[Cite as *State v. McCrory*, 2011-Ohio-546.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio

Appellee

v.

John McCrory

Appellant

Court of Appeals Nos. WD-09-074
WD-09-090

Trial Court Nos. 2009CR0259
2008CR0370

DECISION AND JUDGMENT

Decided: February 8, 2011

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, and Heather M. Baker and David E. Romaker, Assistant Prosecuting Attorneys for appellee.

John Czarnecki, Brad F. Hubbell and Sarah K. Skow, for appellant.

* * * * *

COSME, J.

{¶ 1} Defendant-appellant, John B. McCrory, appeals his conviction and sentence on one count of gross sexual imposition and ten counts of pandering sexually oriented matter involving a minor. Following the denial of his motion to suppress evidence seized from a home computer, appellant accepted a conditional plea agreement and was

sentenced to consecutive terms of 17 months for gross sexual imposition and five years for the counts of pandering. Appellant contends that his motion to suppress was improperly denied because the search warrants were insufficiently particular, executed beyond reasonable limitations, and unsupported by probable cause. He also maintains that the trial court erred in imposing consecutive sentences without making any factual findings. For the reasons that follow, we affirm the judgment of the Wood County Court of Common Pleas.

I. BACKGROUND

{¶ 2} On July 2, 2008, Detective Douglas Kinder of the Perrysburg Police Department submitted an affidavit to the Perrysburg Municipal Court in support of an application for a warrant to search appellant's residence for evidence of rape. The affidavit outlined Detective Kinder's position and training, and indicated that he was responsible for investigating complaints of rape and other sex-related offenses. Kinder stated that he was contacted by a woman on June 30, 2008, and informed that she was sexually assaulted by appellant at his residence on June 22, 2008. During a lengthy interview of the victim, Kinder was told that she went to appellant's residence for a job interview in response to an advertisement that appellant posted on craigslist.org for a topless maid, that appellant informed her ahead of time there were no sexual expectations, and that during the job interview appellant made forcible sexual contact with her.

{¶ 3} Kinder's affidavit stated that prior to the meeting between appellant and the victim, the victim "did correspond with the suspect several times via their respected (sic) email addresses, and through the craigslist.org email service. They discussed the job posting and its requirements. The victim admitted to sending the suspect three photos of her self (sic), one of those photos was as a small child. Through emails they exchanged phone numbers. The victim did call the suspect on his cell phone to set up their appointment at his residence at 417 Mulberry St. Perrysburg, Wood County, Ohio." He then stated, "I have recovered that posting and it is noted that there would be no sexual expectations. In several of the email exchanges the suspect also stated there would be no sexual expectations of the victim."

{¶ 4} Kinder also related that subsequent to the interview between appellant and the victim, appellant called the victim several times from his cell phone and sent her another email. The affidavit further stated that appellant told the victim he received three or four replies to his advertisement, had hired one other maid, had sexually assaulted other women, and had exposed himself in public places. In his affidavit, Kinder confirmed, "We did find a criminal history of Mr. John B McCrory in Ohio and the state of Florida where he was arrested and convicted of indecent exposure."

{¶ 5} Based on Kinder's affidavit, the municipal judge authorized a search of appellant's residence for the following items:

{¶ 6} "Computers, emails, photos, flash drives, external hard drives, cell phones, any documents with information from Craigslish.org. Any names or addresses or phone

number for persons that replied to the advertisement posted on Craigslist.org, any digital media able to store or house emails and photos. Any billing or billing statements from Craigslist.org, any banking withdrawal slip showing cash advances on or about 6/21-22/2008. Any and all contraband.

{¶ 7} "Which is in violation of

{¶ 8} "Rape 2907.02 ORC."

{¶ 9} On July 3, 2008, police searched appellant's home, seized his computers and peripheral storage devices, and filed a return and inventory of the recovered items with the court. That same day, the Perrysburg Municipal Court issued a second warrant authorizing police to analyze the seized devices and "recover any emails, documents, photos, or any other documentation pertaining to Craigslist.org, the victim from 08-6911, any phone calls, text messages received or made to the victim of 08-6911 * * * which is in violation of 2907.02 ORC Rape." Detective Kinder then brought the seized items, along with a copy of the second search warrant, the supporting affidavit, and a photograph of the victim, to the Toledo Police Department Computer Crimes Unit for analysis.

{¶ 10} The forensic analysis of appellant's computer and external drives was conducted by Detective James Dec of the Toledo Police Department. Dec began his analysis by searching one of the smaller capacity data storage devices, a "Lexar Jump Drive," for the three photographs that the victim purportedly sent to appellant. Dec initially connected the jump drive to a write-blocking device, which is a forensic tool that

allows the original hard drive to be read while preventing alteration of the stored digital data. As Dec brought up the JPEG images and hit the view button, pictures of what appeared to be child pornography immediately populated his screen. At that point, Dec shut down the apparatus, discontinued his search, and informed Detective Kinder that he would not go any further until another warrant was issued allowing a search for child pornography.

{¶ 11} On July 7, 2008, the Perrysburg Municipal Court issued a third warrant authorizing an additional search of the seized items for "[a]ny and all photo's (sic), emails, names, addresses and any other contraband involved in possessing or distributing Child pornography," which is in violation of R.C. 2907.321, 2907.322, and 2907.323. Eventually, Detective Dec uncovered large amounts of child pornography that were stored in appellant's electronic files, as well as the pictures and Craigslist postings that were the subject of the initial rape investigation.

{¶ 12} On July 16, 2008, appellant was indicted by a Wood County Grand Jury (case No. 2008CR0370) on one count of rape in violation of R.C. 2907.02(A)(2), a felony of the first degree. On December 12, 2008, appellant filed a motion to suppress the electronic apparatus seized during the search of his residence on July 3, 2008, and all electronic evidence subsequently uncovered as a result of that initial search and seizure. The trial court heard the matter on April 9, 2009, and denied the motion on April 27, 2009.

{¶ 13} On May 21, 2009, appellant was indicted on 14 counts of pandering sexually oriented material involving a minor in violation of R.C. 2907.322(A)(1), a felony of the second degree (case No. 2009CR0259). Appellant entered into a plea agreement under which he pled guilty in case No. 2008CR0370 to an amended charge of gross sexual imposition in violation of R.C. 2907.05(A)(1), a felony of the fourth degree, and pled no contest in case No. 2009CR0259 to ten of the 14 counts of pandering, while preserving his right to appeal the denial of his motion to suppress. As part of the plea agreement, the state agreed that the record pertaining to appellant's motion to suppress in the rape case would be incorporated into the pandering case for purposes of appeal.

{¶ 14} On July 28, 2009, the trial court accepted appellant's pleas and, on September 17, 2009, imposed concurrent sentences of five years on each of the pandering counts to be served consecutively to the 17 month sentence for the offense of gross sexual imposition. This appeal followed.

II. SEARCH AND SEIZURE OF APPELLANT'S ELECTRONIC FILES

{¶ 15} Appellant's first three assignments of error relate to the constitutionality of the seizure and search of his electronic files and will be grouped accordingly. For purposes of facilitating a logical analysis, we will also consider those assigned errors out of their stated order.

A. Probable Cause

{¶ 16} In his third assignment of error, appellant asserts:

{¶ 17} "The trial court erred when it found probable cause to search defendant's computers and external storage devices."

{¶ 18} In support of this assignment of error, appellant contends that the initial and succeeding warrants in this case were improperly based on hearsay information provided by a confidential informant without sufficient corroboration or indicia of the informant's veracity or the reliability of her information. According to appellant, the complainant in this case "was a confidential informant" because "her identity is not disclosed." Appellant maintains that Detective Kinder's affidavit "is defective as it fails to offer any evidence of the complainant's credibility or reliability."

{¶ 19} The Fourth Amendment and Section 14, Article I of the Ohio Constitution provide that no warrant shall issue, but upon probable cause supported by oath or affirmation. In determining the sufficiency of probable cause in an affidavit submitted in support of a search warrant, the Supreme Court of Ohio has adopted the totality-of-the-circumstances test established by the United States Supreme Court in *Illinois v. Gates* (1983), 462 U.S. 213. Under that test, the task of the issuing magistrate or judge "is simply 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." *State v. George* (1989), 45 Ohio St.3d 325, paragraph one of the syllabus.

{¶ 20} Our task as a reviewing court "is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed." Id., paragraph two of the syllabus. In performing this function, we are obliged to accord great deference to the magistrate's determination of probable cause. Id. However, only information appearing on the face of the affidavit may be considered in determining the existence of probable cause. *State v. Graddy* (1978), 55 Ohio St.2d 132, 134, fn. 1; *State v. Bean* (1983), 13 Ohio App.3d 69, 71; *United States v. Gladney* (C.A. 8, 1995), 48 F.3d 309, 312.

{¶ 21} As an initial matter, we are not persuaded that independent corroboration or proof of veracity is even required in this case. Proof-of-veracity rules in regard to the issuance of warrants were formulated primarily for use in cases involving confidential government informants and anonymous tipsters. Information provided by an ordinary witness to, or victim of, a crime, however, is generally imbued with its own inherent indicia of reliability. Thus, questions of veracity and reliability are essentially obviated in cases where the information tendered in support of a search warrant derives from a crime victim or citizen eyewitness.

{¶ 22} Thus, in *State v. Garner* (1995), 74 Ohio St.3d 49, 62-63, the Supreme Court of Ohio explained:

{¶ 23} "In this case Tolliver was neither a confidential nor anonymous informant repeating hearsay information to police in the form of a 'tip.' He was rather a direct, citizen eyewitness to the activities of William Gardner at the scene of a crime. Information coming from a citizen eyewitness is presumed credible and reliable, and

supplies a basis for a finding of probable cause in compliance with *Gates*. Accord *People v. Hall* (1987), 164 Ill.App.3d 770, 776, 115 Ill.Dec. 750, 755, 518 N.E.2d 275, 280; *Winters v. State* (Tex.App.1995), 897 S.W.2d 938. Such individuals do not expect any gain or concession in exchange for the information they give to the police, and are less likely to produce false or untrustworthy information. See *Jaben v. United States* (1965), 381 U.S. 214, 85 S.Ct. 1365, 14 L.Ed.2d 345; *People v. Hall*, supra. * * * We would create an undue burden on the issuance of search warrants were we to impose a requirement that police provide evidence of past instances of reliability of citizens such as Tolliver, who generally provide information to police only once. See, generally, 1 LaFave, Search and Seizure (2 Ed.1987), Section 3.4(a). We refuse to impose such a requirement."

{¶ 24} Similarly, this court explained in *State v. Schrickel* (Sept. 19, 1997), 6th Dist. No. WD-96-060:

{¶ 25} "In regard to the reliability of the informant caller, one commentator has noted that while everyone who gives information to the police is an 'informant' in the broad sense of the word, the term 'does not refer to the average citizen who by happenstance finds himself in the position of a victim or a witness to a crime.' 2 LaFave, Search and Seizure (3 Ed.1996) 192, Section 3.3. Concerning the issue of victim-witness veracity, 'Courts are much more concerned with veracity when the source of information is an informant from the criminal milieu than an average citizen who has found himself in the position of a crime victim or witness.' Id. at 204. 'Basis of knowledge is likewise less

of a problem in the victim-witness cases, for by definition the victim or witness is reporting first-hand knowledge.' Id. 'The lower courts have rather consistently held that the proof-of-veracity rules which obtain in informant cases are not applicable with respect to other sources of information.' Id. at 205. As a general proposition, courts have proceeded as if veracity may be presumed when information comes from the victim of or a witness to criminal activity. Id. at 211. Further, 'Most courts have concluded that "corroboration is unnecessary"' when the citizen or victim is an eyewitness. Id. at 209-210. In *State v. Otte* (1996), 74 Ohio St.3d 555, 559, 660 N.E.2d 711, the Ohio Supreme Court, citing LaFave in regard to a citizen informant, has stated that 'Police could therefore "assume that they [were] dealing with a credible person."'"

{¶ 26} The complainant in this case was not a confidential government informant or anonymous tipster providing hearsay information to police, but a direct, victim-eyewitness reporting her personal, first-hand knowledge of an identified assailant's sexual assault committed face-to-face upon her person. While her name was omitted from the affidavit, we do not believe that she is thereby transformed into a confidential government informant whose veracity or reliability as an information source must be verified or corroborated by additional facts in the affidavit. See, e.g., *State v. Gilbertson* (Sept. 27, 1997), Wis. App. Nos. 96-0648-CR, 96-0649-CR, 1997 WL 590132 (search warrant based on information provided by a person identified only as "Victim # 1" was held properly issued without specific corroboration of the victim's veracity or reliability); *State v. Berry* (Mar. 16, 1995), 10th Dist. No. 94APA08-1153 ("While the record does

not reveal the name of the citizen-informer, the facts of this case do not involve, in the traditional sense, an anonymous informant who learns of criminal conduct 'by being a part of the criminal milieu,' thereby invoking the need for corroboration. * * * Nor does the evidence indicate circumstances which would make the presumption of reliability inoperable"); *T.A.P. v. State* (Oct. 1, 2010), Ala. Crim. App. No. CR-09-0727, quoting *Rutledge v. State* (Ala.Crim.App.1999), 745 So.2d 912, 918 (refusing to treat an unidentified eyewitness to a crime as an anonymous tipster or confidential informant, holding that such an eyewitness "'is presumed to be reliable, and an officer is not required [when requesting a search warrant] to supply the magistrate with information explaining why he believes the citizen-informant to be reliable.'" Cf. *State v. Yeagley* (Aug. 28, 1996), 9th Dist. No. 96CA0022.

{¶ 27} In any event, even if the victim in this case were considered a "confidential informant," we find that her credibility, the reliability of her information, and the basis of her knowledge were sufficiently supported by the facts provided in Detective Kinder's affidavit. The victim reported that she met appellant through Craigslist when she responded to an advertisement he posted for a topless maid, that they exchanged phone numbers through emails, that she called appellant on his cell phone to set up their appointment, that she went to appellant's home address at 417 Mulberry Street for an interview on June 22, 2008, and that while there appellant sexually assaulted her in a particularly described manner. The victim stated that before her interview with appellant, they corresponded several times through their respective email addresses. Although the

affidavit does not specifically state that Detective Kinder requested and received any of the emails from the victim, it is certainly reasonable to infer from the affidavit that Kinder did in fact obtain and review at least some of those emails, as well as the Craigslist posting, before he filed the affidavit. Thus, Kinder attested, "I have recovered that [Craigslist] posting and it is noted there would be no sexual expectations. In several of the email exchanges the suspect also stated there would be no sexual expectations of the victim."

{¶ 28} The affidavit also states that the victim told Kinder about statements appellant made to her in regard to exposing himself in public places and makes clear that Kinder did in fact confirm that appellant had been arrested and convicted of indecent exposure. Moreover, Kinder indicated in his affidavit that he had over 22 years of experience and training as a police officer, which included numerous investigations of computer and sex-related crimes, and that he conducted a lengthy interview of the victim in this case. The experience and evaluation of facts by a trained police officer may be given considerable weight by the issuing judge in determining the existence of probable cause. See *U.S. v. Khami* (C.A.6, 2010), 362 Fed.Appx. 501, 505; *United States Gaskin* (C.A.2, 2004), 364 F.3d 438, 457; *United States v. Caicedo* (C.A.6, 1996), 85 F.3d 1184, 1192.

{¶ 29} In reviewing the totality of the circumstances, we find that the municipal judge clearly acted lawfully in issuing the warrants in this case. The facts set forth in Detective Kinder's affidavit provided a substantial basis for concluding there was a fair

probability that evidence of rape would be found among appellant's home computers and peripheral devices. Accordingly, appellant's third assignment of error is not well-taken.

B. Particularity and Overbreadth

{¶ 30} In his first assignment of error, appellant maintains:

{¶ 31} "The trial court erred when it failed to suppress evidence gathered during an unreasonable general search, in violation of the Fourth Amendment."

{¶ 32} Appellant generally contends that the first and second warrants were insufficiently particular and overbroad because they described the items to be seized in broad terms without imposing a temporal limitation, did not instruct police on how to segregate irrelevant information, and impermissibly authorized the wholesale seizure and subsequent off-site search of all his electronic media. Although appellant's arguments and the principles they invoke tend to overlap and meld together in application, we will address them separately for purposes of analysis.

1. Temporal Limitation

{¶ 33} Appellant faults the first two warrants for having "failed to limit the search to the timeframe relevant to the crime under investigation, [which was] known to police." Appellant argues that the first warrant in particular "authorized search and seizure in broad, general terms: 'computers, emails, photos, flash drives, external hard drives, cell phones * * *.'" According to appellant, a "narrower description was available to the police, namely a limitation to the time between the ad placement (June 14, 2008) and the complaint (June 28, 2008)." Relying principally on *United States v. Ford* (C.A.6, 1999),

184 F.3d 566, appellant avers that the failure to limit broad, descriptive terms by known relevant dates will render a warrant overbroad.

{¶ 34} We disagree, finding that the first two warrants contained sufficient subject-matter limitations to satisfy the particularity requirement.

{¶ 35} Pursuant to the Fourth Amendment and Section 14, Article I, Ohio Constitution, only warrants "particularly describing the place to be searched and the person or things to be seized" may issue. "The manifest purpose of this particularity requirement was to prevent general searches. * * * [T]he requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." *Maryland v. Garrison* (1987), 480 U.S. 79, 84. By requiring a particular description of the items to be seized, the Fourth Amendment "prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Marron v. United States* (1927), 275 U.S. 192, 196.

{¶ 36} Particularization with respect to the things to be seized actually encompasses two distinct, albeit related, concerns: "one is whether the warrant supplies enough information to guide and control the agent's judgment in selecting what to take * * * and the other is whether the category as specified is too broad in the sense that it includes items that should not be seized." (Citations omitted.) *United States v. Upham* (C.A.1, 1999), 168 F.3d 532, 535. Thus, "an otherwise unobjectionable description of the objects to be seized is defective if it is broader than can be justified by the probable cause

upon which the warrant is based." 2 LaFave, Search and Seizure (4 Ed.2004) 607, Section 4.6(a).

{¶ 37} In determining whether a search warrant satisfies the Fourth Amendment's particularity requirement, reviewing courts employ a standard of practical accuracy rather than technical precision. *United States v. Otero* (C.A.10, 2009), 563 F.3d 1127, 1132. "[A] search warrant is not to be assessed in a hypertechnical manner [and need not satisfy the] '[t]echnical requirements of elaborate specificity once exacted under common law pleadings.'" *United States v. Srivastava* (C.A.4, 2008), 540 F.3d 277, 289, quoting *United States v. Ventresca* (1965), 380 U.S. 102, 108. A search warrant will be held sufficiently particular when it enables a searcher to reasonably ascertain and identify the things authorized to be seized. *United States v. Riccardi* (C.A.10, 2005), 405 F.3d 852, 862. "The common theme of all descriptions of the particularity standard is that the warrant must allow the executing officer to distinguish between items that may and may not be seized." *United States v. Leary* (C.A. 10, 1988), 846 F.2d 592, 600, fn. 12.

{¶ 38} The absence of a temporal limitation will not automatically render the warrant a prohibited general warrant. A temporal limitation in a warrant is merely one indicium of particularity. It is but one method of tailoring a warrant description to satisfy the particularity requirement. See, e.g., *United States v. Triumph Capital Group, Inc.* (D.Conn.2002), 211 F.R.D. 31, 58 ("A temporal limitation in a warrant is not an absolute necessity, but is only one indicia of particularity."); *United States v. Khalid* (Nov. 14, 1994), 5th Cir. No. 93-2345, 41 F.3d 661 (Table) ("[T]he failure of the warrants to

specify an explicit time for the documents sought is not alone conclusive as to the validity of the warrants"); *United States v. Bucuvalas* (C.A.1, 1992), 970 F.2d 937, 942, fn.7, abrogated on other grounds by *Cleveland v. United States* (2000), 531 U.S. 12 ("Temporal delineations are but one method of tailoring a warrant description to suit the scope of the probable cause showing"); *United States v. Shilling* (C.A.4, 1987), 826 F.2d 1365, 1369, overruled on other grounds by *Staples v. United States* (1994), 511 U.S. 600 ("[T]here is no flaw in the fact that the documents covered by the warrant did not have specific time periods attached"); *United States v. Graham* (Apr. 20, 2009), D.Minn. Cr. No. 08-251 (JNE/JJG) ("Graham has cited no authority that every warrant must include date restrictions in order to be facially valid"); *United States v. Courtney* (Nov. 20, 2008), E.D.Ark. No. 4:07CR00261 JLH (There is no requirement that "all search warrants must have a limit on the dates of the evidence to be seized"); *United States v. Poulsen* (Jan. 30, 2008), S.D.Ohio No. CR2-06-129 ("[T]he warrant itself does not specify any time frame, nor was it required to do so").

{¶ 39} As to appellant's reliance on *Ford*, in that case the Sixth Circuit reviewed the propriety of a warrant that contained ten clauses listing items to be seized in broad descriptive terms. Id., 184 F.3d at 574. Some of the clauses contained no time or subject matter reference to the crime giving rise to the search warrant, which was illegal gambling. Invalidating these clauses, the court held, "Failure to limit broad descriptive terms by relevant dates, when such dates are available to the police, will render a warrant overbroad." Id., 184 F.3d at 576. Nevertheless, the court upheld other clauses in the

warrant, even though their broad descriptive terms were not limited by relevant dates. In so doing, the court explained:

{¶ 40} "The portions of the warrant limited to fruits and evidence of gambling are sufficiently particular; even though those portions do not contain a time limitation, their subject-matter limitation (fruits and evidence of gambling) fulfills the same function as a time limitation would have done, by limiting the warrant to evidence of the crimes described in the affidavit. * * * Therefore, seizure of the documents pertaining to the gambling and the closely related money laundering charges was permissible." Id. at 578.

{¶ 41} *Ford* does not, therefore, stand for the proposition that the mere failure to restrict broad descriptive terms to known, relevant dates will always or automatically render a warrant invalid. Instead, it is only where such terms are not limited by time or subject matter that the warrant will be held invalid. Thus, in *United States v. Ogden* (May 28, 2008), W.D.Tenn. No. 06-20033, the defendant argued that the search warrant in that case was overbroad because it failed to restrict the broad descriptive terms to the time period during which his relationship with a minor took place. Distinguishing *Ford*, the court explained:

{¶ 42} "This case differs from *Ford*, however, because the search warrant at issue was tailored narrowly enough that it did not permit the seizure of evidence of *unrelated* crimes, but only those related to the Defendant's alleged possession of child pornography and illegal sexual relationship with a minor. See id. (stating that the portions of the

warrant that contained a subject-matter limitation were sufficiently particular, even if they did not contain a time limitation)." (Emphasis sic.)

{¶ 43} Subject-matter limitations sufficient to satisfy the particularity requirement include references to the crime or criminal activity at hand, specific persons, or specific types of material. See, e.g., *State v. Enyart*, 10th Dist. Nos. 08AP-184, 08AP-318, 2010-Ohio-5623, ¶ 40 (search limited to evidence of voyeurism and pandering); *State v. Hale*, 2d Dist. No. 23582, 2010-Ohio-2389, ¶ 77 (search limited to items connected to the offense of pandering); *United States v. Otero* (C.A.10, 2009), 563 F.3d 1127, 1133 (first section of warrant properly limited to "evidence of specific crimes or evidence pertaining to specific persons"); *United States v. Riccardi*, supra, 405 F.3d at 862 ("warrants for computer searches must affirmatively limit the search to evidence of specific federal crimes or specific types of material"); *In re Grand Jury Subpoenas* (C.A.9, 1991), 926 F.2d 847, 857 (search limited by warrant to documents having reference to defendant and other persons).

{¶ 44} In this case, appellant focuses primarily on the lack of a temporal limitation in the first warrant, but it is the second warrant that actually bears relevance to the present issue. The first warrant authorized a search of appellant's premises and the seizure of his electronic devices. The second warrant defined the scope of the search for and seizure of items actually contained within those devices. Nevertheless, both warrants properly delineated the scope of the respective searches in terms of subject matter. Indeed, the

warrants take pains in restricting the search of appellant's computers and peripheral devices to evidence specifically pertaining to the victim and/or craigslist.org.

{¶ 45} Moreover, contrary to appellant's assertions, the warrants clearly limited the search to evidence of rape in violation of R.C. 2907.02. In fact, it was precisely because of that limitation that Detective Dec was compelled to terminate the initial search upon discovery of child pornography until such time as a separate warrant in regard to the latter offense could be secured. Given these subject-matter limitations, we cannot find that the absence of a temporal limitation rendered these warrants overbroad or insufficiently particular.

2. Search and Seizure of Photographs

{¶ 46} Appellant also argues that "the police knew that the complainant had sent [him] only three photographs, yet the warrant allows search and seizure of all photos." Relying on *United States v. Weber* (C.A.9, 1990), 923 F.2d 1338, appellant contends that "all the photos other than the three relevant to the craigslist ad and the complainant should have been suppressed."

{¶ 47} The problem with appellant's argument is that the warrants in this case did not allow police to search for and seize "all photos" from either appellant's home or his computer and associated drives. To the contrary, the warrants specifically limited the search and seizure to photographs that pertained to craigslist.org and/or the victim. *Weber* requires nothing more.

3. Search Protocol

{¶ 48} Appellant further argues, "In this case, where the potential for an overbroad search for evidence beyond the scope of the warrant was great, a search protocol detailing how the files should be searched and irrelevant information segregated should have been used."

{¶ 49} The overwhelming weight of authority is to the effect that warrants need not contain any sort of search protocol, methodology, or other strategy restricting a computer search to specific programs or terms in order to satisfy the particularity requirement. See, e.g., *United States v. Blake* (Feb. 25, 2010), E.D.Cal. No. 1:08-cr-0284 OWW ("A pinpoint computer search restricting the search to a particular program or specific search terms is unrealistic"); *United States v. Bowen* (S.D.N.Y. 2010), 689 F.Supp.2d 675, 681, quoting *United States v. Graziano* (E.D.N.Y. 2008), 558 F.Supp.2d 304, 315 ("To limit the government's computer search methodology *ex ante* would 'give criminals the ability to evade law enforcement scrutiny simply by utilizing coded terms in their files or documents' or other creative data concealment techniques"); *United States v. Burgess* (C.A.10, 2009), 576 F.3d 1078, 1093 ("It is unrealistic to expect a warrant to prospectively restrict the scope of a search by directory, filename or extension or to attempt to structure search methods—that process must remain dynamic"); *State v. Balzum* (Apr. 14, 2009), Minn.App. No. A08-0439 (Rejecting defendant's argument that a warrant authorizing the search of a computer should contain a search strategy); *United States v. Cartier* (C.A.8, 2008), 543 F.3d 442, 448 ("[W]e decline to make a blanket

finding that the absence of a search methodology or strategy renders a search warrant invalid per se"); *United States v. Vilar* (Apr. 4, 2007), S.D.N.Y. No. S305CR621KMK ("[A] rule that does not require a computer search protocol avoids the courts getting into the business of telling investigators how to conduct a lawful investigation, something the courts are ill-equipped to do"); *United States v. Kaechele* (E.D.Mich. 2006), 466 F.Supp.2d 868, 888 ("To require a pinpointed computer search, restricting the search to an email program or to specific search terms, would likely have failed to cast a sufficiently wide net to capture the evidence sought"); *United States v. Shinderman* (Mar. 2, 2006), D.Me. No. CRIM. 05-67-P-H ("[T]here is no Fourth Amendment requirement that search warrants spell out the parameters of computer searches where the warrant provides particularity as to what is being searched for"); *United States v. Brooks* (C.A.10, 2005), 427 F.3d 1246, 1251 ("At the outset, we disagree with Brooks that the government was required to describe its specific search methodology"); *United States v. Triumph Capital Group, Inc.*, supra, 211 F.R.D. at 47 ("Computer searches * * * cannot be limited to precise, specific steps or only one permissible method. Directories and files can be encrypted, hidden or misleadingly titled, stored in unusual formats, and commingled with unrelated and innocuous files that have no relation to the crimes under investigation. Descriptive file names or file extensions such as '.jpg' cannot be relied on to determine the type of file because a computer user can save a file with any name or extension he chooses"); *United States v. Upham*, supra, 168 F.3d at 537 ("The * * * warrant did not prescribe methods of recovery or tests to be performed, but warrants rarely do so. The

warrant process is primarily concerned with identifying *what* may be searched or seized—not how—and *whether* there is sufficient cause for the invasion of privacy thus entailed"). (Emphasis sic.)

{¶ 50} While appellant seeks to temper his argument for a mandated search protocol by way of limitation to cases "where the potential for an overbroad search * * * [is] great," we fail to see why anything more than a standard Fourth Amendment analysis is required to determine the validity of the present warrants. We decline to adopt new search-and-seizure rules that apply only in computer cases, especially where established Fourth Amendment principles are more than suited to the purpose.

4. Wholesale Seizure of Computer and Related Devices

{¶ 51} Finally, appellant argues that "warrants were issued authorizing blanket removal of all electronic media without any explanation of why a wholesale seizure was necessary. * * * And the police had no probable cause * * * to support a wholesale search and seizure of all electronic media to recover three photos and a handful of emails."

{¶ 52} Comparable arguments have failed under equivalent circumstances. In *United States v. Upham*, supra, the First Circuit Court of Appeals rejected the defendant's argument that a warrant was insufficiently particular and overbroad because it authorized a seizure and search of "[a]ny and all computer software and hardware, * * * computer disks, disk drives * * *" for visual depictions of minors engaged in sexually explicit conduct. In so doing, the court explained:

{¶ 53} "As a practical matter, the seizure and subsequent off-premises search of the computer and all available disks was about the narrowest definable search and seizure reasonably likely to obtain the images. A sufficient chance of finding some needles in the computer haystack was established by the probable-cause showing in the warrant application; and a search of a computer and co-located disks is not inherently more intrusive than the physical search of an entire house for a weapon or drugs." Id., 168 F.3d at 535.

{¶ 54} In *United States v. Summage* (C.A.8, 2007), 481 F.3d 1075, the Eighth Circuit upheld a warrant authorizing the seizure and off-site analysis of all electronic media based on an affidavit showing probable cause to believe that defendant had made a videotape and took several pictures of the victim engaged in an illicit sexual encounter at his former residence. In so doing, the court explained:

{¶ 55} "As set forth above, the warrant authorized the search and seizure of all video tapes and DVDs, pornographic pictures, video and digital recording devices and equipment, all equipment that is used to develop, upload, or download photographs and movies, computers, and any indicia of occupancy. At the time the warrant was applied for, the officers knew only that a video and photographs of the alleged incident supposedly existed, not the particular format in which these items were being kept.

{¶ 56} "The requirement of particularity must be assessed in terms of practicality. As a practical matter, it is frequently difficult, and often times more intrusive to an individual's privacy, to perform an on-site review of certain items. * * * An off-site

analysis of the relevant materials is therefore often necessary." (Citations omitted.) Id. at 1079.

{¶ 57} Other courts have upheld or recognized the general propriety of a wholesale seizure and off-site search of computer equipment and/or electronic media, especially where the computer itself was used as an instrumentality of the crime. The logic behind this result is that off-site searches are generally more practical and less intrusive, that investigating officers cannot or usually do not know in advance which apparatus or components of the system will contain the objects of the search, and that the necessary technology and expertise to conduct an appropriate and effective electronic analysis often lies beyond that of the executing officer. See, e.g., *United States v. Karrer* (Sept. 23, 2010), W.D.Pa. Crim. No. 08-236; *United States v. Roberts* (Jan. 14, 2010), E.D.Tenn. No. 3:08-CR-175; *Enyart*, supra, 2010-Ohio-5623, ¶ 40; *United States v. Burns* (Apr. 29, 2008), N.D.Ill. No. 07 CR 556; *United States v, Hernandez* (Oct. 4, 2007), S.D.Fla. No. 07-60027-CR; *United States v. Tylman* (Aug. 22, 2007), C.D.Ill. No. 06-20023; *People v. Gall* (Colo. 2001), 30 P.3d 145, 154; *Guest v. Leis* (C.A.6, 2001), 255 F.3d 325, 335.[1]

{¶ 58} In this case, probable cause existed to believe that appellant's computer was used in furtherance of the crime of rape and that his computer and peripheral devices contained evidence linking him to that crime. The first two warrants essentially authorized the seizure and subsequent off-site search of those devices for images and

[1]We reject appellant's reliance on *United States v. Comprehensive Drug Testing, Inc.* (C.A.9, 2008), 513 F.3d 1085, rehearing en banc (2009), 579 F.3d 989, revised and superseded (2010), 621 F.3d 1162. That decision is not binding on this court, and we find its reasoning inapposite and unpersuasive in the present circumstances.

documents connecting him to the victim and craigslist.org. The objects of the search were specifically described, limited to the crime being investigated, and consistent with the probable cause established by the supporting affidavit. All of the seized computer storage media were capable of storing the items sought. Nothing in the record suggests that the described items could have been readily obtained through an on-site inspection, or that police knew ahead of time precisely where or on which devices those items were stored. Much to the contrary, the record indicates that the seized electronic media had to be transported by Perrysburg police to the Computer Crimes Unit of the Toledo Police Department, where a forensic analysis could be performed. Under these circumstances, we cannot conclude that the warrants were overbroad in authorizing the seizure and subsequent off-site search of all appellant's electronic media or otherwise lacking in particularity.

{¶ 59} Accordingly, appellant's first assignment of error is not well-taken.

C. Scope of Search

{¶ 60} In his second assignment of error, appellant maintains:

{¶ 61} "The trial court erred when it failed to suppress evidence gathered under a search executed beyond reasonable limits."

{¶ 62} Appellant's arguments in support of this assignment of error are by-and-large a redundant admixture of his previous arguments in regard to overbreadth and particularity, and we reject those arguments for the reasons already stated. We also agree

with the state that this case is substantially similar to *State v. Clutter*, 9th Dist. No. 24096, 2008-Ohio-3954. In that case, the Ninth District Court of Appeals reasoned:

{¶ 63} "The search warrant in the record authorized law enforcement officers to search Clutter's computer equipment and to search for pictures of his stalking victim. While searching image files in Clutter's computer equipment, BCI investigators found pictures portraying child pornography. Clutter contends that the pornographic images went beyond the scope of the search warrant and were therefore inadmissible as evidence. Clutter cites *U.S. v. Carey* (C.A.10, 1999), 172 F.3d 1268, where the court disallowed the use of images of child pornography as evidence because their discovery went beyond the scope of the authorized search. However, in *Carey*, the authorized search was limited to searching computer files for information pertaining to drug trafficking and, therefore, entailed a search of 'text' files, but not 'image' files. Id. at 1272. In Clutter's case, the warrant did not limit the search of the computer equipment to a search for information that would only be found in text files and it specifically authorized searching for pictures of the victim. Therefore, it is reasonable to conclude that the search of image files in Clutter's computer was well within the scope of the authorized search and, to the extent that the pornographic images found did not relate to his victim, the images were in plain view once the files were opened. Clutter argues that the suggestive titles of the image files should have enabled BCI investigators to determine that the files did not contain images of the victim without the investigators actually having to open them. We reject

this argument. The contents of the files could only be determined with certainty after they were opened and examined." Id. at ¶ 19.

{¶ 64} Despite appellant's myriad attempts to distinguish *Clutter*, we find its reasoning persuasive and applicable in this case. In fact, the Seventh Circuit Court of Appeals reached the same conclusion for the same reasons in *United States v. Mann* (C.A.7, 2010), 592 F.3d 779. In that case, the executing officer stumbled upon images of child pornography while executing a warrant to search defendant's computers and hard drives for evidence related to the crime of voyeurism, specifically images of women in locker rooms. The defendant, relying heavily on *Carey*, moved to suppress that evidence on grounds that the search exceeded the scope of the warrant. The appellate court upheld the district court's denial of defendant's motion to suppress, distinguishing *Carey* on the basis that the present warrant authorized a search for images and not just documentary evidence. Id. at 783-784.

{¶ 65} The reasoning in *Mann* applies with even more force in the present case. In *Mann*, the executing officer continued to look for evidence of voyeurism after his initial discovery of child pornography and, in the process, discovered more child pornography. In this case, Detective Dec did not continue to look for evidence of rape after discovering evidence of child pornography. Instead, he abandoned his search for evidence of rape as soon as he uncovered what appeared to be evidence of child pornography; and he did not resume his search until Detective Kinder secured a third warrant authorizing a search of

appellant's electronic files for evidence of child pornography. "This is certainly the course of action that courts recommend." *Karrer*, supra.

{¶ 66} Accordingly, appellant's second assignment of error is not well-taken.

III. SENTENCING

{¶ 67} In his fourth and final assignment of error, appellant claims:

{¶ 68} "The trial court erred when it imposed consecutive sentences without making any factual findings in violation of Ohio law."

{¶ 69} Appellant argues that the rationale supporting the Ohio Supreme Court's decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, which struck down and severed the judicial fact-finding sections of Ohio's sentencing scheme, was undercut by the United States Supreme Court's decision in *Oregon v. Ice* (2009), 555 U.S. 160, 129 S.Ct. 711, 172 L.Ed.2d 517. Appellant contends, therefore, that the trial court committed prejudicial error in sentencing him to consecutive terms of imprisonment "without * * * making any factual findings enumerated in R.C. 2929.14(E)(4)."

{¶ 70} During the pendency of this appeal, however, the Supreme Court of Ohio resolved this issue in *State v. Hodge*, __ Ohio St.3d __, 2010-Ohio-6320, at paragraphs two and three of the syllabus:

{¶ 71} "2. The United States Supreme Court's decision in *Oregon v. Ice* (2009), 555 U.S. 160, 129 S.Ct. 711, 172 L.Ed.2d 517, does not revive Ohio's former consecutive-sentencing statutory provisions, R.C. 2929.14(E)(4) and 2929.41(A), which

were held unconstitutional in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.

{¶ 72} "3. Trial court judges are not obligated to engage in judicial fact-finding prior to imposing consecutive sentences unless the General Assembly enacts new legislation requiring that findings be made."

{¶ 73} Accordingly, appellant's fourth assignment of error is not well-taken.

IV. CONCLUSION

{¶ 76} For all of the foregoing reasons, the judgment of the Wood County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Keila D. Cosme, J. _____
CONCUR.
JUDGE