STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1322

State of Minnesota,
Respondent,

vs.

Rory Allen Koch,
Appellant.

Filed June 23, 2014
Affirmed
Ross, Judge

Ramsey County District Court
File No. 62-CR-12-1783

Lori Swanson, Attorney General, St. Paul, Minnesota; and

John J. Choi, Ramsey County Attorney, Peter R. Marker, Assistant County Attorney, Karen A. Kugler, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Timothy D. Webb, Evan H. Weiner, Neve Webb, PLLC, Minneapolis, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Ross, Judge; and Bjorkman, Judge.

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

ROSS, Judge

The state charged Rory Koch with twelve counts of possession of images of child pornography after investigators discovered child pornography in the caches of Koch's

personal computers. The district court denied Koch's motion to suppress evidence of the images even though police had obtained a search warrant based on information obtained more than a year before they sought the warrant. It also denied Koch's motion to dismiss the charges for lack of probable cause. Koch stipulated to a bench trial on the state's evidence, preserving his pretrial challenges for appeal. The district court found Koch guilty and sentenced him to 60 months in prison. Because we hold that the basis for the search warrant was not stale, the state's evidence was sufficient to show probable cause, and Koch's sentence does not reflect an abuse of discretion, we affirm.

FACTS

Ramsey County prosecutors charged Rory Koch with twelve counts of possessing child pornography after investigators found pornographic images in the caches of Koch's computer. The investigation began when AOL reported two suspected transfers of child pornography from a person with the username "Chadwhite73." Chadwhite73 transferred the images on June 8 and 9, 2009, but AOL did not report them to police until February 2010. Investigators linked Chadwhite73 to Koch by address and phone number. St. Paul police sergeant William Haider learned from federal investigators in New York that Chadwhite73 had sent emails containing child pornography to a federal suspect.

In September 2010 Sergeant Haider applied for a warrant to search Koch's St. Paul apartment and seize computers. The sergeant's warrant application asserted that those who possess or distribute child pornography generally retain the images a long time. The district court issued the search warrant and police found two computers. They viewed the computers' files in Koch's presence and discovered an image of a 15- or 16-

year-old boy in a sexual pose. Koch acknowledged that investigators would likely find child pornography on his computers, but, he said, probably fewer than a few dozen images. Koch admitted he had received inappropriate pictures but said he usually deleted them. He volunteered that he enjoyed fantasy chats and claimed people would send him unsolicited images during those chats. But he insisted that he had deleted any child pornography he might have received because it was "not something [he] wanted to dabble in . . . [or] have an interest in." Koch also said he probably would have disposed of his computers if he had known about the search beforehand.

Police found that Koch's computers contained images of child pornography and child erotica, and the state charged him with twelve counts of possession of child pornography. Koch moved to suppress the evidence obtained in the search, arguing that the search warrant lacked probable cause because it was supported by stale information that did not articulate a suspicion of ongoing criminal activity. The district court denied the motion.

Koch also moved to dismiss the charges because the state lacked evidence that he possessed the files in his computers' caches. He relied on the testimony of James Boyer, a former police officer experienced in computer forensics and child pornography investigations. Boyer testified that visited websites and opened emails automatically store files in a computer's cache without the user's effort and that unsophisticated users cannot access cache files. He explained that only special software could retrieve deleted cache files and that no evidence indicated that Koch's cache files had been deliberately saved.

Minneapolis police sergeant Joseph Adams testified about his investigation of Koch's computers. He testified that the computers contained child pornography and erotica, including 37 images in emails. Sergeant Adams testified that Koch had emailed images of child pornography to himself from one account to another and that the computer contained youthful-implying account names like "str8boy14" and "lilzachary4fun." He opined that these names could be used to engage teens in chats unsuspectingly. Koch's computers also contained a history of search terms commonly used to locate child pornography on the internet, like "MalePeddos" and "peddofun." Sergeant Adams added that he found some of the files in different locations within the computers' caches, including a temporary internet cache, a cache for email attachments, and a cache labeled "AOL/temp." He agreed with Boyer's general summary of how computer caches function, but he testified that it was atypical for a program that automatically backs up files to direct them to three different caches, as Koch's computers did. Based on this evidence, the district court denied Koch's motion to dismiss.

Koch waived his right to a trial by jury and stipulated to the state's evidence under Minnesota Rule of Criminal Procedure 26.01, subdivision 4. The state's evidence included the police reports, the search-warrant application, the AOL tip reports, the information leading investigators to Koch's apartment, and transcripts from Koch's discussion with an investigating officer and from the testimony of Sergeant Adams. The district court found Koch guilty on all twelve counts.

The presentence investigation report recommended an executed prison sentence of 60 months, and Koch sought a downward dispositional departure to probation. The

district court rejected the departure motion, emphasizing that Koch lacked remorse, was likely involved in child pornography for a lengthy period, and has psychological traits that make it unlikely he will remain in treatment.

Koch appeals.

D E C I S I O N

I

Koch challenges the basis of the search warrant. A search warrant must be supported by probable cause. U.S. Const. amend. IV; Minn. Const. art. 1, § 10; *State v. Jannetta*, 355 N.W.2d 189, 193 (Minn. App. 1984), *review denied* (Minn. Jan. 14, 1985). We will affirm the district court's conclusion that probable cause supported a search warrant if the district court had a substantial basis to conclude that probable cause was present. *State v. Harris*, 589 N.W.2d 782, 787–88 (Minn. 1999). We look for a substantial basis only in the information contained in the affidavit to determine whether the totality of the circumstances present a fair probability that the search would yield evidence of a crime. *State v. Souto*, 578 N.W.2d 744, 747 (Minn. 1998).

Koch specifically maintains that the information supporting the warrant here was stale. He can prevail on this challenge only if the facts supporting the warrant were not timely enough to justify a probable-cause finding at the time of the warrant. *Jannetta*, 355 N.W.2d at 193. Factors relating to staleness include evidence of ongoing criminal activity, the innocuous or incriminating nature of the items sought, the disposability or transferability of the items sought, and whether the items have any enduring utility. *Souto*, 578 N.W.2d at 750. Koch concedes that child pornography is inherently

incriminating, easily transferable and disposable, and enduringly "useful" to its possessor, so we focus only on whether the affidavit sufficiently suggested that possession of child pornography at Koch's apartment was ongoing.

Possession of child pornography is frequently an ongoing, rather than a fleeting, crime. *United States v. Lemon*, 590 F.3d 612, 614 (8th Cir. 2010); *United States v. Frechette*, 583 F.3d 374, 378 (6th Cir. 2009). It customarily occurs in secret. *Frechette*, 583 F.3d at 378. Courts are therefore more lenient when assessing the timeliness of information supporting a child-pornography search warrant. *Id.*; *see Jannetta*, 355 N.W.2d at 194 (affirming a search warrant for suspected child pornography based on two-year-old information). We have never addressed a staleness claim in a computer-based child pornography case, but other courts have upheld warrants against staleness allegations when the information was older than here. *See, e.g.*, *United States v. Self*, 492 F. App'x 762, 764 (9th Cir. 2012) (14 months not stale); *United States v. Allen*, 625 F.3d 830, 842–43 (5th Cir. 2010); *Lemon*, 590 F.3d at 613–15 (18-month-old information not stale); *Frechette*, 583 F.3d at 378–79, 381 (16 months not stale); *United States v. Morales-Aldahondo*, 524 F.3d 115, 119 (1st Cir. 2008) (3 years not stale).

Koch's staleness argument relies heavily on three cases, none binding on this court and all distinguishable. *United States v. Rugh* addressed nontechnological images (traditional letters, not emails), and not only did the court not resolve the staleness issue and admit the evidence under the good-faith exception, 968 F.2d 750, 752–53 (8th Cir. 1992), the Eighth Circuit later downplayed *Rugh*'s significance, *Lemon*, 590 F.3d at 615. In *United States v. Prideaux-Wentz*, the Seventh Circuit court considered a warrant

arguably based on four-year-old information, and it decided that the information was stale largely because the government never defined when the disputed images were uploaded even though it could have easily done so. 543 F.3d 954, 958–59 (7th Cir. 2008). The parties here do not dispute when Koch transmitted child pornography. And a federal district court held in *United States v. Greathouse* that a search warrant was stale because it rested on thirteen-month-old information, exceeding that court's bright-line (twelve-month) per se staleness limit. 297 F.Supp.2d 1264, 1273 (D. Or. 2003). Minnesota courts do not apply a bright-line staleness limit. *Jannetta*, 355 N.W.2d at 193.

Because child-pornography possession is an ongoing crime, we are satisfied that the district court did not act on unconstitutionally stale information when it issued the warrant in September 2010 after learning that, in June 2009, Koch had digitally transmitted illegal images by computer. We affirm the district court's decision to deny Koch's motion to suppress.

II

We reject Koch's next argument, which is that the district court erred by denying his motion to dismiss the charges. He overstates the district court's holding as concluding that a computer owner always possesses images stored in the computer's cache. But this is not the issue preserved for appeal. Koch preserved the issue for appeal under rule 26.01, subdivision 4, of the Minnesota Rules of Criminal Procedure, initially submitting the issue as "whether . . . evidence found in the cache constitutes possession." The state disputed this characterization, insisting that it "[did] not agree, nor ha[d] it ever agreed, that all of the evidence in this case was found in the cache." The district court treated

Koch's motion to dismiss as one challenging probable cause. The parties eventually agreed that the preserved issue was "the ruling on the motion to dismiss on the grounds that [Koch] did not possess the 12 images charged in the complaint." We review whether probable cause supported the charges, not the purely legal question of whether a defendant necessarily possesses a file stored only his computer's cache.

We review the district court's probable-cause fact findings for clear error, but we review de novo the application of the legal standard to those facts. *State v. Lopez*, 778 N.W.2d 700, 703 (Minn. 2010). The district court should deny a motion to dismiss for lack of probable cause if there are facts on the record that present a question for a jury. *Id.* at 703–04. Koch argues persuasively that viewing an image that appears on a computer screen (possibly without the intent of the user) and intentionally possessing an image are not necessarily the same. He cites cases from other jurisdictions where courts concluded that the mere presence of child pornography in the cache of a computer, without some evidence that the defendant knew about the image being stored or knew how to access the cache, was insufficient to prove that he possessed the file. *See, e.g.*, *United States v. Kuchinski*, 469 F.3d 853, 862–63 (9th Cir. 2006) (holding it improper to enhance sentence based on images of child pornography found in cache when record contains no evidence defendant knew of or had access to files in cache); *United States v. Stulock*, 308 F.3d 922, 925 (8th Cir. 2002) (affirming district court's decision to acquit on charges of possession of images stored in cache without evidence of defendant purposely saving or downloading images); *People v. Kent*, 970 N.E.2d 833, 841 (N.Y. 2012) (insufficient evidence of guilt where no evidence suggested defendant knew of images stored in

cache); *State v. Barger*, 247 P.3d 309, 311 (Or. 2011) (same); *Worden v. State*, 213 P.3d 144, 147–48 (Alaska Ct. App. 2009) (same); *Barton v. State*, 648 S.E.2d 660, 663 (Ga. Ct. App. 2007) (same). Minnesota currently criminalizes only *possessing* images of child pornography, and the statute does not apparently criminalize *viewing* an image that appears on a computer screen. *See* Minn. Stat. § 617.247, subd. 4(a) (2010) ("A person who possesses a pornographic work or a computer disk or computer . . . containing a pornographic work, knowing or with reason to know its content and character, is guilty of a felony."). If we faced the limited legal question of whether the presence of an image in a computer's cache is sufficient to prove possession, Koch's arguments might prevail.

But we need not decide that question to resolve this appeal. The state points to evidence suggesting that Koch *knew* the images may have been stored on his computer, and this is sufficient to overcome a motion to dismiss for lack of probable cause. Koch acknowledged he had traded child pornography with others. A search of his computer revealed that he had also emailed these images to himself, a fact that suggests he may have been attempting to store copies of images he viewed. Most significant, he told police that he would have disposed of his computers altogether had he known they were on the way. That he would have disposed of his computers but not merely attempted to delete files strongly suggests that he knew that offending images were permanently stored on his computers. Koch might have convinced a fact finder that it should not draw this incriminating inference. But a defendant who stipulates to the evidence to preserve pretrial issues, as Koch did, waives any theoretical challenge to the sufficiency of evidence. *See State v. Busse*, 644 N.W.2d 79, 89 (Minn. 2002) (holding that appellant

waived issue not raised before district court). So we resolve only whether the evidence supports probable cause, not conviction, and we have no difficulty holding that it does.

III

Koch argues that the district court abused its discretion by imposing an executed 60-month sentence. We review the district court's sentencing decisions, including whether to depart from the sentencing guidelines, for abuse of discretion. *State v. Pegel*, 795 N.W.2d 251, 253 (Minn. App. 2011). Sentences within the guidelines range are presumptively appropriate. *State v. Jackson*, 749 N.W.2d 353, 359 n.2 (Minn. 2008). We will modify a presumptive guidelines sentence only under compelling circumstances. *State v. Delk*, 781 N.W.2d 426, 428 (Minn. App. 2010), *review denied* (Minn. July 20, 2010).

The district court may weigh the defendant's individual characteristics and the best interests of the defendant and of society when considering a motion for a dispositional departure. *State v. Abrahamson*, 758 N.W.2d 332, 337 (Minn. App. 2008), *review denied* (Minn. Mar. 31, 2009). The caselaw has enumerated relevant factors, such as "the defendant's age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of friends . . . or family." *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). But the district court need not explain its decision not to depart. *State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985).

We are not persuaded by Koch's primary argument, which is that the district court's sentence improperly punishes him for choosing not to plead guilty. The district court observed that Koch minimized his role in obtaining child pornography. And it

expressly considered other factors, including Koch's lack of a criminal history and the apparent support of his family and friends. But the district court inferred that Koch had been involved with child pornography for an extended period and that he has personality traits suggesting treatment alone would not be a success. We are satisfied that imposing the presumptively valid sentence did not punish Koch for choosing not to plead guilty.

The district court was also fully aware of Koch's clean criminal history and the sentencing trends and statistics that Koch presented. It apparently gave little weight to the sentencing statistics, but this is the prerogative of a court charged with weighing numerous factors. We see nothing that suggests that the district court acted beyond its discretion when it denied Koch's motion for departure and sentenced him within the presumptive sentencing range.

Affirmed.