



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

April 3, 2014

To:

Hon. Brian A. Pfitzinger
Circuit Court Judge
210 W. Center St.
Juneau, WI 53039

Lynn M. Hron
Clerk of Circuit Court
Dodge Co. Justice Facility
210 West Center Street
Juneau, WI 53039

Philip J. Brehm
23 W. Milwaukee St., #200
Janesville, WI 53548

Nancy A. Noet
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Yolanda J. Tienstra
Asst. District Attorney
210 W. Center St.
Juneau, WI 53039-1086

You are hereby notified that the Court has entered the following opinion and order:

2013AP1377-CR State of Wisconsin v. Spencer L. Andrle (L.C. # 2011CF71)

Before Blanchard, P.J., Lundsten and Kloppenburg, JJ.

Spencer Andrle appeals a felony conviction for possession of child pornography. He also appeals an order denying his motion for postconviction relief. After reviewing the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).¹ We affirm.

Andrle raises two issues on appeal. First, Andrle argues that he should be allowed to withdraw his no contest plea because the circuit court neither held a preliminary hearing nor

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

conducted a colloquy to determine the validity of Andrle's written waiver of his right to a preliminary hearing, and also never formally bound Andrle over for trial before the State filed the information and the court accepted Andrle's plea. Second, Andrle challenges a suppression ruling made prior to the entry of his plea. We address each issue in turn.

Andrle bases his challenge to the validity of his plea on WIS. STAT. § 970.03(3), which states that a plea “shall not be accepted ... until the defendant has been bound over following preliminary examination or waiver thereof.” However, Andrle cites no authority for the proposition that an alleged defect in a preliminary hearing waiver or the lack of an explicit bindover determination prior to the filing of an information would constitute a manifest injustice warranting plea withdrawal. Moreover, Andrle fails to address several authorities that would suggest otherwise. For instance, WIS. STAT. § 971.02 provides that “[t]he omission of the preliminary examination shall not invalidate any information unless the defendant moves to dismiss prior to the entry of a plea.” Similarly, *Wold v. State*, 57 Wis. 2d 344, 204 N.W.2d 482 (1973), holds that a “[f]ailure to advance the contention of lack of probable cause constitutes a waiver of the objection.” *Id.* at 346. We further note that the purpose of a preliminary hearing—that is, to establish that there is probable cause to support the charge—is substantially satisfied when a circuit court determines that there is a factual basis for a plea. We therefore conclude that a challenge to the validity of a preliminary hearing waiver does not provide grounds for plea withdrawal, and that Andrle is barred by the guilty plea waiver rule from directly raising the issue of whether the circuit court erred in failing to conduct a waiver colloquy or to make an explicit bindover determination after Andrle filed a written waiver of his preliminary hearing. See generally *State v. Kelty*, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886, and WIS. STAT. § 971.31(10) (a plea operates to waive all nonjurisdictional defects and defenses, aside from any suppression ruling).

Andrle next contends that the information contained in the affidavit for issuance of a search warrant used to collect evidence of child pornography on his computer was insufficient to establish probable cause because that information was stale. Specifically, Andrle complains about a two-month gap between the time when the special agent investigating the case linked the IP address of a computer containing sexually explicit images of children and encryption software designed to facilitate peer-to-peer network file sharing to the physical address where the computer was located and the time when the search warrant was obtained and executed at that address.

Because probable cause may dissipate over time, the facts presented in a search warrant affidavit must be sufficiently “related to the time of the issue of the warrant as to justify a finding of probable cause at that time.” See *State v. Ehnert*, 160 Wis. 2d 464, 469, 466 N.W.2d 237 (Ct. App. 1991) (citation omitted). Timeliness is not determined merely by the passage of time, however. Rather, timeliness depends upon the totality of the circumstances, including the nature of the criminal activity being investigated and what is being sought. *Id.* at 469-70.

Here, the nature of the criminal activity being investigated was the possession and distribution of child pornography. As we have observed, evidence of the possession of child pornography on a computer is likely to remain for a considerable period of time, not only because of the proclivity of pedophiles to retain their collected images but also because forensic computer experts can often recover images even after those images have been deleted. See *State v. Gralinski*, 2007 WI App 233, ¶¶26, 31-33, 306 Wis. 2d 101, 743 N.W.2d 448 (holding information that a suspect had used a credit card to obtain membership to a website containing child pornography was not stale over two years later).

The affidavit in this case established a stronger probability of finding pornographic images of children in the target location than did the affidavit in *Gralinski* for several reasons. First, law enforcement officers here had already identified specific files known to contain child pornography on the computer at issue. The officers did not need to make an inference that the defendant likely possessed child pornography merely based upon his access to child pornography. Second, the computer at issue here also contained software designed to share encrypted files. The fact that multiple files containing pornographic images of children were being offered for distribution to others increased the likelihood that the illegal activity was ongoing. And finally, the two-month delay here was substantially shorter than the more than two-year delay in *Gralinski*, and included time law enforcement spent investigating who lived in the identified residence. Given the deference accorded to a magistrate's determination of probable cause, we conclude that the circuit court properly refused to quash the search warrant.

IT IS ORDERED that the judgment of conviction and order denying postconviction relief are summarily affirmed under WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals