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ROBERT J. MANGAN, CLERK
APPELLATE COURT 2nd DISTRICT

No. 02--04--0383

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of McHenry County.
Plaintiff-Appellant,	)	
v.	)	No. 01--CF--0488
MICHAEL A. JONES,	)	Honorable Sharon L. Prather,
Defendant-Appellee.	)	Judge, Presiding.

RULE 23 ORDER

The State appeals from the order of the circuit court of McHenry County suppressing the evidence obtained from the execution of a search warrant at the home and studio of defendant, Michael A. Jones. We dismiss this appeal.

I. BACKGROUND

In April of 2000 the McHenry County sheriff's department received an anonymous complaint regarding child pornography on a website entitle "CDBabes.com." Detective James Wagner, who at the time of the suppression hearing had been promoted to sergeant, began investigating the complaint. Wagner accessed the website and discovered that it was a commercial business that sold adult content. The site indicated that it was for webmasters only and that it complied with the record keeping requirements of "18 U.S.C. 2257 (a)-(c)" and "28 C.F.R. Part 75". The name and address listed for the keeper of records was that of defendant.

After viewing the website Wagner did not find anything which he thought was obviously child pornography or obscene material. At the time Wagner's investigation was focused solely on child pornography. However, Wagner did download some images from defendant's website. Wagner and another detective then went to the address listed on the website, which was defendant's home. The detectives met with defendant at his home and informed him of the anonymous complaint. Defendant admitted that he and his wife ran the website and that he photographed adult content. Defendant also showed the officers a folder containing the records documenting the age of the models he photographed. Defendant indicated that if the detectives had a question regarding a specific image he would provide the proper documentation but that he would not allow the detectives to simply review the documents generally. Defendant also gave the detectives the name of one of his models, Naomi Cutler. Additionally, defendant informed the detectives that he would be moving his business into a studio.

Cutler was interviewed on April 25, 2000. She indicated that she was not aware of defendant using underage models on his website. Cutler no longer modeled for defendant because he had refused to remove the pictures of her from his website. She gave the detectives the name of Vanessa Campbell who was another of defendant's models. Campbell was interviewed on April 26, 2000, and indicated that she had recruited other models for defendant and that she was familiar with his business operations. She, like Cutler, was unaware of defendant using underage models on his website.

Wagner concluded from his investigation that he did not have sufficient credible evidence to pursue a search warrant. He continued to periodically check defendant's website until June 22, 2000, when he closed his investigation as unfounded.

In October of 2000, Wagner received a phone call from Anthony Nettis of the Village of Greenwood. Defendant had opened a studio in Greenwood. Nettis was concerned that defendant was posting "offensive pictures" on his website and that he was operating close to a school. Wagner informed Nettis that he believed the studio's proximity to a school was a zoning, not a criminal, issue. However, Wagner informed Nettis that he would inquire into his concerns. Wagner then spoke to Michael Chmiel, the Village of Greenwood's attorney. Chmiel suggested to Wagner that some of the pictures on defendant's website might be violative of the Illinois criminal statute regarding obscenity (720 ILCS 5/11--20 (West 2000)). Previously, Wagner had focused his investigation solely on the issue of child pornography. Wagner then proceeded to download images from defendant's website that he felt represented either child pornography or obscene material.

Wagner took two of the downloaded images, one of which he had previously downloaded during his initial investigation in April of 2000, and took them to Dr. George Gallant, an emergency room physician. Gallant applied a sexual maturity rating scale known as the Tanner Staging Table to conclude that the model in one of the pictures was likely between 15 and 16 years old, although she could be as old as 19, and that the model in the other photo was between 14 and 17 years old.

Wagner took the two photos he showed to Gallant as well as the photos he felt were obscene to Judge Haskell Pitluck. Based on the photos and the affidavit of Wagner, Judge Pitluck issued a search warrant for both defendant's home and his studio in the Village of Greenwood. Wagner and other officers executed the search warrant. The officers seized a large amount of material, including CDs and video tapes, often without determining what content was contained on these items.

On June 21, 2001, defendant was indicted by a grand jury on multiple counts of child pornography (720 ILCS 5/11--20.1(a)(6) (West 2000)) and obscenity (720 ILCS 5/11--20 (West

2000)). After his indictment, defendant moved to suppress the evidence. On January 16, 2004, the trial court granted defendant's motion to suppress, stating that although the court found that probable caused existed to issue the search warrant, the State had failed to employ the procedural safeguards that were required before seizing material presumptively protected by the First Amendment (U.S. Const., amend. I). On February 13, 2004, a status hearing was held after which the trial court entered an order granting the State leave to file a motion to reconsider within 5 days. The State filed its motion to reconsider on February 19, 2004. Defendant did not object to the motion. On March 19, 2004, the trial court denied the State's motion to reconsider. The State file its notice of appeal on April 19, 2004.

II. DISCUSSION

On appeal, the State contends that the trial court improperly suppressed the evidence obtained pursuant to the search warrant. Defendant contends that the suppression was proper but that, in any event, we lack jurisdiction to consider this appeal. We agree with defendant that we lack jurisdiction and dismiss this appeal.

Upon the granting of a motion to suppress the State's only recourse is to either file a timely motion to reconsider or appeal. See People v. Williams, 138 Ill. 2d 377, 389 (1990). Supreme Court Rule 604(a)(1) allows the State to appeal from an order suppressing evidence. People v. Smith, 232 Ill. App. 3d 121, 127 (1992); 188 Ill. 2d R. 604(a)(1). "[F]ollowing the entry of an order granting a motion to suppress, the State has to file a notice of appeal within 30 days of the entry of the order." People v. Manders, 317 Ill. App. 3d 337, 344 (2000), overruled on other grounds by People v. Greco, 336 Ill. App. 3d 253 (2003). "A motion for reconsideration of a suppression order is an appropriate means for directing the attention of a trial judge to a claim of error and may be filed within 30 days

of the entry of the order being challenged. [Citation.] When such a motion for reconsideration has been seasonably filed, the time for appeal does not commence until that motion has been denied. [Citation.]." People v. Burks, Nos. 3--03--0162, 3--03--0163, & 3--0164, slip op. at 5 (October 18, 2004), modified upon denial of reh'g March 10, 2005, citing People v. Van Matre, 164 Ill. App. 3d 201, 202-03 (1988). In other words, a timely motion for reconsideration of an order granting a motion to suppress will toll the time to file a notice of appeal under Rule 604(a)(1). Smith, 232 Ill. App. 3d at 127.

In this case the trial court entered its order granting defendant's motion to suppress on January 16, 2004. On February 13, 2004, the trial court ordered that the "STATE GRANTED LEAVE TO FILE MOTION TO RECONSIDER WITHIN 5 DAYS." Thus, initially the motion to reconsider was due on February 15, 2004, 30 days from the date of judgment. However, February 15, 2004, was a Sunday and February 16, 2004, was a court holiday. Therefore, the due date would have been February 17, 2004. See 5 ILCS 70/1.11 (West 2002). The trial court's order extended the due date to February 18, 2004, a Wednesday. The State did not file its motion to reconsider until February 19, 2004. Thus, it is clear that the State's motion was not timely filed as it was one day late. Consequently, the motion to reconsider did not toll the time for filing the notice of appeal. As a result, the State was required to appeal within 30 days from the date the motion to suppress was granted. The State's notice of appeal was filed on April 19, 2004, which was well beyond 30 days from January 16, 2004.

The State contends that defendant waived his right to object to the motion because he failed to do so in the trial court. Although it is true that failure to object in the trial court generally waives the issue on appeal (General Motors Acceptance Corp. v. Johnson, 354 Ill. App. 3d 885, 893 (2004)),

"a party cannot consent to or waive appellate jurisdiction." Shermach v. Brunory, 333 Ill. App. 3d 313, 320 (2002). Moreover, an appellate court has an obligation to sua sponte consider whether jurisdiction exists at any time, even after the parties have briefed the merits of the case. Shermach, 333 Ill. App. 3d at 320. Additionally, acquiescing in a trial court's order regarding a motion to reconsider that does not toll the time for appeal, cannot confer jurisdiction upon the appellate court. See Bernhauser v. Glen Ellyn Dodge, Inc., 288 Ill. App. 3d 984, 986-89 (1997). Accordingly, we find that defendant's failure to object to the State's untimely motion to reconsider has no effect upon our lack of jurisdiction to consider this appeal.

The State further contends that it in fact orally moved to reconsider on February 13, 2004, and that the February 19, 2004 motion to reconsider, merely supplanted the original oral motion. There was no report of proceedings or certified bystander's report from February 13, 2004, hearing filed in this case. The State's sole record citation in support of this contention is a citation to the February 13, 2004, trial court order. The order clearly states that the State is given leave to file a motion to reconsider within 5 days and makes no mention of an oral motion being made. Therefore, the State's contention is unsupported by the record and we reject it.

Accordingly, we dismiss this appeal for lack of appellate jurisdiction.

III. CONCLUSION

For the foregoing reasons, we dismiss this appeal.

Appeal dismissed.

KAPALA, J., with McLAREN and BOWMAN, J.J., concurring.