STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0439

State of Minnesota,
Respondent,

vs.

Terry Larue Balzum,
Appellant.

Filed April 14, 2009
Affirmed
Klaphake, Judge

Norman County District Court
File No. K5-05-211

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Rebecca A. Trapp, Assistant Norman County Attorney, 318 E. Main Street, Ada, MN 56510 (for respondent)

Ross Wheeler Brandborg, 503 7th Street N., Suite 206, Fargo, ND 58102 (for appellant)

Considered and decided by Peterson, Presiding Judge; Klaphake, Judge; and Bjorkman, Judge.

U N P U B L I S H E D O P I N I O N

KLAPHAKE, Judge

Appellant Terry Balzum challenges his conviction for one count of disseminating pornographic work involving minors, Minn. Stat. § 617.247, subd. 3(a) (2004), and three

counts of possession of pornographic work involving minors, *id.*, subd. 4(a). In this direct appeal, he challenges the legality of searches of his property, claiming that (1) searches of the contents of his computer and electronic media storage were illegal because the search warrants supporting them did not specifically authorize police to search their contents; (2) the search warrants were too general and overbroad; and (3) the Ada police chief who signed the search warrants materially misrepresented facts pertaining to his background and qualifications in the search warrant applications. We affirm because we conclude that (1) the search warrants specifically authorized police to search appellant's computer and electronic media storage; (2) the search warrants were not overbroad or too general; and (3) the Ada police chief was sufficiently qualified to sign the search warrant applications and did not materially misrepresent facts in those applications.

D E C I S I O N

The United States and Minnesota Constitutions prohibit the government from conducting unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. A district court or magistrate may issue a search warrant only after making a probable cause finding, based on the totality of the circumstances, that "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *State v. Wiley*, 366 N.W.2d 265, 268 (Minn. 1985) (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332 (1983). A probable cause determination must be based on "all the circumstances set forth in the [warrant] affidavit . . . including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information." *Wiley*, 366 N.W.2d

at 268. On review, this court "may consider only the information presented in the affidavit offered in support of the search-warrant application." *State v. Hochstein*, 623 N.W.2d 617, 622 (Minn. App. 2001) (citations omitted); *see Novak v. State*, 349 N.W.2d 830, 831 (Minn. 1984). A judicial determination that a warrant is supported by probable cause "should be paid great deference by reviewing courts[.]" *United States v. Grant*, 490 F.3d 627, 631 (8th Cir. 2007) (quotations omitted).

Appellant first contends that the searches exceeded the scope of the warrants, because the contents of his computer hard drive and storage media were opened, accessed, and read; that he had an expectation of privacy with regard to these items; and that the search of a computer and its peripherals, like other closed containers, must be specifically allowed by warrant. Two search warrants permitting police to search appellant's home included the following items:

> Computer systems, including but not limited to, the main computer box, monitors, scanners, printers, modems, and/or other peripheral devices.
>
> Data contained on either hard drives or removable media, to include deleted files, email files that may show the distribution of child pornography, chat line logs that may identify children being enticed on line or the distribution o[f] child pornography.
>
> Media in whatever form, including, but not limited to, magnetic, optical, or Compact disks.
>
> Papers and effects that tend to show the possession or distribution of child pornography or the enticement of children on line[.]

In addition, the second warrant authorized police to search for a zip drive and "[a]ny new computer system."

Appellant claims that *United States v. Carey*, 172 F.3d 1268 (10th Cir. 1999), requires separate warrants to seize and search the contents of a computer. The holding of *Carey*, however, is dependent on facts that are not present in this case. There, a defendant gave police consent to search his home for drugs, and police obtained a warrant to search his computer for "names, telephone numbers, ledger receipts, addresses, and other documentary evidence pertaining to the sale and distribution of controlled substances." *Id.* at 1270. In conducting that search, police seized "JPG" files (photo files) and files with sexually suggestive names that upon further examination revealed pornography. *Id.* The *Carey* court suppressed the JPG files because police exceeded the scope of the warrant that authorized only a search for drug-related evidence by continuing to search through computer files for evidence of sex crimes. *Id.* at 1276. The court specifically noted that the result was "predicated only upon the particular facts of this case, and a search of computer files based on different facts might produce a different result." *Id.* (footnote omitted).

Carey has no application to appellant's situation. Rather than exceeding their authority to search for evidence of another type of criminal activity, police here were specifically authorized by warrant to search for evidence of child pornography. The warrants were tailored to the objective of the search and specifically authorized the search of appellant's computers, data on those computers or on removable media, and files or chat lines that could show the enticement of children on line or the distribution of

child pornography. *See United States v. Giberson*, 527 F.3d 882, 887 (9th Cir. 2008) (declining to give computers heightened Fourth Amendment protection); *State v. Wills*, 524 N.W.2d 507, 509 (Minn. App. 1994), *review denied* (Minn. Feb. 14, 1995) ("Generally, any container situated within a residence that is the subject of a validly-issued warrant may be searched if it is reasonable to believe that the container could conceal items of the kind portrayed in the warrant"). Thus, the searches at issue here did not exceed the scope of the warrants.

Appellant next makes related arguments that the warrants were overbroad and amounted to general warrants. "The Fourth Amendment requires that a search warrant describe the things to be seized with sufficient particularity to prevent a general exploratory rummaging in a person's belongings." *Carey*, 172 F.3d at 1272. "Prohibiting the issuance of general search warrants, the Fourth Amendment requires that a search warrant describe and identify the items to be seized with particularity. *U.S. v. Cartier*, 543 F.3d 442, 447 (8th Cir. 2008). Broad terms are sufficiently particular if "the description is as specific as the circumstances and the nature of the activity under investigation permit." *United States v. Leary*, 846 F.2d 592, 600 (10th Cir. 1988) (quotation omitted). But items to be searched must be described "with as much specificity as the government's knowledge and circumstances allow." *Id.*

Courts have noted the difficulty in distinguishing between private information and evidence of criminal activity in conducting searches of computers, and in obtaining incriminating evidence when it can be hidden within innocuous-looking computer folders or files. *See, e.g., United States v. Comprehensive Drug Testing, Inc.*, 513 F.3d 1085,

1108 (9th Cir. 2008) (noting that limiting computer search to an e-mail program or search of specific terms is not likely to be sufficiently broad to obtain evidence sought by warrant) *rehearing en banc granted* (Sept. 30, 2008); *United States v. Hill*, 459 F.3d 966, 977-78 (9th Cir. 2006) (noting that perpetrators may name computer files to disassociate themselves from alleged criminal conduct). In *United States v. Brooks*, 427 F.3d 1246, 1251 (10th Cir. 2005), the court stated, "This court has never required warrants to contain a particularized computer search strategy. We have simply held that officers must describe with particularity the *objects of their search*." Here, the object of the search was evidence of child pornography, and the types of files searched could have reasonably contained that evidence. *See Brooks*, 427 F.3d at 1251-52 (requiring a separate warrant to search a computer only when discovered evidence goes outside the mandated scope of a warrant search).

We find compelling the analysis contained in a recent Eighth Circuit Court of Appeals case, in which the court rejected a defendant's argument that a warrant to search a computer should have contained the search strategy suggested in *Carey*, stating, "[t]he standard used to gauge the particularity requirement of a search warrant is one of practical accuracy rather than a hypertechnical one." *Cartier*, 543 F.3d at 447 (quotation omitted). The *Cartier* court also noted that the defendant did not allege a search of unrelated files or that he was prejudiced by the search of unrelated files, *id.*, nor is such an allegation made by appellant here.

Further, the instances of overbreadth enumerated by appellant are not supported by the facts. Appellant claims that police assumed too much discretion in determining what

items to seize from appellant's home, giving examples of specific items that police could have seized and did not, or items that police allegedly seized without authorization. Our review of the record reveals that in executing the search warrants, police sought to identify and seize only evidence that was linked to the suspected crime of child pornography. The warrants were limited to obtaining only such evidence, and for this reason were not overbroad. *See United States v. Wong*, 334 F.3d 831, 837 (9th Cir. 2003) (ruling that search warrant for child pornography sufficiently specific where it limited search to criminal activity, noting that search warrant did not need to identify location on computer where incriminating evidence might be located); *United States v. Campos*, 221 F.3d 1143, 1147 (10th Cir. 2000) (ruling that search warrant for child pornography not overbroad where warrant "was directed at items relating to child pornography"). For these reasons, we conclude that the search warrants were neither too general nor overbroad.

Finally, appellant claims that the warrants were invalidated by Ada Police Chief Wade Krohmer's false statements in the warrant applications regarding his qualifications, training, and experience in the area of online child pornography. In *Franks v. Delaware*, 438 U.S.154, 171, 98 S. Ct. 2764, 2684 (1978), the Supreme Court ruled that a warrant must be reexamined for probable cause if a portion of the affidavit includes a "deliberate falsehood or . . . reckless disregard for truth," which is more than "negligence or innocent mistake." *See State v. Causey*, 257 N.W.2d 288, 292-93 (Minn. 1977) (stating that the first step in deciding whether evidence must be excluded based on an invalid search

warrant is to determine whether a deliberate or reckless misstatement of fact in a warrant affidavit is material to the determination of probable cause).

Here, the alleged misrepresentation is that Krohmer exaggerated his qualifications. After a hearing, the district court found that Krohmer had been a licensed peace officer for 15 years, had specific training on sex crimes and computer crimes, and had investigated six other child pornography cases. He received specific training on computer crimes and children. Krohmer testified, and the district court found, that he is not an expert in online pornography cases. Krohmer also testified that he used "boilerplate" warrant application forms provided by Sergeant William Haider, a member of Minnesota's Internet Crimes against Children Task Force who forwarded the initial evidence linking appellant's computer to child pornography. On this record, we observe no error in the district court's determination that Krohmer's affidavit did not intentionally or recklessly misrepresent material facts in the warrant application. *See United States v. Adams*, 110 F.3d 31, 33 (8th Cir. 1997) (ruling the court's task on review is "simply to ensure that the magistrate had a substantial basis for . . . concluding that probable cause existed").

Affirmed.