obtained from T-Mobile was limited to evidence of the home-invasion ring targeting Asian business owners and their residences between 2014 and 2018. As a result, although the warrant authorized the seizure of “all records,” the particularity requirement was satisfied because the language in the warrant and attached affidavit constrained the search to evidence of a specific series of crimes. As a result, we discern no error in the trial court’s finding that the warrant directed to T-Mobile was sufficiently particular to satisfy the Fourth Amendment and that suppression was not required.

### III. CONCLUSION

Because the warrant directed to T-Mobile was sufficiently particular, we affirm the trial court order denying the motion to suppress the evidence derived from its execution. However, having concluded that the warrants directed to Google and Samsung were constitutionally infirm, it remains to be determined whether suppression of any evidence derived from them is appropriate. Generally, “evidence obtained in violation of the Fourth Amendment cannot be used against a defendant at a subsequent trial.” *Hughes*, \_\_\_ Mich at \_\_\_, 27; slip op at 35. “However, the exclusionary rule is a judicially created remedy that does not apply to every Fourth Amendment violation.” *Id.* Although the prosecution urges this Court to address whether suppression is the

appropriate remedy, our grant of leave was limited to the issues raised in the application.<sup>6</sup> Further, although the issue was raised before the trial court, it did not make a determination as to the applicability of any exceptions to the exclusionary rule. Thus, we reverse the trial court order denying the motion to suppress the evidence derived from the warrants directed to Google and Samsung, and we remand to the trial court to consider whether, in light of the violation of the Fourth Amendment, exclusion of the evidence is warranted.

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ Kathleen Jansen  
/s/ Michael J. Kelly  
/s/ Amy Ronayne Krause

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<sup>6</sup> *People v Mustafa*, unpublished order of the Court of Appeals, issued March 8, 2021 (Docket No. 355153).