**IN THE COURT OF APPEALS OF IOWA**

No. 5-265 / 94-678

**STATE OF IOWA,**

Plaintiff-Appellee,

**vs.**

**STEVEN D. CLAWSON,**

Defendant-Appellant.

FILED
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CLERK SUPREME COURT

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Appeal from the Iowa District Court for Scott County, Charles H. Pelton, Judge.

Steven D. Clawson appeals from his conviction for sexual exploitation of a minor in violation of Iowa Code section 728.12(1) (1993). **AFFIRMED IN PART AND AFFIRMED BY OPERATION OF LAW IN PART.**

Lauren M. Phelps, Davenport, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, William E. Davis, County Attorney, and Julie A. Walton, Assistant County Attorney, for appellee.

Heard by Sackett, P.J., and Habhab and Cady, JJ., but decided en banc.

**CADY, J.**

Steven Clawson appeals from his conviction for sexual exploitation of a minor in violation of Iowa Code section 728.12(1) (1993). He contends the district court erred in denying his motion to suppress evidence based on his challenges to the search warrant, and abused its discretion in allowing the State to enlarge two exhibits before the jury on an overhead projector. Upon our review, we affirm.

On October 12, 1993, Davenport police filed an application for a warrant to search 330 23rd Street, Apartment 4 in Bettendorf, Clawson's residence. The warrant indicated the officers wished to search for property stolen in six recent burglaries. Attached to the application was an affidavit of Officer Bowers. The affidavit indicated David Arthur Johnson, II, admitted to the burglaries and had taken "most of the property not all" to 1504 Mississippi Avenue in Davenport. The affidavit further stated, "Property not taken to 1504 Mississippi Ave. is believed to have been taken to 330 23rd St., Apt. 4, Bettendorf, IA., where Johnson is staying with Steve Clawson." District Associate Judge Douglas MacDonald issued the search warrant.

During the ensuing search officers seized two sexually explicit photographs of a young male. On October 29, 1993, the State charged Clawson with sexual exploitation of a minor. On December 10, 1993, Clawson filed a motion for extension of time to make discovery and file dispositive motions. The motion recited that the

"County Attorney has been advised of this motion and has not resisted." The district court apparently did not rule on the motion.

Clawson filed a motion to suppress on January 21, 1994. He alleged, among other things, that evidence seized in the search of his home should be suppressed because the warrant was issued without probable cause to believe the stolen property would be found at his home. He also claimed the warrant was improperly issued based on false statements from the affiant officer to the effect that Johnson told him he was staying with Clawson. At the suppression hearing, Officer Bowers testified Johnson twice indicated he was staying with Clawson. Johnson denied making those statements. He testified the officer obtained Clawson's address by requiring him to provide an address when he called Clawson from Officer Bowers' office. The district court overruled Clawson's motion to suppress.

Clawson filed a pretrial motion objecting to the State's proposed use of an overhead projector to "blow up" the sexually explicit pictures of the minor child before the jury. Clawson renewed the objection prior to the minor's testimony. The district court overruled the objections.

The jury found Clawson guilty as charged. The district court entered judgment and sentenced Clawson to a prison term of up to ten years.

Clawson appeals. He contends the district court should have suppressed evidence seized during the search of his apartment because the warrant was issued

without probable cause and based on false statements from the affiant officer. Clawson also argues the court abused its discretion by allowing the State to show the enlarged pictures to the jury, throughout the direct examination of the minor.

The State responds Clawson waived his challenges to the search warrant by failing to file a timely motion to suppress. The State maintains that the warrant was not defective, and, in any event, the good-faith exception of *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984) should be applied. The State also asserts the challenge to the length of time the pictures were on the overhead projector was not raised at trial and thus has been waived.

**I. Timeliness of Motion to Suppress**

The State contends Clawson waived his motion to suppress because he filed it more than forty days after arraignment in violation of Iowa Rules of Civil Procedure 10(4) and 11(1). It argues the belated filing of a motion to suppress is ordinarily a sufficient ground for an appellate court to uphold a trial court's ruling admitting the evidence, even though the State did not argue waiver and the trial court did not base its ruling on late filing of the motion. *See State v. Beeman*, 315 N.W.2d 770, 778-79 (Iowa 1982) and *State v. McCowen*, 297 N.W.2d 226, 228 (Iowa 1980) applying this rule to a late motion to suppress inculpatory statements.

Clawson admits the suppression motion was filed more than forty days after the arraignment, but argues the court should consider the arguments put forth in the motion

notwithstanding the late filing. Clawson points out he filed a motion for extension of time for good cause within the forty day period, and the State did not resist the motion or argue waiver at the suppression hearing. He also contends the rule set out in *Beeman* and *McCowen* is inapplicable to evidentiary suppression motions based on an unlawful search and seizure. Finally, he argues although the court did not formally rule on the motion for an extension of time, the court's subsequent actions -- setting the motion for hearing, hearing the motion, and overruling the motion on other grounds -- are an implicit grant of the motion for an extension of time.

Iowa Rules of Civil Procedure 10(3), 10(4), and 11(1)(e) require motions to suppress based on unlawful search and seizure to be filed within forty days after arraignment. *See McCowen*, 297 N.W.2d at 228. Failure of the defendant to timely raise this defense is considered a waiver, unless the period for filing is extended by the court for good cause. Iowa R. Civ. P. 10(3).

In this case, Clawson filed his motion after the forty day time period and unless it was excused, we must consider it waived. The State's failure to argue waiver before the trial court and the court's subsequent ruling on the merits do not excuse the late filing. The rule established in *McCowen* and *Beeman* applies equally to evidentiary suppression motions based on an unlawful search and seizure.

Clawson's case, however, differs from *McCowen* and *Beeman* because he filed a motion for an extension of time within the forty day period. Although the court did

not formally rule on Clawson's motion, we agree that its subsequent actions were an implicit grant of the motion. After Clawson properly filed a motion for an extension of time based on good cause, the court calendared the motion, heard the motion, and did not base its ruling on the late filing. Under these circumstances, the trial court's failure to formally rule on the motion to extend time should not prevent us from reaching the merits of Clawson's suppression motion.[1]

## II. Probable Cause for Search Warrant

Clawson contends no probable cause existed for issuance of the search warrant. He asserts the warrant application does not demonstrate a nexus between the criminal activity, the things to be seized, and the place to be searched.

We review defendant's constitutional challenge to the search warrant de novo. *State v. Godbersen*, 493 N.W.2d 852, 854 (Iowa 1992). In determining whether probable cause has been established for the issuance of a search warrant, the test is whether a person of reasonable prudence would believe a crime was committed on the premises to be searched or evidence of a crime could be located there. *Id.* at 855; *State v. Weir*, 414 N.W.2d 327, 330 (Iowa 1987); *State v. Sykes*, 412 N.W.2d 578, 583 (Iowa 1987). In making this determination we may consider only that information, reduced to writing, which was actually presented to the magistrate at the time application for the

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[1] In the future, we encourage counsel to urge the court for a formal ruling.

warrant was made. *Weir*, 414 N.W.2d at 329; *State v. Seager*, 341 N.W.2d 420, 426 (Iowa 1983).

Probable cause to search requires a probability determination as to the nexus between the criminal activity, the things to be seized, and the place to be searched. *Seager*, 341 N.W.2d at 427. That nexus can be found by considering the type of crime, the nature of the items involved, the extent of the defendant's opportunity for concealment, and the normal inferences as to where the defendant would be likely to conceal the items. *State v. Groff*, 323 N.W.2d 204, 212 (Iowa 1982).

The information presented to the judge in this case is as follows:

> On Monday October 11, 1993, David Arthur Johnson II was arrested on five counts of burglary 3rd. And admitted to burglarizing several residences which were reported to police. . . . Johnson told detectives that he took "most of the property not all though" to 1504 Mississippi Ave., Davenport. Where it was traded for marijuana by a subject identified only as "John" 17-18 yr. old w/m. Property not taken to 1504 Mississippi Ave. is believed to have been taken to 330 23rd St. Apt. 4 Bettendorf, IA., where Johnson is staying with Steve Clawson.

We conclude this information is insufficient to lead a person of reasonable prudence to believe evidence of a crime could be located at Clawson's residence. The affidavit excludes the critical link between Johnson's criminal activities and the residence to be searched. Officer Bowers does not indicate why he believes the remaining property from the burglaries is located at Clawson's residence or where the information that Johnson was staying with Clawson came from. There are no facts supporting Officer Bowers' belief that Johnson is residing at Clawson's residence. The

affidavit leads the reader to believe the information is either Bowers' subjective belief or came from some unidentified source. This is critical information and without it there is no nexus between the burglaries Johnson admitted and the residence to be searched.

## III. *Leon* Issue

The State urges even if the warrant lacks probable cause, we should still affirm the trial court under the good-faith exception set out in *Leon*, 468 U.S. at 922-23, 104 S. Ct. at 3420-21, 82 L. Ed. 2d at 698-99. In *Leon*, the Supreme Court held the Fourth Amendment exclusionary rule does not bar the use of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause. *Id.* at 922, 104 S. Ct. at 3420, 82 L. Ed. 2d at 698. Under the *Leon* rule, the exclusion of illegally obtained evidence is to be refused only in situations where the officer's good-faith motivation casts doubt on the deterrent effect of an exclusionary rule in the particular case.[2] *State v. Jamison*, 482 N.W.2d 409, 413 (Iowa 1992).

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[2] During appellate oral arguments, the question arose whether the *Leon* exception remains applicable to Iowa cases following our Supreme Court's recent ruling in *State v. Beckett*, 532 N.W.2d 751 (Iowa 1995). Beckett challenged the statutory sufficiency of the search warrant under Iowa Code section 808.3 (1993). *Id.* at 753. He asserted the issuing magistrate did not make the required finding of informant credibility. *Id.* at 754. The State sought to admit the evidence under the *Leon* good faith exception. *Id.* at 754. The court held the *Leon* good faith exception is not applicable when the issuing magistrate fails to comply with the informant credibility requirement of section 808.3. *Id.* at 755.

The *Beckett* court made no attempt to expand its rejection of the good faith exception to cases involving deficiencies in the more general statutory requirement for search warrant applications. The court only held "there is no good faith exception when the issuing magistrate fails to comply with the informant credibility requirements of section 808.3 . . ." *Id.*

Therefore, suppression remains an appropriate remedy if: (1) the judge was misled by information in an affidavit the affiant knew was false or would have known was false except for their reckless disregard of the truth; (2) the issuing judge abandoned his or her judicial role in approving the warrant, and merely acted as a rubber stamp for the

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Furthermore, we do not believe an extension of *Beckett* would be justified. The rationale for the *Beckett* holding was that application of a good faith exception to cases involving informant credibility "would effectively defeat the purpose of the statute because the failure to comply with the statute would be of no consequence." *Id.* Adopting the exception would, in light of the clear purpose of section 808.3, be "tantamount to judicial repeal of the statute."

The clear statutory purpose relied on by *Beckett* was the legislature's desire that a magistrate issuing a search warrant make a determination that the informant was credible and state the reason or reasons for the finding. *Id.* This requirement was imposed by the legislature in response to the Supreme Court's abandonment of the two-pronged *Aguilar-Spinelli* test for assessing informant credibility in favor of the "totality of circumstances" test. *State v. Swain*, 412 N.W.2d 568, 571 (Iowa 1987). Our legislature sought to strengthen the probable cause test by imposing the additional requirement that the magistrate make a specific determination of an informant's credibility. *Id.*

Section 808.3 otherwise does not reveal a second clear legislative purpose that would be defeated by applying the good faith exception when a warrant is issued in cases where the application and other circumstances presented to the magistrate failed to support a nexus between the crime and the place to be searched. Section 808.3, in relevant part, provides:

> A person may make application for the issuance of a search warrant by submitting before a magistrate a written application, supported by the person's oath or affirmation, which includes facts, information, and circumstances tending to establish sufficient grounds for granting the application, and probable cause for believing that the grounds exist. The application shall describe the person, place, or thing to be searched and the property to be seized with sufficient specificity to enable an independent reasonable person with reasonable effort to ascertain and identify the person, place or thing. . . .

Iowa Code § 808.3 (1993).

Although this portion of the statute sets forth requirements for a search warrant application, there is no indication they were put in the statute to establish a rule of exclusion. Instead, they are simply a restatement of general, constitutionally-based principles, see *State v. Seiler*, 342 N.W.2d 264, 266 (Iowa 1983), and the good faith exception has been found to comport with our Iowa Constitution. See *Beckett*, at 755.

police officers; (3) the police officers' presumption of the search warrant's validity was objectively unreasonable because the search warrant was facially deficient; and (4) the police officers' good-faith reliance was objectively unreasonable because the affidavit was "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Leon*, 468 U.S. at 923, 104 S. Ct. at 3420, 82 L. Ed. 2d at 699.

Clawson contends two of the exceptions to *Leon* apply in this case. First he argues that Officer Bowers deliberately and /or recklessly misled the judge into issuing the search warrant. Specifically he contends Officer Bowers falsely stated in the affidavit that he believed Johnson was staying at Clawson's home. Clawson points out the contradiction between Officer Bower's sworn statement in the initial complaint which indicates Johnson has "no known address" and his statement in the search warrant application. Furthermore, he argues Officer Bower's testimony explaining how he learned where Johnson was residing is contradictory.

Based on our review of the record, we find Officer Bowers did not deliberately or recklessly mislead the issuing judge. At the suppression hearing, Officer Bowers explained the discrepancy between the complaint and the search warrant application. He testified that during his interview of Johnson, Johnson told him he had no address in Davenport, but was staying with a friend in Bettendorf and gave Clawson's address. Officer Bowers also testified that when he was booking Johnson, Johnson again gave Clawson's address but then attempted to retract his statement. From this evidence, it

is clear the affidavit contained the truth as Officer Bowers knew it, and he did not intentionally or recklessly mislead the issuing judge.

Clawson also argues that Officer Bower's could not reasonably have believed that probable cause existed to support the issuance of the search warrant. We disagree.

Although the affidavit was deficient because it did not adequately connect Clawson's residence with Johnson and his criminal activities, we conclude it was not so deficient that official belief in the existence of probable cause was unreasonable. When assessing the good faith of Officer Bowers, the totality of the circumstances must be considered, including what he knew but did not include in his affidavit. *United States v. Frangenberg*, 15 F.3d 100, 103 (8th Cir. 1994); *United States v. Chambers*, 987 F.2d 1331, 1334 (8th Cir. 1993). Officer Bowers testified that Johnson gave him Clawson's address as the location where he was staying. Officer Bowers also stated that Johnson called Clawson after being arrested and he overheard their conversation. During the conversation, Johnson told Clawson to be careful of what he said because the cops were listening. Furthermore, Officer Bowers had just arrested Johnson for five counts of burglary and Johnson had told him about several of the places he had burglarized and where some of the burgled items were located. Finally, Officer Bowers related that the Scott County Attorney's Office had reviewed the search warrant and indicated there was probable cause. Based on the totality of the circumstances we

conclude it was objectively reasonable for Officer Bowers to have believed probable cause existed in this case.

Moreover, the parameters *Leon* established for use of the exclusionary rule are consistent with its intent to "deter police misconduct rather than to punish errors of judges and magistrates." *Leon*, 468 U.S. at 916, 104 S. Ct. at 3417, 82 L. Ed. at 694. Applying the *Leon* exception in this case does not cast doubt on the deterrent effects of the exclusionary rule. Officer Bower's mistake was that he failed to specify the source of his information linking Johnson to Clawson's residence. This is not the type of flagrant or illegal misconduct meant to be deterred under the exclusionary rule. The trial court was correct in denying Clawson's motion to suppress.

## IV. Enlargement of Photos

Clawson asserts the trial court erred in permitting the State to exhibit two sexually explicit photographs by means of an overhead projector and leaving them on display throughout the testimony of the minor portrayed in the photos. He claims enlargement and continued display of the photos by overhead projector was inflammatory and prejudicial, and had no probative value beyond that of normal methods of publication to the jury.

The State contends Clawson failed to preserve his claim that the trial court erred in permitting the exhibit of the photographs for a longer period then necessary. We disagree.

Clawson objected three times to the display of the photos by means of overhead projector during the minor's testimony. We believe this was sufficient to preserve both the method of presentation issue and the length of time issue. Repeated objections need not be made to the same class of evidence. *State v. Kidd*, 239 N.W.2d 860, 863 (Iowa 1976).

We now turn to the merits of the issues. The trial court has wide discretion in ruling on the admissibility of evidence and we will not disturb its decision unless there is a clear and prejudicial abuse of discretion. *State v. Baccam*, 476 N.W.2d 884, 888 (Iowa App. 1991).

Although we believe ordinary publication of the photos would have been a more appropriate method of displaying them to the jury, we cannot conclude display by overhead projector prejudiced Clawson. *See Montelongo v. State*, 644 S.W.2d 710, 713 (Tex. Crim. App. 1980) (no abuse of discretion in admitting enlarged photos of murder victim); *Goffer v. State*, 430 So. 2d 896, 898-99 (Ala. Crim. App. 1983) (no abuse of discretion in admitting slides of murder victims wounds); *Jones v. State*, 293 S.E.2d 708, 711 (Ga. 1982) (displaying photographs of victim on a screen by use of an overhead projector was not improper). The photos were clearly admissible and would have been published to the jury even if they had not been displayed by overhead projector. The enlargement of the photos did not distort them or provide an inaccurate representation.

The length of time the photos were displayed presents a different issue. We agree with Clawson that displaying the photos throughout the minor's testimony served no purpose other than to shock and inflame the jury. The nature of the photos and the minor's testimony did not require the jury to simultaneously observe them while the minor testified. Leaving the photos on display throughout the minor's testimony was unnecessary and possibly damaging to the minor victim in this case. Although we are appalled by the extended display of these photos and the lack of concern for the damage it may have caused an already victimized child, we conclude it was harmless error in light of the overwhelming evidence of Clawson's guilt. *See State v. Nims*, 357 N.W.2d 608, 610 (Iowa 1984) (improper admission of evidence is not prejudicial error when the record shows that the challenged evidence did not impact on the jury's finding of guilt); *State v. Windsor*, 316 N.W.2d 684, 688 (Iowa 1982) (presumption of prejudice from erroneous evidentiary ruling may be overcome). The record indicates two photos were seized from Clawson's home. The photos depict a nude male lying on a couch. One of the photos shows the subject of the photos masturbating. The couch shown in the photos matches the couch in Clawson's living room. Detective Heitz testified that Clawson admitted taking the photos. Clawson admitted at trial that he possessed the

photos. The subject of the photos testified that Clawson instructed him to undress and to masturbate and then took the two photos. The subject also testified that he was sixteen at the time the photos were taken. We affirm the trial court.

**AFFIRMED IN PART AND AFFIRMED BY OPERATION OF LAW IN PART.**

All judges concur on divisions I and II.

The judges are equally divided on division III with Cady, J., writing separately joined by Donielson, C.J., and Habhab, J. Sackett, J., dissents and writing separately joined by Hayden and Huitink, JJ. *See* Iowa Code § 602.5106(1) (1995).

Donielson, C.J., and Habhab and Huitink, JJ., concur on division IV; and Hayden and Sackett, JJ., dissent.

**SACKETT, J.** (dissenting and writing separately to division III)

I concur with the majority's decision to address the issues raised in the suppression motion. I further agree the information in the warrant is insufficient to lead a reasonable person to believe Johnson lived with defendant. No independent verification was made of the address.

Where I depart from the majority is in their holding a good faith exception rule forgives that deficiency. I further disagree with the majority's suggestion only flagrant or illegal misconduct is necessary to exclude evidence gathered under a search warrant incorrectly obtained. Furthermore, I disagree with the majority's interpretation in footnote 2 of the holding in *State v. Beckett*, 532 N.W.2d 751 (Iowa 1995). The issue in *Beckett* was whether a good faith exception existed to Iowa Code section 808.3.

> Adopting a good faith exception to the statutory requirement would effectively defeat the purpose of the statute because failure to comply with the statute would be of no consequence. In light of the clear purpose of section 808.3, permitting a good faith exception to failure to comply with the statute would be tantamount to judicial repeal of the statute.

*State v. Beckett*, 532 N.W.2d at 755.

Iowa Code section 808.3 (1993) provides in part:

> A person may make application for the issuance of a search warrant by submitting before a magistrate a written application, supported by the person's oath or affirmation, which includes facts, information, and circumstances tending to establish sufficient grounds for granting the application, and probable cause for believing that the grounds exist. The application shall describe the person, place, or thing

> to be searched and the property to be seized with sufficient specificity to enable an independent reasonable person with reasonable effort to ascertain and identify the person, place, or thing . . . .

Iowa Code § 808.3 (1993)

The application here did not include facts and circumstances tending to establish sufficient grounds for the warrant to issue. Specifically, it did not contain information Johnson lived at the residence to be searched. The holding here that the deficiency is forgiven by the good faith exception rule is contrary to *Beckett*.

Hayden and Huitink, JJ., join this separate writing.

**HAYDEN, J.** (dissenting to division IV)

I respectfully dissent.

The majority determines it was not harmless error to have the nude photo of the boy displayed by an overhead projector during the full time the boy testified. These photos were enlarged and were in full view of the jury during this time.

I concur with the majority leaving the photos on display before the jury throughout the boy's (age sixteen) testimony was unnecessary. I too am appalled by the extended display. However, unlike the majority, I determine the extended overhead projector display was bound to impact the jury. I determined this impact was prejudicial to defendant. The other evidence was not so overwhelming as to overcome this prejudicial impact.

I would reverse on this issue and remand for a new trial.

Sackett, J., joins this dissent.