TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-14-00090-CR

Paul Martin Ahern, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 299TH JUDICIAL DISTRICT
NO. D-1-DC-10-100006, HONORABLE KAREN SAGE, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

Following the denial of his pretrial motion to suppress evidence, appellant Paul Martin Ahern pleaded guilty to the offense of possession of child pornography and was sentenced to ten years' imprisonment, but the district court suspended imposition of the sentence and placed Ahern on community supervision for a period of four years.[1] In four related points of error on appeal, Ahern asserts that the district court abused its discretion in denying his motion to suppress. We will affirm the district court's judgment.

BACKGROUND

The record reflects that, following the issuance and execution of a search warrant, images and videos of child pornography were discovered on an external hard drive found in Ahern's home. Based on this evidence, Ahern was charged with three counts of possession of

[1] *See* Tex. Penal Code § 43.26.

child pornography. Subsequently, Ahern filed a motion to suppress, alleging that the search warrant was not supported by probable cause. Following a hearing, the district court denied the motion to suppress. Ahern pleaded guilty to the charges against him and was placed on community supervision as noted above. This appeal followed.

STANDARD AND SCOPE OF REVIEW

Under Texas and federal law, no search warrant may issue without a sworn affidavit that sets forth facts sufficient to establish probable cause.[2] "Ordinarily, the warrant process involves the presentation to a neutral and detached magistrate of an affidavit that establishes probable cause to conduct a search."[3] "Probable cause exists when, under the totality of the circumstances, there is a fair probability or substantial chance that contraband or evidence of a crime will be found at the specified location."[4] Probable cause is a "flexible and non-demanding standard."[5] When reviewing whether a search-warrant affidavit contains sufficient information to establish probable cause, "the test is whether a reasonable reading by the magistrate would lead to the conclusion that the affidavit

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[2] *See* U.S. Const. amend. IV; Tex. Const. art. I, § 9; Tex. Code Crim. Proc. arts. 1.06, 18.01(b), (c).

[3] *Jones v. State*, 364 S.W.3d 854, 857 (Tex. Crim. App. 2012) (citing *Gibbs v. State*, 819 S.W.2d 821, 830 (Tex. Crim. App. 1991)).

[4] *Bonds v. State*, 403 S.W.3d 867, 873 (Tex. Crim. App. 2013) (citing *Flores v. State*, 319 S.W.3d 697, 702 (Tex. Crim. App. 2010); *Rodriguez v. State*, 232 S.W.3d 55, 60 (Tex. Crim. App. 2007)); *State v. Duarte*, 389 S.W.3d 349, 354 (Tex. Crim. App. 2012).

[5] *Bonds*, 403 S.W.3d at 873; *Rodriguez*, 232 S.W.3d at 60.

provided a 'substantial basis for the issuance of the warrant,' thus, 'the magistrate's sole concern should be probability.'"[6]

In most cases, "[a]ppellate courts review a trial court's ruling on a motion to suppress by using a bifurcated standard, giving almost total deference to the historical facts found by the trial court and analyzing de novo the trial court's application of the law."[7] "However, when the trial court is determining probable cause to support the issuance of a search warrant, there are no credibility determinations, rather the trial court is constrained to the four corners of the affidavit."[8] Similarly, the reviewing court "may look only to the four corners of the affidavit," and we "should view the magistrate's decision to issue the warrant with great deference."[9] "[W]e apply a highly deferential standard because of the constitutional preference for searches to be conducted pursuant to a warrant as opposed to a warrantless search."[10] "As long as the magistrate had a substantial basis for concluding that probable cause existed, we will uphold the magistrate's probable cause determination."[11]

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[6] *Rodriguez*, 232 S.W.3d at 60 (quoting *Johnson v. State*, 803 S.W.2d 272, 288 (Tex. Crim. App. 1990)).

[7] *State v. Cuong Phu Le*, 463 S.W.3d 872, 876 (Tex. Crim. App. 2015) (citing *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997)).

[8] *State v. McLain*, 337 S.W.3d 268, 271 (Tex. Crim. App. 2011) (citing *Hankins v. State*, 132 S.W.3d 380, 388 (Tex. Crim. App. 2004)).

[9] *Jones*, 364 S.W.3d at 857.

[10] *McClain*, 337 S.W.3d at 271 (citing *Swearingen v. State*, 143 S.W.3d 808, 810-11 (Tex. Crim. App. 2004)).

[11] *Id*. (citing *Illinois v. Gates*, 462 U.S. 213, 236 (1983)).

Moreover, "[w]e are instructed not to analyze the affidavit in a hyper-technical manner."[12] Instead, we "should interpret the affidavit in a commonsensical and realistic manner, recognizing that the magistrate may draw reasonable inferences."[13] "When in doubt, we defer to all reasonable inferences that the magistrate could have made."[14] "The inquiry for reviewing courts, including the trial court, is whether there are sufficient facts, coupled with inferences from those facts, to establish a 'fair probability' that evidence of a particular crime will likely be found at a given location."[15] "The issue is not whether there are other facts that could have, or even should have, been included in the affidavit; we focus on the combined logical force of facts that are in the affidavit, not those that are omitted from the affidavit."[16] "Provided the magistrate had a substantial basis for concluding that probable cause existed, we will uphold the magistrate's probable-cause determination."[17] "Although the reviewing court is not a 'rubber stamp,' 'the magistrate's decision should carry the day in doubtful or marginal cases, even if the reviewing court might reach a different result upon de novo review.'"[18]

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[12] *Id*. (citing *Gates*, 462 U.S. at 236).

[13] *Rodriguez*, 232 S.W.3d at 61 (citing *Gates*, 462 U.S. at 240).

[14] *Id*.

[15] *Id*. at 62.

[16] *Id*.

[17] *Bonds*, 403 S.W.3d at 873.

[18] *Jones*, 364 S.W.3d at 857 (quoting *Flores*, 319 S.W.3d at 702).

THE AFFIDAVIT

The search-warrant affidavit in this case was drafted by Sergeant Amy Padron of the Cyber Crimes Division of the Office of the Attorney General. Padron began the affidavit with photographs and a detailed description of the single-family home to be searched, including its physical address. Padron then indicated that the property was owned by Ahern. Padron averred that she believed Ahern had possession of computer equipment and files that contained child pornography, and she described in detail two pornographic images that Padron believed would be found at the premises.

Padron next provided details regarding why she believed child pornography would be found at Ahern's address. She began with a summary of her qualifications, including eleven years of law enforcement experience. Padron averred that in her current assignment with the Attorney General's Office, she "focuses primarily on child exploitation crimes, particularly possession and promotion of child pornography." She added, "The vast majority of the investigations in which Affiant has participated [] have involved the use of computers and/or the Internet to facilitate child exploitation crimes." Padron then summarized her investigation in this case. According to Padron, her investigation began with a referral from the FBI based on information that the FBI had received from the National Center for Missing and Expolited Children (NCMEC).[19] The information specified that NCMEC had received "three complaints in reference

[19] According to the affidavit, "the NCMEC was established in 1984 as an organization to provide services nationwide for professionals and families in the prevention of abducted, endangered, and sexually exploited children. Pursuant to its mission and its congressional mandates [internal citations omitted], NCMEC serves as a clearinghouse of information about missing and exploited children."

to a Flickr.com subscriber uploading 181 images that contained child pornography through a Flickr.com account. According to their official reports, the images were uploaded on November 16, 2008 at 8:58 PST and December 29, 2008 at 9:36 PST." The three reports were assigned separate case numbers and then were forwarded to the FBI for further investigation.

The reports "indicated that the Yahoo! Flickr Staff discovered that images of child pornography titled 'img92.jpg' and '154jpg' had been uploaded and posted under Flickr screen/usernames '31984025@N04'" and '32595720@N07'" and that "Yahoo! Flickr staff reported the images were uploaded using Internet Protocol address 66.90.167.50 (the IP address captured at the time of the offense/uploading)."[20] Based on this information, Padron continued, "the FBI issued an administrative subpoena to Yahoo! Inc. requesting Flickr account/subscriber information for '31984025@N04.'" "According to the FBI report, Yahoo! Inc. provided the email address poolager@yahoo.com [and] also provided IP addresses associated with the account/subscriber." Shortly thereafter, "the FBI issued an administrative subpoena to Grande Communications Network, Inc., requesting account/subscriber information for IP address 24.155.244.185 (IP address captured at the time of the account registration and during some of the uploads)." In response to the subpoena, Grande Communications identified Ahern as the account holder and provided the FBI with Ahern's physical address and phone numbers. Padron further specified in the affidavit that the FBI repeated the above process for Flickr account number "32595720@N07" and again obtained the name, email address, physical address, and phone numbers associated with Ahern.

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[20] According to the affidavit, "Yahoo! Flickr screen/usernames are a series of random numbers and/or symbols that Yahoo! uniquely assigns to each Flickr user. Flickr is an online website from Yahoo! where users can upload, manage/organize and share videos and photos."

Padron went on to summarize the details from a subsequent complaint received by NCMEC in March 2009. This complaint was "in reference to a Flickr.com subscriber uploading 70 images that contained child pornography through a Flickr.com account. . . . The report was then forwarded to the Cyber Crimes Unit at the Texas Attorney General's Office for further investigation. Affiant conducted a check on the Internet Protocol address 66.90.167.207 (captured at the time of the uploads)," subpoenaed Grande Communications for the account and subscriber information associated with that IP address, and was again provided with Ahern's name, physical address, and phone numbers. Padron then "requested assistance from Office of Attorney General Analyst Landrah Polansky, to identify the suspect and determine current residence information," and Polansky confirmed that the identifying information associated with Ahern was current. Padron further specified that, on February 5, 2010, she "drove by" the physical address that had been identified, "observed a Subaru Forester, with Texas license plates 356KRG," and confirmed that the vehicle was registered to Ahern. Padron also averred that she "personally viewed the images of child pornography possessed and promoted by suspected party" and that she believed "[t]he material/images uploaded by the suspect, 'img92.jpg' and 154.jpg' depicts child pornography, as defined in Texas Penal Code 43.26, involving children less than 18 years of age engaged in sexual conduct."

Padron then went on to explain why she believed the pornography would still be in Ahern's possession at his home address, over one year after the two images specified in the affidavit were uploaded. Padron averred,

> As a result of the above-mentioned training and experience and in speaking with other experienced investigators, Affiant knows that persons involved in sending or

> receiving child pornography tend to retain said material for extended periods of time, months or even years. The visual images obtained, traded, and/or sold are prized by those individuals interested in child pornography. In addition to their emotional value to the collector (usually quite significant in Affiant's experience), the visual images are inherently valuable for trading or selling and therefore are destroyed or deleted only rarely by the collector.
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> From Affiant's experience and the experience of other officers in the online child pornography area, Affiant knows that collections of child pornography will more than likely be located in the suspect's home. Affiant knows from interviewing such offenders that the primary reason they collect sexually explicit images of children is for their personal sexual arousal and gratification, the primary reason pornography of any type is collected and viewed. Consequently, a high degree of privacy is necessary to enjoy the collection, and no other location can provide the level of privacy needed than one's own home.

Padron also cited to the work of Retired Special Agent Kenneth Lanning of the FBI, who Padron averred was "a widely acknowledged expert in the field of online exploitation," to support her belief that the pornography would still be in Ahern's possession. According to Padron, "Even if evidence of the existence of a child pornography collection is several years old, Agent Lanning believes that chances are he still has the collection now—only larger." Padron continued,

> Through training, Affiant has learned that the address the Internet service provider shows as the billing address is the same address where the person had been using the computer and utilizing the Internet connection. Based on Agent Lanning's expert opinion that 'no matter how much (child pornography) the (collector) has, he never has enough; and he rarely throws anything away,' and Affiant's experience, it is the belief that the computer that the suspect used in the transmission of the contraband in this case and which contains images constituting child pornography is currently located within [Ahern's home address].

Padron went on to provide additional information concerning the characteristics of child pornography "collectors." She concluded the probable-cause portion of her affidavit with

information relating to why she believed pornographic images were likely to be stored on computers for extended periods of time:

> Graphic image files containing child pornography can be maintained for long periods of time in a number of ways: on a computer's built-in hard disk drive, on portable storage disks, on CD-ROMs, or on other computer media. Most often the collector maintains the files purposefully. Even when the pornographic files have been deleted (due to guilt or fear of discovery), however, computer forensic experts are nonetheless often able to recover the pornographic images that had been purposefully possessed previously.
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> From her experience and training, Affiant knows that persons who use personal computers in their homes tend to retain their personal files and data for extended periods of time, months or even years. Affiant knows that due to personal computers' unique ability to store large amounts of data for extended periods of time without consuming much, if any, additional physical space, people tend to retain this data. Affiant knows this to be true regardless of whether or not a person has traded-in or upgraded to a new personal computer. Affiant knows personal computer users to transfer most of their data onto their new computers when making an upgrade. Affiant also knows persons who use personal computers tend to transfer their computers with them when moving to a different residence. Visual images, such as child pornography, are as likely (if not more so) as other data to be transferred to a person's new, replacement or upgraded computer system.

Based on the above information, Padron requested the issuance of a search warrant authorizing the seizure of any computer equipment and related evidence from Ahern's home address. The magistrate, in this case the Hon. Julie Kocurek, granted the request and signed the search warrant.

ANALYSIS

In four related points of error on appeal, Ahern asserts that the search warrant was not supported by probable cause because: (1) the affidavit included information that was "stale"; (2) the affidavit did not set out sufficient facts to establish that Ahern would still be in possession of the digital images that he had earlier uploaded; (3) the affidavit relied on general information relating

to "collectors" of child pornography without establishing that Ahern was in fact a collector; and (4) when the portions of the affidavit that Ahern claims are "false, irrelevant, and nonspecific" are struck from the affidavit, the information that remains is not sufficient to support a finding of probable cause to issue the warrant.

"Stale" information

In his first point of error, Ahern asserts that the evidence on which Padron relied in her affidavit was stale. Similarly, in his second point of error, Ahern asserts that the affidavit failed to set out sufficient facts to establish that the two digital images described in Padron's affidavit, allegedly uploaded by Ahern in November or December 2008, would still be in Ahern's possession and at his residence in February 2010, when the search warrant was executed.

"The probable-cause standard means that the affidavit must set out sufficient facts for the magistrate to conclude that the item to be seized will be on the described premises at the time the warrant issues and the search executed."[21] "Thus, . . 'an affidavit is inadequate if it fails to disclose facts which would enable the magistrate to ascertain from the affidavit that event upon which the probable cause was founded was not so remote as to render it ineffective.'"[22] "Affidavits are to be read 'realistically and with common sense,' and reasonable inferences may be drawn from

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[21] *Crider v. State*, 352 S.W.3d 704, 707 (Tex. Crim. App. 2011) (citing *Cassias v. State*, 719 S.W.2d 585, 588 (Tex. Crim. App. 1986); *Schmidt v. State*, 659 S.W.2d 420, 421 (Tex. Crim. App. 1983)).

[22] *Id*. (quoting *Garza v. State*, 48 S.W.2d 625, 627-28 (Tex. Crim. App. 1932) (op. on reh'g)).

the facts and circumstances set out within the four corners of the affidavit."[23] "But there must be sufficient facts within the affidavit to support a probable-cause finding that the evidence is still available and in the same location."[24] "To justify a magistrate's finding that an affidavit established probable cause to issue a search warrant, the facts set out in the affidavit must not have become stale when the warrant is issued."[25] "In other words, the facts contained in the affidavit must have occurred recently enough to allow the magistrate to conclude that probable cause exists at the time that the warrant is requested and ultimately issued."[26] "If so much time has passed that it is unreasonable to presume that the sought items are still located at the suspected place, the information in an affidavit is stale."[27] "However, the amount of delay that will make information stale for search-warrant purposes depends on the particular facts of the case, including the nature of the criminal activity and the type of evidence sought."[28] "'Mechanical count of days is of little assistance in this determination' but rather common sense and reasonableness must prevail, with

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[23] *Id*.

[24] *Id*.

[25] *Aguirre v. State*, 490 S.W.3d 102, 114 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (citing *Ex parte Jones*, 473 S.W.3d 850, 856 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd); *State v. Dugas*, 296 S.W.3d 112, 116 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd)).

[26] *Kennedy v. State*, 338 S.W.3d 84, 93 (Tex. App.—Austin 2011, no pet.) (citing *Guerra v. State*, 860 S.W.2d 609, 611-12 (Tex. App.—Corpus Christi 1993, pet. ref'd)).

[27] *Id*.

[28] *Aguirre*, 490 S.W.3d at 115 (citing *Lockett v. State*, 879 S.W.2d 184, 189 (Tex. App.—Houston [14th Dist.] 1994, pet. ref'd).

considerable deference given to the magistrate based on the facts before [her], absent arbitrariness."[29] "Further, when the affidavit properly recites facts indicating activity of a protracted and continuous nature—a course of conduct—the passage of time becomes less significant."[30] Accordingly, "'[t]he proper method to determine whether the facts supporting a search warrant have become stale is to examine, in light of the type of criminal activity involved, the time elapsing between the occurrence of events set out in the affidavit and the time the search warrant is issued.'"[31]

The type of criminal activity alleged in this case is possession of child pornography. In the context of child-pornography cases, Texas and federal courts have repeatedly rejected claims that the passage of months or even more than a year between the alleged activity and issuance of the warrant renders the information within an affidavit stale.[32] This is a reasonable conclusion based on

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[29] *Id*. (quoting *Ellis v. State*, 722 S.W.2d 192, 196-97 (Tex. App.—Dallas 1986, no pet.)).

[30] *Id*. (citing *Jones*, 473 S.W.3d at 856; *Lockett*, 879 S.W.2d at 189).

[31] *Crider*, 352 S.W.3d at 707 (quoting *McKissick v. State*, 209 S.W.3d 205, 214 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd).

[32] *See Jones*, 473 S.W.3d at 856-57; *Barrett v. State*, 367 S.W.3d 919, 926 (Tex. App.—Amarillo 2012, no pet.); *State v. Cotter*, 360 S.W.3d 647, 653-54 (Tex. App.—Amarillo 2012, no pet.); *Steele v. State*, 355 S.W.3d 746, 751 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd); *McKissick*, 209 S.W.3d at 215; *Sanders v. State*, 191 S.W.3d 272, 279-80 (Tex. App.—Waco 2006, pet. ref'd); *Morris v. State*, 62 S.W.3d 817, 823-24 (Tex. App.—Waco 2001, no pet.); *Burke v. State*, 27 S.W.3d 651, 655 (Tex. App.—Waco 2000, pet. ref'd); *see also United States v. Allen*, 625 F.3d 830, 842-43 (5th Cir. 2010) (holding lapse of eighteen months did not render information stale in child pornography case); *United States v. Richardson*, 607 F.3d 357, 370 (4th Cir. 2010) (concluding that lapse of four months did not render probable cause to search for child pornography "stale"); *United States v. Newsom*, 402 F.3d 780, 783 (7th Cir. 2005) ("Information a year old is not necessarily stale as a matter of law, especially where child pornography is concerned."); *United States v. Harvey*, 2 F.3d 1318, 1323 (3d Cir. 1993) (concluding that delays of two and fifteen months does not render information stale).

evidence that individuals who possess child pornography tend to retain the pornography that they have obtained for extended periods of time.[33]

Here, Padron specified in her affidavit that the National Center for Missing and Exploited Children (NCMEC) had received "three complaints in reference to a Flickr.com subscriber uploading 181 images that contained child pornography through a Flickr.com account" in November and December 2008. The FBI was able to obtain the IP address from where the images had been uploaded and traced that IP address to Ahern's residence. Padron further specified that in March 2009, there was another report disclosing that an additional 70 images containing child pornography had been uploaded using an IP address that was again traced to Ahern's residence. Thus, according to the affidavit, 251 images that contained child pornography were traced to Ahern's residence over a period of five months. Although Padron was able to verify that only two of the images depicted child pornography, the possession of even a single image of child pornography is

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[33] *See, e.g.*, *United States v. Lemon*, 590 F.3d 612, 615 (8th Cir. 2010) ("Many courts, including our own, have given substantial weight to testimony from qualified law enforcement agents about the extent to which pedophiles retain child pornography."); *United States v. Morales-Aldahondo*, 524 F.3d 115, 119 (1st Cir. 2008) (holding that three-year delay between acquisition of child pornography and application for warrant did not render supporting information stale since "customers of child pornography sites do not quickly dispose of their cache"); *United States v. Watzman*, 486 F.3d 1004, 1008 (7th Cir. 2007) (rejecting challenge to probable cause where three months elapsed between the crime and issuance of the warrant where agent testified child pornographers retain their collected materials for long periods of time); *United States v. Gourde*, 440 F.3d 1065, 1072 (9th Cir. 2006) (en banc) (concluding that "[t]he details provided on the use of computers by child pornographers and the collector profile" provided support for a finding of probable cause); *United States v. Riccardi*, 405 F.3d 852, 861 (10th Cir. 2005) (finding probable cause based, in part, on "the observation that possessors often keep electronic copies of child pornography"); *United States v. Lacy*, 119 F.3d 742, 746 (9th Cir. 1997) ("We are unwilling to assume that collectors of child pornography keep their materials indefinitely, but the nature of the crime, as set forth in this affidavit, provided 'good reason[]' to believe the computerized visual depictions downloaded by Lacy would be present in his apartment when the search was conducted ten months later.")

illegal,[34] and Padron's verification of two of the images would provide the magistrate with a "substantial basis" to conclude that there was a "fair probability" that Ahern had possessed child pornography. Moreover, approximately one week before the warrant was executed, Padron verified that Ahern still lived at the residence where the pornography had been uploaded eleven to fifteen months earlier. Given the digital nature of the evidence at issue and the "course of conduct" described in the affidavit—uploading multiple images containing child pornography on multiple occasions—the magistrate could have reasonably inferred that the child pornography that had been uploaded at Ahern's residence from November 2008 through March 2009 would still be at Ahern's residence in February 2010, particularly in light of Padron's statements in her affidavit, summarized above, tending to show that in her experience, digital images containing child pornography can be stored on computer devices "for extended periods of time, months or even years."[35] Again, the "flexible and non-demanding" standard for determining probable cause is not certainty but whether there is "a fair probability or substantial chance that contraband or evidence of a crime will be found at the specified location."[36] On this record, in light of the authorities cited above and the "highly deferential" standard of review we are to apply to the magistrate's probable-cause determination, we

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[34] *See* Tex. Penal Code § 43.26(b)(3)(A).

[35] *See, e.g.*, *Jones*, 473 S.W.3d at 856-57; *Cotter*, 360 S.W.3d at 653-54; *Steele*, 355 S.W.3d at 751-52; *McKissick*, 209 S.W.3d at 215; *Sanders*, 191 S.W.3d at 279; *Morris*, 62 S.W.3d at 823-24; *Burke*, 27 S.W.3d at 655; *see also Allen*, 625 F.3d at 843-44; *Richardson*, 607 F.3d at 370; *United States v. Frechette*, 583 F.3d 374, 378-79 (6th Cir. 2009); *Morales-Aldahondo*, 524 F.3d at 119; *Riccardi*, 405 F.3d at 860-61; *Newsom*, 402 F.3d at 783; *Lacy*, 119 F.3d at 745-46.

[36] *Bonds*, 403 S.W.3d at 873.

conclude that the affidavit in this case was sufficient to provide the magistrate with probable cause to believe that images of child pornography would be found at Ahern's residence.

We overrule Ahern's first and second points of error.

Information relating to "collectors" of child pornography

In his third point of error, Ahern asserts that the information in the affidavit relating to "collectors" of child pornography, summarized above, did not support the magistrate's finding of probable cause because there was nothing in the affidavit to suggest that Ahern was a collector of child pornography. We disagree. Again, the affidavit in this case included information tending to show that 251 images that "contained child pornography" were uploaded to an IP address that was traced to Ahern's residence, which would support a reasonable inference by the magistrate that Ahern was in fact a "collector" of such images. Moreover, as the State observes, the affidavit did not need to prove that Ahern "collected" child pornography; the affidavit simply needed to provide a "substantial basis" for the magistrate to conclude that there was a "fair probability" that some child pornography would be found at Ahern's residence. The affidavit in this case did so, for the reasons discussed above.

We overrule Ahern's third point of error.

Franks v. Delaware

Finally, in his fourth point of error, Ahern asserts that, pursuant to *Franks v. Delaware*,[37] the district court should have struck what he contends is "false, irrelevant, and

[37] 438 U.S. 154 (1978).

nonspecific" information contained within the affidavit. According to Ahern, if the district court had done so, the remaining information in the affidavit would have been insufficient to establish probable cause.

"Under *Franks*, a defendant who makes a substantial preliminary showing that a false statement was made in a warrant affidavit knowingly and intentionally, or with reckless disregard for the truth, may be entitled by the Fourth Amendment to a hearing, upon the defendant's request."[38] "If at the hearing the defendant establishes the allegation of perjury or reckless disregard by a preponderance of the evidence, the affidavit's false material is set aside."[39] "If the remaining content of the affidavit does not then still establish sufficient probable cause, the search warrant must be voided and the evidence resulting from that search excluded."[40] "At a *Franks* hearing, it is the defendant's burden to prove the alleged perjury or reckless disregard for the truth by a preponderance of the evidence."[41]

We first observe that "in order to be granted a *Franks* hearing a defendant must: (1) allege deliberate falsehood or reckless disregard for the truth by the affiant, specifically pointing out the portion of the affidavit claimed to be false; (2) accompany these allegations with an offer of proof stating the supporting reasons; and (3) show that when the portion of the affidavit alleged to

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[38] *Harris v. State*, 227 S.W.3d 83, 85 (Tex. Crim. App. 2007) (citing *Franks*, 438 U.S. at 155-56).

[39] *Id*.

[40] *Id*.

[41] *Emack v. State*, 354 S.W.3d 828, 838 (Tex. App.—Austin 2011, no pet.) (citing *Franks*, 438 U.S. at 156).

be false is excised from the affidavit, the remaining content is insufficient to support issuance of the warrant."[42] The record does not reflect that Ahern did so. Nevertheless, the district court allowed Ahern to present evidence and argument related to *Franks* at the suppression hearing. Specifically, Ahern argued that Padron had taken some of Agent Lanning's findings regarding child-pornography collectors "out of context," based on Padron's acknowledgment in her testimony that she did not include in her affidavit any statements reflecting a distinction that Lanning had made in his research between "preferential sex offenders" and "situational sex offenders," with the former being more likely than the latter to collect child pornography. However, at the conclusion of the hearing, the district court found that Padron did not make any "deliberate misrepresentations such that would invalidate the search warrant," and the record supports this finding. Ahern elicited no testimony from Padron tending to show that she had made any false statements regarding Lanning's research knowingly and intentionally or with a reckless disregard for the truth. We also observe that, even if the statements referencing Lanning's work were removed from the affidavit, based on a finding that Padron had misrepresented his work, there would still be sufficient statements in the affidavit, discussed above, that provide a substantial basis for the magistrate to conclude that there was a "fair probability" that child pornography would be found at Ahern's residence. On this record, we cannot conclude that the district court abused its discretion in overruling Ahern's *Franks* argument.[43]

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[42] *Harris*, 227 S.W.3d at 85 (citing *Cates v. State*, 120 S.W.3d 352, 356 (Tex. Crim. App. 2003)).

[43] *See, e.g.*, *Massey v. State*, 933 S.W.2d 141, 146-47 (Tex. Crim. App. 1996); *Aguirre*, 490 S.W.3d at 109-10; *Graves v. State*, 307 S.W.3d 483, 494-95 (Tex. App.—Texarkana 2010, pet. ref'd); *McKissick*, 209 S.W.3d at 212-14; *see also Lamarre v. State*, No. 04-11-00618-CR, 2013 Tex. App. LEXIS 2036, at *9-17 (Tex. App.—San Antonio Mar. 1, 2013, pet. ref'd) (mem. op.,

We overrule Ahern's fourth point of error.

CONCLUSION

We affirm the judgment of the district court.

Bob Pemberton, Justice

Before Justices Puryear, Pemberton, and Bourland

Affirmed

Filed: December 1, 2016

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not designated for publication); *Perry v. State*, No. 02-06-00378-CR, 2008 Tex. App. LEXIS 6446, at *24-26 (Tex. App.—Fort Worth Aug. 21, 2008, pet. ref'd) (mem. op., not designated for publication).