IN THE COURT OF APPEALS OF THE STATE OF ALASKA

KEVIN S. PATTERSON, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11816 Trial Court No. 3KN-10-057 CR MEMORANDUM OPINION No. 6476 — May 31, 2017

Appeal from the Superior Court, Third Judicial District, Kenai, Carl Bauman, Judge.

Appearances: Doug Miller, Law Office of Douglas S. Miller, Anchorage, for the Appellant. June Stein, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Craig W. Richards, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Suddock, Superior Court Judge.*

Judge MANNHEIMER.

Kevin S. Patterson is a convicted sex offender who is required to register with the Department of Public Safety for life. In 2014, we upheld Patterson's conviction

* Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

for failing to report one of his e-mail addresses. *See Patterson v. State*, 323 P.3d 65 (Alaska App. 2014).

The present appeal arises from Patterson's convictions on seven counts of possessing child pornography, following a bench trial in the superior court.

The police discovered the child pornography when they served a search warrant on the bed and breakfast owned by Patterson's parents. During this search, the police discovered multiple external hard drives and laptop computers containing downloaded images of child pornography. They also found a small laptop computer hidden in the top rack of the dishwasher in Patterson's separate residence, some three miles away.

In this appeal, Patterson asserts that these searches were illegal. Patterson also argues that the indictment against him should have been dismissed on various grounds. In addition, Patterson argues that the evidence presented at his trial was legally insufficient to support the judge's verdicts — or, that if the evidence was sufficient to support the verdicts, the State's proof at trial varied fatally from the evidence presented to the grand jury.

For the reasons explained in this opinion, we conclude that none of Patterson's arguments have merit, and we therefore affirm his convictions.

The basic facts underlying the charges of possessing child pornography

Patterson moved to Alaska with his parents in September 2007. At that time, Patterson was on probation in Minnesota for sex offenses, and his probation supervision was transferred to the Alaska Department of Corrections. Patterson's conditions of probation prohibited him from using computers or otherwise accessing the Internet except at Kenai Peninsula College, where Patterson was attending classes.

At some point in 2009, Patterson's probation officer began to suspect that Patterson was accessing the Internet in violation of his probation conditions. Subsequent investigation by the police led to the issuance of a series of search warrants.

Eventually, the police obtained a search warrant for the bed and breakfast owned by Patterson's parents in Kenai. Though Patterson was living a few miles away from his parents at the time, the police located a room in the bed and breakfast that appeared to be used by Patterson: the room contained various items of property that apparently belonged to Patterson, including business cards, a backpack, and a camera.

Pursuant to the warrant, the police seized multiple laptops and external hard drives from this room. Forensic analysis of the laptops and the hard drives revealed several folders of child pornography.

Patterson was indicted on eight counts of possession of child pornography.[1] Following a bench trial, he was convicted of seven of those counts.

Patterson's attacks on the search warrants

Early in the investigation of this case, the police successfully applied for a warrant to obtain information from Google concerning two Gmail accounts that they believed Patterson was using. The information obtained from Google included various IP addresses that had been used to access the two Gmail accounts.

Based on this information about the IP addresses, the police applied for another search warrant, this one to obtain records from Alaska Communications Systems (an Internet provider) relating to one of the IP addresses. The resulting records from

[1] AS 11.61.127(a).

Alaska Communications Systems revealed that the IP address in question was associated with the business account of the bed and breakfast owned by Patterson's parents.

Based on this new information, the police applied for the warrant to search the bed and breakfast for computers and other devices that allowed a person to access the Internet, as well as digital storage devices such as external hard drives, flash drives, and compact discs. The execution of this search warrant led to the discovery of the child pornography that formed the basis for the charges against Patterson.

Patterson's attorney attacked these search warrants, both in the district court (where Patterson was charged with the misdemeanor of failing to report the e-mail addresses) and in the superior court (where Patterson was charged with possessing child pornography). The defense attorney alleged that the warrant applications contained false statements and material omissions, and he argued that the resulting search warrants should be struck down under the rule announced by the Alaska Supreme Court in *State v. Malkin*, 722 P.2d 943 (Alaska 1986).

In *Malkin*, the supreme court declared that a search warrant is invalid if the magistrate's finding of probable cause is based on material misstatements of fact (or material omissions of fact) that the police offered in reckless disregard of the truth. In addition, a search warrant is invalid under *Malkin* if the police intentionally misstated the facts with the intent of misleading the judicial officer into issuing the warrant, regardless of a lack of materiality. [2]

Patterson's suppression motion listed several portions of the search warrant applications where, according to the defense attorney, the police officer who applied for these warrants had either materially misstated the facts or had omitted material facts.

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[2] *See Malkin*, 722 P.2d at 946 & n. 6; *Lewis v. State*, 862 P.2d 181, 186-87 (Alaska App. 1993) (interpreting *Malkin*).

The defense attorney asserted that the police must have misrepresented the facts intentionally, or at least recklessly — and that if the true facts had been presented in the search warrant applications, there would not have been probable cause to issue the warrants.

Both the district court and the superior court denied this suppression motion on the pleadings. The district court was the first to issue a written order explaining its decision. The superior court later issued a separate written order reaching the same conclusion.

On appeal, Patterson renews his various claims of material misstatements and material omissions, and he also argues that he was entitled to an evidentiary hearing on these claims. But having reviewed the record, we agree with the trial court that the various alleged misstatements and omissions identified by Patterson's defense attorney were simply not material to the question of whether there was probable cause to issue the search warrants. We also agree with the trial court that Patterson's allegations did not raise a reasonable inference that the police had deliberately lied to the judicial officers who issued these warrants.

Accordingly, we affirm the superior court's denial of Patterson's suppression motion.

Patterson's attacks on the indictment

Patterson argues that the grand jury heard insufficient evidence to justify his indictment for possessing child pornography.

The pornographic images that Patterson was charged with possessing were found on various computers and computer hard drives discovered during the search of the bed and breakfast owned by Patterson's parents. On appeal, Patterson argues that the

State presented no direct evidence that Patterson personally created these images, or that he personally downloaded them from the Internet. Patterson also argues that the State failed to present sufficient evidence to connect him to the room where the computers and hard drives were found, or to show that he owned the computers and the hard drives that were found there, or to show that he was aware of the pornographic images stored on these devices.

The State's evidence may have been circumstantial, but for purposes of assessing the sufficiency of the evidence presented to a grand jury, Alaska law does not distinguish between proof by direct evidence and proof by circumstantial evidence. *Stern v. State*, 827 P.2d 442, 447 (Alaska App. 1992). The question is whether a reasonable person could have concluded that these images belonged to Patterson. And in answering this question, we must view the evidence in the light most favorable to the grand jury's decision. [3]

Viewing the grand jury evidence in this light, we conclude that it was sufficient to support Patterson's indictment for possessing child pornography.

Finally, Patterson argues that the prosecutor who presented Patterson's case to the grand jury failed to fulfill the duty imposed by *Frink v. State* to apprise the grand jurors of exculpatory evidence. [4] But a prosecutor's duty under *Frink* "extends only to evidence that tends, in and of itself, to negate the defendant's guilt." *Cathey v. State*, 60

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[3] *See, e.g.*, *Milligan v. State*, 286 P.3d 1065, 1070 (Alaska App. 2012): "When we consider a challenge to the sufficiency of the evidence supporting an indictment, we draw every legitimate inference in favor of the indictment. There is sufficient evidence to support an indictment if, viewed in the light most favorable to the indictment, the evidence is adequate to persuade reasonable minded persons that if unexplained or uncontradicted it would warrant a conviction of the person charged with an offense by the judge or jury trying the offense."

[4] 597 P.2d 154, 164-66 (Alaska 1979).

P.3d 192, 195 (Alaska App. 2002). A prosecutor is not required "to develop evidence for the defendant [or] present every lead possibly favorable to the defendant." *Frink*, 597 P.2d at 166.

Here, the information that Patterson claims should have been presented to the grand jury was not the kind of information that, in and of itself, tended to negate his guilt. We therefore reject Patterson's argument that the indictment should have been dismissed for failure to present exculpatory evidence.

Patterson's claim that the evidence presented at trial was insufficient to support his convictions

Patterson asserts that the evidence presented at his trial was not legally sufficient to establish that he possessed the images of child pornography found on the computers and the separate hard drives.

Patterson's argument is based primarily on the fact that there were potentially exculpatory explanations for the presence of the pornographic images on the computers and the hard drives, and on the fact that the State presented only circumstantial evidence that Patterson was the person who stored the pornographic images on those devices. But we are obliged to view the evidence (and the reasonable inferences to be drawn from that evidence) in the light most favorable to the trial judge's verdict — and then to ask whether, viewing the evidence in that light, a reasonable person could conclude that the State had proved its case beyond a reasonable doubt. [5]

Using this test, we conclude that the evidence presented at Patterson's trial was legally sufficient to establish his guilt.

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[5] *Shayen v. State*, 373 P.3d 532, 535 (Alaska App. 2015).

Patterson's argument that the trial judge used the wrong law when deciding whether Patterson "possessed" the pornographic images

Included along with Patterson's argument about the sufficiency of the evidence are two quite different claims.

First, Patterson asserts that Alaska has no jurisdiction over crimes that occur in another jurisdiction, and he argues that even if he did possess the pornographic images on the computers and the external hard drives, the evidence suggests that many of those images were placed on the computers and hard drives before he moved to Alaska in 2007. Thus, Patterson contends, the State of Alaska had no jurisdictional authority to prosecute him for these images.

This argument is mistaken. It is true that possession of contraband is a continuing offense.[6] But when "a continuing offense ... runs through several jurisdictions, the offense is committed and cognizable in each."[7] Thus, even if Patterson was in another state when he placed the pornographic images on his computers and hard drives, the fact that Patterson later brought these images to Alaska and continued to possess them here means that the State of Alaska could prosecute him for possessing these images.

Second, Patterson contends that the trial judge failed to use the correct definition of "possession" when the judge found Patterson guilty of possessing the child pornography images. Patterson asserts that, in this context, "possession" could mean a number of different things, and he faults the trial judge for failing to specify what definition of "possession" he was using when he reached his verdict at Patterson's trial.

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[6] *Wiglesworth v. State*, 249 P.3d 321, 330 (Alaska App. 2011).

[7] *United States v. Midstate Horticultural Company*, 306 U.S. 161, 166; 59 S.Ct. 412, 414; 83 L.Ed. 563 (1939).

But at the trial, Patterson's attorney made no argument regarding the precise definition of "possession", nor did the defense attorney ask the judge to specify exactly what definition he was applying to Patterson's case, nor (after hearing the judge announce his verdict) did the defense attorney ask the judge for more specific findings under Alaska Criminal Rule 23(c). Thus, to the extent that there might be uncertainty or ambiguity in the judge's oral pronouncement of the verdict, Patterson must show plain error.

We find no plain error here. Patterson's case was not litigated in a way that required the judge to draw fine distinctions regarding what it means to "possess" child pornography. As shown by the defense attorney's summation at the close of the trial, Patterson's defense focused almost entirely on weaknesses in the State's evidence tying Patterson to the computers and external hard drives found in his parents' bed and breakfast. The defense attorney also suggested that, even if the computers and hard drives belonged to Patterson, there was still a possibility that a computer virus might have planted the pornographic images on these devices without Patterson's knowledge.

These defenses did not require the trial judge to craft or employ a specialized definition of the word "possess". We therefore find no plain error — *i.e.*, no error that "undermine[d] the fundamental fairness of the trial".[8]

Patterson's claim that there was a fatal variance between the crimes charged in the indictment and the crimes for which he was convicted at trial

Patterson claims that there was a fatal variance between the seven crimes charged in his indictment and the seven crimes for which he was convicted at trial. More

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[8] *Adams v. State*, 261 P.3d 758, 764 (Alaska 2011).

specifically, Patterson suggests that the grand jury indicted him on the theory that he *created* the pornographic images, as opposed to the theory that he possessed these images by keeping them stored on computers and external hard drives.

In making this argument, Patterson relies on the dates listed in the indictment as the dates of the seven offenses. As Patterson points out in his brief, most of these dates do not reflect the date on which the search warrant was executed (June 4, 2009), but rather the approximate dates on which the files were first downloaded or stored on the electronic devices.

It is unclear whether, even if Patterson's claim were true, this divergence in the dates would constitute a variance at all. As we explained in *Larkin v. State*, 88 P.3d 153 (Alaska App. 2004), the date of the offense is normally not a material element of the State's proof. Thus, an inaccuracy in an indictment's specification of the date of the offense is generally immaterial, so long as the State's evidence reveals that the offense occurred (1) before the indictment was returned and (2) within the applicable statute of limitations. *Id.* at 156-57.

But in terms of assessing whether there was a variance in Patterson's case, the real question is how the case was submitted to the grand jury. The grand jury record shows that, similar to the way Patterson's case was argued at his trial, the prosecutor presented Patterson's case to the grand jury on the theory that Patterson possessed the pornographic images that were stored on the computers and hard drives found in his parents' bed and breakfast. The State did not try to prove that Patterson created all of these images. Rather, the State's presentation to the grand jury focused on the allegations that Patterson was the owner of these electronic devices, and that he knew that the pornographic images were stored on these devices.

We therefore find no variance, much less a fatal one.

Conclusion

The judgement of the superior court is AFFIRMED.