STATE OF WISCONSIN CIRCUIT COURT BRANCH 7 WAUKESHA COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. Case No. 2018-CF-1470

JOSEPH J. SCHERER,

Defendant.

DECISION AND ORDER

When they drafted the Fourth Amendment, our founding fathers obviously had no concept whatsoever of how technology would exponentially develop and increase in the twenty-first century. Simply put, cell or mobile telephones, the internet, and such digital evidence was never contemplated much less imagined. In fact, "[i]t would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entire unaffected by the advance in technology." *Kyllo v. United States*, 533 U.S. 27, 33-34 (2001). That, however, does not alter the constitutional and democratic concepts of privacy and the Country's foundation based, in large part, on an antipathy to governmental trespasses against citizen's freedoms in their persons, property, and homes. The desire to prevent generalized and unfettered rifling or rummaging through citizen's files and homes was one impetus that lead to our Revolution from England and the creation of our Constitution and accompanying Bill of Rights that was drafted to "enumerate and preserve [the citizens'] liberties under a written constitution." *Allen v. State*, 183 Wis. 323, 326, 197 N.W. 88 (1924).

The passage of the Fourth Amendment "was the founding generation's response to the reviled 'general warrants' and 'writs of assistance' of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity." *Riley v. California*, 573 U.S.373, 403 (2014).

This case involves these basic principles in the context of what this Court is wont to say is a particularly heinous crime—possession of child pornography. But, the potential crime (even an egregious crime), does not negate the guaranteed rights of citizens.

The issue in this case, concerns the seizure and search of Defendant Joseph J. Scherer's cell phone from the room(s) he was renting from individuals who were the subject of a drug selling investigation initiated by the Waukesha County Sheriff's Department. Those individuals (all in the Pense family) had been under surveillance for potential sales of marijuana from a residence in Eagle, Wisconsin. Defendant Scherer was not identified in the Affidavit in Support of a search warrant nor in the search warrant itself that identified the three Pense individuals and also sought to search "all occupants" of the residence for evidence of possession with intent to deliver marijuana.

Defendant Scherer asserts that the seizure of his cell phone was wrongful and illegal as the search warrant was deficiently overbroad such that *his* privacy interests were violated. He further asserts that, once law enforcement were apprised of the fact that he was a separate tenant of the premises and not one of the Penses, there should have been a separate warrant for his cell phone. The State disagrees and asserts that the officers relied in good faith upon the fact that a Court had signed the warrant, that warrants need not identify the names of everyone they seek to seize or search, that there was probable cause to believe Defendant Scherer was involved in the suspected illegal drug activity,[1] that drug transactions are unique, that the cell phone was seized incident to arrest, and/or that the cell phone was practically abandoned as it was not being worn by and in the physical proximity of Defendant when it was seized.

The Court concludes that Defendant Scherer's arguments are meritorious in that the search warrant was overbroad as to Defendant Scherer, a separate renter of space at the premises covered in the search warrant—premises that were occupied by the Pense family, as particularly noted in the affidavit and search warrant that sought to cover "all occupants." The Court further finds that none of the exceptions set out by the State apply to counter the Motion and to allow the retention and admission of evidence seized from Defendant Scherer's cell phone. The Court further finds that the search of the cell phone, itself, was likewise overbroad.

Much that the Court abhors the prevalence or practice of child pornography and its possession, that—in and of itself—cannot vitiate the Constitutional protections

[1]In addition to the possession of child pornography charge in this case, Defendant Scherer is a co-defendant with Branden and Brittany Pense in Case No. 19-CF-1443 where he is charged with Maintaining a Drug Trafficking Place, Repeater, and Possession of THC, Repeater. That case was filed on October 14, 2019, ***after*** the oral argument in this case. This is a little over one year after the possession of child pornography case at issue in this Motion.

afforded to Defendant Scherer and all other citizens. Accordingly, the Defendant's Motion must be granted.

BACKGROUND[2]

Waukesha County Sheriff Detectives were conducting an investigation into a complaint of an individual selling marijuana in the Village of Eagle, Wisconsin. That individual, Branden S. Pense, was currently occupying property at 307 Schroeder Avenue in Eagle.[3] Transportation records indicated that both Branden Pense and Brittany M. Pense occupied the premises. Surveillance of the property suggested that the premises was also occupied by Bradley A. Pense. Unbeknownst to law enforcement, Defendant Scherer was also renting space at the premises.

All of the events in the above-captioned matter arose following a search of a vehicle after a traffic stop in Eagle, Wisconsin in January, 2016, during which marijuana was discovered. The occupants of the vehicle indicated that they had purchased the marijuana from someone at 307 Schroeder Avenue, in Eagle. Village of Eagle Police conducted a field interview at that address on January 8, 2018, speaking with Brittany Pense who admitted that she had sold marijuana. She gave consent to law enforcement to search the residence, admitting that there was marijuana in her bedroom. That was found, with additional drug paraphernalia. Ms. Pense was issued a municipal citation.

This information was referred to the Waukesha County Metro Drug Unit on August 13, 2018, for further investigation.

On August 15, 2018, the Waukesha County Sheriff's Department (Metro Drug Unit) began their own investigation of the Penses, starting with an inspection of the abandoned garbage at the curb of the Schroeder Avenue residence. Corner-cut baggies and baggies with traces of THC[4] were discovered.

Video surveillance was conducted from August 17-20, 2018. A large amount of vehicle traffic was observed as well as a short meeting with individuals and the

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[2]Much of the following information was garnered from the September 13, 2018, Affidavit of Waukesha County Deputy Daniel Coates that was submitted in connection with the search warrant that is at issue in this motion.

[3]The records indicated that the property in question was actually owned by another individual residing in Big Bend, Wisconsin. This is not relevant to the case at hand.

[4]Tetrahydrocannabinol.

Penses in the garage that culminated in a hand-to-hand transaction. All conduct that clearly piqued the interest of the Metro Drug Unit.

More video surveillance was conducted from August 24-27, 2018, during which, again, a large amount of vehicle traffic was observed. In addition, someone believed to be Bradley Pense was observed meeting with a vehicle occupant as well as, on August 24, 2018, with someone believed to be Branden Pense. An exchange of unknown items was observed.

Other garbage investigations were made on August 29, 2018, and September 6, 2018, with similar results as from the first inspection.

All of this information was contained in Detective Coates' Affidavit that was provided to the Court on September 13, 2018, with a proposed search warrant. The search warrant was to search "said premises" as follows:

> . . . in and upon certain premises located at 307 Schroeder Avenue, in the Village of Eagle, in said county ***to include all occupants***, any common storage facilities, any buildings or storage buildings located on the curtilage, any safes or secure storage containers, and any vehicles on the curtilage or on the street directly associated with the **occupants** at the above location; **occupied** by Branden S. Pense, M/W DOB: [. . .], Brittany M. Pense, F/W DOB [. . .], and Bradley A. Pense, M/W DOB: [. . .] The residence is more particularly described as follows: A single family one story residence with attached single vehicle garage . . . .; there are now located and concealed certain things, to wit:
>
> Paraphernalia associated with the personal use of marijuana, . . . ;
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> Records regarding the purchase, distribution and manufacture of marijuana, . . . ;
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> To search[5] and analyze any electronic devices such as pagers, cell phones, computers, including but not limited to any and all information and/or data stored in the form of magnetic or electronic coding on computer media, or upon media capable of being read by computer, or with the aid of computer related equipment, including but not limited to floppy diskettes, fixed hard discs, removable hard disc cartridges, tapes, laser discs, video cassettes and any other media which is capable of storing magnetic coding, including computer hard drives. This also includes any documentary evidence assisting in the recovery of data. To obtain a full physical binary data extraction on certain mobile devices, a process(s) [sic] may have to be performed including, but not limited to, Joint Test Action Group (JTAG), In System Programming (ISP), Cellebrite

[5]This section in the search warrant is in a different font and appears to have been copied from another document and inserted into the list of items to be seized. It is quite broad.

> Advanced Investigative Services (CAIS), or physical removal of the memory chip (chip-off). These processes can potentially be destructive to the devices;
>
> Amounts of U.S. currency;
>
> which things were used in the commission of or may constitute evidence of a crime, to-wit: Possession of Tetrahydrocannabinol With Intent to Manufacture, Distribute or Deliver, committed in violation of Section 961.41(1m)(h), Wisconsin Statutes; Distribute or Deliver Tetrahydrocannabinol, committed in violation of Section 961.41(1)(h), Wisconsin Statutes; Possession of Tetrahydrocannabinol, committed in violation of Section 961.41(3g)(e), Wisconsin Statutes; Maintain Drug House, committed in violation of Section 961.42, Wisconsin Statutes; Possession of Drug Paraphernalia, committed in violation of Section 961.573(1), Wisconsin Statutes.

(Emphasis added).

The search warrant was presented to and signed by the Court[6] on September 13, 2018, and was served on the Penses on September 14, 2018. Four cell phones were seized at the premises—including the cell phone of Defendant Scherer. After the seizure of the Defendant's cell phone, but prior to the subsequent search of the cell phone, law enforcement learned that Defendant Scherer and his girlfriend, Rebekah Berlyn, were renting a room (or the entire basement) of the premises at 307 Schroeder Avenue. His cell phone was found lying on his bed in his rented room.

On September 15, 2018, a Waukesha County Sheriff technician downloaded Defendant Scherer's cell phone and observed two videos with what appeared to be pre-pubescent females. On September 24, 2018, Detective Daniel Chmielewski applied for a second search warrant to extract all of the stored communications on Defendant Scherer's cell phone. One video, downloaded on Defendant's "Samsung cloud" account on June 11, 2018, of confirmed child pornography was discovered. Pursuant to the Complaint, Defendant Scherer told police that he believed he had deleted the video from his phone.

A criminal complaint was filed against Defendant Scherer on October 5, 2018, alleging one charge of Possession of Child Pornography, Repeater.[7]

Defendant Scherer filed a Motion to Suppress Evidence on June 10, 2019, asserting that the search warrant was "so broad" that it improperly included "all occupants at the location and essentially all electronic devices." Defendant claimed that the seizure

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[6]Coincidentally, it was signed by this Court.

[7]The Repeater enhancer was due to a prior felony theft conviction on October 7, 2014.

and search of his cell phone was unlawful because the search warrants' targets were "occupants" named Pense and that the warrant failed to particularly describe him as a person to be searched. More arguments were expanded and elaborated upon at oral argument.

The State filed a Motion to Deny the Defense Motion to Suppress the Search Warrant on June 24, 2019, refuting the lack of particularity arguments of Defendant Scherer, and contending that individuals not expressly named in a search warrant may still be searched if there is probable cause to believe that individual was involved in the crimes alleged in the search warrant and affidavit. Finally, the State further asserted that the search was permissible because Defendant Scherer's cell phone was not worn by or in the Defendant's physical presence at the time of the search and seizure.

On September 5, 2019, prior to the oral argument, the State filed another response brief—an Opposition to Motion to Suppress Evidence Found as a Result of Search Warrant(s)—that maintained the three arguments, but importantly provided additional legal support for each. There was then oral argument on September 5, 2019, at which testimony from the Detectives was waived after counsel made the following Stipulations on the record:

1. Prior to the seizure of Defendant Scherer's cell phone, law enforcement did not know that Defendant Scherer was a resident of the premises.

2. Prior to the search of Defendant Scherer's cell phone, law enforcement was aware that Defendant Scherer was a resident of the premises (the knowledge of his status as a renter is in dispute).

3. Defendant Scherer's cell phone was not connected to the internet (so it had no access to the "cloud") when the cell phone was digitally searched[8] by law enforcement and any images were on the cell phone itself.

During that argument, the Court also raised the issue as to whether the warrant could be considered a "general warrant;" argument was taken on that point as well. Following argument, the Court took the matter under advisement in anticipation of issuing this Decision.

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[8]While not part of the Stipulation, it is clear that this applies as to both searches—the one after the cell phone was seized and the one following the second warrant seeking evidence of child pornography.

THE LAW

The Fourth Amendment is clear; it provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants 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.

(Emphasis added).

The Wisconsin Constitution is, likewise, as clear, providing as follows:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and 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.

Wis. Const. Art. 1, § 11. (Emphasis added).

A search warrant must describe with "particularity" the "place to be searched, and the persons or things to be seized." This particularity requirement prevents a "general, exploratory rummaging in a person's belongings." *Coolidge v. New Hampshire* 408 U.S. 443, 467 (1971). A warrant satisfies the particularity requirement if it allows the executing officer to identity with reasonable certainty those items that the issuing official has authorized to be seized. *Maryland v. Garrison*, 480 U.S. 79, 84 (1987). There is a distinction between the seizure and search of an item or person.

The Court, in *State v. Rindfleisch,* 2014 WI App 121, ¶ 23, 359 Wis. 2d 147, 857 N.W.2d 456, explains:

> "The United States Supreme Court has interpreted the Warrant Clause to be precise and clear, and as requiring only three things: (1) prior authorization by a neutral, detached [judicial officer]; (2) a demonstration upon oath or affirmation that there is probable cause to believe that evidence sought will aid in a particular conviction for a particular offense; and (3) a particularized description of the place to be searched and items to be seized."

(quoting *State v. Sveum*, 2010 WI 92, ¶20, 328 Wis. 2d 369, 787 N.W.2d 317 (citations and quotation marks omitted)).

These rules have recently been interpreted to regulate the acquisition and viewing of digital information and data. Seizures relate to the dumping, imaging, copying or taking possession of digital devices. Searches address the opening up, looking through, reading, watching or forensically analyzing the data *on* a digital device. They are two separate actions – and warrants should distinguish which one is being sought.

In *Riley*, the United States Supreme Court made it very clear that cell phones "are not just another technological convenience," rather, "they hold for many Americans 'the privacies of life.'" *Riley*, 573 U.S. at 403. The Court further noted that "[t]he fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought." *Id.* Accordingly, that Court held that cell phones could not be searched incident to arrest, but rather their search requires a warrant.[9] *Id.* When assessing a warrant, the signing officer should balance "on one hand, the degree to which it intrudes upon an individual's privacy and, on the other hand, the degree to which it is needed for the protection of legitimate government interests." *Riley*, 573 U.S. at 385 (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)).

It is with this backdrop that this Motion is considered.

DISCUSSION

Defendant Scherer raises five major arguments, one[10] of which is without merit. The remaining are that (1) the warrant itself was too broad in what it was seeking and that he was not the target nor was he described with particularity, (2) there was no arrest so there can be no seizure incident to arrest, (3) there was no exigency preventing law enforcement from obtaining a warrant once they discovered that Defendant was a tenant/residence of the premises, and (4) that the search of the cell phone itself was overbroad and unconstitutional. The State countered with five defenses: (1) not every individual to be searched pursuant to a search warrant need

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[9]The *Riley* Court bluntly noted that "[o]ur answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant." *Riley* 573 U.S. at 403. This decision was issued in 2014, four years before the warrant at issue here.

[10]Defendant Scherer also argued that a search for videos on a cell phone had no relation to the suspected offense of drug use or trafficking/dealing. That, as the State aptly argued is incorrect. Unfortunately (or fortunately for the State) criminals following the "selfie" self-absorbed trend, all too common today, oftentimes video themselves using, selling, or storing drugs (and much worse). So, a review of videos is a relevant and appropriate tool used by law enforcement. Thus, this argument is discarded by the Court.

be named in that warrant and "occupants" covered Defendant Scherer, (2) individuals not named in a search warrant may still be searched if there is probable cause to believe that they were involved in the crimes alleged in the search warrant, (3) even without probable cause to search Defendant Scherer, his cell phone could still be searched because it was not being worn by him nor was it in his physical presence when it was searched and seized, (4) the good faith exception applies even if the search warrant is deemed invalid, and (5) drug cases are unique and anyone in the proximity could be selling or buying drugs, so there ought to be an exception.[11]

Each of these arguments and defenses is discussed below.

I. Defendant's cell phone need not have been on him or in his proximity; it was not abandoned by Defendant and cell phones may not be seized or searched incident to arrest.

First, two arguments and theories can be quickly resolved. The State asserts that, even if the warrant is invalid and there was no probable cause to search Defendant Scherer, his cell phone was merely lying on his bed (not worn by him, nor in his physical presence since police had taken Defendant Scherer from that room), thus, it was fair game to be searched or seized.[12] The State relies upon *State v. Andrews*, 201 Wis. 2d 383, 403, 549 N.W.2d 210 (1996) for the proposition that if there is a valid search warrant, the "police can search all items found on the premises that are plausible repositories for objects named in the search warrant, except those worn by or in the physical possession of persons whose search is not authorized by the warrant, irrespective of the person's status in relation to the premises." There are two errors with that statement. First, this presumes that there was a valid warrant (something to still be addressed), and second, and more to the point, it fails to take into account the United State Supreme Court's decision in *Riley* that explains that a search of a cell phone is more exhaustive and intrusive—much more intrusive—than the entire ransacking of someone's home. *Riley*, 573 U.S. at 396. "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.*, at 396-97.

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[11]This final argument, raised in passing in oral argument, is not meritorious and is not discussed further.

[12]Technically, it should be seized then searched.

This argument also fails to take into account that Defendant Scherer was being questioned by law enforcement outside of the presence of his rented room where the cell phone lie on a bed. Any failure of Defendant Scherer to be in close proximity of his cell phone was due to police action; they are not able to cause the removal of the Defendant from his cell phone's proximity and then take advantage of that lack of proximity to blithely assert they are entitled to seize or search it without a warrant.[13]

Next, it is just as clear that the United State Supreme Court has determined that cell phones—"that place vast quantities of personal information literally in the hands of individuals"—may be not searched incident to arrest. *Riley*, 573 U.S. at 386, 403.

That leaves the major issues to be considered.

II. The search warrant, that was actually particularized to the "occupants" it described, was overbroad as to Defendant Scherer.

The major question underlying this Motion is the concept of "occupants," and whether, through the use of that term, the warrant was overbroad as to Defendant Scherer. It was. Constitutional rights to privacy in general, and as particularized in the Fourth Amendment, are not to be treated lightly. This isn't a game of "ends justify the means" if bad actors become ensnared (and rightly so for bad actors) in the coils of the justice system.

That is precisely—precisely—why our founders raged against England and why they decided a better system of justice was worth taking up arms and laying down their lives. It is in fact, "self-evident" that Governments "derive[ ] their just powers from the consent of the governed," and that "when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is [the people's] right, it is their duty, to throw off such Government, and to provide new Guards for their future security." Declaration of Independence, July 4, 1776.

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[13]Neither may they assert that the cell phone was abandoned: there was no deliberate, voluntary effort or decision by Defendant Scherer to abandon his cell phone. *Cf. State v. Bauer*, 127 Wis. 2d 401, 407, 379 N.W.2d 895 (Ct. App. 1985) ("Warrantless seizure of property whose owner has abandoned it or requested another to destroy or get rid of it does not violate the fourth amendment.") Cell phones are ubiquitous; some individuals are not able to go a few hours without holding, accessing of otherwise utilizing their cell phones. In today's day and age, in order to constitute abandonment of a cell phone, there must be more intent than was revealed here. Merely leaving your cell phone in your bedroom cannot even remotely be deemed abandonment. That is a patently frivolously argument.

In creating the Bill of Rights (and the Fourth Amendment, therein), our founders sought to stop the wholesale, unsubstantiated rummaging through citizen's homes and property. Under American's new rules, searches now have to be limited to specific areas and particular things for which probable cause to search exists *before* the search. Exploratory searches—however wide or narrow of a search they may encompass—are prohibited. *Garrison*, 480 U.S. at 84. "[T]he central concern underlying the Fourth Amendment [is] the concern about giving police officers unbridled discretion to rummage at will among a person's private effects." *Arizona v. Gant*, 556 U.S. 332, 345 (2009) (citations omitted).

So, what is required? The Fourth Amendment clearly requires that the place to be searched, and the persons or items to be seized and then searched, must be "particularly described." Not only that, but the United States Supreme Court has suggested that there is a failure of particularity if the warrant does not describe the specific crime that has been committed or is being committed.[14] *See Berger v. New York*, 388 U.S. 41, 55-56 (1967).

Here, as usual, the language is the key. The search warrant sought legal authority to search the premises for evidence of drug dealing and drug possession by the Penses. It also sought to "include all occupants" in that search, as well as any storage or other buildings "associated with the occupants." And then it went further and it *identified* who police officers advised the Judge actually occupied[15] the premise; it was "occupied by Branden A. Pense, . . ., Brittany M. Pense, . . ., and Bradley A. Pense, . . ." There is no mention of Defendant Scherer or his girlfriend.

Law enforcement note, as stipulated herein, that they eventually learned Defendant Scherer was renting a room (or the basement) in the premises. At oral argument, the State conceded—as it must—that, if this was a duplex or a side-by-side rental, privacy interests would have protected the resident in the other duplex. Thus, should Defendant Scherer be given that same protection in his "castle" or abode? Likewise, what if there were other individuals in the premises at the time the search warrant was executed? Would this warrant cover the Fed-Ex delivery person, the florist delivering flowers, the next-door neighbor borrowing a cup of sugar? The

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[14]Granted, there is always the plain view/sight doctrine if an item is plainly seen while a valid search warrant is being executed. But, that does not allow a deeper search to find that plainly viewed item.

[15]Interestingly, the Complaint in Case No. 19-CF-1443 (the drug trafficking and drug possession case) also says that the premises were "occupied" by the Penses. Although it does later state that "a downstairs bedroom . . . was occupied by Joseph Scherer and his girlfriend Rebekah." Again, note that this case was filed after oral argument on this Motion, and thus, is not dispositive.

State says, yes. All is fair under this warrant to prevent drug-dealing and drug possession.

That simply cannot be correct. Even disregarding (for the moment) the fact that the warrant actually on its face identifies the occupants of the premises, this is a step too far to cover all "other" transient occupants. To accept that reading, law enforcement could identify one set of individuals with particularity and then cast a wide net over anyone else who was present at a given location at a certain time. That is akin to a general warrant.

Here, law enforcement knew the Pense family was dealing drugs. The new complaint in the companion case (charging Branden and Brittany Pense as well as Defendant Scherer) notes that friends mentioned the Penses' illegal activities and how they gloated that a first search (the one that started it all and resulted in the municipal citation) was not thorough enough to discover other drugs in their part of the home. There is no mention of Defendant Scherer being involved in this illegal activity until *after* his cell phone is seized and searched. Police watched the Penses—all three of them. There is no mention that Defendant Scherer was watched in the Affidavit supporting the warrant, nor in the drug-dealing/possession case's complaint. The search warrant identifies the occupants of the premises—the three Penses. In that respect, the warrant is indeed specific and particularized.

Once the search warrant was executed and law enforcement find the Penses at their residence, everything was moving forward appropriately. But, once law enforcement discover Defendant Scherer and his girlfriend—separate residents of the premises—they had to pause. The same would be true if there was a Fed-Ex man, a florist delivery woman, an innocent baking neighbor, or a group of addicts. Those individuals could have been spoken to to learn why they were at the premises, and they could have been asked to cooperate. If they acted suspiciously, or if the addicts were under a cloud of THC smoke, they could have been detained as other warrants were sought. If there was a basis to suspect the other people of a crime, they could have been arrested. But, even so, there would have needed to be a search warrant to seize and search their cell phones. *See Riley*, 573 U.S. at 386, 403.

Once law enforcement learned Defendant Scherer was a resident of the premises, they should have paused and sought that additional warrant. Once law enforcement saw the drugs and drug paraphernalia and scale in Defendant Scherer's private residence if they were properly in that room, they could have arrested him and seized his cell phone. At that point, a new warrant should have been obtained. There was no exigency. (*See* below). The cell phone could have been placed in a Faraday bag to

prevent its contents from being deleted or accessed by anyone until the new warrant was issued.

Finally, the Court does agree with the State that not every person covered by a search warrant need be specifically named in that search warrant, but the cases cited by the State are distinguishable to the present circumstances. First, the Court in *United States v. Micheli*, 487 F.2d 429 (1st Cir. 1973), concurs that search warrants have to be limited to what they expressly seek and that there is an interstitial area that comes into play where there is a visitor to a premises covered by a search warrant. The *Micheli* Court notes "[i]t should not be assumed that whatever is found on the premises described in the warrant necessarily falls within the proper scope of the search; rather, it is necessary to examine why a person's belongings happen to be on the premises." *Id.*, 487 F.2d at 432. Citing to *Katz v. United States*, 389 U.S. 347, 352 (1967), *Micheli* explains that "'[t]he Fourth Amendment protects people, not places,' and the protective boundary established by requiring a search warrant should encompass those extensions of a person which he reasonably seeks to preserve as private, regardless of where he may be." *Id.*

The *Micheli* Court was considering a search warrant that potentially covered a brief case left by a co-owner of a premises expressly identified with particularity in a search warrant. There, the Court said, as a co-owner of property named to be searched, the individual couldn't claim any outside privacy rights when it was expected that he would/could leave personal items in the premises. Here, there is a separate privacy interest that Defendant Scherer held because he was renting his own space—space entitled to privacy interests—from the Penses. This privacy right is not comparable to the *Micheli* facts.

Next, in *Zurcher v. Stanford Daily,* 436 U.S. 547, 555 (1978), it is true that warrants can be directed to places and not people and need not name those people in the warrant. But, here, the premises would be those occupied by the Penses and not their tenant—who has a separate right of privacy. In order to cover Defendant Scherer, the affidavit in support of the warrant would have need to explain why *his* constitutional rights to privacy in his home (that are deemed sacrosanct) were being curtailed. It did not.

Accordingly, for the reasons set forth above, the warrant was overbroad as to Defendant Scherer. But, that doesn't end the inquiry; the State raises several exceptions if the warrant is found to be overbroad that would still allow the collection and admission of the child pornography evidence.

III. There was no exigency in preventing law enforcement to obtain a warrant once they learned Defendant Scherer was a tenant who was asserting his Constitutional rights.

Even had the cell phone been lawfully seized, there still was time for law enforcement to hold the phone and obtain a warrant to search it after they learned that Defendant Scherer was a separate resident and tenant of the premises, that he too, may have been involved in the Penses' drug activity scheme, and that he was asserting his Constitutional rights. As difficult as it is to say, the *Riley* Court was excessively blunt in similar circumstances: "Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant." *Riley* 573 U.S. at 403.

Accordingly, this exception does not apply.

IV. The State's other exceptions (probable cause and good faith) likewise do not apply.

The two other exceptions raised by the State, likewise do not apply here.

A. Probable cause.

The State aptly notes that, pursuant to *Ybarra v. Illinois*, 444 U.S. 85 (1979), a valid search warrant for one individual on certain premises may not be extended to other individuals unless there is probable cause particularized as well to that other individual. Here, the State asserts, Defendant Scherer was not a mere coincidental by-stander in this drug trafficking place; he was a full-blown participant. But, the Complaint with these allegations was filed after the oral argument on this Motion. Likewise, the other case cited by the State, *United States v. Schmude*, 699 F. Supp. 200 (E.D. Wis. 1988), *aff'd in part and rev'd in part on other grounds*, 901 F.2d 555 (7th Cir. 1988), is inapplicable. In that case, the defendant was the subject of the search, therefore the ownership of various containers on that owner's property could be searched. Here, the Penses were the occupants identified and the cell phone was in the private residence of Defendant Scherer. These two cases provide no assistance on the question of probable cause to search Defendant Scherer and his cell phone.

No information was relayed in the Affidavit to indicate that Defendant Scherer or his live-in girl-friend, Ms. Berlyn, were involved in any of the suspected drug transactions. Defendant Scherer's identification card was not found in one of the garbage investigations (like that of Branden Pense). There were no allegations that

Defendant Scherer was a party to any of the drug activity in his criminal complaint in this action. He, simply put, was renting a residence in premises being used by the Pense family to use and distribute marijuana. His possible involvement was mentioned by the State in its brief and argument, but that's the first mention in this case until the second Complaint was filed.

Regardless, even if there was a basis to arrest Defendant Scherer for any of the drug-related charges listed on the search warrant, there still should have been a separate warrant to search that cell phone incident to his arrest. There were none of the possible exigent scenarios listed in *Riley*. This was not a volatile arrest situation. There was no need to prevent the imminent destruction of evidence. There was no pursuit of a fleeing individual. There was no person in need of assistance for an injury or subject to the threat of imminent injury. There were no fears of a dangerous instrumentality or explosives. There was no threat of danger to a child who had been abducted. There was no exigency. *Id.*, 573 U.S. at 401-03.

The Court does not agree with the State that a requirement to obtain a warrant (ala the dictates of the United States Supreme Court in *Riley*) would "hamstring" law enforcement. The Court is, however, aware that this does add another layer of intricacy[16] to situations, but that is not a basis to depart from precedent.

B. The good faith exception.

The State also asserts that, if the warrant is found to be invalid (on any ground) as to Defendant Scherer, the good faith exception applies because the seizure and search of the cell phone was made in connection to a search warrant signed by an impartial judge. It is true that a warrant issued by a judicial officer "normally suffices" to establish a law enforcement officer has "acted in good faith in conducting the search." *United States v. Ross*, 456 U.S. 798, 823, n.32 (1982). *See also United States v. Leon*, 468 U.S. 897, 924 (1984).

This concept was adopted in Wisconsin in *State v. Easton*, 2001 WI 98, ¶ 3, 245 Wis. 2d 206, 629 N.W.2d 625, where the Court held "that the good faith exception applies where the State has shown, objectively, that the police officers reasonably relied upon a warrant issued by an independent magistrate." Typically, "[a]n officer's decision to obtain a warrant is prima facie evidence that the officer was acting in good faith." *United States v. Adams*, 934 F.3d 720, 726 (7th Cir 2019).

[16]The Court is also aware that it (and other members of the Bench) will be the ones required to review and sign these additional warrants, but that, too is not reason to deviate from United States Supreme Court directives.

However, exclusion is not always appropriate—or inappropriate—even where a warrant is subsequently invalidated. *Leon*, 468 U.S. at 924. Even in *Leon*, the United States Supreme Court noted that its holding applied to the rejection of suppression motions "posing no important Fourth Amendment questions." *Id.*, at 925. That is because, "the officer's reliance on the magistrate's probable-cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable, and it is clear that in some circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued." *Id.* But, even that strong presumption of good faith can be overcome if "a reasonable officer would disregard the judge's determination of probable cause and forego executing the warrant." *Adams*, 934 F.3d at 727.

So, here, there was clearly an affidavit presented to and executed by a neutral and impartial judge. The law enforcement agent was there with a representative from the district attorney's office who had clearly vetted the affidavit and drafted the proposed warrant. Accordingly, there is a strong presumption of good faith.

But here, there is an important Fourth Amendment question posed. Moreover, law enforcement obtained the warrant with the named "occupant" Penses, but they were advised by Defendant Scherer that he was a renter of a part of the premises and his rights were clearly expressed before the cell phone was seized. They were also expressed before the cell phone was subsequently searched. A reasonable officer should have paused when they learned that there were other property owners with separate rooms in that premises. They should at least have stopped and gotten another warrant to search the cell phone once it was seized pursuant to United States Supreme Court precedence set forth in *Riley*. To allow the good faith exception to be applied here would render the Fourth Amendment protections of Defendant Scherer hollow. He would be able to say he has those Constitutional privileges, but he would be prohibited from exercising them.

This is not akin to a case where premises were searched with some technical flaw in a warrant. This is where an individual not mentioned in the affidavit or warrant had his home invaded and searched, and his property seized and then searched. Good faith should not excuse these multiple violations—even if Defendant Scherer is a bad actor.

V. The search of the cell phone itself was overbroad.

Finally, although the Court has already determined that the seizure and initial search of Defendant Scherer's cell phone was wrongful, the Court deemed it necessary

to address the question of the scope and nature of the search of the cell phone itself. Not raised by any parties (and unfortunately not raised by this Court at the time it signed the initial warrant), there was no temporal scope to the proposed search of any of the cell phones seized. Law enforcement, while perhaps not fully cognizant of the precise time that the Penses started their purported drug operation, may have known when they began residing at the premises in Eagle. The wording of the search warrant gave law enforcement *carte blanche* to go back ten, fifteen, twenty years on any seized cell phones or other electronic devices.

Clearly, if there was a specific start date that should have been provided to the Court. In the absence of that, there should be some temporal limitation on a request. While the Court has already determined that there is no Constitutional "exception" for drug cases, the Court does acknowledge that there should be more flexibility with respect to temporal scope in these types of cases where a clearly defined temporal scope may not exist. Not complete freedom, but a bit more leeway. There should not, however, be an open, unlimited by any temporal scope, invasion of an individual's property and personal rights.

As well, there should have been some requirement that only areas of the cell phone that pertain the suspected criminal activity should be searched. These further limitations, however, are for the subject of another motion, another case, and are not addressed further here by the Court.

CONCLUSION

Based upon the foregoing discussion, the Court GRANTS Defendant Joseph Scherer's Motion to Suppress Evidence.

Dated this 24th day of February, 2020.

BY THE COURT:

Maria S. Lazar
Circuit Court Judge

THIS IS A FINAL ORDER FOR PURPOSES OF APPEAL.

c: Asst. Dist. Atty. Michele M. Hulgaard (by ecf)
Cameron Weitzner (by ecf)
David L. Herring (by regular mail)
Joseph J. Scherer (by regular mail)