FILED: January 29, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-4524
(4:16-cr-00071-AWA-RJK-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

JOHN MOSES BURTON, IV

Defendant - Appellant

ORDER

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-4524

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOHN MOSES BURTON, IV,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Newport News. Arenda L. Wright Allen, District Judge. (4:16-cr-00071-AWA-RJK-1)

Argued: September 27, 2018 Decided: December 19, 2018

Before WILKINSON, DUNCAN, and KEENAN, Circuit Judges.

Affirmed by unpublished opinion. Judge Keenan wrote the opinion, in which Judge Wilkinson and Judge Duncan joined.

ARGUED: Patrick L. Bryant, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Alexandria, Virginia, for Appellant. Richard Daniel Cooke, OFFICE OF THE UNITED STATES ATTORNEY, Richmond, Virginia, for Appellee. **ON BRIEF:** Geremy C. Kamens, Federal Public Defender, Kirsten R. Kmet, Assistant Federal Public Defender, OFFICE OF THE PUBLIC DEFENDER, Alexandria, Virginia, for Appellant. Rachel E. Timm, Criminal Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C; Dana J. Boente, United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

BARBARA MILANO KEENAN, Circuit Judge:

John Moses Burton, IV entered a conditional guilty plea to receipt of child pornography, in violation of 18 U.S.C. § 2252A. He appeals the district court's denial of his motion to suppress evidence found during searches of his two cell phones and his home. Burton raises numerous Fourth Amendment challenges in this appeal, including that: (1) exigent circumstances did not justify the warrantless seizure of the cell phones; and (2) the officers did not reasonably rely on facially valid warrants to search the phones and his home.

Upon our review, we conclude that the officers did not violate Burton's Fourth Amendment rights when they seized the cell phones without a warrant. With respect to the searches of the phones and the home, we hold that the "extreme sanction of exclusion" is inappropriate in this case, because the officers conducted the searches in good faith reliance on two warrants. *United States v. Leon*, 468 U.S. 897, 926 (1984). We therefore affirm the district court's judgment.

I.

Because the district court denied Burton's motion to suppress, we recount the facts in the light most favorable to the government. *United States v. Williams*, 808 F.3d 238, 245 (4th Cir. 2015). Burton first came to the attention of law enforcement authorities in Suffolk, Virginia on July 22, 2011, during an incident that occurred on the premises of a local grocery store to which he was providing equipment maintenance. On that date, a woman reported to police that a man, later identified as Burton, had attempted to take a

photograph of her underneath her skirt (an "up-skirt" photo), while she was at the grocery store (the grocery store incident). The woman, G.B., stated that Burton stood "extremely close" to her, "crouched" behind her, and pointed a cell phone toward her skirt. Burton also had a laptop computer with him during the incident.

Burton participated in two interviews with Detective Gary Myrick on a voluntary basis. The first took place at the police station on July 26, 2011, four days after the grocery store incident (the initial interview). Myrick testified that before the initial interview, he was unsure whether Burton actually had taken an up-skirt photo of G.B. Myrick sought to question Burton to determine whether he had a reasonable explanation for his conduct.

During the initial interview, Burton acknowledged crouching behind G.B. at the store with a cell phone in his hand, but denied taking any up-skirt photos of her. Burton also stated that he had two employer-issued[1] cell phones with him during the grocery store incident, and that one of the phones had both a camera and email functionality. Burton brought both phones to the initial interview.

Myrick testified that he did not believe Burton's explanation for his conduct. Myrick "express[ed] [his] skepticism" to Burton during the initial interview and, at the end of the interview, seized both cell phones that Burton had brought with him to the police station. Myrick testified that he thought he had probable cause to seize the phones,

[1] The government does not argue on appeal that Burton lacks standing to challenge the seizure and search of the employer-issued cell phones.

and that he feared Burton would destroy digital photos, or the phones themselves, if Myrick did not seize them immediately.

Two days later, on July 28, 2011, Myrick sought and obtained a search warrant authorizing the search of "[t]he entire contents of" Burton's two cell phones, including photographs, contact lists, call logs, text messages sent and received, voice mail messages, and memory card (the phone warrant). Searches of the phones revealed multiple up-skirt photos, but no images of G.B.

After the police searched the phones, Myrick and another detective conducted a second interview of Burton on August 15, 2011. During that interview, Burton admitted that he had intended to take an up-skirt photo of G.B. at the grocery store, but had not completed the act. Burton also stated that he had taken up-skirt photos of other women at multiple different locations.

On August 17, 2011, Myrick obtained a warrant to search Burton's residence (the home warrant). In his supporting affidavit, Myrick described the results of the investigation, including the two interviews with Burton and the evidence recovered from the cell phones. The home warrant authorized the search of

> [a]ny computer, computer related storage devices to include flashdrives, memory devices, external hard drives, cameras, cell phones, laptops, and any printed photographs located on the premises at the time of the search. The entire contents of each computer related, camera, laptop, cellphone collected.

Upon executing the home warrant, officers recovered numerous electronic devices from Burton's residence. Forensic examination of some of the devices revealed images of child pornography.

Burton was charged with nine counts of receipt of child pornography, in violation of 18 U.S.C. § 2252A. He filed a motion to suppress, arguing that the initial seizure of the cell phones was unlawful, and that the warrants to search his phones and residence violated the Fourth Amendment. The district court concluded that the warrantless seizure of the phones was justified by the exigent circumstances exception to the warrant requirement, and that Myrick had not delayed unduly in obtaining a warrant. The court also held that although both the phone and home warrants were unconstitutionally overbroad, the good faith exception applied under the facts presented. The court denied Burton's suppression motion, and Burton entered a conditional guilty plea to a single count of receipt of child pornography. Burton now appeals the denial of his suppression motion.

II.

We begin our analysis by considering Burton's challenges to the seizure of his cell phones, and later proceed to evaluate the reasonableness of the officers' reliance on the phone and home warrants. When considering an appeal from the denial of a motion to suppress, we review the district court's legal determinations de novo. *United States v. McKenzie-Gude*, 671 F.3d 452, 458 (4th Cir. 2011). We review the court's factual findings for clear error. *Id.*

A.

Burton argues that the exigent circumstances exception to the warrant requirement is inapplicable to the seizure of the cell phones in this case, because the officers lacked

any reason to believe that he might destroy evidence from the phones before a warrant could be obtained. In Burton's view, applying the good faith exception here would allow the warrantless seizures of cell phones and other electronic devices in nearly every case involving digital evidence. Alternatively, Burton argues that even if the initial seizure was valid, the officers unduly delayed obtaining the phone warrant. We disagree with Burton's arguments.

As an exception to the general warrant requirement, law enforcement officers may seize an item without a warrant if the officers have probable cause to believe that the item contains contraband or evidence of a crime, and "the exigencies of the circumstances demand it." *United States v. Place*, 462 U.S. 696, 701 (1983). To determine whether exigent circumstances justify a warrantless seizure, we consider whether: (1) the police had probable cause to believe that the item seized contained contraband or evidence of a crime; (2) the police had "good reason to fear" that, absent such seizure, the defendant would destroy material evidence before the officers could obtain a warrant; and (3) the police "made reasonable efforts to reconcile their law enforcement needs with the demands of personal privacy." *Illinois v. McArthur*, 531 U.S. 326, 331-33 (2001); *see also United States v. Cephas*, 254 F.3d 488, 495 (4th Cir. 2001) (explaining exigent circumstances justifying a warrantless entry into a home).

A warrantless seizure prompted by exigent circumstances is reasonable if the restraint lasted for "no longer than reasonably necessary for the police, acting with diligence, to obtain the warrant." *McArthur*, 531 U.S. at 332-33. The failure of officers to offer a "good explanation" for delay in seeking a warrant weighs against a finding of

reasonableness. *United States v. Burgard*, 675 F.3d 1029, 1033 (7th Cir. 2012). Ultimately, we will uphold a temporary warrantless seizure if it "was supported by probable cause[,] and was designed to prevent the loss of evidence while the police diligently obtained a warrant in a reasonable period of time." *McArthur*, 531 U.S. at 334; *see also Burgard*, 675 F.3d at 1033.

We conclude that the warrantless seizure of Burton's cell phones after the initial interview was justified under the exigent circumstances exception to the warrant requirement. The police had probable cause at the completion of the initial interview to seize Burton's cell phones, a fact that Burton does not challenge. And based on the circumstances presented here, Officer Myrick had "good reason to fear" that Burton would destroy digital evidence if allowed to depart the police station with the phones. *See McArthur*, 531 U.S. at 332.

Following the initial interview, Burton was aware that he was the subject of an investigation into his use of cell phones to take up-skirt photos, and also knew that Myrick was skeptical of Burton's description of the grocery store incident. *See Cephas*, 254 F.3d at 495 (fact that a suspect is "aware that the police are on [his] trail" supports an exigent circumstances finding (quoting *United States v. Turner*, 650 F.3d 526, 528 (4th Cir. 1981)). Given the ease with which Burton could have deleted, transferred, or otherwise removed the digital photos from the phones, Myrick reasonably assumed that

Burton might destroy any evidence contained on the phones, or the devices themselves.[2] And finally, Myrick made sufficiently "reasonable efforts" to balance law-enforcement needs with Burton's Fourth Amendment rights. *McArthur*, 531 U.S. at 332. Myrick conducted a voluntary interview with Burton, did not immediately place Burton under arrest, and waited to seize the phones until after investigating the victim's allegations and providing Burton with an opportunity to give his version of the events.[3] *See generally Kentucky v. King*, 563 U.S. 452, 466-67 (2011).

We further hold that the two-day delay between the warrantless seizure and the issuance of the warrant was reasonable. First, the duration of the warrantless seizure was two days, far shorter than other instances in which courts have deemed a delay unreasonable. *See, e.g.*, *United States v. Mitchell*, 565 F.3d 1347, 1352-53 (11th Cir. 2009) (21-day delay unreasonable). Indeed, courts have held that longer delays in obtaining a warrant were reasonable under the Fourth Amendment. *See, e.g.*, *Burgard*, 675 F.3d at 1034-35 (six-day delay reasonable); *United States v. Laist*, 702 F.3d 608, 616-17 (11th Cir. 2012) (25-day delay reasonable given officer's diligence). And

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[2] We express no opinion on the question whether the exigent circumstances exception might justify warrantless seizures of cell phones under factual scenarios not presented here.

[3] Contrary to Burton's suggestion at oral argument, the officers were not required to seize the cell phones immediately after the grocery store incident occurred. Myrick testified that before the initial interview, he thought that Burton might have a legitimate explanation for his conduct at the grocery store. And, in any event, the Supreme Court has explained that police are not obligated under the Fourth Amendment "to apply for a search warrant at the earliest possible time after obtaining probable cause." *Kentucky v. King*, 563 U.S. 452, 467 (2011).

importantly, as noted above, Burton does not contest that Myrick had probable cause to seize the phones. *See Burgard*, 675 F.3d at 1033 ("All else being equal, the Fourth Amendment will tolerate greater delays after probable-cause seizures," compared with seizures supported by a lesser degree of suspicion). Under these circumstances, we conclude that the two-day duration of the warrantless seizure was a relatively minor intrusion into Burton's possessory interests.

The record also shows that Myrick acted with reasonable diligence in seeking the warrant. Myrick testified that immediately after seizing the phones on July 26, 2011, he secured and logged them into the police department's "Property and Evidence" unit. On July 27, 2011, Myrick "spent the entire day" investigating other "priority" law enforcement cases involving multiple larcenies and burglaries in the area. Myrick obtained a search warrant for the phones on July 28, 2011, two days after the initial interview and seizure. Accordingly, we conclude that Myrick offered a "good explanation," namely, his other investigative responsibilities, for the short amount of time that passed between the seizure and issuance of the warrant. *Id.*; *see also United States v. Christie*, 717 F.3d 1156, 1163-64 (10th Cir. 2013) (holding that the government's "colorable interest in prioritizing law enforcement efforts" can render a delay reasonable); *Mitchell*, 565 F.3d at 1353 (recognizing that "overriding circumstances . . . necessitating the diversion of law enforcement personnel to another case" might justify some delay in seeking a warrant).

And finally, we decline Burton's suggestion that we require officers to set aside all other law enforcement obligations to obtain a warrant as quickly as possible. The

"ultimate touchstone of the Fourth Amendment is 'reasonableness,'" not perfection. *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) (citation omitted); *Burgard*, 675 F.3d at 1034 ("[P]olice imperfection is not enough to warrant reversal."); *see also United States v. Sullivan*, 797 F.3d 623, 634 (9th Cir. 2015) ("Even if the government could have moved faster to obtain a search warrant, the government is not required to pursue the least intrusive course of action." (citation and internal quotation marks omitted)). Here, the record demonstrates that Myrick acted with the due diligence required by the Fourth Amendment. We therefore conclude that the initial seizure of Burton's cell phones was justified by the exigent circumstances exception, and that the two-day duration of the warrantless seizure was reasonable.

B.

We next consider whether the district court erred in applying the good faith exception to evidence obtained from the phone and home warrants, and in denying Burton's motion to suppress on that basis. We will assume, without deciding, that the warrants were overbroad in violation of the Fourth Amendment. Therefore, we proceed directly to the good faith analysis. *See United States v. Andrews*, 577 F.3d 231, 235 (4th Cir. 2009).

i.

We begin by reciting the principles underlying the good faith exception to the exclusionary rule. The "sole purpose" of the exclusionary rule is to deter future violations of the Fourth Amendment. *Davis v. United States*, 564 U.S. 229, 236-37 (2011). Accordingly, we will not apply the exclusionary rule to evidence that a law

enforcement officer has obtained "in objectively reasonable reliance on" a search warrant. *Leon*, 468 U.S. at 922. Under this good faith exception to the exclusionary rule, "searches conducted 'pursuant to a warrant will rarely require any deep inquiry into reasonableness, for a warrant issued by a magistrate normally suffices to establish that a law enforcement officer has acted in good faith in conducting the search.'" *United States v. Williams*, 548 F.3d 311, 317 (4th Cir. 2008) (quoting *Leon*, 468 U.S. at 922).

Although we rarely will suppress evidence obtained from the proper execution of a search warrant, we have recognized four limited instances in which the good faith exception does not apply:

> (1) when the affiant based his application on knowing or reckless falsity; (2) when the judicial officer wholly abandoned his role as a neutral and detached decision maker and served merely as a 'rubber stamp' for the police; (3) when the affidavit supporting the warrant was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; and (4) when the warrant was so facially deficient that the executing officers could not reasonably have presumed that the warrant was valid.

United States v. Wellman, 663 F.3d 224, 228-29 (4th Cir. 2011). We will address these limitations on imposing the good faith exception in the context of Burton's specific challenges.

ii.

Addressing the good faith exception, Burton contends that the overbreadth of the phone warrant was so apparent that the officers' reliance on the warrant was objectively unreasonable. Burton asserts that the warrant's overbreadth was obvious because it authorized the search of the "entire contents of the cellphones," a scope far greater than

necessary to locate the photos allegedly taken during the grocery store incident. Thus, Burton asserts that the "extreme sanction of exclusion" is appropriate here. *Leon*, 468 U.S. at 916. We disagree.

The Fourth Amendment requires that a warrant "particularly describ[e] the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. Accordingly, "the scope of a lawful search is defined by the object of the search and the places in which there is probable cause to believe that [the object] may be found." *Maryland v. Garrison*, 480 U.S. 79, 84 (1987) (citation and internal quotation marks omitted). Under certain circumstances, "a warrant may be so facially deficient [by] failing to particularize the place to be searched or the things to be seized[,] that the executing officers cannot reasonably presume it to be valid." *Leon*, 468 U.S. at 923.

Here, as noted by the district court, the good faith exception must be evaluated in the context of the emerging cell phone technology and related legal precedent in place at the time the search occurred in 2011. At that time, neither our precedent nor that of the Supreme Court had developed the robust privacy protections for cell phone users that are applicable today. For example, until the Supreme Court's 2014 decision in *Riley v. California*, 134 S. Ct. 2473 (2014), officers could search cell phones without a warrant when the searches were conducted incident to a valid arrest. *See United States v. Murphy*, 552 F.3d 405, 411-12 (4th Cir. 2009), *abrogated by Riley*, 134 S. Ct. 2473. In holding that a warrant is required in such circumstances, the Court in *Riley* reasoned that the "immense storage capacity" of cell phones, as well as the breadth and sensitivity of information that can be stored on such devices, justify more significant Fourth

Amendment scrutiny. *Riley*, 134 S. Ct. at 2489-90. And only this year did the Supreme Court hold that historical cell phone records showing the details of a user's physical movements constituted a search deserving of Fourth Amendment protection. *Carpenter v. United States*, 138 S. Ct. 2206, 2220 (2018); *see also United States v. Graham*, 824 F.3d 421, 427-28 (4th Cir. 2016) (en banc) (holding that no warrant was required to obtain historical cell site location information), *abrogated by Carpenter*, 138 S. Ct. 2206.

Under these circumstances, we cannot conclude that the officers acted unreasonably in failing to appreciate the breadth of the phone warrant at the time it was issued. *Cf. Davis*, 564 U.S. at 239-41 (good faith exception applies if reasonable reliance on binding precedent). We also agree with the district court that nothing in the record suggests that the officers engaged in any reckless or grossly negligent acts in conducting their investigation and in seeking the phone warrant. *See id.* at 238; *McKenzie-Gude*, 671 F.3d at 461. Given the state of the law in 2011, as well as the developing nature of cell phone technology, we conclude that application of the exclusionary rule in this case would not deter officers from committing violations of the Fourth Amendment. *See Davis*, 564 U.S. at 246. Therefore, based on the totality of the circumstances, *see McKenzie-Gude*, 671 F.3d at 459, we hold that the officers acted in objective, good-faith reliance on the phone warrant. Accordingly, the district court did not err in denying Burton's motion to suppress evidence obtained from the cell phones.

iii.

Burton likewise challenges application of the good faith exception to the home warrant. He asserts that the warrant was objectively unreasonable in scope, because the

warrant authorized police to search for "any" computer or other electronic devices located in the home, as well as the "entire contents" of such devices. Burton also argues that the home warrant was not supported by probable cause, because the supporting affidavit failed to establish a nexus between the suspected crime and Burton's home. Thus, in Burton's view, the "extreme sanction of exclusion" is justified here. *Leon*, 468 U.S. at 916. We disagree with Burton's arguments.

A magistrate's probable cause determination is "a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). When seeking a search warrant for a residence, an officer must present evidence linking the suspected criminal activity to the defendant's home. *See United States v. Doyle*, 650 F.3d 460, 471 (4th Cir. 2011). "[T]he nexus between the place to be searched and the items to be seized may be established by the nature of the item and the normal inferences of where one would likely keep such evidence." *Id.* (quoting *United States v. Anderson*, 851 F.2d 727, 729 (4th Cir. 1988)).

In assessing whether the good faith exception applies to a search based on a warrant, we accord "great deference" to a magistrate's determination of probable cause, given that "[r]easonable minds frequently may differ on the question whether a particular affidavit establishes probable cause." *Leon*, 468 U.S. at 914 (citation omitted). And we are not limited in our inquiry to the "four corners of a deficient affidavit," but may consider other facts known to the officers that were not included in the warrant

application. *McKenzie-Gude*, 671 F.3d at 459; *see also United States v. Thomas*, 908 F.3d 68, 72-75 (4th Cir. 2018).

At the time Myrick applied for the home warrant, the officers had obtained details of the grocery store incident from G.B. and from certain employees at the store, as well as Burton's admission that he had interacted with the victim. Officers also had searched Burton's cell phones. As noted above, those searches revealed up-skirt images of women other than G.B., but did not reveal the photos allegedly taken during the grocery store incident. Burton had confessed that he took up-skirt photos of women at various locations, and had intended to take one of G.B. as well. All these facts were detailed in Myrick's affidavit. Additionally, although not included in the affidavit, Myrick knew that Burton had a laptop with him during the grocery store incident, and that one of Burton's cell phones had email functionality.

Under these particular facts and circumstances, we conclude that the officers' reliance on the home warrant was objectively reasonable. Although the home warrant authorized the police to search the "entire contents" of the categories of items listed, this broad scope, standing alone, did not render the officers' reliance on the home warrant objectively unreasonable. Because the officers had not recovered photos of G.B. directly from the phones, the officers reasonably could have believed that the evidence had been transferred to a file in an electronic device, or electronic storage device, located in Burton's home. Notably, the "nature of [digital photos] and the normal inferences of where one would likely keep" such images included the laptop the officers knew Burton

possessed, which had not yet been seized, as well as other electronic devices large and small. *Doyle*, 650 F.3d at 471 (citation omitted).

Our conclusion is not altered by Burton's reliance on the decision of the D.C. Circuit in *United States v. Griffith*, 867 F.3d 1265 (D.C. Cir. 2017). The court in *Griffith* declined to apply the good faith exception when a warrant authorized a search of a home for "all electronic devices," which warrant the court concluded was unconstitutionally overbroad and lacked probable cause. *Id.* at 1269, 1275, 1277-78. The defendant in *Griffith* was suspected of a year-old gang-related homicide and had been incarcerated for much of the year preceding the search. *Id.* at 1268-69. The officers lacked any basis to believe that the defendant owned a cell phone or any other electronic devices. *Id.* at 1272-73. Nor did officers have reason to believe that any such devices would contain incriminating evidence and would be found in his home. *Id.* at 1272-73, 1278. In contrast, here, the nature of Burton's suspected conduct of unlawfully photographing another necessarily would involve the production of digital evidence. The officers also knew that Burton possessed multiple electronic devices, one of which had not been recovered. This evidence was sufficient to render the officers' reliance on the home warrant objectively reasonable.

In sum, based on the totality of the circumstances, we conclude that the officers reasonably relied on the home warrant to search Burton's home for electronic devices to which digital evidence could have been transferred. Accordingly, we hold that the district court properly applied the good faith exception to evidence seized pursuant to the home warrant.

III.

For these reasons, we conclude that the district court did not err in denying Burton's motion to suppress, and we affirm the district court's judgment.

AFFIRMED

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

UNITED STATES OF AMERICA,

v.

JOHN MOSES BURTON, IV,

Defendant.

Criminal No. 4:16cr71

ORDER

Pending before this Court are Motions to Suppress brought by Defendant John Moses Burton, IV. ECF Nos. 17 and 18. A hearing on the Motions was convened on March 8, 2017. For the reasons contained herein, the Court finds that Defendant was not "in custody" during his interviews with police on July 26, 2011 and August 15, 2011, and that the search warrants at issue were constitutionally overbroad. However, because the good faith exception to the exclusionary rule applies, evidence collected pursuant to these warrants will not be suppressed. Accordingly, the Court is compelled to **DENY** the Motions to Suppress.

I. BACKGROUND

A. Factual and Procedural History

On September 22, 2016, Defendant was indicted on nine counts of Receipt of Child Pornography, in violation of 18 U.S.C. §§ 2252A(a)(2) and (b)(1). These charges arose from an investigation into Defendant's alleged unlawful conduct at a Farm Fresh supermarket in Suffolk, Virginia on July 22, 2011. On that date, Defendant was visiting the supermarket as an employee of the National Cash Registry Services ("NCR") when he was accused by a supermarket

customer, G.B., of using his cell phone to take nonconsensual photographs up her skirt (hereinafter referred to as "the Farm Fresh incident").

G.B. called the police, who subsequently contacted Defendant. On July 26, 2011, Defendant went to Suffolk Police headquarters and participated in an interview with police that lasted for twenty-seven minutes. After the interview, the police informed Defendant that they planned to secure Defendant's two company-issued cell phones.[1] The police took possession of the phones.

On July 28, 2011, Suffolk police obtained a warrant to search the contents of both company-issued phones. The warrant for these phones permitted a search for evidence related to the offense of "unlawful filming or photographing of another," in violation of Va. Code Ann. §§ 18.2-2 and 18.386.1. The warrant authorized searching the "entire contents of the cellphones . . . to include all photographs, contact names, missed calls, received calls, dialed calls, text messages sent or received, photographs, saved documents saved on any storage memory card, and voice mail messages." A search of the phones revealed photographs of portions of nude bodies and three "upskirt" images.

Suffolk police visited Defendant at his residence on August 15, 2011. A second interview took place there, lasting for twelve minutes. On August 17, 2011, Defendant was charged with state offenses stemming from the Farm Fresh incident. On August 18, 2017, Suffolk police executed a search warrant of Defendant's residence and arrested Defendant. The search warrant for Defendant's residence authorized a search for evidence related to the offense of "unlawful filming, videotaping or photographing of another," in violation of Va. Code Ann.

[1] Defendant's employer NCR allowed limited personal use of NCR-issued phones subject to compliance with specific policies. Under its code of conduct, NCR expressly required all employees to comply with all applicable laws. Defendant completed the NCR code of conduct training course. NCR also reserved the right to monitor NCR devices without permission from the user.

§§ 18.2-2 and 18.386.1, including the entire contents of "[a]ny computer, computer related storage devices to include flash drives, memory devices, external hard drives, cameras, cell phones, laptops, and any printed photographs located on the premises at the time of the search." Over four hundred items were seized from Defendant's residence.

In January 2013, a federal search warrant was obtained for a forensic search of the electronic items removed from Defendant's residence. The contents of these items form the basis of the pending federal charges.

B. Suppression Motions

Defendant moves to suppress the following evidence: (1) the statements he made to police during the interviews conducted on July 26, 2011 and August 15, 2011; (2) evidence recovered from his two company-issued phones; and (3) evidence recovered from the search of his residence.

Defendant argues that the officers' failure to advise him of his constitutional rights prior to the two interviews on July 26, 2011 and August 15, 2011 violated the Fourth Amendment to the United States Constitution. Regarding the company-issued phones, Defendant argues that the phones were illegally seized and searched. Defendant also asserts that the search warrant for his residence was unsupported by the probable cause and failed to satisfy "the particularity requirement."[2]

A suppression hearing was held on March 8, 2017. After careful consideration of the arguments presented and the applicable law, this Court concludes that the warrants at issue were

[2] The "particularity requirement," addressed in greater detail below, is derived from the teaching that search warrants must be specific, which requires particularity and prohibits overbreadth. Under the particularity requirement, a warrant "must clearly state what is sought." *United States v. Hill*, 459 F.3d 966, 973 (9th Cir. 2006) (internal citation omitted).

constitutionally overbroad. However, the Court also determines that the exclusionary rule is inapplicable pursuant to the "good faith exception."

II. STANDARDS OF LAW

The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. Amend. IV. The Supreme Court of the United States reasoned in *Illinois v. Gates* that "probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules." 462 U.S. 213, 232 (1983).

"When reviewing the probable cause supporting a warrant, a reviewing court must consider only the information presented to the magistrate who issued the warrant." *United States v. Wilhelm*, 80 F.3d 116, 118 (4th Cir. 1996) (citing *United States v. Blackwood*, 913 F.2d 139, 142 (4th Cir. 1990)). "[T]he task of the reviewing court is not to conduct a *de novo* determination of probable cause, but only to determine whether there is substantial evidence in the record supporting the magistrate's decision to issue the warrant." *Massachusetts v. Upton*, 466 U.S. 727, 728 (1984).

III. ANALYSIS

A. Statements to Police

Defendant contends that his statements made during the interviews on July 26, 2011 and August 15, 2011 should be suppressed because he was not advised of his constitutional rights before each interview. Law enforcement officers must warn every person held in custody that he

or she has a right to remain silent and a right to an attorney before custodial questioning takes place. *Miranda v. Arizona*, 384 U.S. 436, 458 (1966). Statements obtained via custodial interrogation without valid *Miranda* warnings are generally inadmissible. *Id.* at 444.

"Custodial interrogation" is defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* at 444. "Two discrete inquiries are essential to the determination" of whether someone is "in custody" for *Miranda* purposes. *Thompson v. Keohane*, 516 U.S. 99, 112 (1995). "[F]irst, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." *Id.* (footnote omitted).

In evaluating the totality of the circumstances, courts consider the following factors to determine whether a suspect was "in custody": (1) whether the officers told the suspect that he or she was under arrest, or free to leave; (2) the location or physical surroundings of the interrogation; (3) the length of the interrogation; (4) whether the officers used coercive tactics, such as the display of weapons or physical restraint of the suspect; and (5) whether the suspect voluntarily submitted to questioning. *Rose v. Lee*, 252 F.3d 676, 686 (4th Cir. 2001); *United States v. Hargrove*, 625 F.3d 170 (4th Cir. 2010). An interview at a suspect's residence, "on his own turf," is indicative of "the type of setting that is not of the degree typically associated with a formal arrest." *Hargrove*, 625 F.3d at 181.

Regarding the July 26, 2011 interview at the police station, Defendant argues that he was "in custody" because he was summoned to police headquarters and his phones were seized without his consent. He argues that he was "in custody" during the August 15, 2011 interview at his residence because he claims that the interrogating officer had the "sole purpose" to question

him about the ongoing investigation. Defendant claims that during both interviews, his freedom of action was curtailed, and a reasonable person in his position would have understood the situation to be one of custody.

Application of the five factors enunciated in *Rose v. Lee*, 252 F.3d 676, 686 (4th Cir. 2011) confirms that Defendant was not "in custody" during either interview. The July 26, 2011 interview took place at police headquarters, where Defendant appeared voluntarily, was told repeatedly that he was free to leave, signed a form confirming that his statements were freely and voluntarily given, and no coercive tactics were used by police. The August 15, 2011 interview took place at Defendant's home, which is indicative of "the type of setting that is not of the degree typically associated with a formal arrest." *Hargrove*, 625 F.3d at 181. Moreover, that interview lasted only twelve minutes, and there is no evidence that coercive tactics were used. During both interviews, Defendant knew that he was not under arrest, he was not restrained, and the tone, context, and substance of the interview were primarily non-confrontational.

The fact that interrogating officers asked questions that were "reasonably likely to elicit an incriminating response" does not implicate *Miranda*, because Defendant was not "in custody" at the time of the questioning. *See Rhode Island v. Innis*, 446 U.S. 291, 300–01 (1980). Because Defendant was not in custody during the interviews on July 26, 2011 and August 15, 2011, the police were not required to provide *Miranda* warnings prior to questioning, and Defendant's statements cannot be suppressed on this basis.

B. Seizure and Search of Cell Phones

The Court finds that Defendant has standing to challenge the seizure and search of the cell phones, even though the phones were owned and issued by his employer. A defendant has standing to challenge a search of a cell phone, even if that phone is issued by the defendant's

employer, if the defendant has a possessory interest in the phone, has a right to exclude others from using the phone, is permitted to use the phone for personal purposes, and where the defendant took normal precautions to maintain his or her privacy in the phone. *United States v. Finley*, 477 F.3d 250, 258–59 (5th Cir. 2007).

Defendant had a reasonable expectation of privacy in these phones because he enjoyed a possessory interest in them, he took action to protect the privacy of the phones by using passwords, and he could exclude others, aside from his employer, from gaining access to the phones. Regardless of whether his employer could exert control over the cell phones, Defendant's expectation of being free from *government* intrusion remained intact. *See id.* at 259.

Defendant argues that the warrantless seizure of his cell phones following the police interview on July 26, 2011 was unlawful. In general, "seizures of personal property are 'unreasonable within the meaning of the Fourth Amendment . . . unless . . . accomplished pursuant to a judicial warrant.'" *Illinois v. McArthur*, 531 U.S. 326, 330 (2001) (quoting *United States v. Place*, 462 U.S. 696, 701 (1983)). However, an officer may temporarily seize property without a warrant if he or she has "probable cause to believe that a container holds contraband or evidence of a crime" and "the exigencies of the circumstances demand it or some other recognized exception to the warrant requirement is present." *Place*, 462 U.S. at 701. After the initial warrantless seizure, police must obtain a search warrant within a reasonable period of time. *McArthur*, 531 U.S. at 332–33; *United States v. Burgard*, 675 F.3d 1029, 1032 (7th Cir. 2012); *cf. Place*, 462 U.S. at 709–10.

Suffolk police had probable cause to believe that at least one of Defendant's company-issued cell phones contained evidence of a crime, the "unlawful filming or photographing of

another" in violation of Va. Code §§ 18.2-2 and 18.386.1.[3] *See McArthur*, 531 U.S. at 331–32 (finding probable cause to believe that Defendant's trailer contained evidence of contraband where officers had the opportunity to speak with the defendant's wife about her observations of the defendant's marijuana use).

The officers received a report from the victim of the Farm Fresh incident concerning the behavior of an individual whom she described as attempting to photograph up her skirt. At least two law enforcement officers spoke with the victim regarding the behavior of the individual and obtained his description. Tr., 9–15. Based on this information, the officers provided a description to Farm Fresh management and Defendant was identified as an NCR employee who matched the description. Tr., 16. Officers then contacted representatives from NCR to identify Defendant. Tr., 17–18. The identity of Defendant was corroborated by Farm Fresh management and representatives from NCR. Based on these investigative steps, the officers had probable cause to believe that at least one of Defendant's phones could have contained evidence of the Farm Fresh incident.

Regarding the issue of "exigent circumstances," the United States Supreme Court's decision in *Riley v. California*, 134 S. Ct. 2473 (2014) is instructive. In *Riley*, the Supreme Court held that police must obtain a warrant before searching a cell phone incident to arrest. *Id.* at 2495. In *dicta*, the Court stated that "officers could have seized and secured [the defendants'] cell phones to prevent destruction of evidence while seeking a warrant." *Id.* at 2486. The Sixth Circuit has also found that the warrantless seizure of a laptop believed to contain child

[3] That statute makes it "unlawful for any person to knowingly and intentionally videotape, photograph, or film any nonconsenting person or create any videographic or still image record by any means whatsoever of the nonconsenting person if . . . (ii) the videotape, photograph, film or videographic or still image record is created by placing the lens or image-gathering component of the recording device in a position directly beneath or between a person's legs for the purpose of capturing an image of the person's intimate parts or undergarments covering those intimate parts when the intimate parts or undergarments would not otherwise be visible to the general public. . . ." Va. Code § 18.2-386.1 (2011).

pornography fell within the exigent circumstances exception where investigators have a reasonable belief that evidence of criminal activity could be destroyed. *United States v. Bradley*, 488 Fed. App'x 99, 103 (6th Cir. 2012) (unpublished) ("Courts have doubted the wisdom of leaving the owner of easily-destructible contraband in possession of that contraband once the owner is aware that law enforcement agents are seeking a search warrant.").

Under the circumstances presented, it was reasonable for officers to believe that exigent circumstances warranted temporary seizure of the phones, given the destructibility of the phones themselves and the evidence contained within, and Defendant's knowledge that he was under investigation by the police. *See United States v. Turner*, 650 F.2d 526, 528 (4th Cir. 1981) (stating factors for determining presence of exigent circumstances).

The delay between the warrantless seizure and the procuring of the search warrant was reasonable. The intervening time period of two days "was no longer than reasonably necessary for the police, acting with diligence, to obtain the warrant . . . [g]iven the nature of the intrusion and the law enforcement interest at stake." *McArthur*, 531 U.S. at 332-333; *see also United States v. Van Leeuwen*, 397 U.S. 249, 253 (1970) (finding a 29-hour detention of a mailed package reasonable given the unavoidable delay in obtaining a warrant and the minimal nature of the intrusion); *Burgard*, 675 F.3d at 1034 (finding that a delay of six days between the seizing the defendant's cell phone and obtaining a warrant was not so egregious as to render the search and seizure unreasonable under the Fourth Amendment); *cf. Place*, 462 U.S. at 709-10 (finding that a 90-minute detention of the defendant's luggage was unreasonable based on the nature of the interference with the defendant's travels and the lack of diligence of the police). For these reasons, the warrantless seizure of Defendant's cell phones did not violate the Fourth

Amendment, and the two-day delay between seizing the phones and obtaining the search warrant was reasonable.

Defendant next challenges the validity of the search warrant for his phones because he argues that the warrant lacked particularity and was overly broad. The Fourth Amendment provides that "no Warrants shall issue" unless "particularly describing the place to be searched and the persons or things to be seized." U.S. Const. amend. IV. As noted above, search warrants "must be specific. Specificity has two aspects: particularity and breadth. Particularity is the requirement that the warrant must clearly state what is sought. Breadth deals with the requirement that the scope of the warrant must be limited by the probable cause on which the warrant is based." *United States v. Hill*, 459 F.3d 966, 973 (9th Cir. 2006) (internal citation omitted). The purpose of this "particularity requirement" is to protect against the issuance of "general warrants." *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2084-85 (2011).

The search warrant and accompanying affidavit for Defendant's cell phones properly described the "place, person, or thing" to be searched and the specific illegal activity justifying the search. The affidavit described the "things" to be searched with sufficient particularity as follows: "AT&T Blackberry Cellphone model 8520 serial number 65087 and a Samsung Cellphone model sph-m910 with serial number A000002959D534."

The affidavit also described with particularity the criminal offense justifying the search by listing the relevant criminal statute, "Unlawful Filming or Photographing of Another" in violation of Va. Code Ann. § 18.2-386.1, and by providing a detailed description of the underlying facts of the Farm Fresh incident. This description of the "specific illegal activity" was "sufficiently particular" because it limited the officers' investigation to a type of illegal activity—filming and photographing a person without permission—that "generates quite

distinctive evidence," as opposed to "a broad criminal statute or general criminal activity such as wire fraud, fraud, conspiracy, or tax evasion . . . which provide[ ] no readily ascertainable guidelines for the executing officers as to what items to seize." *United States v. Dickerson*, 16 F.3d 667, 694 (4th Cir. 1999) (internal quotations omitted).

However, the *object* of the search—"[t]he entire contents of the cellphones"—is constitutionally overbroad. The Court finds *United States v. Winn*, 79 F. Supp. 904 (S.D. Ill. 2015) instructive.[4] In *Winn*, the defendant was charged with public indecency, and, like the warrant at issue here, the warrant authorized seizure of "any or all files" contained in the defendant's cell phone. *Id.* at 919. The *Winn* court held that the warrant was overbroad because it allowed police to search for and seize "broad swaths of data" without probable cause to believe that everything on the phone would contain evidence of the crime of public indecency. *Id.* at 919–20. The court also held that the search of a cell phone should be limited by the facts of the underlying offense, particularly where that offense is limited to a particular time frame and location. *Id.* at 920–21.

[4] The cases provided by the Government, in which courts have upheld warrants challenged on the basis of overbreadth, are distinguishable from the instant case. *See United States v. Schesso*, 730 F.3d 1040 (9th Cir. 2013) (finding that the warrant was not overbroad because, given the nature of the underlying offense of uploading and distributing child pornography through a peer-to-peer network, the prosecution was unable to limit the search to specific files or storage locations); *United States v. Bazar*, No. 15cr499, 2015 WL 6396011 (S.D. Cal. Oct. 21, 2015) (not reported) (finding that "some overbreadth is permissible" in the context of digital searches where the defendant had no standing to challenge the search of the cell phone at issue, and the underlying offense involved written communications and images between multiple parties that were not confined to a particular time period); *United States v. Garcia-Alvarez*, No. 14cr0621, 2015 WL 777411 (S.D. Cal. Feb. 24, 2015) (not reported) (holding that the search warrant was not overbroad because the defendant's alleged criminal activity was not limited or confined to a specific time period); *United States v. Nazemzadeh*, No. 13cr5726, 2013 WL 544054 (S.D. Cal. Feb. 12, 2013) (not reported) (where the search warrant limited the search to particular types of data, such as the defendant's email account—as opposed to the entire contents of his computer—a search of the defendant's entire email account was not overbroad because the defendant was allegedly involved in a conspiracy that was not limited to a particular time period); *United States v. Juarez*, No. 12cr59, 2013 WL 357570 (E.D.N.Y. Jan. 29, 2013) (not reported) (finding that the search warrant was not overbroad where it limited the search to specific types of data, such as photographs and video recordings, that would be likely to contain evidence of the crime in question, which also involved taking "upskirt" photographs).

Here, officers had probable cause to believe that Defendant committed the offense of unlawful filming or photographing of another. A search of his cell phone should have been limited to types of data that would be likely to contain evidence of this offense, such as photographs, text messages, and documents saved on a storage memory card. The warrant was overbroad because it authorized a search of the cell phones' "entire contents." As was the case in *Winn*, the investigating officer knew the location and precise identity and contents of the photos sought, in addition to a very narrow relevant time frame: the evidence would have consisted of "upskirt" photos taken at Farm Fresh on July 22, 2011. Permitting a search of "the entire contents" of Defendant's cell phones was constitutionally overbroad because evidence of the underlying offense should have been limited to the relevant time period and to particular types or categories of data contained in the phones. *Winn*, 79 F. Supp. 3d at 919–21; *see also United States v. Juarez*, No. 12cr59, 2013 WL 357570, at *4 (E.D.N.Y. Jan. 29, 2013) (not reported) (upholding the validity of a search warrant where it "identified particular devices and file types to be searched for evidence of a specific statutory offense").

C. Search of Residence

Defendant asserts that the search of his residence was unlawful because the search warrant lacked probable cause and was overbroad. The affidavit in support of the search warrant stated that a search was requested in relation to the offense of Unlawful Filming or Photographing of Another, in violation of Va. Code Ann. § 18.2-386.1. The affidavit provided a description of the Farm Fresh incident to establish probable cause that a violation of the statute occurred. The affidavit stated that the "place, person, or thing to be searched" is the residence of Defendant, including "any computer, computer related storage devices to include flashdrives,

memory devices, external hard drives, cameras, cell phones, laptops and any printed photographs located on the premises at the time of the search."

Defendant argues that the search warrant lacked probable cause on its face because it failed to establish a nexus between the Farm Fresh incident and the need to search Defendant's entire residence. *See United States v. Zimmerman*, 277 F.3d 426 (3d Cir. 2002) (finding that the search warrant affidavit failed to establish a nexus between allegations of sexual abuse and searching the defendant's entire home for child pornography). Defendant asserts that police did not have probable cause to believe that his home contained evidence relating to the Farm Fresh incident.

Defendant also argues that the warrant to search his residence was overbroad. The warrant allowed officers to search "any computer, computer related storage devices" and the "entire contents of each computer related, camera, laptop, cell phone collected." ECF No. 17 at 15. *See United States v. Ford*, 184 F.3d 566, 576 (6th Cir. 1999) ("Failure to limit broad descriptive terms by relevant dates, when such dates are available to the police, will render warrant overbroad."). Defendant contends that the warrant was overbroad because it allowed the police to search for and seize "broad swaths of data and items without probable cause to believe it constituted evidence of the alleged [Farm Fresh] incident." ECF No. 17 at 16.

Probable cause to search is defined as "a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). This standard does not "require officials to possess an airtight case before taking action." *Taylor v. Farmer*, 13 F.3d 117, 121–22 (4th Cir. 1993). Based on the underlying facts of the Farm Fresh incident and Defendant's subsequent interview on August 15, 2011 (in which Defendant admitted that he intended to take the "upskirt" photograph of G.B., and also admitted to taking

other "upskirt" photographs at different locations), officers had probable cause to believe that Defendant committed the offense listed in the affidavit. There existed a "fair probability" that evidence of the crime of unlawful filming or photographing of another could be found in the electronic storage devices in Defendant's home.

However, the search warrant for Defendant's residence was overbroad because it authorized the search and seizure of evidence that was "broader than the probable cause on which [the warrants and affidavits are] based." *United States v. Weber*, 923 F.2d 1338, 1342 (9th Cir. 1991). The warrant permitted police to search the entire contents of the electronic media and storage devices in Defendant's home, without limiting the search of these devices to the particular file types likely to contain evidence of the offense in question. The warrant for searching Defendant's residence and the warrant for searching his phones were both constitutionally overbroad.

D. Good Faith Exception

The Supreme Court has recognized that the "sole purpose" of the exclusionary rule "is to deter future Fourth Amendment violations." *Davis v. United States*, 564 U.S. 229, 236–37 (2011). Suppression may be warranted where the circumstances of the unconstitutional search are likely to recur, and interests in deterrence "are advanced by discouraging the routine use of dangerous procedures [of the type in this case]." *United States v. Edwards*, 666 F.3d 877, 886–87 (4th Cir. 2011).

However, because exclusion is a drastic remedy, it is considered a "last resort" when addressing Fourth Amendment violations. *United States v. Stephens*, 764 F.3d 327, 335 (4th Cir. 2014). Accordingly, the Supreme Court established a good faith exception to the exclusionary rule in *United States v. Leon*, 468 U.S. 897, 922 (1984). Under the good faith exception, courts

may decline to exclude evidence obtained pursuant to a later-invalidated search warrant, if law enforcement's reliance on the warrant was objectively reasonable. *United States v. Doyle*, 650 F.3d 460, 467 (4th Cir. 2011).

When considering the application of the good faith exception, courts are "not limited to consideration of only the facts appearing on the face of the affidavit." *Id.* at 471 (internal citation omitted). Instead, courts must "examine the totality of the information presented to the magistrate in deciding whether an officer's reliance on the warrant could have been reasonable." *United States v. Legg*, 18 F.3d 240, 244 n.1 (4th Cir. 1994).

There are four circumstances in which the good faith exception will be found to be inapplicable:

> (1) if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth; (2) if the issuing magistrate wholly abandoned his judicial role in the manner condemned in *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979); (3) if the affidavit supporting the warrant is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; and (4) if under the circumstances of the case the warrant is so facially deficient – *i.e.*, in failing to particularize the place to be searched or the things to be seized – that the executing officers cannot reasonably presume it to be valid.

Doyle, 650 F.3d at 467 (citing *United States v. DeQuasie*, 373 F.3d 509, 519–20 (4th Cir. 2004) (quoting *Leon*, 468 U.S. at 923)).

Defendant argues that the good faith exception is inapplicable because the judge who issued the warrant was misled by the omission of information from the affidavit ("prong one"), and because that affidavit was so lacking in indicia of probable cause that the officers' reliance upon the search warrant was entirely unreasonable ("prong three"). The Court disagrees.

At the time of the searches in question, July 28, 2011 and August 18, 2011, the legal authority governing the scope of permissible searches of electronic devices was less developed

than it is today. During that time period, a warrant was not required to search the contents of a cell phone if it was seized incident to a lawful arrest. *United States v. Murphy*, 552 F.3d 405, 410–12 (4th Cir. 2009) (overruled by *Riley v. California*, 134 S. Ct. 2473 (2014)); *see also Davis*, 564 U.S. at 235 (holding that the exclusionary rule is inapplicable to searches conducted in accordance with then-binding appellate precedent, even if that precedent is later overruled). Given the uncertainty of the governing legal standards in 2011, suppression of evidence in this instance would do little to deter future Fourth Amendment violations. *Davis*, 564 U.S. at 236–37.

This case is distinguishable from *United States v. Winn*, 79 F. Supp. 3d 904 (S.D. Ill. 2015) in which the court upheld the exclusionary rule and found the good faith exception inapplicable. In *Winn*, evidence of recklessness on the part of those who prepared the search warrant and affidavit existed. *Id.* at 923. The court also found that the issuing judge acted as a "rubber stamp" when he failed to notice the clear errors and discrepancies on the face of the affidavit, and that the officers exceeded the scope of the warrant in their execution of the search. *Id.* at 923–24.

In contrast, there is no evidence of recklessness or gross negligence in the investigation, preparation, or execution of the search warrants issued here, nor is there evidence that the issuing judge acted as a "rubber stamp." Rather, the evidence supports the conclusion that the police acted with an "objectively reasonable good-faith belief that their conduct [was] lawful[.]" *Davis*, 564 U.S. at 238. Accordingly, the good faith exception must apply in this case, and the evidence obtained from Defendant's cell phones and from his residence will not be suppressed.

IV. CONCLUSION

For the foregoing reasons, Defendant's Motions to Suppress, ECF Nos. 17 and 18, are **DENIED.**

The Clerk is **REQUESTED** to mail a copy of this Order to all attorneys of record.

IT IS SO ORDERED.

Norfolk, Virginia
4. 7., 2017

Arenda L. Wright Allen
United States District Judge