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**DISTRICT IV**

November 28, 2018

*To*:

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

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2018AP84-CR State v. Berne Patrick Moran (L.C. # 2014CF827)

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

**Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

Berne Patrick Moran appeals a judgment of conviction following Moran's guilty plea to repeated sexual assault of a child. Moran argues that the circuit court erred by denying Moran's motion to suppress evidence from Moran's cell phone that was obtained pursuant to a search warrant. Based upon our review of the briefs and record, we conclude at conference that this

case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).[1] We summarily affirm.

Moran was charged with repeated sexual assault of a child based on disclosures made by nine-year-old K.L.A. The State moved to admit evidence of pornography involving intrafamilial sexual contact that was obtained from Moran's cell phone during execution of a search warrant in connection with allegations of child sexual assault against Moran involving a different child in another county.[2] Moran moved to suppress the evidence obtained from his cell phone, arguing that the search warrant lacked probable cause. The circuit court granted the State's motion to admit the evidence and denied Moran's suppression motion. Moran then pled guilty to repeated sexual assault of a child.

Moran contends that the circuit court erred by denying Moran's motion to suppress the evidence obtained from his cell phone. He contends that the search warrant was not supported by probable cause to believe that evidence of a crime would be found on his phone. Moran asserts that the search warrant affidavit contained no allegations that Moran used his cell phone in connection with the alleged child sexual assault or that Moran possessed child pornography on his phone. He contends that the search warrant affidavit set forth only general information about the potential value of cell phone data in criminal investigations, which could have been used in practically any criminal case in hopes of obtaining evidence. The State responds that the specific allegations in the search warrant affidavit—that Moran had repeatedly sexually assaulted a child,

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] Moran was acquitted of the child sexual assault charges against him in that county following a jury trial.

that Moran viewed pornography regularly on his cell phone, and that cell phones can access the internet and store photographs and videos—gave rise to probable cause to believe that Moran's cell phone would contain child pornography. Moran replies that the inference the State draws is unreasonable. We conclude that the search warrant affidavit established probable cause to believe that a search of Moran's phone would uncover evidence of child pornography.

"A search warrant may issue only upon probable cause." ***State v. Jones***, 2002 WI App 196, ¶10, 257 Wis. 2d 319, 651 N.W.2d 305. Probable cause is established by facts sufficient "to excite an honest belief in a reasonable mind that the objects sought are linked with the commission of a crime, and that the objects sought will be found in the place to be searched." ***State v. Higginbotham***, 162 Wis. 2d 978, 989, 471 N.W.2d 24 (1991) (quoted source omitted). It "is not a technical, legalistic concept, but a flexible, common-sense measure of the plausibility of particular conclusions about human behavior." ***Id.*** at 989-90 (quoted source omitted). Whether a search warrant is supported by probable cause is a "totality-of-the-circumstances" test of "whether, given all the circumstances set forth in the affidavit[,] a fair probability exists that contraband or evidence of a crime will be found in a particular place." ***State v. Sloan***, 2007 WI App 146, ¶24, 303 Wis. 2d 438, 736 N.W.2d 189 (quoted source omitted). The warrant-issuing judge may also rely on "reasonable inferences from the facts asserted in the affidavit." ***Jones***, 257 Wis. 2d 319, ¶10. We "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." ***Id.***, ¶11. We conclude that, here, the facts contained in the search warrant affidavit and the reasonable inferences from those facts supported a finding of probable cause.

The search warrant affidavit was executed by a police detective who asserted the following. The detective knew through training and experience that cell phones often have internet access and photograph-taking capabilities, and that photographs and videos are often found in cell phone storage. The detective had reviewed a police report which stated that nine-year-old C.J.A. had recently reported that he had been sexually assaulted by Moran on multiple occasions. The detective met with Moran's wife, who reported that Moran had viewed pornographic material on his cell phone on a nightly basis until he was taken into custody, but that she had not personally viewed the material. We agree with the State that the recent allegations of child sexual assault against Moran supported the reasonable inference that at least some of the pornography that Moran viewed nightly on his cell phone was child pornography. The totality of the facts in the search warrant established a fair probability that child pornography would be found on Moran's cell phone.[3]

Moran argues that federal courts have held that allegations of child sexual assault, standing alone, do not provide probable cause to search for child pornography. *See* ***United States v. Doyle***, 650 F.3d 460, 471-73 (4th Cir. 2011) (search warrant affidavit alleging that the defendant sexually assaulted a child and showed the child pictures of nude children did not give rise to probable cause to search for child pornography; photographs of nude children did not necessarily meet the statutory definition of child pornography in Virginia); ***United States v. Falso***, 544 F.3d 110, 121-23 (2d Cir. 2008) (defendant's conviction for a child sex crime did not

[3] Because we conclude that the search warrant was supported by probable cause, we do not reach the parties' arguments about whether the court's order denying the motion to suppress was harmless or whether to remand for the circuit court to consider whether Moran's wife validly consented to the search of Moran's phone.

establish probable cause to believe defendant possessed child pornography); ***United States v. Hodson***, 543 F.3d 286, 292-93 (6th Cir. 2008) (probable cause to believe that defendant committed child molestation did not provide probable cause to believe that the defendant possessed child pornography). However, the search warrant in this case was not based solely on the allegations against Moran of child sexual assault. Rather, the search warrant was based on the child sexual assault allegations plus Moran's wife's report that Moran viewed pornography every night on his cell phone, and the detective's knowledge that cell phones can access the internet and store photographs and videos.

Additionally, none of the cases cited by Moran involve the same set of facts present here, and they therefore do not dictate the outcome. *See* ***State v. Gralinski***, 2007 WI App 233, ¶15, 306 Wis. 2d 101, 743 N.W.2d 448 ("Every probable cause determination must be made on a case-by-case basis, looking at the totality of the circumstances." (quoted source omitted)). Thus, we are not persuaded by Moran's contention that the allegation in ***Doyle*** that the defendant sexually assaulted a child and showed the child pictures of nude children is a stronger indication that the defendant possessed child pornography than the allegation here that Moran sexually assaulted a child and also viewed pornography on his phone every night. Each case is assessed on its own facts and, for the reasons explained above, the facts present here were sufficient to establish probable cause to believe that Moran possessed child pornography.

Moreover, other federal courts have recognized the logical inference that a person who sexually assaults children is likely to possess child pornography. *See* ***United Stated v. Colbert***, 605 F.3d 573, 578 (8th Cir. 2010) ("There is an intuitive relationship between acts such as child molestation or enticement and possession of child pornography."); ***United States v. Byrd***, 31 F.3d 1329, 1339 (5th Cir. 1994) ("[C]ommon sense would indicate that a person who is sexually

interested in children is likely to also be inclined … to order and receive child pornography."). Here, the fact that Moran was alleged to have sexually assaulted a child, and also that he was alleged to have viewed a non-specific type of pornography on his cell phone every night, supported a reasonable inference that some of the pornography accessed on his phone was child pornography. The facts in the search warrant affidavit, in their entirety, established a fair probability that Moran possessed child pornography on his phone.

Therefore,

IT IS ORDERED that the judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Sheila T. Reiff*
*Clerk of Court of Appeals*