

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

UNITED STATES OF AMERICA

v.

Criminal No. 00-76-P-C

DAVID J. OAKES,

Defendant

Gene Carter, District Judge

**MEMORANDUM OF DECISION AND ORDER DENYING
DEFENDANT’S MOTION TO SUPPRESS**

The Court now has before it Defendant’s Motion to Suppress, in which he seeks suppression of all statements he made to the police and the probation officers and all evidence seized from his residence. Docket No. 7. The Government responds that the statements were voluntarily made and that the evidence was lawfully seized. Docket No. 8. After an evidentiary hearing, the Court agrees with the Government and will, therefore, deny Defendant’s Motion to Suppress.

I. FACTS

From the testimony and documents admitted in evidence at the hearing, the Court makes the following findings of fact. Defendant David Oakes was placed on probation after pleading guilty in Maine Superior Court to the dissemination of sexually explicit materials, in violation of 17 M.R.S.A. § 2923. *See* Government Ex. 1. After serving thirty days in jail, Defendant was placed

on probation under the supervision of Pauline Gudas. At their first meeting, Ms. Gudas reviewed Oakes's conditions of probation with him. Those conditions included that Oakes: refrain from all criminal conduct and violation of state, federal, and local laws; report to his probation officer as directed; answer all reasonable inquiries by the probation officer and permit the probation officer to visit at reasonable times at home or elsewhere; refrain from the possession or use of alcohol; submit to random search and testing for alcohol, drugs, pornographic or adult sexually oriented material upon demand of the probation officer or police officer; and not use, subscribe to, or have access to the Internet. *See* Government Ex. 2. Oakes signed the Conditions of Probation, acknowledging receipt and acceptance of the stated conditions. *See id.*

On July 5, 2000, an anonymous e-mail was received by the Auburn Police Department from an Auburn woman concerned about her son, whom Oakes had befriended, and inquiring into Oakes's background. An Auburn police officer telephoned Ms. Gudas and informed her of the e-mail. The previously anonymous individual again contacted the Auburn Police Department, identified herself, and agreed to meet with the Auburn police. On July 7, 2000, Ms. Gudas received a phone call from Auburn Police Detective Paul Renaud, who was then meeting with the Auburn woman who had previously inquired into Defendant's background. Ms. Gudas spoke by telephone with the woman, who told Ms. Gudas that Oakes had communicated with her on the Internet, that his online address was davidblueeyes@aol.com, and that he had a computer in the bedroom of his apartment. In response to another question by Ms. Gudas, the woman stated that Defendant had consumed alcohol at her house a few times.

Knowing that, in investigating whether Defendant was in violation of the probation condition prohibiting use of the Internet, she might need to gain access to the contents of any computer that Defendant might be using, Ms. Gudas contacted Lewiston Police Detective James

Rioux and Officer Michael Webber – the officers assigned to the Maine Computer Crime Task Force – to ask the officers for their assistance on the computer aspects of the investigation. Ms. Gudas told the officers that Oakes used davidblueeyes@aol.com as his Internet address and that she had a prescheduled, regular supervision meeting with Defendant on Monday, July 10, 2000.¹ At that time, Ms. Gudas also asked the officers to attend part of her regularly scheduled probation meeting with Defendant on that following Monday.

On July 10, 2000, Ms. Gudas called Rioux and Webber and told them that Oakes was at her office for his prescheduled meeting. Ms. Gudas met, initially alone, with Defendant. The meeting occurred in the reporting office of the facility where Ms. Gudas's office is located. The office where the meeting took place is approximately twelve feet square, having one wholly glass wall and a door and window in the opposite wall. The office is furnished with a desk and two chairs. During the meeting, Gudas sat in a chair behind the desk and Defendant sat in a chair about two feet from the front of the desk. During the approximately ten minutes that Ms. Gudas met alone with the Defendant, they discussed routine matters regarding his compliance with the conditions of his probation: his present place of residence, whether he was working regularly, and what he was doing to comply with a condition requiring community service. No mention was made of his accessing the Internet.

After Rioux and Webber arrived at the probation office, Ms. Gudas brought the officers into the room where she had been meeting with Defendant and they stood to the right of the door. Ms. Gudas introduced the officers, Webber handed Defendant his business card and identified himself as a member of the Maine Computer Crime Task Force. Defendant was then advised that Ms. Gudas was concerned about whether Defendant was accessing the Internet in violation of a

¹ Officer Webber subsequently learned from America On Line (“AOL”) that the Internet address davidblueeyes@aol.com belonged to Defendant David Oaks.

condition of his probation, and Webber asked Defendant if he had been accessing the Internet. Defendant admitted that he had accessed the Internet, but denied that in doing so he was violating the conditions of his probation. Ms. Gudas indicated to Defendant that using the Internet did indeed constitute a violation, and then left the room to retrieve his file from a nearby file area and to make a copy of the order setting forth the conditions of his probation. Ms. Gudas remained out of the room for approximately two minutes. While she was out of the room, Officer Webber asked Oakes if he had been viewing pornography on the Internet. Defendant denied doing so. Webber then asked whether Defendant was aware that if he used the computer to browse the Internet and view images of pornography, “fingerprints” or images of his activity might still be on the computer. Webber then asked Defendant whether there were images or fingerprints of pornography on his computer. Defendant nodded affirmatively.²

When Ms. Gudas reentered the room, she showed Oakes his written conditions of probation and told him that he was under arrest for violating the terms of his probation. Probation Officer Mark Fortin placed Oakes in handcuffs. Defendant was informed that his apartment would be searched, and that he would subsequently be taken to jail. Defendant was not, according to the record made at the hearing, given a *Miranda* warning either upon or after being arrested.³

Detective Rioux, Officer Webber, and Probation Officers Gudas and Fortin took Defendant to his apartment. Once inside Defendant’s apartment, the officers found a computer in Defendant’s bedroom. At Ms. Gudas’s request, Webber seized the computer, related computer components and

² Defendant testified that these latter two questions were asked of him *after* he had been placed under arrest. The Court rejects this testimony for lack of credibility and finds that these questions were asked before Defendant was arrested.

³ Although questioned after his arrest, those questions did not elicit answers or lead to the discovery of evidence which the Government proposes to offer in evidence at trial.

software, and other evidence of Defendant's probation violation.⁴ On July 11, 2000, Officer Webber obtained a search warrant, issued by a Maine District Court Judge, authorizing him to search the computer, floppy disks, and CD ROMS. *See* Government Ex. 3. During the ensuing search of the computer, Webber found, among other graphic depictions, sexually explicit images of children.

II. DISCUSSION

A. Statements Made During the Probation Interview

Defendant contends that the statements made to the authorities prior to his arrest were unlawfully obtained as a result of custodial interrogation. The Government disagrees, asserting that Oakes was not in custody at the time he was questioned by Ms. Gudas and the police officers. The Court will also address the issue of whether Defendant's Fifth Amendment privilege was self-executing.

When an individual's custodial status is questioned, the Court must consider what a reasonable person in the defendant's position would have understood the situation. *See Stansbury v. California*, 511 U.S. 318, 324 (1994). Relevant circumstances include "whether the suspect was questioned in familiar or at least neutral surroundings, the number of law enforcement officers present at the scene, the degree of physical restraint placed upon the suspect, and the duration and character of the interrogation." *United States v. Jones*, 187 F.3d 210, 217-18 (1st Cir. 1999) (quoting *United States v. Masse*, 816 F.2d 805, 809 (1st Cir. 1987)). A routine meeting between an individual and his or her probation officer does not constitute custody. *See Minnesota v. Murphy*, 465 U.S. 420, 431-33, 104 S. Ct. 1136, 79 L. Ed. 2d 409 (1984). A probation interview, unlike custodial arrest, is arranged by appointment at a mutually convenient time and is not

⁴ The testimony at the suppression hearing revealed that the officers also seized some photographs of a minor boy which were found in an envelope. The Court notes, however, that neither the Lewiston Police Department inventory invoices nor Officer Webber's affidavit, written to support the application for a search warrant for the material stored on the computer, mention the

conducted in an unfamiliar atmosphere or coercive environment. *See id.* Despite the presence of two police officers, neither Ms. Gudas nor the officers engaged in any coercive, threatening, or intimidating words or conduct of any kind. The record clearly establishes that Oakes was not in custody or unreasonably restrained in any way while he was being questioned at the probation office prior to his arrest. The Court finds that no reasonable, objective person in Oakes's position could conclude that they were in custody prior to Defendant's formal arrest.

Even though a probationer is not in custody for the purpose of *Miranda* during a probation interview, the condition that a probationer report his or her activities to a probation officer raises Fifth Amendment self-incrimination concerns. Although statements may be lawfully obtained for use in support of the state's probation revocation proceeding, a question remains as to whether those statements may be used against a defendant in a separate criminal prosecution. At issue is whether the probation conditions place a defendant in the penalty situation that would give rise to a self-executing privilege against the use of the statements to incriminate the defendant in another proceeding. If so, the statements must be suppressed, regardless of the fact that Defendant did not invoke his Fifth Amendment right. The Supreme Court addressed this issue in *Murphy* where the defendant, whose conditions of probation included a requirement that he report to and "be truthful" with his probation officer, admitted during a session with the officer that he had committed a rape and murder. *Id.* at 436. The defendant raised the defense that he did not think his responses could be used against him in a separate criminal prosecution and argued that the fact he was required to be truthful with his probation officer put him in the classic penalty situation. The Supreme Court held that the state may require a probationer to appear and discuss matters that affect his probationary status and that such a requirement does not put the probationer in the penalty situation

photographs. *See* Government Ex. 3.

and, hence, does not give rise to a self-executing privilege. *Id.* at 435; *see also U.S. v. Gordon*, 4 F.3d 1567, 1573 (10th Cir. 1993) (Fifth Amendment right against self-incrimination not violated when probationer voluntarily offered his version of events to probation officer and those statements were later used against him because privilege against self-incrimination is not self-executing and must be invoked). That is, a person subject to the conditions of probation must assert the Fifth Amendment privilege; otherwise, his statements will be considered voluntary.

Under *Murphy*, a state is prohibited from requiring the probationer “to choose between making incriminating statements and jeopardizing his conditional liberty by remaining silent.” *Murphy*, 465 U.S. at 436. This further impermissible step would give rise to what the court termed a “penalty situation” triggering a self-executing Fifth Amendment privilege. The Court suggested, in *dictum*, that

if the State, either expressly or by implication, asserts that invocation of the privilege would lead to revocation of probation, it would have created the classic penalty situation, the failure to assert the privilege would be excused, and the probationer's answers would be deemed compelled and inadmissible in a criminal prosecution.

Id. at 435. Defendant asserts that this case raises the penalty situation where although “a State may validly insist on answers to even incriminating questions and hence sensibly administer its probation system, . . . the required answers may not be used in a criminal proceeding.” *See id.* at 435 n. 7. The Court finds that the instant facts do not create an impermissible penalty case.

The *Murphy* Court considered both subjective and objective methods of determining whether the state has attached an impermissible penalty to the exercise of the privilege against self-incrimination. The Court considered the following factors as informative in determining whether the penalty situation existed: what the probationer was told at the time of the meeting; what were the pertinent conditions of the probation order, and whether the state could revoke

probation based on the individual's exercise of his Fifth Amendment privilege. The Court also suggested that the defendant's subjective perception of a penalty situation must be reasonable. *See id.* at 438.

As stated above, the compulsion to attend regular meetings and answer all reasonable questions of a probation officer is insufficient in itself to create a penalty situation. *Id.* at 437. Nor do any of the other objective factors surrounding Oakes's statements. Ms. Gudas or the police officers never expressly informed Oakes during the meeting that the assertion of his privilege would result in the imposition of a penalty. The court order setting forth Oakes's probation conditions does not require him to answer all questions truthfully or that he would be subject to sanction. In *Murphy*, the Court found that the probation order at issue required the probationer to be truthful and that the failure to be truthful could result in revocation. The Court noted that the order did not "define the precise contours of Murphy's obligation to respond to questions." *Id.* at 437. Indeed, the order said nothing about his "freedom to decline to answer particular questions and certainly contained no suggestion that his probation was conditional on his waiving his Fifth Amendment privilege with respect to further criminal prosecution." *Id.* Similarly, Oakes's probation order requires him to answer only "reasonable questions." See Government Ex. 2. This provision clearly suggests that Oakes, like Murphy, was free to decline to answer certain questions. Moreover, the Court notes that the state could not lawfully revoke an individual's probation for the legitimate exercise of his Fifth Amendment privilege alone. Maine's revocation statute does not impose a penalty for a valid exercise of a probationer's Fifth Amendment privilege. *See* 17-A M.R.S.A. §§ 1205-1207 (2000 Supp.). In Maine, revocation of probation is not automatic; rather, the probationer must be afforded a hearing and the court must find a specific

violation. *See* 17-A M.R.S.A. § 1206 (2000 Supp.). Indeed, Ms. Gudas testified that she would not have revoked Oakes's probation for the assertion of the privilege.

Although Oakes testified that he knew that he needed to answer the questions posed to him, he did not testify about what made him reach this conclusion. Even if the Court were to infer from such testimony that the reason he answered Webber's questions was that he feared that his probation would be revoked for exercising the Fifth Amendment privilege, that belief would not have been reasonable. The Court holds that Maine did not attempt to take the extra, impermissible step of forcing Defendant to make a Hobson's choice, and thus Oakes's Fifth Amendment privilege was not self-executing. Ms. Gudas was lawfully charged, as Defendant's supervising officer, to enforce the probation conditions upon him and to secure his compliance with them. The Court finds that the statements Oakes made prior to his arrest were freely and voluntarily given and were not a result of coercion.

B. Search By Probation and Police Officers

Defendant generally asserts the unlawfulness of the search of Defendant's apartment. The Government disagrees.

It is well recognized that probationers have a reduced expectation of privacy, which allows reasonable warrantless searches of their person and residence by their probation officer, even though less than probable cause may be shown. *Griffin v. Wisconsin*, 483 U.S. 868, 107 S. Ct. 3164, 97 L. Ed. 2d 709 (1987)(warrantless search of probationer's home found reasonable where based on valid administrative regulation which allowed probation officers to search a probationer's home on reasonable grounds to believe contraband was present). This reduced expectation of privacy results from a probationer's conviction and his agreement to allow a probation officer to investigate his activities in order to establish compliance with the provisions

of his probation. Nevertheless, a probationer is not subject to the unrestrained power of the authorities. A search to which he is subjected may not serve as a ruse for a police investigation.⁵ Instead, it is to be conducted when the officer believes such a search is necessary in the performance of his duties, and must be reasonable in light of the total atmosphere in which it takes place. However, a probation search remains legal even though police authorities cooperate or jointly participate with the probation authorities. *See* Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* (3d ed.1996), § 10.10(e), Vol. 4, 792 n. 135 (citing *United States v. Butcher*, 926 F.2d 811 (9th Cir.1991) (a parole officer is not considered a "stalking horse" if the parole officer initiates the search in the performance of his or her parole supervision duties)). As long as the search is instigated by probation authorities, a probation officer "may enlist the aid of police officers in performing his duty." LaFave, *supra*, at 792-93 (quoting *State v. Simms*, 10 Wash. App. 75, 516 P.2d 1088 (Wash. App.1973)). Here, the Court concludes that the probation officer's search of Oakes's residence without a warrant was reasonable. Based on the information received by her on July 7, 2000, and Defendant's subsequent admission to her on July 10, 2000, Ms. Gudas had a reasonable basis to believe that Oakes had committed a violation of his probation condition relating to use of the Internet. In addition, based on the information given to her by the Auburn woman that Oakes had a computer in his bedroom and contacted her by electronic mail, Ms. Gudas had a reasonable basis to believe that evidence of those violations would be found in Oakes's apartment. The search was conducted by or at the direction of Oakes's probation officer. Officers Webber and Rioux never directed or asked for permission to search Oakes's apartment. Rather, it was Ms. Gudas who decided that she wanted to search Oakes's

⁵ An otherwise permissible probation search may be held invalid if it is merely a cover for illegal police activity. As stated by one commentator, a probation officer's "exercise of that authority [for a warrantless search] should not be upheld when it appears that the probation ... officer 'was nothing more than the agent, tool, or device of' the police." Wayne R. LaFave, *Search and*

apartment. The search for evidence that Oakes had accessed the Internet bears a direct relationship to the nature of the crime for which Oakes was convicted. The search was explicitly authorized by Defendant's conditions of probation.⁶ The Court concludes, therefore, that the

Seizure: A Treatise on the Fourth Amendment (3d ed.1996), § 10.10(e), Vol. 4, p. 794 (quoting *United States v. Hallman*, 365 F.2d 289, 292 (3d Cir.1966)).

⁶ One of the conditions of Oakes's state probation requires him to "submit to (random) search of and testing for (alcohol) (drugs) (pornographic or adult sexually oriented mat'l) (upon demand of probation officer or police officer." Government Ex. 2. Defendant does not question the application of this generalized provision to the search of his residence.

search was reasonable and was conducted for valid probation supervision purposes.

III. CONCLUSION

Accordingly, the Court **ORDERS** that Defendant's Motion to Suppress be, and it is hereby, **DENIED**.

Gene Carter
District Judge

Dated at Portland, Maine this 10th day of January, 2001.

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