COURT OF APPEALS DECISION DATED AND FILED

December 17, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP2847-CR

Cir. Ct. No. 2005CF302

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RALPH A. HOAK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: LINDA VAN DE WATER, Judge. *Affirmed*.

Before Brown, C.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. Ralph A. Hoak appeals a judgment entered upon his guilty plea convicting him of three counts of possession of child pornography and an order denying him postconviction relief. Hoak contends that he is entitled

to a ***Franks/Mann***[1] hearing on his claim that the affidavit supporting the search warrant omitted critical information; he should be allowed additional discovery on that issue; and the affidavit did not establish probable cause to issue a warrant. We disagree and affirm.

¶2 The State alleged that Hoak purchased memberships in onlinesharingcommunity.com and BoyzMovies.com, two Internet websites that contained child pornography. His arrest came about as a result of a federal investigation into Internet child pornography by the Department of Homeland Security's Bureau of Immigration and Customs Enforcement (ICE). The investigation showed that a company called Regpay owned and operated various members-only fee-based websites that contained images of apparently real children engaging in pornographic and sexually explicit conduct with adults and other children. Regpay, located in Belarus, maintained its customer database of members' credit card numbers and e-mail addresses in an account in Florida. ICE agents obtained the database, traced several of the credit card numbers and e-mail addresses to Hoak and referred the case to the City of Brookfield police.

¶3 On June 3, 2004, City of Brookfield Police Detective Ron LaGosh swore out an affidavit in support of a warrant to search Hoak's home and seize his computers. The affidavit detailed LaGosh's and an ICE special agent's qualifications, provided information about the investigating task force, described the role of the Internet and computers in facilitating the dissemination of child pornography, and advised that law enforcement agencies and the National Center

[1] *See* ***Franks v. Delaware***, 438 U.S. 154 (1978); *see also* ***State v. Mann***, 123 Wis. 2d 375, 367 N.W.2d 209 (1985).

for Missing and Exploited Children identified Regpay as a major facilitator of Internet sales of child pornography. The affidavit also summarized the particular facts establishing probable cause, which included the seizure of Regpay's customer database, the identification of Hoak as a Regpay customer, and a description of various images from the fee-based websites to which access was purchased with Hoak's credit cards, based on task force agents' own purchase of memberships to those sites. The magistrate issued the search warrant.

¶4 After police seized Hoak's computers and other materials, he was arrested and charged with ten counts of possession of child pornography in violation of WIS. STAT. § 948.12(1m) (2005-06).[2] Hoak moved to suppress the evidence seized in the search. He argued that the affidavit supporting the warrant recklessly or intentionally failed to inform that the fee-based websites contained "abundant" licit material in addition to child pornography and therefore did not establish probable cause. Hoak also filed a motion to compel discovery on grounds that the State had provided incomplete materials regarding what the investigating agents knew about the websites. The trial court denied both motions. Hoak pled guilty to three counts, and the State agreed to dismiss and read in the remaining seven counts. The court withheld sentence and ordered three concurrent five-year terms of probation. Hoak's motion for postconviction relief was denied.

¶5 On appeal, Hoak first contends that the trial court erred in denying his motion to suppress the fruits of the search. He argues the search warrant was

[2] All references to the Wisconsin Statutes are to the 2005-06 version.

not supported by probable cause because it was tainted by a misleading affidavit, and that he should have been given a chance to make that showing. We disagree.

¶6 We give great deference to a magistrate's determination that probable cause supports issuing a search warrant. *See* ***State v. Multaler***, 2002 WI 35, ¶7, 252 Wis. 2d 54, 643 N.W.2d 437. The determination stands unless the defendant shows that the facts are clearly insufficient to support such a finding. ***Id.*** The issuing magistrate is to make a practical, commonsense decision whether, considering everything the affidavit sets forth, including the veracity and basis of knowledge of those who supply hearsay information, a fair probability exists that contraband or evidence of a crime will be found in a particular place. ***State v. DeSmidt***, 155 Wis. 2d 119, 131, 454 N.W.2d 780 (1990).

¶7 Hoak sought a hearing to challenge the affidavit. He claims the affidavit was recklessly or intentionally misleading because it asserted that the websites to which he held paid subscriptions were "known child pornography websites" without also referencing their "abundant" legal content. He acknowledges the members-only websites to which he subscribed contained some child pornography, but asserts that the "vast majority" of the content was legal. Had this information been included in the warrant affidavit, he continues, the magistrate could not have found probable cause to issue the search warrant.

¶8 To be afforded a hearing, the defendant must make a substantial preliminary showing that the affidavit contains false statements made knowingly and intentionally or with reckless disregard of the truth, or omits facts which, if included, would have precluded a finding of probable cause. *See* ***Franks v. Delaware***, 438 U.S. 154, 155-56 (1978); *see also* ***State v. Mann***, 123 Wis. 2d 375, 384, 388-89, 367 N.W.2d 209 (1985). Omitted facts must be undisputed, capable

of a single meaning and critical to a determination of probable cause. ***Mann***, 123 Wis. 2d at 388. Moreover, omissions made innocently or negligently do not prompt a hearing. *See* ***id.*** at 386-87. They must be "the equivalent of 'a deliberate falsehood or a reckless disregard for the truth.'" ***Id.*** at 388 (citing ***Franks***, 438 U.S. at 155-56). Hoak has not established that such is the case here.

¶9 Hoak's motion to suppress argued that the affidavit "conveniently fail[ed] to mention that federal law enforcement officials discovered that only a very small percentage of images on these two websites were considered child pornography," and that "[i]n the absence of any documentation to the contrary, I have to assume that the amount of child pornography on each website is less than 1% of the total number of pictures contained on each website." Hoak's argument rests on a shaky and unproved premise: that the ICE report's identification of four sexually explicit images of children on one website and five on another comprised the websites' entire pornographic content. Hoak may "have to assume" that the websites offered predominantly licit material, but we decline to make that leap or to fault the magistrate for not having done so. We also decline to draw a line at which a website's child pornography content becomes acceptable. Hoak's arguments are better suited to convincing a jury that he lacks culpability than to establishing that the affidavit lacks probable cause. His conclusory allegations fall short of the substantial preliminary showing necessary to warrant a hearing.

¶10 Hoak also argues that he is entitled to further discovery to shore up his claims that onlinesharingcommunity.com and BoyzMovies.com are "ordinary sites hosting mainly licit material into which some modest traces of contraband may have crept for some period of time." He claims entitlement to "any record" of the ICE investigators "such as reports or screenprints or server files, describing

or showing the contents of the websites in question, which would have demonstrated their relative dearth of illicit material."

¶11 The right to discovery in criminal cases is limited by statute. *See* ***State v. O'Brien***, 223 Wis. 2d 303, 319, 588 N.W.2d 8 (1999). The State's discovery obligations under WIS. STAT. § 971.23(1)(a)-(h) extend to material and information in the possession or control of others who have investigated or evaluated the case and who either regularly report or, in a particular case, have reported to the prosecutor's office. *See* ***State v. DeLao***, 2002 WI 49, ¶24, 252 Wis. 2d 289, 643 N.W.2d 480.

¶12 Assuming Hoak believes the reports would be exculpatory, *see* § 971.23(1)(h),[3] the prosecutor's duty to obtain investigative information is not limitless. *See* ***DeLao***, 252 Wis. 2d 289, ¶24. Hoak indicated at the hearing on his discovery motion that he was seeking "[a]ny reports that would … describe the general content" of the websites at issue, but conceded he did not know what reports that would be. The court responded: "I don't know either. I can't order [the State] to produce something you don't know and I don't know." Indeed, Hoak acknowledged that Homeland Security informed the prosecutor that "no reports … exist with respect to a general summary of these particular websites." Hoak has not shown that any further discovery obligation or entitlement exists.

¶13 Hoak next claims that the search warrant affidavit required too many inferences to reasonably establish probable cause. A search warrant may issue only on a finding of probable cause by a neutral and detached magistrate.

[3] Hoak cites only WIS. STAT. § 971.23(1)(b), which applies to a written summary of his oral statements. That subsection would not seem to apply to the ICE reports Hoak seeks.

DeSmidt, 155 Wis. 2d at 131. The warrant-issuing judge must be given enough facts to "excite an honest belief in a reasonable mind" that the objects sought are linked with a crime and will be found in the place to be searched. ***State v. Higginbotham***, 162 Wis. 2d 978, 989, 471 N.W.2d 24 (1991) (citations omitted). We are confined on review to the record that was before the warrant-issuing judge and to ensuring that the magistrate had a substantial basis for concluding that the probable cause existed. *See* ***id.***

¶14 The warrant affidavit here detailed the credentials of the local and federal investigators; explained the role of computers and the Internet in the production, distribution, use and storage of child pornography; described the federal task force that identified websites containing child pornography and explained how individuals use personal information to subscribe to those websites; identified Hoak as a subscriber through his name, home and e-mail addresses, date of birth, and credit card numbers; and described particular sexually explicit and pornographic images of children found on those websites.

¶15 Hoak argues, though, that the affidavit demanded the drawing of too many inferences. He contends the affidavit does not establish that: (1) the time period during which he had access to the websites coincided with the period that the sites "hosted" the illicit material; (2) he actually viewed any illicit images; (3) even if he "noticed" the illicit material, he also "acquire[d]" it; and (4) even if the first three are true, the images still would be on his computer at the time of the search. In determining whether an affidavit states probable cause, however, we consider only the facts that are presented to the magistrate. *See* ***State v. Ward***, 2000 WI 3, ¶26, 231 Wis. 2d 723, 604 N.W.2d 517.

¶16 The facts alleged in this affidavit closely reflect those found to establish probable cause in ***State v. Gralinski***, 2007 WI App 233, 306 Wis. 2d 101, 743 N.W.2d 448, *review denied*, 2008 WI 6, 306 Wis. 2d 46, 744 N.W.2d 296. ***Gralinski*** also arose out of an ICE investigation into Internet child pornography which led investigators to Regpay. ***Id.***, ¶3. Federal agents identified Gralinski from Regpay's customer database as a subscriber to suspect websites. ***Id.***, ¶¶4-5. A special agent submitted an affidavit in support of a search warrant for Gralinski's home. ***Id.***, ¶7. As here, the issue there was whether the warrant affidavit established probable cause to justify searching Gralinski's home and computer. ***Id.***, ¶1. Gralinski argued that the affidavit did not establish probable cause because, given the prevalence of credit card fraud, the connection between the use of his credit card number and a reasonable probability that his home contained evidence of criminal activity was too tenuous and required the "piling of inferences" and "near total reliance" on the affiant's stated training and expertise. ***Id.***, ¶12.

¶17 We rejected that argument. ***Id.*** Emphasizing the deferential nature of our review, we observed that the warrant-issuing court may consider both the experience and special knowledge of police officers who apply for a search warrant. ***Id.***, ¶16. We concluded that the use of an individual's credit card to purchase a membership to websites containing child pornography, together with customer records confirming that person's home address, e-mail address, and credit card information, led to the reasonable inference that the person had, in fact, received or downloaded images. *See* ***id.***, ¶24. We cited with approval a Sixth Circuit case stating that evidence that a person has visited or subscribed to websites containing child pornography supports the conclusion that the person

likely has downloaded, kept and otherwise possessed the material. ***Id.***, ¶20 (citing ***United States v. Wagers***, 452 F.3d 534, 540 (6th Cir. 2006)).

¶18 Hoak tries to distinguish ***Gralinski*** because Gralinski did not argue that the websites linked to his personal account information were not fundamentally child pornography sites. That argument is immaterial to whether the affidavit on its face supported the magistrate's probable cause determination. *See* ***DeSmidt***, 155 Wis. 2d at 131. The affidavit set forth the circumstances of Hoak's alleged subscriptions to "known child pornography websites." It also described the investigators' credentials, which the magistrate may consider in a probable cause determination. *See* ***id.*** at 134-35. On that information, the magistrates' inference was reasonable, and we will defer to it. *See* ***Multaler***, 252 Wis. 2d 54, ¶7. Hoak cannot avoid a finding that probable cause existed simply because another inference may exist. The test is whether the inference actually drawn is reasonable. ***Gralinski***, 306 Wis. 2d 101, ¶25. Here, it is.

¶19 Finally, Hoak contends that permitting the warrant to stand chills First Amendment rights. He did not present this issue to the trial court; we will not address it here. *See* ***State v. Gove***, 148 Wis. 2d 936, 941, 437 N.W.2d 218 (1989) (stating that even the claim of a constitutional right is deemed waived if not timely raised in the trial court).

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.