

71255-1

71255-1

NO. 71255-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Appellant,

v.

JOSEPH PADGETT,

Respondent.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JIM ROGERS

**BRIEF OF APPELLANT**

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

JAMES M. WHISMAN  
Senior Deputy Prosecuting Attorney  
Attorneys for Appellant

King County Prosecuting Attorney  
W554 King County Courthouse  
516 3rd Avenue  
Seattle, Washington 98104  
(206) 296-9650

2005 JUN 01 10:00 AM  
KING COUNTY COURTHOUSE  
1100 3rd Avenue  
Seattle, WA 98101

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A. ASSIGNMENT OF ERROR

The trial court erred by entering an order suppressing evidence and another order clarifying the original order.

B. ISSUE PRESENTED

Is a search warrant sufficiently particular if it cites to RCW 9.68A.070, the statute entitled "Possession of Depictions of Minor Engaged in Sexually Explicit Conduct" even if the warrant also refers to the crime as "child pornography?"

C. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Based on materials obtained pursuant to a November 15, 2010 search warrant, the defendant, Joseph Pelham Padgett, was charged on January 7, 2011 by information under King County Cause number 11-1-00114-4 with one count of possessing depictions of minors engaged in sexually explicit conduct, contrary to RCW 9.68A.070. CP 1. On October 16, 2013, Padgett filed a Defense Motion to Suppress Evidence Discovered Pursuant to Invalid Search Warrant. CP 6-30. The State opposed the motion. CP 59-64. The trial court ruled that the first of two search warrants

was defective and suppressed evidence obtained under the first warrant. CP 65, 68. The State appealed.

## 2. SUBSTANTIVE AND SEARCH-RELATED FACTS

On November 11, 2010, Detective Christopher Knudsen of the King County Sheriff's Office responded to a call from Darla Padgett, the defendant's wife of 10 years, regarding child pornography Ms. Padgett had found in the defendant's possession. Ms. Padgett believed that the defendant had been unfaithful and she intended to confront him, but before doing so she disabled the combination lock on his gun safe so that he would not have access to his guns. The defendant came home and Ms. Padgett confronted him about the affair. Before talking to her, the defendant checked under Ms. Padgett's clothes to make sure she was not wearing a hidden recording device.<sup>1</sup> He was upset about the damaged gun locker and told her that the contents of the laptops in the safe could get him sent to jail. CP 18.

A week later the defendant returned to California. While he was gone Ms. Padgett hired a locksmith to open the safe. Inside

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<sup>1</sup> The defendant was formerly a police officer in San Jose, California. CP 18. He resigned after being charged with voyeurism. CP 18.

she found three laptops, four external hard drives, one thumb drive and numerous CDs, DVDs, Zip Drives and 3.5 inch floppy disks. She also found hundreds of pictures, including photos of Mr. Padgett having sex with women or posing naked for pictures. There was also a photograph where the head of a pornographic model had been removed and replaced with a photograph of a former neighbor who was a 15-year-old girl. CP 18-19.

Ms. Padgett took these items to a storage facility and then called police. CP 19.

On November 15, 2010, Detective Knudsen applied for a search warrant, specifically including in the affidavit a citation to RCW 9.68A.070, which is the statute prohibiting possession of depictions of minors engaged in sexually explicit conduct. CP 17.

The detective referred to the crime using its former title, "Child Pornography." CP 17. The affidavit said that Ms. Padgett had seen "about three pictures where . . . prepubescent girls were topless with their breasts exposed," and "a picture of a boy who was about 10 or 11 naked, holding his penis." CP 19.

Judge Phillipson signed the search warrant, finding probable cause to believe a violation of RCW 9.68A.070 had occurred, and permitting the search of "[t]hree laptop computers, two desktop

computers, four external hard drives, one thumb drive and numerous CD's, DVD's, Zip Drives and 3.5 inch floppy disks in the possession of the King County Sheriff's Office" for "[e]vidence of Child Pornography, including but not limited to files containing child pornography, data relating to dominion and control and users of the computers and media storage devices and information about programs used to obtain the child pornography." CP 15. Padgett was charged on January 7, 2011 with a single count of possessing depictions of minors engaged in sexually explicit conduct. CP 1.

On October 12, 2011, Det. Knudsen had filed an affidavit in support of a second search warrant. CP 25-27. That affidavit noted that in November, 2010, Det. Knudsen "reviewed the printed materials" turned over by Ms. Padgett and those materials did not contain any "child pornography, but there were pictures of clearly underage girls in bathing suits. Some of the printed pornography had teen/barely legal themes. I spot checked several of the VHS tapes and found they contained pornography or anime. The brief review did not find any child porn." CP 25. This second affidavit made clear, however, that the first search yielded "child pornography." CP 26. Det. Knudsen noted that he had arrested the defendant for "child pornography" and that the defendant was

thereafter charged with "Possession of Child Pornography." CP 26.

This second affidavit also explained that on September 7, 2011, Darla Padgett had found 17 rolls of undeveloped film and another VHS cassette. Det. Knudsen spoke with an investigator in California who had worked on Padgett's voyeurism case. The investigator described seizing many videotapes, including one showing a five-year-old girl taking a bath. The defendant is heard on the tape describing his desire to "take her sexually." CP 27. Other records from that investigation describe how the defendant appears on video masturbating a dildo while describing his fantasy to violently anally rape a different 5-year-old girl. CP 27.

Det. Knudsen requested permission to search the undeveloped film and the additional VHS cassette for "evidence of the crime of Possession of Child Pornography..." CP 28. Judge Corina D. Harn found that "there is probable cause to believe that the crimes(s) [sic] of Possession of Child Pornography, RCW 9.68A.070 has been committed" and the judge authorized Det. Knudsen to seize "Evidence of the crime of Possession of Child Pornography including but not limited to images of child pornography, files or information which suggest a sexual interest in children or evidence of dominion and control." CP 24.

Padgett moved to suppress the fruits of both warrants. CP 59-64. The trial court granted the motion to suppress, seemingly ruling that any warrant using the term “child pornography” would be invalid. CP 65. The court issued a second order that corrected a scrivener’s error in the first order and clarified that evidence seized pursuant to the first warrant was suppressed, but ruling that evidence seized pursuant to the second search warrant was admissible. CP 68. A motion to reconsider was denied. CP 69-83, 86.

D. ARGUMENT

The term “child pornography” is not *sufficient* to justify a search because the term, standing alone, does not identify contraband with particularity. But neither are the words “child pornography” always *fatal* to a warrant, as long as the warrant contains other language limiting the search to possession of material that constitutes a crime.

The warrant in this case expressly cited to a statute that forbids “possession of depictions of minors engaged in sexually explicit conduct.” RCW 9.68A.070. The statutory citation limited the scope of the warrant to contraband. The detective used—as do

courts, the legislature, and publications designed for use by law enforcement officers—the term “child pornography” as a synonym for “depictions of minors engaged in sexually explicit conduct.” The use of the term does not defeat an otherwise legitimate warrant.

1. STANDARD OF REVIEW.

A trial court faced with a challenge to a search warrant must defer to the issuing magistrate's judgment as to whether the warrant was sufficient.

A search warrant is entitled to a presumption of validity. State v. Wolken, 103 Wn.2d 823, 827-28, 700 P.2d 319 (1985) (recognizing that a defendant is entitled to go beyond the face of the search warrant affidavits only in limited circumstances). The decision to issue a search warrant is highly discretionary. State v. Cole, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). We generally give great deference to the magistrate's determination of probable cause and view the supporting affidavit for a search warrant in a commonsensical manner rather than hypertechnically. State v. Young, 123 Wn.2d 173, 195, 867 P.2d 593 (1994); see also State v. Vickers, 148 Wn.2d 91, 109, 59 P.3d 58 (2002) (incorrect date in warrant affidavit was an immaterial scrivener's error); In re Pers. Restraint of Yim, 139 Wn.2d 581, 989 P.2d 512 (1999) (failure to expressly state that suspect did not possess an explosives license, an essential element of the crime, did not invalidate warrant). Accordingly, we generally resolve doubts concerning the existence of probable cause in favor of the validity of the search warrant. Vickers, 148 Wn.2d at 108-09.

State v. Chenoweth, 160 Wn.2d 454, 477, 158 P.3d 595 (2007).

2. CITATION TO RCW 9.68A.070 MAKES THIS  
WARRANT SUFFICIENTLY PARTICULAR.

The Fourth Amendment provides, “no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. Const. amend. IV. “[It] mandates that warrants describe with particularity the things to be seized.” State v. Riley, 121 Wn.2d 22, 28, 846 P.2d 1365 (1993). The particularity requirement “eliminates the danger of unlimited discretion in the executing officer’s determination of what to seize.” State v. Perrone, 119 Wn.2d 538, 546, 834 P.2d 611 (1992). However, “[t]he underlying measure of adequacy in the description is whether given the specificity in the warrant, a violation of personal rights is likely.” State v. Reep, 161 Wn.2d 808, 813-14, 167 P.3d 1156 (2007) (quoting United States v. Johnson, 541 F.2d 1311, 1313 (8th Cir.1976)). Thus, a warrant must be sufficiently particular to narrow an officer’s discretion and to minimize the risk of an overly broad search, but the ultimate determination must be made in the context of the warrant as a whole.

Washington law provides that “[a] person commits the crime of possession of depictions of a minor engaged in sexually explicit conduct in the first degree when he or she knowingly possesses visual or printed matter depicting a minor engaged in sexually explicit conduct as defined in RCW 9.68A.011(4) (a) through (e).”

RCW 9.68A.070(1)(a). “Sexually explicit conduct” means

actual or simulated: (a) Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex or between humans and animals; (b) Penetration of the vagina or rectum by any object; (c) Masturbation; (d) Sadomasochistic abuse; (e) Defecation or urination for the purpose of sexual stimulation of the viewer; (f) Depiction of the genitals or unclothed pubic or rectal areas of any minor, or the unclothed breast of a female minor, for the purpose of sexual stimulation of the viewer. ... or (g) Touching of a person’s clothed or unclothed genitals, pubic area, buttocks, or breast area for the purpose of sexual stimulation of the viewer.

RCW 9.68A.011.

In this case, the detective was specific in saying that there was probable cause to believe that “Evidence of the crime(s) of Possession of Child Pornography, RCW 9.68A.070” was located on the defendant’s computers. CP 17 (underline in original). The affidavit described images that would fit the statutory definition, including images of “prepubescent girls ... with their breasts exposed” and “a boy who was about 10 or 11 naked, holding his

penis.” CP 19. The affidavit made clear that the defendant kept these images in a safe, that he felt he would go to jail based on the contents of the safe, and that he believed his wife might be acting as a law enforcement informant. CP 18. When confronted about the images, the defendant did not deny possession or claim they were legitimately possessed; rather, he offered to seek therapy. CP 19.

The issuing magistrate expressly found on the face of the warrant that “[u]pon the sworn complaint made before me there is probable cause to believe that *the crimes(s)* [sic] of Possession of Child Pornography, RCW 9.68A.070 has been committed and that evidence of *that crime* ... is/are concealed in or on certain premises, vehicles or persons.” CP 15 (underline in original, italics added). Read in context, and in a commonsense manner, this warrant authorized the seizure of only items criminalized under RCW 9.68A.070. The warrant did not permit the seizure of a wide universe of otherwise protected or vaguely-described material.

Under the appropriate standard of review, the trial court should defer to the magistrate’s judgment as to whether, in context, the citation to RCW 9.68A.070, along with references to child pornography, would ensure a proper search. The State respectfully

suggests that the trial court's ruling was hypertechnical rather than commonsense, and did not defer to the magistrate's judgment. The warrant linked the items to be searched to those items criminalized by the statute and, thus, sufficiently narrowed the items to be seized.

3. STATE V. PERRONE AND STATE V. REEP HOLD THAT THE TERM "CHILD PORNOGRAPHY" IS NOT SUFFICIENTLY PARTICULAR TO NARROW THE SCOPE OF AN OTHERWISE OVERBROAD WARRANT, BUT THE CASES DO NOT FORBID ANY USE OF THE TERM.

The State respectfully suggests that the trial court's ruling misperceived the holdings in State v. Perrone and State v. Reep.

The court ruled that

it has been crystal clear in the State of Washington since 1992 that the term "child pornography" is unconstitutionally vague and will not support a search warrant. Whatever doubts there may have been about the holding in *Perrone* were dispelled by *Reep*, where our Supreme Court was even stronger in its holding.

CP 65. The warrants in Perrone and Reep used vague terminology and were otherwise patently overbroad, and neither cited to the relevant criminal statute to define the scope of targeted material. It was under such circumstances that the supreme court held that the

colloquial term “child pornography” was insufficiently particular to satisfy constitutional standards. However, the court has never outright forbidden use of the term “child pornography” in a search warrant. As used by the warrant in this case, the term was tied to and limited by the statutory definition, and thus it is not invalid under Perrone or Reep.

In Perrone, Oakland, California police informed the Seattle Police Department that the defendant was on a mailing list of pedophiles. Oakland detectives operating undercover obtained from the defendant 82 films he said contained adult and child pornography. In their application for a search warrant, Oakland police indicated they had reviewed 17 of those 82 films, and provided to the magistrate a description of nine films. Five films showed “children in sexually explicit activity and four showed adult females involved in sexual bestiality.” A search warrant for the defendant’s car was obtained in Washington State based on the affidavit of the Oakland police, which authorized the seizure of:

*Child or adult pornography; photographs, movies, slides, video tapes, magazines or drawings of children or adults engaged in sexual activities or sexually suggestive poses; correspondence with other persons interested in child pornography, phone books, phone registers, correspondence or papers with names, addresses, phone numbers which tend to identify any*

*juvenile; camera equipment, video equipment, sexual paraphernalia; records of safe deposit boxes, storage facilities; computer hardware and software, used to store mailing list information or other information on juveniles; papers of dominion and control establishing the identity of the person in control of the premise; any correspondence or papers which tend to identify other pedophiles.*

Perrone, 119 Wn.2d at 543. The trial court found that while there was probable cause for the seizure of child pornography, there was "...no probable cause for the seizure of adult pornography, drawings of children and some of the other items described in the warrant." Id. at 544. The trial court also found that the warrant was overbroad because it authorized seizure of a great deal of protected material. Id. The State appealed, arguing that the defective language should have been excised and that the remaining language was sufficiently particular to satisfy the Fourth Amendment.

The court of appeals agreed with the State, but the supreme court reversed, and upheld the trial court's suppression order. The supreme court first observed that "the term 'child ... pornography' is an 'omnibus legal description' and is not defined in the statutes. It is a term analogous to 'obscenity,' and the term 'obscenity' is not sufficiently particular to satisfy the Fourth Amendment because it

leaves the officer with too much discretion in deciding what to seize under the warrant.” Id. at 553. The court held that

the remaining language authorizes a search for and seizure of ‘[c]hild...pornography; photographs, movies, slides, video tapes, magazines....of *children...engaged in sexual activities....*’ Exhibit 10. We conclude that the term ‘child...pornography,’ i.e. the remainder of the first clause, is invalid *in the context of the warrant’s language as a whole.*

Perrone, at 552-53 (italics added). The court noted that imprecise terms like “child pornography” or “involvement and control of prostitution activity” might sometimes provide substantive guidance in the context of other information. Id. at 555 (citing United States v. Spilotro, 800 F.2d 959, 964 (9th Cir.1986), United States v. Washington, 797 F.2d 1461, 1472 (9th Cir.1986), and State v. Lingo, 32 Wn. App. 638, 649 P.2d 130 (1982)). But, such reasoning could not save the warrant in Perrone because nothing in the warrant limited its scope.

The problem is, of course, that so much of the rest of the warrant suffers from lack of probable cause and from insufficient particularity. It is simply too much to ask to believe that a term overly general in itself can provide substantive guidance for the exercise of discretion in executing a warrant otherwise riddled with invalidities.

Perrone, at 555.

In State v. Reep, the warrant authorized seizure of evidence related to “child sex,” a term even more opaque than child pornography. Reep, 116 Wn.2d at 815. The warrant contained no other language that might further define or limit the bounds of a search for evidence of “child sex” and there was no statutory citation that would limit the search to a permissible scope. As in Perrone, the court in Reep found the unadorned term “child sex” to be insufficiently particular. But, in neither Perrone nor Reep did the state supreme court hold that use of the term “child pornography” is always fatal to a warrant. Rather, the court simply held that the terms “child pornography” or “child sex” are, standing alone, insufficiently particular to meet constitutional standards.

The November 15, 2010 warrant did not stand alone; the term “child pornography” was qualified and limited by the citation to the relevant statute criminalizing the possession of a very particular form of conduct, namely, the possession of depictions of minors engaged in sexually explicit conduct. Thus, the warrant in this case is not invalid under Perrone and Reep.

4. THE TERM "CHILD PORNOGRAPHY" IS COMMONLY USED AS A SYNONYM FOR STATUTORILY PROHIBITED CONDUCT.

It is clear from case law, legislative language, and legal publications that the term "child pornography" in conjunction with the appropriate statutory citations is synonymous with "depictions of minors engaged in sexually explicit conduct."

The statute was formerly entitled "Possession of Child Pornography." See 13B Wash. Prac., Criminal Law § 2503 (2012-2013 ed.). Although the title changed, the prohibited behavior remained largely the same.

Despite the change in the statute's official title, appellate courts continue to use the term "child pornography" as a synonym for "depictions of minors" as defined in the statute. See e.g., State v. Garbaccio, 151 Wn. App. 716, 214 P.3d 168 (2009) (affidavit for search warrant contained facts sufficient to find that "...evidence of possession of child pornography..." would be discovered); State v. Luther, 157 Wn.2d 63, 134 P.3d 205 (2006) (in affirming a conviction for attempted possession of depictions of minors, the supreme court said that "If a person attempts to obtain actual child pornography but the crime is not completed..."); State v. Grenning, 169 Wn.2d 47, 234 P.3d 169 (2010) (in affirming reversal of 20

counts of possession of depictions of minors engaged in sexually explicit conduct, the Supreme Court referred to the statute as “commonly referred to as possession of child pornography...”).

Likewise, as recently as four years ago, the Legislature used the term “child pornography” as a synonym for “depictions of minors engaging in sexually explicit conduct.”

... The legislature further finds that due to the changing nature of technology, offenders are now able to access **child pornography** in different ways and in increasing quantities. By amending current statutes governing *depictions of a minor engaged in sexually explicit conduct*, it is the intent of the legislature to ensure that intentional viewing of and dealing in **child pornography** over the internet is subject to a criminal penalty without limiting the scope of existing prohibitions on the possession of or dealing in **child pornography**, including the possession of electronic *depictions of a minor engaged in sexually explicit conduct*...

See Laws of 2010, Ch. 227, Sec. 1 (italics and bold added).

Legal publications use the terms synonymously, too. Many officers, including Detective Knudsen, carry the “Pocket Guide to Washington Criminal Laws,” a publication provided to law enforcement agencies around the state. CP 80-83. This pocket guide uses the term “child pornography” to refer to the crime of “Depictions of Minors Engaged in Sexually Explicit Conduct.” Id. The guide uses the term “child pornography” as shorthand for the

official title of the crime, but the guide correctly sets forth the proper statutory text. CP 82-83 (“Pornography- Definitions” at RCW 9.68A.011, including the definition of “Sexually Explicit Material”). Det. Knudsen made clear in a declaration that he used the term “child pornography” as a shorthand way of referring to the statutorily forbidden material. CP 78-79. Moreover, the affidavit for the second warrant makes clear that Det. Knudsen knows the difference between material that shows sexually-related images of children, as opposed to material that is truly child pornography prohibited by statute. CP 25 (describing various sexualized images of children but saying “I reviewed the printed materials and didn’t find any child pornography.”).

If appellate courts, the legislature, and legal publications continue to use the term “child pornography” when referring to the crime of “Possession of Depictions of Minors Engaged in Sexually Explicit Conduct,” then it is reasonable to expect that detectives and magistrates, too, will understand “child pornography” to be limited to the definition of the statutory crime, where they specifically cite the statute. Thus, although a loose or colloquial understanding of the term “child pornography” might, standing alone, be insufficient to particularize a warrant, if the term is tied

directly to the statutory definition, it serves as a synonym for the statutory crime, and makes a warrant particular.

E. CONCLUSION

For these reasons, the State respectfully suggests that the warrant signed by Judge Phillipson in this case authorized a search limited to material that is prohibited under RCW 9.68A.070. Such a warrant is constitutionally particular. The State respectfully asks that the trial court's ruling be reversed.

DATED this 19<sup>th</sup> day of May, 2014.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
JAMES M. WHISMAN, WSBA #19109  
Senior Deputy Prosecuting Attorney  
Attorneys for Appellant  
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Nielsen Broman & Koch, the attorney for the respondent, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Appellant, in STATE V. JOSEPH PADGETT, Cause No. 71255-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

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