



LEGAL UPDATE

POLICE NOT REQUIRED TO ATTACH IMAGES OF CHILD PORNOGRAPHY TO SEARCH WARRANT AFFIDAVIT

Commonwealth v. Dunn, 494 Mass. 42 (2024).

RELEVANT FACTS

On March 18, 2020, Microsoft submitted a report to the National Center for Missing and Exploited Children (NCMEC) about two images of suspected child pornography. After investigating the images, NCMEC reported the images to the State police. NCMEC included information that both images contained “recognized hash values,” indicating that the images had previously been submitted to NCMEC.

The State trooper assigned to the Internet Crimes Against Children (ICAC) task force viewed the two images and believed them to depict child pornography. Further investigation linked the Internet protocol (IP) address associated with the images to the defendant’s apartment.

The trooper applied for a search warrant for the defendant’s residence. The trooper described the images but did not attach them to the affidavit. Upon execution of the warrant, the police seized a thumb drive from which over 2,800 images of child pornography were recovered.

The grand jury indicted the defendant on two counts of possessing child pornography as a subsequent offense. The defendant filed a motion to suppress in which he argued that the search warrant was not supported by probable cause. The court denied the motion.

For specific guidance on the application of this case or any law, please consult your supervisor or your department’s legal advisor.

DISCUSSION

“Where an application for a search warrant is based on an allegation that an image possessed by the defendant is child pornography, probable cause for the issuance of a warrant can be established through:

- (1) the magistrate independently viewing the image in question and determining that it constitutes child pornography;
- (2) a sufficiently detailed description in the search warrant affidavit of the image in question to allow the magistrate to determine that the image constitutes child pornography; or
- (3) other sufficient evidence contained in the four corners of the affidavit that corroborates that the image in question is child pornography.” p. 48.

The defendant argued that the court should require that the magistrate personally see the image in order to find probable cause that it constitutes child pornography. The affidavit in this case described the subject of the photo as “a pubescent male standing completely naked with the focus of the image on the young boy’s penis. The young boy is approximately thirteen to fifteen years of age.” p. 50.

The court found that the description of the images was vague. It failed to establish how the penis was the focus of the picture and there was no information provided about the lighting, perspective of the photograph, gesture or positioning of the boy, or if the photo was cropped or blurred in some area. But the court also drew a distinction between a naked picture of 13 – 15 year olds, who are normally clothed, and an innocent photo of a naked infant in a bathtub.

In addition to the vague description, the affidavit included other information about the investigation which was helpful in determining whether the images depicted child pornography. The affidavit explained how the pictures came to the attention of the trooper, the fact that “NCMEC returned ‘recognized hash values’ for both images. This allowed the magistrate to reasonably infer that another person or entity previously submitted images with the same hash values to NCMEC. Although this information does not confirm that the images are child pornography, it does raise the reasonable inference that another person or provider suspected that the exact same images were child pornography.” p. 52 (internal citations omitted.)

The affidavit also contained information about the defendant’s prior arrest for similar charges and that he was a registered level two sex offender. “A defendant’s prior criminal history may be helpful for establishing probable cause, particularly where the prior history involves a similar crime.” p. 52.

“Whether describing an image in the search warrant affidavit or attaching the image itself is the better approach will depend on the nature of the subject matter and the circumstances of each case. In deciding which method to use, affiants should also consider that anytime a person -- including a magistrate -- views an image of child pornography, the child is revictimized.” p. 55.

When viewed as a whole, the affidavit contained sufficient information to find probable cause to issue the warrant.

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