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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A18-1598**

State of Minnesota,  
Respondent,

vs.

Joel Andrew Matz,  
Appellant.

**Filed June 10, 2019  
Affirmed  
Ross, Judge**

Hennepin County District Court  
File No. 27-CR-17-16010

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Katlyn J. Lynch, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

John J. Leunig, Justin J. Duffy, The Law Office of John J. Leunig, Bloomington, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Johnson, Judge; and Klaphake, Judge.\*

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\* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

## **UNPUBLISHED OPINION**

**ROSS, Judge**

Joel Matz's wife told a mandatory reporter, who in turn told a child-protection worker, that Matz possessed images of naked preteen girls on his computer. Police obtained and executed a search warrant and found more than one hundred images of girls engaged in sexual conduct. Facing charges of possessing child pornography, Matz moved to suppress the evidence, arguing unsuccessfully that the warrant lacked probable cause because the application omitted the date when Matz's wife saw the images and did not describe the nude children as engaging in any sexual activity. We affirm because the totality of the circumstances in the warrant application supported probable cause to search at the time police applied for and executed the warrant.

### **FACTS**

The South Lake Minnetonka Police Department received a report on April 25, 2016, from Hennepin County Child Protection Services about suspected child pornography in Joel Matz's possession. Detective Mike O'Keefe prepared a search warrant application describing the following facts.

Matz's wife found "suspected child pornography" on Matz's computer. The images depicted "nude females that appeared to be 12 years of age." Matz's wife "believed the photos had been downloaded from the internet, and [were] not created by Mr. Matz." Matz's wife confronted him about the images, and Matz admitted to being addicted to pornography, but he denied being sexually interested in children. Matz erased the computer's hard drive. Matz's wife told a mandated reporter what she had seen, and the

mandated reporter told child protection. Child protection relayed the report to the police department on April 25, 2016. Detective O’Keefe contacted the child-protection investigator, who informed him that she had already met with the Matzes. She told the detective that Matz admitted his “pornography addiction to her, and also admitted to having erased his computer’s hard drive.”

The remainder of the warrant application detailed Detective O’Keefe’s training and experience in investigating child-pornography crimes. Detective O’Keefe stated that possessors of child pornography often store it on hard drives and keep it for repeated viewing. He also stated that he “has been successful at retrieving previously deleted data from computers and other electronic devices.”

The only specific date in the factual description of the warrant application was April 25, 2016, the date that child protection relayed the report to police. A district court judge issued a warrant on May 16, 2016, to search Matz’s home, including his computer, among other places. The officers executed the warrant that day, and the search revealed over one hundred electronic image files of child pornography. The state charged Matz with possessing child pornography.

Matz moved to suppress the evidence, arguing that the affidavit supporting the warrant was facially invalid because it did not specify when Matz’s wife saw the suspected child pornography and because its description of nude 12-year-old girls was insufficient to meet the definition of child pornography and therefore could not establish probable cause of criminal activity. The district court denied the motion. Matz agreed to a stipulated-facts bench trial under Minnesota Rule of Criminal Procedure 26.01, subdivision 4, and the

district court found him guilty of possessing child pornography. The district court convicted Matz and sentenced him to a 15-month term of imprisonment, stayed on probationary conditions.

Matz appeals.

## DECISION

Matz challenges the validity of the search warrant based on two omissions. He first emphasizes that the search warrant affidavit included no date when his wife saw the images of naked children on his computer. He then emphasizes that the description of the images included insufficient details about what they depicted to indicate that possessing them violates the child-pornography statute. Either omission, he maintains, defeats any finding of probable cause of a crime. We hold instead that neither one invalidates the warrant.

### I

Matz argues that the search warrant is invalid because its supporting affidavit did not specify the date that Matz's wife observed allegedly criminal activity. The United States and Minnesota Constitutions allow search warrants only on probable cause. U.S. Const. amend. IV; Minn. Const. art. I, § 10. We will not invalidate a search warrant after a probable-cause challenge if the issuing judge "had a 'substantial basis for . . . conclud[ing] that a search would uncover evidence of wrongdoing.'" *State v. Wiley*, 366 N.W.2d 265, 268 (Minn. 1985) (quoting *Illinois v. Gates*, 462 U.S. 213, 236, 103 S. Ct. 2317, 2331 (1983)). We review the warrant affidavit's components in their totality to decide whether it offers a substantial basis for a finding of probable cause. *Id.*

Matz’s challenge raises the concern of staleness. We will affirm an issuing judge’s probable cause determination if “the probable cause recited in the affidavit still exists at the time of execution of the warrant.” *State v. Yaritz*, 287 N.W.2d 13, 16 (Minn. 1979). That is, we must determine whether the information in the warrant application is too stale to permit a finding of probable cause to believe that evidence of a crime would be found at the time the warrant is executed. The likelihood that evidence will be found in a specific “place is a function not simply of watch and calendar but of variables that do not punch a clock.” *Id.* (quotation omitted). The character of the crime, the thing to be seized, and the place to be searched are all relevant considerations. *Id.* at 16–17. Child pornography is of enduring utility to its possessor such that courts can expect him to retain it for ongoing sexual gratification. *State v. Jannetta*, 355 N.W.2d 189, 194 (Minn. App. 1984), *review denied* (Minn. Jan. 14, 1985). This background puts Matz’s contention in context.

Matz contends that no warrant affidavit provides a substantial basis for finding probable cause if it fails to specify when an identified witness observed the events creating a suspicion of criminal activity. The law strongly disapproves of affidavits lacking any reference to time. *See State v. Harris*, 589 N.W.2d 782, 789 (Minn. 1999). But reviewing courts may infer the timing of events from the context of facts in the affidavit. *See id.* We can do so here.

The affidavit explains that police learned of the allegations from Matz’s wife as relayed through two mandatory reporters. The affidavit identifies the unidentified person to whom Matz’s wife made her report as a mandatory reporter, and any child-protection worker to whom this person relayed the report is also a mandatory reporter. *See Minn.*

Stat. § 626.556, subd. 3(1) (2018) (mandating that “a professional . . . engaged in the practice of the . . . social services” who knows of children being sexually abused must report the information). The mandatory report of the use of a minor in sexual performance must occur “immediately,” which is not more than 24 hours after learning of it. *Id.*, subds. 2(o)(11), 3(a), (e) (2018). This ties closely together the initial report by Matz’s wife and the detective’s May 16, 2016, affidavit and warrant application.

The affidavit implies that, in the short time between child protection’s receiving the report and child protection’s relaying it to police, Matz participated in a child-protection interview during which he announced that he is addicted to pornography and that, after the confrontation with his wife, he erased the computer’s hard drive. The nature of these events and the manner of their description strongly imply that they also had a very close temporal relationship with each other. The affidavit’s failure to pinpoint the date of the initial discovery and confrontation is therefore not fatal to the warrant’s validity. We add that the detective’s statements indicating that possessors of child pornography tend to retain the offending images for a long time and indicating his success in recovering even deleted images from computers broaden the length of the post-confrontation period during which evidence was likely to continue to exist on Matz’s computer. We hold that the absence of the specific date that Matz’s wife observed Matz’s images of 12-year-old girls does not invalidate the search warrant.

## II

We also will not invalidate the search warrant by virtue of the affidavit’s failure to portray the images in a more sexually detailed fashion beyond the description, “images of

nude females that appeared to be 12 years of age.” Matz accurately points out that the images had to depict sexual content, not mere nudity, to constitute illegal child pornography under the statute. *See* Minn. Stat. §§ 617.246, subd. 1, 617.247, subd. 4 (2016). But probable cause does not require a showing of criminal activity, only a showing of a probability of criminal activity. *Harris*, 589 N.W.2d at 790–91. The facts described in the affidavit easily establish a probability of criminal behavior. Matz responded to being confronted about the images by alluding to his addiction to “pornography” and then deleting the images. The totality of the circumstances described in the affidavit therefore strongly suggests that the nude images Matz possessed depicted sexual content. This meets the standard, showing a probability of criminal behavior.

Matz asks for a different outcome by relying heavily on *United States v. Battershell*, 457 F.3d 1048, 1051 (9th Cir. 2006). The Ninth Circuit federal decision in *Battershell* is not binding on us, as we are neither guided nor restrained by any courts other than the United States Supreme Court and the Minnesota Supreme Court in interpreting the Fourth Amendment. *See Citizens for a Balanced City v. Plymouth Congregational Church*, 672 N.W.2d 13, 20 (Minn. App. 2003). And *Battershell* is also readily distinguished from this case. It stands for the notion that the report of a photograph of a young female naked in a bathtub—with no hint of sexual content—may be insufficient to establish probable cause under a federal child-pornography statute. *Battershell* says nothing about our circumstance, where a man confronted with his possession of multiple images of nude, preteen girls immediately and implicitly acknowledges their pornographic nature.

**Affirmed.**