

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

MEMORANDUM and ORDER

GREGORY BLUM,

07-CR-27-S-01

Defendant.

On June 20, defendant Gregory Blum pled guilty to two counts of producing child pornography. Defendant moved to suppress the government's evidence on the grounds that the search warrant improperly relied on stale evidence. He also moved to dismiss the charges on the ground that the use of § 2251(a) in this case violates the Commerce Clause.

On June 14, 2007 the Honorable Stephen L. Crocker, United States Magistrate Judge recommended that defendant's motions be denied.

On June 25, 2007 defendant filed objections to the report and recommendation. Defendant objects to the Magistrate Judge's legal conclusion that the charging statute 18 U.S.C. § 2251(a) as applied to the defendant does not violate the Commerce Clause.

Pursuant to 28 U.S.C. § 636(b)(1)(C), this Court reviews the report and recommendation and finds as follows. The Court adopts the findings of fact found by the Magistrate Judge.

MEMORANDUM

Defendant claims that the charging statute, 18 U.S.C. § 2251(a) is unconstitutional as applied to him because his conduct did not implicate interstate commerce. He is alleged to have recorded on a Panasonic miniDV two sexual assaults in July, 2006 of a girl who probably was less than four years old. Defendant argues that the Commerce Clause does not permit the federal criminalization of his conduct according to United States v. Lopez, 514 U.S. 549 (1995).

The United States Court of Appeals for the Seventh Circuit upheld a similar statute, 18 U.S.C. 2252(a), which prohibits possessing child pornography. See United States v. Angle, 234 F.3d 326 (7th Cir. 2000), cert. denied, 533 U.S. 932 (2001). The Court concluded that Congress wished to prohibit possession of "homegrown" child pornography to reduce the interstate demand. *Id.* at 337-38.

In Gonzales v. Raich, 545 U.S. 1 (2005) the Court used market theory to hold that the Federal Controlled Substances Act could be used to prohibit the intrastate growth and possession of marijuana for medical purposes without violating the Commerce Clause. *Id.* at 18-22, and 32-33. Defendant argues that the analysis in Raich, a drug case, is not applicable to his production of child pornography.

The Supreme Court, however, vacated and remanded for reconsideration the Eleventh Circuit's decision that 18 U.S.C. 2251(a) did not survive Commerce Clause scrutiny. See United States v. Smith, 545 U.S. 1125 (2006). On remand, the Eleventh Circuit held that § 2251(a) could be used to prosecute the defendant for recording his sexual activities with a 14-year old girl on photographs printed on Kodak paper from outside the

state. United States v. Smith, 459 F.3d 1276 (11th Cir. 2006), cert. denied, ___ U.S. ___, 127 S.Ct. 990 (2007). The Court held that the application of §2251(a) to the defendant's intrastate production of child pornography was within Congress's constitutional authority. Id. at 1284-85.

The Court is persuaded by the reasoning in Smith that Congress may criminalize homegrown child pornography produced using equipment from another state. Section 2251(a) does not violate the Commerce Clause in general, nor as applied to Blum in this prosecution and the charges against defendant should not be dismissed.

The Court adopts the recommendation of the Magistrate Judge that the defendant's motion to dismiss the indictment should be denied. The Court also adopts the Magistrate Judge's recommendation that the warrant should not be quashed. Defendant's motions to dismiss the indictment and quash the warrant will be denied.

ORDER

IT IS ORDERED that the recommendation of the Magistrate Judge to deny defendant's motions to quash the warrant and to dismiss the indictment is ADOPTED.

IT IS FURTHER ORDERED that defendant's motions to quash the warrant and to dismiss the indictment are DENIED.

Entered ths 27th day of June, 2007.

BY THE COURT:

/s/

JOHN C. SHABAZ

District Judge