

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

UNITED STATES OF AMERICA, )  
 )  
v. ) Crim. No. 01-45-B-S  
 )  
RANDLE L. MORGAN, )  
 )  
Defendant )

***RECOMMENDED DECISION***

Randle L. Morgan has filed a motion seeking to suppress evidence seized and statements made during a search of his residence on June 5, 2001, and statements made when he was arrested on August 9, 2001. (Docket No. 9.) I now recommend that the court adopt the proposed findings of fact and **DENY** the motion to suppress.

***Proposed Findings of Fact***

Alan Perkins, a detective with the Waterville Police Department for six years, executed a state search warrant at Morgan's residence at 12 Elm Street in Waterville on June 5, 2001. Perkins has experience and training in the area of child pornography. He went to the residence to search for pictures and/or computer files he believed contained pornographic pictures of children. Perkins's information, as recited in the affidavit in support of the search warrant, arose not from any independent investigation he conducted, but rather was based primarily upon the information conveyed to him by Michael Murray, a mental health retardation tech III and case manager employed by HealthReach Network, Community and Support Management, Waterville, Maine. (See Stipulation No. 1.) Murray reported to Perkins that Morgan had told him "I have found

myself downloading pics of little girls from pay sites that I have found.” Armed with this revelation Perkins sought and obtained a search warrant from a Maine District Court judge on May 30, 2001.

The execution of the warrant some five days later was conducted in a cordial and polite fashion. Perkins, accompanied by three other detectives and a uniformed police officer, knocked on the door, explained who he was and why he was there, and directed Morgan to have a seat on the couch while the officers conducted their search. Perkins and others proceeded to search the apartment while Morgan remained on the couch in the kitchen area in the company of the uniformed officer. The officers arrived at approximately 9:15 a.m. and left by 11:30 a.m. By 9:50 a.m. they had found some photos of children considered by them to be pornographic.

After locating the photographs Perkins decided to speak with Morgan and proceeded to advise him of his rights pursuant to Miranda v. Arizona, 384 U.S. 436 (1966). Morgan does not remember being advised of Miranda rights, and he believes that it was during the first half hour after the officers’ entry that he told Perkins where the file and CD with the alleged child pornography were located. Thus, according to Morgan’s version of the events, he made some incriminating statements before Miranda had been read to him, but, of course, he does not remember Miranda ever being read to him. I am satisfied from the evidence, both testimonial and documentary, that Detective Perkins did read the Miranda warnings to Morgan. Perkins kept contemporaneous notes that reflect that Miranda was administered. He also testified that he clearly remembers reading those rights from a card. Perkins reports that Morgan responded affirmatively that he understood his rights and would waive them and speak with the officers.

Following the events of June 5, 2001, no state charges issued. However, an indictment was returned by the federal grand jury in Bangor. On August 9, 2001, United States Customs Special Agent Karen Boone and others went to Morgan's apartment to place him under arrest pursuant to a warrant issued on the indictment. Boone testified that Detective Perkins accompanied her and that shortly after they entered the apartment Perkins asked Morgan a question, but before he could respond to the inquiry, she apprised him of his rights by reciting the Miranda warning. According to Boone, Morgan said that he would have no problem talking with the officers. Morgan denies that he was advised of his Miranda rights, but freely admits that he spoke willingly with the officers as he rode to the Penobscot County Jail with Boone in the backseat of the cruiser operated by United States Customs Special Agent Matthew Saylor. Based upon the evidence presented I am satisfied that it is more likely than not that Morgan was advised of his rights prior to speaking with the officers on August 11.

Morgan had been receiving psychiatric care from Dr. Michael Tofani of the HealthReach Network for approximately two years prior to the search of his residence. At the time of the search he was taking various medications for conditions including anxiety, depression, and pedophilia.<sup>1</sup> The prescribed drugs had a calming effect on Morgan and relieved his anxiety and panic attacks. They also caused him to act like a "hermit," remaining home alone for extended periods of time. However, I am satisfied from the evidence presented that the drugs did not interfere with Morgan's ability to understand and voluntarily waive his Miranda rights nor did they impact the voluntariness of any statements he made.

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<sup>1</sup> Since the end of August 2001, Morgan has not been able to get the medications because he is in the process of trying to change medical providers in light of the events giving rise to these charges.

Doctor Tofani is a licensed medical doctor in the State of Maine and clearly embarked upon a course of conduct designed to diagnosis and treat Morgan's mental and/or emotional condition, including his substance abuse related problem. Any statements made by Morgan to Tofani were confidential within the meaning of the physician/patient privilege. Michael Murray was employed as a case manager by HealthReach Network. HealthReach Network is a private entity affiliated with Maine General Hospital as more fully set forth in the stipulation of the parties. Given the "wrap around" nature of the community care and services provided to Morgan and the circumstances set forth in the stipulation, it is apparent that statements made to Michael Murray by Morgan would be subject to the patient/psychotherapist privilege as those statements, even though they took the form of an e-mail, were made in the course of Morgan's treatment under the direction of Tofani through HealthReach Network.

### *Discussion*

#### **1. Suppression of Statements**

Morgan argues that the statements he made to Perkins and Boone should be suppressed because they were obtained in violation of Miranda v. Arizona, 384 U.S. 436 (1966). The government apparently now concedes that both the statements to Perkins and to Boone were the product of custodial interrogation and, therefore, it must establish that the officers complied with the Miranda warning and that Morgan properly waived his rights under Miranda. For the reasons indicated in my proposed findings of fact, I am satisfied that both officers administered the requisite warnings to Morgan. I acknowledge that Morgan disputes this fact, but the evidence supports the contrary conclusion.

Additionally in order for Morgan's statements to the police to be admissible, the government must establish by a preponderance of the evidence that Morgan "voluntarily, knowingly and intelligently" waived his right to remain silent and to speak with counsel. Lego v. Twomey, 404 U.S. 477, 484-86 (1972) (establishing preponderance standard); Miranda, 384 U.S. at 444 (1966) ("The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently."). The voluntariness of a waiver depends on the totality of the circumstances. Arizona v. Fulminante, 499 U.S. 279, 286 (1991). The United States must demonstrate that Morgan's will was not overborne and that his decision to speak was freely and voluntarily made. Bryant v. Vose, 785 F.2d 364, 367-68 (1st Cir. 1986). Relevant considerations include "both the characteristics of the accused and the details of the interrogation." Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973) (discussing voluntariness standard in the context of a consent to search).

Morgan suggests not only a failure to comply with Miranda, but also that his mental health problems coupled with his dependence upon the enumerated prescription drugs rendered his statements involuntary. The First Circuit has noted that the fact that a suspect is in a weakened condition due to heroin withdrawal symptoms does not necessarily mean that his post-arrest statements are involuntary. United States v. Palmer, 203 F.3d 55, 61-62 (1st Cir. 2000) ("In the context of the voluntariness of a confession, a defendant's mental state by itself and apart from its relation to official coercion never disposes of the inquiry into constitutional voluntariness."). Morgan's psychological state and attendant mental health problems may or may not have been a motivating factor in his choice to cooperate with officials, but his medication did not overwhelm him or

prevent him from making an independent and rational choice. He made a conscious choice to speak with the agents.

There was nothing in his demeanor or remarks at either interview that suggested that Morgan was not in full control of his faculties. Morgan himself describes the medications as having a calming effect on him and relieving his tendency toward panic attacks. The fact that he was properly under the influence of those prescribed medications on the dates in question does not render his statements involuntary. Indeed, the nature of the medication's effects makes it more likely that the statements were the product of rational choice. Certainly there is nothing in this scenario to suggest that either Perkins or Boone engaged in any coercive conduct that produced Morgan's statements. Based upon all of the evidence it is clear that both sets of statements were voluntary.

## **2. Suppression of Evidence Seized Pursuant to the Warrant**

A determination with respect to Morgan's motion to suppress as it relates to the search warrant requires the resolution of two issues: (1) whether the inclusion within the affidavit of a statement subject to the psychotherapist/patient privilege violates Morgan's constitutional rights requiring the application of the exclusionary rule; and (2) more prosaically, but perhaps more significantly in this case, whether the affidavit is facially sufficient to support a finding of probable cause.

As a preliminary matter, the stipulations of the parties now establish that the statements that Morgan made to Murray come within the evidentiary privilege as set forth in In re Violette, 183 F.3d 71 (1st Cir. 1999). The United States wants me to consider that Murray may have had a valid basis under applicable regulations for breaching the

privilege. (Gov't Proffer, Exs. 6A & 6B.) Likewise Morgan wants me to consider expert testimony on the issue of whether or not Murray's breach was a deviation from acceptable professional standards. (Def.'s Mot. Expert Funds, Docket No. 29.) I do not need to resolve this issue in the context of the present motion. Whether Murray, in his professional capacity and pursuant to regulations governing confidentiality, should or should not have disclosed this privileged communication is not the key concern of my inquiry. The significant factor, and one that is undisputed on this evidence, is that no law enforcement officer or other governmental representative, state or federal, solicited Murray's assistance or contributed to his decision to breach the confidence.

The evidentiary rule of psychotherapist/patient privilege recognized by the Supreme Court in Jaffee v. Redmond, 518 U.S. 1 (1996) does not rise to the stature of a constitutional right. See cf. United States v. Doe, 478 F.2d 194, 195 (1<sup>st</sup> Cir. 1973) (common law spousal privilege not of constitutional magnitude). Furthermore, the evidentiary privilege, applicable to testimony offered against a party, is inapplicable in the situation where the disclosing party has merely provided information to a government agency. See cf. United States v. Lefkowitz, 464 F. Supp. 227, 233 n.3 (C.D. Ca. 1979), affirm'd, 618 F.3d 1313 (9th Cir. 1980) (discussing the evidentiary rule of marital privilege, noting that such a privilege does not implicate the Fourth Amendment or other constitutional rights and explaining that providing information to a government agency does not equate with testifying in terms of an evidentiary privilege). Common sense dictates that an evidentiary privilege, intended to protect someone from court compelled disclosures of secrets or confidences, is not applicable to a voluntary, unsolicited

disclosure made to a law enforcement officer and then incorporated into an affidavit in support of a search warrant.

Morgan also fashions a more generalized argument that his unspecified right to “privacy” was violated by Murray’s disclosure and that therefore the officer should not have been allowed to include Murray’s statement in the affidavit. This privacy right apparently grows out of the numerous regulations, policies, and state statutes that govern the conduct of health care providers such as HealthReach Network. However Morgan has not cited any authority to support the notion that information obtained in violation of any of these confidentiality provisions must be suppressed in the context of a criminal prosecution. In fact, in a somewhat analogous situation, the First Circuit has said that evidence obtained when the government itself violates a regulatory provision does not result in suppression. United States v. Edgar, 82 F.3d 499, 510 –11 (1st Cir. 1996) (suppression of evidence is not a remedy for governmental violation of the Fair Credit Reporting Act). The present case is even further removed from the suppression issue than was Edgar because the alleged violator of the regulatory provisions was a private person, not the government or someone acting at the behest of a law enforcement officer.

Once the court determines that there is no reason to exclude Murray’s information from the affidavit the test then becomes whether the information found within the four corners of the affidavit presented to the state court judge is sufficient to support a finding of probable cause that a crime was committed and that evidence of the commission of that crime will be found at the place to be searched. United States v. Schaefer, 87 F.3d 562, 565 (1st Cir. 1996). The issuing state court judge’s determination of probable cause is based upon the totality of the circumstances put forth in the affidavit and it is entitled

to ““great deference by reviewing courts.”” Id. (quoting Illinois v. Gates, 462 U.S. 213, 236 (1983)).

The affidavit in this case recited that Michael Murray, a case manager from HelathReach in Waterville, Maine, told the affiant that he had been professionally involved with Morgan for the past nine months and that Morgan had a long history of depression, alcohol abuse, and suicide attempts. Morgan had expressed to Murray that he had guilt feelings about sexual acts he had performed in the past on an eight-year-old female child. Murray somehow had inferred that the child was Morgan’s daughter, now eighteen-years-old, who resides in California. According to Murray, Morgan revealed that he had been watching young girls again and expressed fears that he would do “something.”

Murray revealed to the affiant that Morgan lived at 12 Elm Street in Waterville and had recently purchased a new computer with Internet access. Murray gave the affiant Morgan’s e-mail address and a printed copy of an e-mail message he received approximately two and one-half weeks earlier from Morgan stating “I have found myself downloading pics of little girls from pay sites that I have found.” The affiant independently verified that Morgan had a 1991 charge (not a conviction) in California involving “willful child cruelty,” displays his name on the mailbox at 12 Elm Street, and had purchased a computer in March 2001. The affiant also provided information about his own training and background and offered the opinion that his expertise in child pornography investigations allowed him to conclude that computers are “utilized by child pornography collectors and traders to produce, store, and distribute child pornography.”

The warrant issued based upon a finding that probable cause existed to believe that items that were evidence of the possession of sexually explicit material in violation of 17 M.R.S.A. § 2924 would be found on the premises.<sup>2</sup> There was no information regarding the precise nature of the sexually explicit material other than the oblique reference to “pics of little girls from pay sites.” The issuing state court judge was called upon “simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit . . .there [was] a fair probability that contraband or evidence of a crime [would] be found in a particular place.” Illinois v. Gates, 462 U.S. 213, 238 (1983); accord United States v. Brunette, 256 F.3d 14, 16 (1st Cir. 2001) (quoting this passage from Gates). The judge knew that Morgan had expressed a recent

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<sup>2</sup> This criminal statute reads as follows:

1. Definitions. As used in this section, the term “sexually explicit conduct” means any of the following acts:
    - A. Sexual act, as defined in Title 17-A, section 251, subsection 1, paragraph C;
    - B. Bestiality;
    - C. Masturbation;
    - D. Sadomasochistic abuse for the purpose of sexual stimulation;
    - E. Lewd exhibition of the unclothed genitals, anus or pubic area of a person. An exhibition is considered lewd if the depiction is designed for the purpose of eliciting or attempting to elicit a sexual response in the intended viewer; or
    - F. Conduct that creates the appearance of the acts in paragraphs A to D and also exhibits any uncovered or covered portions of the genitals, anus or pubic area.
  2. Offense. A person is guilty of possession of sexually explicit material if that person intentionally or knowingly transports, exhibits, purchases or possesses any book, magazine, print, negative, slide, motion picture, videotape or other mechanically reproduced visual material that the person knows or should know depicts another person engaging in sexually explicit conduct, and:
    - A. The other person has not in fact attained the age of 14 years; or
    - B. The person knows or has reason to know that the other person has not attained the age of 14 years.
  3. Defense. It is a defense to a prosecution under this section that the person depicted was the spouse of the person possessing the sexually explicit material at the time the material was produced.
  4. Age of person depicted. The age of the person depicted may be reasonably inferred from the depiction. Competent medical evidence or other expert testimony may be used to establish the age of the person depicted.
  5. Penalty. Possession of sexually explicit material is a Class D crime. If the State pleads and proves a prior conviction under this section, the crime is a Class C crime.
  6. Contraband. Any material that depicts a person who has not attained the age of 14 years engaging in sexually explicit conduct is declared to be contraband and may be seized by the State.
- 17 M.R.S.A. § 2924 (West Supp. 2000).

sexual interest in young girls, that he had recently acquired a computer with internet access, and that he was downloading pictures of young girls. Had the affiant not provided any background on Morgan, the mere fact that he was downloading pictures of little girls from the internet would not have provided the issuing magistrate with the necessary probable cause. In this case, however, Morgan's own expressed concerns about his conduct and his past history combined to create a fair probability that the "pics" he referenced were sexually explicit. While the question is close, in my view, given the deferential standard that this court should take when reviewing a probable cause determination, the government might well meet its burden in the eyes of some jurists.

This case is not a situation where the investigating officers viewed the allegedly pornographic photographs prior to obtaining the warrant and merely announced their pornographic nature in conclusory language in the body of the affidavit. See, e.g., Brunette, 256 F.3d at 17-19. Rather this case involves the situation where the officer had never seen the pictures believed to be in Morgan's possession. In the present case the probable cause inquiry centers on Morgan's own words coupled with his past history of sexual predation upon young girls. Viewing the totality of the circumstances one could conclude that there was a likelihood that the pictures he admitted to downloading from the internet were pornographic. See, e.g., United States v. Benedict, 104 F.Supp.2d 174, 180-81 (W.D.N.Y. 2000) (concluding that a federal warrant could be supported by state police officer's tip, based on a prior search, that defendant had pornographic images and on the affiant's representation that a third party pornographic correspondent had a computer disk with the defendant's name and address listed and with correspondence

expressly referencing child pornography from someone with the defendant's first and last initials).

Admittedly, from an unadulterated probable cause standpoint, the question as to whether the search evidence should be excluded is close in light of the First Circuit's Brunette discussion of probable cause in child pornography cases. However, even if the totality of the circumstances does not support a finding of probable cause, I conclude that this warrant satisfies the "good faith" exception to exclusion as iterated in United States v. Leon, 468 U.S. 897, 918-23 (1984) and reiterated by the First Circuit in Brunette, 256 F.3d at 19-20.

Officer Perkins concluded his affidavit by presenting the issuing judge with the following qualification:

Your affiant recognizes that Randle Morgan did not describe sexually explicit pictures in his E-mail message to Michael Murray, and that it is possible to download pictures of "little girls" from the internet that would not be criminal in nature. However, based on the totality of the circumstances described in this affidavit, your affiant believes that Randle Morgan was referring to pornographic pictures of little girls and that a search of his residence and person will provide sexually explicit photographs of female children.

In light of this final paragraph, it cannot be said that Perkins misled the issuing judge; that he knew the information to be false or would have known it to be false save for a reckless disregard of the truth. Leon, 468 U.S. at 923; Brunette, 256 F.3d at 19. And an objectively reasonable official would not find this affidavit as a whole "so lacking in indicia of probable cause" as to undermine that official's belief in the existence of probable cause. Leon, 468 U.S. at 923; accord Brunette, 256 F.3d at 19. Thus, I conclude that there is sufficient evidence of Perkins's objective good faith to justify an

application of the good faith exception to exclusion even if the warrant was based on inadequate probable cause.

### Conclusion

Based upon the foregoing, I recommend that the motion to suppress be **DENIED**.

### NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

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Margaret J. Kravchuk  
U.S. Magistrate Judge

Dated November 8, 2001

CJACNS

U.S. District Court

District of Maine (Bangor)

CRIMINAL DOCKET FOR CASE #: 01-CR-45-ALL

USA v. MORGAN

Filed: 08/09/01

Dkt# in other court: None

Case Assigned to: Judge GEORGE Z. SINGAL

RANDLE MORGAN (1)

N. LAURENCE WILLEY, JR.

defendant

989-3366

[COR LD NTC cja]

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Pending Counts:

Disposition

18:2252A.F - Possession of Child Pornography

(1)

18:2252A.F - Receipt of Child Pornography

(2)

Offense Level (opening): 4

Terminated Counts: NONE

Complaints: NONE

HEALTHREACH NETWORK (2) BENJAMIN P. TOWNSEND, ESQ.

Interested Party [term 11/05/01]

[term 11/05/01] [COR LD NTC ret]

KOZAK & GAYER, 160 CAPITOL STREET

AUGUSTA, ME 04330 207-621-4390

Pending Counts: NONE

Terminated Counts: NONE

Complaints: NONE

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