

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

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UNITED STATES OF AMERICA,

Plaintiff,

v.

TIMOTHY URBANSKI,<sup>1</sup>

Defendant.

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OPINION AND ORDER

12-cr-9-bbc

Defendant Timothy Urbanski has filed a motion to withdraw his plea of guilty, contending that he made it unknowingly. At his request, new counsel has been appointed to represent him. I am granting the motion, despite the closeness of the question whether defendant failed to understand what was being asked of him, so as to avoid any future question about the validity of the plea.

BACKGROUND

Defendant was charged in a one count indictment with violating 18 U.S.C. § 2252(a)(4)(B), which makes it a crime to possess a DVD containing a visual depiction of a minor engaged in sexually explicit conduct, the production of which involved the use of a

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<sup>1</sup> Defendant signs his submissions Timothy Urbaninski, but he has been charged under the name Urbanski.

minor engaged in sexually explicit conduct and the use of materials that had been transported and shipped in interstate or foreign commerce, provided that the defendant knew that the DVD contained a visual depiction of a minor engaged in sexually explicit conduct. Defendant appeared at a plea hearing on May 15, 2012 and entered a plea of guilty to the charge in the indictment. He was advised of the maximum penalties, advised of the rights he was giving up, such as the right to a jury trial and unanimous verdict, and asked whether he understood the plea agreement, whether he had been promised anything in exchange for the plea or threatened or forced to enter a plea and whether he had been told he was going to receive a particular sentence. He answered “No” to these questions.

The government explained the evidence it would have adduced at trial to prove defendant’s guilt: a Superior, Wisconsin police detective would have testified that he had participated in the execution of a search warrant at defendant’s home on July 26, 2011, where he and other officers found approximately nine computers, one hard drive and a large amount of computer media, including CDs, DVDs, thumb drives and floppy discs. Several of the items were analyzed and found to contain child pornography, including one picture on a DVD+RW of an adult male inserting his penis into the vagina of a prepubescent female. The government said that it would have introduced testimony at trial that the female in that picture and the small girl in another picture shown holding the erect penis of an adult male and putting her mouth on the end of the penis were real children and under the age of 18 when the pictures were taken. There would also have been evidence that the DVD+RW was made by Sony outside the United States.

Defendant told the court that he did not think there was anything that the Assistant United States Attorney had gone over that she would not be able to prove at trial. Then he was asked to tell the court in his own words about his possession of the DVD. He said, “Just that I had it in my possession at the time.” Plea Hrg. Trans., dkt. #28-1, at 14. He agreed that “the time” was July 26, 2011. He was asked, “And you knew that you had this in your possession. It wasn’t a mistake or accident?” and he answered, “No, I knew I had it in my possession, but . . .” Then he was asked, “And did you know what the pictures were on the DVD?” to which he answered, “Not all of them, just—I know most of them.” Finally, he was asked, “And you knew they were depictions of minors involved in sexually explicit conduct?” and he answered “Yes.” Id. at 15.

On July 19, 2012, defendant filed an affidavit, dkt. #29, in support of his motion to withdraw his plea, in which he averred that he had acknowledged at the plea hearing that he possessed a DVD+RW containing child pornography but his acknowledgment had been based upon information given him by his attorney. He averred that when he was asked about his knowledge of the contents of the DVD+RW, he believed that he was being asked about what he was aware of as of May 15, 2012 and not what he was aware of on July 26, 2011, when his house was searched. He averred that at the time of his plea he did not know that he could not be found guilty of possessing child pornography unless he knew both that he had possessed the DVD+RW and that it contained child pornography and that “even if the DVD that is in question was in my possession on July 26, 2011—a fact that is not entirely clear to me at this point—I did not know of its contents until after I was arrested

and informed of such by my attorney.” He ended by saying that he was not aware on July 26, 2011 that any DVD+RW in his possession contained child pornography.

According to defendant’s counsel, defendant was in special education classes throughout his years in high school. He graduated last in his high school class of 68.

## OPINION

Fed. R. Civ. P. 11(d)(B) allows a defendant to withdraw his plea before sentencing if he can show “a fair and just reason for requesting the withdrawal.” The burden is on the defendant to make that showing; when “a proper Rule 11 colloquy has taken place, a guilty plea enjoys a presumption of verity and the ‘fair and just’ Rule 11(d)(B) escape hatch is narrow.” United States v. Mays, 593 F.3d 603, 607 (7th Cir. 2010). The burden is a heavy one. Id. The defendant must prove one of three things: his plea was involuntary and unknowing; he is actually innocent; or he is legally innocent.

In this case, the issue is whether defendant actually knew at the time his house was searched that he possessed a DVD with pictures of minors engaging in sexually explicit activities. He has sworn in his affidavit that he was not aware at that time that any DVD+RV in his possession contained child pornography and that he has no first-hand knowledge of what that DVD+RW contained because he has never viewed it. His only knowledge of its contents comes from his lawyer. Defendant argues that his plea was unknowing; the government argues that his averments support a claim of actual innocence, if they support any claim at all.

It is not clear that it matters which category the claim occupies. Defendant says that he did not understand at the time he entered his plea that he could be found guilty only if he knew when he possessed the DVD+RW in his house that it contained prohibited depictions; he also says that he did not know of these depictions when he had the DVD in his house. Such a claim might support a finding that he entered his plea not knowing what he was admitting as well as a finding that he could be actually innocent of the charge.

The transcript supports defendant's position, if only tenuously. Defendant used the present tense of "know" when asked about his knowledge of the contents of the DVD; he says that he knows now, from what his counsel has told him, that the contents were of minors engaged in sexual explicit conduct, but that he did not know the nature of the contents at the time he possessed the DVD. Had I recognized at the time that defendant had some questions about the charge or that he was not acknowledging that he knew of the contents as of July 26, 2011, I could have asked more questions to clarify the issue. Without that clarification, I cannot say that defendant's plea was a knowing one and I will allow him to withdraw it.

The government has asked the court to hold an evidentiary hearing if it is inclined to grant defendant's motion. That request will be denied. If the government believes that it can prove that defendant did know the contents of the DVD+RV disc, the proper time to make that showing is at trial.

ORDER

IT IS ORDERED that defendant Timothy Urbanski's motion to withdraw his plea is GRANTED. The magistrate judge will hold a scheduling conference with counsel to set a date for trial.

Entered this 1st day of August, 2012.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge