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NO. 50823-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DANIEL GRIFFIN,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

Pierce County Cause No. 15-1-02646-3

The Honorable Edmund Murphy, Judge

REPLY BRIEF OF APPELLANT

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II. A communication with a minor is only criminal if it is made for the purpose of “sexual misconduct;” but the jury was never instructed on that requirement at Mr. Griffin’s trial. *Either* the absence of such an instruction requires reversal of Mr. Griffin’s convictions for communicating with a minor for immoral purposes (CMIP) *or* the CMIP statute is unconstitutionally vague as applied to his case. 6

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ARGUMENT

I. THE UNCONSTITUTIONAL GENERAL WARRANT IN MR. GRIFFIN’S CASE – WHICH PERMITTED TO THE *ACTUAL SEIZURE* OF VOLUMINOUS COMMUNICATIONS AND FILES WHOLLY UNRELATED TO THE CHARGES AGAINST HIM -- IS IN NO WAY ANALOGOUS TO A SITUATION IN WHICH THE POLICE RIFLE THROUGH ALL OF A PERSON’S PAPERS IN ORDER TO FIND SPECIFIC DOCUMENTS IDENTIFIED IN A SEARCH WARRANT. THE STATE’S ATTEMPT TO DRAW SUCH A COMPARISON IS UNAVAILING.

The search warrant for Mr. Griffin’s cell phone was unconstitutionally overbroad because it permitted the seizure of, *inter alia*, “any and all stored data,” without any regard to whether that data was linked to an alleged crime. CP 40; *State v. McKee*, 413 P.3d 1049 (Wash. Ct. App. 2018), *review granted*, 191 Wn.2d 1012, 426 P.3d 749 (2018); U.S. Const. Amends. IV, XIV; *Andresen v. Maryland*, 427 U.S. 463, 480, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976); *Kentucky v. King*, 563 U.S. 452, 459, 131 S.Ct. 1849, 179 L.Ed.2d 865 (2011); *State v. Besola*, 184 Wn.2d 605, 359 P.3d 799 (2015). The trial court erred by denying Mr. Griffin’s motion to suppress the voluminous evidence seized pursuant to the unconstitutional “general” warrant

When conducting a warrant search for documents or computer files, the constitution permits the police to search through unrelated documents and files, as necessary, to locate the items listed in the warrant. *See e.g. Andresen v. Maryland*, 427 U.S. 463, 482 n. 11, 96 S. Ct. 2737,

2749, 49 L. Ed. 2d 627 (1976) (“In searches for papers, it is certain that some innocuous documents will be examined, at least cursorily, in order to determine whether they are, in fact, among those papers authorized to be seized”).

Nonetheless, appellate courts have consistently urged caution when undertaking such a search because of the grave risk that it could transform an otherwise constitutional warrant search into an unconstitutional “general” search. *Id.*; *See also United States v. Grimmer*, 439 F.3d 1263, 1270 (10th Cir. 2006) (“[o]fficers must be clear as to what it is they are seeking on the computer and conduct the search in a way that avoids searching files of types not identified in the warrant”).

Even so, the rule permitting the police to search through unenumerated documents as necessary to find ones specified in a warrant has nothing to do with the constitutional requirement that the items subject to actual seizure must be described with particularity. *See e.g. United States v. Heldt*, 668 F.2d 1238, 1257–59 (D.C. Cir. 1981); *United States v. Rude*, 88 F.3d 1538 (9th Cir., 1996) (addressing issues of whether the warrant met the particularity requirement and whether its execution was overbroad separately).

Still, the state attempts to justify the overbroad general warrant in Mr. Griffin’s case by drawing a comparison to a situation in which the

police rummage through all of a person's files in order to locate specific documents enumerated in a warrant. *See* Brief of Respondent, p. 25.

Respondent's analogy is unpersuasive.

Nor is Mr. Griffin's case one in which the police were simply unable to specify the *form* that the data would take in the warrant application. The officers could have, permissibly, limited the language in the warrant to encompass only communications between Mr. Griffin and S.L. and other data demonstrating their relationship, while still leaving open the possibility that that evidence could have been located in an unexpected location or form on the cellphone.

Nevertheless, respondent relies heavily on authority holding that a warrant is not required to specify the form that electronic data will take or the location in which it will found in order to meet constitutional muster. Brief of Respondent, pp. 26-28. Again, the state's argument is unavailing.

Respondent is unable to point to any relevant authority permitting the general warrant permitting the search and seizure of *all* of the data on Mr. Griffin's cell phone. *See* Brief of Respondent *generally*. The trial court erred by denying Mr. Griffin's motion to suppress.

II. A COMMUNICATION WITH A MINOR IS ONLY CRIMINAL IF IT IS MADE FOR THE PURPOSE OF “SEXUAL MISCONDUCT;” BUT THE JURY WAS NEVER INSTRUCTED ON THAT REQUIREMENT AT MR. GRIFFIN’S TRIAL. EITHER THE ABSENCE OF SUCH AN INSTRUCTION REQUIRES REVERSAL OF MR. GRIFFIN’S CONVICTIONS FOR COMMUNICATING WITH A MINOR FOR IMMORAL PURPOSES (CMIP) OR THE CMIP STATUTE IS UNCONSTITUTIONALLY VAGUE AS APPLIED TO HIS CASE.

In *State v. McNallie*, the Supreme Court addressed an instructional issue and vagueness challenge to the statute criminalizing Communication with a Minor for Immoral Purposes (CMIP) in tandem. *See State v. McNallie*, 120 Wn.2d 925, 929-33, 846 P.2d 1358, 1364 (1993). In that case, the defense argued that *either* (a) the trial court erred by failing to give an instruction narrowly defining the term “immoral purposes” *or* (b) that, if such an instruction was not required, then the statute was unconstitutionally vague. *Id.*

Similarly, in Mr. Griffin’s case, the arguments that the trial court committed instructional error or that the CMIP statute is unconstitutionally vague as applied can be considered in parallel. *See Appellant’s Opening Brief*, pp. 23-32. The analysis of both issues turns on the question of whether the one is left to guess at what constitutes an “immoral” communication or whether adequate guidance is provided to juries, law enforcement, and citizens to narrow the scope and limit the types of communication that can lead to criminal conviction.

But Mr. Griffin’s case differs from *McNallie* on a critical point. The defense in *McNallie* proposed an instruction limiting the CMIP statute only to communications enticing a minor to engage in crimes under RCW chapter 9.68A, which criminalizes having a minor “engage in sexually explicit conduct which will be photographed or made a part of a live performance; or [h]ave the minor engage in sexual conduct for a fee.” *McNallie*, 120 Wn.2d at 929. The Supreme Court upheld the trial court’s ruling that such an instruction would have been too narrow because it excluded things like attempting to persuade a child to engage in sexual acts with an adult when no fee was involved. *Id.*

The *McNallie* court held that, rather than being limited to sexual acts for payment, the CMIP statute criminalized any communication designed to promote a minor’s “exposure to and involvement in *sexual misconduct*.” *Id.* at 933 (emphasis added).¹

But the jury at Mr. Griffin’s trial was not instructed on the requirement that the alleged communications address “sexual misconduct” at all. *See* CP 531-62. Rather, to convict Mr. Griffin, the jury was only

¹ The state relies heavily on the use of the phrase “exposure to” in the *McNallie* holding, arguing that the alleged communications between Mr. Griffin and S.L. “exposed” her to sexual content even if they did not attempt to persuade her to participate in any specific activity. Brief of Respondent, p. 54.

Respondent misses the point. The issue in this case is that the instructions did not require the jury to find that Mr. Griffin had communicated with S.L. regarding “sexual misconduct” at all, leaving it to the jury to determine what types of communications were “immoral.”

required to conclude that the communications had been made for “immoral purposes of a sexual nature.” *See* CP 446-59. Indeed, the trial court refused to instruct the jury on the “sexual misconduct” requirement even after the jury expressed confusion regarding the bounds of the term “immoral purposes.” CP 397; RP 2194-2200. The trial court violated Mr. Griffin’s right to due process by failing to instruct the jury on each element of the offense of CMIP. *State v. O’Donnell*, 142 Wn. App. 314, 322, 174 P.3d 1205 (2007); *McNallie*, 120 Wn.2d at 929; U.S. Const. Amend. XIV; art. I, § 22.

In the alternative, if an instruction informing the jury that conviction was only permitted if the state proved that Mr. Griffin had communicated with S.L. for purposes of “sexual misconduct” was not required, then the CMIP statute is unconstitutionally vague as applied to Mr. Griffin’s case because the vast majority of the alleged communications between Mr. Griffin and S.L., though addressing sexual topics, did not concern any “misconduct.”² Nor does the CMIP statute provide “ascertainable standards” delineating the point at which

² The state broadly claims, without pointing to any evidence, that all of Mr. Griffin’s communications with S.L. were made for the purpose of promoting her “exposure to and involvement in child molestation.” Brief of Respondent, p. 54. There was no evidence linking, for example, communications regarding S.L.’s relationship with her girlfriend or her fantasies involving fictional characters with any alleged molestation. *See* RP *generally*. Respondent’s claim is not backed up by the record in this case.

(Continued)

permissible conversation with a minor regarding sexual topics crosses the line into criminality.³ The CMIP statute is unconstitutionally vague as applied to Mr. Griffin’s case. *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972); *State v. Danforth*, 56 Wn. App. 133, 135–36, 782 P.2d 1091 (1989), *overruled on other grounds by McNallie*, 120 Wn.2d 925.

I. THE TRIAL COURT ERRED BY ADMITTING AN EXHIBIT, DETAILING EIGHT-MONTHS-WORTH OF SEX-RELATED INTERNET BROWSING HISTORY EXTRACTED FROM MR. GRIFFIN’S PHONE, WHICH WAS INADMISSIBLE UNDER ER 401, 403 AND 404(B).

Mr. Griffin relies on the arguments set forth in his Opening Brief.

II. THE TRIAL COURT VIOLATED MR. GRIFFIN’S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE.

Mr. Griffin relies on the arguments set forth in his Opening Brief.

III. THE TRIAL COURT VIOLATED MR. GRIFFIN’S RIGHT TO COUNSEL BY FAILING TO PRESUME THAT HE HAD BEEN PREJUDICED BY POLICE INTRUSION INTO HIS PRIVILEGED COMMUNICATION WITH HIS ATTORNEY.

Mr. Griffin relies on the arguments set forth in his Opening Brief.

³ The state fails to point to any such “ascertainable standards” in its brief. *See* Brief of Respondent *generally*.

CONCLUSION

For the reasons set forth above and in Mr. Griffin's Opening Brief,
Mr. Griffin's convictions must be reversed.

Respectfully submitted on January 7, 2019,



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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Daniel Griffin/DOC#400418
Stafford Creek Corrections Center
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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Pierce County Prosecuting Attorney
pcpatcecf@co.pierce.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on January 7, 2019.



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