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

UNITED STATES OF AMERICA

Plaintiff,

v.

MARK SCOTT,

Defendant.

OPINION & ORDER

15-cr-131-jdp

Defendant Mark Scott has been charged with 14 counts of sexual exploitation of children, in violation of 18 U.S.C. § 2251(a), and one count of possession of child pornography, in violation of 18 U.S.C. § 2252(a)(4)(B) and (b)(2). These charges stem from photographs and videos found during a search of Scott's home. Scott has moved to suppress the fruits of the search on the grounds that the application for the warrant did not establish probable cause to search his residence. Dkt. 11.

Scott was arrested a hundred miles from his home, while waiting in his car to meet "Kyle," a 14-year-old boy, for sex. Or so Scott thought. It turns out that Kyle was the fictitious creation of law enforcement officers, who charged Scott with several crimes under state law. The officers applied for and obtained a warrant to search Scott's residence. During the search, officers found the digital photographs and videos that are the basis for the federal child pornography charges in this case.

Scott concedes that the circumstances of his arrest gave law enforcement officers probable cause to search his car and his phone for evidence related to child enticement. But he contends that the application for the warrant did not establish any nexus between the suspected crime and Scott's residence. For reasons explained in this opinion and order, the

court concludes that the warrant application established a sufficient nexus. Scott's motion to suppress will therefore be denied.

BACKGROUND FACTS

The following factual summary is drawn from the affidavit in support of the application for a warrant to search Scott's residence. Dkt. 11-1.

Special Agents Jonathan Meyer and David Kleinhans worked for the Wisconsin Department of Justice, Division of Criminal Investigation, investigating internet crimes against children. In December 2014, SA Meyer forwarded to SA Kleinhans a Craigslist ad seeking an m4m (male for male) sexual encounter with a young man. SA Meyer indicated that the ad seemed similar to one that he had investigated using an undercover profile of a 14-year-old boy. The ad read:

> Looking for a young top to come fill me, have you ever wanted to do it to a father figure? or maybe a teacher in school, or your friends dad? Lets do some rollplay, whatever you want. I'm 6' 185, vers, like to bottom, ddf, 420 ok, std-, aids-, clean, discreet, can host/travel. Looking for a young guy under 25, shaved/smooth +, ongoing possible. Send stats, pic, put your location in subject, lets get together and have some fun! I will host, lets do this!

Id. at 8. The ad was apparently placed by an adult male from Polk County, Wisconsin, using the email address marker6969@yahoo.com.

SA Kleinhans responded to the ad using the fictional persona of a 14-year-old boy named "Kyle," who purported to live in Fall Creek, Wisconsin. Kyle and the adult male exchanged email messages from December 15 to December 28. Many of the messages from the adult male were sexually explicit. The adult male also sent Kyle two sexually explicit photographs of an adult male, and he asked for sexually provocative photographs of Kyle in

return. The adult male proposed to get a room in Fall Creek, where he and Kyle could have sex. The adult male arranged to meet Kyle at a determined time in a park in Fall Creek, where he would be waiting in a maroon Ford.

At the determined time and place, officers from the Wisconsin Department of Justice, Division of Criminal Investigation, found Scott sitting in a maroon 1989 Mercury Grand Marquis and arrested him. From Wisconsin DOT records, the officers learned that the vehicle was registered to Mark R. Scott, at 317 Central Avenue, Centuria, Wisconsin.

Scott admitted to the officers that he had posted Craigslist ads seeking sexual encounters, and he said that he had travelled to Fall Creek to meet a boy named "Anderson," whose first name he did not recall. Scott said that he had been talking to Anderson on the computer and that Anderson had said that he was 14 years old, although Scott said that he did not believe that Anderson was in fact 14. Scott acknowledged his address in Centuria. The interview terminated when Scott invoked his right to an attorney. Scott was held in the Eau Clair County jail on three recommended state-law charges: Use of a Computer to Facilitate a Child Sex Crime; Child Enticement; and Attempted Second Degree Sexual Assault of a Child.

SA Meyer confirmed Scott's residence and acquired photographs of the property. SA Meyer prepared a warrant for Craigslist records related to SA Meyer's past communication with the marker6969@yahoo.com email address, which included the associated telephone number (651) 500-9556, and an additional email address rods999999@yahoo.com. Eau Claire County Circuit Court Judge Kristina Bourget issued the warrant. Craigslist responded to the warrant with records showing that 45 postings had been submitted from rods999999@yahoo.com between January 27, 2013, and August 23, 2014. Records also

showed that Craigslist had received 62 postings from marker69@yahoo.com between August 25, 2014, and December 18, 2014. Most of these 107 postings were placed in the m4m personals section; all included similar sexually explicit themes.

SA Kleinhans then prepared an application for a warrant to search Scott's residence. The supporting affidavit included the information summarized above, as well as information about SA Kleinhans's training and experience, and general information about the search for and collection of digital evidence. The affidavit also recited SA Meyer and SA Kleinhans's opinion that those with an interest in child sexual exploitation tended to retain any images or videos of such activity on their computers or other digital devices, and that, accordingly, evidence relating to child sexual exploitation was commonly found in a suspect's private places or residence. *Id.* at 15-16. The paragraph concluded by stating that the facts suggested to SA Kleinhans that Scott had used a computerized communication system to communicate with a child with the intent to have sexual contact or intercourse with the child at Scott's residence.

The application sought a warrant to search, essentially, Scott's residence and everything in it for evidence of the three state crimes of which Scott was suspected. The evidence to be searched for and seized included "[i]mages, photographs, videotapes or other recordings or visual depictions representing the possible exploitation, sexual assault and/or enticement of children." *Id.* at 2. Eau Claire County Circuit Court Judge Michael A. Schumacher issued the warrant.

The United States indicted Scott in this court on November 4, 2015. Dkt. 2. Scott has now moved to suppress the evidence that state law enforcement officers seized pursuant to the search warrant. Dkt. 11.

ANALYSIS

Scott contends that the application for the warrant did not establish probable cause to search his residence because SA Kleinhans's affidavit did not establish a nexus between the suspected state-law crimes and his residence.

The essential legal principles are not disputed. "When an affidavit is the only evidence presented to a judge in support of a search warrant, the validity of the warrant rests solely on the strength of the affidavit." *United States v. Peck*, 317 F.3d 754, 755 (7th Cir. 2003). Probable cause to support the warrant is established when, "based on the totality of the circumstances, the affidavit sets forth sufficient evidence to induce a reasonably prudent person to believe that a search will uncover evidence of a crime." *Id.* The reviewing court will accord deference to the issuing judge, upholding the finding of probable cause "so long as the issuing judge had a substantial basis to conclude that the search was reasonably likely to uncover evidence of wrongdoing." *United States v. Reichling*, 781 F.3d 883, 886 (7th Cir.), *cert. denied*, 136 S. Ct. 174 (2015). "Probable cause is far short of certainty—it requires only a probability or substantial chance of criminal activity, not an actual showing of such activity, and not a probability that exceeds 50 percent (more likely than not), either." *Id*. at 887 (internal citations and quotation marks omitted).

An affidavit must establish a nexus between the suspected crime and the location to be searched. *United States v. Wiley*, 475 F.3d 908, 916 (7th Cir. 2007). And the mere fact that a suspect resides somewhere does not automatically create a sufficient nexus between the suspected crime and that location. *Id*. Here, Scott contends that "[t]he affidavit contains no allegation (not one) establishing a link between Scott's attempt to meet the 14 year-old and the place to be searched—his residence." Dkt. 11, at 1. Scott is correct that the enticement

could have been accomplished entirely with a smartphone, without leaving any evidence at Scott's residence. But that conceptual possibility did not defeat probable cause, which "does not require direct evidence linking a crime to a particular place." *United States v. Anderson*, 450 F.3d 294, 303 (7th Cir. 2006).

SA Kleinhans's affidavit, considered as a whole, provided facts that supported a reasonable inference that there was a fair probability that evidence related to child enticement would be found at Scott's residence. For example, the affidavit showed that, based on the evidence subpoenaed from Craigslist, Scott had placed 107 similar personal ads on Craigslist over a period of roughly two years. As Scott acknowledges, "involvement in ongoing criminal activity may go a long way in supplying probable cause to search a participant's residence for evidence relating to the unlawful conduct." *United States v. Watts*, 535 F.3d 650, 656 (7th Cir. 2008). The fact that Scott placed personal ads seeking sexual liaisons approximately once a week for two years raised an inference that there might have been evidence of this sustained activity at Scott's home. Sure, it was possible that Scott had done all of his posting and emailing from a smartphone. But the sheer extent of this effort suggested that Scott had done at least some of it from a computer. And, according to the affidavit, Scott himself told the officers that "he had been talking to Anderson on the computer." Dkt. 11-1, at 11.

Might Scott's computer have been somewhere other than his home? Again, that was a conceptual possibility. But the more reasonable inference was that Scott did at least some of his posting and emailing from home. The intimate nature of sexually explicit communications made it unlikely that Scott would have undertaken this activity at work or anywhere public. The issuing judge was not a "babe in the woods"; he could draw reasonable inferences from

the facts presented in the affidavit. *Reichling*, 781 F.3d at 887. A reasonable inference, based on the nature of the suspected crime, was that Scott used his home computer for some of his communications seeking liaisons.

This inference was supported by one of the sexually explicit photographs that Scott sent to Kyle, which, as described in the affidavit, showed a man lying on maroon bedspread. Dkt. 11-1, at 9. Scott argues that the bedspread might have been a sleeping bag, and that the photograph was taken away from home. But again, that possibility did not make it unreasonable to infer that the photograph was taken on a bedspread at home, and it lent more support to the conclusion that there was a fair probability that more such evidence would be found at Scott's home.

In sum, this is not like a drug-dealing case in which the officers went straight for the suspect's home on the mere assumption that there must have been evidence there. Based on the nature of the suspected crime (which involved intimate, sexually explicit communication with children), Scott's two-year history of Craigslist postings, and Scott's own description of his communications with Kyle/Anderson as being "on the computer," the issuing judge made the requisite "practical, common-sense decision about whether the evidence in the record show[ed] a fair probability that contraband or evidence of a crime [would] be found" at Scott's home. *United States v. Miller*, 673 F.3d 688, 692 (7th Cir. 2012).

Despite these facts, Scott contends that certain features of the affidavit undermined its validity. Specifically, Scott argues that "boilerplate" in the affidavit was cut-and-pasted from an earlier affidavit that SA Meyer had used in a child pornography case. Scott argues that the child pornography boilerplate was not merely irrelevant, but clearly showed that the

agents failed to conduct a sufficient investigation before seeking a warrant to search Scott's residence. The court is not persuaded by the "boilerplate" argument for several reasons.

First, the lack of an IP address did not undermine the affidavit. Scott is correct that the agents did not identify the IP address connected to the Craigslist postings. In some internet crime investigations, investigating officers start with an IP address (often because it is all that they have) and trace it back to a physical location by subpoenaing the internet service provider and determining the physical location based on account information that the provider discloses. But the agents in this case already had Scott's physical address from his vehicle registration information. The IP address might have confirmed the physical location of the computer used to make the Craigslist postings, but the agents were not obligated to take the time to track down all the confirming information that they could gather before applying for the warrant.

Second, the affidavit was not inappropriately targeted to child pornography. Scott argues that he was not legitimately suspected of possessing child pornography, but that the affidavit nevertheless included information justifying a search for child pornography, particularly in paragraph 23. *See* Dkt.11-1, at 15-16. Scott is correct that the application for the search warrant included language that was likely modelled after previous applications, such as the one that SA Meyer used in a child pornography case.[1] And the warrant included an unnecessary reference to IP addresses, which were non-existent in the supporting affidavit. But Scott has not established that the application for the warrant was so recklessly prepared

[1] Scott's use of this other affidavit is questionable. As Scott points out, the court limits its review of the warrant's validity to the four corners of the supporting affidavit. Dkt. 11, at 1-2; *United States v. Koerth*, 312 F.3d 862, 866 (7th Cir. 2002). But the government does not object to Scott's argument, so the court will consider it.

as to undermine its validity. Nor is the court persuaded that the references to "child sexual exploitation" reflected that the affidavit was inappropriately targeted to a baseless search for child pornography. Under the facts presented in the affidavit, the warrant appropriately targeted sexually explicit images and videos because Scott sent and solicited such images when he thought he was communicating with a 14-year-old boy. The affidavit appropriately included information, based on the training and experience of SA Meyer and SA Kleinhans, that individuals with a sexual interest in children retain such images and that they are typically found at the suspect's home. An issuing judge may rely on such statements of expertise concerning the tendencies of certain offenders in making the probable cause determination. *See United States v. Carroll*, 750 F.3d 700, 704 (7th Cir. 2014).

The court agrees with Scott's criticism of the last sentence of paragraph 23, which stated that the facts in the affidavit suggested that Scott communicated with a child with the intent to have sexual contact or intercourse with that child at Scott's residence. Contrary to the government's argument, Scott's proposal to "host" a sexual encounter was not a clear reference to his residence. The warrant would have been of questionable validity if it had turned on whether Scott intended to have sex with Kyle at his home, which would have seemed quite unlikely given that Kyle lived so far away. But the validity of the warrant did not turn on this point: the affidavit included ample facts from which the issuing judge could determine that there was a reasonable probability that evidence of a crime would be found at Scott's residence.

Because the warrant was supported by probable cause, the court will not reach the question of whether Scott's motion to suppress should be denied under the good-faith exception to the exclusionary rule. *Cf. United States v. Leon*, 468 U.S. 897, 922-23 (1984).

ORDER

IT IS ORDERED that defendant Mark Scott's motion to suppress, Dkt. 11, is DENIED.

Entered January 26, 2016.

BY THE COURT:

/s/

JAMES D. PETERSON
District Judge