

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

GREGORY BLUM,

Defendant.

REPORT AND
RECOMMENDATION

07-CR-27-S

REPORT

The grand jury has charged defendant Gregory Blum with producing child pornography in violation of 18 U.S.C. § 2251(a). Blum has moved to suppress the government's evidence on the ground that the search warrant improperly relied on stale evidence, and has moved to dismiss the charges on the ground that the use of §2251(a) in his case violates the Commerce Clause. *See* dkts. 9 & 10. For the reasons stated below I am recommending that this court deny both motions.

I. The Search Warrant

On October 23, 2006, state officers executed a search warrant of a semitrailer in which was stored defendant Gregory Blum's laptop computer. A search of the computer revealed alleged contraband and led to an interview of Blum. As a result of this evidence, state agents obtained a second search warrant on October 24, 2006 which led to additional evidence, including more statements by Blum. Blum contends that the evidence supporting the first search was stale, which invalidates the first warrant; as a result, argues Blum, all evidence derived from

that warrant, including his statements, the October 24, 2006 warrant and the statements resulting from *that* search, must be suppressed. *See* dkt. 9.

Blum acknowledges that his motion to suppress hinges on the staleness of the information contained in Agent Price's affidavit dated October 22, 2006. *See* brief in support, dkt. 22, at 1. Blum concedes that Seventh Circuit law, never favorable to his position, now virtually forecloses his arguments:

Blum is aware that *United States v. Watzman*, ___ F.3d ___ 2007 WL 1425615 (7th Cir., May 16, 2007), decided within the last month, virtually insulates from review "expert" opinions of affiants, like those rendered by Price, concerning the length of time that pornography consumers retain their pornography collections.

Brief in support, dkt. 22, at 2.

Blum nonetheless wishes to preserve the issue for appeal. *Id.* Duly noted. For the sake of completeness, I note that Agent Price's October 22, 2006 affidavit is attached to Blum's motion to suppress, dkt. 9. Agent Price is a special agent with the Wisconsin Department of Justice, Department of Criminal Investigation, assigned to the Wisconsin Internet Crimes Against Children Task Force. Agent Price's affidavit contains about 15 pages of small-font, single-spaced probable cause narration, most of which is boilerplate explaining Price's training and experience in the field of child pornography. Among other things, Agent Price opined that time is virtually irrelevant to a child pornography collector's possession of contraband images. Price provided several specific examples to back up her opinion, including the recovery of contraband images years after the police last received information linking the suspect to child pornography. *See* Affidavit at 6-7.

Agent Price then outlined the background of “Operation Falcon” which investigated suspected child pornography collectors on the Internet. This investigation revealed that defendant Gregory Blum had purchased a one-month membership to a child pornography website on May 3, 2002. *Id.* at 11. Agent Price also reported that in November, 2004, other agents linked Blum to another set of child pornography websites. The implication was that Blum visited these sites in November 2004, although this is not completely clear from the affidavit. *Id.* at 14. Finally, Agent Price reported that she received 12 “Cybertips” from the National Center for Missing and Exploited Children dated from July 2005 through April 2006 in which Blum was listed as the registrant/owner for two specified websites on which images of child pornography were located. *Id.* at 14-15. In her summary, Agent Price opined that notwithstanding the age of some of the information regarding Blum, Blum still would be in possession of child pornography. *Id.* at 17. The state court issued the requested warrant, which led to the discovery and seizure of the contraband Blum now wishes to suppress.

As Blum acknowledges, the Seventh Circuit’s recent opinion in *United States v. Watzman* dooms his motion. In *Watzman*, the court upheld a search warrant for child pornography against challenges similar to those made by Blum. The appellate court held that when reviewing a warrant application, a court was entitled to rely on the affiant’s expertise to conclude that there was a fair probability that child pornography would be found at the specified location. 2007 WL 145615 at *3. The court brushed aside the defendant’s staleness challenge because child pornography warrants present a different standard for staleness than other cases; therefore, if

the affiant offered an expert opinion that people who view child pornography typically maintain their collections for many years, then the court was entitled to rely on this. *See Id.*

Watzman controls the instant analysis. Although the most damaging evidence against Blum was 4 ½ years old, some of the tips related to his websites were as recent as five months prior to Agent Price's warrant request. In light of Agent Price's adequately-founded expert opinion, corroborated by specific examples in her affidavit, the issuing court did not err by finding probable cause to support the challenged warrant. As Blum concedes, there is no basis to suppress the evidence in this case.

II. The Statute

Blum claims that the charging statute, 18 U.S.C. § 2251(a) is unconstitutional as applied to him because his conduct did not implicate interstate commerce. *See* motion (dkt. 10) and brief in support (dkt. 23). A narrative overview of the conduct charged against Blum may be found in Agent Price's March 1, 2007 affidavit in support of the criminal complaint issued by this court. *See* dkt. 1 at 2-4. Essentially, Blum is alleged to have recorded on a Panasonic miniDV two sexual assaults in July, 2006 of a girl who probably was less than four years old.¹ The assaults all took place in Wisconsin and there is no evidence that Blum's videotape of his assaults ever left the state. According to Blum, under the retrenchment of Commerce Clause prosecutions mandated by *United States v. Lopez*, 514 U.S. 549 (1995), this conduct does not fall

¹ Blum confessed to sexual contact with three girls in that age range and can only speculate as to which one appears on the videotape.

within any of the three broad categories of activity that Congress may regulate under its commerce power.

Blum acknowledges that the Seventh Circuit demonstrated its lack of sympathy toward his position when it upheld a similar statute, 18 U.S.C. 2252(a), which prohibits *possessing* child pornography (as opposed to *producing* child pornography). *See United States v. Angle*, 234 F.3d 326 (7th Cir. 2000), *cert. denied*, 533 U.S. 932 (2001). A panel of judges not normally associated with the Chicago school relied on market theory to surmise that Congress wished to prohibit possession of “homegrown” child pornography to reduce the interstate demand. *Id.* at 337-38.²

Rather than put the brakes on this train of thought, the Supreme Court turbocharged it in *Gonzales v. Raich*, 545 U.S. 1 (2005). In *Raich*, the Court used market theory to hold that the Federal Controlled Substances Act could be used to prohibit the intrastate growth and possession of marijuana for medical purposes without violating the Commerce Clause. *Id.* at 18-22, and 32-33.

Blum argues that the analysis in *Raich*, a drug case, is not applicable to child pornography jurisprudence. Reply Brief, dkt. 26, at 1-3. The Supreme Court views *Raich*’s reach more broadly, citing it as grounds to vacate and remand for reconsideration the Eleventh Circuit’s decision that 18 U.S.C. 2251(a) did not survive Commerce Clause scrutiny. *See United States v. Smith*, 545 U.S. 1125 (2006). On remand, the Eleventh Circuit held that § 2251(a) *could* be used to prosecute the defendant for recording his sexual activities with a 14- year old girl on photographs printed on Kodak paper from outside the state. *United States v. Smith*, 459 F.3d

² Coffey, Evans and Williams, JJ.

1276 (11th Cir. 2006), *cert. denied*, ___ U.S. ___, 127 S.Ct. 990 (2007). Indeed, in light of *Raich*, the court “rather easily concluded” that the application of §2251(a) to the defendant’s intrastate production of child pornography was within Congress’s constitutional authority. *Id.* at 1284-85.

Other circuit courts agree. *See, e.g., United States v. Jeronimo-Bautista*, 425 F.3d 1266, 1269-73 (10th Cir. 2005) (§2251(a) could be used to prosecute three men for sexually assaulting a 13-year old girl and recording their assault on a camera manufactured in another state); *United States v. Morales-de Jesus*, 372 F.3d 6, 17-18 (1st Cir. 2004)(§ 2251(a) could be used to prosecute defendant for recording sexual assault of a 13-year old girl on equipment that had moved in interstate commerce); *United States v. Holston*, 343 F.3d 83, 90-91 (2nd Cir. 2003) (§2251(a) could be used to prosecute videos of child pornography defendant had produced on a video recorder and cassettes manufactured overseas); and *United States v. Hampton*, 260 F.3d 832, 833-34 (8th Cir. 2001) (§ 2251(a) could be used to prosecute defendant for videotaping his sexual assault of a 4-year old girl where videotapes were manufactured outside Missouri).

In short, there no longer is any serious debate in the federal courts that Congress may criminalize homegrown child pornography produced using equipment from another state. Section 2251(a) does not violate the Commerce Clause in general, nor as applied to Blum in this prosecution. The court should not dismiss the charges.

RECOMMENDATION

Pursuant to 28 U.S.C. §636(b)(1)(B) and for the reasons stated above, I recommend that this court deny defendant Gregory Blum's motion to quash the warrant and deny his motion to dismiss the indictment.

Entered this 14th day of June, 2007.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

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June 14, 2007

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Re: United States v. Gregory Blum
Case No. 07-CR-027-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 June 25, 2007, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by June 25, 2007, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,

/s/

Connie A. Korth
Secretary to Magistrate Judge Crocker

Enclosures

cc: Honorable John C. Shabaz, District Judge