NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
v.	:	
JASON GUERRA	:	
Appellant	:	No. 423 EDA 2018

Appeal from the Judgment of Sentence June 24, 2016
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0003037-2014

BEFORE: GANTMAN, P.J.E., STABILE, J., and STEVENS*, P.J.E.

MEMORANDUM BY GANTMAN, P.J.E.: **FILED AUGUST 19, 2019**

Appellant, Jason Guerra, appeals *nunc pro tunc* from the judgment of sentence entered in the Philadelphia County Court of Common Pleas, following his jury trial convictions for one count each of rape, involuntary deviate sexual intercourse, unlawful contact with a minor, sexual assault, corruption of minors, simple assault, sexual exploitation of children, trafficking of persons, and 10 counts of promoting prostitution.[1] We affirm in part, vacate in part, and remand.

In its opinion, the trial court correctly set forth most of the relevant facts of this case. Therefore, we have no reason to restate them. We add that Appellant committed his offenses between November 2012 and May or June

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[1] 18 Pa.C.S.A. §§ 3121(a)(1); 3123(a)(1); 6318(a)(1); 3124.1; 6301(a)(1)(ii); 2701(a)(1); 6320(a); 3002(a); and 5902, respectively.

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* Former Justice specially assigned to the Superior Court.

of 2013. Prior to the current offenses, in 2009, police arrested Appellant for an alleged assault, and recovered a laptop. Appellant did not request recovery of this laptop, and it remained in police custody. In 2014, police obtained a search warrant for Appellant's residence. Police executed the search on January 21, 2014, and recovered a second laptop, among other items.

On February 8, 2016, Appellant filed a motion to suppress evidence recovered from Appellant's laptops, cellphones, and computers based on an invalid search warrant. That same day, the court held a hearing where Appellant specified he was only arguing the invalidity of the 2014 search warrant. The court denied Appellant's motion to suppress at the conclusion of the hearing. On February 17, 2016, a jury convicted Appellant of 10 counts of promoting prostitution, 6 counts of various sexual offenses, and one count each of trafficking persons and simple assault. On June 24, 2016, the court sentenced Appellant to 48 to 96 years' imprisonment and informed Appellant of his obligation to register and report for life as a Tier III offender under the Sexual Offender Registration and Notification Act ("SORNA"). Appellant timely filed a post-sentence motion on July 1, 2016, which was denied by operation of law on October 31, 2016.

On July 18, 2017, Appellant timely filed a *pro se* petition pursuant to the Post-Conviction Relief Act ("PCRA"), at 42 Pa.C.S.A. §§ 9541-9546. Appointed counsel filed an amended PCRA petition on October 24, 2017, which sought reinstatement of Appellant's post-sentence motion rights and direct appeal

rights *nunc pro tunc*. On January 4, 2018, the PCRA court entered an order reinstating Appellant's post-sentence motion and direct appeal rights *nunc pro tunc*. On Monday, January 15, 2018, Appellant timely filed a post-sentence motion *nunc pro tunc*. Appellant filed a premature notice of appeal on February 5, 2018. Appellant's post-sentence motion was denied by operation of law on May 16, 2018.[2] On June 13, 2018, the court ordered Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Appellant timely complied on July 5, 2018, and filed a supplemental Rule 1925(b) statement on October 11, 2018.

Appellant raises the following issues for our review:

> UNDER THE 4TH AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTION 8 OF THE PENNSYLVANIA CONSTITUTION, WAS THE JANUARY 20, 2014 SEARCH WARRANT FOR 7607 RUGBY ST. INVALID BECAUSE ITS AUTHORITY TO SEARCH WAS VAGUE AND OVERBROAD AS IT IS EVEN PHRASED IN A 'CATCH-ALL' FASHION STATING "ALL RECORDS OF THE BACKPAGE POSTINGS, PHOTOS, FINANCIAL RECORDS, ETC. ANY AND ALL CONTRABAND."?
>
> UNDER THE 4TH AND 14TH AMENDMENTS OF THE UNITED

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[2] Appellant's notice of appeal relates forward to May 16, 2018, the date his post-sentence motion was denied by operation of law. Thus, there are no jurisdictional impediments to our review. ***See Commonwealth v. Borrero***, 692 A.2d 158 (Pa.Super. 1997) (explaining general rule that if defendant files timely post-sentence motion, judgment of sentence does not become final for purposes of appeal until trial court disposes of motion or motion is denied by operation of law). ***See also Commonwealth v. Ratushny***, 17 A.3d 1269, 1271 n.4 (Pa.Super. 2011) (explaining if court denies appellant's post-sentence motion following filing of premature notice of appeal, Superior Court will treat appellant's premature notice of appeal as having been filed after entry of order disposing of post-sentence motion).

> STATES CONSTITUTION AND ARTICLE 1, SECTION 8 OF THE PENNSYLVANIA CONSTITUTION WAS THE TRIAL COURT'S AUTHORIZATION TO SEARCH THE 2009 LAPTOP/IPHONE VAGUE AND OVERBROAD?

(Appellant's Brief at 3-4).

After a thorough review of the record, the briefs of the parties, the applicable law, and the well-reasoned opinion of the Honorable Diana Anhalt, we conclude Appellant's issues merit no relief. The trial court opinion comprehensively discusses and properly disposes of the questions presented. (***See*** Trial Court Opinion, filed February 14, 2019, at 7-15) (finding: **(1)** 2014 warrant and corresponding affidavit of probable cause supported probable cause to believe contraband or evidence of crime would be found within computers at 7607 Rugby Street in Philadelphia; affidavit of probable cause stated Victim and two additional witnesses, who worked as prostitutes for Appellant, noted Appellant would bring his laptop computer from his residence to hotel where he used it to post *BackPage* ads; warrant listed specific information that authorities sought from electronic devices in Appellant's home; warrant was sufficiently specific to allow authorities to seize and search those items; warrant included language limiting its scope and described equipment believed to have been instrumental to Appellant's suspected criminal acts of promoting prostitution and human trafficking; **(2)** Appellant did not object to manner of probable cause determination in February 8, 2016 motion or at hearing on that motion; on record, Appellant specifically excluded 2009 materials from February 2016 motion; when court asked if Appellant's

argument regarding February 2016 motion excluded 2009 materials, counsel replied, "That is correct"; at February 2016 hearing, counsel twice agreed on record to court finding probable cause for search of 2009 materials in lieu of search warrant, so Appellant waived any objection to search of 2009 materials; moreover, even if Appellant had preserved this issue for appeal, no relief would be due; court considered motion, heard argument from both parties, and found sufficient probable cause to search 2009 materials; Commonwealth presented evidence of statements of women, who had worked for Appellant as prostitutes, detailing Appellant's use of his laptop to post ads on *BackPage* and to keep expense information; information was enough to show fair probability that contraband or evidence of crime would be found on 2009 materials; 2009 materials were properly searched). The record supports the court's rationale. Accordingly, we affirm Appellant's issues based on the trial court opinion.

Nevertheless, we are mindful of recent case law calling into question the validity of Appellant's SORNA registration requirements. Thus, we elect to review the legality of Appellant's sentence *sua sponte*. ***See Commonwealth v. Randal***, 837 A.2d 1211 (Pa.Super. 2003) (*en banc*) (explaining challenges to illegal sentence cannot be waived and may be raised by this Court *sua sponte*, assuming jurisdiction is proper; illegal sentence must be vacated).

> Our Supreme Court declared SORNA unconstitutional, to the extent it violates the *ex post facto* clauses of both the United States and Pennsylvania Constitutions. [***Commonwealth v. Muniz***, 640 Pa. 699, 164 A.3d 1189 (2017), *cert. denied*,

___ U.S. ___, 138 S.Ct. 925, 200 L.Ed.2d 213 (2018)]. The ***Muniz*** court determined SORNA's purpose was punitive in effect, despite the General Assembly's stated civil remedial purpose. SORNA also violates the *ex post facto* clause of the Pennsylvania Constitution because it places a unique burden on the right to reputation and undermines the finality of sentences by demanding more severe registration requirements. The effective date of SORNA, December 20, 2012, controls for purposes of an *ex post facto* analysis.

In light of ***Muniz***, this Court also held: "[U]nder ***Apprendi*** [***v. New Jersey***, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)] and ***Alleyne*** [***United States***, 570 U.S. 99, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013)] a factual finding, such as whether a defendant has a mental abnormality or personality disorder that makes him…likely to engage in predatory sexually violent offenses, that increases the length of registration must be found beyond a reasonable doubt by the chosen fact-finder." ***Butler, supra*** at 1217 (addressing SVP status *sua sponte* as illegal sentence) (internal quotations and citations omitted). ***See also Alleyne, supra*** (holding any fact that increases mandatory minimum sentence for crime is considered element of crime to be submitted to factfinder and found beyond reasonable doubt). This Court further held: "Section 9799.24(e)(3) of SORNA violates the federal and state constitutions because it increases the criminal penalty to which a defendant is exposed without the chosen fact-finder making the necessary factual findings beyond a reasonable doubt." ***Id.*** at 1218. The ***Butler*** Court concluded that trial courts can no longer designate convicted defendants as SVPs or hold SVP hearings, "until [the] General Assembly enacts a constitutional designation mechanism." ***Id.*** (vacating appellant's SVP status and remanding to trial court for sole purpose of issuing appropriate notice under 42 Pa.C.S.A. § 9799.23, governing reporting requirements for sex offenders, as to appellant's registration obligation).

Following ***Muniz*** and ***Butler***, the Pennsylvania General Assembly enacted legislation to amend SORNA. Act 10 amended several provisions of SORNA, and also added several new sections found at 42 Pa.C.S.A. §§ 9799.42, 9799.51-9799.75. In addition, the Governor of Pennsylvania signed new legislation striking the Act 10

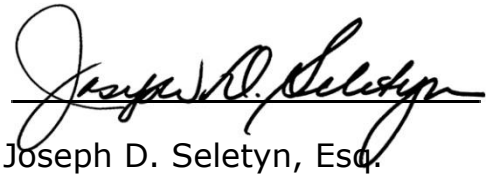
> amendments and reenacting several SORNA provisions, effective June 12, 2018. Through Act 10, as amended in Act 29, the General Assembly created Subchapter I, which addresses sexual offenders who committed an offense on or after April 22, 1996, but before December 20, 2012. Subchapter I contains less stringent reporting requirements than Subchapter H, which applies to offenders who committed an offense on or after December 20, 2012.

Commonwealth v. Alston, 2019 PA Super 178, *2-*3 (filed June 6, 2019) (footnotes and some internal citations omitted). "[W]hen an appellant's offenses straddle the effective dates of Subchapters H and I of SORNA, he is entitled to the lower reporting requirements of Subchapter I, absent a specific finding of when the offenses related to the convictions actually occurred." ***Id.*** at *3.

Instantly, Appellant committed sexual offenses between November 2012 and May or June of 2013. A jury convicted Appellant of numerous sexual offenses but did not specifically find the dates when Appellant committed his offenses. Appellant's offenses straddled the operative dates for Subchapters H and I. Without a specific jury finding of when the offenses occurred, Appellant is entitled to the lower punishment. ***See id.*** Accordingly, we affirm in part and vacate in part regarding Appellant's SVP status/SORNA reporting requirements; we remand the case for the court to give Appellant proper registration and reporting requirements.

Judgment of sentence affirmed in part and vacated in part solely as to SVP status and SORNA reporting requirements; case remanded with instructions. Jurisdiction is relinquished.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 8/19/19

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CRIMINAL TRIAL DIVISION

COMMONWEALTH OF PENNSLYVANIA	:	
	:	
	:	**CP-51-CR-0003037-2014**
v.	:	
	:	
	:	
JASON GUERRA	:	

OPINION

ANHALT, J.

OVERVIEW AND PROCEDURAL HISTORY

Jason Guerra (hereinafter "Appellant") was arrested on January 21, 2014 and appeared before the Court of Common Pleas, Criminal Trial Division on February 17, 2016 where a jury found Appellant guilty of Human Trafficking, Rape, Involuntary Deviate Sexual Intercourse, Sexual Assault, three counts of Promoting Prostitution of a Minor, two counts of Promoting Prostitution Generally, and Simple Assault. On June 24, 2016, Appellant was sentenced to a total term of incarceration of forty-eight to ninety-six years. On July 1, 2016, Appellant filed a Motion for Reconsideration of Sentence. On January 4, 2017, Appellant's post-sentence and direct-appeal rights were reinstated *nunc pro tunc*.

Appellant filed a timely notice of appeal on February 5, 2018. A Statement of Matters Complained of on Appeal was filed on October 11, 2018. Appellant raises the following issues:

1. The trial court erred in not suppressing the digital media and data in the form of pictures, websites, videos, inter alia, and GPS data recovered from Appellant's digital media devices in 2014 because the search warrant for Appellant's home was defective and deficient in probable cause as it:

a. Was vague and overbroad in its authorization to search 7607 Rugby St, and its contents therein;

b. Lacked specificity and particularity as to what devices and parts thereof would be searched;

c. Did not authorize forensically searching any laptop, computer, or digital media devices, although the intent was expressed in the affidavit of probable cause for said warrant;

2. The trial court erred in not suppressing the digital media and data in the form of pictures, websites, videos, inter alia, and GPS data recovered from Appellant's digital media devices seized by police in 2009, as this search was done without a warrant specifically authorizing the search of the devices; without probable cause; and was not a harmless error.

FACTUAL HISTORY

Appellant entered a plea of not guilty to all charges against him and asserted his right to trial by jury. The sum and substance of the evidence at trial was as follows:

In 2012, shortly after M.M.'s (Complainant) 14th birthday, Appellant Jason Guerra solicited her in the Frankford section of Philadelphia to work for him doing sexual services for money. Notes of Testimony, ("N.T."), 2/12/16 at 85-87. M.M. indicated that she was unwilling at the time, but Appellant gave her his phone number and told her to call if she changed her mind. Id. at 87. At that time, M.M. had just run away from a group home, after having been bounced around between various group and foster homes. Id. at 85-87. She was living on the streets, sometimes sleeping in the back of a store. Id. A few months later, because it was cold and

she didn't have anywhere to stay, M.M. called the Appellant to say she was interested in working for him, even though she felt ashamed and dirty. Id. at 88-89. Appellant and a woman named Jessica picked her up around Margaret and Orthodox Streets in Philadelphia and took her to the Days Inn in Chester, PA. Id. at 89. That first day, Jessica told her how to do the dates, and M.M. began doing dates that same day, meaning having vaginal and/or oral sex with men who came to the hotel room and paid a "donation." Id. at 89-90, 101-102. They stayed at the hotel for a week, and she and Jessica both did dates. Id.

After about four weeks of prostituting, M.M. "felt lost" because she had thought she was going to get half of the money she made from the dates, but she wasn't getting any money at all. Id. at 99. She told Appellant that she wanted to leave, and in response he slapped her and punched her in the ribs, and told her that if she ever tried to leave he would have no hesitation to shoot her and say she was a drug addict who tried to sneak into his house. Id. at 100. M.M. was visibly pregnant at that time. Id. at 105. Appellant beat her so badly that she began bleeding heavily, and had a miscarriage in the bathtub, describing it by saying, "I just kept bleeding real bad and it came out." Id. at 105-106. She was alone when this happened, and when asked what she did with the baby's remains, she said, "I threw it away. I couldn't do nothing else." Id. M.M. said she felt "like I was worthless. . . I felt like a slave. I didn't have no say in my body. My body was just there and my soul was in another place." Id. at 100.

M.M. wasn't allowed to talk to anyone besides Jessica and Appellant. Even if she could have called her family, she believed her mother wouldn't have helped her, because she called her mom when she was homeless, and her mom told her they didn't have room for her. Id. at 111-12. If she was tired, and didn't want to do the dates, it didn't matter, she had no choice. Id. at 101. Appellant gave M.M. various drugs, including marijuana and Xanax, and tried to give her all

kinds of other drugs, including heroin, but she refused because she had seen what it did to Jess and she didn't want to turn out like that. Id. at 113-14. M.M. saw Appellant beat up Jess really badly, hitting her until she fell down two steps and continuing to punch her in the ribs. Id. at 102.

Appellant had vaginal and oral sex with the complainant against her will, although most times she didn't say no because she knew if she did, there would be repercussions. Id. at 112-13. However, she remembered one time that she said no because she had her period, and he grabbed her head, pushed it down, and told her to "give him some head." Id.

After about six or seven months, M.M. escaped, but Appellant found her, and hit her with his gun, and continued punching her in the face, sides, head and thighs while she went in and out of consciousness. Id. at 118-120. He said, "You are lucky I didn't kill you," and he left. Id. at 120.

In December of 2013, two FBI agents found M.M. when she was doing calls out of a basement, and she broke down and told them everything. Id. On January 21, 2014, Appellant was arrested at his residence located at 7607 Rugby Street. Id. On that date, search warrants were executed for Defendant's residence and automobile, and multiple items were recovered including laptop computers, a loaded firearm, over $1,000, and narcotics. N.T. 2/11/16 at 166, 171-178.

At trial, the Commonwealth's evidence included photos of Appellant receiving oral sex from complainant, and a photo of him about to have vaginal intercourse with complainant, as well as testimony from girls who were part of his prostitution operation. Id. at 126-27.

Information was seized from his computer pursuant to a search warrant. In ruling that the warrant was executed based on probable cause and with sufficient particularity, the Court considered the following facts from the search warrant and its attached affidavit of probable cause.

On its face, the warrant identified the items to be searched and seized as follows: "Jason Guerra, any and all guns, computers, laptop computers, safe, business records, financial statements, bank records, photographs of residence, photos, proof of residence, victim's photos, any and all contraband, [illegible]." Search Warrant, No. 179296, Jan. 20, 2014. The warrant provided the address of the premises to be searched—7607 Rugby St. Philadelphia, Pa.—and identified the occupant of that address as the Appellant. Search Warrant, No. 179296, Jan. 20, 2014. In the space reserved for probable cause, the warrant referenced the "ATTACHED CONTINUATION OF PROBABLE CAUSE," a three-page affidavit of probable cause. Search Warrant, No. 179296, Jan. 20, 2014.

The affidavit of probable cause, written by Detective Kevin Gage, set forth information from his two interviews with the then fifteen-year-old Complainant, M.M. Aff. of Probable Cause for Search and Seizure Warrant No. 179296, at 1, Jan. 20, 2014. The affidavit stated that the Complainant first encountered Appellant in the Frankford neighborhood of Philadelphia, likely in 2012, when she was fourteen years old. Aff. of Probable Cause at 1. Appellant offered Complainant employment as an "escort," and when she refused his offer, he left her with his phone number in case she changed her mind. Aff. of Probable Cause at 1.

Months later, she called him, and he picked her up near where they had initially spoken. Aff. of Probable Cause at 1. Appellant then drove Complainant to a Days Inn hotel in Chester, Pennsylvania Aff. of Probable Cause at 1. Complainant stated that once they arrived at the hotel, Appellant used his laptop to publish an advertisement on www.*Backpage*.com[1] using the alias "Vivian" and providing a contact phone number. Aff. of Probable Cause at 1. When people would call the advertised number, Complainant stated, another girl would answer a cell phone and direct

[1] *Backpage* was the website infamous for advertising sexual services at this time. N.T. 2/12/16 at 7-8.

the "dates" to a room where Complainant provided sex for money. Aff. of Probable Cause at 1. Complainant noted that Appellant would "always bring his laptop computer from his residence to the hotel where he used it to post the *BackPage* ads." Aff. of Probable Cause at 2.

Detective Gage spoke with two additional women who both stated that they worked for Appellant as prostitutes and like Complainant, both said they witnessed Appellant placing ads on the *BackPage* website. Aff. of Probable Cause at 2–3. One indicated that she watched Appellant place such ads on "numerous occasions." Aff. of Probable Cause at 3. That same witness further explained that Appellant always used his laptop and an "Air card" for internet access, that he was "good" at using the computer, and that he used various Gmail accounts to be "very careful" to hide his identity while creating the prostitution advertisements. Aff. of Probable Cause at 3.

In the affidavit of probable cause, after thoroughly detailing the witnesses' statements, Det. Gage explained the reasons for the search, the scope of the search, and the items to be seized, as follows:

> Based on my experience, persons who use laptops often keep those computers in their residences, because computers often contain information of a personal nature, including bank account information, tax information, photographs, personal electronic communications, and the like. In addition, persons who utilize websites such as *Backpage* for advertising prostitution often store the photographs that they upload to *Backpage* advertisements on their personal computers and cellular phones. Additionally in my past experience, I have submitted computers and additional digital storage media to qualified forensic specialists who have been able to recover files, including deleted files from the hard drives of these items by using available forensic tools.
>
> Based on the above facts and witness statements . . . your Affiant respectfully requests the issuance of a Search and Seizure Warrant for suspect Jason Guerra's residence located at 7607 Rugby St. Philadelphia, Pa. This Search Warrant will be executed in an attempt to take the suspect into custody and the recovery of items to include . . . any and all computers, laptops, which will be transported to a location where they can be forensically examined by a qualified

> forensic specialist in an attempt to recover any and all records of the *Backpage* postings, photos, financial records, etc. Any and all contraband."

Aff. of Probable Cause at 3.

DISCUSSION

I. The trial court properly admitted into evidence the digital media and data in the form of pictures, websites, videos, inter alia, and GPS data recovered from Appellant's digital media devices in 2014 based on a properly executed search warrant.

At the outset, the Court notes that "the standard and scope of review for a challenge to the denial of a suppression motion is whether the factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct." Com. v. Orie, 88 A.3d 983, 1002-03 (Pa. Sup. Ct. 2014) (quoting Com. v. Johnson, 33 A.3d 122, 125–126 (Pa.Super.2011) (citations and footnote omitted), appeal denied, 616 Pa. 634, 47 A.3d 845 (2012)). When reviewing the rulings of a suppression court, the Superior Court considers only the evidence of the prosecution and so much of the evidence for the defense as remains uncontradicted when read in the context of the record as a whole. Id.

Probable Cause

The 2014 warrant supported the conclusion that probable cause existed to believe contraband or evidence of a crime would be found within the computers at 7607 Rugby Street, Philadelphia. Probable cause exists where the information included in the warrant and affidavit is "sufficient . . . to warrant a man of reasonable caution in the belief that a search should be conducted." Com. v. Jones, 988 A.2d 649, 655 (Pa. 2010) (quoting Com. v. Thomas, 292 A.2d 352, 357 (Pa. 1972)). Probable cause is the baseline in a warrant analysis; it determines the scope of the search. See id.

Probable cause is a "practical and fluid concept" resting on probabilities. Com. v. Huntington, 924 A.2d 1252, 1256 (Pa.Super 2007). As such, it "does not require a *prima facie* showing of criminal activity." Id. Hearsay information is a sufficient basis for a search warrant when the "issuing authority has been provided with sufficient information to make a 'neutral' and 'detached' decision about whether there is a fair probability that contraband or evidence of a crime will be found in a particular place. Id. at 1255.

In reviewing a warrant application, a magistrate must *only* consider evidence contained within the "four corners" of the affidavit of probable cause. Id. at 1258. In turn, the court must analyze probable cause from the magistrate's perspective when determining "whether [a warrant] provides sufficient information, within the four corners of the affidavit, to support the conclusion that probable cause exists to believe that contraband or evidence of a crime will be found in a particular place." Id. at 1258.

Applying the "totality of the circumstances" standard to the 2014 warrant, this Court found that the warrant and its attached affidavit detail ample evidence of probable cause for the search and seizure of Appellant's computer. See Jones, 988 A.2d at 655. In the affidavit of probable cause, the Complainant, who worked for Appellant as a prostitute, noted that Appellant would "always bring his laptop computer from his residence to the hotel where he used it to post the *BackPage* ads." Aff. of Probable Cause at 2. Two additional witnesses who worked for Appellant as prostitutes made similar statements. Id. at 2-3. The statements by Complainant and corroborating witnesses establish probable cause that Appellant's computer would contain contraband or evidence of crime.

In this case, involving human trafficking facilitated by online solicitations, the Court found the warrant was supported by probable cause. In relevant part, the warrant listed "items to

be searched and seized" as "computers, laptop computers . . . victims photos, any and all contraband." Search Warrant, No. 179296, Jan. 20, 2014. The attached affidavit of probable cause stated the authorities' intent to search and seize "any and all computers, laptops, which will be transported to a location where they can be forensically examined by a qualified forensic specialist in an attempt to recover any and all records of the *BackPage* postings, photos, financial records, etc. any and all contraband." Aff. of Probable Cause at 3. This Court found that the search warrant and its attached affidavit of probable cause exceeded the standard required for lawful search and seizure articulated in Article I, Section 8 of the Pennsylvania Constitution.

A. Vague and overbroad

Having looked at probable cause as it applies to the 2014 warrant, we turn to Appellant's specific claims as to why the warrant was deficient and defective. First, Appellant claims that the 2014 search warrant was defective and deficient in probable cause as it was vague and overbroad in its authorization to search 7607 Rugby St., Philadelphia, and its contents therein. Appellant is incorrect.

"A warrant unconstitutional for its overbreadth authorizes in clear or specific terms the seizure of an entire set of items, or documents, many of which will prove unrelated to the crime under investigation ... An overbroad warrant is unconstitutional because it authorizes a general search and seizure." Com. v. Orie, 88 A.3d 983, 1002-03 (Pa. Sup. Ct. 2014).

In a warrant analysis, it is appropriate for a court to consider both the warrant itself and the accompanying affidavit or similar document expressly incorporated by reference. Doe v. Groody, 361 F.3d 232, 239 (3d Cir. 2004). Such a document may be used in determining the scope of the warrant. Bartholomew v. Com. of Pa., 221 F.3d 425, 428 (3d Cir. 2000).

In Orie, a warrant for a USB flash drive, while supported by probable cause to believe the flash drive contained evidence of criminal activity, was overbroad, because it sought "any contents contained therein, including all documents, images, recordings, spreadsheets or any other data stored in digital format" without limitation to account for any non-criminal use of the flash drive." Orie at 1008.

However, the Orie warrant was followed by a second warrant for the flash drive with an accompanying affidavit that outlined the types of files that would be present on the flash drive, including specified databases and/or spreadsheets containing donation/contribution lists, letterhead and/or masthead, thank you letters, and host committee lists. The Court found the second warrant to have sufficient specificity to meet constitutional standards.

The instant case is analogous to the second warrant in Orie, because rather than allowing a search of any contents contained in the computers, it listed the specific things sought from the computers, including "records of the *BackPage* postings, photos, financial records, etc. Any and all contraband." This specificity is sufficient to make the warrant constitutional, similar to the second warrant in *Orie*.

B. Particularity

Appellant next claims that the 2014 search warrant was defective because it lacked specificity and particularity as to what devices and parts of devices would be searched. "A warrant unconstitutional for its lack of particularity authorizes a search in terms so ambiguous as to allow the executing officers to pick and choose among an individual's possessions to find which items to seize. This will result in the general "rummaging" banned by the [F]ourth [A]mendment." Com. v. Rivera, 816 A.2d, 282, 290 (Pa.Super 2003).

"The language of the Pennsylvania Constitution requires that a warrant describe the items to be seized "as nearly as may be . . . ." Orie at 1003. However, this requirement is tempered by a "common sense" factor dictating that warrants "should not be invalidated by hypertechnical interpretations"—therefore, "a generic description will suffice" where an exact description is not possible. Id. (quoting Com. v. Rega, 593 Pa. 659, 933 A.2d 997, 1012 (2007) (citation omitted), cert. denied, 552 U.S. 1316, 128 S.Ct. 1879, 170 L.Ed.2d 755 (2008)). Further, the Pennsylvania Supreme Court has held that "where the items to be seized are as precisely identified as the nature of the activity permits . . . the searching officer is only required to describe the general class of the item he is seeking." Rega, 933 A.2d at 1012 (quoting Com. v. Matthews, 285 A.2d 510, 514 (Pa. 1971).

The police were searching for evidence related to promoting prostitution and human trafficking, and they had probable cause to believe they would find such evidence on Appellant's computers based on statements from several of the women who had worked for him, and had seen him posting advertisements and photos to *Backpage* from that laptop.

Here, the affidavit of probable cause provided evidence that Appellant's computer would have evidence constituting contraband. Complainant was under eighteen-years-old, and she stated that Appellant used his laptop to advertise her as a prostitute. Aff. of Probable Cause 1–2. Additionally, Complainant stated Appellant always brought his laptop computer from his residence to the hotel where he used it to place *Backpage* ads. Id. at 2. Another witness who also worked for Appellant as a prostitute, stated that she observed him placing ads for prostitution for the girls who worked for him on numerous occasions, always using his laptop and an "Air card" for his internet access. Id. at 3. She stated he was "very good on the computer and very careful

about his prostitution postings in an attempt to keep his identity out of the postings by using various Gmail accounts." Id.

The warrant in the present case included language limiting its scope. Id. ("... in an attempt to recover any and all records of the *BackPage* postings, photos, financial records, etc. Any and all contraband."). It also described the equipment believed to have been an instrumentality of the criminal activities of the defendant. In addition, the probable cause provided a description of the search process, stating that the equipment would be taken to a location where it would be examined by forensic experts. Id.

This language is not only appropriately limiting but also could not be limited further, given the nature of the crime and the information available to authorities at the time the warrant was issued. The warrant here narrowly defined both the type of information sought and the scope of the search, and it placed those descriptions alongside a detailed description of the alleged crime, further tailoring the information sought to the particular circumstances for which probable cause was established. With that, law enforcement was legally justified in searching Appellant's laptop for the types of files specified.

C. Forensic search not authorized

Appellant's third claim is that the "actual substance of the warrant did not authorize forensically searching any laptop, computers or digital media devices although the intent was expressed in the affidavit of probable cause for said warrant."

Appellant seems to be claiming that although the affidavit of probable cause expressed the intent to search the laptop, computers, etc, this search was not authorized by the warrant.

Assuming Appellant is claiming that a separate warrant was needed to forensically search the laptop, computers and devices seized pursuant to the warrant, once again, he is incorrect.

In the Suppression hearing, Appellant cited Riley v. California in support of this proposition. N.T. 2/8/16 at 35-53. Riley is distinguishable because it involved a phone seized incident to arrest, and searched without a warrant. Riley v. California and United States v. Wurie, —— U.S. ——, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014). In the instant case, Appellant's phone was searched pursuant to a legal warrant, supported by probable cause, which met all constitutional requirements, as detailed above. The warrant specifically stated they were looking for items inside the computer and specifically stated it would be forensically analyzed. For these reasons, this argument lacks merit.

II. The Trial Court did not err in denying Appellant's Motion to Suppress information found on Appellant's digital media devices seized by police in 2009.

Appellant contends that this Court erred in denying his Motion to Suppress the information found on his digital media devices seized by police in 2009, claiming the search was done without a warrant and without probable cause.

First, counsel did not object to the manner of probable cause determination in the second motions hearing, on February 8, 2016, when he submitted a Motion to Suppress the materials seized during his 2014 arrest. He specifically excluded the 2009 materials from the motion, on the record. The Court specifically asks trial counsel if his argument is related to the 2014 laptops, and he agrees. The Court clarified, "Not the 2009 laptop?" and defense counsel replied, "That is correct." N.T. 2/8/16 at 38-39.

Second, at the time of the hearing about the motion for finding of probable cause, Appellant's trial counsel agreed twice on the record to the procedure of having the court determine probable cause in this manner, in lieu of a search warrant, saying, "I'm not objecting to procedurally Your Honor reviewing it and making a determination." N.T. 7/27/15 at 5, 32-33. Because Appellant did not raise an objection to the manner of finding of probable cause, he has waived that objection and cannot raise it for the first time on appeal. Pa.R.A.P. 302(a). Had defense counsel objected at the time to proceeding in this fashion, the Commonwealth could have applied for and been granted a Search Warrant to search the items requested in the Motion. In fact, counsel raised the same issues he would have raised in a Motion to Suppress the Search Warrant as he raised in the motion to proceed in this fashion.

Finally, even if Appellant had preserved for appeal the procedural manner of finding probable cause by court order instead of a search warrant, any error was harmless. The Trial Court considered the motion, listened to argument from both sides, and determined there was sufficient probable cause to search "laptop, iPhone and contents of backpack" that were seized at the time of Appellant's arrest in 2009. This probable cause was based on evidence presented from women who admitted working for Appellant as prostitutes, and described his process for posting ads on *Backpage* using his laptop, and also said he kept his expenses on the computer. Commonwealth's Motion in Limine for Admission of Other Acts, Attachment 2, p 1-2, 6. This information was enough to show a fair probability that contraband or evidence of a crime would be found on the items seized from the room at the time of his arrest in 2009. *See* Jones, at 199-200, (quoting Com. v. Gray, 509 Pa. 476, 503 A.2d 921 (1986)).

Because Appellant's Motion to Suppress did not apply to the items seized in 2009, because he waived the argument that the search was unlawful for a lack of warrant, and because

the Commonwealth had an Order from the court, a specific finding of probable cause to allow them to search the laptop, iPhone, and backpack, those items were properly searched and the Trial Court was correct in denying Appellant's Motion to Suppress.

CONCLUSION

Given the applicable statutes, evidence, and case law, the Court was correct in denying Appellant's Motion to Suppress. Accordingly, the decision of the trial court should be **AFFIRMED**.

BY THE COURT:

Diana L. Anhalt

DIANA ANHALT, J.

February 14, 2019

PROOF OF SERVICE

I hereby certify that on the date set forth below, I caused an original copy of the Judicial Opinion to be served upon the persons at following locations, which service satisfies the requirements of Pa.R.A.P. 122:

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By: Diana L. Anhalt
Honorable Diana L. Anhalt