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Court of Appeal, Fourth District, Division 1, California.

The PEOPLE, Plaintiff and Respondent,
v.
John David SANCHEZ, Defendant and Appellant.

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APPEAL from a judgment of the Superior Court of San Diego County, Evan P. Kirvin, Judge. Affirmed. (Super. Ct. No. SCE359409)

Attorneys and Law Firms

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Opinion

IRION, J.

***1** John David Sanchez pleaded guilty to 34 counts alleging violations of various provisions of the Penal Code (31 counts) and the Health and Safety Code (three counts), and he admitted special allegations associated with certain of the Penal Code violations (four counts). He appeals, contending that the trial court erred in denying his motion to suppress the evidence seized pursuant to a search warrant. In particular, he argues that the seizures of a cellular telephone found in his car and a laptop computer found in his bedroom were not reasonable under the Fourth Amendment of the United States Constitution and that the search warrant did not comply with certain statutory requirements of the Electronic Communications Privacy Act (ECPA), Penal Code section 1546 et seq.[1]

As we explain, the evidence submitted in support of the issuance of the search warrant established probable cause. As we further explain, even if the warrant does not comply with the ECPA, Sanchez did not establish reversible error. Accordingly, the trial court did not err in denying Sanchez's motion to suppress the evidence seized, and on that basis, we will affirm the judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND[2]

A. *The Sexual Assault of Kristie P.*

On the night of February 25, 2016, Kristie P. (Kristie), a 28-year-old woman, made plans to meet S.C. for a first date at a specified location in the North Park neighborhood of San Diego. After meeting, they walked two or three blocks and went into a bar.

They both had several drinks before they left the bar around 2:00 a.m. the following morning. Kristie was intoxicated; after telling S.C. that she felt too drunk to drive herself home, she vomited outside on the side of a building. Using his cellular telephone's application for a commercial ridesharing service, S.C. arranged for a car to pick them up. In response, Sanchez arrived, driving a silver or gray Scion. After Sanchez took S.C. to his car (a few blocks away, near where he and Kristie had met), S.C. asked Sanchez to take Kristie wherever she wanted to go. Kristie gave the driver her home address, he entered it into his phone, and they left North Park.

On the way to her El Cajon home, Kristie twice asked Sanchez to pull over to the side of the road because she did not feel well and had to vomit. The first stop was on the side of the freeway, and as Kristie leaned out of the rear passenger side door, Sanchez came around the outside of the car. After vomiting, Kristie leaned back into the car and laid on the rear seat, where Sanchez had joined her. However, once Sanchez began rubbing one of her thighs, under her dress, she asked that he continue driving. The second stop was a few blocks from her home; as Kristie again leaned out of the door, Sanchez

again left the driver's seat, went outside to the rear passenger's door (where Kristie was), and ultimately got into the back seat.

***2** This time, however, Sanchez leaned over Kristie, straddled her with his knees on either side of her, pulled her undergarments down to her knees, and inserted his penis into her vagina. Kristie asked Sanchez multiple times what he was doing and why he was doing it, but he failed to respond until Kristie started crying—at which point, Sanchez pulled out, said they had a mutual friend, and told her that his first name was " 'Johnny' " and his last name was " 'Sanchez.' "

Kristie took her belongings, got out of Sanchez's vehicle, noted the first digit of the license plate, and walked the remaining few blocks to her home. Kristie plugged in her battery-dead mobile telephone and called 911 to report the attack.

B. *The Initial Investigation*

El Cajon Police Officer H. and his partner, Officer S., responded at approximately 6:00 a.m. After taking a statement and other formalities, Officer H. accompanied Kristie to a Sexual Assault Response Team examination.

Meanwhile, Officer S. spoke with S.C., who independently confirmed what Kristie had told the officers about their date up to the time Sanchez dropped off S.C. at his car. S.C. also provided Officer S. with a copy of the text message he received approximately a half hour later from the ridesharing service; the receipt indicated the fare for transporting Kristie and the driver's first name, "John."

A search warrant for the records of the ridesharing service disclosed the identity of Sanchez and a copy of his driver's license photograph, and a public records check on Sanchez indicated that he had registered a 2012 Toyota Scion with California license plates "6xxxxxx" at a specified address on Dayton St. in San Diego. Police detectives went to the address, where they found the vehicle and detained Sanchez.

C. *The Search Warrant at Issue*

Officer H. then prepared an affidavit in support of a search warrant.[3]

With regard to the details of the requested search, Officer H. first identified the specific address on Dayton Street, the Toyota Scion with California license plates 6xxxxxx, and Sanchez (identified by race, age, height, weight, birthdate, and driver's license number).

Officer H. next described nine categories of property to be seized, the following two of which are at issue in this appeal:

> "5. ... [A]ll computer hardware and software and any other device capable of storing text or images in an electronic or digital format, including cellular phones, Blackberries, personal data assistants (PDAs), and the like;
>
> "6. Diaries, journals, or other writings, either paper or electronic, tending to describe rapes or other sexual assaults upon women; recorded words or images, whether photographic, digital, or audio or video tape, showing women, either naked or in various stages of undress, who appear to be disheveled, bruised, beaten, bleeding, or other conditions indicating possible sexual assault[.]"

Officer H. then testified to his background and training, in part as follows:

> "I am a peace officer employed by the El Cajon Police Department ... and have been so employed since 01-17-06. I have received training about sexual assaults from the San Diego Regional Academy in 2006. I received training during pre-shift meetings while in patrol on several occasions, from 2007-2011. [¶] I began working as a patrol officer in July 2006. I worked in Patrol Division until February 2011. During my time in Patrol Division I responded to a variety of radio calls to include suspected sexual assaults and other violent crimes. In patrol I have worked with the Family Protection Unit of the El Cajon Police Investigations on many different types of sexual assaults. [¶] From 2011-2015 I was assigned to El Cajon Police Department Special Enforcement Division where I was a member of the Special Operations Unit. At the time my duties included ... investigation and enforcement of all crimes at the four high school campuses in the City of El Cajon, including sexual assaults. [¶] I am currently again assigned to the Patrol Division since 2015 and have completed numerous complex criminal investigations, including sexual assaults. I have also attended and completed a class in Technology in Investigation which is a 40 hour training class that focuses on obtaining evidence in computers and cellular telephones...."

***3** Officer H.'s affidavit next set forth the events, mostly described at parts I.A. and I.B., *ante*, during the 12 and a half hours between the time S.C. and Kristie left the bar at closing and the time Officer H. presented his affidavit to the magistrate.

Finally, based on his background, experience, and qualifications and the facts surrounding Kristie's sexual assault and Sanchez's detention, Officer H. presented the following opinion evidence:

> "Based on the above investigation I believe that SANCHEZ knowingly committed Forcible Rape of an Intoxicated Person in violation of Penal Code section 261[, subdivision] (A)(3) in El Cajon. Additionally, since [Kristie] stated the sexual assault occurred in the backseat of SANCHEZ's vehicle, it is reasonable to believe that there is evidence in that vehicle which helps prove or disprove that SANCHEZ is involved in the crime.
>
> "Based on my training and experience, I know that men who sexually assault women will often keep souvenirs of these encounters as 'trophies' o[f] their 'conquests.['] These souvenirs can include ... some sort of audio, video, or photographic record of the event. The souvenirs not only allow the attacker to memorialize the event but also to 're-live' the event at future dates.
>
> "Likewise, some attackers will also memorialize the event for future reference by writing about it in a diary or journal. Nowadays, such records are maintained in computer files not only because computers have largely replaced paper records, but also due to the ability to more quickly erase (destroy) such records if the attacker believed he was being investigated or was otherwise compromised.
>
> "My training and experience has shown that the property to be seized will provide corroborating evidence that SANCHEZ is the perpetrator of the sexual assault on [Kristie]. This additional evidence is critical in proving identity.
>
> "Therefore, based on my training, experience, and the above facts, I believe I have substantial cause to believe the above-described property or a portion thereof will be at the described premises when the warrant is served.
> "Based on the aforementioned information and investigation, I believe grounds for the issuance of a search warrant exist as set forth in ... section 1524."[4]

After consideration of the evidence in Officer H.'s affidavit, the magistrate found "substantial probable cause" for the issuance of the requested search warrant and issued Search Warrant No. E2016-125 (SW-125).

Pursuant to SW-125, later that same day (Feb. 26, 2016), Officer H. searched the location, property and persons authorized. As relevant to the issues in the appeal, paragraphs 5 and 6 of the inventory disclosed that Officer H. seized an "android cell phone" from Sanchez's car (cellphone) and a "MacBook laptop" from Sanchez's bedroom (laptop).

Although the record does not contain evidence of additional warrants or searches, Sanchez and the People agree that two later search warrants were issued for the *searches* of the cellphone and the laptop. The results of the search of Sanchez's laptop revealed numerous videos and several photographs, which the People describe as depicting crimes *in addition to Kristie's sexual assault*. Having reviewed the transcript from the preliminary examination hearing, we accept the People's summary of this evidence: "The videos showed [Sanchez] in his bedroom with 14 different teenage girls. The girls were always completely passed out or unconscious. The detective [who testified at the preliminary examination hearing] described them as 'unresponsive,' 'limp,' and 'motionless;' and in two videos you can hear the victim snoring. [Citations to record references.] [¶] [Sanchez] taped himself raping, orally copulating, sodomizing, and assaulting the girls while they were asleep or unconscious."

D. *The Charges, the Motion to Suppress Evidence, the Guilty Plea, & the Judgment*

***4** In late March 2016, approximately one month after the sexual assault of Kristie and the seizure of Sanchez's property, the district attorney charged Sanchez with one felony count of rape of an intoxicated person—namely, Kristie—in violation of section 261, subdivision (a)(3). At the end of May 2016 and again in July 2016—i.e., after the seizure and subsequent search of the cellphone and laptop that contained evidence of additional crimes—the district attorney twice amended the earlier complaint, ultimately alleging 28 felony counts and three misdemeanor counts against Sanchez.

In August 2016, at the conclusion of the preliminary examination hearing, the court held Sanchez to answer on all 31 counts of the second amended complaint. A few weeks later, the district attorney filed a 34-count

information, asserting 31 felony violations and three misdemeanor violations.

Almost a year later, in July 2017, Sanchez filed a motion to quash SW-125 and suppress the evidence obtained as a result of its execution. Sanchez directed the motion exclusively to the seizure of the cellphone and the laptop, seeking to suppress the evidence obtained from the later searches of these electronic devices. He argued both that probable cause did not support the issuance of SW-125 and that SW-125 failed to comply with the ECPA. The People filed written opposition, and Sanchez filed a reply.

Prior to the commencement of trial in August 2017, the trial court heard argument on Sanchez's motion and denied it. More specifically, the court ruled that Officer H.'s affidavit set forth sufficient evidence to establish probable cause for the issuance of SW-125 and that SW-125 did not violate the ECPA.[5]

Later that day, the district attorney filed an amended information, alleging 31 felony counts (one with special allegations) and three misdemeanor counts (each with special allegations) against Sanchez. As part of the same proceedings, Sanchez was arraigned on the amended information, pleaded not guilty and denied all of the allegations, and then changed his plea to guilty to all counts and special allegations.

In November 2017, the court sentenced Sanchez to a total prison term of 80 years and four months, imposed protective orders as to all of the victims, and ordered that Sanchez pay specified fees, fines, and penalties. Sanchez timely appealed.

II. DISCUSSION

Sanchez argues that the seizures of the cellphone from his car and the laptop from his bedroom violated the Fourth Amendment and that the search warrant was issued in violation of the ECPA. As we explain, Sanchez did not meet his burden on appeal of establishing reversible error.

A. *Probable Cause Supported the Issuance of SW-125*

1. *Law*

The Fourth Amendment to the United States Constitution prohibits "unreasonable searches and seizures" and requires that search warrants be issued only upon a showing of "probable cause" under oath and describing particularly "the place to be searched, and the ... things to be seized."

As the California Supreme Court recently summarized, the pertinent rules governing a Fourth Amendment challenge to the validity of a search warrant are "well-settled." (*People v. Westerfield* (2019) —— Cal.5th ——, ——, 243 Cal.Rptr.3d 18, 46, 433 P.3d 914 (*Westerfield*).) " 'The question facing a reviewing court asked to determine whether probable cause supported the issuance of the warrant is whether the magistrate had a substantial basis for concluding a fair probability existed that a search would uncover wrongdoing.' (*People v. Kraft* (2000) 23 Cal.4th 978, 1040, 99 Cal.Rptr.2d 1, 5 P.3d 68 (*Kraft*), citing *Illinois v. Gates* (1983) 462 U.S. 213, 238-239, 103 S.Ct. 2317, 76 L.Ed.2d 527.) 'The test for probable cause is not reducible to "precise definition or quantification." '(*Florida v. Harris* (2013) 568 U.S. 237, 243, 133 S.Ct. 1050, 185 L.Ed.2d 61.) But ... it is ' "less than a preponderance of the evidence or even a prima facie case." ' (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 370, 178 Cal.Rptr.3d 185, 334 P.3d 573.) ' "The task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." ' (*Kraft, supra,* at pp. 1040-1041, 99 Cal.Rptr.2d 1, 5 P.3d 68, quoting *Illinois v. Gates, supra,* at p. 238, 103 S.Ct. 2317.) 'The magistrate's determination of probable cause is entitled to deferential review.' (*Id.,* at p. 1041, 99 Cal.Rptr.2d 1, 5 P.3d 68; accord *People v. Carrington* (2009) 47 Cal.4th 145, 161, 97 Cal.Rptr.3d 117, 211 P.3d 617.) ... [T]he warrant 'can be upset only if the affidavit fails as a matter of law to set forth sufficient competent evidence' supporting the finding of probable cause." (*Westerfield,* at p. ——, 243 Cal.Rptr.3d at 46, 433 P.3d 914].)

***5** Similarly, according to our state's high court, the standard of appellate review of a trial court's ruling on a motion to suppress is "well established." (*People v. Glaser* (1995) 11 Cal.4th 354, 362, 45 Cal.Rptr.2d 425, 902 P.2d 729 (*Glaser*).) "We defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent

judgment." (*Ibid.*)

2. *Analysis*

Sanchez raises four arguments in support of his position that the trial court erred in denying his suppression motion. However, he has not met his burden, as we explain, because Officer H.'s affidavit contains substantial evidence of probable cause for the issuance of SW-125.

First, Sanchez argues that there is "no evidence to support Officer H[.]'s belief that evidence of Kristie's reported rape would be found on the electronic devices."[6] We disagree; the evidence in support of Officer H.'s "belief" is the foundational facts associated with his 11 and a half years of "training and experience" about sexual assaults. (See pt. I.C., *ante*.) Initially, we note that "information and belief alone may support the issuance of search warrants, which require probable cause." (*Humphrey v. Appellate Division* (2002) 29 Cal.4th 569, 573, 127 Cal.Rptr.2d 645, 58 P.3d 476.) Moreover, as expressly applicable here, " 'a magistrate, in deciding whether or not to issue a search warrant, can consider competent and relevant opinion evidence bearing on the issue of probable cause' "; i.e., "the magistrate d[oes] not have to disregard the officer's opinion predicated upon his experience." (*People v. Superior Court* (*Marcil*) (1972) 27 Cal.App.3d 404, 412-413, 413, 103 Cal.Rptr. 874; accord, *People v. Hochanadel* (2009) 176 Cal.App.4th 997, 1019, 98 Cal.Rptr.3d 347 [detective's "experience and knowledge" sufficient to make him "competent to author the search warrant affidavit"]; *People v. Tuadles* (1992) 7 Cal.App.4th 1777, 1785, 9 Cal.Rptr.2d 780 ["opinion of an experienced, well trained narcotics officer-expert" competent to establish probable cause that contraband would be found at defendant's residence]; *People v. Johnson* (1971) 21 Cal.App.3d 235, 245, 98 Cal.Rptr. 393 ["The officer's extrapolation from the known facts of the previous search through his personal experience and expertise to his ultimate opinion was legally competent and factually persuasive."].)

In a related argument, Sanchez objects to the evidentiary showing in support of probable cause, on the basis that Officer H.'s affidavit did not present to the magistrate "any *case specific* facts or circumstances" which suggest that evidence of Kristie's reported rape would be found on the electronic devices. (Italics added.) The evidence that Kristie's reported rape would be found on the electronic devices is not "case specific"; it is Officer H.'s professional opinion—based on evidence of his years of training and experience regarding sexual assaults—that men who commit the *case-specific* crime committed here, i.e., rape, often record the event and keep evidence of it on computer files. Thus, the combination of Officer H.'s opinion testimony and the *case-specific* evidence that Sanchez raped Kristie[7] provided the probable cause sufficient for the issuance of a warrant to seize Sanchez's cellphone and the laptop.

***6** Second, Sanchez contends that probable cause was lacking, because there is no nexus between the crime alleged (rape of an intoxicated person) and the laptop. More specifically, Sanchez argues that the "broad category of 'all computer hardware and software' under 'Items To Be Seized' on SW-125 clearly exceeded the probable cause under the circumstance." We disagree; the scope of the search was limited to Sanchez's vehicle and residence—two specific locations where, if Sanchez had a laptop, it likely would be located. Sanchez further suggests that there was only an "extremely remote" probability that the laptop would contain evidence of Kristie's sexual attack, "given the short period of time that elapsed between the time the crime would have occurred and the time that [Sanchez] was detained outside his residence." Notably, Sanchez does not tell us, let alone provide record references in support of his contention of, how much time he maintains elapsed between the crime and his detention. In any event, based on Officer H.'s affidavit, the magistrate was provided with evidence that "men who sexually assault women often keep ... some sort of audio, video, or photographic record of the event" and that "[n]owadays" such offenders maintain records of their attacks in computer files "due to the ability to more quickly erase (destroy) such records" if necessary. From this testimony, the magistrate easily could have inferred that, *if Sanchez's cellphone contained evidence of Kristie's rape*—and Sanchez does not suggest that, as a commercial rideshare driver, he did not have his cellphone in his car at the time of Kristie's alleged attack[8]—Sanchez immediately transferred the recorded evidence of the attack to his laptop "to more quickly erase (destroy) such records" on the cellphone that he uses in public on a regular basis as a rideshare driver.

Third, Sanchez argues that, because Kristie's statement to Officer H. did not mention any audio or video recording, Officer H.'s opinions "that audio or video ... may have been taken" or "that some attackers will memorialize the event" are unsupported by evidence. Preliminarily, we note that the uncontroverted evidence from Officer H.'s affidavit is that Kristie was intoxicated and sick while she was being driven home, including immediately preceding the attack. Thus, a reasonable inference in support of the trial court's ruling is that, if Sanchez's actions were

consistent with Officer H.'s knowledge and experience—i.e., if there is recorded evidence of the sexual assault—then Kristie was either unaware of the recording or not asked about it by Officer H. In any event, as we explained *ante*, the foundation of Officer H.'s opinions regarding men who sexually assault women were facts related to his knowledge, training, and experience, not what Kristie observed.

Finally, Sanchez challenges Officer H.'s testimony "that the evidence sought will provide corroborating evidence of [Sanchez's] identity," because his identity "was not at issue when Officer H[.] requested SW-125." According to Sanchez, by the time Officer H. requested the search warrant, Sanchez had told Kristie his name, the police had detained Sanchez, the rideshare company had verified Sanchez's identity, and S.C.'s rideshare receipt had confirmed Sanchez's first name. However, Sanchez takes Officer H.'s testimony out of context. In full, Officer H. stated: "My training and experience has shown that the property to be seized *will provide corroborating evidence that SANCHEZ is the perpetrator of the sexual assault on* [*Kristie*]. This additional evidence is critical in proving identity." (Italics added.) Very simply, the testimony is not that Officer H. sought the evidence to corroborate *Sanchez's identity* ; the testimony is that Officer H. sought the evidence to corroborate *that Sanchez committed the crime*. Moreover, Sanchez does not provide authority, and our independent research has not disclosed authority, for Sanchez's implied argument that a search warrant lacks probable cause because it seeks additional evidence of facts already known to law enforcement.

For the foregoing reasons, none of Sanchez's arguments supports a conclusion that probable cause was lacking for the issuance of SW-125; i.e., Sanchez has not established that Officer H.'s affidavit " 'fails as a matter of law to set forth sufficient competent evidence' supporting the finding of probable cause" (*Westerfield, supra*, —— Cal.5th at p. ——, 243 Cal.Rptr.3d at 46, 433 P.3d 914, quoting *Skelton v. Superior Court* (1969) 1 Cal.3d 144, 150, 81 Cal.Rptr. 613, 460 P.2d 485). After deferring to the trial court's factual findings that are supported by substantial evidence, we have no difficulty concluding in our independent review that the magistrate did not err in determining there was " 'a fair probability' " that evidence of Kristie's rape would be found on the cellphone and/or the laptop. (*Westerfield, supra*, —— Cal.5th at p. ——, 243 Cal.Rptr.3d 46, 433 P.3d 914, quoting *Kraft, supra*, 23 Cal.4th at pp. 1040-1041, 99 Cal.Rptr.2d 1, 5 P.3d 68, citing *Illinois v. Gates, supra*, 462 U.S. at p. 238, 103 S.Ct. 2317.)

B. *The ECPA Does Not Provide a Basis on Which to Suppress the Evidence Seized Pursuant to SW-125*

***7** The ECPA, found at section 1546 et seq., was enacted in 2015, effective January 1, 2016. (Stats. 2015, ch. 651, § 1.) Although the ECPA has been amended twice (Stats. 2016, ch. 86, § 233, eff. Jan. 1, 2017; Stats. 2016, ch. 541, § 2, eff. Jan. 1, 2017), since SW-125 was issued and executed in February 2016, we are considering only—and all citations are to—the original version of the act.

In general, the ECPA protects electronic information—which is defined to include electronic communication information and electronic device information[9] (§ 1546, subd. (h))—from limitless government search. As applicable here, the ECPA requires that a government entity must obtain a warrant before accessing a person's "electronic device information by means of physical interaction or electronic communication with the device."[10] (§ **1546**.**1**, subd. (c)(1).)

The procedural mechanism for suppressing evidence obtained in violation of the ECPA is found at section 1538.5. (§ 1546.4, subd. (a).[11]) Thus, we will apply the same standard of review as in appeals from other section 1538.5 proceedings: We will review factual findings for substantial evidence and the application of the law to those facts de novo. (*Glaser, supra*, 11 Cal.4th at p. 363, 45 Cal.Rptr.2d 425, 902 P.2d 729.)

Sanchez contends that SW-125 violated section **1546**.**1**, subdivision (d)(1), because it failed to describe with sufficient particularity both the specific time periods and the types of information sought.[12] According to Sanchez, because SW-125 does not contain sufficient particularity, it failed to comply with the ECPA, and because SW-125 failed to comply with the ECPA, the trial court erred in denying suppression of the evidence obtained through SW-125's execution.

***8** The People respond by arguing that, even if SW-125 failed to comply with the ECPA, there is no ECPA violation because the ECPA does not apply to SW-125. According to the People, the ECPA applies only to warrants seeking to "access electronic device information" (§ **1546**.**1**, subd. (c)(1)), and here SW-125 was used merely to seize, not to access electronic information from, the cellphone and laptop.

Sanchez replies with the observation that paragraph 5 of SW-125 authorizes not only the *seizure* of all computer hardware and software (including cellular telephones and

laptops), but also the *viewing and forensic examination* of such electronic devices.

We will assume without deciding that, as argued by Sanchez, SW-125 does not contain the particularity required in section **1546.1**, subdivision (d), and thus does not comply with the ECPA. Nonetheless, for two independent reasons, Sanchez has not established reversible error based on this statutory noncompliance.

First, Sanchez is wrong, in suggesting that, because SW-125 is statutorily noncompliant, "probable cause d[id] not exist to issue the warrant" and, accordingly, "any evidence obtained from the execution of the illegal warrant should be suppressed" under section 1538.5. Sanchez is conflating two independent concepts, noncompliance with a specific statute and noncompliance with an unrelated constitutional provision. Lack of probable cause is a constitutional concept based on the guarantee that, because people are "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, ... *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., 4th Amend., italics added.) In contrast, the particularity requirement in ECPA is a statutory concept limited to what is *described in a search warrant*—in this case, the particularity of "the time periods covered" and "the types of information sought" (§ **1546.1**, subd. (d)(1))—and has nothing to do with probable cause or the showing made to support issuance of the warrant. Although a violation of the ECPA and a violation of the Fourth Amendment both allow an aggrieved party to seek relief—i.e., to request suppression of evidence obtained from execution of the noncompliant warrant—under the procedures established at section 1538.5 (§§ 1546.4, subd. (a) [ECPA],[13] 1538.5 [U.S. Const.]), a violation of the ECPA does not establish a violation of the United States Constitution. Therefore, contrary to Sanchez's presentation, noncompliance with the particularity requirements for describing electronic property in a warrant under section **1546.1**, subdivision (d), is not the equivalent of a lack of probable cause to issue the warrant under the Fourth Amendment.

Moreover, even if paragraph 5's authorization of access to electronic information (i.e., to view and examine the cellphone and laptop) is statutorily noncompliant, Sanchez has not demonstrated prejudice by the (assumed) ECPA violation. Here, regardless whether paragraph 5 of SW-125 *authorized* access to certain electronic information, Sanchez has not established that the government ever attempted, let alone gained, access to the cellphone or laptop *pursuant to this authorization*. To the contrary, the parties agree that, in fact, SW-125 was used exclusively to *seize* the electronic devices. In their briefing both in the trial court and on appeal, Sanchez and the People explain that the government obtained two later warrants (Nos. E2016-254 and E2016-352) for the forensic examination—i.e., the *search*—of the cellphone and laptop. In this context, therefore, error without a showing of prejudice is insufficient to obtain relief on appeal.

***9** For the foregoing reasons, based on Sanchez's showing on appeal, even if SW-125 does not comply with the ECPA, Sanchez is not entitled to suppression of the evidence based on such noncompliance.

III. DISPOSITION

The judgment is affirmed.

WE CONCUR:

McCONNELL, P.J.

GUERRERO, J.

All Citations

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Footnotes

1 Further undesignated statutory references are to the Penal Code.

2 Because Sanchez's conviction was based on a guilty plea, the facts are taken from the evidence admitted at the August 2016 preliminary examination hearing and in conjunction with Sanchez's July 2017 motion to suppress evidence.

3 A deputy district attorney reviewed the affidavit for "legal sufficiency."

4 Section 1524, originally enacted in 1872 and amended numerous times since then, is lengthy and sets forth the grounds upon which a search warrant may issue, as well as certain procedures for conducting searches authorized by a warrant issued under this section.

5 The court further ruled that, even if probable cause was lacking for the issuance of the warrant, the officers who executed the warrant acted in good faith and in objectively reasonable reliance on the warrant, as argued by the People under *United States v. Leon* (1984) 468 U.S. 897, 922, 104 S.Ct. 3405, 82 L.Ed.2d 677 (evidence obtained pursuant to a facially-valid search warrant, later found to be invalid, is admissible if the executing officers acted in good faith and in objectively reasonable reliance on the warrant).

6 In addition to suggesting a lack of probable cause to *seize* the cellphone and the laptop, Sanchez argues that the record lacks evidence to support a finding of probable cause to "***view, or forensically examine the electronic devices***." (Emphasis in original.) However, Sanchez acknowledges that the devices were searched pursuant to *two different search warrants*, not SW-125; thus, we need not and do not decide whether SW-125 is supported by probable cause to view or forensically examine the two devices.

7 Officer H. testified: "The driver again placed his hand on [Kristie]'s mid and upper left thigh.... The driver then took off [Kristie]'s underwear.... [¶] [Kristie] stated the driver grabbed her, lifted her dress and 'mounted' her from behind. [Kristie] tried to push him away, but she was unable to.... The driver then forced his penis into her vagina.... The driver forced sexual intercourse with [Kristie] for a few minutes, then stopped."

8 Sanchez contends there is no nexus between the alleged crime *and the cellphone*. We disagree.

9 " 'Electronic communication information' means any information about an electronic communication or the use of an electronic communication service, including, but not limited to, the contents, sender, recipients, format, or location of the sender or recipients at any point during the communication, the time or date the communication was created, sent, or received, or any information pertaining to any individual or device participating in the communication, including, but not limited to, an IP address. 'Electronic communication information' does not include subscriber information as defined in this chapter." (§ 1546, subd. (d).)
" 'Electronic device information' means any information stored on or generated through the operation of an electronic device, including the current and prior locations of the device." (§ 1546, subd. (g).)

10 " 'Electronic communication' means the transfer of signs, signals, writings, images, sounds, data, or intelligence of any nature in whole or in part by a wire, radio, electromagnetic, photoelectric, or photo-optical system." (§ 1546, subd. (c).)

11 "Any person in a trial, hearing, or proceeding may move to suppress any electronic information obtained or retained in violation of the Fourth Amendment to the United States Constitution or of this chapter [ECPA, § 1546 et seq.]. The motion shall be made, determined, and be subject to review *in accordance with the procedures set forth in subdivisions (b) to (q), inclusive, of Section 1538.5*." (§ 1546.4, subd. (a), italics added.)
Given this statutory language, we reject the People's suggestion that, where a section 1538.5 motion is denied on Fourth Amendment grounds, as here (see pt. II.A.2., *ante*), the section 1538.5 motion must also be denied under the ECPA. Section 1538.5 merely provides *the procedures* for making, determining, and reviewing a motion to suppress evidence; the Fourth Amendment and the ECPA provide independent *legal standards* for establishing whether evidence must be suppressed under *section 1538.5's procedures*.

12 "Any warrant for electronic information shall comply with the following: [¶] (1) The warrant shall describe with particularity the information to be seized by specifying, as appropriate and reasonable, the time periods covered, the target individuals or accounts, the applications or services covered, and the types of information sought." (§ **1546**.**1**, subd. (d).)

13 Although section 1546.4, subdivision (a) *does* allow an aggrieved party to seek suppression of evidence under section 1538.5 where the claim is that electronic information was obtained or retained in violation of the Fourth Amendment (see fn. 11, *ante*), Sanchez has not raised a Fourth Amendment argument *under the ECPA* in this case.

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