

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

JESSE D. FEATHERLY,

Defendant.

OPINION AND ORDER

14-cr-127-bbc

Defendant Jesse D. Featherly has been charged with receiving and possessing child pornography. He contends that the charges are based on evidence gathered pursuant to an invalid warrant, arguing that it would not have issued but for the false information it contained. He wants the court to quash the warrant.

Magistrate Judge Stephen Crocker held a hearing on the motion and issued a Report and Recommendation, dkt. #21, in which he recommended denial. Having reviewed the motion, the parties' briefs and the report, I am persuaded that the magistrate judge was right. Defendant failed to show either that the affidavit supporting the warrant included any intentionally false statements or material omissions or that it lacked probable cause to support the issuance of the warrant.

Defendant's objections to the report essentially track the argument he raised before the magistrate judge, which is that the supporting affidavit contained an intentionally false

statement, specifically, that a particular Charter modem was a computer and that this statement led the magistrate judge to believe that the affiant was referring to a uniquely identified device. He adds that once this had been shown, the magistrate judge should have stricken the statement from the affidavit and then determined whether the remainder was sufficient to support the issuance of the warrant. Because I agree with the magistrate judge that the affidavit contained no intentional false statement or material omission, I agree with his conclusions that he did not need to analyze the affidavit under Franks v. Delaware, 438 U.S. 154 (1978), and that the affidavit was sufficient to support the issuance of a warrant.

The affidavit set out the facts that (1) an FBI agent working in Oklahoma had downloaded child pornography from a user known to the agent as “anon_be90ff@Ares;” in the process the agent had been able to determine the IP address of the computer used by “anon_be90ff@Ares,” which was IP 68.190.144.255 (hereafter IP 255). (2) Other agents sent an administrative subpoena to Charter Communications, which elicited the subscriber information for the IP 255 address on the date and at the time the child pornography files were unloaded, as well as the residence at which Charter’s modem was located and the specific customer attached to the IP address. Hrg. trans., dkt. #16, at 15. (3) Agents checked the physical location of the sender, using the address they had obtained from Charter, saw a vehicle parked there and obtained information from the Wisconsin Department of Motor Vehicles that the owner was the same person identified by Charter as its customer.

FBI agent Forrest Wilkins prepared an affidavit setting out what he believed was

probable cause for the issuance of the warrant. In doing so, he made an error in entering the time that the agent's download of pornography ended on May 6, 2014. Defendant jumped on this error when he first challenged the warrant, but has withdrawn it in his appeal from the report and recommendation. In fact, the Charter records of the time of the downloads corresponded with the time recorded by the agent in Oklahoma. It is true that both defendant and a user in another city connected to the same Charter modem on May 6, 2014, but they did so at different times.

Defendant now rests his claim of a false statement on the affiant's averment in his affidavit that a certain IP address was associated with a particular *computer*. This might qualify as a mistake, because the address was actually the address of Charter Communications' *modem* and, in defendant's view, could not have been a unique identifier for a particular laptop. However, Wilkins explained at the hearing how the FBI had learned that the Charter modem had been accessed by an IP address assigned to an account registered to defendant.

Wilkins's explanation is not good enough for defendant. He finds it a leap—and an improper one—for the agents to have reasoned from the fact that the Charter modem was associated with an account that pornography would be found on the computer of the Charter subscriber to whom the 255 IP address was assigned during a session between an FBI agent and the person using an “anon_be90ff@Ares” address. According to defendant, because a modem is not a computer, but a device that has two sides, one to receive input from the Internet services provider and the other to distribute the input to the devices in the

residence, and can be connected to any device anywhere, it was false for Wilkins to represent that it was a computer connected to defendant's residence. His representation gave the impression that the modem was a fixed device that serviced only one residence, when it could have been connected to any device anywhere. This may well be true, but it is irrelevant, because Charter has the capability to determine exactly when the modem is serving any particular customer and the identity of that customer (or at least the persons in the residence). If it was error to refer to the modem as a computer, it was not one that requires quashing the warrant. As the magistrate judge pointed out, Wilkins had no reason to use the wrong term for the modem because the erroneous attribution did nothing to bolster the probable cause showing. R & R, dkt. #21, at 13.

Because defendant has not shown that the agents made any affirmative false statements, there is no reason to take up defendant's contentions that the magistrate judge erred in his application of the Franks standard or in not evaluating the remainder of the affidavit without the so-called false statement.

In the end, I am puzzled over counsel's pursuit of this motion. Although there may have been a reason to question the warrant before the mistake in the times of the download was corrected, continuing with it seems an odd use of finite resources. Counsel quoted Cervantes in his initial brief, dkt. #18, at 7, about mistaking the road for the inn. Continuing in that vein, one might ask why he persisted in tilting at this windmill.

ORDER

IT IS ORDERED that the report and recommendation entered by United States Magistrate Judge Stephen L. Crocker on June 22, 2015, dkt.#21, is ADOPTED as the court's own; defendant Jesse D. Featherly's motion to quash the warrant issued on July 16, 2014 and suppress the evidence obtained during the execution of the search warrant is DENIED.

Entered this 20th day of July, 2015.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge