

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS LENNART HELLSTROM,

Defendant-Appellant.

FOR PUBLICATION

October 21, 2004

9:10 a.m.

No. 252984

Macomb Circuit Court

LC Nos. 2003-001463-FH

2003-001464-FC

Official Reported Version

Before: Neff, P.J., and Smolenski and Zahra, JJ.

NEFF, P.J. (*dissenting*).

I respectfully dissent. Contrary to the conclusion reached by the majority, I find that the facts of this case do not justify the application of the "good-faith" exception to the exclusionary rule as recently adopted and explained by the Michigan Supreme Court in *People v Goldston*, 470 Mich 523; 682 NW2d 479 (2004).¹

I agree with the majority's view of the legal principles underlying the good-faith exception, but disagree only with its application of those principles. The Supreme Court's decision in *Goldston* left unchanged the probable-cause standard and the various requirements for a valid warrant. *Ante* at ____, citing *United States v Leon*, 468 US 897; 104 S Ct 3405; 82 L Ed 2d 677 (1984). The majority decision all but "turns a blind eye" to these standards.

Although the *Goldston* decision has ushered in a new era in Michigan law, it is legal terrain well-traveled in federal law since the 1984 United States Supreme Court decision in *Leon*. My review of this case and examination of similar cases in which the courts have applied *Leon* leaves no doubt that the affidavit in this case was lacking in probable cause and that the nature of this deficiency rules out a good-faith exception. Accordingly, the trial court should have suppressed the evidence seized in the search of defendant's home.

¹ The prosecution did not raise the good-faith argument below in arguing the probable-cause issue and it was not addressed by the trial court. The prosecution raises the good-faith exception for the first time on appeal.

I

Interpreting the Fourth Amendment of the United States Constitution, the *Leon* Court adopted a good-faith exception to the exclusionary rule as a remedy for unreasonable searches and seizures. "Under *Leon*, the exclusionary rule does not bar the admission of evidence seized in reasonable, good-faith reliance on a search warrant ultimately found to have been defective." *Goldston, supra* at 525-526.

The good-faith exception turns on objective reasonableness: whether the police officers' reliance on the magistrate's determination of probable cause and on the technical sufficiency of the search warrant was objectively reasonable. *Goldston, supra* at 531; see also *ante* at ___, quoting *Leon, supra* at 923-924. The focus with respect to the affidavit in this case is on probable cause. The standards to be applied are well settled.

"A search warrant may be issued only on a showing of probable cause that is supported by oath or affirmation." *People v Nunez*, 242 Mich App 610, 612; 619 NW2d 550 (2000); Const 1963, art 1, § 11. Probable cause exists when a reasonably cautious person would be justified in concluding that evidence of criminal activity could be found in a stated place to be searched. *Id.* A magistrate must "make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." *People v Hawkins*, 468 Mich 488, 502 n 11; 668 NW2d 602 (2003), quoting *Illinois v Gates*, 462 US 213, 238; 103 S Ct 2317; 76 L Ed 2d 527 (1983). In reviewing a magistrate's decision regarding probable cause, this Court asks whether a reasonable magistrate could have found a "substantial basis" to infer that the evidence sought would be found at the place to be searched. *People v Russo*, 439 Mich 584, 603-604; 487 NW2d 698 (1992), quoting *Gates, supra* at 236-238.

Evidence seized pursuant to an invalid search warrant may nonetheless be admissible if the government acted in good faith in relying on the magistrate's issuance of a warrant for the search. *Leon, supra* at 920-922; see also *ante* at ___; *Goldston, supra* at 530. The inquiry is "whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization." *Leon, supra* at 923 n 23. Objective good faith is not manifested if an affidavit is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Ante* at ___, quoting *Leon, supra* at 923 (citation omitted). Nor is good faith manifested "if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth." *Id.* at 923.

II

In this case, the affidavit was clearly so lacking in the indicia of probable cause that it rendered official belief in its existence entirely unreasonable. *Goldston, supra* at 531. Further, the averments with regard to the officer-affiant's experience and expert knowledge, relied on by the trial court, were irrelevant, and while not false per se, were certainly misleading.

A

The affidavit supplied by the officer-affiant, Detective Bergeron, to support the search warrant provided the following statements to establish probable cause:

3. The facts establishing probable cause or the grounds for search are:

a) On 03-05-03 Detective Bergeron received two different complaints (03-4435 and 03-4430) of a criminal sexual conduct against the suspect at 30018 Manhattan, St Clair Shores, Michigan, 48082.

b) Detective Bergeron has been a police officer for the past 15 years. He is currently assigned to the investigation bureau.

c) The named suspect is a resident of the address in question.

d) There are two different victim's [sic] claiming that they were both sexually assaulted by the same suspect.

e) The victim's [sic] are both neighbor's [sic] to the suspect and have been alone with him at 30018 Manhattan in the past.

f) The search of the above listed premises should help to further this investigation.

g) Based on my experience (sic) as a detective investigating sexual assaults it is known that this activity may also lead to the use of pornography for sexual gratification of the suspect.

h) It is also (sic) known that child sexual assaultive predators are known to have items of sexual gratification inside their homes, computers and other devices.

The objective shortform version of the facts in the affidavit is essentially: (1) the affiant received criminal sexual conduct complaints from two different persons against the suspect at 30018 Manhattan, where the suspect resides, and (2) the complainants are neighbors and have been alone with the suspect at 30018 Manhattan. These facts do not conceivably justify a *reasonably cautious* person in concluding that evidence of the pornographic material specified in the affidavit would be found at 30018 Manhattan.

In applying the good-faith exception, the majority places reliance on the experience and knowledge of Detective Bergeron, who signed the affidavit and participated in the search, to support the adequacy of the affidavit and the good faith of the concomitant reliance on the warrant. However, while a *magistrate* may consider an officer's experience in determining whether probable cause exists, *ante* at ___ n 7, the principles to be applied with respect to the good-faith exception are altogether different. This Court's task in applying the good-faith exception rests on the *officer's* good-faith reliance on the warrant, not the magistrate's determination of probable cause. Properly viewed, Detective Bergeron's experience offers no support for applying the good faith-exception.

Detective Bergeron avers in the affidavit that he has fifteen years experience as a *police officer*; he is currently assigned to the investigation bureau, and his knowledge concerning the search warrant request is based on his experience as a detective investigating sexual assaults. In fact, Detective's Bergeron's experience was, by his own admissions, almost wholly lacking in any background that would support the claim that he was sufficiently knowledgeable about criminal sexual conduct involving children to reliably swear out the request for the search warrant.

Detective Bergeron testified at the suppression hearing that although he had been a policeman for a number of years, his duties included six months as an undercover officer in high schools, two years in traffic enforcement, eight years as an evidence technician, and four years as a detective. In his capacity as a detective he had investigated very few pedophile criminal sexual conduct cases, testifying about being involved in "A couple. I haven't done very many. . . . [M]y forte is more home invasion." He further testified about having investigated no case involving pedophilia in which he was the officer in charge and that he had "[v]ery little" training related to "children CSC [sic]." He was even uncertain whether some or all pornography is illegal to possess and testified that "I'm not the CSC expert."²

Therefore, when Detective Bergeron stated in the affidavit in support of his search warrant request that "g) Based on my experince (sic) as a detective *investigating sexual assaults* it is known that this activity may also lead to the use of pornography for sexual gratification of the suspect" (emphasis added) and "h) It is aslo (sic) known that child sexual assaultive predators are known to have items of sexual gratification inside their homes, computers and other devices," his statements were almost completely without substantive basis. Any reliance by this Court on Detective Bergeron's experience is completely unjustified in deciding the good-faith issue. Pursuant to *Leon, supra* at 923 n 24, we must review the objective reasonableness of the officers who obtained the warrant as well as those who executed it, so the reliance on Detective Bergeron's experience was particularly unjustified because he typed and signed the affidavit and participated in executing the warrant.³

² At one point Officer Bergeron testified about his belief that all pornography used for sexual gratification is illegal to possess.

³ The manner of the execution of this warrant, while not necessarily germane to the probable-cause issue, is also of concern to me. The affidavit signed by Detective Bergeron states that two complaints were received on March 5, 2003, the day before the warrant was issued. The search took place in the middle of the night, about 1 a.m., with "six or seven" officers participating. The defendant and his family were roused from bed and their home searched over the course of the next two or more hours. The only explanation for the execution of the warrant at that hour was that was when the "paperwork" was completed. There was no claim of a concern that evidence was in danger of destruction or being hidden. After all, as far as the officers knew, defendant did not even know he was a suspect in a criminal investigation and the officers were proceeding on mere speculation that there was some evidence of some crime to be found. Detective Bergeron stated that he intended to seize anything he could get his hands on that

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The only remaining averment in the affidavit is that "the search of the above listed premises should help to further this investigation." A finding of probable cause or good-faith reliance is not conceivably supported by a statement that the search "should help to further this investigation." Again, the relevant evidence at the suppression hearing supports a contrary finding.

There is no indication in the affidavit or elsewhere in this record that the complainants claimed that defendant photographed or videotaped them or showed them sexually suggestive materials or items. Detective Bergeron could not have harbored an objectively reasonable belief in the existence of probable cause in this case.

B

The circumstances in *Goldston* and those in this case are at opposite ends of the Fourth Amendment spectrum. In *Goldston*, the Supreme Court applied the good-faith exception to circumstances of a technical deficiency in the warrant resulting in an invalid warrant: the warrant failed to connect the place to be searched with the defendant and did not state the date that the police observed the defendant soliciting money. *Goldston, supra* at 527. In this case, the question is whether there was probable cause to issue the warrant.

This case more closely parallels *United States v Weber*, 923 F2d 1338, 1346 (CA 9, 1990), in which the United States Court of Appeals for the Ninth Circuit applied *Leon* to conclude that the warrant, obtained on the basis of foundationless expert testimony of pornography, lacked probable cause and did not justify application of the good-faith exception. In *Weber*, officers targeted the defendant for investigation of child pornography after he ordered four sets of pictures depicting children engaged in "sex action" as part of a reverse sting operation by law enforcement. *Id.* at 1340. The affiant-officer sought a warrant to search the defendant's home on the basis of the sting information, a statement that a package of pornographic materials was sent to the defendant's house almost two years earlier, and a general description of the proclivities of pedophiles, which was based on the affiant-officer's experience and training in child pornography investigations and his discussion with other law enforcement agents. The affidavit contained a lengthy, several-page recitation of expert knowledge of another officer regarding "child molesters," "pedophiles," and "child pornography collectors." *Id.* at 1341. Of significance was the fact that nowhere in the affidavit was there even a conclusory recital that evidence of the defendant's interest in child pornography, evidenced by his picture order, placed him in the categories of pedophiles, molesters, and collectors discussed in the affidavit. The court concluded that the "expert" portion of the affidavit was not drafted with the facts of the case or the particular defendant in mind. *Id.* at 1345. Particularly relevant to this case, the court observed:

It is well established that expert opinion may be presented in a search warrant affidavit. But if the government presents expert opinion about the

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related to this case that could possibly have physical evidence to further the case. The seizure included personal computers allegedly belonging to defendant's two nineteen-year-old sons.

behavior of a particular class of persons, for the opinion to have any relevance, the affidavit must lay a foundation which shows that the person subject to the search is a member of the class. [*Id.* (citation omitted).]

The *Weber* Court distinguished *United States v Rabe*, 848 F2d 994 (CA 9, 1988), another pornography case relying on expert opinion, on three grounds:

First, in *Rabe* there was concrete evidence that the defendant had pornography in his home shortly before the warrant was executed. *Id.* [at 995.] Second, there was expert testimony in the affidavit which addressed the facts of the defendant's case and specifically concluded that based on those facts, the defendant was a pedophile. *Id.* at 996. Finally, not only did the expert review the defendant's file, but there was enough information to make a judgment as to whether the defendant fit the profile of a "pedophile." The defendant's admitted collection of child pornography and his desire to take photographs were known to the expert and the magistrate before the warrant issued. [*Weber, supra* at 1345 - 1346.]

In this case, as in *Weber*, there was absolutely nothing linking Detective Bergeron's claimed expertise to defendant or defendant's alleged criminal activity. Detective Bergeron's expertise, even if valid, was irrelevant to this case. As the court aptly concluded in *Weber, supra* at 1346:

The foundationless expert testimony may have added fat to the affidavit, but certainly no muscle. Stripped of the fat, it was the kind of "bare bones" affidavit that is deficient under *Leon* [*supra* at 926]."

III

The majority has deserted the context of *Goldston* and the good-faith exception to an invalid search warrant. In adopting the good-faith exception, the *Goldston* majority could not have intended to turn a blind eye to the principles on which the exception is based. Otherwise, the *Goldston* reasoning would be for naught.

In *Goldston*, the Supreme Court acknowledged the *Leon* Court's recognition that application of the good-faith rule was not without limitation. *Goldston, supra* at 550. In this regard, the *Leon* Court stated that it was not suggesting that "exclusion is always inappropriate" where an officer obtains and relies on a warrant. *Leon, supra* at 922. Accordingly, suppression remains an appropriate remedy if an officer fails to manifest good faith and "relies on a warrant based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Goldston, supra* at 531, quoting *Leon, supra* at 923 (citation and quotation marks omitted). The affidavit in this case contains an entirely superficial recitation of probable cause, and "a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization." *Leon, supra* at 923 n 23.

The majority decision violates the purpose of the good-faith exception and is contrary to long-established precedent for its application. The decision turns the good-faith exception into a

carte blanche exception to an invalid search warrant, as long as the affidavit contains some "fat." Under the majority's reasoning and contrary to *Leon*, the magistrate and the courts become nothing more than a rubber stamp for the police. The majority decision eviscerates any necessary foundation for applying the good-faith exception because no reasoned application remains. For these reasons, I would reverse.

IV

The majority response to the dissent misses the point. Statistical inference *alone* cannot be a basis of probable cause. There must be some connection to the suspect. That is the point in *Weber*. The expert information in the affidavit must relate to the criminal suspect. If pedophilia is alleged, there must be evidence of pedophilia. If child pornography is alleged, there must be evidence of child pornography.

This case involves *no* allegations of *any* conduct involving child pornography or pedophilia. See *Russo, supra* at 599 n 24 (defining "pedophile"). So the quotations from *Russo* are irrelevant. That pedophilia or child pornography activity was involved in *Russo*, was a foregone conclusion. The affidavit contained ample allegations of such activity:

[T]he victim reported that, while between the ages of five and ten years old, she had been sexually abused by the defendant at his home every other weekend over a four-year period, beginning in the fall of 1978 and ending in August, 1982; the *victim described being photographed by the defendant "naked or in various stages of undress" and having been videotaped alone or with the defendant involved in sexual activity*; and she reported *being shown the photographs and videotapes* numerous times by the defendant during her visits to his home, and that she was familiar with the different locations *within the home where the defendant stored the material* and his method of securing the *piles of photographic material* with "string or rubber bands." [*Russo, supra* at 598 (emphasis added).]

The key issue in *Russo* was the staleness of that information. Unlike the majority in this case, the Supreme Court was careful to state what *Russo* did not stand for:

This is not a situation in which the government claims that simply because a person has indicated interest in possessing pornographic material he is likely to be in present possession of it. *United States v Weber*, 915 F2d 1282 (CA 9, 1990). Nor is this a situation in which the government seeks a search warrant on the basis of a single incident of photographing child victims. *State v Woodcock* [407 NW2d 603 (Iowa, 1987)]. Most importantly, this is not a situation in which the government claims the right to invade the sanctity of the home on the basis of a profile that suggests: once a collector of child pornography, always a possessor. *Washington v Smith*, 60 Wash App 592; 805 P2d 256 (1991), lv den 116 Wash 2d 1031 [813 P2d 582] (1991).

We hold only that where suspicion of criminal activity has focused on a specific individual by a standard more probable than not, and it is alleged that the

evidence sought was created, retained, and employed in ongoing criminal activity over a four-year period, the magistrate could reasonably conclude that there was a "fair probability" that the evidence would be retained in the residence of the accused. [*Russo, supra* at 613-614.]

The majority's use of quotations from *Russo* to establish probable cause in this case amounts to a profile search, clearly not sanctioned by the *Russo* Court.

/s/ Janet T. Neff