

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
June 21, 2012

v

BRIAN IVAR SKOGLER,

Defendant-Appellant.

No. 303803
Muskegon Circuit Court
LC Nos. 10-059804-FH;
10-059715-FH; 10-059716-FH

Before: DONOFRIO, P.J., and MARKEY and OWENS, JJ.

PER CURIAM.

In these consolidated cases, defendant appeals by right his convictions after a bench trial: (a) in LC No. 10-059715-FH of three counts of possessing child sexually abusive material, MCL 750.145c(4), and three counts of using a computer to commit a crime, MCL 752.796(1); (b) in LC No. 10-059716-FH of one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a) (victim under 13 years of age); and (c) in LC No. 10-059804-FH of two counts of child sexually abusive activity, MCL 750.145c(2). We affirm.

In August of 2010, following forensic interviews of two young boys, the Michigan State Police conducted a search of defendant's residence pursuant to a search warrant. During the search, officers seized a digital camera, a computer, and computer hard drives. Forensic analysis of the computer uncovered approximately 1,200 thumbnail images, mainly depicting child pornography. The photographs depicted children, mostly males, engaged in various sexual acts or positions. Police also obtained a second digital camera from defendant when he arrived at the home during the search. Analysis of that camera revealed deleted images of the two boys with their eyes closed and their genitalia exposed.

On appeal, defendant first asserts that the trial court erred in denying defendant's motion to suppress the evidence seized during the search of defendant's residence because the search warrant was invalid. We review for clear error a trial court's factual findings on a motion to suppress evidence. *People v Custer*, 465 Mich 319, 325-326; 630 NW2d 870 (2001). We review de novo the trial court's legal conclusions, including its determinations whether there was a Fourth Amendment violation and whether the exclusionary rule applies. *Id.* at 326; *People v Hyde*, 285 Mich App 428, 436; 775 NW2d 833 (2009).

The right to be free from unreasonable searches and seizures is guaranteed by both the United States Constitution and the Michigan Constitution. *People v Kazmierczak*, 461 Mich 411,

417; 605 NW2d 667 (2000). A search or seizure conducted pursuant to an invalid warrant is unreasonable when the police's actions do not fall within one of the specific exceptions to the warrant requirement. *People v Hellstrom*, 264 Mich App 187, 192; 690 NW2d 293 (2004). For a warrant to be valid, it must be based on probable cause and must "particularly describe the place to be searched and the persons or things to be seized." *Id.*, citing US Const, Am IV; Const 1963, art 1, § 11; MCL 780.654(1). "[A] search warrant and the underlying affidavit are to be read in a common-sense and realistic manner." *People v Russo*, 439 Mich 584, 604; 487 NW2d 698 (1992). When reviewing the sufficiency of a search warrant, the relevant inquiry is "whether a reasonably cautious person could have concluded that there was a 'substantial basis' for the finding of probable cause." *Id.* at 603 (citations omitted). Reviewing courts should accord great deference to a magistrate's determination of probable cause. *Id.* at 604, citing *Illinois v Gates*, 462 US 213, 236-237; 103 S Ct 2317; 76 L Ed.2d 527 (1983).

"Probable cause to issue a search warrant exists where there is a 'substantial basis' for inferring a 'fair probability' that contraband or evidence of a crime will be found in a particular place." *Kazmierczak*, 461 Mich at 417-418, citing *Russo*, 439 Mich at 604. "The magistrate's finding of reasonable or probable cause shall be based upon all the facts related within the affidavit made before him or her." MCL 780.653. "[A]n affiant's representations in a search warrant affidavit that are based upon the affiant's experience can be considered along with all the other facts and circumstances presented to the examining magistrate in determining probable cause." *People v Darwich*, 226 Mich App 635, 639; 575 NW2d 44 (1997).

In this case, the affidavit supporting the search warrant contained specific allegations about defendant's conduct with the boys during the two years preceding the search. The affiant, a state police trooper, set forth the results of investigative interviews of two young boys. The affiant alleged that one boy stated that defendant pulled down his underwear, touched his exposed penis, and took pictures of his naked body on multiple occasions, including an instance in which defendant posed him for a photograph by placing the boy's hand on his own penis. The affidavit further related the interview of the other boy who similarly described incidents of defendant's taking pictures of him and the other boy while naked, including one time when defendant instructed the boy to "hold his own privates." The affiant alleged both boys stated that these incidents occurred while the boys were in defendant's home. The affidavit also set forth the affiant's knowledge about the habits and routine practices of pedophiles based on: (1) his training; (2) his 21 years of experience, during which he investigated over 50 criminal sexual abuse cases, many involving children; and (3) his discussions with other officers with experience investigating pedophiles. The affidavit stated that pedophiles routinely have collections of pornographic material and frequently use computers and computer storage devices to maintain digital copies of their videotapes and photographs and transmit the materials over the Internet. A common-sense and realistic reading of the affidavit supported that defendant was a pedophile. The facts related in the affidavit, coupled with the officer's experience regarding the habits of pedophiles, provided a substantial basis for the magistrate's conclusion that there was a fair probability that evidence of child pornography would be found in defendant's home. *Kazmierczak*, 461 Mich at 417-418; *Russo*, 439 Mich at 603-604.

Defendant nevertheless contends that the officer's experience, including his review of and reliance on the expert testimony discussed in *Russo*, was irrelevant to the probable cause determination in this case. We disagree. Where, as here, there is both evidence of the habits of

pedophiles and facts from which it may reasonably be inferred that the subject of the investigation is a pedophile, the expert opinion regarding the proclivities of pedophiles regarding the collection and possession of pornography is relevant to the determination of probable cause. See *Hellstrom*, 264 Mich App at 201-202; *United States v Rugh*, 968 F2d 750, 754 (CA 8, 1992).

Defendant next argues that the warrant was overbroad because the description of the items to be seized lacked particularity. The particularity requirement is intended “to provide reasonable guidance to the officers executing the search with regard to the items to be seized and to prevent unfettered discretion in this determination.” *Hellstrom*, 264 Mich App at 192. “The degree of specificity required depends on the circumstances and types of items involved.” *People v Zuccarini*, 172 Mich App 11, 15; 431 NW2d 446 (1988).

A common-sense and realistic reading of the warrant in this case indicates that officers did not have unfettered discretion in determining what items to seize. The language of the warrant limited seizure to items that displayed or related to child pornography; items that showed adults engaged in sexual activity or nudity, and equipment that could be used to create, display, store or transmit images or data. The description of items displaying or relating to child pornography is sufficiently particular because of the reference to the illegal activity being investigated. See *id.* at 15-16. The description of the items showing adults engaged in sexual activity or nudity was also sufficiently particular and supported by probable cause. The affidavit alleged that “pedophiles will often show children movies, videotapes, magazines, books and photographs of children or adults engaged in sexual activity or in various stages of undress to encourage a child to engage in sexual activity or nudity.” Although the warrant’s description of equipment that could be used to create, display, store or transmit images or data is broad, a broad description in a warrant is not overly broad when there is probable cause to support the breadth. *Id.* The evidence that defendant was a pedophile who took photographs of two naked young boys and the officer’s knowledge that pedophiles often store digital copies of their photographs and videotapes and swap the images and data over the Internet provide probable cause for the seizure of any equipment that could be used to facilitate such activities.

Defendant nevertheless repeatedly points out that the warrant did not specifically identify as a subject of the search the alleged photographs of the two boys. However, the search warrant authorized the seizure of “photographs . . . displaying, depicting, discussing or relating to children in a sexual way including children engaging in sexual acts, children in various stages of undress or children watching sexual acts.” This description included the alleged photographs of the boys and was sufficiently particular both to limit the discretion of the searching officers and to distinguish between child sexually abusive material and unrelated property. The description of the items to be seized was sufficiently particular to provide reasonable guidance to the officers as to the items to be seized and to prevent their unfettered discretion in determining which items to seize. *Hellstrom*, 264 Mich App at 192-193.

On the record before this Court, we conclude that the search warrant was valid and that the trial court, therefore, properly denied defendant’s motion to suppress.

Defendant next argues that in LC No. 10-059715-FH, insufficient evidence supported his convictions for knowingly possessing child sexually abusive material, MCL 750.145c(4), and using a computer to commit a crime, MCL 752.796(1) and MCL 752.797(3)(d). We review de

novo a challenge to the sufficiency of the evidence in a bench trial, viewing the evidence in a light most favorable to the prosecution to determine whether the trial court could have found that the essential elements of the crime were proved beyond a reasonable doubt. *People v Sherman-Huffman*, 241 Mich App 264, 265; 615 NW2d 776 (2000).

MCL 750.145c(4) criminalizes the knowing possession of “any child sexually abusive material.” MCL 750.145c(1)(m) broadly defines “child sexually abusive material” to include, pertinent to this case, “any depiction, whether made or produced by electronic, mechanical, or other means, including . . . electronic visual image, computer diskette, computer or computer-generated image, or picture, . . . of a child or appears to include a child engaging in a listed sexual act” In this case, a forensic inspection of the hard drive of a computer seized from defendant’s residence revealed “a folder named “Thumbs D-B” that contained approximately 1200 thumbnail images of what is commonly referred to as child pornography. On appeal, defendant does not dispute that the police found child sexually abusive material in deleted temporary Internet files on defendant’s computer. His complaint is that this data could only be accessed by police with their specialized expertise and software. Although defendant concedes this evidence showed that although sometime in the past, defendant’s computer contained images of child abusive material that had been deleted, only with speculation could it be concluded defendant ever knowingly possessed them. We disagree.

In *People v Flick*, 487 Mich 1, 22; 790 NW2d 295 (2010), our Supreme Court held that MCL 750.145c(4) prohibits individuals from intentionally accessing and purposely viewing depictions of child sexually abusive material on the Internet. The Court reasoned that the Legislature’s use of the word “possession” in the statute is consistent with established Michigan caselaw: possession can be either actual or constructive. *Id.* at 14. Ultimately, the finder of fact must determine from circumstantial or direct evidence whether an accused possessed the contraband. *Id.* Constructive possession is established if an accused has the power and the intention at a given time to exercise dominion or control over a thing. *Id.* Furthermore, “[d]ominion or control over the object need not be exclusive.” *Id.* The Court cautioned, however, that “if a person accidentally views a depiction of child sexually abusive material on a computer screen, that person does not ‘knowingly possess’ any child sexually abusive material in violation of MCL 750.145c(4).” *Flick*, 487 Mich at 19. The Court held that “a defendant constructively possesses child sexually abusive material when he knowingly has the power and the intention at a given time to exercise dominion or control over the contraband either directly or through another person or persons.” *Id.* at 22.

The offenses in LC No. 10-059715-FH were alleged to have occurred in the eight months before the execution of the search warrant. The data of the deleted images were stored on defendant’s computer that was located in defendant’s home. There was evidence that the computer was password protected, and only defendant knew the password. In addition, other child sexually abusive images of the two young boys that provided the information supporting the search warrant were found on a media storage card in defendant’s camera. Some of these photographs depicted the hand of an adult wearing a watch similar to that of defendant, who admitted taking photographs of the boys in his home. We conclude when viewing this evidence and reasonable inferences in the light most favorable to the prosecution, a rational finder of fact could determine beyond a reasonable doubt that during the timeframe alleged in the information defendant knowingly possessed—exercised dominion and control over—at least three computer-

generated images of child sexual abusive material that were stored on his computer. It follows that the same evidence supports defendant's convictions for using a computer to commit a crime.

We affirm.

/s/ Pat M. Donofrio
/s/ Jane E. Markey
/s/ Donald S. Owens