

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA)	
)	
<i>v.</i>)	Criminal No. 99-17-P-H
)	
GREGORY JAMES GRANT,)	
)	
<i>Defendant</i>)	

**MEMORANDUM DECISION ON MOTION FOR FRANKS HEARING AND
RECOMMENDED DECISION ON DEFENDANT’S MOTION TO SUPPRESS**

The defendant, charged with violations of 18 U.S.C. § 2252A(a)(2) and (a)(5)(B), both of which involve child pornography and, in this case, use of a computer, Indictment (Docket No. 7), moves to suppress all evidence seized from his residence and all statements he may have made during the search of his residence on the ground that the search warrant authorizing that search was invalid due to material flaws in the affidavit upon which it was based, Defendant Grant’s Motion to Suppress (“Motion to Suppress”) (Docket No. 9) at 1-2. He also requests an evidentiary hearing on this motion, Motion to Conduct an Evidentiary Hearing on Defendant Grant’s motion to Suppress (Docket No. 10), pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978). I deny the motion for a hearing and recommend that the court deny the motion to suppress.

I. Background

The subject search warrant was issued by this court on September 1, 1998 after review of the 36-page affidavit of Karen S. Booke, a special agent of the United States Customs Service. The

warrant authorized a search of the defendant's residence for, *inter alia*, objects used to depict child pornography, visual depictions of minors engaged in sexually explicit conduct, correspondence regarding child pornography and groups or individuals engaged in the production or exchange of such depictions, and records pertaining to trade in or transmission of such depictions through interstate or foreign commerce. The warrant was executed on September 1, 1998. A criminal complaint charging the defendant with knowing possession of graphic images the production of which involved the use of minors engaging in sexually explicit conduct that had been transported in interstate and foreign commerce by computer, in violation of 18 U.S.C. § 2252A(a)(5)(B), and with knowingly distributing child pornography by computer, in violation of 18 U.S.C. § 2252A(a)(2), was filed September 2, 1998. Docket No. 1. An indictment containing the same charges was handed down on March 16, 1999. Indictment at 2. The motion to suppress was filed on April 2, 1999.

II. Discussion

The defendant challenges the assertion included in the Booke affidavit that an Internet account in the defendant's name with Road Runner Pro, Time Warner Cable had been continuously logged on to the Internet for the month of August 1998. Defendant Grant's Response to Government's Memorandum in Opposition to Defendant's Motion to Suppress ("Reply Memorandum") (Docket No. 22) at 4. He also contends that allegations concerning the presence of someone using the screen name "sassy!sassygal4" in a secret Internet channel called "#ourplace," created for trafficking in child pornography, between 9:15 p.m. and 11:30 p.m. on August 30, 1998 cannot be considered evidence of his involvement, even though the port address through which this person was connected to the Internet was assigned to the defendant's account, because the service

provider's records indicate that this person was connected to the Internet through a Virginia telephone number, and the affidavit also provides evidence suggesting that the defendant was at home in South Portland, Maine at that time. Motion to Suppress at 2-3.¹ The Booke affidavit also notes that the defendant had used the screen names "sassybabe" and "sassywork" on the Internet. The defendant contends that the affidavit is materially false and misleading because it "attempts to draw the conclusion" that the defendant was the person in the "#ourplace" chat room on August 30, 1998. *Id.* at 3.

In *Franks*, the Supreme Court held that

where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request.

438 U.S. at 155-56. "To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth" *Id.* at 171. If these requirements are met and the allegedly false material is set aside and the remaining content of the affidavit nonetheless is sufficient to support a finding of probable cause, no hearing is required. *Id.* at 171-72. "To warrant a *Franks* hearing, the false statement must be necessary to the finding of probable cause." *United States v. Southard*, 700 F.2d 1, 9 (1st Cir. 1983). "A comparable showing is required if the defendant would establish that technically accurate statements by an affiant have

¹ The defendant offers the Affidavit of Fletcher Kittredge ("Kittredge Aff.") (Docket No. 24) in support of this argument. While that affidavit adds additional information explaining the available methods of obtaining access to the Internet, it does not contain any information that would cause me to change the conclusion I reach *infra*.

been rendered misleading by material omissions.” *United States v. Scalia*, 993 F.2d 984, 987 (1st Cir. 1993). It is the latter standard which the defendant here must meet since he has not shown that any challenged statement in the Booke affidavit is other than technically accurate.²

In the First Circuit,

[t]he standard [courts] apply in determining the sufficiency of an affidavit is whether the “totality of the circumstances” stated in the affidavit demonstrates probable cause to search either the premises or the person. “[P]robable cause need not be tantamount to proof beyond a reasonable doubt. . . . Probability is the touchstone.” “[P]robable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity.” To establish probable cause for a premises search, the information available in the affidavit must show “a fair probability that contraband or evidence of a crime will be found in a particular place.” An affidavit supporting a request for a search warrant must give the magistrate a “substantial basis” upon which to conclude that there is such a “fair probability.” The facts must be judged against an objective standard: “would the facts available to the officer at the moment of . . . the search ‘warrant a [person] of reasonable caution in the belief that the action taken was appropriate?’”

United States v. Khounsavanh, 113 F.3d 279, 283 (1st Cir. 1997) (citations and footnote omitted).

² With respect to the affidavit’s assertion that Road Runner Pro records indicate that the defendant’s account had “been continuously logged onto the Internet for approximately one month” prior to September 1, 1998, Booke Affidavit ¶¶ 37-38, the defendant’s affidavit does not show that this statement was incorrect, but merely that someone at Road Runner Pro told him — or someone who in turn told him — that there was a “problem with their system” that resulted in Road Runner Pro’s logs showing that a user is logged on “even if their computer is not turned on,” Affidavit of Gregory J. Grant in Support of Defendant’s Motion to Suppress (“Defendant’s Affidavit”) (Docket No. 11) ¶ 2. Even if the defendant had shown that Booke was aware of this “problem” when she executed her affidavit, which he has not done, the fact that he may not have been logged on through Road Runner Pro at the relevant time on August 30, 1998 makes it more likely that he was the individual who obtained access to the Internet through the Virginia telephone number than would be the case if he were connected through Road Runner Pro at the time. *See also* Kittredge Aff. ¶¶ 4, 6, 8. In any event, a showing that the defendant’s home computer was logged on through Road Runner Pro on August 30, 1998 is not necessary to the establishment of probable cause, for the reasons discussed in the text following this note. On this point, therefore, the defendant has failed to make the showing necessary to entitle him to a *Franks* hearing. *See Scalia*, 993 F.2d at 987.

Here, the maker of the affidavit swears that she was not aware of the significance of the letters “va” in the account identification information provided by IBM Global Services concerning the August 30 event when she executed the affidavit.³ Affidavit of Karen S. Boone, attached to Government’s Memo in Opposition to Defendant’s Motion to Suppress and Motion for Evidentiary Hearing (“Government’s Memorandum”) (Docket No. 18), ¶ 8. The defendant does not provide any evidence to contradict this assertion but rather responds that it was “reckless for Ms. Boone to claim to have done the requisite research and investigation required in such a technologically advanced and involved case, to in good conscience make the representation to a magistrate that she has probable cause to believe” that a connection can be made between the August 30 information and “the Defendant himself being present in the chat room.” Reply Memorandum at 5. The warrant affidavit makes no such representation. Even if it could be read to do so, however, the defendant has not shown that Boone’s professed ignorance on this particular point constitutes reckless disregard for the truth of factual assertions necessary to the establishment of probable cause for the search.

³ The defendant’s affidavit explains that the information provided by IBM Global Services concerning the August 30 use was a “reverse lookup,” identified as “slip166-72-215-109.va.us.ibm.net,” which includes a number that is assigned to a computer when it is on the Internet (the “IP address,” in this case 166-72-215-109) and data concerning the provider of access to the Internet and the geographic location from which the computer account, or IP address, originated its access (in this case, “va,” for Virginia). Defendant’s Affidavit ¶ 5. The affidavit of a representative of IBM Global Services who provided the information to the government in response to a subpoena confirms that the “va” is “a coding system that identifies the locations . . . of the point of presence from which the subscriber connects to the Internet” and that in this case the point of presence was in Virginia. Affidavit of Robert Frederick (Docket No. 20) ¶¶ 3-4. He also states that a point of presence “is simply an access point that our subscribers can use to connect to the Internet via a local phone number without incurring a toll call charge,” that on August 30, 1998 IBM was unable to determine where the subscriber using a given point of presence was in fact physically located, and that a subscriber could have called the Virginia point of presence from anywhere in the world. *Id.* ¶¶ 3, 5. The defendant does not dispute this affidavit’s assertion that 166-72-215-109 was on August 30, 1998 the IP address assigned to him by IBM. *Id.* ¶ 2.

Indeed, the facts presented in the affidavit concerning August 30 are not necessary to the establishment of probable cause in any event. The defendant does not challenge the information presented in the warrant affidavit that someone using the screen name “sassybabe” was present in a different Internet channel, also dedicated to child pornography, on April 1, 1998 at 7:14 p.m.,” that “sassybabe” was connected to the Internet at the time via IBM Global Services; that at this time the screen name “sassybabe” was registered to an account in the defendant’s name; and that there was activity in the defendant’s IBM Global Services account through August 1998. Affidavit ¶¶ 30-31, 34. The defendant does not challenge Booke’s statements that his Road Runner Pro account is an FTP server site, a facility that permits the transfer of files from one computer to another upon which members of the identified group of child pornography traders subject to the investigation that led investigators to the defendant rely to swap images of minors engaging in sexually explicit conduct, *id.* ¶ 38; that the defendant used the “highly suggestive” screen name “sassybabe,” *id.* ¶ 49; that access to the Internet chat room in which “sassybabe” was present on April 1, 1998 could only be gained through membership in the “Orchid Club,” which membership could only be acquired by individuals who possessed at least 10,000 pre-teen images of child pornography, and an FTP server to give other members access to those images, *id.* ¶¶ 20-23; or the opinion of Senior Special Agent Glenn Nick of the United States Customs Service, an experienced agent specializing in the investigation of international trafficking in child pornography who completed reports of the international investigation that led to the identification of the defendant as a suspect,⁴ that the defendant was a collector of child pornography, *id.* ¶¶ 7, 15-16, 20-30, 49. This information, without

⁴ See generally *United States v. Simpson*, 152 F.3d 1241, 1247 (10th Cir. 1998) (investigator’s experience in area of investigating child pornography cases relevant factor for consideration by judicial officer asked to issue search warrant).

reference to the August 30 event, was sufficient to provide probable cause for the search warrant in this case under the totality-of-the-circumstances test. *Khounsavanh*, 113 F.3d at 283.

III. Conclusion

For the foregoing reasons, I **DENY** the defendant's motion for a *Franks* hearing and recommend that the defendant's 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 after 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.

Dated this 7th day of June, 1999.

David M. Cohen
United States Magistrate Judge