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Court of Appeals
Division I
State of Washington

No. 96035-6

NO. 73947-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

MARC MCKEE,

Appellant.

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

The Honorable Michael E. Rickert, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE WARRANT PERMITTING A SEARCH OF McKEE'S PHONE WAS NOT SUFFICIENTLY PARTICULAR TO SATISFY THE FOURTH AMENDMENT.

Because the warrant in this case involved an electronic storage device, and implicated materials protected by the First Amendment, it triggered heightened privacy concerns and demanded greater particularity. Rather than comply with the Fourth Amendment's requirements, however, the warrant in McKee's case failed to attach or incorporate the supporting affidavit, included a broad list of items not inherently associated with the alleged crimes, listed a suspected crime for which there was no probable cause, and ultimately authorized a "physical dump" and examination of all memory on the phone, rendering superfluous any language limiting the scope of the search.

In response, the State does not directly address many of these arguments. Instead it notes that the warrant specified two crimes under investigation, identified the phone to be seized, and listed items from the phone that could be collected. Brief of Respondent, at 9-10. Moreover, citing foreign cases, the State asserts it may be impossible for law enforcement officers to narrow,

in advance of a search, the information that can be seized and examined on a cell phone. Brief of Respondent, at 6-7.

In Washington, however, such a narrowing is required. See State v. Keodara, 191 Wn. App. 305, 309-317, 364 P.3d 777 (2015) (warrant authorizing collection of broad range of items on single cell phone violated particularity requirement), review denied, 185 Wn.2d 1028, 377 P.3d 718 (2016). Moreover, law enforcement has proved itself fully capable of compliance. See State v. Askham, 120 Wn. App. 872, 879-880, 86 P.3d 1224 (particularity requirement met because warrant identified devices to be searched and specifically identified files, images, and applications on those devices that could be searched), review denied, 152 Wn.2d 1032, 103 P.3d 201 (2004).

The State also asserts there was probable cause supporting the crime of *Dealing* in Depictions of Minors Engaged in Sexually Explicit Conduct. The State argues:

> Law enforcement had probable cause to investigate the defendant's phone to discover images reported to have been seen and to investigate what the defendant had done with those images. Law enforcement had probable cause to investigate if those images had been transferred to another device, copied, or printed. Law enforcement had probable cause to determine how the images were obtained

> and what had been done with them since they were obtained.
>
> The defendant was reported to have videos of him having sex with a minor on the device in question, his phone. The phone had been reported to contain photos of a minor in his bedroom while naked. Images of other young girls that were undressed were also reported to be on the phone. Evidence of what he was doing with these images would be found on the phone. Thus, there were facts and circumstances sufficient to establish a reasonable inference that the criminal activity was occurring.

Brief of Respondent, at 12.

Notably, the State's argument centers on the possibility a search of McKee's phone would reveal "*if* th[e] images had been transferred to another device, copied, or printed" and reveal "*what* had been done with them since they were obtained." In other words, law enforcement had no evidence that McKee ever duplicated, published, printed, disseminated or did any other act that would constitute dealing in the depictions on his phone. It was the mere possibility of obtaining some evidence of dealing (the *if* and *what*) that the State now describes as probable cause. This is not probable cause.

"Probable cause exists if the affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in

criminal activity and that evidence of the crime can be found at the place to be searched." State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). The affidavit supporting the search warrant in McKee's case contains no facts or circumstances establishing that McKee was probably involved in Dealing in Depictions of Minors Engaged in Sexually Explicit Conduct. None. See CP 225-227. Yet, by listing this as a suspected crime on the search warrant, the warrant's scope was improperly expanded, making it less particular.

Recognizing this Court may find an absence of probable cause supporting dealing in depictions, the State asks this Court to sever the invalid portion of the warrant in McKee's case from any valid portion. Brief of Respondent, at 13. As the State concedes, however, where the lawful and unlawful portions of the warrant are "inextricably intertwined," severance is not appropriate. Id. (discussing State v. Perrone, 119 Wn.2d 538, 834 P.2d 611 (1992); State v. Maddux, 116 Wn. App. 796, 67 P.3d 1135 (2003), aff'd, 152 Wn.2d 499, 98 P.3d 1199 (2004)).

Dealing in Depictions of Minors Engaged in Sexually Explicit Conduct was listed on the warrant itself as a suspected crime. CP 228. This crime is then referenced as one of "the above listed crimes" in the description of authorized items to be searched. CP

229. The severability doctrine can only be applied where it is possible to have "meaningful separation" of items described with specificity and for which there is probable cause. Perrone, 119 Wn.2d at 560. Moreover, particularly where materials protected by the First Amendment are involved, severance is inappropriate where it would require extensive "editing" of the warrant to save it. Id. at 560-561.

As in Perrone, there simply is no effective way to "edit out" reference on the warrant to the crime of Dealing in Depictions of Minors Engaged in Sexually Explicit Conduct, a listed crime that expressly and intentionally guided the scope of law enforcement's search of the various items on McKee's phone. Not only would severance fail to rectify the other deficiencies in this general warrant, it is not even possible under the circumstances.

2. COUNSEL WAS INEFFECTIVE FOR FAILING TO ARGUE THE POSSESSION OFFENSES IN COUNTS 1 THROUGH 4 INVOLVED THE "SAME CRIMINAL CONDUCT" FOR PURPOSES OF McKEE'S OFFENDER SCORES.

The State concedes the test for whether multiple convictions violate constitutional double jeopardy prohibitions and the test for whether multiple convictions are treated as "same criminal conduct" under the SRA are not the same. Brief of Respondent, at 15 (citing

State v. Chenoweth, 185 Wn.2d 218, 370 P.3d 6 (2016)). And nowhere does the State contest McKee's assertion that his crimes in counts 1 through 4 would satisfy the test for "same criminal conduct."

Instead, the State posits that the language of RCW 9.68A.070(1)(c) – "For the purposes of determining the unit of prosecution under this subsection, each depiction or image of visual or printed matter constitutes a separate offense" – controls both the double jeopardy and SRA inquiries, and removes discretion from sentencing courts to find "same criminal conduct." Because McKee's convictions for Possessing Depictions of Minors in the First Degree were not subject to "same criminal conduct" analysis, reasons the State, defense counsel's failure to argue that McKee's convictions in counts 1 through 4 satisfied that analysis was not ineffective. Thus, the State deems the issue waived. Brief of Respondent, at 14-17. The State is mistaken.

The language in subsection (1)(c), referring to the "unit of prosecution," comes directly from double jeopardy jurisprudence. See, e.g., State v. Hall, 168 Wn.2d 726, 729-730, 230 P.3d 1048 (2010); State v. Adel, 136 Wn.2d 629, 632-635, 965 P.2d 1072 (1998). This language was added to the statute in 2010 in

response to the opinion in State v. Sutherby, 165 Wn.2d 870, 878-882, 204 P.3d 916 (2009), where the Supreme Court held, under double jeopardy analysis, that the unit of prosecution for possession of depictions of minors was a single count, regardless of the number of images possessed or number of children depicted. See Laws of 2010, ch. 227 § 6.

It is important to distinguish statutes such as RCW 9.68A.070(1)(c), which is a charging statute, from statutes intended as sentencing statutes. For example, RCW 9A.56.300, which pertains to Theft of a Firearm, provides, "Each firearm taken in the theft under this section is a separate offense." RCW 9A.56.300(3). Like RCW 9.68A.070(1)(c), this is a charging statute, defining the number of charges that can be prosecuted against a defendant. It is not, however, a sentencing statute. Therefore, multiple convictions under this statute are still subject to the SRA's "same criminal conduct" analysis. State v. Smith, 99 Wn. App. 510, 513-518, 990 P.2d 468 (1999), review denied, 141 Wn.2d 1012, 10 P.3d 1072 (2000); State v. Roose, 90 Wn. App. 513, 517-518, 957 P.2d 232 (1998).

By way of contrast, the burglary anti-merger statute is both a charging statute and a sentencing statute. See RCW 9A.52.050

("Every person who, in the commission of a burglary shall commit any other crime, may be punished therefor [*sentencing component*] as well as for the burglary, and may be prosecuted for each crime separately [*charging component*]."); Roose, 90 Wn. App. at 517 (contrasting a pure charging statute with burglary anti-merger statute). Notably, however, even with the burglary anti-merger statute's sentencing component, trial courts retain the discretion to treat multiple convictions as a single offense under the "same criminal conduct" provisions of the SRA. State v. Lessley, 118 Wn.2d 773, 779-782, 827 P.2d 996 (1992); State v. Tresenwriter, 101 Wn. App. 486, 495-497, 4 P.3d 145 (2000), review denied, 143 Wn.2d 1010, 21 P.3d 292 (2001).

Because RCW 9.68A.070(1)(c) is merely a charging statute, and does not address sentencing for Possessing Depictions of Minors in the First Degree, the "same criminal conduct" analysis of RCW 9.94A.589(1)(a) applied to McKee's convictions in counts 1 through 4. And because McKee's crimes clearly meet the statutory test, defense counsel was ineffective for failing to argue the matter at sentencing, resulting in a significantly longer term of incarceration for Mr. McKee. See Brief of Appellant, at 16-22. This

issue is properly raised. See State v. Saunders, 120 Wn. App. 800, 824-825, 86 P.3d 232 (2004).

B. CONCLUSION

For the reasons discussed in the opening brief and here, this Court should vacate McKee's convictions on counts 1 through 4 based on the faulty warrant. Alternatively, this Court should find defense counsel was ineffective for failing to argue these convictions involved the "same criminal conduct" and remand for resentencing under the significantly shorter standard ranges.

DATED this 23rd day of March, 2017.

Respectfully Submitted,

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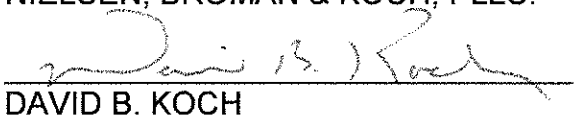

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