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

UNITED STATES OF AMERICA,

Plaintiff,

v.

REPORT AND RECOMMENDATION

GARY R. DAUSEY,

06-CR-178-S

Defendant.

REPORT

The grand jury has charged defendant Gary R. Dausey with possession of child pornography. *See* dkt. 2. Before the court for report and recommendation is Dausey's motion to suppress the physical evidence seized from his house based on his claim that the government has not proved that his consent to search was voluntary. *See* dkt. 7. Because the government has met its burden of proof, I am recommending that this court deny the motion to suppress.

Dausey did not request an evidentiary hearing on his motion, content to rely on the FBI 302 and the handwritten consent forms. These are the material facts:

On December 9, 2005, FBI Special Agents James D. Hopp and Andrew M. John visited defendant Gary R. Dausey at his home in Tomah Wisconsin because they suspected that he might possess child pornography. The agents identified themselves to Dausey and told him the reason for the interview. Dausey agreed to talk to the agents.

Dausey told them that he was a registered sexual offender in the state of Wisconsin. Dausey did not recall ordering anything from a website advertising child pornography but a few

weeks previously he had downloaded onto his computer a free movie clip and some pictures of child pornography. Dausey admitted that he regularly received e-mail advertisements from child pornography sites, regularly downloaded their free pictures and movies, and visited child pornography websites almost every day or every other day. Dausey told the agents that he possessed about 300 floppy disks that might possibly have some form of child pornography on them. Dausey expressed his willingness to cooperate with the agents.

The agents hand-wrote a consent to search and a consent to seize form for Dausey's signature, then told him he was not obliged to sign them. Dausey signed both.

The first consent form reads:

> I, Gary Dausey, having been advised of my constitutional right to not have my computer & media searched without a warrant authorizing such a search, hereby consent to the . . . FBI searching all files on the computer, 318 floppy discs & 3 CDs which I turned over to the FBI on 12/09/2005, the computer having serial # 2010109668.

Dkt. 10, Exh. 2.

The second consent form reads:

> I Gary Richard Dausey am turning over the following items voluntarily to SA. James Hopp and SA. Andrew John of the FBI
>
> - 318 3.5" floppy disk's
> - 3 CD's (start-up disc's)
> - K-Mart model # LG6178BC/serial # 2010109668
>
> Computer hard drive

Dkt. 10, Exh. 3

Dausey signed and dated both hand-written forms and an agent countersigned them.

ANALYSIS

Dausey's challenges to the seizure and subsequent search of his computer, floppies and CDs are that they were not seized pursuant to a warrant and his consent is commemorated on handwritten forms rather than

> a formal, non-holographic printed form which explicitly states on its face the particulars concerning that which is being consensually surrendered and under what authority and potential costs to the defendant.

Brief in Support, dkt. 10, at 2.

The Fourth Amendment provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .." A search conducted without a warrant is presumptively unreasonable except in a few delineated situations, such as consent. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973); *Katz v. United States*, 389 U.S. 347, 357 (1967). Consent to search may be limited by the property owner, *United States v. Breit*, 429 F.3d 725, 729-30 (7th Cir. 2005); to determine whether a search exceeded the scope of defendant's consent, courts ask how a reasonable person would have understood the conversation between the law enforcement officer and the criminal suspect. *Id.*; *see also Florida v. Jimeno*, 500 U.S. 248, 251 (1991).

When the government claims that consent as the justification for the search and seizure, it is the government's burden to prove that the consent was voluntarily given. The test for voluntariness is whether, given all the circumstances, the defendant's consent was the product

of a free will and not the product of duress or coercion. *Schneckloth*, 412 U.S. at 227. Factors to consider are:

> (1) the person's age, intelligence and education; (2) whether he was advised of his constitutional rights; (3) how long he was detained before he gave his consent; (4) whether his consent was immediate, or was prompted by repeated requests by the authorities; (5) whether any physical coercion was used; and (6) whether the individual was in police custody when he gave his consent.

United States v. Villegas, 388 F.3d 317, 325 (7th Cir. 2004), quoting *United States v. Raibley*, 243 F.3d 1069, 1075-76 (7th Cir. 2001).

Obviously there was no search warrant here, but equally obviously, there was consent to search. Although Dausey's challenge to the content of the handwritten consent forms suggests that he is alleging that his consent was unknowing and therefore involuntary, he has not supported this suggestion with his affidavit, nor did he request an evidentiary hearing. The record available to this court sufficiently establishes that the agents told Dausey what they were looking for and apprised him of his right to refuse consent. It is logical to conclude that Dausey, as a registered sex offender, was more aware than most people of the adverse consequences he would face if he were found in possession of child pornography. In sum, I conclude that Dausey's voluntarily consented to the agents seizing his property and searching it.

This leaves what appears to be Dausey's main challenge, the agents' resort to handwritten consent forms rather than preprinted forms. This is a nonstarter. Other than its effect, if any, on the voluntariness determination, the format of a person's consent is irrelevant. Verbal consent to search is sufficient. *United States v. Strache*, 202 F.3d 980, 985 (7th cir. 2000)(when police ask if they may "take a look" in defendant's bedroom, response of "go ahead" can

establish valid consent). Even implicit consent, inferred from the totality of circumstances, is sufficient to render a search reasonable. *United States v. Wesela*, 223 F.3d 656, 661 (7th Cir. 2000); *United States v. Cotnam*, 88 F.3d 487, 495 (7th Cir. 1996). *See also United States v. Martino*, 664 F.2d 860, 875 (2nd Cir. 1981)(agents hand-wrote a consent to search form that defendant signed, then lost the form; consent still voluntary under totality of circumstances); *United States v. Andrade*, 925 F.Supp. 71, 82 (D. Mass. 1996)(document hand-written by defendant appearing to acknowledge consent to search is "powerful evidence of consent freely given").

Agents Hopp and John, in a commendable abundance of caution, obtained written commemoration of Dausey's consent. Other than deducting style points for the agents' failure to have brought blank preprinted consent forms, there is nothing for this court to do. Dausey suffered no deprivation of his Fourth Amendment rights. He is not entitled to suppression of any evidence.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend this court deny defendant Gary Dausey's motion to suppress physical evidence.

Entered this 9th day of February, 2007.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN
120 N. Henry Street, Rm. 540
Post Office Box 591
Madison, Wisconsin 53701

Chambers of
STEPHEN L. CROCKER
U.S. Magistrate Judge

Telephone
(608) 264-5153

February, 2007

Elizabeth Altman
Assistant United States Attorney
P.O. Box 1585
Madison, WI 53701-1585

Dennis J. Ryan
Ryan Law Office
6701 Seybold Road, Ste. 103
Madison, WI 53719

Re: United States v. Gary Dausey
Case No. 06-CR-178-S

Dear Counsel:

The attached Report and Recommendation has been filed with the court by the United States Magistrate Judge.

The court will delay consideration of the Report in order to give the parties an opportunity to comment on the magistrate judge's recommendations.

In accordance with the provisions set forth in the newly-updated memorandum of the Clerk of Court for this district which is also enclosed, objections to any portion of the report may be raised by either party on or before February 20, 2007, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by February 20, 2007, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,

Connie A. Korth

Secretary to Magistrate Judge Crocker

Enclosures

cc: Honorable John C. Shabaz, District Judge