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1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 Opinion Number: _____

3 Filing Date: **July 15, 2024**

4 **No. A-1-CA-40123**

5 **STATE OF NEW MEXICO,**

6 Plaintiff-Appellee,

7 v.

8 **JORDAN PADILLA,**

9 Defendant-Appellant.

10 **APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**

11 **Cindy Leos, District Court Judge**

12 Raúl Torrez, Attorney General

13 Santa Fe, NM

14 Michael J. Thomas, Assistant Attorney General

15 Albuquerque, NM

16 for Appellee

17 Law Offices of Marshall J. Ray, LLC

18 Marshall J. Ray

19 Albuquerque, NM

20 for Appellant

1 **OPINION**

2 **YOHALEM, Judge.**

3 {1} This case raises a single issue for resolution by this Court on appeal: whether
4 the State’s nineteen-day delay in obtaining a search warrant for the contents of
5 Defendant Jordan Padilla’s tablet computer¹ was unreasonable, in violation of the
6 Fourth Amendment of the United States Constitution.² Federal law provides that a
7 temporary warrantless seizure supported by probable cause and designed to prevent
8 the loss of evidence is constitutional so long as “the police diligently obtained a
9 warrant in a reasonable period” of time. *Illinois v. McArthur*, 531 U.S. 326, 334
10 (2001). The district court concluded, after weighing Defendant’s diminished
11 possessory interest in the tablet and the legitimate interests of law enforcement, that
12 under the circumstances, the nineteen-day delay between when the tablet was seized
13 and when a search warrant was obtained was reasonable under the Fourth
14 Amendment. We agree and affirm.

¹In the record and briefing, Defendant’s tablet is variously referred to as a computer, a tablet, or a laptop. It is described by the witnesses as a tablet that had a keyboard, and opened and closed like a laptop. We refer to it as a “tablet.”

²Defendant also contends that the delay in obtaining a search warrant was unconstitutional under Article II, Section 10 of the New Mexico Constitution. Defendant fails to provide a developed argument in support of his claim that the New Mexico Constitution should be construed differently than the United States Constitution. We, therefore, address Defendant’s claim under the Fourth Amendment of the United States Constitution.

1 **BACKGROUND**

2 {2} On January 13, 2020, Defendant left his tablet in the living room of his
3 girlfriend's (Girlfriend) house. The tablet was not password protected. Girlfriend,
4 for reasons unrelated to this case, opened the tablet and viewed its content. She found
5 videos of children engaged in sexual acts, as well as a video of Defendant sexually
6 abusing a child under thirteen years of age. Horrified and frightened, Girlfriend
7 sought advice from her friend, showing her the videos, as well as seeking advice
8 from Girlfriend's mother (Mother). Concerned about having contraband in her
9 possession, Girlfriend gave the tablet to Mother for safekeeping.

10 {3} On January 15, 2020, Mother called the New Mexico Attorney General's
11 Office and reported that her daughter had viewed what appeared to be child
12 pornography on Defendant's tablet. Mother stated that she wanted to turn the tablet
13 over to police, and provided Girlfriend's phone number so that law enforcement
14 could contact her. An agent was assigned to investigate the allegations against
15 Defendant. The agent promptly attempted to contact Girlfriend at the phone number
16 provided on Mother's message. Girlfriend hung up on him and would not respond
17 to his voice messages. Unable to reach Girlfriend, the agent went to Mother's house
18 to pick up the tablet. Mother's partner, who was at the house, called Girlfriend and
19 put her on speaker phone so that the agent could talk to her. Girlfriend told the agent
20 that she had seen several videos of what she believed was child pornography, as well

1 as a video showing Defendant sexually abusing a child. Based on information
2 provided by an Albuquerque Police Department detective about a phone call from
3 Girlfriend's friend to the Children, Youth and Families Department, the agent
4 learned that Defendant might be able to remotely remove files from the tablet. The
5 agent took possession of the tablet and placed it in a Faraday bag that would prevent
6 Defendant from remotely accessing it. Defendant does not challenge on appeal that
7 law enforcement had probable cause to seize his tablet, or that exigent circumstances
8 justified the seizure in order to prevent Defendant from altering its contents.

9 {4} The agent drafted an affidavit for a warrant to search the contents of the tablet
10 the same day he seized it, relying on the telephone conversation with Girlfriend to
11 establish probable cause. The next morning, the agent submitted his draft application
12 for a search warrant to the prosecutor for approval. While awaiting approval, the
13 agent continued his investigation. He made several appointments to interview both
14 Girlfriend and her friend, but they repeatedly canceled or failed to show up. The
15 agent testified that he wanted to interview them to see if their descriptions of the
16 videos on the tablet were consistent with each other and to generally confirm the
17 accuracy of what Girlfriend had told him on the phone. He finally was able to
18 interview them at Girlfriend's house on January 24, 2020, nine days after seizing the
19 tablet. The interview corroborated the information Girlfriend had provided over the

1 telephone. The agent decided that no changes were necessary to the warrant
2 application unless the prosecutor wanted more corroboration.

3 {5} Three days after his interview of Girlfriend and her friend, on January 27,
4 2020, still not having heard from the prosecutor, the agent sent a follow-up email.
5 The prosecutor approved the warrant application the same day. The prosecutor
6 reported that through an oversight, he had not seen the agent's initial email and the
7 accompanying draft warrant application until he received the follow-up email. The
8 agent got approval from a judge on February 3, 2020, to search the tablet, and
9 executed the warrant the same day.

10 {6} Based on the contents of the tablet, as well as evidence discovered on other
11 devices owned by Defendant and searched pursuant to separate warrants, Defendant
12 was indicted on numerous counts of child sexual abuse and exploitation, among
13 other charges. Prior to trial, Defendant filed a motion to suppress the contents of the
14 tablet, claiming violations of both the Fourth Amendment to the United States
15 Constitution and Article II, Section 10 of the New Mexico Constitution based on the
16 State's nineteen-day delay in obtaining a search warrant. The district court held an
17 evidentiary hearing on the motion. The agent testified and the affidavit for the search
18 warrant, the agent's initial report, and the warrant itself were admitted into evidence.

19 {7} The district court entered extensive findings of fact and, after weighing all of
20 the circumstances, concluded that, although the State "did not act with 'perfect'

1 diligence,” the delay was not unreasonable under the Fourth Amendment or the New
2 Mexico Constitution.

3 {8} Defendant was tried and convicted by a jury on twenty-five counts and
4 sentenced to fifty seven years in prison. Defendant challenges his convictions on
5 appeal solely on the basis that the contents of his tablet should have been suppressed
6 and excluded from evidence at trial because of unreasonable delay by the State in
7 obtaining a search warrant. Defendant contends that evidence subsequently found
8 on his other devices must be suppressed as well because its discovery can be traced
9 to the search of his tablet and thus it is inadmissible as “the fruit of the poisonous
10 tree.”

11 **DISCUSSION**

12 **I. Standard of Review**

13 {9} “Appellate review of a district court’s decision regarding a motion to suppress
14 evidence involves mixed questions of fact and law.” *State v. Urioste*, 2002-NMSC-
15 023, ¶ 6, 132 N.M. 592, 52 P.3d 964. If facts are in dispute, we will defer to the
16 district court’s findings of fact if they are supported by substantial evidence. *See id.*
17 In this case, Defendant accepts the district court’s findings of fact, but argues that
18 when the appropriate legal standard is applied to these facts, suppression of the
19 evidence obtained from his tablet is required under both federal and state
20 constitutional standards. When “[t]he parties do not dispute the pertinent facts,”

1 *State v. Tapia*, 2018-NMSC-017, ¶ 10, 414 P.3d 332, “[w]e then review the
2 application of the law to those facts, making a de novo determination of the
3 constitutional reasonableness of the search or seizure.” *State v. Martinez*, 2018-
4 NMSC-007, ¶ 8, 410 P.3d 186 (internal quotation marks and citation omitted).

5 **II. The Delay Was Reasonable Under the Fourth Amendment to the United**
6 **States Constitution**

7 {10} We first reiterate that Defendant does not dispute that law enforcement had
8 probable cause to seize his tablet and that exigent circumstances justified its seizure.
9 It is also undisputed that law enforcement did not search the contents of the tablet
10 until *after* a warrant was obtained. Therefore, the sole issue for our review is whether
11 the State’s nineteen-day delay in obtaining a search warrant was reasonable under
12 the Fourth Amendment to the United States Constitution.

13 {11} Federal law provides that a temporary warrantless seizure of a container (be
14 it luggage or a computer) supported by probable cause and designed to prevent the
15 loss of evidence is constitutional so long as “the police diligently obtained a warrant
16 in a reasonable period of time.” *McArthur*, 531 U.S. at 334. In determining whether
17 a delay in obtaining a warrant is reasonable, the Fourth Amendment requires courts
18 to “balance the nature and quality of the intrusion on the individual’s Fourth
19 Amendment interests against the importance of the governmental interests alleged
20 to justify the intrusion.” *United States v. Place*, 462 U.S. 696, 703 (1983); *see United*
21 *States v. Jacobsen*, 466 U.S. 109, 124 (1984) (“[A] seizure lawful at its inception

1 can nevertheless violate the Fourth Amendment because its manner of execution
2 unreasonably infringes possessory interests protected by the Fourth Amendment’s
3 prohibition on ‘unreasonable seizures.’”). “[W]hen we balance these competing
4 interests we must take into account whether the police diligently pursued their
5 investigation.” *United States v. Burgard*, 675 F.3d 1029, 1033 (7th Cir. 2012)
6 (alteration, internal quotation marks, and citation omitted). The reasonableness of
7 the delay “will reflect a careful balancing of governmental and private interests” “in
8 light of all the facts and circumstances, . . . on a case-by-case basis.” *United States*
9 *v. Mitchell*, 565 F.3d 1347, 1351 (11th Cir. 2009) (per curiam) (internal quotation
10 marks and citations omitted). “There is unfortunately no bright line past which a
11 delay becomes unreasonable.” *Burgard*, 675 F.3d at 1033.

12 {12} Turning first then to evaluate the strength of Defendant’s private interests, we
13 note that federal courts uniformly have held that seizure of a computer invades an
14 individual’s possessory interests under the Fourth Amendment. *See United States v.*
15 *Mays*, 993 F.3d 607, 617 (8th Cir. 2021); *United States v. Laist*, 702 F.3d 608, 616
16 (11th Cir. 2012); *Burgard*, 675 F.3d at 1034; *United States v. Christie*, 717 F.3d
17 1156, 1162 (10th Cir. 2013). The case law acknowledges the significant role that
18 computers play in both the personal affairs and the business affairs of their owners.
19 *See United States v. Andrus*, 483 F.3d 711, 718 (10th Cir. 2007) (“A personal
20 computer is often a repository for private information the computer’s owner does

1 not intend to share with others.”), *clarified on denial of reh’g by*, 499 F.3d 1162
2 (10th Cir. 2007) (order); *Laist*, 702 F.3d at 616 (providing that “the possessory
3 interest in a computer derives from its highly personal contents”).

4 {13} Courts have found that a defendant’s possessory interest in a computer,
5 however, is diminished under a number of circumstances. These include, as relevant
6 here, when the computer is taken from another person rather than directly from the
7 possession of the defendant; when the computer’s contents lack password protection
8 or other security; and when the individual fails to make diligent efforts to have the
9 computer returned. *See, e.g., Burgard*, 675 F.3d at 1033-34 (inferring that an
10 individual’s possessory interest is diminished where the device was relinquished to
11 a third party, and the individual neither checked on the device nor sought assurances
12 of its swift return); *United States v. Sparks*, 806 F.3d 1323, 1339 (11th Cir. 2015)
13 (considering the lack of password protection, that seizure occurred from another
14 person rather than from the defendant, and that the defendant failed to diligently seek
15 recovery as indicative of a diminished possessory interest), *overruled on other*
16 *grounds by United States v. Ross*, 963 F.3d 1056 (11th Cir. 2020).

17 {14} Applying these factors to Defendant’s possessory interest in his tablet, we
18 conclude that Defendant’s interest was diminished by each of these factors.
19 Defendant left his tablet in Girlfriend’s living room and it was seized from Mother
20 rather than from Defendant. The tablet was not password protected, despite

1 Defendant being skilled in computer technology, and could be easily accessed by
2 anyone. Defendant did not immediately remember where he had left the tablet. When
3 he learned he had left it at Girlfriend's, he waited until the next day to contact her,
4 and rather than take it back immediately, asked her to hide it "somewhere safe." He
5 also had left his tablet at her house on numerous prior occasions. We agree with the
6 district court that evidence that prior to the seizure of the tablet, Defendant made
7 inquiries of Girlfriend by telephone about whether she had the tablet was not
8 sufficient to outweigh the evidence supporting a general disregard for both his
9 possessory interest in the tablet and the privacy of its content.

10 {15} Turning next to the other side of the scale—the government's interests—we
11 note that a government interest based on probable cause to believe a computer
12 contains child pornography, as was the case here, weighs more heavily in favor of
13 the government than a seizure made with only reasonable suspicion. *See Burgard*,
14 675 F.3d at 1033. Additionally, we are directed by case law to examine the reasons
15 for the delay and whether law enforcement "diligently pursued their investigation"
16 during the time period at issue. *See Laist*, 702 F.3d at 614 (alteration, internal
17 quotation marks, and citation omitted). As previously noted, "[t]here is . . . no bright
18 line past which a delay becomes unreasonable." *Burgard*, 675 F.3d at 1033. In
19 determining whether law enforcement was diligent, federal courts look for evidence
20 of "careful, attentive police work." *Id.* at 1034 (recognizing that such diligence

1 should not be discouraged “even if it appears to us that [the investigation] could or
2 should have moved more quickly”).

3 {16} If the delay occurred because investigators pursued other assignments or
4 because law enforcement was short-handed, courts look to whether the focus on
5 other work was supported by legitimate law enforcement interests, and whether there
6 were other personnel who readily could have taken over and obtained the warrant.
7 *See Christie*, 717 F.3d at 1163-64 (holding that a five-month delay in obtaining a
8 warrant was not constitutionally unreasonable where the government agent
9 conducting the investigation was diverted to an undercover operation that was a
10 higher law enforcement priority and there was no evidence the case could have been
11 reassigned given the office workload); *see also Mitchell*, 565 F.3d at 1352-53
12 (holding a three-week delay unreasonable but noting that the ruling might be
13 different if the government had shown the need to “diver[t] . . . law enforcement
14 personnel to another case”).

15 {17} Defendant claims that law enforcement was not reasonably diligent when it
16 took nineteen days to obtain a search warrant after seizing his tablet primarily
17 because the agent had drafted an application for a warrant on January 15, 2020, and
18 submitted it for prosecutorial approval on January 16, 2020, the day after the State
19 took possession of the tablet. Defendant argues that the agent’s explanation “about
20 needing to do further investigation is therefore an unpersuasive post hoc rationale”

1 and does not justify the eleven-day delay in obtaining the prosecutor's approval or
2 the few remaining days after that.

3 {18} Although it is true that the agent immediately drafted an affidavit outlining
4 evidence of probable cause to search Defendant's tablet based solely on his
5 telephone conversation with Girlfriend, and that the prosecutor ultimately approved
6 that draft, we do not believe that these facts suffice to show a lack of diligence by
7 law enforcement in investigating these crimes and in obtaining a search warrant.

8 First, immediately drafting an application for a warrant has been recognized as
9 showing diligence by law enforcement in pursuing an investigation, even if the
10 warrant was not immediately obtained. *See Laist*, 702 F.3d at 618. In this case, the
11 agent promptly drafted a warrant application and then continued his investigation
12 rather than simply waiting for the warrant application to be approved or denied by
13 the prosecutor. The agent sought to confirm the accuracy of Girlfriend's description
14 of the videos as child pornography and her identification of Defendant as a
15 perpetrator shown in a video she viewed on the tablet. He sought in-person
16 interviews with both Girlfriend and her friend to confirm that the person they
17 claimed to have seen depicted in a video was Defendant, and that they were in
18 agreement about the pornographic nature of the material they had seen on the tablet.

19 The agent expressed concern in his testimony at the suppression hearing that
20 Girlfriend may not have been forthcoming in her description of the contents of the

1 tablet when he talked to her on the telephone because Mother's partner was listening
2 to the conversation. Defendant presented no evidence of any significant delay in this
3 investigation. Although the agent took nine days to complete the interviews of
4 Girlfriend and her friend, we agree with the district court that he acted diligently,
5 making numerous attempts to interview them, and finally succeeding, despite their
6 attempts to avoid him.

7 {19} Defendant also argues that the district court improperly attributed the
8 remaining delay to the agent's heavy workload. The agent was in an office with only
9 five other agents collectively responsible for internet crimes throughout the state,
10 and was completing cases from his previous law enforcement job at the time of this
11 investigation.

12 {20} Finally, Defendant argues that eleven days of the delay are attributable to the
13 prosecutor's negligence in failing to see the agent's email and respond and claims,
14 relying on *Mitchell*, that this delay was unreasonable under the Fourth Amendment.
15 In *Mitchell*, the court concluded that a twenty-one-day delay by law enforcement in
16 obtaining a search warrant for a computer was unreasonable because the agent had
17 all of the information he needed on the date the computer was seized, and yet did
18 not begin to prepare the probable cause affidavit until after first delaying for two
19 days, without any explanation, and then attending a two-week training course before
20 turning to the warrant. *See* 565 F.3d at 1351. The decision in *Mitchell* turned on the

1 agent’s failure to offer any law enforcement justification for the delay. The agent
2 testified that he “didn’t see any urgency of the fact that there needed to be a search
3 warrant during the two weeks that he was gone.” *Id.* (alteration and internal quotation
4 marks omitted). Concluding that the agent was simply indifferent to the defendant’s
5 Fourth Amendment rights, the court found the delay unreasonable and suppressed
6 the evidence obtained from the search of the computer. *Id.* at 1353.

7 {21} Here, although the prosecutor overlooked the agent’s email, “imperfection is
8 not enough to warrant” a finding that law enforcement was not sufficiently diligent
9 in pursuing a warrant. *See Burgard*, 675 F.3d at 1034. Neither the prosecutor’s, nor
10 the agent’s delay in this case was “the result of complete abdication of [their] work
11 or failure to ‘see any urgency’” in pursuing a warrant—the basis for the court’s
12 decision finding the delay unreasonable in *Mitchell*. *See Burgard*, 675 F.3d at 1034
13 (quoting *Mitchell*, 565 F.3d at 1351). As discussed above, the agent acted diligently
14 to investigate and to confirm the accuracy of the evidence included in his warrant
15 application throughout the nineteen-day period. When he was not actively pursuing,
16 this investigation, the evidence shows, and the district court found, that the agent
17 was paying attention to other legitimate law enforcement commitments. The
18 evidence does not reflect the indifference to the defendant’s rights found to be
19 dispositive in *Mitchell*.

1 {22} In balancing the State’s interest and Defendant’s interests under the
2 circumstances of this case, we weigh the State’s diligence in pursuit of its
3 investigation as described above against the harm to Defendant’s possessory interest
4 caused by the nineteen-day delay in obtaining a warrant. The record reveals little or
5 no harm to Defendant’s possessory interest to weigh in the balance. Possibly because
6 the tablet was one of many electronic devices that he owned, Defendant did not
7 actively assert his interest in its return, did not password-protect it, and carelessly
8 left it at Girlfriend’s house, allowing the child pornography it contained to be readily
9 accessed. These facts, as set forth above, diminish Defendant’s possessory interest
10 in the tablet. Considering all of the circumstances, then, we affirm the district court’s
11 well-reasoned conclusion that the State’s nineteen-day delay was constitutionally
12 reasonable.

13 {23} Because we uphold the constitutionality of the nineteen-day delay, and affirm
14 the denial of Defendant’s motion to suppress the evidence found on his tablet, we do
15 not address Defendant’s argument that evidence from his other devices should have
16 been suppressed under the exclusionary rule as the fruit of the poisonous tree.

17 **CONCLUSION**

18 {24} For the above reasons, we affirm the district court’s denial of Defendant’s
19 motion to suppress and Defendant’s conviction.

1 {25} IT IS SO ORDERED.

2
3

JANE B. YOHALEM, Judge

4 WE CONCUR:

5

6 **JENNIFER L. ATTREP, Chief Judge**

7

8 **SHAMMARA H. HENDERSON, Judge**