

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

UNITED STATES OF AMERICA,	)	
	)	
v.	)	Crim. No. 02-35-B-S
	)	
ROBERT ROBINSON,	)	
	)	
Defendant	)	

RECOMMENDED DECISION ON  
DEFENDANT'S MOTION TO SUPPRESS

Robert Robinson has moved to suppress any and all evidence seized from his residence on July 25, 2001, pursuant to a search warrant obtained on that same date. (Docket No. 8). The warrant authorized the police to search for computer equipment, camera equipment, visual depictions of juveniles, and various additional items, all of which was alleged to be evidence of the commission of the crime of Possession of Sexually Explicit Material, a violation of Maine state law, 17 M.R.S.A. § 2924. Robinson maintains that the affidavit submitted in support of the search warrant fails to establish probable cause that the residence to be searched contained evidence of such criminal activity. I now recommend that the court **DENY** the motion to suppress.

**Proposed Findings of Fact**

The affidavit of David Caron, a police detective with the City of Waterville, Maine, sets forth the following pertinent facts in support of his request that a search warrant issue for Robinson's residence:

- 1.) On July 19, 2001, Caron received a telephone call from the assistant manager at the local WalMart, reporting that the store had in its possession what it believed to be sexually explicit film that had been dropped off for developing. The store's policy is that it does not develop such film.

- 2.) Caron went to WalMart and observed the film on monitors. He observed two separate young looking girls in several of the photographs. One of the females was on her stomach with her naked buttocks lifted slightly in the air exposing her vagina. The vaginal area did not have any pubic hair visible. The other female appears to be sleeping in all but one photo. In all of the photos the female is fully clothed. Some of the photos depict her crotch area but do not show her exposed genitals. In two of the pictures the female's tank top has been moved aside, exposing her breasts in both pictures.
- 3.) The name left with the film was L.C. Given the subject matter of the photos, Caron decided to investigate further. He waited at WalMart while the employees called L.C. advising her the film was ready to be picked up.
- 4.) After about twenty minutes a female arrived at WalMart to pick up the photos. The officer recognized her as the female whose genitals were exposed in two of the photographs.
- 5.) Caron followed L.C. to her vehicle after she picked up the photos. He judged her age to be fourteen to fifteen years. He approached her at her vehicle and asked for identification. He learned at that time that her date of birth was September 17, 1972, making her twenty-eight years of age in July, 2001. In response to Caron's questioning, L.C. explained that she had cancer when she was nine years old and it had stunted her growth resulting in her apparent youthful appearance.
- 6.) L.C. said the other female in the photographs was her twelve or thirteen year old cousin, R.G. She said she took the photos, other than the ones with R.G.'s breasts exposed, because she thought her cousin looked cute. She indicated that her boyfriend, Richard Robinson, must have taken the other pictures. L.C. told the officer where R.G. lived and he determined that he would go speak with her and her parents.
- 7.) The next day Caron met with R.G. and her parents. R.G. said that she knew about the one picture taken when she was awake, but did not know about the other pictures being taken, including the two with her breasts exposed. She also told Caron that the previous day, after he had spoken with L.C., she and Robinson had spoken to R.G. and asked her to tell the officer that she knew about and had given her permission for the photographs to be taken.
- 8.) R.G. also told L.C. that Robinson has a picture on his wall of a female on a truck wearing a thong bikini. Robinson had asked R.G. if she would pose like that in a thong bikini for him. She declined.
- 9.) Caron also learned from both R.G. and her mother's aunt (T-- S---) that Robinson had a computer in his home and spent a great deal of time on the computer. According to R.G., who had been able to use the computer when in the home, there were "hundreds of pornographic pictures" on the computer. R.G. also said that all of the photographs were of adult women, except for one picture she saw of young people. R.G. described the

picture as a “pornographic picture of young people (boys and girls).” R.G. could not state the age of the boys and girls but noted that the girls were not developed in the chest area and she did not see any pubic hair on either the boys or girls. Other than stating that the boys and girls were standing on their hands, R.G. description of the pornographic pictures contained no further details.

10.) Caron also included information from R.G.’s mother that she had written in the narrative section of a request for a Protection from Abuse Order filed in state court on behalf of R.G. According to Mrs. G---, “I believe he (Robinson) was going to scan it (the pictures) on his computer – He is always looking at XXX and child pornography.”

11.) Caron then reviewed his case facts with Alan Perkins, a more experienced detective on the Waterville Police Department and both men agreed that none of the photographs they had observed met the statutory definition of sexually explicit material.

12.) Caron also incorporated into his affidavit knowledge that he and the other detective had acquired concerning the habits and practices of collectors of child pornography including the fact that these collectors may have 1000’s of images and retain them in excess of twenty years. Caron also incorporated some general knowledge about how the internet works and why child pornography collectors frequently employ that means of communication and use computers to store their collections.

13.) Perkins and Caron concluded that while the photos were not sexually explicit, they were sexually “suggestive.”

14.) Perkins thought it significant that the sexually suggestive photos were on the same roll of film as the sexually explicit photo of L.C. and that L.C.’s poses were similar to the pictures of R.G., except that R.G. was wearing clothes.

15.) Caron indicated in his affidavit “I am aware that there are situations in which the possession of pornographic pictures of young girls would not be criminal in nature.” However, he indicated that in his opinion Robinson had demonstrated an escalating interest or fascination with the twelve year old girl and that therefore he believed that “Robinson will be in possession of sexuall(sic) explicit photographs of minors.”

After Caron completed the affidavit he had it reviewed by an assistant district attorney in Somerset County, Maine. The attorney approved the affidavit and Caron presented it to a Maine District Court judge. The judge did not sign the affidavit at first, voicing a concern about some hearsay information from T--- S----. Caron cured that problem by speaking directly with T---- S---- and the judge then signed the warrant.

## Discussion

The First Circuit has clearly set forth the standard this court should employ when reviewing whether a given set of facts constitute probable cause for the issuance of a search warrant.

In determining the sufficiency of an affidavit, we consider whether the “totality of the circumstances” stated in the affidavit demonstrates probable cause to search the premises. We examine the affidavit in “a practical, common-sense fashion” and accord “considerable deference to reasonable inferences the [issuing justice] may have drawn from the attested facts.” “Under the ‘probable cause’ standard, the ‘totality of the circumstances’ disclosed in the supporting affidavits must demonstrate ‘a fair probability that contraband or evidence of a crime will be found in a particular place.’” In a doubtful or marginal case, the court defers to the issuing magistrate’s determination of probable cause.

United States v. Barnard, --F.3d--, 2002 WL 1827285, \*2 (1<sup>st</sup> Cir. Aug. 14, 2002), (internal citations omitted).

This 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>1</sup> This case does not involve a

---

<sup>1</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.

situation where the affiant failed to describe the photos with sufficient particularity to allow the issuing magistrate to make an independent determination that the depictions fell within the statutory definition. See United States v. Brunette, 256 F.3d 14, 17 (1st Cir. 2001). The affiant candidly volunteered to the issuing magistrate that he knew, and had confirmed with another officer, that none of the pictures viewed by the police met the statutory definition of sexually explicit material. I also note that none of R.G.'s descriptions of other photos in Robinson's possession meet that definition either. Nor is this a case where the affiant had knowledge that the subject had a past history of sexual predation upon young girls, had recently expressed concern about his own behavior, and had admitted to downloading pictures of young girls from the internet. See United States v. Morgan, 2001 WL 1402998 (D. Me., Nov. 8, 2001)(Rec. Dec., Kravchuk, M.J.).

Reading the affidavit with the deference due to the issuing magistrate, I find that the judge could have determined that Robinson possessed materials that were sexually "suggestive", recently displayed a disturbing interest in a twelve year old girl, and used the internet extensively. None of those three facts amounts to probable cause in and of itself; the sole question is whether the issuing magistrate was justified in concluding that the totality of the circumstances amounted to probable cause to believe that there had been a violation of the state statute.

- 
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).

A warrant application must demonstrate probable cause to believe that (1) a crime has been committed--the "commission" element, and (2) enumerated evidence of the offense will be found at the place to be searched-- the so-called "nexus" element. See United States v. Zayas-Diaz, 95 F.3d 105, 111-112 (1st Cir. 1996). It is the “commission” element that concerns me here. These facts certainly make one suspicious that at least illicit, if not illegal conduct, may be afoot, but the notion that a search of this residence would produce materials that meet the statutory definition of “sexually explicit” is supported mainly by informed speculation. This case hardly resembles the more typical case involving established evidence of visits to websites known for their sexually explicit depictions creating the fair probability that such material will be stored on the suspect computer. The police investigation never progressed to the stage where they sought or obtained information from Robinson’s Internet Service Provider (ISP) that might have produced evidence indicative of the actual materials Robinson had on his computer.

Of course the officers can hardly be faulted that an unquestionably neutral and detached judge agreed to sign the warrant. In fact the testimony developed during the “good faith” hearing showed that the judge conscientiously required the officer to undertake a further interview before she would agree to sign the warrant. Thus, the judge acted in a “neutral and detached” manner and did “not merely serve as a rubber stamp for the police.” See United States v. Leon, 468 U.S. 897, 914 (1984). That she, and an assistant district attorney, both well-trained in the law, believed that the affidavit supported a finding of probable cause makes the case more likely to be a “marginal or doubtful case” rather than one where probable cause is totally lacking. In any event, the

Government's contention is that if probable cause did not exist, the "good faith" exception to the Fourth Amendment's exclusionary rule applies. United States v. Leon, 468 U.S. 897 (1984).

Evidence seized in violation of the Fourth Amendment is nevertheless admissible if the officers placed an "objectively reasonable reliance on" a neutral and detached judge's incorrect probable cause determination. Id. at 922. Robinson argues that these officers did not rely upon an objectively reasonable determination of probable cause because the affidavit was "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." See id. at 923 (quoting Brown v. Illinois, 422 U.S. 590, 610-11 (1975) (Powell, J. concurring in part)). His argument ignores elaborate steps taken by the affiant to try to insure that his statement of probable cause was adequate.

In considering the application of the "good faith" exception to these facts, it is significant that the affiant did not try to "gild the lily." The affiant acknowledged that he was "aware that there are situations in which the possession of pornographic pictures of young girls would not be criminal in nature" and he further stated that he knew that none of the pictures he had seen met the statutory definition of sexually explicit material. Caron did not in any manner mislead the issuing judge or present demonstrably false facts. He simply presented the facts known to him and allowed the judge to make her determination. That she signed the warrant and others would not have makes this either a "doubtful or marginal" case of probable cause wherein this court should accord her determination the appropriate deference or a "borderline" case wherein probable cause is lacking but the warrant's defects should not be charged against the affiant. See United

States v. Ricciardelli, 998 F.2d 8, 15 (1<sup>st</sup> Cir. 1993)(“If . . .the warrant’s defectiveness results from . . . borderline calls about the existence of probable cause, then the evidence may be used, despite the warrant’s defectiveness.”)(citing Leon, 468 U.S. at 926). If, as I have concluded, the warrant does not set forth probable cause, then the “good faith” exception applies because the officers conducted this search in reasonable reliance upon the issuing judge’s decision. Whether one accords deference to the issuing magistrate’s review or applies the “good faith” exception to the officer’s conduct, the result remains the same.

### **Conclusion**

Based upon the foregoing, I recommend that the court **DENY** the motion to suppress.

### 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.

---

Margaret J. Kravchuk  
U.S. Magistrate Judge

Dated August 22, 2002

U.S. District Court  
District of Maine (Bangor)

CJACNS

CRIMINAL DOCKET FOR CASE #: 02-CR-35-ALL

USA v. ROBINSON  
05/14/02  
Dkt# in other court: None

Filed:

Case Assigned to: Judge GEORGE Z. SINGAL

ROBERT ROBINSON (1)  
defendant

JEFFREY M. SILVERSTEIN, ESQ.  
[COR LD NTC cja]  
BILLINGS & SILVERSTEIN  
6 STATE STREET  
P.O. BOX 1445  
BANGOR, ME 04402-1445  
(207) 941-2356

Pending Counts:

Disposition

18:2252A.F ACTIVITIES RE MATERIAL CONSTITUTING/CONTAINING  
CHILD PORNO; POSSESSION OF CHILD PORNOGRAPHY  
(1)

Offense Level (opening): 4

Terminated Counts: NONE

Complaints: NONE

U. S. Attorneys:

GAIL FISK MALONE  
[COR LD NTC]  
U.S. ATTORNEY'S OFFICE  
P.O. BOX 2460  
BANGOR, ME 04402-2460  
945-0344