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No. 4D19-1499

IN THE

Fourth District Court of Appeal of Florida

STATE OF FLORIDA,
Appellant,

v.

ROBERT KRAFT,
Appellee.

On Appeal from the County Court of the Fifteenth Judicial Circuit in and for Palm Beach County
L.T. No. 2019MM002346AXXX

AMENDED REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ARGUMENT

I. THE COUNTY COURT ERRONEOUSLY SUPPRESSED VIDEO EVIDENCE OF KRAFT'S PROSTITUTION OFFENSES.

A. The warrant was valid.

1. Kraft argues that the search warrant was facially defective because it did not instruct police to minimize. Ans. Br. 22-25. Normal rules governing warrants do not apply, in his view, because "electronic surveillance" requires special standards so as to not leave individuals "at the mercy of advancing technology." *Id*. at 21.

Applicable caselaw does not support that contention. In *Dalia v. United States*, the Court rejected the claim that "warrants for electronic surveillance are unique," such that wiretap orders "must include a specification of the precise manner in which they are to be executed." 441 U.S. 238, 257 (1979). It instead held that, even in the intrusive context of Title III wiretaps, the Warrant Clause "require[s] only three things": a magistrate, probable cause, and particularity. *Id.* at 255.

Berger v. New York, 388 U.S. 41 (1967), does not hold that a warrant authorizing non-audio video surveillance must include minimization procedures. There, the Court invalidated a state law authorizing wiretap orders without requiring "particularity in the warrant as to" three areas "specifically required by the Fourth Amendment," including "[1] what specific crime has been or is being committed, [2] 'the place to be searched,' or [3] 'the persons or things to be seized.'" *Id.* at 56. In contrast, the warrant here (1) found probable cause for the crime of Deriving

Support from the Proceeds of Prostitution; (2) named certain locations within the Orchids of Asia Day Spa as the place to be searched; and (3) described the objects of the search as "Evidence of Prostitution . . . specifically the Non-audio, video recordings of individuals engaged in acts related to these violations." R. 2116.

To be sure, the Supreme Court also found the New York law invalid because it authorized "continuous" and "indiscriminate[]" recording "of any and all persons coming into the area." Ans. Br. 20. That ruling, however, was based not on any alleged lack of minimization, but on a violation of the probable cause requirement. *Berger*, 388 U.S. at 59. "[A]uthorization of eavesdropping for a two-month period," the Court wrote, "is the equivalent of a series of intrusions, searches, and seizures pursuant to a *single showing of probable cause*." *Id.* (emphasis added). When a lengthy surveillance operation is based on one probable cause finding, whatever suspicion existed when the warrant issued may be stale by the search's end. This warrant, on the other hand, approved searches for only five days. R. 2116.

Kraft is also incorrect that the "uniform, persuasive precedent" of federal courts requires that video surveillance warrants include minimization protocols. Ans. Br. 17-18 (citing cases). Those decisions are hardly "uniform," as numerous federal authorities have rejected the view that minimization instructions are required by the Warrant Clause. *See, e.g.*, *United States v. Vento*, 533 F.2d 838, 861 (3d Cir. 1976) (affirming "[d]espite the absence of the minimization provision" because that

omission is a "mere 'technical defect'"); *United States v. Dorfman*, 542 F.Supp. 345, 388 (N.D. Ill. 1982); *United States v. Batiste*, 2007 WL 2412837, at *8 n.9 (S.D. Fla. Aug. 21, 2007). Nor are Kraft's preferred cases persuasive. Init. Br. 14-20; *see, e.g.*, *United States v. Koyomejian*, 970 F.2d 536, 542-51 (9th Cir. 1992) (Kozinski, J., concurring in judgment). Regardless, those federal decisions are "not binding on state courts," *State v. Dwyer*, 332 So. 2d 333, 335 (Fla. 1976), and none reversed based on a lack of minimization, casting into doubt their precedential status even in the federal courts that decided them. *Koyomejian*, 970 F.2d at 544 & n.2.

2. Nor are the State's Warrant Clause arguments "procedurally barred." Ans. Br. 18-19. In the proceeding below, the State contended that this was "not a Title III case" and that "Title III" was merely "guidance," adding that "there is no case in the State of Florida on video recording." R. 3233. *Statutory* minimization requirements governing audio surveillance, in other words, need not be imported into the *constitutional* requirements governing non-audio video surveillance.

Moreover, typical preservation rules are unsuited to the unique facts here. Currently pending before the Court is the State's appeal in *Zhang*, where it is undisputed that prosecutors preserved the argument that the Warrant Clause does not require minimization instructions. *E.g.*, Zhang R. 577. That is relevant because this is an *interlocutory* appeal. When the "state of the law regarding the reasonableness of a search [] has changed since the suppression hearing," that new law governs the

remainder of the proceedings. *Murphy v. State*, 32 So. 3d 122, 123 (Fla. 2d DCA 2009). So if the Court rules that the Warrant Clause was satisfied in the related cases, the county court "has inherent authority" to reconsider its non-final suppression order. *Bettez v. City of Miami*, 510 So. 2d 1242, 1243 (Fla. 3d DCA 1987).

B. Law-enforcement officers properly executed the warrant.

1. None of the minimization procedures Kraft proposes was required by the Reasonableness Clause of the Fourth Amendment.

First, the Constitution did not require police to stop filming whenever (1) a Spa patron left on his underwear at the start of a massage or (2) the lights were not instantly dimmed at the start of a massage. Ans. Br. 26. Underwear may be removed, and lights may be dimmed, *after* a massage starts, just as prostitution may take place whether the lights are on, dimmed, or off entirely. In this very case, for instance, the county court noted that at least one man who received an illicit massage "started with underwear on but had his underwear later removed." R. 2100.

Second, the Fourth Amendment did not bar surveillance outside ordinary "business hours" Ans. Br. 29-30. Police were investigating a criminal enterprise involving prostitution, and they possessed evidence that some or all of the masseuses may have been living in the massage parlor. R. 2108. In that circumstance, the Constitution did not require investigators to presume that prostitution would occur only during ordinary business hours.

Third, police did not have to minimize by placing cameras to cover only "the register" in the lobby, rather than the massage rooms where suspected prostitution was occurring. Ans. Br. 29. Kraft's argument to the contrary observes that detectives already possessed "smoking-gun proof" of prostitution, and therefore assumes that they were permitted to film only money "transactions" constituting "discrete evidence of proceeds." *Id.* But that misunderstands the elements of Deriving Support from the Proceeds of Prostitution. To establish that crime, the State must show that the defendant derived support "from what is believed to be the earnings or proceeds of such person's prostitution." § 796.05(1), Fla. Stat. Put differently, prosecutors must link specific "prostitution earnings" with the act of deriving support. *State v. Morris*, 540 So. 2d 226, 226 (Fla. 5th DCA 1989). To do so here, police had to trace the money from the johns to the sex workers and from the sex workers to Spa management and ownership. On top of that, video evidence of the manager's presence in the massage rooms during a sex act would establish her knowledge that the money was an illicit "proceed" of prostitution.

Fourth, police did not have to cease recording any time a "female client[]" entered a massage room and film only "massages of men." Ans. Br. 25, 29; FACDL Br. 18. The Fourth Amendment did not require the magistrate judge to employ sex-based classifications in the warrant; indeed, doing so might well have raised rather than dispelled constitutional concerns. *See Craig v. Boren*, 429 U.S. 190, 197-204

(1976). At a minimum, law-enforcement officers did not need to presume that *only* male clients procure illicit prostitution services during the "early stages" of their surveillance operation—before the video evidence established an evidentiary basis for surveilling men and women differently. *See Scott v. United States*, 436 U.S. 128, 141 (1978).

Finally, one *amicus* argues that police should have engaged in "short, periodic spot-checking." DPI Br. 10-11. But law-enforcement officers reasonably recorded the entirety of each massage that was subject to surveillance: The start of an illegal massage, no less than the proverbial "happy ending," supplies evidence critical to a fair assessment of the crime charged. Absent a full recording, defendants might complain that the State failed to document contextual evidence that was either exculpatory or germane to an assessment of potential defenses. *See, e.g.*, *State v. Powers*, 555 So. 2d 888, 890 (Fla. 2d DCA 1990).[1]

2. The State did not concede, in this or any other case, that Kraft's Fourth

[1] Kraft and his *amici* fail to show (Ans. Br. 17; DPI Amicus Br. 12-13) that non-audio video recording is categorically more invasive of individual privacy than audio surveillance, or that the proper remedy for any such problem is to import the *statutory* standards governing audio surveillance into the *Fourth Amendment* requirements governing non-audio video surveillance. A key difference is that non-audio video surveillance does not reveal the contents of a person's mind as evidenced by private communications—the covert monitoring and recording of which might reasonably be thought to be *more* invasive than mere visual observation—in the way that wiretaps have the capacity to do. Silent video surveillance will never unveil, for instance, the substance of confidential communications between attorney and client, priest and penitent, or husband and wife.

Amendment rights were violated. *See* Ans. Br. 2, 3, 4, 15, 22, 38. In *Zhang*, ASA Greg Kridos contended that detectives reasonably executed the warrant; highlighted their minimization techniques; and argued that the evidence against each defendant was admissible. Zhang R. 568, 583-84, 592-93, 601, 625, 626. Mr. Kridos regretted that four other people were filmed receiving apparently non-criminal massages, and he opined that, as to "*those four individuals*," *id.* at 589 (emphasis added), detectives had not made a "good faith effort" to minimize. *Id.* at 595. The "best practice," he thought, would have been to stop recording if the conduct on screen was innocent. *Id.* at 579. He did not concede that police failed to minimize as to the *defendants* in *Zhang*. To the contrary, he maintained that "evidence that was gathered against Ms. Wang and Ms. Zhang and the twenty-five other individuals was obtained lawfully." *Id.* at 590; *see id.* at 603 ("Neither Ms. Wang or [] Ms. Zhang were part of any improperly recorded video."). Still less did he concede that incriminating videos of Kraft were improperly recorded.

At any rate, ASA Judith Arco later clarified that because "[l]ots of these guys got massages for forty minutes and the last five minutes was where the criminal conduct happened," there was "no … way that the officer could immediately tell" which massages would be criminal. *Id.* at 626-28. That tracks the State's position here: Requiring police to predict whether a massage would end in prostitution was a "very difficult burden" not imposed by the Constitution. *Id.* at 628; Init. Br. 24-25.

At a minimum, this Court is not bound by an alleged concession that a lone prosecutor offered as to non-parties in a different case.

C. In any event, videos of Kraft should not have been suppressed.

1. The good-faith exception applies in the event of a Warrant Clause Violation.

Suppression would not be the remedy even if some constitutional violation occurred. At the outset, Kraft is incorrect that the good-faith exception is "properly reserved" for cases where the warrant is invalid due to a "technical defect." Ans. Br. 37. The good-faith exception exists to temper the deleterious effects of exclusion when exclusion will not result in appreciable deterrence, and therefore applies any time police reasonably rely on an invalid warrant. *See, e.g.*, *State v. Irvine*, 558 So. 2d 112, 113-14 (Fla. 4th DCA 1990) (applying good-faith exception to warrant lacking probable cause). In any event, the omission of minimization instructions from a warrant *is* a "mere technical defect" under Title III, *Vento*, 533 F.2d at 861, and there is no cause for concluding that it would be otherwise if that statutory minimization requirement were imported into the Fourth Amendment.

None of the courts below found that law-enforcement officers lacked good faith. If anything, the county court acknowledged that there is a "dearth of Florida cases offering guidance on this issue," R. 2095, while the circuit court in *Zhang* stressed that the Fourth Amendment requirements for non-audio video surveillance warrants are "unchartered territory." Zhang R. 576. Accordingly, the circuit court

assured officers attending the hearing that "no matter what I do here, don't take it personally" because "executing these types of things" "is difficult." *Id.*

That Detective Sharp's affidavit cited several cases on which Kraft now relies, Ans. Br. 38, *supports* the State's reliance on the good-faith exception. By apprising the magistrate of those non-binding authorities, police were entitled to later rely on that warrant in good faith, knowing they had discharged their duty of candor to the court. *See United States v. Leon*, 468 U.S. 897, 921 (1984).

In addition, the State Attorney's Office aided in drafting, and in fact reviewed, the warrant. R. 2342-43, 2883-84. The good-faith exception applies when an "officer t[akes] the proposed affidavit to an assistant state attorney for approval as to form before executing it before the magistrate." *Pazos v. State*, 654 So. 2d 1000, 1001 (Fla. 4th DCA 1995); *see also State v. Sabourin*, 39 So. 3d 376, 384 (Fla. 1st DCA 2010) ("an Assistant State Attorney [] reviewed the affidavit and informed her it was sufficient to present to the county judge").

2. Should the Court find a violation of the Reasonableness Clause, suppression is limited at most to those videos seized outside the scope of the warrant.

A. Kraft does not and cannot show that the videos incriminating him would not have been obtained with the minimization requirements he posits. *See Rakas v. Illinois*, 439 U.S. 128, 138 (1978) (suppression requires the challenged search to have "violated the Fourth Amendment rights of that particular defendant"); *cf.*

United States v. Sparks, 806 F.3d 1323, 1340 (11th Cir. 2015) (holding that Fourth Amendment standing requires an "injury in fact"). He argues that police should not have recorded women; but he is a man. He claims that massage rooms should not have been recorded after ordinary business hours; but he obtained illegal prostitution services during ordinary business hours. He urges that only the end of massages should have been recorded; but his first offense came at the end of a massage.[2] And he insists that police should not have recorded men who left on their underwear; but he removed his own underwear immediately.

Kraft is also wrong that if he lacks Fourth Amendment standing then "virtually no one can be expected to enforce minimization in practice." Ans. Br. 4, 33-34; FACDL 13-19. In this very case, third parties have filed a lawsuit under 42 U.S.C § 1983, alleging that the same video surveillance of which Kraft complains violated *their* Fourth Amendment rights. *See Doe v. Town of Jupiter*, No. 19-cv-80513 (S.D. Fla.). Likewise, if police film a person committing a crime which otherwise would have been shielded from recording under a proper minimization regime, that person might obtain suppression. If, for instance, Kraft were a woman—and if the

[2] Kraft committed the first of his two acts of solicitation of prostitution at the end of a massage on January 19, 2019. Thus, had police viewed only the end of that massage, they would have captured his conduct. His second crime occurred at or near the beginning of the massage on January 20. By then, police already knew that Kraft was likely to commit a crime; under any reasonable standard, they would have been justified in recording the entirety of his second massage. *See supra* at 6.

Constitution forbade filming women—Kraft would have standing.

B. Asking the Court to expand the usual scope of suppression, Kraft alleges that police "blatantly ignored" the terms of the warrant, thereby justifying "total suppression." Ans. Br. 34-35. The Supreme Court has already rejected that theory. *See Waller v. Georgia*, 467 U.S. 39, 43 n.3 (1984); Init. Br. 36-38.

Rodriguez v. State—a case that predated *Waller* and therefore did not have the benefit of that decision; addressed Florida's statutory wiretap scheme, not the constitutional question; and, like several other decisions cited by Kraft, Ans. Br. 27, 35 n.19, involved wiretaps implicating the unique context of the attorney-client privilege—does not change that. *See* 297 So. 2d 15 (Fla. 1974).

In the "exceedingly rare" case where a federal court has applied the flagrant disregard exception, *United States v. Webster*, 809 F.3d 1158, 1170 (10th Cir. 2016), evidence will be suppressed in its totality only where the police "in bad faith" "effect a widespread seizure of items that were not within the scope of the warrant," *United States v. Liu*, 239 F.3d 138, 140 (2d Cir. 2000), or where "the lawful part [of a search] seems to have been a kind of pretext for the unlawful part." *United States v. Young*, 877 F.2d 1099, 1105-06 (1st Cir. 1989). There must be "persuasive evidence that the search was merely a subterfuge to examine or seize other evidence not specified in the warrant." *United States v. Heldt*, 668 F.2d 1238, 1268 (D.C. Cir. 1981). But no widespread seizure or pretext exists here.

II. KRAFT'S REMAINING ARGUMENTS LACK MERIT.

A. Along with his minimization arguments, Kraft contends that video surveillance, at least in the massage rooms themselves, was unnecessary. Ans. Br. 38-44. But necessity is not an independent Fourth Amendment requirement. *See* Init. Br. 43. Even if it were, Kraft's claim assumes that to prove the crime of Deriving Support from the Proceeds of Prostitution, police needed only to film money exchanging hands at "the register." Ans. Br. 42. More is clearly needed, however, *supra* at 5, and neither "tax and bank records" nor "videos at the register" sufficed for that task. Ans. Br. 41-42.

For purposes of assessing the validity of the magistrate's warrant, or the manner in which that warrant was executed, it is inaccurate to assert that police were only investigating a "routine misdemeanor" for which video surveillance was per se illegal or presumptively disproportionate. Ans. Br. 1; *see also id.* (citing "the State's disproportionate effort to win a misdemeanor conviction"); Prof's Amicus Br. 8-10. By its terms, the warrant at issue here authorized law-enforcement to investigate Deriving Support from the Proceeds of Prostitution—a *felony* offense. *See* R. 2116; § 796.05(2), Fla. Stat. (providing that "[a]nyone violating this section," which prohibits deriving support from the proceeds of prostitution, commits a felony offense). This investigation has already culminated in felony charges against the owner, manager, and employees of the Spa. In addition, the Legislature has

determined that Solicitation of Prostitution may itself constitute a felony in some circumstances. *See* § 796.07(5)(a)2., Fla. Stat. (providing that "[a] person who violates paragraph (2)(f)," which makes it unlawful "[t]o solicit . . . prostitution," "commits . . . [a] felony of the third degree for a second violation" and "[a] felony of the second degree for a third or subsequent violation"). Finally, this Court need not turn a blind eye to the fact that investigations into illicit prostitution schemes often yield evidence of more serious crimes, including the modern-day slavery that underlies the felony offense of sex trafficking.

In all events, the necessity for a search cannot turn on a reviewing judge's "personal opinion regarding the need for or the importance of the criminal provisions that appear to have been violated." *United States v. Williams*, 124 F.3d 411, 417 (3d Cir. 1997) (Alito, J.).

B. Last, Kraft claims that "[t]hree categories of misstatements materially infected the warrant." Ans. Br. 45. But the county court declined to reach the *Franks v. Delaware* issue, meaning this record lacks the fact-finding necessary to affirm under the "Tipsy Coachman" doctrine. *See* R. 2101 n.4; *Bueno v. Workman*, 20 So. 3d 993, 998 (Fla. 4th DCA 2009) (doctrine inapplicable "where a lower court has not made factual findings on an issue").

Either way, Kraft has not shown a "deliberate falsehood or a statement in reckless disregard of the truth." *Johnson v. State*, 660 So. 2d 648, 655 (Fla. 1995).

His allegation that Health Department Inspector Karen Herzog "cook[ed] up" her testimony that she observed indicators of "primary domicile," Ans. Br. 7, is easily disproved by *photographic evidence* of the bedding, clothing, medications, and other signs that the Spa's employees may have been living there. R. 3369-76.

So too, the suggestion that Detective Sharp improperly referred—on one occasion in his affidavit—to the "middle-aged therapists as 'girls,'" Ans. Br. 47, is belied by Sharp's inclusion of the birthdates of each of the women Inspector Herzog found working there, R. 2108, and by his use of the term "women" multiple times in the same paragraph where he referenced "girls." R. 2112. A lone, offhand reference to "girls" could not possibly have misled the magistrate into believing the Spa's sex workers were underage.

It is similarly untrue that Detective Sharp "falsely implied that he had observed only men patronizing the Spa." Ans. Br. 45. While Detective Sharp wrote in his affidavit that the Spa had "overwhelmingly (if not exclusively) male customer clientele," R. 2111, he explained at the suppression hearing that he believed the few women who entered the Spa during the pre-surveillance period "did not obtain services for which the business was advertised for" because they "exited the business a short amount of time" after entering. R. 2424; *see also* R. 2427-31.

Finally, Kraft assails Detective Sharp's statement that he had "strongly considered" the *Mesa-Rincon* case, and that he possessed "specialized training and

experience in the investigation of prostitution organizations." Ans. Br. 45. Yet Sharp testified that while he had not personally read that opinion, members of the State Attorney's Office "advised [him] of the case law" and gave him the opportunity to ask "What does this case involve?" R. 2457-58. Regarding Detective Sharp's training and experience in the field of prostitution investigations, he had taken multiple classes discussing the topic, attended "several meetings," and "participated in prostitution stings." R. 2442-44, 2445.

Even assuming a misstatement, none of the alleged inaccuracies was material. "The materiality prong of *Franks* requires the moving party to establish that the affidavit, with the misstatements deleted, would itself fail to establish probable cause." *Johnson*, 660 So. 2d at 654. Yet Kraft acknowledges that police had "*already proved*"—via untainted statements—that prostitution "was occurring" in the Spa. Ans. Br. 40. The magistrate undoubtedly would have found probable cause based on undisputed facts properly set forth in the affidavit, including admissions by Subjects A-D that they paid for sex acts in the Spa, R. 2109-11; adult website reviews, R. 2105-07; trash pulls revealing napkins covered in seminal fluid, R. 2109; and Lei Wang's contacts with another illicit massage parlor. R. 2111.

CONCLUSION

This Court should reverse the suppression order.

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