COURT OF APPEALS
DECISION
DATED AND FILED

May 4, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1506-CR **Cir. Ct. No. 00CF004420**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CEDRIC HOLZE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER and JOHN FRANKE, Judges. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Cedric A. Holze appeals from a judgment entered after a jury convicted him of one count of possession of child pornography, in

violation of WIS. STAT. § 948.12 (1999-2000).[1] He also appeals from an order denying his motion for postconviction relief. Holze contends that: (1) § 948.12 is unconstitutional on its face and as applied in his case; (2) there was insufficient evidence for the jury to conclude that he possessed a pictorial reproduction of an actual child; (3) the scope of the version of § 948.12 in effect at the time of his offense did not specifically include possession of a computer disk with a stored image of child pornography as a prohibited item; and (4) trial counsel was ineffective for failing to bring a motion challenging the search warrant. Because § 948.12 is constitutional, his insufficient evidence argument lacks merit, possession of a computer disk with a stored image of child pornography was prohibited at the time of his offense, and he has failed to establish that his trial counsel was ineffective, we affirm.

I. BACKGROUND.

¶2 In February 2000, police executed a search warrant at Holze's residence. They seized his computer and hundreds of floppy disks. The disk found in the computer contained three stored images, one of which was an image of a child engaged in sexually explicit conduct. Holze was subsequently charged with one count of possession of child pornography.

¶3 Before trial, Holze filed a motion challenging the constitutionality of the statute, which was denied. The case proceeded to trial. At the trial, the testimony of a police officer and a detective established that the relevant image was found on a disk that was in the computer, the image had been copied onto the

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

disk from a website the day before the search, and the defendant admitted that he was the principal user of the computer and that he was using the computer when the police arrived. A letter-sized copy of the image was printed out by the detective and entered into evidence.

¶4 Holze did not deny copying the image onto the disk, but testified that he must have saved it while he was researching children's exposure to nudity on the internet. He testified that he took on this research as a project that he thought would fulfill the continuing education requirements for maintaining his (and his wife's) license as a day-care provider. The jury found him guilty. He filed a postconviction motion, which was denied. He now appeals.

II. ANALYSIS.

A. WISCONSIN STAT. § 948.12 is constitutional.

¶5 Holze appears to contend that WIS. STAT. § 948.12 is both overbroad and vague. Although it is a bit unclear, it seems the general thrust of his argument is that the statute, as written, is a "strict liability" offense insofar as it does not allow possession of the materials for scientific, cultural, or prosecutorial purposes:

> Sec. 948.12, Stats., as written, requires a strict liability prosecution with no allowances for conduct in possessing said materials which may be for a scientific, cultural or legal purpose. Holze further contends that Sec. 948.12, Stats., as written at the time in question here, did not even allow possession for legal purposes in a prosecution such as the case at bar. In fact, the State had no statutory basis to create/fabricate or use Exhibit 6 against Holze at trial, leading to an equal protection clause violation, in violation of the Fourteenth Amendment. Counsel has found no cases or exceptions to Sec. 948.12, Stats., for the relevant period of time, which would allow a prosecutor to possess said material or allow the prosecutor to turn over to the defense for discovery purposes the material which is the subject matter of this prosecution.

Holze also appears to argue that ***Ashcroft v. Free Speech Coalition***, 535 U.S. 234 (2002), supports his conclusion that § 948.12 is unconstitutional: "Holze contends that ***Ashcroft*** has its impact on the correlative Wisconsin Statute under which Holze was prosecuted and convicted[,]" and "under ***Ashcroft***, sec. 948.12, Stats., is unconstitutional, both on its face and as applied, given the particular facts and circumstances of the present case on grounds of overbreadth, vagueness, and ambiguity." However, Holze never really tells us why this is so. Without more, we are unable to properly discern and address his ***Ashcroft*** argument.

¶6 Regardless, ***Ashcroft*** dealt with the portions of a federal statute that prohibited "virtual" child pornography and images of sexually explicit conduct that convey the impression of child pornography; here, we are concerned with a statute prohibiting pornography produced with an actual child. *Compare* ***Ashcroft***, 535 U.S. at 241-42 ("Section 2256(8)(B) prohibits 'any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture,' that 'is, *or appears to be*, of a minor engaging in sexually explicit conduct.'… Section 2256(8)(D) defines child pornography to include any sexually explicit image that was 'advertised, promoted, presented, described, or distributed in such a manner *that conveys the impression*' it depicts 'a minor engaging in sexually explicit conduct.'") (citation omitted) (emphasis added), *with* WIS. STAT. § 948.12 (prohibiting the possession of "any undeveloped film, photographic negative, photograph, motion picture, videotape or other pictorial reproduction or audio recording of a child engaged in sexually explicit conduct"); *see also* WIS. STAT. § 948.01(1) ("'Child' means a person who has not attained the age of 18[.]").

¶7 The constitutionality of a statute presents a question of law that we review independently. ***State v. Schaefer***, 2003 WI App 164, ¶30, 266 Wis. 2d

719, 668 N.W.2d 760. Generally, statutes "enjoy a presumption of constitutionality that the challenger must refute[, but w]hen a statute infringes on First Amendment rights, … the State bears the burden of proving the statute constitutional beyond a reasonable doubt." ***State v. Trochinski***, 2002 WI 56, ¶33, 253 Wis. 2d 38, 644 N.W.2d 891 (citation omitted). This burden is applicable here because "[w]hile possession of child pornography does not fall under the protections of the First Amendment, nonobscene sexually explicit materials depicting persons over the age of eighteen are protected speech[, and thus o]ur examination of WIS. STAT. § 948.12 involves the boundary between protected and unprotected speech[.]" ***Schaefer***, 266 Wis. 2d 719, ¶30 n.4 (citation omitted). "As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear. The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children." ***Ashcroft***, 535 U.S. at 245-46.

¶8 "The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process." ***Id.*** at 255. A person whose conduct is clearly unprotected is still allowed to attack the facial validity of a statute because of the chilling effect an overly broad statute may have on protected speech. ***New York v. Ferber***, 458 U.S. 747, 768-69 (1982). "Because of the wide-reaching effects of striking down a statute on its face at the request of one whose own conduct may be punished despite the First Amendment, [the Supreme Court has] recognized that the overbreadth doctrine is 'strong medicine' and [has] employed it with hesitation, and then 'only as a last resort.'" ***Id.*** at 769 (citation omitted). As such, the

Supreme Court insists that "the overbreadth involved be 'substantial' before the statute involved will be invalidated on its face." ***Id.***

¶9 Holze's overbreadth argument fails for a number of reasons. First, as noted above, WIS. STAT. § 948.12 concerns child pornography involving *actual* children—there is no risk here of prohibiting the allegedly protected speech of virtual child pornography. Second, if Holze is attempting to claim that the statute is overbroad because it creates a "strict liability" offense, the State correctly points out that ***Schaefer*** recently held that § 948.12 has a scienter requirement and thus is *not* a strict liability offense, and passes constitutional muster in that regard. 266 Wis. 2d 719, ¶¶33-41 (discussion of relevant constitutional case law regarding the scienter requirement in child pornography statutes).[2] Third, in regard to Holze's claim that the statute is overbroad because it does not allow for possession of the materials for scientific or cultural purposes, the State also correctly points out that this argument, made in regard to a New York statute, was expressly rejected in ***Ferber***, the seminal child pornography case. In concluding that the child pornography statute was not overbroad, the Supreme Court explained:

> While the reach of the statute is directed at the hard core of child pornography, the Court of Appeals was understandably concerned that some protected expression, ranging from medical textbooks to pictorials in the National Geographic would fall prey to the statute. How often, if ever, it may be necessary to employ children to engage in conduct clearly within the reach of [the statute] in order to produce educational, medicinal, or artistic works cannot be known with certainty. Yet we seriously doubt, and it has not been suggested, that these arguably impermissible

[2] Although ***State v. Schaefer***, 2003 WI App 164, 266 Wis. 2d 719, 668 N.W.2d 760, evaluated the 2001-2002 version of WIS. STAT. § 948.12, the relevant portion of the statute—"(c) The person knows or reasonably should know that the child engaged in sexually explicit conduct has not attained the age of 18 years."—is identical to the 1999-2000 version at issue here.

> applications of the statute amount to more than a tiny fraction of the materials within the statute's reach.

458 U.S. at 773. Likewise, there is no substantial overbreadth here; § 948.12 is similarly "a state statute whose legitimate reach dwarfs its arguably impermissible applications." *See* ***id.***

¶10 Finally, Holze's apparent argument that WIS. STAT. § 948.12 is overbroad because it prohibits possession of the materials for prosecutorial purposes lacks any merit or legal foundation. Holze points to the definitions of "exhibit" and "recording" in chapter 948, and argues that "[t]hese newly created statutes now provide a way for the State to make an exhibit of materials based upon statutory law[,]" which he apparently insists was not the case during his trial. His reasoning is unclear, and we cannot surmise any legitimate explanation of or basis for his argument. Furthermore, this argument incredulously seems to suggest that every statute prohibiting the possession of an item or substance would require some sort of provision allowing for its possession by law enforcement authorities or the courts in the course of prosecution; that claim is specious.

¶11 WISCONSIN STAT. § 948.12 is not overly broad. The State has satisfied its burden. Child pornography is not protected under the First Amendment, and § 948.12 constitutionally prohibits its possession.

B. Holze's insufficient evidence argument lacks merit.

¶12 Holze argues that the State failed to meet its burden of proof in that it did not provide "competent and relevant testimony concerning the actual age of the child," or expert testimony regarding "the lack of digital alteration or modification of the image." Essentially, Holze contends that the State should be required to prove that the child was indeed under the age of eighteen and that the

child was an actual person, and not merely a modified image. Holze does not, however, cite any authority in support of the contention that the image alone is insufficient.[3] In fact, as will be discussed below, a number of relevant cases come to the opposite conclusion.

¶13 As the supreme court reiterated in ***State v. Poellinger***, 153 Wis. 2d 493, 503-04, 451 N.W.2d 752 (1990) (citations omitted) (alterations and omissions in original):

> The burden of proof is upon the state to prove every essential element of the crime charged beyond reasonable doubt. The test is not whether this court or any of the members thereof are convinced [of the defendant's guilt] beyond reasonable doubt, but whether this court can conclude the trier of facts could, acting reasonably, be so convinced by evidence it had a right to believe and accept as true.... The credibility of the witnesses and the weight of the evidence is for the trier of fact. In reviewing the evidence to challenge a finding of fact, we view the evidence in the light most favorable to the finding. Reasonable inferences drawn from the evidence can support a finding of fact and, if more than one reasonable inference can be drawn from the evidence, the inference which supports the finding is the one that must be adopted.

¶14 An appellate court gives deference to a trial court's findings because of "the superior opportunity of the trial court to observe the demeanor of witnesses and to gauge the persuasiveness of their testimony." ***Kleinstick v. Daleiden***, 71 Wis. 2d 432, 442, 238 N.W.2d 714 (1976). It is the jury's job to resolve any conflicts or inconsistencies in the evidence and to judge the credibility of the evidence. ***State v. Pankow***, 144 Wis. 2d 23, 30-31, 422 N.W.2d 913 (Ct. App.

[3] Holze cites ***State v. Schroeder***, 2000 WI App 128, 237 Wis. 2d 575, 613 N.W.2d 911, as a case in which the State called an expert witness to testify regarding the ages of the children portrayed in the images. While that did occur, the question of whether such testimony was necessary was never an issue nor addressed as such.

1988) ("The function of the jury is to decide which evidence is credible and which is not, and how conflicts in the evidence are to be resolved."). Moreover, "[o]nly when the evidence is inherently or patently incredible will [the court] substitute [its] judgment for that of the factfinder." ***State v. Saunders***, 196 Wis. 2d 45, 54, 538 N.W.2d 546 (Ct. App. 1995) (citation omitted).

¶15 Holze's only argument in regard to the sufficiency of the evidence appears to be that the State failed to meet its burden because it did not present relevant and competent testimony regarding the age of the child in the image and because it did not present expert testimony regarding whether the image was an actual child or a digitally altered image. Interestingly, he does not seem to be arguing that the child in the image appeared to be close to the age of eighteen or that there was a basis for concluding that the image was not that of a real child. Instead, he appears to be advocating a *per se* rule requiring expert testimony. In denying Holze's motion for postconviction relief, the trial court concluded that additional evidence regarding the child's age and whether the image was an actual child was neither required nor necessary. The court determined that, in regard to the age of the child, "jurors are able to make such a judgment about [the image in this case] without expert assistance." The court also found that "the question of whether this picture might depict something other than an actual child remains within the realm of juror competence. While jurors are free to decide that the 'phony child' possibility does raise a reasonable doubt, such doubt is not so tangible or apparent as to require expert evidence to remove it." We agree.

¶16 In concluding that whether additional evidence regarding the age of the child is necessary must be determined on a case-by-case basis, the Fifth Circuit Court of Appeals indicated:

> A case by case analysis will encounter some images in which the models are prepubescent children who are so obviously less than [eighteen] years old that expert testimony is not necessary or helpful to the fact finder. On the other hand, some cases will be based on images of models of sufficient maturity that there is no need for expert testimony.

United States v. Katz, 178 F.3d 368, 373 (5th Cir. 1999); *see also* ***United States v. Riccardi***, 258 F. Supp. 2d 1212, 1218-19 (D. Kan. 2003) (citing ***Katz***, 178 F.3d at 373); ***State v. May***, 829 A.2d 1106, 1119-20 (N.J. Super. Ct. App. Div. 2003) (citing ***Katz***, 178 F.3d at 373); ***Commonwealth v. Robertson-Dewar***, 829 A.2d 1207, 1212-13 (Pa. Super. Ct. 2003) (citing ***Katz***, 178 F.3d at 373). We similarly conclude that the image alone may be sufficient.

¶17 The argument that expert testimony is necessary to prove that the image is that of an actual child has also been rejected by other courts. Addressing the federal child pornography statute, the Tenth Circuit Court of Appeals concluded that ***Ashcroft***:

> did not establish a broad, categorical requirement that, in every case on the subject, absent direct evidence of identity, an expert must testify that the unlawful image is of a real child. Juries are still capable of distinguishing between real and virtual images; and admissibility remains within the province of the sound discretion of the trial judge.

United States v. Kimler, 335 F.3d 1132, 1142 (10th Cir. 2003), *cert. denied*, 124 S. Ct. 945 (2003). Other cases have come to the same conclusion. *See* ***United States v. Slanina***, 359 F.3d 356, 357 (5th Cir. 2004) (per curiam) ("the Government was not required to present any additional evidence or expert testimony to meet its burden of proof to show that the images downloaded by Slanina depicted real children, and not virtual children."); ***United States v. Deaton***, 328 F.3d 454, 455 (8th Cir. 2003) (per curiam) ("we have previously

upheld a jury's conclusion that real children were depicted even where the images themselves were the only evidence the government presented on the subject") (citing ***United States v. Vig***, 167 F.3d 443, 450 (8th Cir. 1999) (regarding defendant's insufficient evidence argument: "Vig produced no expert evidence at trial to show that the images were computer generated or other than what they appeared to be. In essence, Vig's claim that the images may not have been of real children is purely speculative and we do not think that the government, as part of its affirmative case, was required to negate what is merely unsupported speculation.")). *But see* ***United States v. Hilton***, No. 03-1741, 2004 WL 691247, at *5 (1st Cir. Apr. 2, 2004).[4] Here, the trial court concluded that the determination of whether the image in this case was an actual child was properly within the province of the jury. We agree.

¶18 The trial court concluded that there was sufficient evidence to permit the jury to convict Holze and we find no reason to upset that determination. Furthermore, there is no apparent basis in the record to support an argument that

[4] To the contrary, the First Circuit recently held that "[a]fter [***Ashcroft v.***] ***Free Speech Coalition***, [535 U.S. 234 (200),] the government must prove that an image depicts actual children to sustain a[n 18 U.S.C] § 2252A(a)(5)(B) conviction." ***United States v. Hilton***, No. 03-1741, 2004 WL 691247, at *4 (1st Cir. Apr. 2, 2004). However, ***Hilton*** cites no authority, other than ***Ashcroft***, a case not directly concerning § 2252A(a)(5)(B), for this conclusion. Instead, it explains that Congress amended the Child Pornography Prevention Act in 1996 "as a response to technological developments that enabled the manufacture of images that look like child pornography and yet are produced without children[,]" and concludes "[b]ecause the Supreme Court has established that the First Amendment does not countenance prohibitions on such speech, we hold that conviction under § 2252A(a)(5)(b) requires the [federal] government to present evidence proving that the child in the image is not confabulated, but real." ***Hilton***, 2004 WL 691247, at *5. The First Circuit acknowledged that several federal circuits have held otherwise, but still held that "the government must introduce relevant evidence in addition to the images to prove the children are real." ***Id.***

the image was not a child or that there was ever a serious question regarding the child's age.[5] As such, Holze's argument lacks merit.

C. Possession of a computer disk with a stored image of child pornography was prohibited at the time of his offense.

¶19 Although Holze recognizes that ***State v. Whistleman***, 2001 WI App 189, 247 Wis. 2d 337, 633 N.W.2d 249, held that "computer disks that store images of child pornography are included within the meaning of the term 'or other pictorial reproduction[,]'" ***id.***, ¶1, he insists that the underlying logic "lacks foundation in fact or law." Specifically, he argues that in using the word "reproduction," the language of the statute indicates that "a person must possess a pictorial that has already been made and is viewable[, and a] digital file clearly does not fit within the parameters of this definition." Next, he argues that floppy disks do not contain images, but "merely store digital data," and differentiates floppy disks from videotapes insofar as the legislature specifically listed videotapes in the statute and did not list floppy disks. As such, he contends that the version of WIS. STAT. § 948.12 in effect at the time of the alleged offense "did not prohibit mere possession of a computer floppy disk, regardless of what digital data was stored on the floppy disk. Sec[tion] 948.12 … would apply only in the event that someone would take the floppy disk and create and possess a 'pictorial reproduction' which is viewable in the material possessed." Holze is mistaken.

¶20 Although Holze may disagree with the conclusions of this court in ***Whistleman***, it is well settled that "only the supreme court, the highest court in the state, has the power to overrule, modify or withdraw language from a published

[5] Indeed, it does not even appear that either was actually challenged during the trial.

opinion of the court of appeals." ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). Furthermore, this conclusion—that computer disks that store images are included within the meaning of the term "or other pictorial reproduction"—has been recognized since ***Whistleman***. In ***State v. Multaler***, 2002 WI 35, 252 Wis. 2d 54, 643 N.W.2d 437, the defendant was convicted of twenty-eight counts of possession of child pornography resulting from the seizure of two computer disks containing the pornographic images. The supreme court, in addressing a multiplicity claim regarding the legislature's intended unit of prosecution, concluded that a basic definition of "reproduction" "encompasses the images stored on [the defendant's] disks which themselves are copies of something that was once printed, scanned, or photographed." ***Id.***, ¶62.[6] In a footnote, the court goes on to explain:

> Although neither party cites the case, we note that in [***Whistleman***], the court of appeals determined that computer disks that store images of child pornography are included within the meaning of the phrase "or other pictorial reproduction" in Wis. Stat. § 948.12. The court in ***Whistleman***, however, was not confronting a multiplicity challenge. Rather, it was determining whether the possession of child pornography on a computer disk was even covered by the language of the statute. The ***Whistleman*** court's analysis does not preclude a determination that an image on a disk is itself a "pictorial reproduction."

Multaler, 252 Wis. 2d 54, ¶62 n.8. Accordingly, the supreme court recognized, and arguably expanded, ***Whistleman***'s conclusion. Thus, we conclude that

[6] In ***State v. Multaler***, 2002 WI 35, 252 Wis. 2d 54, 643 N.W.2d 437, there were multiple images of child pornography on a computer disk. The defendant argued, in regard to a multiplicity claim, that the legislature intended the unit of prosecution to be one charge for each disk, not for each image on the disk. The court disagreed. Further, it is important to note that the text of the version of WIS. STAT. § 948.12 at issue in ***Multaler*** was identical to the version at issue in this case.

possession of a computer disk with a stored image of child pornography was prohibited at the time of his offense.

D. Trial counsel was not ineffective.

¶21 Holze argues that his trial counsel was ineffective for failing to bring a motion challenging the search warrant that resulted in the seizure of his computer and the floppy disks. He contends that the search warrant application was insufficient in that it "merely parrots the statutory definition … without providing any descriptive support and without an independent review of the images in question." He bases his argument on a First Circuit Court of Appeals case, decided two months after his trial, concluding that a warrant application was insufficient for failing to include copies or descriptions of the allegedly pornographic images with the supporting affidavit. *See* ***United States v. Brunette***, 256 F.3d 14 (1st Cir. 2001). What he fails to mention, however, is that ***Brunette*** actually affirmed the denial of the motion to suppress under the good faith exception to the exclusionary rule.[7] ***Id.*** at 20. Nonetheless, he goes on to argue that in making a determination of probable cause, the magistrate "is to make a practical, common sense decision whether, given all of the circumstances set forth in the affidavit for search warrant …, including the 'veracity' and 'basis for knowledge' of persons supplying hearsay information, there is a fair probability

[7] Interestingly, the trial court appears to have used the same reasoning in addressing this claim in Holze's postconviction motion:

> On the issue of prejudice, defendant makes no effort to demonstrate that the motion would have been successful. ***Brunette*** is of no help in this regard, because the First Circuit proceeded to affirm the denial of the motion to suppress under the good faith exception to the exclusionary rule, and it did so in terms that apply with equal force to the Holze affidavit. Defendant has, at best, identified a motion that ought to have been brought and ought to have been denied.

that contraband or evidence of a crime will be found in a particular place[,]" and, as such, trial counsel should have "looked at the affidavit for [the] search warrant and recognized the fact that the search warrant was based upon broad federal language and that the affidavit … only contained the officer's legal opinion that parroted the federal statutory definition." He contends that there is "nothing in the affidavit for search warrant that shows the 'basis of knowledge[,]'" such as a specific image, and thus trial counsel should have recognized that a potential problem existed and brought a motion to suppress.

¶22 In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the defendant was prejudiced as a result of this deficient conduct. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); *see also* ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). To prove deficient performance, the defendant must identify specific acts or omissions of counsel that fall "outside the wide range of professionally competent assistance." *See* ***Strickland***, 466 U.S. at 690. To show prejudice, the defendant must demonstrate that the errors were so serious that the result of the proceeding was unreliable. ***Id.*** at 687.

¶23 Both prongs of the ***Strickland*** test involve mixed questions of law and fact. ***Pitsch***, 124 Wis. 2d at 633-34. We will not disturb the trial court's findings of fact unless they are clearly erroneous. ***Id.*** at 634. However, "[t]he questions of whether counsel's behavior was deficient and whether it was prejudicial to the defendant are questions of law, and we do not give deference to the decision of the [trial] court." ***Id.*** If the defendant fails on either prong—deficient performance or prejudice—the ineffective assistance of counsel claim fails. ***Strickland***, 466 U.S. at 697. We "strongly presume[]" counsel has rendered adequate assistance. ***Id.*** at 690. Furthermore, trial counsel's failure to bring a

motion that would have been denied provides no basis for an ineffective assistance of counsel claim. *See* ***State v. Golden***, 185 Wis. 2d 763, 771, 519 N.W.2d 659 (Ct. App. 1994).

¶24 Appellate courts "accord great deference to the warrant-issuing judge's determination of probable cause, and that determination will stand unless the defendant establishes that the facts are clearly insufficient to support a finding of probable cause." ***Multaler***, 252 Wis. 2d 54, ¶7. "The duty of the court issuing the warrant is to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before it, there is a fair probability that contraband or evidence of a crime will be found in a particular place." ***Id.***, ¶8. "Our review of the magistrate's decision to issue the search warrant is independent from that of the circuit court." ***State v. Steadman***, 152 Wis. 2d 293, 304, 448 N.W.2d 267 (Ct. App. 1989).

¶25 Holze points to no Wisconsin law, or other settled law, that required search warrant affidavits to include copies or detailed descriptions of the alleged child pornography in order to establish probable cause at the time of his trial. He argues that, even absent any law requiring as much, trial counsel should have recognized that, in light of the broad statutory language used in the affidavit and the alleged absence of a "basis of knowledge," there was a potential probable cause problem. We disagree.

¶26 A review of the affidavit indicates that a significant amount of information was provided, including, but not limited to: information regarding the results of a United States Customs investigation of a child pornography website; a determination that child pornography had been downloaded on a computer located at Holze's address; detailed information regarding the method by which Customs

agents determined that Holze's computer downloaded sixty-two images from the relevant website; the fact that Customs agents were able to collected the images downloaded by Holze's computer on a computer disk; a statement indicating that the affiant had reviewed the images and determined that eleven of the images "clearly depict a child engaged in sexually explicit conduct, a violation of Wis. Stat. sec. 948.12"; definitions of relevant terms; and a detailed explanation of the affiant's training and experience in regard to child pornography, pedophiles, and computers.

¶27 Given all of the circumstances, the magistrate could easily conclude that there was a fair probability that evidence of the crime would be found in Holze's home. Holze points to no case law suggesting that this amount of information had been held to be insufficient in Wisconsin at the time of trial. Furthermore, he does not point to any other *settled* law at the time of his trial, federal or otherwise, requiring as much.[8] Thus, it hardly seems reasonable to conclude that his trial attorney was deficient for failing to challenge the finding of probable cause. Moreover, were we to assume *arguendo* that trial counsel should have challenged the search warrant on this basis, Holze fails to convince us that the motion to suppress would have been successful. As such, Holze's ineffective assistance of counsel claim also fails.[9]

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[8] In his reply brief, however, Holze contends: "It should also be noted that the District Court's decision in ***Brunette*** was in existence long prior to Holze's trial in 2001 and it flagged the issue of whether a magistrate judge may rely solely upon an affiant's assertion in a warrant affidavit that a defendant possessed materials which constituted prohibited child pornography without presenting such to the issuing magistrate." We are unpersuaded.

[9] In one sentence at the end of his brief, Holze "requests that this matter be remanded back to the trial court, in order that an evidentiary hearing might be held, pursuant to ***State v. Machner***, 92 Wis. 2d 797, 285 N.W. 2d 905 (1979)." Because there is no basis for Holze's request, we decline to do so.

¶28 Accordingly, we affirm.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.