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NO

54793-3

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY SANDERSON,

Appellant.

FILED
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WHATCOM COUNTY,

The Honorable Michael Moynihan

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

On appeal of his convictions for malicious mischief based on alleged graffiti vandalism, Anthony Sanderson challenged the court's approval of a search of his computer by law enforcement pursuant to a general warrant, the court's finding he consented to the search, and the admission of highly prejudicial propensity evidence that was not relevant to prove common scheme or plan or *modus operandi*. The State's response misstates relevant cases and the record and misapplies the law. For these reasons, the State's arguments should be rejected by this Court.

1. THE SEARCH OF SANDERSON'S COMPUTER
WAS NOT AUTHORIZED BY THE GENERAL
WARRANT OR ANY CLAIM OF "CONSENT."

a. The images of graffiti were protected under the First Amendment. The general warrant relied upon by law enforcement permitted a search for "images of graffiti or graffiti-related malicious mischief in progress recorded in any format and/or on any medium." CP 134. The State cites four factors which it claims are relevant to evaluating Sanderson's appeal of the search.¹ First, the State makes the circular argument that because

¹ Sanderson fails to see how the second and fourth factors cited by the State – that Almer told Sanderson he did not have to answer questions, and that Sanderson allegedly confessed after the images were discovered – are relevant

“investigators seized what the warrant allowed” the warrant was not impermissibly broad.² Br. Resp. at 5-6. In support of this claim, the State contends that because Officer Almer intended to utilize the warrant to search for digital images, this sufficiently narrowed the warrant’s scope.

However, the State can cite to no cases which hold an officer’s subjective intent in conducting a search may narrow an otherwise-overbroad search warrant. Rather, the reviewing court must look solely to the warrant itself in assessing whether it meets the Fourth Amendment’s stringent particularity requirement. State v. Perrone, 119 Wn.2d 538, 545, 834 P.2d 611 (1992).

Moreover, as argued in Sanderson’s opening brief, because the warrant here authorized a search for First Amendment materials, the warrant must be scrutinized with “scrupulous exactitude.” Stanford v. Texas, 379 U.S. 476, 485, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965). Under this heightened scrutiny, the warrant violates the Fourth Amendment’s particularity requirement. Perrone, 119 Wn.2d at 545; State v. Nordlund, 113 Wn. App. 171, 179-80, 182-83, 53 P.3d 520 (2002).

to this Court’s disposition of the question whether the search violated the Fourth Amendment and Article I, section 7.

² Given the warrant’s remarkable breadth, it goes without saying that the officers seized what the warrant allowed.

The State claims that graffiti is not protected by the First Amendment but in support of this claim, cites cases that are not on point and selectively extrapolates text from these decisions in a manner that misrepresents the context of the Courts' remarks. Br. Resp. at 13-14. For example, the State quotes only a portion of Justice Stevens' dissent in Metromedia, Inc., v. City of San Diego, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981). See Br. Resp. at 13-14. The full quote actually reads:

Archaeologists use the term "graffiti" to describe informal inscriptions on tombs and ancient monuments. The graffito was familiar in the culture of Egypt and Greece, in the Italian decorative art of the 15th century, and it survives today in some subways and on the walls of public buildings. [Internal citation omitted.] It is an inexpensive means of communicating political, commercial, and frivolous messages to large numbers of people; some creators of graffiti have no effective alternative means of publicly expressing themselves. Nevertheless, I believe a community has the right to decide that its interests in protecting property from damaging trespasses and in securing beautiful surroundings outweigh the countervailing interest in uninhibited expression by means of words and pictures in public places. If the First Amendment categorically protected the marketplace of ideas from any quantitative restraint, a municipality could not outlaw graffiti.

Metromedia, 453 U.S. at 549-50 (Stevens, J., dissenting in part).

Thus, rather than supporting the State's claim that graffiti is not

protected by the First Amendment, Justice Stevens' comments undermine it.

Likewise, the quoted text from Riely v. Reno, 860 F.Supp. 693, 702 (D.Ariz. 1994),³ first appeared in Texas v. Johnson, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989), which struck down a conviction for flag-burning, finding such to be protected speech under the First Amendment. Furthermore, Riely itself does not help the State, as the Court there considered the question of whether the Freedom of Access to Clinic Entrances Act of 1994 (FACE) violated First Amendment rights by prohibiting protected speech. 860 F.Supp at 696. Sanderson does not argue the instant prosecution for malicious mischief violates his First Amendment rights; therefore, Riely is not on point.

b. The warrant does not specify computers or link the computer search to Sanderson's alleged crime. Finally, State v. Griffith, __ Wn. App. __, __ P.3d __, 2005 Wash. App. LEXIS 2370 (September 13, 2005),⁴ also relied upon by the State, is distinguishable. In Griffith, the principal reason the Court found the computer search permissible was the fact that the affidavit for the

³ See Br. Resp. at 14.

⁴ Following a motion for reconsideration by Griffith, the opinion cited by the State in its response was withdrawn and replaced by the opinion cited here.

warrant indicated C.R., a minor, posed naked for Griffith and then observed him hook up his digital camera to his computer. 2005 Wash. App. LEXIS at 5-9. The court found that because the computer and storage media were specifically named in the warrant and, given C.R.'s observations, arguably connected to the crime of possessing sexually explicit images of minors, this limited search was permissible. Id. at 9.⁵ Here the State can identify no similar facts that will save the warrant. This Court should reverse and remand with direction the fruits of the unconstitutional search be suppressed.

c. The State cannot prove valid consent to the search. The court below alternately found the search was authorized by Sanderson's alleged consent. 2RP 229. This was incorrect. Because the search of Sanderson's computer occurred in his home, under Article I, section 7 of the Washington Constitution, Almer should have explicitly advised Sanderson of his rights to refuse and/or revoke the consent and to limit the scope of the search. State v. Ferrier, 136 Wn.2d 103, 118, 960 P.2d 927

⁵ For the same reason, the court found related evidence of a web site, film and videotapes were not related to the crime, and should have been suppressed. Griffith, 2005 Wash. App. LEXIS at 8.

(1999). Almer did not so advise Sanderson and thus his consent was not voluntary.

In response, the State suggests Sanderson consented under State v. Reichenbach, 153 Wn.2d 126, 101 P.3d 80 (2004). The State neglects to mention, however, that Reichenbach addressed a search of a vehicle, not the defendant's home and thus does not set forth the proper standard for assessing the voluntariness of the alleged consent given in this case. That standard, instead, is contained in Ferrier. 136 Wn.2d at 118.

d. Even assuming Sanderson validly consented, he limited the scope of the search by trying to prevent Almer from accessing his C Drive. The State also notes that Sanderson's "tone changed" when Almer looked at the computer's C drive. Br. Resp. at 8. According to the record, when Almer attempted to access the C drive, Sanderson told him, "Look, there's no sites there." 1RP 143. Almer testified he then asked Sanderson, "'what about your C Drive?' which from my limited computer knowledge is like the main storage place for a lot of computers." 1RP 143. According to Almer, Sanderson then said, "no." Almer clicked on the C Drive anyway, and that was when he found "a whole bunch of graffiti-type things." 1RP 143-44.

Based on this record, and in light of Ferrier, even assuming this Court decides Sanderson validly consented, this Court should also find Sanderson attempted to limit the scope of Almer's search by dissuading him from searching the C drive. Reversal and suppression are required.

2. THE STATE FAILED TO MEET THE STRINGENT
STANDARD FOR ADMISSION OF PRIOR
MISCONDUCT EVIDENCE.

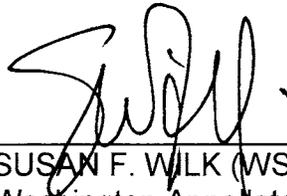
Pursuant to RAP 10.1(g), Sanderson adopts by reference the arguments contained in co-appellant Michael Lawrence Foxhoven's reply answering the State's claim that the challenges raised by both appellants to the admission of ER 404(b) evidence go to weight, not admissibility.

B. CONCLUSION

Based on the foregoing arguments and the arguments in Sanderson's opening brief, this Court should reverse his convictions and remand for a new trial.

DATED this 20th day of October, 2005.

Respectfully submitted:



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