

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

JEREMY J. HUART,

Defendant.

OPINION AND ORDER

12-cr-114-wmc

Defendant Jeremy J. Huart moves to suppress evidence recovered from his cellular telephone, which was seized by personnel at the federal halfway house where Huart was in custody. A search of that cell phone revealed that Huart was in possession of multimedia images of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B). Huart argues that (1) suppression is justified because halfway house personnel violated his Fourth Amendment rights; and (2) although the FBI eventually obtained a warrant for the phone and its contents, agents waited too long to access the phone's electronically-stored images.

On January 10, 2013, Magistrate Judge Stephen Crocker held an evidentiary hearing on Huart's motion to suppress. On January 27, 2013, Judge Crocker issued a detailed report and recommendation advising this court to deny the motion (dkt. # 37) which the court will adopt for reasons that follow.

SUMMARY OF FACTS¹

After Huart pleaded guilty to possessing child pornography, the United States District Court for the Northern District of Illinois sentenced him to a 65-month prison sentence. *See United States v. Jeremy Huart*, No. 1-07-cr-00047-01 (N.D. Ill. Sept. 25, 2008). While still incarcerated within the Bureau of Prisons, Huart met with his case manager and signed a Resident Behavior Contract in preparation for his transfer to a halfway house to serve the last 5½ months of his sentence before beginning a three-year term of supervised release on November 1, 2011. By signing that contract, Huart acknowledged that he would be subject to additional security measures because of his conviction for a sex offense and that halfway house personnel would be conducting routine searches for contraband, including, but not limited to, pornography of any kind. In addition, Huart acknowledged that he was not allowed to use any mobile communication device with internet capability, *i.e.*, a cell phone, while in custody at a halfway house.

When Huart arrived at the Rock Valley Correctional Program -- a secure transitional facility or halfway house near Janesville, Wisconsin, under contract with the Bureau of Prisons -- he also signed a document entitled “Conditions of Residential Treatment Programs,” acknowledging that he was required to abide by certain rules and regulations outlined in a “Resident Information Packet and Program Rules” handout.

¹ In his report and recommendation, Judge Crocker set forth his detailed factual findings that the court adopts and will not repeat here. This summary simply provides basic facts necessary to address Huart’s objections to that report.

These rules were explained to Huart at an orientation meeting, including that searches of the facility, all residents, and their personal belongings would be conducted on a regular basis to keep the facility free from contraband.

All residents of the Rock Valley halfway house were expressly prohibited from using cell phones without written authorization from a case manager. Residents who had authorization to use a cellphone were also required (1) to sign a pledge not to keep any sexually explicit images on that device and (2) to acknowledge that “ANY STAFF may request at ANY TIME to view the contents of [that] phone with or without reason.” In addition, the director of the halfway house personally advised Huart that he was not allowed to possess a cell phone.

While conducting a routine search at the Rock Valley halfway house on August 19, 2011, personnel encountered Huart lying on the bed in his room. Also lying on Huart’s bed was an unauthorized cell phone. Because the cell phone was contraband, halfway house personnel confiscated the device and searched its contents, which contained 214 images that appeared to depict child pornography.

Halfway house personnel gave Huart’s cellphone to the Rock County Sheriff’s Department, which tendered the device to FBI Special Agent Brian Baker for further investigation. On December 8, 2011, Agent Baker obtained a warrant from this court to search the contents of that phone. The warrant authorized a search to occur on or before December 15, 2011. After Agent Baker discovered the phone was password protected, he sent the phone to the FBI office in Milwaukee for examination by the Computer Analysis

Response Team (CART). On December 13, 2011, a Milwaukee agent sent the phone to the FBI's Forensic Electronic Device Analysis group in Quantico, Virginia, where analysts successfully accessed the phone on January 25, 2012, and downloaded the child pornography that forms the basis for the charges currently pending against Huart.

OPINION

Huart contends that, by searching his phone, officials at the halfway house violated his right to privacy under the Fourth Amendment to the United States Constitution. Huart maintains further that, by exceeding the December 15, 2011 deadline in the search warrant, the seizure of evidence by FBI forensic analysts on January 25, 2012, was improper. Huart offers no persuasive basis to depart from the well-reasoned report and recommendation by Judge Crocker, who rejected both arguments. This court does as well.

A. The Right to Privacy in a Halfway House

While the Fourth Amendment protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,” *United States v. Jackson*, 598 F.3d 390, 346 (7th Cir. 2011) (quoting U.S. Const. amend. IV), it “does not proscribe all state-initiated searches and seizures[.]” *Florida v. Jimeno*, 500 U.S. 248, 250 (1991). Rather, it protects only against warrantless intrusions by the government into areas in which an individual holds a reasonable or “legitimate

expectation of privacy.” *Rakas v. Illinois*, 439 U.S. 128, 143 (1978). Whether an expectation of privacy exists for Fourth Amendment purposes depends upon the answers to two questions: (1) whether the individual, by his conduct, has exhibited an actual expectation of privacy; and (2) whether the individual’s expectation of privacy is one that society is prepared to recognize as reasonable. *See Katz v. United States*, 389 U.S. 347, 361 (1967).

A defendant objecting to a search bears the burden of proving that he had a legitimate expectation of privacy in the item searched. *See United States v. Yang*, 478 F.3d 832, 835 (7th Cir. 2003). This is a burden Huart cannot meet. As an initial matter, he does not dispute that the cell phone was his. Huart also does not dispute that (1) he was not allowed to have a cellphone; and (2) unauthorized cellphones were contraband, which could be seized and searched by staff for any reason or no reason at all.

Huart nevertheless objects to the magistrate judge’s conclusion that he had no reasonable expectation of privacy as a resident of the Rock Valley Correctional Program. Specifically, Huart argues that the conditions of his confinement at the half-way house were much less restrictive than prison and, therefore, not devoid of Fourth Amendment protection. Unfortunately for Huart, the first premise does not lead to the second.

As to the first, Huart is right, of course, that prisoners lack any reasonable expectation of privacy under the Fourth Amendment. *See, e.g., Hudson v. Palmer*, 468 U.S. 517, 528 (1984) (“A right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates and their

cells required to ensure institutional security and internal order.”); *Johnson v. Phelan*, 69 F.3d 144, 146 (7th Cir. 1995) (observing that prison inmates “do not retain any right of seclusion or secrecy against their captors, who are entitled to watch and regulate every detail of daily life”).

By virtue of the restrictive conditions of supervision imposed, however, parolees and probationers also may be subject to warrantless searches. *See United States v. Sampson*, 547 U.S. 843, 857 (2006); *United States v. Knights*, 534 U.S. 112, 121 (2001); *see also United States v. Hagenow*, 423 F.3d 638, 643 (7th Cir. 2005) (discussing *Sampson* and *Knights*). Indeed, the Supreme Court recognizes warrantless searches of parolees and probationers as administratively necessary to further the government’s “overwhelming interest” in supervising those more likely to commit future criminal offenses. *See Sampson*, 547 U.S. at 853 (recognizing that the government’s interests in reducing recidivism and promoting positive citizenship among probationers and parolees warrant privacy intrusions that would not otherwise be tolerated under the Fourth Amendment) (citing *Griffin v. Wisconsin*, 483 U.S. 868, 879 (1987)).

While having more liberty than prison inmates, the evidence adduced at the hearing confirms that individuals assigned to the Rock Valley Correctional Program were subject to restrictive conditions, including resident contracts with the Bureau of Prisons prohibiting possession of cell phones or access to the internet, as well as routine searches for pornography. (*Hearing Tran.*, Dkt. # 30, at 17-40, 47-48.) While Huart points to other “freedoms” enjoyed by residence at the halfway house -- such as the ability to leave

unsupervised on a day pass or to purchase personal items -- the facts show he had *no* right to a cell phone or pornographic images. Indeed, he expressly contracted those rights away in exchange for release and residency in the halfway house. Accordingly, Huart's status as a halfway house resident was more restrictive than the conditions imposed on probationers, parolees, or others under a form of supervised release who are at large in the community. Recognizing that the conditions of confinement in a halfway house are as restrictive, if not more so, than the conditions imposed on other persons on parole or probation, courts have found no reasonable expectation of privacy in the halfway house setting. See *United States v. Dixon*, 546 F. Supp. 2d 1198, 1203 (D. Kan. 2008); see also *United States v. Lewis*, 400 F. Supp. 1046, 1049 (D.C. N.Y. 1975) (concluding that inspection of a halfway house resident's locker for contraband, or on other "appropriate occasions," was a legitimate intrusion under the circumstances and was "fully supported by the necessities of a reasonable regimen of the orderly operation of a correctional facility").

Huart offers no reasonable basis for a legitimate expectation of privacy in his unauthorized cell phone or its contents. To the contrary, Huart was repeatedly put on notice that any expectation of privacy while serving a portion of his federal sentence at a halfway house would be wholly unreasonable and, in any event, is not an expectation that society is prepared to recognize as reasonable. Therefore, Huart fails to establish that the seizure and search of his cell phone violated the Fourth Amendment.

B. Search and “Seizure” Conducted After the Warrant Expired

Huart’s other argument in support of suppression is that the December 15, 2011, deadline imposed in the search warrant had already expired when the FBI finally accessed the contents of his cell phone in late January 2012. As Judge Crocker observed, this argument is foreclosed by Fed. R. Crim. P. 41(e)(2)(B), which addresses the extraction of electronically-stored information within the time limit on search warrants. *See* FED. R. CRIM. P. 41(e)(2)(A) (requiring search warrants to be executed “within a specified time no longer than 14 days”). Amended in 2009, Rule 41(e)(2)(B) states that the time for executing a search warrant with respect to electronic storage media “refers to the seizure or on-site copying of the media or information and not to any later off-site copying or review.” *United States v. Ivers*, 430 Fed. App’x 573, 575-76, n. 2, 2011 WL 1594652 (9th Cir. 2011). In that respect, the 2009 Advisory Committee Notes clarify that Rule 41 was amended specifically to acknowledge the practical considerations involved in extracting electronically-stored information without imposing a “one size fits all” prescriptive time limit. *See United States v. Kernell*, No. 3:08-cr-142, 2010 WL 1491873, at *14 (E.D. Tenn. March 31, 2010) (quoting FED. R. CRIM. P. 41(e)(2)(B), Committee Comments to the 2009 Amendments).

Given that the cell phone itself was properly seized as contraband, it is questionable whether the FBI was required to obtain a warrant before extracting its stored contents. Regardless, it is undisputed that the delay in accessing the cell phone’s contents was directly attributable to precautions taken by Agent Baker and his colleague

in Milwaukee, who determined that further forensic analysis was necessary to recover the stored data. Huart does not show that the delay was unreasonable or that the search violated Fed. R. Crim. P. 41(e)(2)(B). *See United States v. Gregoire*, 638 F.3d 962, 967-68 (8th Cir. 2011) (holding that a one-year delay from seizure to subsequent search of a laptop computer did not violate Rule 41 or the Fourth Amendment).

For reasons articulated persuasively in the report and recommendation (dkt. # 37, at 11-15) Huart likewise does not demonstrate that any failure to comply with the search warrant was so flagrant or egregious as to require suppression. *See United States v. Brewer*, 588 F.3d 1165, 1172 (8th Cir. 2009) (reasoning that forensic analysis of a seized computer beyond the ten-day time limit was permissible because there was no indication that probable cause had dissipated or that the warrant had become stale) (citing *United States v. Syphers*, 426 F.3d 461, 468-69 (1st Cir. 2005)). Accordingly, the court will adopt the magistrate judge's report and recommendation and deny Huart's motion to suppress the evidence recovered from his cellphone.

ORDER

IT IS ORDERED that the Report and Recommendation (dkt. # 37) is ADOPTED and defendant's Motion to Suppress (dkt. # 18) is DENIED.

Entered this 26th day of February, 2013.

BY THE COURT:
/s/
WILLIAM M. CONLEY
District Judge