Circuit Court for Howard County
Case No. C-13-CR-20-000380

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND

No. 1116

September Term, 2021

MICHAEL WALLMAN

v.

STATE OF MARYLAND

Shaw,
Albright,
Zarnoch, Robert A.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Shaw, J.

Filed: January 17, 2023

*At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

**This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Appellant, Michael Wallman, was indicted in the Circuit Court for Howard County on charges of possession of child pornography. Howard County Police, in December 2017, received a cyber tip reporting that files containing sexually explicit material of children were uploaded to a Dropbox account connected to Appellant. In 2020, the police obtained search warrants and executed them on Appellant's residence. His computer and hard drive were seized, and a forensic examination revealed hundreds of files and videos of child pornography.

Appellant filed a motion to suppress the materials seized, which was denied. He later pled not guilty to an agreed statement of facts on three counts of possession of child pornography, and the court found him guilty on all three counts. He was sentenced to an aggregate of nine years' incarceration with all, but six months suspended, three years of supervised probation, forfeiture of the seized electronics, and he was required to register as a Tier I Sex Offender. Appellant timely appealed and presents the following questions for our review, which we have reordered:

1. Did the circuit court err in denying Appellant's suppression motions?
2. Is the evidence sufficient to sustain Appellant's convictions?
3. Did requiring Appellant to register as a Tier I sex offender constitute an illegal sentence?

For reasons discussed below, we affirm.

BACKGROUND

On or about January 5, 2018, the Howard County Police Department began investigating a complaint of suspected child pornography. The complaint alleged that

approximately fifty-four files of child pornography were uploaded to a Dropbox account connected to an email address associated with the screen username of "Michael Wow" and an ESP user ID. In April of 2018, Detectives served a search warrant to Dropbox for records related to that account. Dropbox provided a reconstruction of the requested files that contained images depicting child sexual exploitation. Further investigation showed that two IP addresses and two mobile phones connected to the downloads were registered to Michael Wallman located at an address in Ellicott City, Maryland.

On February 19, 2020, a search warrant was issued for Appellant's residence for evidence of child pornography, and executed the following day. Appellant was identified on the premises. Law enforcement officers advised Appellant of his Miranda Rights, which he waived, before conducting an interview. Appellant stated that the computer in the bedroom upstairs belonged to him and was used only by him. He also provided one of his email addresses. During the interview, officers asked if Appellant viewed child pornography, and he told police that "it might have popped up or something" and that he "generally would not stay on such a page." A forensic preview was conducted on Appellant's computer and hard drive, which revealed videos of child exploitation materials in the cache section of the computer and on the hard drive labeled G drive as user Michael. The computer and hard drive were both seized.

On July 7, 2020, a forensic examination was conducted on Appellant's hard drive. The examination uncovered three hundred and twelve files, two hundred and ninety-four videos, two hundred and fifty-six of which were unique, and eighteen images, eleven of

which were non-duplicitous. Appellant was arrested and charged with six counts of possession of child pornography.

On February 26, 2021, Appellant filed a motion to suppress,[1] asserting defects in the search warrant based on particularity, remoteness, and staleness issues. The court orally denied the motion finding "that there was a substantial basis to conclude that there was sufficient particularity" and that "the information was not too remote in time or stale to provide probable cause."

On September 27, 2021, Appellant pled not guilty to an agreed statement of facts on three counts of child pornography in violation of Md. Code Ann., § 11-208(b). The three counts were based on three separate visuals recovered by Howard County Police that depicted two six-year-old boys and an eleven-year-old boy. The court found Appellant guilty on all three counts and sentenced him to nine years of incarceration, all suspended except for six months with three years' supervised probation. Appellant was required to forfeit the seized electronics and register as a Tier I sex offender. He timely appealed.

STANDARD OF REVIEW

In reviewing a circuit court's denial of a motion to suppress evidence, this Court "must rely solely upon the record developed at the suppression hearing." *Grimm v. State*, 232 Md. App. 382, 396 (2017) (quoting *Briscoe v. State*, 422 Md. 384, 396 (2011)). "We

[1] On February 26, 2021, Appellant filed a "Motion to Suppress" and a "Motion to Suppress and Request for a Concurrent *Franks* Hearing." The *Franks* hearing issue is not properly before us and thus, we decline to address it. The "Motion to Suppress" asserted defects in the warrant based on particularity, staleness, and remoteness. The "Motion to Suppress and Request for a Concurrent *Franks* Hearing" asserted warrant defects based on particularity. At the May 2021 hearing, the court denied the motions to suppress on all three issues.

view the evidence" presented, and any "inferences that may be drawn . . . in the light most favorable to the party who prevails on the motion." *Id.* This Court accepts "the circuit court's findings of fact unless they are clearly erroneous, but . . . we undertake an independent constitutional evaluation by reviewing the relevant law and applying it to the unique facts and circumstances of this case." *Trott v. State*, 473 Md. 245, 254 (2021) (citation and internal quotations omitted).

"In assessing legal sufficiency, we will look only at that which was formally received in evidence…our evidentiary universe is strictly circumscribed within the four corners of the agreed statement of facts." *Polk v. State*, 183 Md. App. 299, 306 (2008). "The standard for appellate review of evidentiary sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Suddith*, 379 Md. 425, 429 (2004).

In considering the legality of a sentence pursuant to a statute, "[i]nterpretation of a statute is a question of law, and, therefore, we review *de novo* the decision of the Circuit Court." *Moore v. State*, 388 Md. 446, 452 (2005). "[W]e review the question of constitutionality de novo." *Myers v. State*, 248 Md. App. 422, 437 (2020).

DISCUSSION

I. Motion to Suppress

The Fourth Amendment to the United States Constitution guarantees:

> [t]he 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 person or things to be seized.

U.S. Const. amend. IV. "The exclusion of evidence obtained in violation of these provisions is an essential part of the Fourth Amendment protections." *Swift v. State*, 393 Md. 139, 149 (2006); *Mapp v. Ohio*, 367 U.S. 643, 655-56 (1961).

i. *Particularity*

Appellant argues that the search warrant lacked particularity because it allowed for the seizure of all electronic communication devices found on the premises and included electronic devices that were not identified by Dropbox as having been accessed by him. According to Appellant, probable cause existed only for the two devices with IP addresses that Dropbox identified, and the warrant did not list those devices.

The State argues the warrant satisfied the Fourth Amendment particularity requirement because "police had probable cause to believe that evidence of the crime could be on *any* device in [Appellant's] possession that had sharing capabilities." The State argues the nature of the information sought and the means of storage and transmission from one device to another permitted police to look for any electronic devices on which the information could be stored. The State asserts that the images were uploaded to a Dropbox account, which is a "file syncing and collaboration service that allows users to access and share their files on computers, phones, tablets . . ." and "[b]ased on that knowledge, it was not unreasonable for police to believe that [Appellant] could save pictures on multiple devices."

In ruling on particularity, the trial court found that:

> This sort of material is easily move[d] between electronic devices. And sometimes stored on hard drives, sometimes stored in the cloud, sometimes on computers but necessarily on the computer that made the contact to the Dropbox. So, with respect to particularity, I find that there was a substantial basis for [the issuing judge's] conclusion that there was sufficient particularity.

The U.S. Supreme Court, in *Maryland v. Garrison*, held,

> [t]he Warrant Clause of the Fourth Amendment categorically prohibits the issuance of any warrant except one "particularly describing the place to be searched and the persons or things to be seized." The manifest purpose of this particularity requirement was to prevent general searches. By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications . . . .

480 U.S. 79, 84 (1987).

In deciphering whether there is probable cause to believe that evidence is located in a particular place, we examine the "totality-of-the-circumstances." *Illinois v. Gates*, 462 U.S. 213, 230-31 (1983). That "process does not deal with hard certainties, but with probabilities . . . the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." *Id.* at 231-32.

In submitting the warrant application, the Howard County Police Department's lead detective provided her law enforcement experience and described, in detail, her training and knowledge from handling child abuse and sex crime cases. The affidavit stated:

> Your affiant knows from her training, knowledge and experience, that people who possess and/or trade child sexual exploitation material often make copies of the material to store in various locations for security and ease of viewing. Your affiant knows that cellular telephones, electronic tablets, and computers are capable of storing these files for an extended period of

> time; those who collect and/or trade child exploitation material often take advantage of this, and keep the material for extended periods of time. Furthermore, your affiant knows that child sexual exploitation material will often be uploaded to and stored in cloud based computing storage systems, which can then be viewed from other devices. Dropbox, Inc. is a file syncing and collaboration service that allows users to access and share their files on computers, phones, tablets, and the Dropbox website. Dropbox, Inc. creates a special folder on the user's computer, the contents of which are then synchronized to Dropbox's servers and to other computers and devices on which the user has installed Dropbox, Inc., keeping the same files up to date on all devices. Your affiant knows through her training, knowledge, and experience that people who possess child sexual exploitation material sometimes delete and/or add to files, images, and/or videos to change the collection of files, images, and/or videos that they possess and/or share.
>
> The warrant application sought authorization to search the residence for:
>
> Contraband and/or evidence relating to the commission of the following crime, to wit:
>
> Annotated Code of Maryland CR 11-208: Possession of Visual Representation of Child Under 16 Engaged in Certain Sexual Acts.

We glean from the standard articulated in *Illinois v. Gates*, that law enforcement officers are permitted to formulate "certain common-sense conclusions about human behavior" based on probabilities stemming from years of training, knowledge, and experience. *Id.* at 231.

Here, the motions court found that "the detective was not seeking to search everything in the house, but she was seeking, based on her training, experience, over . . . twenty-six years or twenty-four years, . . . and all these different pages on the affidavit outlining her experience." The court concluded that based on her experience and familiarity in handling these types of cases where "this sort of material is easily move[d]

between electronic devices," there was a substantial basis for the issuing judge to conclude that there was sufficient particularity since all the electronic devices in Appellant's possession had the capacity to store child exploitation materials.

We agree and hold that the court did not err in its factual findings or legal conclusions. The court's probable cause analysis was based on the totality of the circumstances and was not a fishing expedition. There was a substantial basis for the issuance of the search warrant, as it was a controlled request and authorization for the search and seizure of information that could have been found on multiple devices. As noted by the Supreme Court of Maryland in *Richardson v. State*:

> With respect to a small subset of cases, most notably child pornography and financial crimes, experience has shown that some perpetrators purposely mislabel electronic files or hide evidence in unusual places. Thus, a search warrant authorizing a broad forensic analysis of a cell phone can be appropriate where the warrant limits the search for evidence of one of these crimes (but an issuing court should consider requiring the inclusion of search protocols to restrict how the searching officers conduct such an analysis).

481 Md. 423, 461 (2022).

ii. *Staleness/ Remoteness*

"There is no 'bright-line' rule for determining the 'staleness' of probable cause; rather, it depends upon the circumstances of each case, as related in the affidavit for the warrant." *Greenstreet v. State*, 392 Md. 652, 674 (2006) (citations omitted). "Factors used to determine staleness include: passage of time, the particular kind of criminal activity involved, the length of the activity, and the nature of the property to be seized." *Id.* In *Andersen v. State*, this Court stated:

> The ultimate criterion in determining the degree of evaporation of probable cause, however, is not case law but reason. The likelihood that the evidence sought is still in place is a function not simply of watch and calendar but of variables that do not punch a clock: the character of the crime (chance encounter in the night or regenerating conspiracy?), of the criminal (nomadic or entrenched?), of the thing to be seized (perishable and easily transferable or of enduring utility to its holder?), of the place to be searched (mere criminal forum of convenience or secure operational base?), etc. . . . The hare and the tortoise do not disappear at the same rate of speed.

24 Md. App. 128, 172 (1975).

Appellant argues the probable cause underlying the February 2020 warrant application was stale at the time the warrant was issued because there was almost a two-year interim between the initial discovery of child pornography files and the application for the search warrant. He asserts the twenty-two-month delay renders the probable cause stale and the evidence seized pursuant to the warrant should have been suppressed.

The State argues that the nature of the activity and property sought support the validity of the warrant because a computer is not the sort of item that rapidly dissipates or degrades. The State contends that "a 'collector' of child pornography tends to keep copies of downloaded images, and a computer could still have evidence of information that the offender believes he has destroyed."

In *Fone v. State*, a child pornography case, we examined whether a search warrant lacked probable cause because the affidavit failed to include the dates of the events relied upon to show probable cause. Fone contended that it was "impossible to determine the remoteness in time between the facts observed and the issuance of the warrant." *Id.* at 98-99. The State countered, arguing that "child pornography stored on a digital device is a 'collector's item.'" *Id.* at 100. The circuit court, in denying the motion to suppress, relied,

in part, upon the lead detective's search warrant affidavit about 'the habits and propensities of those who view or collect child pornography.' The warrant also included the detective's fourteen years of experience assigned to the Special Victims Investigations Division. The court found that staleness is "highly relevant to the legality of a search of a perishable or consumable objects like cocaine" but, less so for computer files which can be saved or recovered if deleted. *Id.* at 101 (quoting *United States v. Seiver*, 692 F.3d 774, 777 (7th Cir. 2012)).

We affirmed the circuit court's denial of the motion to suppress, finding that the information in the warrant application was not stale. *Id.* at 102. We noted that internet service providers were required by statutory mandate to report suspected child pornography "as soon as reasonably possible" and as a result, the issuing judge could "rationally infer that the image of child pornography was . . . reasonably close in time . . . and certainly within a few years." *Id.* at 106. We held that the lapse in time coupled with the Detective's "averments about the habits of possessors of child pornography and the ability of the police 'to recover files and data from computer media [even] after it has been deleted' gave rise to a substantial basis for the issuing judge's probable cause determination." *Id.*

We observed: "[s]everal federal courts addressing staleness of probable cause in the context of child pornography stored on digital devices have reasoned that because digital images have a 'potentially infinite lifespan,' 'the passage of time alone' cannot demonstrate staleness." *Fone,* 233 Md. App. at 104 (internal citations omitted). For instance, the Seventh Circuit held that:

> [A] seven-month delay from the date that child pornography images were downloaded from the internet to the defendant's computer to the date a search warrant for the defendant's computer was applied for did not render the information stale. The court opined: 'Staleness' is highly relevant to the legality of a search for a perishable or consumable object, like cocaine, but rarely relevant when it is a computer file. Computers and computer equipment are "not the type of evidence that rapidly dissipates or degrades."

Id. at 105 (citing *U.S. v. Seiver*, 692 F.3d 774, 777 (7th Cir. 2012)) (internal citations omitted).

In the present case, in examining the totality of the circumstances, we conclude that the nature of the material, the potential lifespan of material stored on electronic devices, and the ability to recover deleted material support the judge's determination that there was probable cause for the issuance of the search warrant. The items sought were not highly perishable or consumable and were not subject to a high level of degradation or dissipation. The court did not err in denying Appellant's motion to suppress.

II. The Statute is constitutional, and the evidence included in the agreed statement of facts was sufficient to sustain Appellant's conviction.

According to Appellant, his conviction under § 11-208 cannot be sustained because the statute is unconstitutional. He contends because "it allows for prosecution for images involving a computer-generated image that is indistinguishable from an actual and identifiable child, this statute bans material that does not involve or harm any real child." He further argues the agreed statement of facts did not establish that the images were real children. The State argues that Appellant failed to preserve his claim challenging the constitutionality of the statute, but nevertheless, the statute is constitutional. The State argues that the agreed statement of facts sufficiently established Appellant's guilt.

"Maryland appellate courts have consistently held that, pursuant to Maryland Rule 8-131(a), and its predecessors, Rules 885 and 1085, appellate courts will not ordinarily decide issues not raised or decided by a trial court." *Taylor v. State*, 381 Md. 602, 612 (2004). Parties are required to first raise a claim in the trial court to preserve the claim for appellate review. *Medley v. State*, 52 Md. App. 225, 231 (1982).

Appellant did not challenge the constitutionality of § 11-208 during any proceedings before the trial court below and raises a constitutionality claim for the first time before this court. As such, he did not properly preserve the issue and we need not address it. We note, further, that the State did not rely, in its prosecution, on the portion of the statute prohibiting computer generated images but rather real children.

Regarding the sufficiency of the evidence, Appellant argues that the court never viewed the images to make a determination as to whether they depicted real children. The State argues, citing *McIntyre v. State*, that it is not required to prove the specific identity of actual children that form the basis of a conviction in child pornography cases. 168 Md. App. 504, 528 (2006).

In *McIntyre v. State*, Appellant, McIntyre, was investigated by a Texas Police Department for sending child exploitation images to an undercover detective through an online chatroom. *Id.* at 510. The investigation revealed McIntyre, a Maryland resident, as the owner of the online account and sender of child pornography. *Id.* at 511. A search warrant was issued and executed on McIntyre's residence, *id.*, where evidence of child pornography was found on two computer disks and a computer's hard drive. *Id.* at 513. McIntyre was subsequently "convicted by a jury . . . of forty-seven counts of possession of

child pornography and two counts of distribution of child pornography." *Id.* at 509. He appealed.

On appeal, McIntyre relied on *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002) and "contend[ed] that his convictions must be reversed because the evidence produced at trial was insufficient to establish that the images depicted actual children, as opposed to virtual images of children." *McIntyre*, Md. App. at 526. The State argued that "defense counsel never contended that the State's evidence was insufficient due to its failure to prove that the depictions were those of real children. The State, therefore, contend[ed] that this issue was not preserved for appellate review." *Id.* at 527. This Court agreed, and held that if appellate review was proper, "[McIntyre] would not prevail." *Id.* at 528.

We concluded that:

> *Free Speech Coalition*, did not establish a broad, categorical requirement that, in every case on the subject, absent direct evidence of identity, an expert must testify that the unlawful image is of a real child. Juries are still capable of distinguishing between real and virtual images; and admissibility remains within the province of the sound discretion of the trial judge. *The only two circuits to have considered the issue take the same position.*

168 Md. App. 504, 530 (2006) (emphasis added).

Here, the agreed statement of facts included the description of three child sexual exploitation images that were found on Appellant's computer.

> [The State]: The following three images were a compilation of what was found on Mr. Wallman's computer and were the first three counts of the indictment. The first . . . officers would have testified depicted a young boy, approximately age six performing fellatio on an adult male. . . . The second video . . . depicts a young boy, approximately age six . . . . The third video . . . depicts a young boy approximately age eleven in the shower.

* * *

> [Appellant's Counsel]: And, Your Honor, for the purposes of the not guilty statement of facts, I have no additions, corrections or deletions.
>
> The Court: Okay. The statement of facts would lead to a guilty finding for Counts One, Two and Three, the possession of child pornography.

On this record, the trial court properly concluded that the children depicted in the videos were minor children. We note that Appellant did not object to the State's characterization of the victims as young boys and further, there was no assertion that the images were not real children.

III. Legality of Tier I Sex Offender Status

Appellant argues that requiring him to register as a Tier I sex offender constitutes an illegal sentence because the State failed to prove that the victim was a minor as required by the statute. Section 11-701(o)(2) states, in pertinent part: "Tier I sex offender means a person who has been convicted of conspiring to commit, attempting to commit, or committing a violation of § 3-902 or § 11-208 of the Criminal Law Article, if the victim is a minor." Md. Code Ann., Crim. Proc. § 11-701(o)(2).

Appellant relies on *Rogers v. State*, in support of his contention that the State did not prove beyond a reasonable doubt that minor children were depicted in the images. 468 Md. 1 (2020). In *Rogers*, the petitioner was convicted of violating § 11-303(b)(1) (now § 3-1102(b)(1)) and required to register as a Tier II sex offender. Rogers appealed his sentence asserting that it was illegal because a "victim's age must be found by the trier of fact beyond a reasonable doubt before sentencing, not by the Registry's manager at some point after conviction." *Id.* at 30.

The Supreme Court of Maryland agreed, because "the victim's age was not established during the agreed statement of facts or at any point during the guilty plea proceeding." *Id.* at 46. The Court held "that a fact necessary for placement on the Registry, such as the victim's age, must be determined by the trier of fact beyond a reasonable doubt, during the adjudicatory phase of the criminal proceeding, prior to sentencing." *Id.* at 45. Since the victim's age was not established prior to sentencing the Court ordered the removal of Rogers' name from the sex offender registry. *Id.* at 46.

Rogers, however, is inapplicable to the present case because, here, the victims' ages were established during the adjudicatory phase through the agreed statement of facts. Here, the agreed statement of facts included that the three boys depicted in the videos were ages six and eleven. Appellant supplied no additions or corrections to the facts presented. As such, the agreed statement of facts was sufficient to establish the victims' ages as minor children and Appellant's conviction and Tier I sex offender status. The court did not err.

JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.