

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

MEMORANDUM AND ORDER

DUANE DOAN,

05-CR-179-S

Defendant.

Defendant Duane Doan pled guilty to possessing images of minors engaged in sexually explicit conduct on his computer. Defendant moves to suppress physical evidence because the search warrant was invalid and to suppress his statements because they were derived from the allegedly unconstitutional search and seizure.

On March 13, 2006 the Honorable Stephen L. Crocker, United States Magistrate Judge, recommended that the Court deny defendant's motion to suppress evidence.

On March 27, 2006 defendant objected to the recommendation to deny his motion to suppress evidence and to the Magistrate Judge's denial of a Franks hearing. Pursuant to 28 U.S.C. § 636(b)(1)(C), this Court reviews the report and recommendation and finds as follows.

FACTS

In his affidavit Agent Sutherland states that on April 7, 2003, defendant used his e-mail account to visit www.lust-gallery.com and

www.veiled.pages.com. Doan provided his personal credit card information to buy time at these websites. (The agents had to pay \$49.95 to obtain access to "lust-gallery" and \$57.90 for a subscription to "veiledpages"). As Agent Sutherland described in ¶¶ 44-48 of his affidavit, the "lust-gallery" and "veiled pages" websites contained actual images of child pornography and touted themselves as such, quoting a sales pitch from one site:

Expect all the things RedLagoon Studio is famous for: leg spreads and close ups, shots from behind and some peeing shots. We also manage to improve picture quality significantly. All the models are 14 and younger and never shown at our sites before . . .

Sutherland Affidavit at ¶ 47.

Agent Sutherland includes in his affidavit the following handwritten note: "In my professional career I have discovered sexually explicit child pornography that has been aged more than eighteen months."

MEMORANDUM

Defendant objects to the Magistrate Judge's denial of a Franks hearing and the motion to suppress. Defendant contends that he is entitled to a hearing under Franks v. Delaware, 438 U.S. 154 (1978).

To be entitled to such a hearing defendant must demonstrate that the affidavit contains false statements made knowingly and intentionally or with reckless disregard of the truth or has omitted facts which, if included, would have precluded a finding of

probable cause. See United States v. Morrow, 272 F.3d 817, 821 (7th Cir. 2001). Where the material that is allegedly false is set aside and there remains sufficient content in the warrant affidavit to support a finding of probable cause, no Franks hearing is required. See United States v. Souffront, 338 F.3d 809, 822 (7th Cir. 2003).

Defendant argues that the agent should have known that his statement that internet files could be retained 18 months was false. Defendant has not submitted any evidence, however, that shows that the agent's statement if false was made knowingly and intentionally or with reckless disregard of the truth. Accordingly, the defendant is not entitled to a Franks hearing and the Magistrate Judge's denial of the hearing will be affirmed.

Defendant argues that the warrant was insufficient on its face and did not support probable cause. A court that is asked to issue a search warrant must determine if probable cause exists by making a practical, common-sense decision whether given all the circumstances there exists a fair probability that contraband or evidence of a crime will be found in a certain place. United States v. Walker, 237 F.3d 845, 850 (7th Cir. 2001).

Defendant argues that there could have been an innocent explanation for defendant's visiting the websites and the information was 17 months old. A reasonable inference could be drawn from the agent's affidavit, however, that a subscriber who pays to join a site geared explicitly and exclusively to child

pornography would attempt to get his money's worth by downloading some images. See United States v. Martin, 426 F.3d 68, 75, reh. en banc den'd, 431 F.3d 73(2nd Cir. 2005).

The affidavit on its face is sufficient support the conclusion that there was a fair probability that contraband or evidence of a crime would be found in defendant's residence even though 17 months had passed since defendant had visited the website.

This warrant, even if issued improperly, would be rescued by the safety net of the good faith doctrine established in United States v. Leon, 468 U.S. 897 (1984). In this case the warrant application was not so lacking of indicia of probable cause as to render reliance on the warrant issued by the Court unreasonable. Id. at p. 921.

Defendant was not entitled to a Franks hearing and there was probable cause to search his residence. Accordingly, the Court will adopt the Magistrate Judge's recommendation to deny defendant's motion to suppress evidence because the search was lawful.

ORDER

IT IS ORDERED that the recommendation of the Magistrate Judge to deny defendant's motion to suppress evidence is ADOPTED.

IT IS FURTHER ORDERED that defendant's motion to suppress evidence is DENIED.

Entered this 30th day of March, 2006.

BY THE COURT:

S/_____
JOHN C. SHABAZ
District Judge