ORIGINAL

IN THE SUPREME COURT
OF THE STATE OF OHIO

CASE NO. 2013-0781

STATE OF OHIO, Plaintiff-Appellee, v. NICHOLAS CASTAGNOLA, Defendant-Appellant.	}	On Appeal from the Summit County Court of Appeals, Ninth Judicial District Court of Appeals Case Nos. 26185, 26186

REPLY BRIEF OF APPELLANT NICHOLAS CASTAGNOLA

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ARGUMENT

In addition to those arguments Mr. Castagnola set forth in his Merit Brief, he now sets forth the following in reply to the Appellee State of Ohio's Brief.

IN REPLY TO PROPOSITION OF LAW NO. 1: 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.

This case centers a single word. In his affidavit for the warrant seeking seizure of Mr. Castagnola's computers, Detective Kreiger alleged in two places that Mr. Castagnola said he found the address of the prosecutor whose car he egged "online"; according to the detective, allegation Mr. Castagnola related this to "Source May" in a conversation the police monitored. The State devotes the first four pages of its argument to urging this Court to find, as did the courts below, that these two references were sufficient to establish probable cause for the computer's seizure.

That argument suffers from the fact that Mr. Castagnola never said anything of the sort, as the State concedes: the word "online" does not appear on the recording.

The State insists that this does not matter, first citing the trial court's finding that "it was reasonable for Detective Kreiger to interpret the substance of what was said and to paraphrase the same in his affidavit." Brief at 11. The appellate court below came to a similar conclusion: "Detective Kreiger testified that he believed Mr. Castagnola had searched online for the director's address, so he paraphrased Mr. Castagnola's statements in the affidavit." *State v. Castagnola,* 9th Dist. No. 26185, 26186, 2013-Ohio-1215, ¶17. The State concludes its

argument here with the same claim made by the appellate court: "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." Brief at 12; compare *Castagnola* at ¶18.

The first problem with this argument is that it is wrong. A plain reading of the affidavit clearly indicates Detective Kreiger was not paraphrasing, he was quoting: "Castagnola then *says* that he found Maistros online" and "Castagnola *said* that he also found that Maistros [sic] law offices were in Chagrin Falls and he went through Maistros's mailbox to confirm that Maistros did live at the address he found for him online."

The second problem is that whatever Detective Kreiger may have surmised about the search, it was not conveyed to the magistrate as an interpretation, but as a fact. As noted in Mr. Castagnola's Merit Brief, this usurps the role of the magistrate; it is the magistrate, not the affiant, who is supposed to make inferences from the facts to determine whether probable cause for a search exists.

Finally, even assuming that Detective Kreiger was "paraphrasing" and the magistrate understood him to be doing so, this would not save the search. Completely absent from the affidavit is any evidence of the remaining requirements for probable cause: namely, that Mr. Castagnola used *his* computer in *his* house to make the search, and that evidence of that search would still be present on the computer.

The State seeks final sanctuary in *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), arguing that "Detective Krieger was not reckless in concluding that Mr. Castagnola found the law director's address 'online,'" Brief at 12. But that misses the point: the

question is not whether Detective Krieger was reckless in making his interpretation of what Mr. Castagnola said, but whether he was reckless in telling the magistrate that this was a fact, rather than his interpretation. More broadly, the State asserts that "there was no evidence that the affiant gave the issuing judge information that he knew or should have known to be false." Brief at 11. Of course there was evidence of that: Detective Krieger had monitored the conversation, and the recording of it was easily available to him. Notwithstanding the fact that it is indisputable that Mr. Castagnola never said the word "online," that is the word that Detective Krieger attributed to him.

More importantly, in this context, the State's reliance on a *Franks* analysis, where we debate whether the affiant had knowledge of the falsity of an allegation or was "reckless" in that regard, is misplaced. Whatever might be said of *Franks,* it surely cannot stand for the proposition that where the only factual allegation in a search warrant affidavit which provides probable cause is demonstrably false, we can pretend that it is true.

That is precisely the situation here. Even if Mr. Castagnola had said that he found the address "online," that would not have sufficed to establish probable cause to believe he did so on his home computer, and that the computer would still contain evidence of it. But he did not say that, and excising that word from the affidavit leaves it barren of anything remotely constituting probable cause for the search and seizure of Mr. Castagnola's computer.

IN REPLY TO PROPOSITION OF LAW NO. 2: A general exploratory search for evidence on a computer does not meet the particularity requirement of the Fourth Amendment. An affidavit and 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.

The State begins its argument here by contending that "Castagnola did not challenge the particularity requirement of the warrant in either the trial court or courts of appeals," and thus has waived the issue. Brief at 13. This assertion is not further developed and is unsupported by any citation to case law, and for good reason: Mr. Castagnola raised the particularity issue in both courts. This dialogue with the trial court at the hearing on the motion to suppress is illuminative on this point:

> THE COURT: I am trying to understand what would be the logical outlines, if you will, of the contention that you make. Because what I have not yet gleaned, not having read the cases that you cite, is whether those cases stand for the proposition that in order for the police to conduct a search and/or seize evidence from a house they have to have particular knowledge of the contents, things, information, and so forth that they may encounter. I mean, how would they ever have such knowledge?
>
> MR. BENSING: Well, I think that's addressed by the Fourth Amendment which requires the warrant to particularly set -- specifically set forth the items to be searched and seized.

(T.p. Suppression Hearing at 15).

The State next contends that the warrant "did describe with particularity the items to be sought," because "it identif[ied] 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." Brief at 13. To be sure, the warrant did indeed identify the offenses and list items to be seized. But there was no connection between the two: not a clue was offered as to how or where evidence of the named offenses would be found on the computers, let alone the "cameras, video recorders, or any photo imaging devices," or what that evidence might be. As the court found in *United States v. Buck*, 813 F.2d 588, 592 (2d Cir. 1987), a warrant which "only described the

crimes . . . gave no limitation whatsoever on the kind of evidence sought."

The State's belief that the mere identification of the offenses suffices to satisfy the particularity requirement carries over into its defense of the search by Natasha Branam, the computer examiner; since "the computers were seized in relation to the offenses of menacing, threatening, and intimidation," that is all she was looking for. As she acknowledged, though, she was "was looking for any evidence of intimidation of David Maistros . . . and anything associated with that." (T.p. B:91-92). The "association" was so amorphous that the first thing she did was pull up the image files from the computer. One struggles in vain to discern how the warrant or affidavit would have guided her in any meaningful way in determining the limits of her search.

In response, the State cites numerous cases which supposedly support its contention that no methodological is required. That contention breaks down under closer scrutiny. To be sure, as the court found in *United States v. Burgess*, 576 F.3d 1078, 1093 (10th Cir. 2009), "it is unrealistic to expect a warrant to prospectively restrict the scope of a search by directory, filename, or extension." But that case does not hold that the police have *carte blanche* to search the contents of a computer. The court in fact held that "[i]f the warrant is read to allow a search of all computer records without description or limitation it would not meet the Fourth Amendment's particularity requirement." 576 F.3d at 1091. What saved the warrant in that instance was "was limited to the kind of drug and drug trafficking information likely to be found on a computer, to wit (as the warrant says): 'pay-owe sheets, address books, rolodexes' and 'personal property which would tend to show conspiracy to sell drugs.'" *Id.* Similarly, in *United States v. Cartier*, 543 F.3d 442, the defendant did not deny that the search warrant described and

identified the items to be seized, and understandably so: the warrant identified the hash values of several child pornography files which were determined to have been downloaded onto Cartier's computer. Rather, Cartier simply argued that the absence of a specific, detailed search strategy on how those files were to be located rendered the warrant invalid *per se*. This argument has been rejected by most courts which have dealt with it, and understandably so; as long as the affidavit recites what is being sought, the police are not required to detail exactly how they intend to go about finding it.

The State cites *United States v. Brooks*, 427 F.3d 1246 (10th Cir. 2005), for support on this point, but the case actually undercuts the State's argument. To be sure, as quoted by the State, the *Brooks* court did indeed state that the warrant was not required to "contain a particularized computer search strategy." But the court, while rejecting that argument, went on to state that "[w]e have simply held that officers must describe with particularity the *objects of their search*." 427 F.3d at 1251 (emphasis in original).

This is the critical distinction, and it is not one that was made in this case. The affidavit here did not describe the "objects of the search"; it did not instruct the examiner to look for evidence of online searches, the only claimed basis for the search of the computer. It did no more than describe the offenses for which Mr. Castagnola had been arrested, giving Ms. Branam unfettered discretion to rummage through the contents of the computer in the hopes of finding any evidence of their commission.

CONCLUSION

The Fourth Amendment commands that a search warrant be supported by probable cause and that it particularly set forth the items to be seized. The affidavit in this case fell woefully

short of meeting either requirement. For those reasons, Appellant respectfully prays the Court to reverse the judgment of the courts below and to remand the case for further proceedings.

Respectfully submitted,

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The undersigned hereby certifies that a copy of the foregoing Reply Brief of Appellant Nicholas Castagnola was sent by ordinary U.S. mail, postage prepaid, to Heaven DiMartino, Assistant Prosecuting Attorney, Summit County Safety Building, 53 University Avenue 6th Floor, Akron, OH 44308, this 19th day of March, 2014.

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