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State v. Reisner, 253 A.3d 1273 (R.I. 2021)

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Criminal Law and Procedure. *State v. Reisner,* 253 A.3d 1273 (R.I. 2021). When approving a search warrant based on an investigation into the possession of child pornography, a Magistrate Judge must find that the application and supporting affidavit provides a substantial basis for determining that probable cause exists according to a multifactor test. An investigating agent's testimony that he/she viewed the files and determined that the files contained child pornography is not enough standing on its own. There must be included either a detailed description of what is in the files or an image from the files appended to the supporting affidavit.

FACTS AND TRAVEL

In June of 2015, a member of the Rhode Island State Police (RISP) Internet Crimes Against Children Task Force (ICAC) was monitoring peer-to-peer file sharing networks[1] when the Internet Protocol Address (IP Address)[2] "100.10.41.6" downloaded files thought to contain child pornography.[3] An RISP detective then downloaded the files in question to determine if they did in fact contain child pornography.[4] RISP determined the IP Address was owned by Verizon and served Verizon with a subpoena in order to identify the subscriber using the IP Address at the time.[5] Verizon identified the IP Address as belonging to defendant's wife, Heather

1. Peer-to-peer file sharing networks allow users to directly share information and media files without the use of a central server. State v. Reisner, 253 A.3d 1273, 1276 (R.I. 2021); "It is akin to 'leaving one's documents in a box marked *free* on a busy city street." *Id.* (Quoting Clifford Fishman & Anne McKenna, *Wiretapping and Eavesdropping* §23:25 at 88 (2016)).

2. IP Addresses are unique strings of numbers acquired by every electronic device when it connects to the internet. IP Addresses are owned by internet service providers who can identify which of their subscribers a particular IP Address was assigned to at a particular time. *Reisner,* 253 A.3d 1273 at 1275.

3. *Id.* at 1276.

4. *Id.*

5. *Id.*

Reisner, and was connected to a computer at 15 Harding Street, West Warwick, RI.[6]

With this information the RISP applied for and was granted a search warrant for the address and conducted a forensic review of the equipment seized during the search.[7] In the affidavit supporting the application for a search warrant, the RISP "generally described peer-to-peer networks, explained what hash values[8] are, and stated that 'over time numerous files have been identified through a specific hash value as confirmed child pornography.'"[9] One of the files downloaded and viewed by the RISP prior to applying for the search warrant was identified as follows:

> "File Name: Jamtien.mpeg"
>
> "Date/Time: June 15, 2015, at 11:42 PM (UTC)"
>
> "HASHValue: 2aad88e182cc9c66ccd7ba15aa186ecfac39f370"
>
> "Description: This video file depicts a prepubescent female on the beach removing her bathing suit exposing her genitals."[10]

Despite describing in general how hash values had been used in the past to identify child pornography, the search warrant did not state that *this specific* hash value was identified as containing child pornography.[11] There was not further explanation of how the RISP identified the file "Jamtien.mpeg" as containing child porn.[12] No image from the file was attached to the affidavit in support of the search warrant.[13]

RISP's application for a search warrant for the West Warwick home was approved by a District Court judge and the search was executed on August 3, 2015.[14] The defendant's Mac Pro desktop

6. *Id.*
7. *Id.*
8. "Hash values, which are often referred to as 'electronic fingerprints' consist of a string of numbers that, for all practical purposes, uniquely identifies a digital file." *Reisner,* 253 A.3d 1273 at 1275.
9. *Id.* at 1277
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Reisner,* 253 A.3d 1273 at 1277.

computer was seized, and a forensic examination uncovered seven videos of child pornography.[15] After waiving his *Miranda* rights, the defendant was interviewed by the police on a variety of topics including child pornography, the use of peer to peer file sharing, and his Wi-Fi access.[16] Upon being told the results of the forensic analysis of his computer, the defendant stated "Well I need to talk to a lawyer."[17] The RISP however did not stop the interview.[18]

Defendant was eventually charged with one count of possession of a computer hard drive that contained videos of child pornography,[19] and one count of knowingly mailing, transporting, delivering, or transferring videos of child pornography.[20] Prior to trial, defendant moved to suppress any evidence seized during the search on the basis that there was no probable cause to search under the 4th Amendment and state due process grounds.[21] The trial justice denied the motion on the grounds that "the search warrant's accompanying affidavit contained an adequate description of child pornography, albeit 'barely[,]' to support a probable cause determination under the standard set out in *United States v. Brunette*."[22] The trial justice further ruled that the affidavit provided "trustworthy information to demonstrate a likelihood that child pornography images or videos were in 15 Harding Street."[23] The trial justice came to this conclusion by applying the factors set forth in *United States v. Dost*[24] to the "Jamtien.mpeg" description included in the

15. *Id.* at 1278.
16. *Id.*
17. *Id.*
18. *Id.*
19. In violation of R.I. Gen. L. §11-9-1.3(b)(2).
20. *Id.;* In violation of R.I. Gen. L. §11-9-1.3(b)(1).
21. *Reisner,* 253 A.3d 1273 at 1278.
22. *Id.* (citing United States v. Brunette*,* 256 F.3d 14 (1st Cir. 2001)).
23. *Id.*
24. In United States v. Dost, 636 F. Supp. 828 (S.D. Cal. 1986), the District Court announced the following factors for determining if an image or video is a "graphic or lascivious" exhibition of the genitals: (1) whether the focal point of the visual depiction is on the child's genitalia or pubic area; (2) whether the setting of the visual depiction is sexually suggestive; (3) whether the child is depicted in an unnatural pose, or inappropriate attire, considering the age of the child; (4) whether the child is fully or partially clothed or nude; (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; (6) whether the visual depiction is intended or designed to elicit a sexual response.

affidavit.[25] The trail justice determined that because a child removing their bathing suit in a public place is an unnatural pose, the action suggested sexual coyness, and the making of the video was intended to elicit a sexual response, the description of the video in the affidavit provided a reasonable basis for the search warrant and, therefore, the trial justice denied the motion to suppress.[26] The trail justice additionally accepted defendant's stipulation that the videos seized, including Jamtien.mpeg, contained child porn and granted defendant's motion to suppress the portion of the recorded interrogation that occurred after defendant requested legal counsel.[27]

A jury found the defendant guilty of possession of child pornography.[28] The defendant was not found guilty of transferring child pornography.[29] After the trail justice denied a motion for a new trail, the defendant was sentenced to five years' incarceration, suspended, along with additional conditions such as registering as a sex offender.[30] The defendant filed an appeal raising two different issues.[31] The defendant first argued on appeal that the trail justice inappropriately denied his motion to suppress evidence found based on the search warrant, arguing there was no probable cause to issue the search warrant.[32] Additionally, the defendant argued that the trial justice should have granted his motion for a mistrial due to the prosecution referring to statements made by defendant during the prosecutions opening, after those statements had been excluded from evidence.[33]

ANALYSIS AND HOLDING

On appeal the Court conducted a *de novo* review of the trial justice's determination of the existence of probable cause.[34] The

25. *Reisner,* 253 A.3d 1273 at 1278.
26. *Id.*
27. *Id.* at 1279.
28. *Id.*
29. *Id.*
30. *Id.*
31. *Reisner,* 253 A.3d 1273 at 1279.
32. *Id.* at 1275.
33. *Id.* The R.I. Supreme Court does not reach this issue on appeal as their decision on issue one results in vacating the opinion of the trial court. *Id.* at 1283.
34. *Id.* at 1279.

Court focused on the affidavit supporting the search warrant to determine "whether the magistrate made a 'practical, common-sense determination' that 'there is a fair probability that contraband or evidence of a crime will be found in a particular location.'"[35] The Court focused particularly on two aspects of the search warrant: the description of the "Jamtien.mpeg" file in the affidavit and the *lack of* any still image or the video itself being appended to the search warrant.[36] Ultimately, the Court determined that based on these two factors, the affidavit did not provide sufficient information for a determination of probable cause.[37]

The Court began by reviewing the decision by the First Circuit in *United States v. Brunette,*[38] noting that *Brunette* court stated "[a] court reviewing a warrant application to search for pornographic materials ordinarily is unable to perform the evaluation required by the Fourth Amendment if the application is based on allegedly pornographic images neither appended to, nor described in, the supporting affidavit."[39] The Court took issue with the lack of a still or video from the file not being appended and leaving the determination of probable cause to be based solely on the twelve word description of the file.[40] The Court here agreed with the First Circuit that the "inherent subjectivity" involved in determining the existence of child pornography in a particular file places that determination under the auspices of a "judicial officer" and, therefore, the investigating agent's subjective determination cannot be used to determine whether probable cause exists.[41]

Once determining the investigating agent's determination of the existence of child porn in the file could not be the basis for a determination of probable cause, the Court turned to applying the *Dost* factors to the description and the file name, finding that only one applied.[42] The Court concluded that the affidavit described a minor's nudity in a public place, but that does not automatically

35. *Id.* at 1270 (quoting State v. Byrne, 972 A.2d 633, 639 (year)).
36. *Reisner,* 253 A.3d 1273 at 1281.
37. *Id.*
38. *Burnette*, 256 F.3d 14, 20 (1st Cir. 2001).
39. *Reisner,* 253 A.3d 1273 at 1281 (Quoting *Burnette,* 256 F.3d at 20).
40. *Id.* at 1282.
41. *Id.*
42. *Id.*

constitute "child pornography."[43] Additionally, the Court found that "the setting was not particularly sexually suggestive," the affidavit did not show that the minor's genitals or pubic area were the focal point, there was "no indication" the image suggested sexual coyness or a willingness to engage in sexual activity, or that the file was intended to elicit a sexual response.[44] Additionally, the Court took further issue with the affidavit for probable cause because there was no indication that the *specific* hash value for the *specific* file downloaded by the defendant was connected to child pornography.[45]

Ultimately, the Court determined that there was not enough in the affidavit for the search warrant to support a finding of probable cause.[46] The Court consequently vacated the judgement of the trial justice.[47] However, Justice Goldberg disagreed with the majority and filed a dissent in which she argued that she would have affirmed the existence of probable cause based on the affidavit alone.[48]

Justice Goldberg wrote in her dissent that she would have found probable cause based solely on the affidavit submitted in support of the search warrant.[49] Justice Goldberg specifically disagreed with the majority's reliance on the *Burnette* opinion.[50] Justice Goldberg would have the Court consider the *Burnette* requirement of either a thorough description or the images being appended to the search warrant as simply a "best practice" and would not "graft" such a requirement onto Rhode Island due process jurisprudence.[51] She also took issue with the fact that the *Dost* factors were established in the context of a sentencing enhancement decision and the First Circuit eventually adopted them to

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43. *Id.*
44. *Id.* at 1281.
45. "The affidavit at issue in the case at bar did not allege that HASH Value: 2aad88e182cc9c66ccd7ba15aa186ecfac39f370, the hash value for the Jamtien.mpeg file, matched a hashvalue for confirmed child pornography." *Reisner,* 253 A.3d 1273 at 1281.
46. *Id.* at 1282.
47. *Id.*
48. *Id.* at 1283.
49. *Id.*
50. *Id.*
51. *Reisner,* 253 A.3d 1273 at 1284.

determine a "lascivious exhibition of genitals."[52] She noted that there has never been a judgement vacated on the basis of a search warrant issued without probable cause and, if it was up to her, she would not make this case the first to do so.[53]

Justice Goldberg departed significantly from the majority in how much weight she would give to the RISP officer's determination that the files contained child pornography.[54] Justice Goldberg would have included the "seasoned" detective's averment that child pornography was in the files as part of the "substantial basis" for determining that probable cause existed.[55] She went on to recite the extensive knowledge and training that the RISP detective had gained through his involvement in the force and the ICAC.[56] Additionally, Justice Goldberg noted that the specific file and hash value downloaded by defendant were not specifically cited in the affidavit as being ones that had been flagged as containing child porn, and she stated that a "fair inference," based on the report of another detective, could be drawn that "files containing suspected child pornography were downloaded."[57] According to Justice Goldberg, the detective's findings and determinations of child porn would be an influential piece of the "totality of circumstances" that a magistrate judge would review in determining the existence of probable cause.[58] Justice Goldberg would have upheld the trail justice's decision to deny the motion to suppress and affirmed the conviction.[59]

COMMENTARY

The Rhode Island Supreme Court is attempting to strike a balance between protecting the most vulnerable of our citizens and a bedrock constitutional requirement. The Court acknowledges multiple times in their opinion that there is a line between "nudity" and

52. *Id.*
53. *Id.*
54. *Id* at 1288.
55. *Id.* at 1289; "The search warrant in this case was supported by probable cause based on the sworn affidavit of a trained detective who conducted a thorough investigations. . ." *Id.* 1291–92.
56. *Reisner,* 253 A.3d 1273 at 1291-92.
57. *Id.* at 1290.
58. *Id.* at 1292.
59. *Id.*

"child pornography."[60] This seems to make sense as children are idiosyncratic beings that do things (such as taking their clothes off) for idiosyncratic reasons at seemingly arbitrary times (like at the beach in front of strangers). The Court seems to be concerned with criminalizing a photograph taken by a family member of a child who, at that moment, decided they no longer needed their bathing suit. To that end, the Court refuses to allow an investigating agent's determination to serve as the main basis for a finding of probable cause under Fourth Amendment Due Process.[61] Instead, the Court holds that the determination of probable cause in the context of child pornography cases should be made considering the multi-factor test from *Dost*.[62]

The Court seems particularly concerned with the potential for overreach or mistake by an investigating agent when determining probable cause.[63] Should the Court hold otherwise, the door would be open for police and other investigating agents to determine probable cause without oversight and restraint. Even Justice Goldberg is willing to accept the RISP's determination of child porn being on the devices and probable cause existing based on him being a "seasoned" detective, his training and experience on the ICAC task force, and his general knowledge of peer-to-peer network sharing.[64] She specifically stated that she is not concerned with the lack of specific connection between the specific hash value or file name and specific indicators they contained child pornography.[65] This would suggest, absent the majority ruling in the way that they did, any police officer that could show the same training would have carte-blanch to determine that a file that *might* contain child pornography does in fact contain it and use that to justify probable cause and a search warrant. The majority does not seem to be ready to offer such power to trod over constitutional protections.

60. *Id.* at 1282.

61. *Id.*

62. *Reisner,* 253 A.3d 1273 at 1282.

63. "The First Circuit noted in *Brunette* that the "inherent subjectivity" involved in determining whether an image is child pornography "is precisely why the determination should be made by a judge, not an agent." *Id.*

64. *Id.* at 1289.

65. *Id.*

Conclusion

In this decision, the Rhode Island Supreme Court has laid out for Magistrate Judges what should be considered when determining probable cause for a potential search warrant based on the downloading of files suspected to contain child pornography. When the images at question do not portray minors in sexual acts but instead show "mere nudity," the affidavit supporting the approval of a search warrant must include either a detailed description of the images contained or append the images themselves, or a still of a video file.[66] The Court indicated that for a "substantial basis" for probable cause to exist, the search warrant and the supporting affidavit must be able to satisfy multiple *Dost* factors.[67]

David Tice

66. *Id.*
67. *Id.* at 1282.