

IN THE SUPREME COURT OF OHIO
Supreme Court Case Number 13-0781

STATE OF OHIO

Appellee

v.

NICHOLAS CASTAGNOLA

Appellant

On Appeal from the Summit
County Court of Appeals
Ninth Appellate District
Nos. 26185, 26186

MERIT BRIEF OF APPELLEE
STATE OF OHIO

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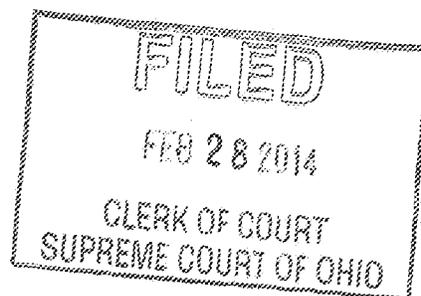
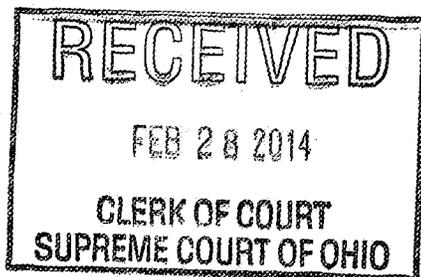


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STATEMENT OF FACTS

A jury found Nicholas Castagnola guilty two counts of retaliation, one count of criminal damaging, one count of vandalism, one count of criminal trespass, and one count of possession of criminal tools, in Cr 2010-07-1951, (hereinafter referred to as “the retaliation case”). Castagnola was also found guilty of ten counts of pandering sexually oriented matter involving a minor, in a separate case, CR 2010-08-2244, (hereinafter referred to as “the pandering case”). The child pandering case developed during the course of the investigation in the retaliation case.

During the retaliation case trial, David Maistros, a prosecutor and law director for the City of Twinsburg, averred that, in 2010, he was involved in an annual sweep to ferret out businesses selling alcohol to underage consumers involving eleven randomly selected establishments. (Tr. 19-20; 27). On April 24, 2010, Castagnola sold alcohol to two underage people during a controlled sale at one of these eleven establishments. (Tr. 21-22). As a result, Castagnola was charged. (Tr. 24).

Castagnola appeared for his arraignment *pro se*. (Tr. 24). Prosecutor Maistros spoke with Castagnola, provided him with discovery, and advised him of the penalties that he was facing. (Tr. 25-28). Prosecutor Maistros averred that, when he showed Castagnola the video surveillance of him selling the alcohol to the minors, Castagnola made disparaging comments about the Twinsburg Police Department. (Tr. 28-31).

Prosecutor Maistros averred that Castagnola next appeared in court on June 14, 2010. (Tr. 39). At that time, the judge denied all of Castagnola’s pending motions. (Tr. 39). The following morning, June 15, 2010, Prosecutor Maistros discovered that, outside his home, someone had egged his car and his wife’s car and removed and destroyed the side mirror from his wife’s car. (Tr. 40-41).

Prosecutor Maistros testified that, approximately one week later, he agreed to handle a speeding case for the Reminderville Prosecutor involving a defendant named Nick Behr. (Tr. 49-50). When Prosecutor Maistros reviewed Nick Behr's file, he noticed that it contained all the same motions Castagnola had filed in his case and when Behr appeared in court on June 21, 2010, he was accompanied by Mr. Castagnola, who is not an attorney. (Tr. 51-52). Prosecutor Maistros dismissed the charges against Behr that day. (Tr. 53).

Prosecutor Maistros testified that while he subsequently reviewed police reports, he learned that the City of Twinsburg Police Department had stopped four individuals, one of whom was Castagnola, in possession of dozens of eggs. (Tr. 45; 63-67). Maistros advised the investigating officer that someone had recently egged and damaged his personal vehicles. (Tr. 45-47).

One of the person involved in the egging, Zachary Downer, testified that, in the early morning hours of June 15, 2010, he and Castagnola egged Prosecutor Maistros' vehicles outside the prosecutor's home and Downer destroyed a mirror on one of the cars. (Tr. 97-103; 111). Downer averred that Castagnola relayed to him he did not like Maistros because Maistros was prosecuting him and because of this he was going to egg the prosecutor's house. (Tr. 84-88). To that end, Downer said that Castagnola purchased eggs, gloves, and bleach which were placed in Castagnola's vehicle, in which Castagnola also had a bat in the trunk. (Tr. 88-92; 133-134).

Downer testified that armed with the eggs, he and Castagnola first proceeded to Castagnola's residence, where Castagnola obtained Maistros' address online. (Tr. 87; 92-93). Afterwards, Castagnola entered the prosecutor's address in the GPS system and drove to Maistros' residence. (Tr. 91-95; 134-135). After verifying the prosecutor's address, the two men egged the vehicles and Downer damaged the mirror on one of the vehicles. (Tr. 97-103).

Downer further averred that, after this incident, both Nick Behr and Mr. Castagnola told him that the two of them egged a Reminderville police cruiser because of a speeding ticket. (Tr. 104). Downer said he did not participate in the egging of the police cruiser. (Tr. 104).

Nick Behr also testified at trial. Mr. Behr averred that, in May of 2010, he received a speeding ticket from the Reminderville Police Department, and, with the assistance of Castagnola filed a number of pretrial motions in the case. (Tr. 144-148). Castagnola was in court with Behr when Prosecutor Maistros dismissed the speeding case. (Tr. 149).

Nick Behr testified that, because of this speeding ticket, Castagnola drove him, and two other men, to the city of Reminderville Police Department in the middle of the night. (Tr. 152; 157; 161; 171). En route to the police department, the men purchased eggs. (Tr. 154; 193). He noted that there was also a baseball bat in Castagnola's trunk. (Tr. 154). When the men arrived at the Reminderville police station, one of the men egged the police car while Behr struck the cruiser with the baseball bat. (Tr. 161-167; 193). When they ran out of eggs, Castagnola drove them home. (Tr. 170).

Twinsburg Officer Ternosky testified that, On June 27, 2010, an informant whom he identified as "Source May" provided him with text messages from Castagnola wherein Castagnola confessed to his involvement in the retaliation incident at the home of Prosecutor Maistros. (Tr. 227-235). Officer Ternosky testified that, the following day, Source May went to Castagnola's house wearing a wire. (Tr. 237; 248-249). The State played a recording of the conversation, during which Castagnola can be heard relaying information about the incidents involving the prosecutor's vehicles and the police cruiser and his reason for committing both crimes. (Tr. 238-256).

Sergeant Kreiger averred that, after he heard the recorded conversation between Source May and Castagnola, he contacted the Reminderville Chief of Police. (Tr. 256-257). The chief confirmed that a cruiser had sustained damage. (Tr. 256-257). After this, law enforcement officers obtained and executed search warrants. (Tr. 257).

While executing a search warrant in the retaliation case, law enforcement discovered child pornography on a computer that was removed from Castagnola's home. Castagnola was charged with ten counts of pandering sexually oriented matter involving a minor. In that case, Castagnola moved to suppress the evidence obtained from his home computer. After a hearing on the motion, the court denied Castagnola's motion to suppress and the pandering case proceeded to a bench trial.

At trial, a computer analyst, Natasha Branam, testified that, while she was searching the computer for evidence in the retaliation case, she found evidence of child pornography, on a computer that was seized from the family room of the residence that Castagnola shared with his mother, brother, and, for a short time, his grandfather. (Tr. 29-35; 91). Branam averred that there were three users within the computer: "Nick," "Debbie," and "Nick C" and that all three of these users had passwords. (Tr. 107-112). Branam was able to determine the password for the user "Debbie" however, despite six trillion attempts her computer could not decipher the strong passwords associated with the "Nick" and "Nick C." users. (Tr. 107-118).

Branam testified that, with regard to the user "Nick," which was created on August 2, 2008 and last accessed on June 17, 2010, she discovered five videos and five images of pornographic material involving children. (Tr. 121-133). Within the "Nick" user, Branam also found a school paper for Castagnola dated April 8, 2010. (Tr. 158). There were no documents for anyone other than Castagnola within the "Nick" user. (Tr. 159). On June 18, 2010, the

settings for users "Nick" and "Debbie" were changed, rendering the two user profiles inaccessible; however, the user Nick C. was unchanged. (Tr. 281-285).

Debbie Castagnola, the mother of the defendant, testified that everyone in the home and "just about everybody in the neighborhood" had access to the computer in the family room of their home. (Tr. 221). However, she acknowledged that only she and Nicholas had a user name and password. (Tr. 221-222; 233).

Ms. Castagnola averred that she knew the password assigned to the user "Nick." (Tr. 223). Ms. Castagnola further stated that she had accessed the computer using the Nick user and password and downloaded things. (Tr. 223-226). Ms. Castagnola also said that, on approximately twelve occasions, she logged into the computer under the "Nick" user and password and reviewed the internet history. (Tr. 223-226). She said that she never saw any pornographic material. (Tr. 223-226). Ms. Castagnola did acknowledge; however, that she did not search within the file folders contained within the "Nick" user. (Tr. 227).

Castagnola contends that the affidavit for the search warrant in the retaliation case, which gave rise to the pandering case, did not establish probable cause and further argues that a general exploratory search for evidence contained within a computer does not meet the particularity requirement.

PROPOSITION OF LAW I

In Determining Whether An Affidavit Is Sufficient To Establish Probable Cause For The Issuance Of A Search Warrant, The Inquiry Is Limited To The Four Corners Of The Affidavit, Or Testimony Taken By The Magistrate Under Oath, And Cannot Be Based On Inferences Drawn By The Affiant Unless Those Inferences Were Fairly Communicated To The Issuing Magistrate.

LAW AND ARGUMENT

Castagnola argues that the trial court erred in denying his motion to suppress evidence obtained from computers seized during the execution of a search warrant because, he contends that the four corners of the affidavit do not establish probable cause. The State disagrees.

“A warrant shall issue on [] an affidavit * * * sworn to before a judge of a court of record” once the judge “is satisfied that probable cause for the search exists.” Crim.R. 41(C)(1)(2). When determining whether there is sufficient evidence of probable cause in an affidavit submitted in support of a search warrant, “[t]he task of the issuing [judge] is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the ‘veracity’ and ‘basis of knowledge’ of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.” *State v. George*, 45 Ohio St.3d 325 (1989), paragraph one of the syllabus, quoting *Illinois v. Gates*, 462 U.S. 213, 238-239 (1983). “[T]he duty of a reviewing court is simply to ensure that the [judge] had a substantial basis for concluding that probable cause existed.” *George* at paragraph two of the syllabus. Great deference should be afforded to the issuing judge’s probable cause determination, “and doubtful or marginal cases in this area should be resolved in favor of upholding the warrant.” *Id.*

In this case, the issuing judge based her probable cause determination strictly upon the four corners of the affidavit submitted in support of the warrant. A review of the affidavit,

shows that the affiant, Detective Mark Kreiger averred that, at Mr. Castagnola's residence there were: "Records and documents either stored on computers, ledgers, or any other electronic recording device to include hard drives and external portable hard drives, cell phones, printers, storage devices of any kind, printed out copies of text messages or emails, cameras, video recorders or any photo imaging devices and their storage media to include tapes, compact discs, or flash drives." Detective Kreiger stated that the items would be used as evidence in the prosecution of the crimes of Retaliation, Criminal Trespassing, Criminal Damaging, and Possession of Criminal Tools.

Additionally, in the Affidavit, Detective Kreiger averred that he was made aware of approximately twenty-five incidents of criminal mischief that occurred in the area between Twinsburg and Reminderville within the weeks that had elapsed prior to a confidential informant providing law enforcement with information about these incidents. The detective explained that this confidential informant advised law enforcement that Castagnola was involved in the criminal mischief incidents and provided the police with the name of another informant identified as "Source May" who was willing to work with the police.

Detective Kreiger averred in the affidavit that Source May showed the police ten text messages from Mr. Castagnola each of which pointed to Mr. Castagnola's involvement in the criminal mischief. Detective Kreiger quoted each of these ten text messages in his affidavit. Detective Kreiger further averred that Source May went to Mr. Castagnola's home, wearing a wire, and had a conversation with Mr. Castagnola, which was recorded. Detective Kreiger averred that during the conversation, Mr. Castagnola admitted to damaging several vehicles, including the law director's vehicle.

Also in the affidavit, Detective Kreiger stated that Mr. Castagnola said that “he found [the law director] online in the clerk of courts” as well as the location of the law director’s law office. Detective Kreiger also stated that Mr. Castagnola said he had gone “through [the law director’s] mailbox to confirm that [he] did live at the address he found for him online.”

The trial court found that the affidavit established that probable cause existed for the seizure of Mr. Castagnola’s computer. The trial court found that the two references in the affidavit to “online” activities to ascertain the prosecutor’s address provided the issuing judge with a basis for concluding that there was probable cause to justify the search and seizure of the computers. The trial court further held that the issuing court could have drawn a reasonable inference amounting to a fair probability that the cell phone data, including text messages, which created a suspicion of criminal activity, could have been backed up or synchronized to computer files. This information provided the issuing court with a substantial basis for concluding that there was a fair probability that contraband or evidence of a crime was in the seized computers.

Castagnola argues that the fact that one form of technology, such as a text message sent from a cellular phone, which contains evidence of an individual’s wrongdoing, does not equate to the conclusion that another form of technology, such as computer file saved in a computer, will contain similar evidence. Castagnola relies upon *State v. Eash*, 2d Dist. No. 03-CA-34, 2005-Ohio-3749.

In *Eash*, the police obtained a warrant to seize Eash’s computer and other items after several minor females reported that he had propositioned them from his vehicle and/or assaulted them in his car. The officer who provided the affidavit in support of the *Eash* search warrant later testified that he sought to seize and search Eash’s computer based on his personal experience in law enforcement and recent consultation with a member of the police department’s

Child Abuse Response Team. *Eash* at ¶ 15. The other officer explained that suspects who prey upon children sometimes hide incriminating evidence on computers. However, the *Eash* affidavit did not provide any “causal link” between Eash’s computer and the aforementioned reports from the minor females. *Id.* at ¶ 16. In light of this, the Second District Court of Appeals found that the State’s error in failing to establish any causal link in the affidavit was fatal to the warrant because the affidavit did not establish probable cause for the seizure of the computer. *Id.*

The instant case is distinguishable from *Eash*. Here, the affiant averred that Mr. Castagnola had “found [the law director] online” and had gone “through [the law director’s] mailbox to confirm that [he] did live at the address [Mr. Castagnola] found for him online.” The affidavit contains averments from which the issuing judge could conclude that Mr. Castagnola used the internet to locate the law director’s personal residence. Therefore, unlike the affidavit in *Eash*, the affidavit in this case established a causal link between Mr. Castagnola’s alleged criminal activities and the item seized.

As a matter of common sense, the issuing judge could have determined that Mr. Castagnola used a computer to conduct the foregoing online searches such that the computer would contain evidence of his criminal activities. See *George*, 45 Ohio St.3d at paragraph one of the syllabus, quoting *Gates*, 462 U.S. at 238-239. Detective Kreiger’s affidavit gave the issuing judge a substantial basis upon which to find that there was a fair probability that any computer or device capable of accessing the internet in Mr. Castagnola’s home contained evidence of his crimes. Consequently, the warrant was based upon probable cause.

Next, Castagnola argues that the trial court erred by upholding the warrant because some of the information contained in Detective Kreiger’s affidavit was untrue, to wit: the officer’s

assertion that Castagnola told Source May during the recorded conversation that he had searched for the law director's address "online."

Suppression is "an appropriate remedy where: (1) '* * * [the] judge * * * was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth * * *.' " *George*, 45 Ohio St.3d at 331, quoting *U.S. v. Leon*, 468 U.S. 897, 923 (1984). "[T]o successfully attack the veracity of a facially sufficient search warrant affidavit, a defendant must show by a preponderance of the evidence that the affiant made a false statement, either 'intentionally, or with reckless disregard for the truth.' " (Internal citations and quotations omitted.) *State v. Willan*, 9th Dist. No. 24894, 2011-Ohio-6603, ¶ 95. "Reckless disregard means that the affiant had serious doubts of an allegation's truth. Omissions count as false statements if designed to mislead, or * * * made in reckless disregard of whether they would mislead, the [issuing judge]." (Internal quotations and citations omitted.) *State v. Ruffin*, 9th Dist. No. 25916, 2012-Ohio-1330, ¶ 6, quoting *State v. Waddy*, 63 Ohio St.3d 424, 441 (1992).

Mr. Castagnola argues that Detective Kreiger's averments that Castagnola searched for information "online" were untrue because, during the recorded conversation with Source May, Castagnola never said he found the law director's address "online". In support his attack on the veracity of the affidavit, Castagnola points to the recorded conversation as well as Detective Krieger's testimony at the suppression hearing.

The trial court reviewed the recording between Castagnola and Source May when it issued its decision and the trial court judge acknowledged that Mr. Castagnola never used the word "online" during his conversation with Source May. The trial court determined, however, that it was reasonable for Detective Kreiger to interpret the substance of what was said and to

paraphrase the same in his affidavit by saying that Castagnola searched online for the law director. Thus, the trial court found that there was no effort made by the detective to mislead the issuing judge. The court further found that there was no evidence that the affiant gave the issuing judge information that he knew or should have known to be false. Therefore, the trial court found that the detective was acting in good faith. The State agrees.

On appeal, the Ninth District Court of Appeals noted: “Detective Kreiger testified that, given Mr. Castagnola’s statements to Source May and the text message he sent, it was his impression that Mr. Castagnola had searched online to find the law director. In two of his text messages, Mr. Castagnola wrote: (1) ‘Found this address and went to his house * * *’ and (2) ‘How many David M. Maistros’ could there be who are attorneys.’ In the recorded conversation between Mr. Castagnola and Source May, Mr. Castagnola never stated that he found the law director’s home ‘online,’ but did state that he ultimately had to find the address through the clerk of courts because the address was unlisted. Mr. Castagnola specified that he was able to find the law director’s address through the clerk of courts because the law director had received a traffic citation at one point. Detective Kreiger testified that he believed Mr. Castagnola had searched online for the law director’s address, so he paraphrased Mr. Castagnola’s statements in the affidavit. He specified that Mr. Castagnola’s initial text message questioning how many attorneys there could be with the same name as the law director led him to believe that Mr. Castagnola was conducting his search in an online capacity. That belief was bolstered by Mr. Castagnola’s statements to Source May that he found the correct address through a search of the clerk of courts’ records.” *State v. Castagnola*, Ninth District Nos. 26185, 26186, 2013-Ohio-1215, at ¶ 17.

A review of the record shows that, Detective Kreiger did not quote Mr. Castagnola's actual statements to Source May in his affidavit; instead, the detective provided the court with his understanding of the conversation. Detective Kreiger was not reckless in concluding that Mr. Castagnola found the law director's address "online." There was no evidence presented to show that Detective Kreiger's averments in the affidavit were made with a reckless disregard for the truth. Therefore, his affidavit did not mislead the judge. See *George*, 45 Ohio St.3d at 331, quoting *Leon*, 468 U.S. at 923.

Mr. Castagnola failed to demonstrate that Detective Kreiger intentionally or recklessly included false statements in his affidavit. Consequently, both the trial court and the court of appeals correctly concluded that the warrant was supported by probable cause. Mr. Castagnola's First Proposition of Law should be overruled.

PROPOSITION OF LAW II

A General Exploratory Search For Evidence On A Computer Does Not Meet The Particularity Requirement Of The Fourth Amendment. An Affidavit Search Warrant Authorizing The Seizure And Search Of A Computer Must Describe With Particularity The Type Of Items To Be Sought, Supported By Probable Cause To Believe That Those Items Will Be Found On The Computer.

LAW AND ARGUMENT

In his Second Proposition of Law, Castagnola argues that an affidavit and a search warrant authorizing the seizure and search of a computer must describe with particularity the type of items sought. The State notes that Castagnola did not challenge the particularity requirement of the warrant in either the trial court or the court of appeals. Instead, the record shows that in the courts below he argued that the affidavit for the search warrant was not supported by probable cause. Castagnola did not argue that the warrant was impermissibly broad or that it failed to describe the items sought with particularity. As such, the State contends this issue has been improvidently certified and accepted.

Even assuming that this issue has been properly preserved and addressed by the courts below, Castagnola's Second Proposition of Law still must be overruled because the affidavit and warrant did describe with particularity the items to be sought. The affidavit and warrant identify the offenses of retaliation, criminal trespassing, criminal damaging, and possession of criminal tools, identifies the items of property for which officers are to search, and indicates that the listed items are connected with the aforementioned offenses. Therefore, the warrant can reasonably read to restrict seizure to items connected with retaliation, criminal trespassing, criminal damaging, and possession of criminal tools. As such, the warrant in this case informed law enforcement officers that they were to search only for items connected to the crimes of retaliation, criminal trespassing, criminal damaging. Since the warrant was limited to particular

crimes, the warrant did not authorize a broad, wide-reaching search such that would improperly permit officers to search for anything. The warrant in this case authorizes officers to search the premises only for “records and documents stored on computers, ledgers, or any other electronic recording device to include hard drives and external portable hard drives, cell phones, printers, storage devices of any kind, printed out copies of text messages or emails, cameras, video recorders or any photo imaging devices and their storage media to include tapes, compact discs, or flash drives.”

“In search and seizure cases where a warrant is involved, the requisite specificity necessary therein usually varies with the nature of the items to be seized. Where, as here, the items are evidence or instrumentalities of a crime, it appears that the key inquiry is whether the warrants could reasonably have described the items more precisely than they did.” *State v. Benner*, 40 Ohio St.3d 301, 307, 533 N.E.2d 701 (1988), citing LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* 104-105, Section 4.6(d) (1978), and abrogated on other grounds by *Horton v. California* (1990), 496 U.S. 128, 110 S.Ct. 2301, 110 L.Ed.2d 112. Under the circumstances in this case, the warrant could not reasonably have described the items more precisely. The search was limited to items related to the specified offenses of retaliation, criminal trespassing, criminal damaging, and possession of criminal tools, each of which are defined by statute. As such, contrary to Castagnola’s contentions otherwise, the search warrant in this case did not authorize an intrusion into unrelated matters.

The warrant in this case is sufficiently particular. The actions of the computer forensic examiner, Ms. Branam, demonstrate that the warrant was sufficiently particular. Ms. Branam averred that the computers were seized in relation to the offenses of menacing, threatening, and intimidation and noted that law enforcement was looking for any evidence of intimidation of

David Maistros. Ms. Branam explained that, in light of this, when she received the computers she was “doing searches for his name * * * and anything associated with that.” (Tr. 91). Ms. Branam stated that, while she was searching for that evidence and the “My Image tab” populated, images of child pornography popped up. (Tr. 92). Ms. Branam stopped her analysis and called a detective to advise that they would need an additional search warrant for child pornography. (Tr. 92). Ms. Branam only resumed her forensic computer search on July 14, 2010, after she was presented with a copy of a search warrant for the child pornography. (Tr. 92). Ms. Branam explained that, at that time, she “proceeded to do both the intimidation and child porn, simultaneously looking for Dave Maistros, anything related to that, and any images of child pornography.” (Tr. 92).

Castagnola is incorrect in his contention that the warrant did not provide law enforcement guidance as to what to search and that the warrant was so broad that it included items that should not have been seized. Ms. Branam testified that she was looking for evidence of intimidation of Mr. Maistros when the child pornography popped up. She said that, as soon as the child pornography popped up, she immediately stopped searching the computer. Ms. Branam resumed her search for evidence of the intimidation only after officers also obtained a warrant for the child pornography. Thus, the warrant in this case was sufficiently particular.

Next, Castagnola argues, for the first time, that the search warrant was invalid because it did contain any procedure or limitation as to how law enforcement was to search the computer. Castagnola contends that Ms. Branam conducted an overly expansive search by opening the “My images” tab on the computer and states that there was no explanation as to why evidence of intimidation of the law director would be found on any images on his computer. The State notes that the evidence showed that Castagnola looked at images on the internet to identify Maistros’

address and sent text messages, all of which can be saved as images rather than text files. It is reasonable that these images could have been saved on the computer. Additionally, since computer files can be re-labeled to disguise their contents, opening the “My Image” tab did not exceed the scope of the search.

Moreover, the overwhelming weight of authority shows that a search warrant does not need to contain any sort of search protocol, methodology, or other strategy restricting a computer search to specific programs or terms in order to satisfy the particularity requirement. *State v. McCrory*, 6th Dist. Nos. WD-09-074, WD-09-090, 2011-Ohio-546, ¶49. “See, e.g., *United States v. Blake* (Feb. 25, 2010), E.D.Cal. No. 1:08-cr-0284 OWW (“A pinpoint computer search restricting the search to a particular program or specific search terms is unrealistic”); *United States v. Bowen* (S.D.N.Y.2010), 689 F.Supp.2d 675, 681, quoting *United States v. Graziano* (E.D.N.Y.2008), 558 F.Supp.2d 304, 315 (“To limit the government's computer search methodology ex ante would ‘give criminals the ability to evade law enforcement scrutiny simply by utilizing coded terms in their files or documents’ or other creative data concealment techniques”); *United States v. Burgess* (C.A.10, 2009), 576 F.3d 1078, 1093 (“It is unrealistic to expect a warrant to prospectively restrict the scope of a search by directory, filename or extension or to attempt to structure search methods—that process must remain dynamic”); *State v. Balzum* (Apr. 14, 2009), Minn.App. No. A08-0439 (Rejecting defendant's argument that a warrant authorizing the search of a computer should contain a search strategy); *United States v. Cartier* (C.A.8, 2008), 543 F.3d 442, 448 (“[W]e decline to make a blanket finding that the absence of a search methodology or strategy renders a search warrant invalid per se”); *United States v. Vilar* (Apr. 4, 2007), S.D.N.Y. No. S305CR621KMK (“[A] rule that does not require a computer search protocol avoids the courts getting into the business of telling investigators how

to conduct a lawful investigation, something the courts are ill-equipped to do”); *United States v. Kaechele* (E.D.Mich.2006), 466 F.Supp.2d 868, 888 (“To require a pinpointed computer search, restricting the search to an email program or to specific search terms, would likely have failed to cast a sufficiently wide net to capture the evidence sought”); *United States v. Shinderman* (Mar. 2, 2006), D.Me. No. CRIM. 05-67-P-H (“[T]here is no Fourth Amendment requirement that search warrants spell out the parameters of computer searches where the warrant provides particularity as to what is being searched for”); *United States v. Brooks* (C.A.10, 2005), 427 F.3d 1246, 1251 (“At the outset, we disagree with Brooks that the government was required to describe its specific search methodology”); *United States v. Triumph Capital Group, Inc., supra*, 211 F.R.D. at 47 (“Computer searches * * * cannot be limited to precise, specific steps or only one permissible method. Directories and files can be encrypted, hidden or misleadingly titled, stored in unusual formats, and commingled with unrelated and innocuous files that have no relation to the crimes under investigation. Descriptive file names or file extensions such as ‘.jpg’ cannot be relied on to determine the type of file because a computer user can save a file with any name or extension he chooses”); *United States v. Upham, supra*, 168 F.3d at 537 (“The * * * warrant did not prescribe methods of recovery or tests to be performed, but warrants rarely do so. The warrant process is primarily concerned with identifying what may be searched or seized—not how—and whether there is sufficient cause for the invasion of privacy thus entailed”). (Emphasis sic.)” *Id.*

In this case, the warrant specifically described the objects of the search which were limited to the crimes being investigated and were consistent with the probable cause established by the supporting affidavit. The seized computer storage media were capable of storing the items sought. Nothing in the record suggests that the police knew ahead of time precisely where

or on which devices those items were stored. Therefore, a forensic analysis needed to be performed to determine on which electronic device the text messages, maps, or other evidence relating to the incident involving the law director were stored. Under these circumstances, the warrant was not overbroad in authorizing the seizure and subsequent search and the warrant was not lacking in particularity. Additionally, the computer forensic expert's search was not overbroad as she ceased her search immediately upon her inadvertent discovery of child pornography and did not resume her search until a warrant for the material was obtained. The actions of the computer forensic expert comported with the requirements set forth in *United States v. Carey*, 172 F.3d 1268, 1275 n. 7 (10th Cir .1999), wherein the court noted that, when officers come across relevant computer files intermingled with irrelevant computer files, they "may seal or hold" the computer pending "approval by a magistrate of the conditions and limitations on a further search" of the computer. *Id.*

In light of the foregoing, Castagnola's Second Proposition of Law must be overruled.

CONCLUSION

Pursuant to the argument offered, the State respectfully contends that the judgment of the Ninth District Court of Appeals should be affirmed.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read 'Heaven DiMartino', written over a horizontal line.

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PROOF OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief was sent by regular U.S. Mail to Attorney Russell S. Bensing, 1350 Standard Building, 1370 Ontario Street, Cleveland, Ohio 44113, on the 27th day of February, 2014.

A handwritten signature in black ink, appearing to read "Heaven Dimartino", with a long horizontal line extending to the right.

HEAVEN DIMARTINO
Assistant Prosecuting Attorney
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APPENDIX

OHIO RULES OF CRIMINAL PROCEDURE

RULE 41. Search and Seizure

(A) Authority to issue warrant. A search warrant authorized by this rule may be issued by a judge of a court of record to search and seize property located within the court's territorial jurisdiction, upon the request of a prosecuting attorney or a law enforcement officer.

(B) Property which may be seized with a warrant. A warrant may be issued under this rule to search for and seize any: (1) evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) weapons or other things by means of which a crime has been committed or reasonably appears about to be committed.

(C) Issuance and contents.

(1) A warrant shall issue on either an affidavit or affidavits sworn to before a judge of a court of record or an affidavit or affidavits communicated to the judge by reliable electronic means establishing the grounds for issuing the warrant. The affidavit shall name or describe the person to be searched or particularly describe the place to be searched, name or describe the property to be searched for and seized, state substantially the offense in relation thereto, and state the factual basis for the affiant's belief that such property is there located. If the affidavit is provided by reliable electronic means, the applicant communicating the affidavit shall be placed under oath and shall swear to or affirm the affidavit communicated.

(2) If the judge is satisfied that probable cause for the search exists, the judge shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant may be issued to the requesting prosecuting attorney or other law enforcement officer through reliable electronic means. The finding of probable cause may be based upon hearsay in whole or in part, provided there is a substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished. Before ruling on a request for a warrant, the judge may require the affiant to appear personally, and may examine under oath the affiant and any witnesses the affiant may produce. Such testimony shall be admissible at a hearing on a motion to suppress if taken down by a court reporter or recording equipment, transcribed, and made part of the affidavit. The warrant shall be directed to a law enforcement officer. It shall command the officer to search, within three days, the person or place named for the property specified. The warrant shall be served in the daytime, unless the issuing court, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. The warrant shall designate a judge to whom it shall be returned.

(D) Execution and return with inventory. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken, or shall leave the copy and receipt at the place from

which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The judge shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant. Property seized under a warrant shall be kept for use as evidence by the court which issued the warrant or by the law enforcement agency which executed the warrant.

(E) Return of papers to clerk. The judge before whom the warrant is returned shall attach to the warrant a copy of the return, inventory, and all other papers in connection therewith and shall file them with the clerk.

(F) Definition of property and daytime. The term "property" is used in this rule to include documents, books, papers and any other tangible objects. The term "daytime" is used in this rule to mean the hours from 7:00 a.m. to 8:00 p.m.

[Effective: July 1, 1973; amended effective July 1, 2010.]