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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Georgetown County
Hon. Edward B. Cottingham, Circuit Court Judge
Appellate Case Tracking No. 2015-002507

The State, Respondent,

v.

Sarah D. Cardwell, Petitioner.

RETURN TO PETITION FOR REHEARING

On January 23, 2019, this Court properly affirmed the trial court's decision refusing to suppress the contents of a video which was properly seized because it was seen in plain view and inevitably would have been discovered. Further, this Court could have affirmed the decision on the basis the seizure and search did not take place on Petitioner's computer, but instead were initially on a third-party's computer. Additionally, Petitioner could not maintain an expectation of privacy in information voluntarily turned over to a third party without any restriction on that third party's access and use of the information. This Court did not misapprehend or overlook any relevant facts or law applicable in this case. As a result, the Court should deny the petition for rehearing.

Plain View and Contraband

Also, even assuming Petitioner has some expectation of privacy remaining in the data turned over to Marsh and copied by Marsh onto his computer, the file was seen in plain view by

Chief Douglas and he had the right to seize the file. Once he saw the file, its nature as contraband was obvious and Petitioner can have no legitimate interest in contraband.

"Under the 'plain view' exception to the warrant requirement, objects falling within the plain view of a law enforcement officer who is rightfully in a position to view the objects are subject to seizure and may be introduced as evidence." State v. Wright, 391 S.C. 436, 443, 706 S.E.2d 324, 327 (2011). The Court explained: "the two elements needed to satisfy the plain view exception are: (1) the initial intrusion which afforded the authorities the plain view was lawful and (2) the incriminating nature of the evidence was immediately apparent to the seizing authorities." Id.

In the instant case, Chief Douglas was clearly where he was entitled to be and his "intrusion" into Marsh's work area was lawful. Both Chief Douglas and Marsh testified Marsh had packages delivered to the police station because he was sometimes closed. Chief Douglas was delivering the package to Marsh and was in Marsh's work area at Marsh's invitation. Chief Douglas stayed in the area he first met Marsh and there is no indication he was not properly in this area. As a result, when he witnessed the thumbnail go across the screen, he clearly was in a location he was lawfully allowed to be.

Both March and Chief Douglas testified regarding the nature of the still image they saw. Marsh testified it was an image of the oldest child "in a pink bra." (R.54). He was asked whether the child was wearing any clothing and he responded: "No, just a pink bra." (R.55). Chief Douglas testified: "I had seen an image that was - that concerned me on a computer on a table there. . . . I'd seen an image that appeared to be a child, a **nude child maybe holding a ladies' bra up across his chest.**" (R.74) (emphasis added). Both also explained the still image seen was really a link to video, which heightens the concern and incriminating nature of the file.

The incriminating nature of this image was immediately apparent. See e.g., S.C. Code Ann. § 16-15-365 (Supp. 2010) ("Any person who wilfully and knowingly exposes the private parts of his person in a lewd and lascivious manner and in the presence of any other person, or aids or abets any such act, or who procures another to perform such act, . . . is guilty of a misdemeanor and, upon conviction, must be imprisoned for not more than six months or fined not more than five hundred dollars, or both."); S.C. Code Ann. § 16-15-395 (Supp. 2010) ("An individual commits the offense of first degree sexual exploitation of a minor if, knowing the character or content of the material or performance, he: (1) uses, employs, induces, coerces, encourages, or facilitates a minor to engage in or assist others to engage in sexual activity for a live performance or for the purpose of producing material that contains a visual representation depicting this activity; (2) permits a minor under his custody or control to engage in sexual activity for a live performance or for the purpose of producing material that contains a visual representation depicting this activity"); S.C. Code Ann. § 63-5-70 (Supp. 2010) ("It is unlawful for a person who has charge or custody of a child, or who is the parent or guardian of a child, or who is responsible for the welfare of a child as defined in Section 63-7-20 to: (1) place the child at unreasonable risk of harm affecting the child's life, physical or mental health, or safety"). Accordingly, the contraband was seen in plain view and appropriately seized by Chief Douglas.

The United States Supreme Court has made it clear that one does not have a legitimate interest in contraband. The Court held:

> Official conduct that does not "compromise any legitimate interest in privacy" is not a search subject to the Fourth Amendment. Jacobsen, 466 U.S., at 123, 104 S.Ct. 1652. We have held that any interest in possessing contraband cannot be deemed "legitimate," and thus, governmental conduct that only reveals the possession of contraband "compromises no legitimate privacy interest." Ibid. This is because the expectation "that certain facts will not come to the attention of the authorities" is not the same as an interest in

> "privacy that society is prepared to consider reasonable." Id., at 122, 104 S.Ct. 1652 (punctuation omitted).

Illinois v. Caballes, 543 U.S. 405, 408-409 (2005). Once the contraband was in plain view, the fact Chief Douglas manipulated the video compromised no legitimate expectation of privacy. Petitioner cannot demonstrate a violation of her Fourth Amendment right when the file was seen and seized in plain view and it was clearly contraband for which she cannot have an expectation of privacy. See Jacobsen, 466 U.S. 109, 130 (1984), White, J. concurring (citing Coolidge v. New Hampshire, 403 U.S. 443, 489 (1971)) ("Where a private party has revealed to the police information he has obtained during a private search or exposed the results of his search to plain view, no Fourth Amendment interest is implicated because the police have done no more than fail to avert their eyes.").

As a result, this Court should affirm its finding that the video was seen in plain view and properly seized and searched.

Inevitable Discovery

Finally, even if there was no basis for the search and seizure by Chief Douglas or Investigator Hanna, once the file was viewed by Chief Douglas the officers would have obtained, and ultimately did obtain, a warrant for the computer and files so any discovery of the video and its contents was inevitable. The inevitable discovery doctrine is an exception to the exclusionary rule which requires the State to establish by a preponderance of the evidence the same evidence seized unlawfully would have been discovered inevitably by lawful means. See Nix v. Williams, 467 U.S. 431, 447, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984) (holding evidence may be admitted despite a violation of the Fourth Amendment "if the government can prove that the evidence would have been obtained inevitably and, therefore, would have been admitted regardless of any

overreaching by the police")). When the doctrine applies, the evidence will not be suppressed despite the fact it was obtained pursuant to an illegal search.

The Nix decision is very instructive. The Court in Nix explains: "exclusion of evidence that would inevitably have been discovered would also put the government in a worse position, because the police would have obtained that evidence if no misconduct had taken place." Nix, 467 U.S. at 444. The Court continued: "If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means . . . then the deterrence rationale has so little basis that the evidence should be received. Anything less would reject logic, experience, and common sense." Id.

In Nix, officers obtained the location of a missing child's body after a violation of Nix's Sixth Amendment right to counsel. However, at the time, a search was underway for the child. The Court explained the search party was about two and a half miles from where Nix ultimately lead officers to the body. The Court found the search party would have likely found the body, so any violation of the Sixth Amendment did not require exclusion because all the evidence which resulted from the violation would have inevitably been found through lawful means. Id.

In the case *sub judice*, Investigator Hanna testified he obtained a warrant to search the computer and the files on the computer as standard procedure when images of child pornography are seen. (T.101; R. 83). The search warrant was obtained on the basis of the image seen by Chief Douglas, an image that would not change because of its digital nature and would not disappear because it was in Marsh's possession.

Also, Marsh testified based on the image he saw and his experience he would have been required to report the matter to law enforcement even if Chief Douglas had not been there to seize the computer and file. (R.67). Even if not properly seized in plain view, the computer and

image would have been brought to the attention of law enforcement because Marsh had a copy of the file on his computer and would have been required to report the image of the naked child holding a bra to his chest. See S.C. Code Ann. § 16-3-850 (2003) (requiring computer technicians to report their discovery of images depicting minors "engaging in sexual conduct, sexual performance, or a **sexually explicit posture**") (emphasis added). As a result, any possible violation of the Fourth Amendment should not require exclusion because the evidence would have been found through the search warrant investigator Hanna obtained based on the image and the subject matter of the image, or in the alternative because the authorities would ultimately have to be notified by Marsh once he saw the image on the computer.

As a result, this Court should affirm its decision finding the trial court did not err in refusing to suppress the evidence because it would have been inevitably discovered.

Other Basis to Deny Petition

Additionally, as discussed in more thorough detail in the State's Brief of Respondent, there are several other basis upon which this Court could and should affirm the admission of the evidence and affirm Petitioner's conviction and sentence. The information was conveyed to a third party and resided on a third party's computer at the time of the search. As a result, Petitioner has no expectation of privacy and no basis upon which to assert a Fourth Amendment violation occurred.

First, the search that took place, to the extent one took place, occurred on Marsh's computer and was a search of a file in his possession. He explained the laptop brought in by Petitioner would not boot. He had to remove the data from that computer's hard drive and copy it onto his own computer to begin the repair. Any manipulation of the data, search of the data, or seizure of the data had to be from Marsh's computer and not Petitioner's because the data had to

be copied onto Marsh's computer to be accessible. (R.65-66). As a result, Petitioner has no expectation of privacy and no basis to assert a Fourth Amendment violation because nothing belonging to he was searched or seized. See Katz v. United States, 389 U.S. 347 (1967) (finding the touchstone of Fourth Amendment analysis has been the question whether a person has a "constitutionally protected reasonable expectation of privacy.") Minnesota v. Carter, 525 U.S. 83, 88 (1998) (finding "in order to claim the protection of the Fourth Amendment, a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable").

Also, once Petitioner turned her data over to a third party without any restrictions on what that third party could do with the data, she lost her reasonable expectation of privacy in the data. See United States v. Miller, 425 U.S. 435 (1976) ("This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed."); see also, Commonwealth v. Sodomsky, 939 A.2d 363 (Pa. Super. 2007) (analyzing a similar situation in which a computer was turned over to a technician and finding the defendant "abandoned his privacy interest" and explaining several cases reaching a similar result).

Accordingly, this Court should affirm its original decision finding the evidence was in plain view or would be inevitably discovered, and therefore, suppression was not warranted. Even if this Court concluded those two bases were insufficient, it should find Petitioner no longer had a reasonable expectation of privacy in information voluntarily turned over to a third

party without any restrictions and which was ultimately searched and seized from that third party's possession.

CONCLUSION

For all of the foregoing reasons, the State requests the Court deny the petition for rehearing and affirm the decision of the trial court.

Respectfully submitted,

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Attorney General

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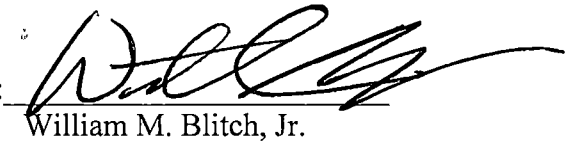
Assistant Attorney General

BY: 

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February 26, 2019

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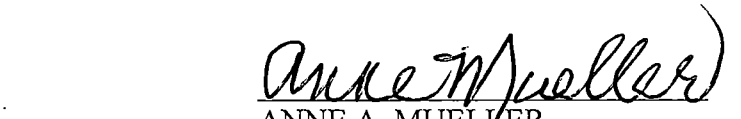
PROOF OF SERVICE

I, Anne A. Mueller, certify that I have served the within Return to Petition for Rehearing by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Wanda H. Carter, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.
This 26th day of February, 2019.



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