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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

SARAH D. CARDWELL,

APPELLANT

APPELLATE CASE NO. 2012-213334

Appeal from Georgetown County

Edward B. Cottingham, Circuit Court Judge

Opinion No. 2015-UP-150 (Filed March 18, 2015)

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, Appellant respectfully petitions the Court for a rehearing of its Opinion No. 5351 issued on September 2, 2015 based upon the following points overlooked or misapprehended by the Court.

1. Under the United States Supreme Court case of *Walter v. United States*, 447 U.S. 649 (1980), Petitioner had a reasonable privacy expectation in the video file on the computer. *Walter* involved illicit films individually packaged in boxes with labels indicating the films

contained obscene matter. The films are therefore analogous to the video file with a still-shot "label" in this case. The opinion in *Walter* explained, "[N]otwithstanding that the nature of the contents of these films was indicated by descriptive material on their individual containers, we are nevertheless persuaded that the unauthorized exhibition of the films constituted an unreasonable invasion of their owner's constitutionally protected interest in privacy." *Id.* at 654. Thus, in this case, Petitioner nevertheless had a protected privacy interest in the video file.

The Opinion cites *Melton v. State*, 69 So.3d 916 (Ala. Crim. App. 2010) for the proposition that Appellant had no legitimate privacy interest in the file because she took the risk that the file would be disclosed to police based on the questionable still-shot. The Court should not rely on *Melton*. First, its legal analysis is unconvincing. The court held that a computer owner had no legitimate expectation of privacy in files with textual labels "highly suggestive of child pornography." *Id.* at 931. The court analogized the case *United States v. Jacobsen*, 466 U.S. 109 (1984), which held that testing a white, powdery substance to determine whether it is cocaine—"'conduct that can reveal . . . no other arguably "private" fact'"—compromises no legitimate privacy interest. *Melton* at 928 (quoting *Jacobsen*). Of course, opening a computer file or folder that the owner has labeled with an intentionally misleading or facetious name can certainly reveal private, non-illicit material. Second, as explained above, the holding in *Melton* contradicts the United States Supreme Court's holding in *Walter* because opening the computer files and viewing the films constituted the same improper police action under the Fourth Amendment.

2. The trial record contains no arguments, findings, or support for the Court's ruling that the still-shot of the naked child made the conclusion forgone that the video's contents were illicit. The Opinion cites *United States v. Williams*, 41 F.3d 192 (4th Cir. 1994) for the principle that the search of a container following its plain-view seizure is permissible if the

container's outward appearance make it a "foregone conclusion" that it contains contraband. South Carolina Code section 16-15-365 makes it a crime to aid someone in exposing his private parts in a "lewd and lascivious manner"—i.e., reflective of a "'shameful or morbid interest in nudity [or] sex." *State v. Bouye*, 325 S.C. 260, 267 (1997). Section 16-15-395 makes it a crime to cause a child "to engage in sexual activity or appear in a state of sexually explicit nudity when a reasonable person would infer the purpose is . . . producing material that contains a visual representation [thereof] when a reasonable person would infer the purpose is sexual stimulation." Section 16-5-70 makes it a crime to put a child "at unreasonable risk of harm affecting the child's . . . mental health."

In this case, the only description in the record of the still-shot was that it showed a child wearing only a pink bra. R. 54, line 19—App. 55, line 1; R. 74, lines 17-19. Based on seeing the whole video, the trial judge "[did not] know what [e]ffect it will or might have on these children," which would be a question for the jury. App. 125, lines 17-22. In her closing, the solicitor made the following remarks about the video:

> . . . Trust me, if you want to take pictures of your, you know, children or grandchildren running around naked and, you know, doing cute things, you know, I think we've all got those naked kid pictures that your parents might through during your, I don't know, rehearsal dinner. . . . [O]ne thing I will agree with the Defense is that video is the case. Clearly it is. That video along with the testimony of those children that lived through that video is the entire case.
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> . . .
>
> One of the things that [defense counsel does] is he breaks down, "Well, if you take it out of context, then like the pictures that you've seen, if you take it out of context then, of course, you know it looks bad, you know, a snapshot of what's going on with this video." Ladies and gentlemen, that video lasted for two minutes and 30 seconds. In two minutes and 30 seconds I was able to pull of still shots showing nipple stimulation . . . and a child who is either seven or eight years old touching himself in such a manner that all of you

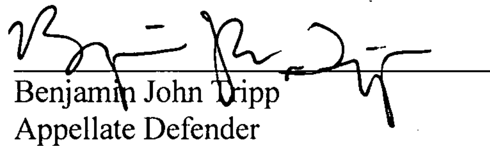
> can look and determine whether or not you believe that he came up with that himself . . . .
>
> . . .
>
> . . . So, yeah, I'm not asking you to take things out of context. I'm asking you to put it in context. **I'm not telling you to look at those individual pictures and make your decision. I'm saying look at the entire video and use your common sense because the video as a whole is what makes it sexual. The video as a whole is what's going to make you all agree beyond a reasonable doubt** that these parents . . . made a conscious, intentional, maybe reckless decision to videotape those children in a performance that includes sexual activity . . . .

R. 176, line 13—R. 181, line 8 (emphasis added). Thus, the record contradicts this Court's holding that the still-shot showed activity that was sexual, that it was reflective of a morbid or shameful interest in nudity or sex, or that it put the child at an unreasonable risk of mental harm. Because the contents of the video as contraband were not a foregone conclusion based on the still-shot, no plain-view circumstances supported the police officer's opening of the video file without a warrant.

3. The inevitable discovery doctrine does not apply simply because probable cause would have supported a warrant to open the video file. The Opinion cites *Nix v. Williams*, 467 U.S. 431, 432 (1984) for the proposition that "[i]f the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means—here the volunteers' search—then the deterrence rationale has so little basis that the evidence should be received." This language appears in a syllabus to the *Nix* opinion promulgated by the reporter. The actual holding of *Nix* is that "when . . . evidence in question would inevitably have been discovered *without reference to the police error or misconduct*, there is no nexus sufficient to provide a taint and the evidence is admissible." *Id.* at 448 (emphasis added). Thus, in this case the inevitable discovery doctrine does not apply because the State adduced no purported channel through which the police would have discovered the contents of the video file independent

of the police officer and the computer technician unconstitutionally opening it. Moreover, as the United States Supreme Court stated in *Walter*, "The fact that the labels on the [packages] established probable cause to believe the [contents] were obscene clearly cannot excuse the failure to obtain a warrant; for if probable cause dispensed with the necessity of a warrant, one would never be needed." 447 U.S. at 657 n.10.

Respectfully submitted,



Benjamin John Tripp
Appellate Defender

This 11th day of September, 2015.

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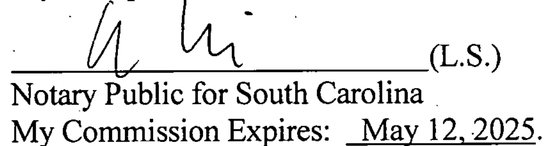
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above referenced case has been served upon William M. Blitch, Jr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 11th day of September, 2015.

Benjamin John Tripp
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this11th
day of September, 2015.



_______________(L.S.)
Notary Public for South Carolina
My Commission Expires: May 12, 2025.