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NO. 71255-1-I

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

REC'D

JUL 15 2014
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Appellant,

v.

JOSEPH PADGETT,

Respondent,

2014 JUL 15 PM 3:58
COURT OF APPEALS
STATE OF WASHINGTON
Sh

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

The Honorable Jim Rogers, Judge

BRIEF OF RESPONDENT

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A. INTRODUCTION

The King County District Court issued a warrant permitting the King County Sheriff to search five computers, four external hard drives, one thumb drive, and numerous other disks belonging to Joseph Pelham Padgett for “[e]vidence of the crime of Possession of Child Pornography.” This description of items subject to seizure was insufficiently particular, even in spite of the warrant’s single reference to a criminal statute. The trial court suppressed all evidence seized pursuant to the warrant because the warrant failed to comply with Fourth Amendment requirements. This ruling was correct. This court must accordingly affirm.

B. COUNTERSTATEMENT OF THE ISSUES

1. Must a warrant that refers to evidence of the “crime of Possession of Child Pornography” fail for insufficient particularity because there is no such crime?

2. Must a warrant that refers entirely to the items subject to seizure as evidence of “child pornography” fail for insufficient particularity because it is overbroad and vague under the Fourth Amendment?

3. When a magistrate has more particular language available, does the magistrate’s failure to use the more particular description of items subject to seizure render a warrant insufficiently particular?

4. When a warrant potentially subjects items to seizure that are presumptively protected by the First Amendment to the United States Constitution, must the particularity of the warrant satisfy the heightened standard of scrupulous exactitude?

5. When a single statute referenced at the beginning of a warrant does not actually describe items subject to seizure but merely cross-references another statute that might, does it make the warrant sufficiently particular?

6. When a statute referenced in a warrant cross-references another statute, but some of the cross-referenced statute's definitions describe items that are either too general to be particular or items that are not necessarily connected with criminal activity, does the statute referenced in the warrant fail to make the warrant sufficiently particular?

C. COUNTERSTATEMENT OF THE CASE

On November 11, 2010, King County Sheriff's Office Detective Chris Knudsen responded to the call of Padgett's estranged wife, Darla Padgett, who claimed to have child pornography to turn over. CP 3. Knudsen went with Darla to a storage unit where he seized five computers, four external hard drives, a USB thumb drive, and several other materials. CP 3. Knudsen also seized items Darla claimed she retrieved from Padgett's

gun safe. CP 3. Darla claimed she saw various images of nude or provocatively posed prepubescent children. CP 19.

On November 15, 2010, Knudsen applied for a search warrant. CP 17-20. In his application, approved by a King County deputy prosecutor, Knudsen stated he believed that “Evidence of the crime(s) of Possession of Child Pornography, RCW 9.68A.070” was contained on “[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 floppy disks” CP 17, 20.

Former District Court Judge Darrell Phillipson issued the warrant, permitting seizure of “[e]vidence of the crime of Possession of Child Pornography, including but not limited to files containing child pornography, data relating to dominion and control and users of the computer and media storage devices and information about programs used to obtain the child pornography.” CP 15. The first sentence of this warrant read, “Upon 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” CP 15.

On January 7, 2011, the State charged Padgett with the crime of possessing depictions of minors engaged in sexually explicit conduct. CP 1. The information did not specify the degree of the offense. CP 1.

Knudsen filed a second affidavit for a search warrant on October 12, 2011 based on videotapes recovered by Darla Padgett. Knudsen also disclosed that he had found materials constituting “child pornography” from his November 2010 search. CP 25-26. The King County District Court issued a warrant that permitted search of the videos as well as other materials and seizure of “[e]vidence of the crime of Possession of Child Pornography including but not limited to images of child pornography, files and information which suggest a sexual interest in children or evidence of dominion and control.” CP 24.

Padgett moved to suppress the materials seized pursuant to both warrants in October 2013. CP 6-30. Padgett argued the warrants violated the Fourth Amendment’s particularity requirement. CP 9-13.

On November 8, 2013, the court heard argument on Padgett’s motion. RP 1-14. On November 14, 2013, the court issued an order suppressing the evidence discovered pursuant to the October 12, 2011 warrant, noting, “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.” CP 65.

Padgett moved for clarification of the order because it only referenced the October 2011 warrant and not the November 2010 warrant. CP 66-67. The trial court granted this motion and suppressed the evidence

obtained pursuant to the November 2010 warrant. CP 68. The trial court believed additional language might make the October 2011 warrant sufficiently particular, but noted additional briefing on this issue was required. CP 68. At issue in this appeal is the November 2010 warrant only.

The State moved for reconsideration, which the trial court denied. CP 69-83, 86. This appeal follows.

D. ARGUMENT

THE WARRANT WAS NOT SUFFICIENTLY PARTICULAR TO SATISFY THE FOURTH AMENDMENT

The Fourth Amendment to the United States Constitution 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.” The Fourth Amendment’s particularity requirement has three purposes: “[1] prevention of general searches, [2] prevention of the seizure of objects on the mistaken assumption that they fall within the issuing magistrate’s authorization, and [3] prevention of the issuance of warrants on loose, vague, or doubtful bases of fact.” State v. Perrone, 119 Wn.2d 538, 545, 834 P.2d 611 (1992). “Whether a search warrant contains a sufficiently particularized description is reviewed de novo.”¹ Id. at 549.

¹ The State provides a lengthy excerpt of State v. Chenoweth, 160 Wn.2d 454, 477, 158 P.3d 595 (2007), to support its mistaken assertion that the magistrate’s

Because the warrant at issue here directed officers to seize “child pornography,” an overbroad and vague term, the trial court properly suppressed all the evidence seized under the warrant. That the warrant contained one reference to a statute or that appellate courts and the legislature might employ the term “child pornography” to refer to contraband fails to make the warrant sufficiently particular. This court must affirm.

1. The warrant allows a blanket seizure of “child pornography,” which gives too much discretion to executing officers

“[C]onformance with the [particularity] requirement eliminates the danger of unlimited discretion in the executing officer’s determination of what to seize.” Perrone, 119 Wn.2d at 546. The “warrant must enable the searcher to reasonably ascertain and identify the things which are authorized to be seized.” Id. (quoting United States v. Cook, 657 F.2d 730, 733 (5th Cir. 1981)). “[T]he degree of specificity required varies according to the circumstances and the type of items involved.” Perrone, 119 Wn.2d at 546 (citing United States v. Krasaway, 881 F.2d 550, 553 (8th Cir. 1989)). Generally, “the use of a generic term or general description is

particularity determination is entitled to a presumption of validity and deference. Br. of Appellant at 7-8. But Chenoweth only gave deference and a presumption of validity to the magistrate’s determination of probable cause. 160 Wn.2d at 477 (noting courts “give great deference to the magistrate’s *determination of probable cause*” and “resolve doubts concerning the existence of *probable cause* in favor of the validity of the search warrant” (emphasis added)). The sufficiency of a warrant’s particularity, in contrast, is a question of constitutional law and is thus reviewed de novo. Perrone, 119 Wn.2d at 549.

constitutionally acceptable only when a more particular description of the items to be seized is not available at the time the warrant issues.” Perrone, 119 Wn.2d at 547.

Moreover, when a search warrant implicates materials that may be protected by the First Amendment, “the degree of particularity demanded is greater” and must “be accorded the most scrupulous exactitude.” Id. at 547-48 (quoting Stanford v. Texas, 379 U.S. 476, 485, 85 S. Ct. 506, 13 L. Ed. 2d 431 (1965)). Although the United States Supreme Court has held that child pornography is not protected by the First Amendment, New York v. Ferber, 485 U.S. 747, 757, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982), this is “irrelevant in addressing the particularity requirement” because “[o]nly an after the fact judicial determination can conclusively establish the nature of such materials as ‘child pornography,’” Perrone, 119 Wn.2d at 550 (citing United States v. Hale, 784 F.2d 1465, 1469 (9th Cir. 1986), abrogated in part on other grounds by New York v. P.J. Video, Inc., 475 U.S. 868, 875, 106 S. Ct. 1610, 89 L. Ed. 2d 871 (1986)); see also State v. Reep, 161 Wn.2d 808, 814-15, 167 P.3d 1156 (2007) (reaffirming Perrone’s holding that child pornography for the purposes of the particularity requirement is presumptively protected by First Amendment). A search warrant that permits general seizure of “child pornography” remains subject to First Amendment rights and the scrupulous exactitude requirement.

The warrant issued by King County District Court permitted the search of multiple computers, drives, and disks and the seizure of “Evidence of the crime of Possession of Child Pornography, including but not limited to files containing child pornography . . . and information about the programs used to obtain child pornography.” CP 15. For several reasons, this language gives an unconstitutional level of discretion to searching officers and thus fails to satisfy the particularity requirement.

First, Washington has no crime titled possession of child pornography. Seizure of items that violate a fictitious crime does not enable a searcher to recognize what may be seized. See Reep, 161 Wn.2d at 815 (stating fictitious crime of “child sex” referenced in search warrant too broad to be particular). Because a warrant giving discretion to seize items of an imaginary crime provides no guidance to executing officers regarding what they may lawfully seize, such a warrant can never be sufficiently particular.

Second, even if “possession of child pornography” were a crime, the term “child pornography” is still not sufficient to satisfy the particularity requirement.

[T]he 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.

119 Wn.2d at 553; accord Reep, 161 Wn.2d at 815. A warrant whose omnibus legal description permits the seizure of anything the searcher thinks is “child pornography” provides too much discretion.

Third, use of the generic term “child pornography” is not constitutionally acceptable because the trial court could easily have employed a much more particular description of items subject to seizure. General descriptions in warrants may be acceptable, but only when a more particular description is not available. Perrone, 119 Wn.2d at 547, 553. As the Perrone court concluded, had the warrant simply been cast in the language of RCW 9.68A.011 to describe specific images of prohibited “sexually explicit conduct,” the warrant would likely have satisfied the particularity requirement. Id. at 553-54. Because the trial court could have but did not provide a more particular description, the warrant does not satisfy the Fourth Amendment’s particularity guarantee.

Fourth, because the warrant potentially subjected to seizure items protected by the First Amendment, such as writings, drawings, photographs, and the like, the degree of particularity must satisfy the heightened standard of scrupulous exactitude. Stanford, 379 U.S. at 485; Perrone, 119 Wn.2d at 547-48. As discussed, a general description like “child pornography” provides no exactitude whatsoever, let alone any exactitude that might

qualify as scrupulous. The warrant improperly allowed officers to seize items potentially entitled to First Amendment protection. The warrant fails.

A warrant that permits a seizure of “child pornography” is overbroad, vague, and accordingly fails to satisfy the particularity requirement of the Fourth Amendment. This has been the law in Washington for nearly 22 years. The trial court correctly concluded that the warrant was not sufficiently particular.

2. The inclusion of a single statutory reference in the warrant does not make the warrant sufficiently particular

The State simplistically reads Perrone to conclude that the problem there could have been solved by reference to a statute. Br. of Appellant at 11-15. The State contends a single reference in the warrant to RCW 9.68A.070 makes the warrant sufficiently particular. The State’s contention is meritless.

The reference to RCW 9.68A.070 occurs in the first sentence of the warrant: “Upon 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 . . .” CP 15. This is the only reference to this or any other statute in the warrant. A single reference to a statute at the beginning of a warrant does not make the warrant sufficiently particular. In spite of the initial statutory reference, the warrant here still permitted officers

to “[s]eize . . . [e]vidence of the crime of Possession of Child Pornography,” which, as discussed, does not “enable the searcher to reasonably ascertain and identify the things which are authorized to be seized.” Perrone, 119 Wn.2d at 546 (quoting Cook, 657 F.2d at 733). The description of items the court allowed to be seized in this warrant is essentially identical to what the Perrone court found was insufficiently particular.

But even if RCW 9.68A.070 were referenced alongside the description of what officers could seize, RCW 9.68A.070 itself does not provide any information that clarifies what might be subject to lawful seizure. RCW 9.68A.070(1)(a) provides, “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 a visual or printed matter depicting a minor engaged in sexually explicit conduct as defined in RCW 9.68A.011(4)(a) through (e).” Similarly, RCW 9.68A.070(2)(a) establishes the second degree crime when a person “knowingly possesses any visual or printed matter depicting a minor engaged in sexually explicit conduct as defined in RCW 9.68A.011(4)(f) or (g).” While RCW 9.68A.070 defines the crimes of first and second degree possession of depictions of a minor engaged in sexually explicit conduct, it does not define “sexually explicit conduct.” The warrant still fails for insufficient particularity because RCW 9.68A.070 does not describe what to seize.

Although RCW 9.68A.070 cross-references RCW 9.68A.011, where “sexually explicit conduct” is defined, officers have to search through statutory cross-references to determine what might be subject to seizure. That requirement fails to establish the warrant’s particularity. Indeed, when a more particular description is available, the issuing court must use that description. Perrone, 119 Wn.2d at 547. A warrant that references a statute that references another statute that contains a description of items that might be seized is not sufficiently particular.

Moreover, RCW 9.68A.011(4) defines “sexually explicit conduct” as

- (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 . . .; and
- (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.

While subsections (a) and (b) satisfy the particularity requirement, the remaining definitions describe items that are too general to be particular or are not necessarily connected with criminal activity at all.

It would be difficult, if not impossible, to fairly identify images of “masturbation” or “sodomasochistic abuse” with sufficient particularity. These terms, like the term “child pornography,” are “omnibus legal descriptions” not defined in the statute. Perrone, 119 Wn.2d at 553. Accordingly, these terms “leave[] the officer with too much discretion in deciding what to seize under the warrant.” Id.

More germane to this case are the definitions of “sexually explicit conduct” in RCW 9.68A.011(4)(e), (f), and (g). To be criminal, possession of these depictions require the depictions to be created “for the purpose of sexual stimulation of the viewer.” See State v. Powell, ___ Wn. App. ___, 326 P.3d 859, 864-65 (2014). That is, merely possessing images of nude children or of children touching their genitals is not a crime; possession of such images is criminal only if the creator of the images intended to sexually stimulate the viewer. Id.

Because an officer executing a search warrant that described items based on the statutory definitions provided in RCW 9.68A.011(4)(e) through (g) could not ascertain whether the items were created for sexual stimulation, the officer could not determine whether the possession of such images

constituted criminal activity. Accordingly, even warrants that permitted seizure of depictions that met the definitional language of RCW 9.68A.011(4)(e), (f), or (g) would still not be sufficiently particular.

Some of the images described in Officer Chris Knudsen's affidavit for a search warrant illustrate this problem. Officer Knudsen indicated that Padgett's wife identified pictures of topless prepubescent girls and of a boy holding his penis. CP 19. But, without knowing who took these photos or whether they did so for the purpose of the viewer's sexual stimulation, mere possession of these photos is not a crime. The warrant would not be sufficiently particular.

In sum, one reference to a criminal statute in a warrant to seize "child pornography" does not render the warrant sufficiently particular. The reference to RCW 9.68A.070 in this warrant does not adequately describe with particularity items to be seized. It merely cross-references RCW 9.68A.011, and several definitions of "sexually explicit conduct" in RCW 9.68A.011 grant too much discretion to the officer or would subject noncriminal materials to seizure. As the trial court properly concluded, the warrant in this case was unconstitutional.

3. The ubiquitous use of the term “child pornography” does not make warrants employing the term constitutional

Finally, the State argues that because appellate courts, the legislature, and certain law enforcement publications refer to conduct prohibited by RCW 9.68A.070 as “child pornography” “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.” Br. of Appellant at 18. This court should reject this argument.

The State’s argument overlooks that the legislature and appellate courts do not write warrants and are not bound by the Fourth Amendment particularity requirement in crafting their language. Detectives and magistrates, on the other hand, must be sufficiently particular in applying for and issuing search warrants. For this reason, police materials such as the POCKET GUIDE TO WASHINGTON CRIMINAL LAWS, relied on by Detective Knudsen in this case, that still refer to the crime of “child pornography” are no longer acceptable. See CP 81-83. Magistrates and law enforcement personnel must employ the most particular language they can in warrants and warrant applications to describe items subject to search or seizure. In Washington, more than two decades have passed since the state supreme court unanimously held that “child pornography” is not a sufficiently particular term because it does not adequately describe what may be lawfully

searched or seized. Perrone, 119 Wn.2d at 547. That law enforcement agencies have failed to update the language in their materials to conform to current law, and that magistrates might accept such outdated language in issuing warrants, is no excuse for flouting the requirements of the Fourth Amendment.

E. CONCLUSION

The warrant at issue in this case was insufficiently particular under the Fourth Amendment. Although the term “child pornography” is frequently used as shorthand for contraband and the warrant made one reference to a criminal statute, neither saves the warrant from being insufficiently particular. The trial court reached the correct conclusion by suppressing the fruits of the unlawful warrant. This court must affirm.

DATED this 15th day of July, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to read "Kevin A. March", written over a horizontal line.

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DIVISION ONE

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Appellant,)	
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v.)	COA NO. 71255-1-I
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JOSEPH PADGETT,)	
)	
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DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 15TH DAY OF JULY 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF RESPONDENT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JOSEPH PADGETT
EMAIL
actiontkr@gmail.com

SIGNED IN SEATTLE WASHINGTON, THIS 15TH DAY OF JULY 2014.

x *Patrick Mayovsky*