STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County
The Honorable Carmen T. Mullen, Circuit Court Judge

THE STATE,

Respondent,

vs.

TIMOTHY LAMAR HERNDON,

Appellant.

APPELLATE CASE NO 2023-001834

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court correctly refused to suppress child pornography extracted from electronic devices which were timely seized in Beaufort County pursuant to a valid search warrant issued by a Beaufort County magistrate where police gratuitously obtained a second warrant 63 days later, also from a Beaufort County magistrate, before an analyst extracted the content of the devices in Richland County.

STATEMENT OF THE CASE

This case arose from allegations that Appellant Timothy Herndon repeatedly drugged and raped two young girls who lived next door to him in Hilton Head, and filmed and photographed the abuse. (Indictments). A Beaufort County grand jury indicted Herndon for numerous counts of criminal sexual conduct with a minor (CSCM) and sexual exploitation of a minor. Herndon proceeded to jury trial on November 13–16, 2023, before the Honorable Carmen Mullen, circuit court judge. The State proceeded on three counts of CSCM 2nd degree, two counts of CSCM in the third degree, and twelve counts of sexual exploitation of a minor in the first degree. The jury convicted Herndon on every count. Judge Mullen sentenced him to 15 years' imprisonment on the CSCM 3rd charges and 20 years on each other charge. Judge Mullen ordered the CSCM sentences and one sexual exploitation of a minor sentence to be served consecutively, with the remaining sexual exploitation of a minor sentences to be served concurrently. In this direct appeal, Herndon challenges the warrants authorizing the search of his electronic devices.

STANDARD OF REVIEW

On review of a motion to suppress based on the Fourth Amendment, the appellate court reviews the trial court's factual findings for any evidentiary support, but the ultimate legal conclusion is a question of law subject to de novo review. State v. Frasier, 437 S.C. 625, 633–34, 879 S.E.2d 762, 766 (2022). The interpretation of a statute is a question of law subject to de novo review. State v. Sweat, 379 S.C. 367, 373, 665 S.E.2d 645, 648 (Ct. App. 2008), aff'd as modified, 386 S.C. 339, 688 S.E.2d 569 (2010).

ARGUMENT

Police searched Herndon's devices containing child pornography pursuant to a valid search warrant.

Police seized Herndon's electronic devices containing child pornography pursuant to a valid search warrant. This warrant, issued on March 28, 2019, authorized a full search of Herndon's devices, and the warrant was timely executed when police seized the devices on the day the warrant was issued. Although police gratuitously obtained a second warrant on May 30, 2019, before an outside analyst extracted the contents of the devices, it was unnecessary for them to do so. Regardless, this warrant was also valid because the Beaufort County magistrate had the authority to authorize the search of the devices even though they had been taken out of Beaufort County. Police completed the search in a reasonable amount of time, and they were not required to immediately copy the content of the devices and return them to Herndon. This Court should affirm.[1]

A. The March 28 warrant authorized the extraction of all the data from Herndon's electronic devices.

Conspicuously absent from Herndon's brief is any substantive discussion of the validity of the March 28 search warrant. At trial, Herndon argued the authority to search the contents of the devices pursuant to this warrant expired after 10 days because the magistrate directed that police "execute" the warrant within 10 days of its issuance and police did not complete their forensic analysis within that time. At the pretrial suppression hearing, defense counsel conceded that the March warrant "did give them that authority [to search the content of the devices]" but argued the warrant was "only good for ten days." Nov. 13 Tr.p.202.

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[1] Appellant's issues #1 and #2 are consolidated in Respondent's brief.

The March 28 warrant explicitly authorized police to search the content of the devices. The warrant authorized police to search "all information on cell phones . . . computer devices . . . data processing devices . . . data storage facilities or electronic storage devices or media devices such as . . . flash memory cards, external hard drives, USB storage devices" and the like. Defendant's Exhibit #3. The warrant authorized a complete search of all the content on these devices, including deleted data and "**any and all electronic media and/ or data located within the device**, to include possible inserted SIM or additional memory storage cards." Defendant's Exhibit #3 (emphasis added).

The premise of Herndon's argument regarding the untimely "execution" of the warrant is incorrect. The March 28 warrant was executed on the same day it was issued, when officers searched Herndon's home and seized the electronic devices in question. See State v. Sanchez, 476 P.3d 889, 893 (N.M. 2020) (holding that a search warrant for information stored on an electronic device is executed "when the device is seized or when the data stored on the device is copied on site" (citing United States v. Carrington, 700 F. App'x 224, 232 (4th Cir. 2017))); Commonwealth v. Bowens, 265 A.3d 730, 751 (Pa.Super. 2021) (deeming a warrant for the search of a cell phone to be "executed" upon seizure of the phone); see also Fed. R. Crim. P. 41 ("A warrant under Rule 41(e)(2)(A) [seeking electronically stored information] may authorize the seizure of electronic storage media or the seizure or copying of electronically stored information. Unless otherwise specified, the warrant authorizes a later review of the media or information consistent with the warrant. The time for executing the warrant in Rule 41(e)(2)(A) and (f)(1)(A) refers to the seizure or on-site copying of the media or information, and not to any later off-site copying or review.").

The primary purpose of the 10-day limitation on the execution of warrants is to prevent the probable cause from becoming stale. See State v. Simmons, 430 S.C. 1, 13, 841 S.E.2d 845, 851 (2020) ("We have recognized an affidavit in support of a search warrant 'must state facts so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at that time.' . . . the reason for this rule is that probable cause, with time, dissipates." (citing State v. Winborne, 273 S.C. 62, 64, 254 S.E.2d 297, 298 (1979))). Because the devices were in the custody of police from the moment they were seized from Herndon's house, it was not possible for the warrant to become stale. See United States v. Syphers, 426 F.3d 461, 469 (1st Cir. 2005) (noting that courts have permitted some delay in the execution of search warrants involving computers because of the complexity of the search and concluding that suppression was not warranted if the delay did not cause a lapse in probable cause or prejudice to the defendant, unless the officers acted in bad faith); United States v. Brewer, 588 F.3d 1165, 1173 (8th Cir. 2009) ("The computer media at issue here were electronically-stored files in the custody of law enforcement. Because of the nature of this evidence, the several months' delay in searching the media did not alter the probable cause analysis."); United States v. Jarman, 847 F.3d 259, 267 (5th Cir. 2017) (explaining "a delay of several months or even years" between the seizure of electronic evidence and the completion of the government's review of it is reasonable and does not render the warrant stale).

Even if Herndon was right that the warrant directed police to complete the extraction within 10 days, absent any probable cause defect this requirement would be ministerial in nature and non-compliance would not justify suppression because Herndon was not prejudiced. See State v. Weaver, 374 S.C. 313, 323, 649 S.E.2d 479, 483–84 (2007) ("The failure to observe the ten-day requirement for the execution and return of a warrant, a ministerial requirement, does not

necessarily void the warrant. The warrant will be invalidated only if the defendant can show he was prejudiced by the failure."). This case is not like State v. McKnight, 291 S.C. 110, 352 S.E.2d 471 (1987), where police failed to produce a written warrant affidavit. The failure to produce an affidavit affects the legitimacy of a warrant because it prevents a reviewing court from assessing whether the warrant was supported by probable cause in the first place. The 10-day rule (if it was applicable in this scenario) would not affect the probable cause supporting the search of Herndon's devices. Likewise, Herndon suffered no additional deprivation of privacy on the eleventh day after his devices were seized.

It is unclear why police obtained a second warrant when the original warrant authorized a full search of the contents of the devices. The second warrant, like the first, authorized the search of "any and all electronic media and/or data" on the devices. Defendant's Exhibit #11. Frank Brennan, the Homeland Security computer forensics analyst who extracted the devices, stated he could not "interact with the devices at all until we have the search warrant in these cases." Nov. 13 Tr.p.195. The solicitor also seemed to be under the impression that the March 28 warrant "was just to physically get the items . . . ." Nov. 13 Tr.p.196. However, this is clearly inconsistent with the plain language of the warrant. Law enforcement's mistaken belief that they were required to get a second warrant does not make it so. Likewise, even though the trial court stated it "thought" the devices were "searched pursuant to" the second warrant, it nonetheless correctly denied the suppression motion on another basis. This Court can affirm the trial court's ruling on any ground appearing in the record. See Rule 220(c), SCACR; State v. Warner, 436 S.C. 395, 402, 872 S.E.2d 638, 641 (2022) (explaining "in light of our concerns that the trial court mistakenly found the warrant invalid, we find it necessary to analyze the validity of the . . . warrant" (citing Rule 220(c))).

Police timely executed the March 28 warrant and maintained possession of the devices until their contents could be extracted by a qualified analyst. Because the March 28 warrant authorized the full search of all seized devices, the later warrant was gratuitous. Herndon's entire argument rests on a faulty premise.

B. There was no unreasonable delay in the execution of the warrant.

After seizing the devices, police were entitled to a reasonable amount of time in which to extract their contents. Building upon the faulty premise regarding the "execution" of the March 28 warrant, Herndon argues the police unreasonably delayed their search by obtaining a second warrant 63 days after the devices were seized. He argues police should have copied the contents of the devices "and returned the devices to Appellant in a reasonable time frame." Brief of Appellant at 18–19.

Police were under no duty to return Herndon's child pornography to him within 63 days. Nor were they required to complete their forensic analysis of the devices within 10 days, as Herndon argued at trial. Police were entitled to a reasonable amount of time in which to extract the contents of the devices.

The solicitor explained the Beaufort County Sheriff's Office had limited capability to conduct this type of sophisticated forensic analysis and thus asked Homeland Security for assistance. Nov. 13 Tr.p.198–99. She further explained there was the potential that Herndon would be prosecuted by the federal government. Nov. 13 Tr.p.199. The devices were transferred to Homeland Security offices in Charleston on April 30, the second warrant was obtained on May 30, and Homeland Security began extracting the contents of the devices in Columbia on June 7. Nov. 2022 Tr.p.172; Nov. 13, 2023 Tr.p.199. This was an imminently reasonable amount of time in which to search the devices. See Syphers, 426 F.3d at 469 (noting

courts have permitted some delay in the search of computers because of the complexity of the search); Jarman, 847 F.3d at 267 (explaining "a delay of several months or even years" between the seizure of electronic evidence and the completion of the government's review of it is reasonable).

All of the cases Herndon cites as authority involved the warrantless seizure of persons or things and delays by police in resorting to judicial process. They have no applicability to this case, where Herndon's devices were seized pursuant to a valid warrant at the outset. Herndon suffered no additional deprivation of privacy as police diligently worked to complete the extraction of the devices by a qualified expert, and he was not entitled to the immediate return of devices containing child pornography. Even if police had immediately copied the contents of the devices and returned them to Herndon, the evidence admitted at trial would have been the same. Herndon has not shown error or prejudice.

C. There was no jurisdictional defect with either search warrant.

Herndon alleges the Beaufort County magistrate was without jurisdiction to issue the May 30 warrant because the devices had been removed from Beaufort County. Herndon's devices were transferred to Charleston, and later to Columbia, so that they could be forensically analyzed by a qualified expert with the Department of Homeland Security. Police obtained the second warrant after the items had been transferred to Charleston County on April 30. As discussed above, Herndon's argument rests on the faulty premise that the initial March 28 warrant expired 10 days after it was issued. But even if there was a defect in the first warrant, the second warrant was also valid.

There is no provision of law requiring evidence to be analyzed in the jurisdiction where it is seized. The trial court correctly noted that evidence is routinely analyzed by SLED scientists

in Columbia after being seized in various parts of the State. Contrary to Herndon's assertion, an additional warrant is not required in these cases. Police obtained the second warrant after the items left Beaufort County, but it was unnecessary for them to do so because the March 28 warrant authorized police to search the contents of the devices.

Even if there was some defect in the first warrant, the Beaufort County magistrate had the authority to authorize the search of the devices after they were transferred out of Beaufort County. In State v. Warner, 436 S.C. 395, 872 S.E.2d 638 (2022), the supreme court held that magistrates have the authority to grant warrants for things located outside of their territorial jurisdiction. In that case, the evidence collected was phone records located in New Jersey. The court explained the language in the search warrant statute providing that certain courts "having jurisdiction over the area where the property sought is located" may issue warrants did not apply to magistrates. Rather, this language "applies only to the last item in the series, not to 'Any magistrate,' which is the first item in the series." Id. at 403, 872 S.E.2d at 642 n.5. Thus magistrates have the authority to order the search of items "from any place where such property may be located . . . ." S.C. Code Ann. § 17-13-140. Accordingly, there was no jurisdictional defect in the second warrant, which was gratuitous in the first place.

Finally, the police acted in good faith. See State v. Sachs, 264 S.C. 541, 562, 216 S.E.2d 501, 512 (1975). They secured a second warrant even though they were not required to do so. Herndon cites no contemporary case law holding magistrates did not have the authority to issue warrants for things outside their territorial jurisdiction, a position which the supreme court has now rejected. Suppression would serve no deterrent purpose in this case. This Court should affirm.

CONCLUSION

For the foregoing reasons, Herndon's convictions and sentences should be affirmed.

Respectfully submitted,

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