MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Jared Smith,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

June 30, 2023

Court of Appeals Case No. 22A-CR-2496

Appeal from the Steuben Superior Court

The Honorable William C. Fee, Judge

Trial Court Cause No. 76D01-2202-F5-251

Memorandum Decision by Chief Judge Altice
Judges Riley and Pyle concur.

Altice, Chief Judge.

Case Summary

[1] In this discretionary interlocutory appeal, Jared Smith appeals the trial court's partial denial of his motion to suppress pornographic images seized during a warrant search of his cell phone. Smith claims that the images were found during a search of a Google Photos application (app) that was not within the scope of the warrant and should be suppressed.

[2] We affirm and remand.

Facts & Procedural History

[3] On November 1, 2021, police responded to an attempted theft at a business called Mat Mat'rs in Angola, Indiana. Shortly thereafter, Angola Police Department Officer Matthew Kling initiated a traffic stop of a pick-up truck matching the description of that seen driving away from the scene. Smith was the driver, and he admitted to attempting to steal a catalytic converter and to possession of drugs in his truck. Officer Kling obtained and executed a search warrant for Smith's truck to search for drugs, paraphernalia, and tools used in the attempted theft. Toward the end of the search, Officer Kling heard a cell phone ringing and saw it, face up, on the seat. When the phone stopped ringing, the display changed to the last text message received, which stated, "It's your first offense shut off your phone." *Transcript* at 10; *Appendix* at 73.

[4] After seeing this, Officer Kling believed other communications about the attempted theft might exist on the phone and, pursuant to policy used to secure digital devices for later imaging, Officer Kling powered down the phone so that

any "alterations" to the phone's contents could not "be made remotely." *Transcript* at 10. In shutting down the phone, the full text message string became visible, which included several messages exchanged between Smith and another person, with Smith stating, "We got pulled over dude. We f[*]cked", and the other individual responding, "It's your first offense shut off your phone". *Appendix* at 73.

[5] Officer Kling applied for a search warrant for Smith's phone, averring to his belief that

> text messages, emails, *other forms of communication and/or messaging*, calling history, *GPS location data*, and account holder/subscriber information *relating to an investigation for the crime of attempted theft of a catalytic converter* will be found in the contents of the said cellular phone.

Id. at 75 (emphases added). The trial court issued a warrant for the phone that provided:

> You are authorized and ordered in the name of the State of Indiana . . . to search the contents of the black, android cellular phone believe[d] to be owned/possessed by Jared Smith that was located in the white, Ford F-250 truck, *to inspect and seize communication with other person(s) relating to the attempted theft of a catalytic converter* from Mat Mat'rs occurring on November 1, 2021*, including, but not limited to, any and all text messages, emails, other forms of communication and/or messaging*, calling history, and account holder/subscriber information on said cellular phone.
>
> You are further authorized . . . *to inspect and seize any GPS location data information on said cellular phone as it relates to the location of*

> *Jared Smith during the time-frame of the attempted theft of a catalytic converter* from Mat Mat'rs.

Id. at 76 (emphases added).

[6] Detective Sergeant Michael Wood conducted the forensic examination of the cell phone, connecting it to the Cellebrite computer software program that makes "a complete image" of the device's contents and then formats that information into an extraction report. *Transcript* at 22. Separate from the extraction process, Sergeant Wood opened the cloud-based Google Photos app (the Photos app)[1] on Smith's phone. *Id*. at 26. In the Photos app, he observed a grid of small – often called thumbnail – images, and three of them appeared to be child pornography. Sergeant Wood thereafter clicked each of the three to open the full image and confirmed the images were child pornography. Sergeant Wood continued searching the Photos app and discovered additional pornographic photos or videos. He also searched the phone's internet browsing history, which showed that Smith had visited child sex websites. Sergeant Wood thereafter sought and received a warrant for Google to obtain further information.

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[1] Sergeant Wood distinguished the Google Photos app from the Gallery on Smith's phone. He explained that the Gallery is the "native" app on Smith's Android phone that contains photographs that are on the device, which would be included in the Cellebrite extraction report. *Transcript* at 37. In contrast, the Photos app "is a backup" of the Gallery, such that "every photo that was once on a device" is automatically backed up to the Photos app but would not necessarily be included in the extraction report. *Id*. at 45, 54.

[7] The State charged Smith on February 25, 2022, with five possession of child pornography offenses, four Level 5 felonies and one Level 6 felony. Smith filed a motion to suppress, asserting that the search of his phone violated the Fourth Amendment of the U.S. Constitution and Article 1, Section 11 of the Indiana Constitution because the officers "exceeded the scope of the warrant" by engaging in a general search of the phone and seizing "articles not described in the search warrant." *Appendix* at 44-45, 61. Smith argued that the warrant identified with particularity the areas to be searched – specifically, apps that contained data relating to the attempted theft of a catalytic converter, "including but not limited to texts messages, other forms of communication and or messaging . . . and GPS location data on November 1, 2021" – but that Sergeant Wood "used his discretion" to search "an app[] he knew held photographs and was not a form of communication with others." *Id*. at 63. That is, Smith argued, Sergeant Wood was "in a place he was not authorized to search," and, as a result, the images should be suppressed. *Id*. at 66.

[8] At the July 2022 hearing, Sergeant Wood was asked why he opened the Photos app on the phone and how that related to the attempted theft. He explained that Cellebrite makes a copy of "everything that's on the phone" but does not copy anything "that was stored in the cloud" and, to access cloud data, the officer needs to "to go through the phone" and open the apps pertaining to the data being searched for. *Transcript* at 26, 27, 35. Noting that the warrant in this case authorized a search for both GPS location and text conversations, Sergeant Wood explained that he opened the Photos app because:

> Photos contain GPS location through their meta data and I also know people to screen shot on their phone, using the screen shot function, important text conversations that they may be saving for certain reasons. So in my training and experience, I've often found text conversations within photos and I know I can find GPS data very often in photos.

Id. at 34. He recalled that in a majority of the approximately eighty phone examinations he has done, he has found photographed – or "screen shotted" – text messages in the phone's Gallery or the Photos app. *Id*. at 58.

[9] Sergeant Wood described that, when an app is opened, it "pop[s] up" at the location where the phone's user was last looking. *Id*. at 38; *see also id*. at 46. The Photos app on Smith's phone contained grids of thumbnail images, and Sergeant Wood encountered three images next to each other that appeared to be pornographic, although he did not recall how many thumbnails he saw before he came across the three at issue. Sergeant Wood stated that after viewing the three images, he continued searching the phone for text messages and GPS data, as well as possible additional pornographic images.

[10] On August 26, 2022, the trial court issued an order granting Smith's motion in part and denying it in part:

> The evidence shows the search of photos for evidence of screenshot communications related to the theft of catalytic converter(s) occurred within the restrictions of the warrant. *The first grid of photos revealed three (3) photos depicting child porn. These photos are not suppressed*. However, once discovered, these photos established a reasonable belief that other child porn photos would be located. *These subsequent photos are suppressed, due to the necessity*

> *of a new search warrant* related to an investigation into child pornography.

Appendix at 95 (emphases added). The trial court granted Smith's request to certify the order for interlocutory appeal, and this court accepted jurisdiction. Smith now appeals. Additional facts will be provided below as needed.

Discussion & Decision

[11] Smith appeals the trial court's decision not to suppress the three images that Sergeant Wood discovered in the Photos app on Smith's phone. This court reviews the denial of a motion to suppress similar to other sufficiency matters. *Isley v. State*, 202 N.E.3d 1124, 1129 (Ind. Ct. App. 2023), *trans. denied*. We must determine whether substantial evidence of probative value exists to support the trial court's decision, construing any conflicting evidence in favor of the trial court's decision. *Id*. (quotations omitted). "However, we consider any substantial and uncontested evidence favorable to the defendant." *Marshall v. State*, 117 N.E.3d 1254, 1258 (Ind. 2019), *cert. denied* (2019) (internal quotations omitted). We do not reweigh the evidence or judge witness credibility. *Id*. When the trial court's decision denying a defendant's motion to suppress concerns the constitutionality of a search and seizure, then it presents a legal question that we review de novo. *Wilson v. State*, 173 N.E.3d 1063, 1066 (Ind. Ct. App. 2021), *trans. denied*.

[12] Smith claims that Sergeant Wood's search violated his rights under the Fourth Amendment of the U.S. Constitution and Article 1, Section 11 of the Indiana

Constitution.[2] As our Supreme Court has recognized, "even though the Fourth Amendment and Article 1, Section 11 share parallel language," the Indiana Constitution "sometimes affords broader protections than its federal counterpart and requires a separate, independent analysis." *Marshall*, 117 N.E.3d at 1258. We thus address each in turn.

Fourth Amendment

[13] Smith correctly observes that the Fourth Amendment requires search warrants to particularly describe the place to be searched and the persons or things to be seized. *See Allen v. State*, 798 N.E.2d 490, 499 (Ind. Ct. App. 2003) (quotation omitted). In this case, the warrant authorized search of Smith's phone for, among other things, text message communications and GPS location data related to the attempted theft. Smith argues that Sergeant Wood "ignor[ed] the limits of the warrant" and opened the Photos app, which was "an application clearly distinguishable from the communications files," and, consequently, the detective was not "in a place he was [] authorized to search." *Appellant's Brief* at 14, 16. Therefore, Smith contends, Sergeant Wood exceeded the scope of the warrant.

[14] In support, Smith directs our attention to *Frasier v. State*, 794 N.E.2d 449 (Ind. Ct. App. 2003), *trans. denied*. There, an officer applied for a warrant to search

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[2] The State argues that Smith waived his claim under the Indiana Constitution because he did not raise it in his motion to suppress. As Smith raised and argued a violation of Article 1, Section 11 in his brief in support of his motion, we decline to find his claim waived.

the defendant's residence, including his computer, for any evidence relating to possessing or dealing marijuana or child pornography. A warrant was issued to search Frasier's home for various things related to the sale of marijuana, including notes and records; it did not authorize a search for child pornography, as requested. In searching Frasier's computer, the officer began opening files in a "Documents" menu, which contained recently-viewed items. *Id.* at 454. When the officer opened the first document, he discovered it was an image of child pornography. He opened "two or three more" "cryptically named" files before he realized that the files listed in "Documents" likely contained images. *Id*. at 454, 465. The officer then obtained a search warrant to search the computer for child pornography. The State charged Frasier with both drug offenses and a count of child pornography.

[15] Frasier filed a motion to suppress the pornographic images. The officer testified at the hearing that he did not know that the first file he opened was an image until he opened it. The trial court denied Frasier's motion to suppress, and, on appeal, he raised various arguments in support of his claim that the images should not be admitted, including that the search warrant authorized a search for notes and records related to the sale of marijuana, not for child pornography. In affirming the trial court, we determined that the officer's

search in the documents menu on the computer was authorized by the warrant and that the images were inadvertently discovered in plain view.[3]

[16] Smith argues that, unlike in *Frasier* – where the images were "intermingled and indistinguishable from document files that officers were authorized to search" – the images in the present case were in the Photos app, which is "easily distinguishable from the files the officers were authorized to search," and thus not inadvertently discovered or in plain view as they were in *Frasier*, such that they should be suppressed. *Appellant's Brief* at 13, 14. We are unpersuaded that the reasoning of *Frasier* requires suppression of the discovered images. To the contrary, we find that, just as the officers in *Frasier* were authorized by the warrant to search a documents folder on the defendant's computer, officers here were authorized by the warrant to search the Photos app on Smith's phone for text communications and GPS data as those apps were known to contain such information.

[17] Indeed, we agree with the State that this case is akin to a situation where police have a search warrant for a residence to look for a firearm, and in looking for a firearm within that residence, they may look within any container where the firearm reasonably may be found. *See Allen*, 798 N.E.2d at 499-500 (officers did

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[3] Under the plain view doctrine, police may seize evidence not identified in a warrant when a police officer inadvertently discovers items of readily apparent criminality while rightfully occupying a particular location. *Frasier*, 749 N.E.2d at 460. For the plain view doctrine to apply the following must exist: (l) the initial intrusion must have been authorized under the Fourth Amendment, (2) the items must be in plain view, and (3) the incriminating nature of the evidence must be immediately apparent. *Id.* (citing *Jones v. State*, 783 N.E.2d 1132, 1137 (Ind. 2003)).

not exceed scope of warrant that authorized search of apartment for "pistols" when they opened cigar box and found cocaine). Here, the warrant authorized officers to search Smith's phone for communication and GPS data pertaining to the attempted theft, and Sergeant Wood testified that he knew from training and experience that saved text communications and GPS data could be found in photographs. He further stated that, on Smith's Android phone, his photos would be backed up and saved to the Photos app. On these facts, Sergeant Wood did not violate the Fourth Amendment when he opened and searched the Photos app.

Article 1, Section 11

[18] Turning to Smith's claim that the search violated Article 1, Section 11 of the Indiana Constitution, we review the constitutionality of a search warrant's execution by looking at the totality of the circumstances. *Brown v. Eaton*, 164 N.E.3d 153, 166 (Ind. Ct. App. 2021), *trans. denied*. The reasonableness of a search turns on a balance of (1) the degree of concern, suspicion, or knowledge that a violation has occurred, (2) the degree of intrusion the method of the search or seizure imposes on the citizen's ordinary activities, and (3) the extent of law enforcement needs. *Id.* (quoting *Litchfield v. State*, 824 N.E.2d 356, 361 (Ind. 2005)). Smith does not provide separate analysis of the three *Litchfield* factors but his claims appear to focus solely on the degree of intrusion, arguing that Sergeant Wood treated the warrant "as authority to search the entire phone," *i.e.*, was too intrusive. *Appellant's Brief* at 18.

[19] As to the first factor, our Supreme Court has recognized that the existence of a valid warrant provides strong support for an officer's concern that a violation has occurred and that evidence of the violation will be found in the place identified in the warrant to be searched. *Hardin v. State*, 148 N.E.3d 932, 944 (Ind. 2020). Smith does not argue that the warrant was not valid, and the first *Litchfield* factor weighs in favor of the State.

[20] As to the second factor, we recognize that when examining the degree of intrusion into the citizen's ordinary activities, we consider the intrusion into both the citizen's physical movements, which is not applicable here, and the citizen's privacy. *Hardin*, 148 N.E.3d at 944-45. In examining the way that officers conduct a search or seizure, we examine "'all of the attendant circumstances' – not a single aspect of the search or seizure in isolation." *Id*. at 945 (quoting *Garcia v. State*, 47 N.E.3d 1196, 1202 (Ind. 2016)).

[21] Smith asserts that Sergeant Wood engaged in "unbridled rummaging" on Smith's phone. *Appellant's Brief* at 18. However, the record does not indicate what, if any, apps Sergeant Wood examined other than the Photos app and a messaging app, both of which could contain communications and GPS data. We are not persuaded that Sergeant Wood searched Smith's "entire phone" or otherwise engaged in rummaging.

[22] Smith also suggests that Sergeant Wood unreasonably "thumbed through the phone rather than use a set accepted methodology to search the Cellebrite copied data." *Id*. However, the record does not reflect that there was a

required "set accepted methodology" that Sergeant Wood should have but failed to use. Furthermore, as we understand Sergeant Wood's testimony, the Cellebrite program copies data that is on the phone and formats it into an extraction report, but that, in addition to that report – not in place of it – Sergeant Wood physically examined the phone's Photos app to access cached cloud-based information not included in the extraction report. According to Sergeant Wood, the two types of examination, the extraction report and his physical examination of the Photos app, were executed while the phone was connected to the Cellebrite program, and each performed a distinct method to search for text communications and GPS information.

[23] While inadvertent discovery is no longer an indispensable element of the plain view doctrine for Fourth Amendment analysis, "the inadvertence requirement still has application with respect to Article 1, Section 11 of the Indiana Constitution." *See Frasier*, 794 N.E.2d at 461. Here, there is no evidence that Sergeant Wood was searching for child pornography or otherwise anticipated that he would find such. Officer Kling's affidavit requesting a warrant for the phone averred only that he believed additional communications or information about the attempted theft would be found on the phone. Sergeant Wood testified that the reason he opened the Photos app was because training and experience told him that he would potentially find photographed text message communications or GPS data there, and while in that app, he encountered what he recognized as pornographic images. We will not reweigh his credibility on appeal. *Id.*

[24] We recognize that "searching the data of a [] cell phone is intrusive." *Brown*, 164 N.E.3d at 166. However, considering all the attendant circumstances discussed above, we find that Sergeant Wood's search of Smith's cell phone resulted in, at most, a moderate degree of intrusion. *See Hardin*, 148 N.E.3d at 946 (recognizing "the obvious intrusion into Hardin's privacy by the search of his vehicle" but finding the search resulted in only moderate intrusion).

[25] Lastly, in reviewing the extent of law-enforcement needs, we look to the needs of the officers to act in a general way, for instance, to combat drug trafficking, but we also look to the needs of the officers to act in the particular way and at the particular time they did. *Id*. at 946-47. Here, the business reported an attempted theft, Smith's truck contained items associated with the theft of catalytic converters, and he admitted to attempting to steal such. During the search of the truck, Officer Kling observed a message on the screen of Smith's phone pertaining to the theft. On these facts, Officers had a general need to investigate Smith's criminal activity, and they obtained a warrant to search Smith's phone for communications and GPS related to the attempted theft. We have recognized that "[o]fficers have a significant need to faithfully execute search warrants." *Brown*, 164 N.E.3d at 166. Sergeant Wood conducted an extraction report and physically examined the messaging and the Photos apps for cloud-based communications and GPS data. On these facts, law enforcement had a moderate, if not high, need to search Smith's phone when and how it did.

[26] On balance of the *Litchfield* factors, and given the totality of circumstances before us, we find that Sergeant Wood's search of Smith's phone did not violate Article 1, Section 11 of the Indiana Constitution.

Conclusion

[27] For all the reasons discussed herein, we affirm the trial court's decision denying Smith's motion to suppress the three images discovered when Sergeant Wood opened the Photos app, and we remand for further proceedings consistent with this opinion.

[28] Judgment affirmed and remanded.

Riley, J. and Pyle, J., concur.