STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL GEORGIE CARSON,

Defendant-Appellant.

FOR PUBLICATION
February 15, 2024

No. 355925
Emmet Circuit Court
LC No. 20-005054-FC

Before: HOOD, P.J., and REDFORD and MALDONADO, JJ.

HOOD, P.J. (*concurring*)

I agree completely with the majority's analysis and conclusions. I write separately only to highlight that in addition to the warrant being overbroad and therefore facially deficient, I would conclude that the warrant affidavit fails the nexus requirement for search warrants. *People v Hughes*, 506 Mich 512, 527 n 6; 958 NW2d 98 (2020). The description of probable cause does not describe the target phone or in any way link it to the underlying investigation. It contains only the most general description of criminals (like everyone else) using cellphones. This is insufficient.

The majority opinion accurately states the factual and procedural background of this case. One point however warrants amplification: the affidavit supporting the search warrant application failed to explain how or why the target device would contain evidence, fruits, or contraband related to the crimes under investigation: namely, larceny and safe breaking.

As the majority observes, the warrant application and affidavit identified the target device as a "Cellular device belonging to Michael Georgie Carson and seized from his person upon his arrest." It further identified the device by make, serial number, and location (the county sheriff's property room). Again, the majority correctly observes that the items to be seized encompassed all data on the device with little to no limitation, an obvious issue regarding particularity and overbreadth.

But the warrant affidavit also fails to explain what basis the investigator's had for believing evidence of larceny in a building and safe breaking would be on Carson's cell phone. Unquestionably, the warrant affidavit provides a detailed description of the investigation current

through the date of the affidavit, including evidence linking Carson to the suspected larceny and safe breaking. The affidavit, however, makes little mention of cell phones generally and no mention of Carson's specific cell phone. The only references are in paragraphs 3.w., 3.x., and 3.y. of the affidavit. The affiant attested:

> w) Based on your affiant's training and experience, it is known that mobile communication devices are often used to plan, commit, and conceal criminal activity and evidence. Therefore, data obtained from mobile communication devices and records created by these devices can assist law enforcement in establishing the involvement of a possible suspect or suspects.
>
> x) Records created by mobile communication devices can also assist law enforcement in establishing communication activity/behavior, patterns, anomalies, patterns of life and often the identity of the device user. This is most effectively accomplished by reviewing a larger segment of records ranging prior to and after the incident under investigation if possible.
>
> y) The aforementioned information combined with your affiant's training and experience causes him to believe that the execution of this search warrant will assist with the furtherance of this criminal investigation.

None of these paragraphs discuss how, based on the affiant's training and experience, cell phone data impacts investigations involving larceny or safe cracking. Critically, the affidavit does not mention the target cell phone at all. On its terms, there is no information about how the cell phone was seized, whether Carson used or possessed it, or how long he used or possessed it (including whether he had the same phone at the time of the suspected offense). The affidavit is conspicuously silent on any link between the cell phone and Carson or the cell phone and the investigation into larceny and safe breaking.

The majority correctly states the standard of review. Claims of ineffective assistance of counsel present mixed questions of fact and law. *People v Head*, 323 Mich App 526, 539; 917 NW2d 752 (2018). We review the fact findings for clear error. *Id.* We review de novo legal questions including questions of constitutional law. *Id.*

I agree with the majority that the warrant here was overly broad. But I believe the warrant was invalid for another reason: the supporting affidavit failed to establish a nexus between the target cell phone, Carson, and the alleged conduct. *Hughes*, 506 Mich at 527 n 6. See *Zurcher v Stanford Daily*, 436 US 547, 556; 98 S Ct 1970; 56 L Ed 2d 525 (1978); *Riley v California*, 573 US 373, 399; 134 S Ct 2473; 189 L Ed 2d 430 (2014).

The so-called "nexus" requirement is an aspect of both probable cause and particularity. See *Hughes*, 506 Mich at 527 n 6 and 538-539. "Generally, in order for a search executed pursuant to a warrant to be valid, the warrant must be based on probable cause." *People v Hellstrom*, 264 Mich App 187, 192; 690 NW2d 293 (2004). See also US Const Am IV ("[N]o 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."); Const 1963, art 1, § 11 ("No warrant to search any place or to seize any person or things or to access electronic data or electronic

communications shall issue without describing them, nor without probable cause, supported by oath or affirmation."). "Probable cause to issue a search warrant exists where there is a 'substantial basis' for inferring a 'fair probability' that contraband or evidence of a crime will be found in a particular place." *People v Kazmierczak*, 461 Mich 411, 417-418, 605 NW2d 667 (2000) (citation omitted). Regarding the nexus requirement, our Supreme Court has stated that "some context must be supplied by the affidavit and warrant that connects the particularized descriptions of the venue to be searched and the objects to be seized with the criminal behavior that is suspected, for even particularized descriptions will not always speak for themselves in evidencing criminality." *Hughes*, 506 Mich at 538-539, citing *Warden, Maryland Penitentiary v Hayden*, 387 US 294, 307; 87 S Ct 1642; 18 L Ed 2d 782 (1967) ("There must, of course, be a nexus . . . between the item to be seized and criminal behavior. Thus . . . , probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction. In so doing, consideration of police purposes will be required.").

"A magistrate's finding of probable cause and his or her decision to issue a search warrant should be given great deference and only disturbed in limited circumstances." *People v Franklin*, 500 Mich 92, 101; 894 NW2d 561 (2017). Our Fourth Amendment jurisprudence requires a magistrate to "make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit . . . , there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v Gates*, 462 US 213, 238; 103 S Ct 2317; 76 L Ed 2d 527 (1983). See also *United States v Carpenter*, 360 F3d 591, 594 (CA 6, 2004) ("To justify a search, the circumstances must indicate why evidence of illegal activity will be found in a particular place. There must, in other words, be a nexus between the place to be searched and the evidence sought.") (quotation marks and citation omitted); *United States v Corleto*, 56 F4th 169, 175 (CA 1, 2022); *United States v Lindsey*, 3 F4th 32, 39 (CA 1 2021); *United States v Mora*, 989 F.3d 794, 800 (CA 10, 2021); *United States v Johnson*, 848 F3d 872, 878 (CA 8, 2017); *United States v Freeman*, 685 F2d 942, 949 (CA 5, 1982).[1] Without a sufficient nexus, a judge may not issue a search warrant. See *United States v Tellez*, 217 F3d 547, 550 (CA 8, 2000) ("We agree, of course, that there must be evidence of a nexus between the contraband and the place to be searched before a warrant may properly issue"). Like other probable cause determinations, whether a sufficient nexus exists is a fact specific question requiring consideration of the totality of the circumstances. *Gates*, 462 US at 238. "The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought." *Zurcher* 436 US at 556. To simplify, if law enforcement seeks a warrant to search an individual's cell phone for evidence of safe breaking, the warrant application needs to explain not only why an individual is suspected of safe breaking, but also why law enforcement expects to find that evidence *in the individual's cell phone*.

Applying these principles to this case, the warrant fails the nexus requirement for two reasons: (1) the general description of the usefulness of cell phone data in investigations is insufficient to establish a nexus to the suspected crimes in this case; and (2) the warrant does not

[1] Though nonbinding on state courts, we may consider lower federal court decisions for their persuasiveness. *People v Brcic*, 342 Mich App 271, 280 n 3; 994 NW2d 812 (2022).

provide the magistrate with any factual information about the phone: who owned it, who used it, how it was recovered, or how long it was used. These failings are obvious from the face of the warrant and affidavit.

Regarding the first issue, the warrant affidavit only contains bald assertions regarding crime and cell phones; there is nothing specific to larceny, safe breaking, or this defendant. In *Hughes*, our Supreme Court expressed reservation about finding a sufficient nexus to issue a warrant to search and seize cell-phone data based solely on the nature of the crime alleged. *Hughes*, 506 Mich at 527 n 6. The Court ultimately declined to answer the question whether the affidavit, stating that the detective's training and experience informed him that drug traffickers commonly use cell phones to aid their criminal enterprise, was insufficient to provide probable cause that the defendant's cell phone would contain evidence of drug trafficking because it concluded that the warrant was invalid for other reasons. *Id*. But even in that case, the affidavit provided some minimal link between the suspected class of crime and use of cell phones. Here, however, that is wholly absent. There is only a reference to criminals using cell phones. This is insufficient. See *id*. (citing approvingly language in *Riley*, 573 US at 399, that "[i]t would be a particularly inexperienced or unimaginative law enforcement officer who could not come up with several reasons to suppose evidence of just about any crime could be found on a cell phone"); *United States v Brown*, 828 F3d 375, 384 (CA 6, 2016) ("[I]f the affidavit fails to include facts that directly connect the residence with the suspected drug dealing activity, . . . it cannot be inferred that drugs will be found in the defendant's home—even if the defendant is a known drug dealer"). If we were to conclude that the bald assertions in paragraphs 3.w. and 3.x, that criminals use cell phones, are sufficient to authorize the search in this case, then we will effectively render the warrant requirement a mere formality.

Second, and more critically, even if we were to look past the limited discussion of the affiant's experience regarding criminals generally using cell phones, the affidavit in this case does not identify the target cell phone, let alone who owned it, who used it, when they used it, how it was seized, or how in any way that cell phone specifically ties to this case. The affidavit does not contain even the most minimal connection between the cell phone identified on the first page of the warrant application and the investigation. The investigators could have provided this information through common investigative tactics (i.e., a search warrant to Carson's service provider to determine how long he had the device or when it was last used), or even by adding details about Carson's arrest and the seizure of the device. We cannot overlook this glaring deficiency. The reviewing magistrate also should not have overlooked this.

These reasons, in addition to those stated in the majority opinion, provide a basis for concluding that the warrant was invalid, law enforcement could not have reasonably relied on it, and the good-faith exception does not apply.

/s/ Noah P. Hood