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DISTRICT III

May 14, 2019

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

2018AP227-CR State of Wisconsin v. John A. Lagrew (L. C. No. 2016CF23)

Before Stark, P.J., Hruz and Seidl, 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).

John Lagrew appeals from a judgment of conviction for possession of child pornography. Lagrew argues the circuit court erroneously denied his motion to suppress evidence obtained by police after a cleaning person found images of child pornography in Lagrew's home. 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 (2017-18).¹

A cleaning service was contracted to clean Lagrew's house because it was determined to be unfit for habitation pursuant to a welfare check conducted prior to Lagrew's return from receiving medical care at a nursing home. Lagrew directed the cleaning service to make contact with his brother to gain entrance to the house. On the third or fourth day of cleaning, the cleaning personnel "stumbled across material that appeared to be child pornography."

The cleaning service notified law enforcement, and dispatch was given information concerning what appeared to be child pornography inside Lagrew's home. The responding officers met with representatives of the cleaning company outside the home, and were informed of the images they found inside Lagrew's home. One of the officers was led into the home and directed to a bedroom closet where the officer observed and collected folders of approximately 135 computer-printed images of children engaging in explicit sexual conduct. The cleaning personnel told the officer that many items inside the home had not yet been gone through, such as cabinets, bins, and zipped cases, and also that Lagrew's brother had retrieved a laptop computer and multiple locking boxes from inside the home. Police then obtained a search warrant that uncovered more illegal images in the home, including CDs containing videos of child pornography.

Lagrew was charged with ten counts of possession of child pornography. The circuit court denied his suppression motion, concluding that although law enforcement had improperly

¹ All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

entered the home without exigent circumstances prior to obtaining the search warrant, the officers would have inevitably discovered the child pornography because the officers had sufficient probable cause to obtain the warrant based solely on the information available to them before they entered Lagrew's house.

Lagrew subsequently pleaded to one count of possession of child pornography and the circuit court imposed the parties jointly recommended sentence consisting of three years' initial confinement and three years' extended supervision. Lagrew now challenges the denial of his suppression motion.²

Lagrew argues the only information the police officer had before he entered the house was that the cleaning contractor discovered images in the bedroom closet depicting "nude or naked children." According to Lagrew, this information omits the required element of child pornography that the images depict "sexually explicit conduct." At the outset, we note Lagrew provides no citation to legal authority holding that an affidavit in support of a search warrant must allege every element of possession of child pornography. In this regard, the probable cause standard for obtaining a warrant is lower than required to support a bindover for trial. *See State v. Higginbotham*, 162 Wis. 2d 978, 989, 471 N.W.2d 24 (1991).

Regardless, we conclude discovery of the pornographic images was inevitable given that police had probable cause to obtain a search warrant based solely on the information available to them before they entered Lagrew's house. *See State v. Jackson*, 2016 WI 56, ¶47, 369 Wis. 2d

673, 882 N.W.2d 422. To start, the record supports the circuit court's finding that the cleaning company was permissibly in Lagrew's home to clean it and make it habitable prior to his return from the nursing home. Although the tainted information in the search warrant affidavit is arguably somewhat difficult to separate from the untainted information, the affidavit in the search warrant application included the following paragraph from the facts and circumstances section:

On November 11, 2015, your affiant was advised by Bayfield County dispatch that [the cleaning company foreman] wanted an officer to respond to [Lagrew's house] to meet with Adam [from the cleaning company] to identify what Adam had reported to be pages of child pornography that was contained in a file/folder that were found in the residence that is being serviced by [the cleaning company] employees.

The search warrant affidavit further stated that the officer then made contact with the cleaning company employee outside of Lagrew's residence. The court properly found the source of the information was reliable.³ This untainted information in the search warrant affidavit provided probable cause for a search warrant by setting forth a substantial basis for concluding that there

² Notwithstanding the entry of Lagrew's plea, we may review the denial of the suppression motion. *See* WIS. STAT. § 971.31(10). The State represents that it has no basis to challenge the circuit court's conclusion that the officer illegally entered Lagrew's house by following the cleaning personnel inside. We therefore shall not further discuss that issue.

³ The affidavit also contained information the cleaning contractor provided to the police while they were inside Lagrew's house, but that was not "tainted" by the entry because it was not dependent on the officer and the contractor being inside the house. That information included the contractor's explanation to the officer of the scope of the cleaning job and how the materials were discovered. Because the contractor likely would have provided the information to police outside the house if the officer had not entered, under an inevitable discovery analysis it arguably would be included as "untainted" affidavit evidence. However, because the clearly untainted information supplied sufficient probable cause without these other statements, we need not focus on that information.

was a fair probability that a search of Lagrew's house would uncover evidence of wrongdoing. See *Jackson*, 369 Wis. 2d 673, ¶79.

In addition, the context in which the cleaning company personnel provided the information to the police officer also informed the officer's understanding of what the contractor saw, and it further buttressed the probable cause for issuing a search warrant. The officer was aware that while cleaning Lagrew's house, an employee saw images depicting nude children that caused the cleaning company to leave the residence immediately and contact law enforcement. The employee testified that he told the dispatcher the photos he saw had nude children, they were "provocative," and "that there was obvious child pornography within the folder." That information provided to police dispatch also supported probable cause and was imputed to the officer based on dispatch's relaying that information to the officer. Accord *State v. Pickens*, 2010 WI App 5, ¶12, 323 Wis. 2d 226, 770 N.W.2d 1 (2009). The employee also called his supervisor to explain the situation, who in turn also called the police. Two to three minutes later, while the cleaning company employees were still outside the house, a police officer arrived. The employee told the officer "exactly what [he] found and where [he] found it" and confirmed that he gave the officer "a clear description of what [he] had seen in the house." He testified he told the officer that "we found what I believed to be child porn" although he could not "recall word-for-word what [he] said to the officer."

Thus, the record supports the inference that the officer understood that the cleaning company employee saw images of such a pornographic nature that they caused him to stop what he was doing and call the police. The employee's immediate reaction to the images helped inform the officer that the images likely went well beyond images of naked children devoid of sexually provocative content.

The officer explained at the suppression hearing that his purpose in entering Lagrew's house was the understanding that he needed to remove the "sensitive material" so that no one else would see it or remove it. His entry and its limited scope—i.e., going directly to the closet, removing only the items the employee saw, and leaving and securing the house—are consistent with that purpose. They also support the reasonable inference that the officer was committed to investigating the cleaning contractor's claims. As the circuit court found, the officer immediately began applying for the warrant after his initial entry. This supports the inference that the officer would have sought a warrant even had he not entered the house to see and remove the images in the closet.⁴ See *State v. Carroll*, 2010 WI 8, ¶50, 322 Wis. 2d 299, 778 N.W.2d 1. Furthermore, had police sought a search warrant before entering the house, there is nothing to suggest that anything about the scope of the warrant would have prevented the officers from finding the collection of printed images on the closet floor, or the CDs containing the pornographic videos. Indeed, there is no doubt that police would have found the child pornography had a warrant issued without the officer's initial entry.

Accordingly, a reasonable person would have concluded, based on the totality of the circumstances available to the officer before he entered Lagrew's house, that a search of the home may produce evidence of possession of child pornography. See *State v. Tompkins*, 144 Wis. 2d 116, 125, 423 N.W.2d 823 (1988). The officer had probable cause to obtain a warrant before his entry, the officer would have inevitably sought the warrant absent his entry, and the scope of the warrant would have allowed law enforcement to find the pornography. The circuit

⁴ We do not discern from Lagrew's reply brief to this court that he disputes that the officer would have sought a warrant had he not entered the house.

court therefore properly determined that police would have inevitably found the child pornography in the home, given that police already possessed probable cause to seek and obtain a valid search warrant, the execution of which would have produced the pornography even absent the officer's prior entry.

Therefore,

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

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

Sheila T. Reiff
Clerk of Court of Appeals