IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ANTHONY LOGAN MERRICK,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	Case No. F 2005-569
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

LEWIS, JUDGE:

Appellant, Anthony Logan Merrick, was tried at a bench trial before the Honorable Susan Caswell, District Judge, in Oklahoma County District Court Case No. CF-2004-1427. Merrick was convicted of:

> twenty one (21) counts of Sexual abuse of a Child in violation of 10 O.S.2001, § 7115(E) (counts 1-20 and count 24);
>
> two (2) counts of Sexual Exploitation of a Child in violation of 10 O.S.2001, § 7115(G) (counts 21-22);
>
> fifteen (15) counts of Possession of Obscene Material Involving Participation of a Minor in violation of 21 O.S.2001, § 1021.2 (counts 23, 27-33, 44-49, and 51);
>
> four (4) counts of First Degree Rape by Instrumentation in violation of 21 O.S.2001, §§ 1111-1114 (counts 25 and 38-40); and
>
> eight (8) counts of Indecent or Lewd Acts with a Minor Child Under Sixteen in violation of 21 O.S.2001, § 1123 (counts 26, 34-37, and 41-43).

Judge Caswell sentenced Appellant to Life for the convictions of Sexual Abuse of a Child, First Degree Rape by Instrumentation, and Sexual Exploitation of a Child. Appellant was sentenced to twenty (20) years on the convictions of Possession of Obscene Material and Indecent or Lewd Acts with a Minor Child. The sentences for counts one through twenty four were ordered to run concurrently with each other and the remaining counts were ordered to run concurrently with each other, but consecutively with counts one through twenty four. In essence, Merrick received two consecutive life sentences. Merrick has perfected an appeal of his convictions and sentences, raising the following propositions of error.

I. The search warrant issued in this case failed to set out probable cause to search Mr. Merrick's house. Therefore, all the evidence seized as a result of the unlawful warrant is fruit of a poisonous tree and should have been suppressed by the trial court.

II. The search warrant that was issued for Mr. Merrick's residence was not sufficiently particular as to the items to be seized and therefore was invalid under the Fourth Amendment of the United States Constitution and corresponding provisions of the Oklahoma constitution

III. Mr. Merrick's convictions for lewd acts with a child, child sexual abuse and possession of obscene material violates the federal and state prohibitions against double punishment.

IV. Mr. Merrick received ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and corresponding provisions of the Oklahoma Constitution.

After thorough consideration of Merrick's propositions of error and the entire record before us on appeal, including the original record, transcripts, exhibits and briefs, we have determined that the judgments and sentences of the District Court should be affirmed except that the judgments and sentences in counts 28-33 and counts 45-49 shall be reversed with instructions to dismiss.

In reaching our decision, we find, in proposition one, that this Court reviews the sufficiency of information contained in an affidavit for probable cause to determine whether the issuing magistrate had a substantial basis for concluding that probable cause existed. *Lynch v. State,* 1995 OK CR 65, ¶ 18, 909 P.2d 800, 804-05. This Court applies a "totality of the circumstances test" to determine whether probable cause existed. *Id.*; *also see Illinois v. Gates,* 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983).

> Under the totality of the circumstances approach, the task of the issuing magistrate is 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.

Lynch, 1995 OK CR 65, ¶ 18, 909 P.2d at 804-05.

Merrick first argues that the affidavit is lacking because it does not name a specific crime for which there is probable cause to believe has occurred. Constitutional provision only requires that the affidavit set forth probable cause that contraband or evidence of a crime will be found in a particular

place. *Id.* Here the affidavit shows probable cause to believe that evidence of a crime will be found. Probable cause is simply more probable than not. *Harjo v. State*, 1994 OK CR 47, ¶ 22, 882 P.2d 1067, 1073. Merrick complains that the affidavit "is so lacking in probable cause that it does not even allege a specific crime . . .."

Probable cause exists if a "succession of superficially innocent events had proceeded to the point where a prudent man could say to himself that an innocent course of conduct was substantially less likely than a criminal one." *United States v. Patterson*, 492 F.2d 995, 997 (9th Cir. 1974); *see Gonzales v. State*, 1974 OK CR 133, ¶ 11, 525 P.2d 656, 658; *Johnson v. State*, 1976 OK CR 200, ¶ 8, 554 P.2d 51, 54.[1]

In this case, the totality of circumstances show probable cause did exist for the trial court to determine that contraband and evidence of crimes against children would be found in Merrick's home. We hold that the affidavit was sufficient to support probable cause for the search warrant.

In deciding proposition two, we find that the search warrant was sufficiently particular. The description enabled the searcher to reasonably ascertain and identify the things authorized to be seized. *United States v. Riccardi*, 405 F.3d 852, 862 (10th Cir. 2005). Even entire computer systems

[1] *See* 2 W.R. LaFave, *Search and Seizure* § 3.2(e), at 70 (3d ed.1996) (probable cause exists if a "succession of superficially innocent events had proceeded to the point where a prudent man could say to himself that an innocent course of conduct was substantially less likely than a criminal one").

may be seized as long as the items listed on the warrant are qualified by phrases that limit the type of contraband sought to be seized. *United States v. Campos*, 221 F.3d 1143 (10th Cir. 2000). Furthermore, and more importantly, the officers in this case did not engage in an exploratory search because the items were described "with as much exactitude as was possible at that stage of the investigation." *See Moore v. State*, 1990 OK CR 5, ¶ 33, 788 P.2d 387, 395-96.

In proposition three, we find that Merrick is claiming that,

> first, charging Merrick with lewd molestation (looking upon) and the possession of photographs of that crime constitutes double punishment (charges against A.C. and A.M.);
>
> second, possessing multiple photographs of child pornography should constitute only one count; and
>
> third, unlawful touching (child sexual abuse under section 7115 of title 10) and possession of the photographs of that touching constitutes double jeopardy (Against his step-daughter).

The first and third claims are identical. There are two distinct crimes: the actual lewd molestation (looking upon or touching) and the subsequent possession of the photographic record of those events. There is no violation of 21 O.S.2001, § 11, unless a single criminal act gives rise to offenses which are not separate and distinct. *Davis v. State*, 1999 OK CR 48, 993 P.2d 124, 126. These two crimes are separate and distinct.

In the second argument, Merrick argues that a "single cache" of pornography can support only one count of possession of child pornography.

See *Watkins v. State*, 1991 OK CR 119, 829 P.2d 42, *modified*, 1992 OK CR 34, 855 P.2d 141, *Hunnicut v. State*, 1988 OK CR 91, 755 P.2d 105 and *Trim v. State*, 1996 OK CR 1, 909 P.2d 841.

> In construing a statute, the Court of Criminal Appeals gives effect to the intent of the Legislature. "A statute should be given a construction according to the fair import of its words taken in their usual sense, in connection with the context, and with reference to the purpose of the provision."

Davis v. State, 1996 OK CR 15, ¶ 12, 916 P.2d 251, 256 [citations omitted].

The statute for which Merrick was charged with violating reads:

> Any person who shall procure or cause the participation of any minor under the age of eighteen (18) years in any child pornography or who knowingly possesses, procures, or manufactures, or causes to be sold or distributed any child pornography shall be guilty, upon conviction, of a felony and shall be punished by imprisonment for not more than twenty (20) years or by the imposition of a fine of not more than Twenty-five Thousand Dollars ($25,000.00) or by both said fine and imprisonment. Persons convicted under this section shall not be eligible for a deferred sentence. The consent of the minor, or of the mother, father, legal guardian, or custodian of the minor to the activity prohibited by this section shall not constitute a defense.

21 O.S.2001, § 1021.2. Child pornography is defined as:

> any film, motion picture, video tape, photograph, negative, undeveloped film, slide, photographic product, CD-ROM, magnetic disk memory, magnetic tape memory, play or performance wherein a minor under the age of eighteen (18) years is engaged in any act . . . or where the lewd exhibition of the uncovered genitals has the purpose of sexual stimulation of the viewer . . . .

21 O.S.2001, § 1024.1. Here, the State introduced a video recording containing multiple images constituting child pornography which supported one count. The State also introduced a CD-ROM which contained multiple

images of child pornography which constituted another count of possession. The State then introduced printouts of thirteen images which supported thirteen separate counts of possession of child pornography. The problem here lies in these thirteen images. The stipulation entered by the parties states that

> [M]ultiple images recorded in digital format including computer disks, computer CDs, and/or computer hard drives were seized which are evidence of the Defendant photographing . . . [A.C./A.M].. . . . Detective Davidofsky printed some of said images on paper format . . ..

We find that this language fails to prove that the images should be treated as separate counts because the statute defines a digital/magnetic storage device as a distinct item. The language of the statute requires the State to prove separate crimes. We find that the State has only proven two counts in these thirteen images, one count which is supported by images of A.C. and one count which is supported by images of A.M.[2] Therefore, we order that counts 28-33 and counts 45-49 will be reversed with instructions to dismiss.

In proposition four, we determine that Merrick has not shown that he was prejudiced by counsel's conduct at trial. *See Strickland v. Washington*, 466 U.S. 668, 688 and 694, 104 S.Ct. 2052, 2064 and 2068, 80 L.Ed.2d 674 (1984). In proposition five, we find that Merrick's sentences do not shock the conscience of this Court. *Rea v. State*, 2001 OK CR 28, ¶ 5, 34 P.3d 148, 149 n. 3

[2] "It is the policy of this state to provide for the protection of children who have been abused or neglected and who may be further threatened by the conduct of persons responsible for the care and protection of such children. . . ." 10 O.S.Supp.1997, § 7102(A)(1).

DECISION

Counts 28-33 and counts 45-49 of the Judgment and Sentence shall be **REVERSED** and **REMANDED** with instructions to **DISMISS**. The remaining counts of the Judgment and Sentence shall be **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2006), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

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OPINION BY: LEWIS, J.

CHAPEL, P.J.: Recused
LUMPKIN, V.P.J.: Concurs in Results
C. JOHNSON, J.: Concurs
A. JOHNSON, J.: Concurs in Results