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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0834**

State of Minnesota,
Respondent,

vs.

Daryll Gene Cagle,
Appellant.

**Filed May 7, 2018
Reversed
Peterson, Judge**

Renville County District Court
File No. 65-CR-16-278

Lori Swanson, Attorney General, St. Paul, Minnesota; and

David Torgelson, Renville County Attorney, Laurence Stratton, Assistant County
Attorney, Olivia, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Peterson, Judge; and Ross,
Judge.

UNPUBLISHED OPINION

PETERSON, Judge

In this appeal from his convictions of (1) possessing pornographic work involving
a minor, (2) soliciting a child to engage in sexual conduct, and (3) distributing electronic

communication material describing sexual conduct to a child, appellant Daryll Gene Cagle argues that the district court erred when it denied his motion to suppress evidence obtained under search warrants for his cellphone and cellphone data. Because the search warrant that authorized a search of Cagle's cellphone data was invalid and the data obtained in the search were inadmissible, we reverse Cagle's convictions and sentence.

FACTS

At around 11:00 a.m. on May 2, 2016, law-enforcement officers responded to a call that reported an unresponsive toddler at an apartment. After arriving at the scene, Renville County Sheriff's Department Investigators Thomas Hendrichs and Jason Mathwig determined that the child was deceased. Investigators could not determine a cause of death, and the child had no known medical conditions or signs of injury.

A May 2, 2016 search-warrant application states that Mathwig interviewed the child's mother, who stated that, on the evening of May 1, 2016, she went to bed at around 11:00 p.m., and Cagle—mother's live-in boyfriend—remained awake using a computer. She said that Cagle and other family members brought the child to a park on May 1, and the child appeared fine and did not suffer any injuries. Mother's brother-in-law stated that photographs of the child were taken while he was at the park. Both Cagle and mother owned cellphones.

Hendrichs reviewed a February 5, 2016 child-protection report, which indicated that mother sought medical attention for the child due to a "two day history of scrotal swelling" and "significant bruising on the left part of the scrotum." Mother said that she did not know what caused the swelling and bruising.

The district court determined that probable cause existed to issue a warrant to search the child's residence for, among other things, "personal electronic devices" and cellphones. Law enforcement seized five cellphones. One of them was Cagle's Samsung Galaxy cellphone, which was found in the master bedroom.

On May 3, 2016, Hendrichs applied for a second warrant to search the contents of the seized cellphones, including Cagle's Samsung phone. Hendrichs swore in the search-warrant affidavit that the cellphones, "constitute[] evidence which tends to show a crime" or that a particular person has committed a crime. Other than stating that police seized five cellphones during the initial search, the second search-warrant application did not contain any new material information regarding the investigation. The second warrant application sought authorization to search the cellphones for "Cellular Telephone Data," including:

- a) Electronic Serial Number (ESN)
- b) Integrated Circuit Card Identifier (ICCID)
- c) International Mobile Station Equipment Identity (IMEI) Number
- d) Mobile Equipment Identifier (MEID)
- e) Device Telephone Number
- f) Cellular Network and/or Carrier Information
- g) Wi-Fi Address
- h) Media Access Control (MAC) Address
- i) Bluetooth Address
- j) Stored Data identifying the device user or owner
- k) 'Contacts' Data or Lists
- l) 'Call Log' Data
- m) 'Favorites' Data
- n) Data associated, linked, maintained or contained within, software commonly referred to as a Mobile Application/ Application / "App"
- o) Short Message Service (SMS) Messages/Text Message Content
- p) Multimedia Messaging Service (MMS) Media that includes photographs, videos, audio files and text pages

- q) Electronic Notes and/or Memorandums
- r) Electronic Mail (E-mail) Messages
- s) Global Positioning System (GPS) Data associated with Mobile Applications or as independent data
- t) Internet Browsing History to include dates and times of access, browsed/viewed sites and search history
- u) Portable Storage Media Contained Within

On May 3, the district court determined that probable cause existed to issue a second search warrant, which was executed that afternoon. Law enforcement then extracted all data from the cellphones and placed it onto four Blu-Ray discs. More than two months later, on July 22, 2016, Mathwig received the cellphone data. Mathwig's initial query of Cagle's cellphone data was limited to activity on the phone that occurred on May 1 and 2, 2016. Mathwig found a text message sent from Cagle's phone to M.K.E. at 12:03 a.m. on May 2, in which Cagle asked whether M.K.E. was awake. M.K.E. never responded. Using a data "extraction report" program, Mathwig conducted a broader query for M.K.E.'s first name, in order to identify M.K.E. The query was not limited to a particular period of time, and it produced all data on the phone involving M.K.E., including calendar entries, text messages, and phone-call records. The query returned 4,659 text messages between M.K.E. and Cagle from October 2014 to May 2, 2016.

Before requesting an additional search warrant, Mathwig discovered text conversations between Cagle and M.K.E. that were sexual in nature and involved exchanges of pornographic images. Initially, Mathwig did not know whether the images were illegal. Mathwig then found a text message in which M.K.E. said that she was under the age of 16. Mathwig realized that the images could be child pornography, and he stopped his search.

Based on these text messages, Mathwig sought a third warrant on August 16, 2016, to continue the search of the data from Cagle's cellphone for evidence of child pornography or child exploitation. When the third warrant was executed, Mathwig found additional text messages from Cagle that indicated that he requested and received pornographic images of M.K.E., and that he knew that M.K.E. was a minor.

Cagle was charged with possession of pornographic work involving a minor, in violation of Minn. Stat. § 617.246, subd. 4(a) (2014); solicitation of a child to engage in sexual conduct, in violation of Minn. Stat. § 609.352, subd. 2 (2014); and distribution of electronic communication material describing sexual conduct to a child, in violation of Minn. Stat. § 609.352, subd. 2a(3) (2104). Cagle moved to suppress the evidence and to dismiss the case for lack of probable cause, arguing that there was not a sufficient basis for issuing the search warrants and that the scope of the search under the May 3 warrant was overbroad. The district court denied the motions, and the case was presented to the district court on stipulated evidence pursuant to Minn. R. Crim. P. 26.01, subd. 4, in order to obtain review of the district court's ruling on the validity of the search warrants. The district court found Cagle guilty on all three counts, sentenced him to a stay of imposition of 25 months and a fine for possession of pornographic work involving a minor, and placed him on supervised probation for five years. Cagle appeals.

D E C I S I O N

Under the Fourth Amendment to the United States Constitution, “no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. Const.

amend. IV; *accord* Minn. Const. art. I, § 10. In general, police must obtain a search warrant before searching a cellphone. *See Riley v. California*, 134 S. Ct. 2473, 2485 (2014). “Generally, a search is lawful only if it is executed pursuant to a valid search warrant . . . after a finding of probable cause.” *State v. Holiday*, 749 N.W.2d 833, 839 (Minn. App. 2008).

Probable cause requires “that there is a fair probability that the evidence will be found at the specific site to be searched.” *State v. Yarbrough*, 841 N.W.2d 619, 622 (Minn. 2014). This means that a sufficient nexus must exist between the alleged criminal behavior and the particular place to be searched or the item to be seized. *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 307, 87 S. Ct. 1642, 1650 (1967); *Yarbrough*, 841 N.W.2d at 622; *State v. Souto*, 578 N.W.2d 744, 747-48 (Minn. 1998).

[D]irect observation of evidence of a crime at the place to be searched is not required. A nexus may be inferred from the totality of the circumstances. Among the circumstances the issuing judge—and our court on “substantial basis” review—considers in determining whether there is probable cause to believe that the evidence sought will be found at a particular place are the type of crime, the nature of the items sought, the extent of the defendant’s opportunity for concealment, and the normal inferences as to where the defendant would usually keep the items.

Yarbrough, 841 N.W.2d at 622-23 (citations and footnote omitted).

When reviewing a district court’s decision to issue a search warrant, appellate courts consider whether the issuing judge “had a substantial basis for concluding that probable cause existed.” *State v. Fawcett*, 884 N.W.2d 380, 384 (Minn. 2016) (quotation omitted). Appellate review “is limited to the information presented in the warrant application and

supporting affidavit.” *Id.* A district court’s factual findings are reviewed for clear error. *State v. Jackson*, 742 N.W.2d 163, 168 (Minn. 2007). Appellate courts afford a district court “great deference” when reviewing its probable-cause determination and do not engage in de novo review. *State v. Rochefort*, 631 N.W.2d 802, 804 (Minn. 2001). “[D]oubtful or marginal cases should be largely determined by the preference to be accorded to warrants.” *Fawcett*, 884 N.W.2d at 385 (quotation omitted).

Nexus

Cagle argues that the district court lacked a substantial basis to find probable cause to issue the first and second search warrants because a sufficient nexus did not exist between the property to be seized and searched and the suspected crime. We agree that a substantial basis did not exist to issue the second search warrant because the second search-warrant application did not contain sufficient information to establish a nexus between the suspected crime of child abuse or neglect and Cagle’s cellphone data.

The Minnesota Supreme Court applied the nexus principle in a case that involved a search of electronic devices owned by a man who was suspected of killing his wife. *State v. Holland*, 865 N.W.2d 666, 668-69, 672, 675-76 (Minn. 2015). Holland argued on appeal that the warrants that authorized the searches of electronic devices, which included “laptops, old cell phones, iPads, thumb drives, and hard drives,” lacked probable cause connecting him to his wife’s death or showing that the devices would contain evidence relevant to the crime. *Id.* at 675.

In *Holland*, the affidavits supporting the search warrants for the electronic devices described (1) the 911 call that Holland made reporting that his wife was in cardiac arrest,

unconscious, not breathing, and cold; (2) the medical examiner's report about Holland's wife's injuries; and (3) the medical examiner's conclusion that Holland's wife's death was caused by an assault by another human being. *Id.* at 668, 675. The affidavits connected Holland to the suspected crime because they stated that police saw several scratches on Holland's face and neck and that evidence discovered from previously searched cellphones and surveillance video contradicted Holland's statements to police. *Id.* at 674-75. Finally, the affidavits stated that Holland admitted to police that he searched the phrase "can you break your neck falling down the stairs" on his phone and iPad and claimed that he searched the phrase because his wife had a dream about becoming paralyzed. *Id.* at 675.

The supreme court determined that Holland's electronic devices "could have contained . . . search terms that would confirm or dispute Holland's statements about the research" and concluded "that there was a substantial basis to determine that probable cause existed and that the district court did not err in denying Holland's motion to suppress evidence obtained from [searching the electronic devices]." *Id.*

Unlike *Holland*, the second search-warrant application here did not contain sufficient information to establish a nexus between the suspected crime of child abuse or neglect and Cagle's cellphone data. While photographs of the child were taken at the park one day before the child's death, the affidavit for the second search warrant contained no information about whether Cagle's cellphone was used to take the photographs. The child had no signs of injury, and the child's mother told law enforcement that the child appeared fine after going to the park and had not suffered any noticeable injuries. Therefore, even if we assume that there were photographs on Cagle's phone, there was not a fair probability

that they would be evidence of a crime. And, although the warrant application stated that Cagle used a computer the night before the child's death, it said nothing about Cagle's general cellphone use or his cellphone use near the time of the child's death. Also, the second search-warrant application did not establish how or why certain cellphone data—e.g., text messages, emails, internet browsing history, or GPS information—would tend to be evidence in this case.

We recognize that the February 2 child-protection report could be evidence that the child suffered sexual or physical abuse. But, to establish a nexus between abuse and the child's death, "the proof must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time." *Souto*, 578 N.W.2d at 750 (quotation omitted). "When an activity is of an ongoing, protracted nature, the passage of time is less significant." *Id.* The child-protection report was dated three months before the child's death, and there was no information that would support an inference of ongoing abuse that would make the passage of time less significant. Also, the second search-warrant application included no information to establish that Cagle was a caregiver for the child at the time of the report or at the time of the child's death or that Cagle's cellphone might contain information about possible abuse.

The state argues that, viewing the totality of the circumstances, a sufficient nexus existed for the district court to find probable cause because a child was found dead and the police had no reasonable and obvious explanation for the death. According to the state, law enforcement had a reason to suspect either a deliberate act or neglect, and searching the data on Cagle's cellphone could help police "determine what happened to the child, to

piece together the circumstance[s] surrounding his death, to identify potential witnesses and suspects, to find motive, and to confirm or deny alibis.”

We are not persuaded, because the state’s argument is based on the fact that cellphones can hold a wealth of information about what a person is doing at any moment. While it is possible that Cagle’s cellphone data could reveal something about the child’s unexplained death, establishing probable cause requires more than a possibility. There must be a fair probability that the cellphone data will include evidence about the death. See *Yarbrough*, 841 N.W.2d at 622.

In holding that a warrant is generally required before searching cellphone data, the Supreme Court explained in *Riley* that the breadth of information potentially available in a cellphone increased the scope of the privacy interests at stake in a cellphone search. 134 S. Ct. at 2491. The court said:

Indeed, a cell phone search would typically expose to the government far *more* than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is.

Id. (emphasis in original). And, in rejecting the proposal that a warrantless search of an arrestee’s cellphone should be allowed whenever it is reasonable to believe that the phone contains evidence of the crime of arrest, the *Riley* court noted that “[i]t would be a particularly inexperienced or unimaginative law enforcement officer who could not come up with several reasons to suppose evidence of just about any crime could be found on a

cell phone.” *Id.* at 2492. Simply suggesting reasons to suppose that Cagle’s cellphone data could reveal something about the child’s death does not establish probable cause.

Particularity

The second search warrant was also invalid because it lacked particularity and resulted in an overbroad search. The Fourth Amendment requires that a search warrant particularly describe “the place to be searched, and the persons or things to be seized.” U.S. Const. amend. IV.

This requirement is intended to prevent “general searches” and to “assure the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search.” *Groh v. Ramirez*, 540 U.S. 551, 561, 124 S. Ct. 1284, 1292 (2004). “[T]he specific evil is the ‘general warrant’ abhorred by the colonists, and the problem is not that of intrusion per se, but of a general, exploratory rummaging in a person’s belongings.” *Coolidge v. New Hampshire*, 403 U.S. 443, 467, 91 S. Ct. 2022, 2038 (1971). A sufficiently particular warrant should leave nothing to the discretion of the officer executing the warrant. *Marron v. United States*, 275 U.S. 192, 196, 48 S. Ct. 74, 76 (1927). “By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications.” *Maryland v. Garrison*, 480 U.S. 79, 84, 107 S. Ct. 1013, 1016 (1987). A search executed pursuant to a warrant that fails to conform to the particularity requirement is unconstitutional. *Massachusetts v. Sheppard*, 468 U.S. 981, 988 n.5, 104 S. Ct. 3424, 3427 n.5 (1984).

“[W]hen determining whether a clause in a search warrant is sufficiently particular, the circumstances of the case must be considered, as well as the nature of the crime under investigation and whether a more precise description is possible under the circumstances.” *Fawcett*, 884 N.W.2d at 387. “The standard to be used in this determination is one of practical accuracy rather than technical nicety.” *State v. Miller*, 666 N.W.2d 703, 713 (Minn. 2003) (quotation omitted).

The second warrant authorized the search of Cagle’s cellphone for “Cellular Telephone Data” and listed 21 types of information found on cellphones. In its order denying Cagle’s motion to suppress, the district court found that it signed the second search warrant requesting permission to search Cagle’s cellphone “for information and phone activity during the dates of May 1st through May 2nd.” This finding is clearly erroneous because the second search warrant placed no temporal limitation on the data to be searched. There was also no subject-matter limitation. The warrant allowed police to search for anything on Cagle’s phone going back years, which resulted in law enforcement reading text messages from 2014. Under the circumstances of this case, it was practical for law enforcement to carefully tailor the search of the cellphone data to the purpose of finding evidence regarding the child’s death by more precisely describing the data to be searched and limiting the search to the time near the child’s death.

Fruit of the Poisonous Tree

Evidence obtained by searches and seizures in violation of the Constitution is inadmissible in state court. *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S. Ct. 1684, 1691 (1961). Evidence that is the fruit of illegal state action is inadmissible fruit of the poisonous tree.

Wong Sun v. United States, 371 U.S. 471, 488, 83 S. Ct. 407, 417 (1963). The evidence obtained under the second search warrant—Cagle’s text messages with M.K.E. going back to 2014—is inadmissible because it was obtained in violation of the Fourth Amendment. All evidence obtained under the third search warrant is inadmissible as fruit of the poisonous tree because the third search warrant was based on information illegally discovered under the second search warrant.

Citing *State v. Lindquist*, 869 N.W.2d 863 (Minn. 2015), the state argues that the good-faith exception to the exclusionary rule should apply. In *Lindquist*, the Minnesota Supreme Court held that “the exclusionary rule does not apply to violations of the Fourth Amendment . . . when law enforcement acts in objectively reasonable reliance on binding appellate precedent.” *Id.* at 876 (emphasis added). The state does not identify any “binding appellate precedent” that law enforcement reasonably relied on. Also, the state failed to raise this issue below, and appellate courts “generally will not decide issues which were not raised before the district court.” *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). The state forfeited the good-faith issue by not raising it at the omnibus hearing.

Because the evidence obtained under the second and third search warrants was inadmissible and Cagle’s convictions were based on this evidence, we reverse all of Cagle’s convictions and his sentence.

Reversed.