

Statement of Facts

The application and affidavit for a search warrant pursuant to K.S.A. 22-2502 and Section 15 of the Bill of Rights of the Kansas Constitution was prepared by Detective Daryl Ludolph of the Topeka Police Department. The affidavit was presented to Judge Thomas Conklin on August 9, 2006. Detective Ludolph swore under oath to Judge Conklin that the facts and statements in the affidavit were true to the best of his knowledge and belief.

The affidavit contained information regarding an online chat that Virginia Delaney of U.S. Cyberwatch.com had with "mufasa1975." On July 24, 2006, Ms. Delaney posted a profile for "katie2_u2" stating that she was 13 years of age and including a photograph of a young girl who was actually 11 years old when the photo was taken. On August 3, 2006, a person with a screen name of "mufasa1975" contacted "katie2_u2" and began an online chat. The chat turned sexual and within a short period of time "mufasa1975" began soliciting "katie2_u2" to engage in sexual acts according to Detective Ludolph's affidavit. "Mufasa1975" sent a photograph of himself and also provided "katie2_u2" with his cellphone number, (785) [REDACTED]. A search of computer data bases of phone numbers revealed that the phone number belonged to a [REDACTED].

Detective Ludolph stated in the affidavit that "mufasa1975" asked to meet "katie2_u2" in order to engage in sexual acts and that they arranged to meet on August 9, 2006, at the address 7121 Wheatfield, Topeka, Shawnee County, Kansas.

Later a subject identified as [REDACTED] arrived at the residence in a black 2001 BMW 330i bearing the personalized tag, [REDACTED]. [REDACTED] made a statement that two

years earlier he had met a 14 year old girl on-line who lived at Montara and that they had met on two occasions and one of the times they had sex. In [REDACTED]'s possession was a cellphone with the number (785) 969-9529.

Based on the affidavit, Judge Conklin issued three separate search warrants; one for [REDACTED]'s residence of [REDACTED], Shawnee County, Kansas; one for a black 2001 BMW 330I four door, Kansas license tag [REDACTED]; and one for a Samsung cellular phone (785) [REDACTED].

Conclusions of Law

Issue I

The defendant contends that the affidavit did not establish probable cause to believe that "pornographic images" would be found in [REDACTED]'s residence, car, or phone.

The standard of review related to a search warrant is whether the magistrate had "substantial basis" for concluding that there was probable cause to issue a search warrant. *State v. Ruff*, 266 Kan. 27, 36, 969 P.2d 742 (1998). The magistrate (in this case Judge Conklin) should view the affidavit taking into account the totality of the circumstances.

The warrant authorizes searching the residence of [REDACTED] Kansas, for the following:

any computer, CPU, keyboard, external media, disk drives, CDs, photographs or photographic equipment, DVDs, vides (sic), or any types (sic) of computer devices used to operate store or any way assist in the processing of information, which could possibly contain pornographic images, including but not limited to:

The defendant argues that the affidavit did not even mention "pornography," neither adult pornography nor child pornography. The defendant is correct on this point. There was

no mention of child or adult pornography in the affidavit nor was there any assertion that there would be any type of pornography on the computers or other electronic equipment.

The defendant cites the case *State v. Lum*, 27 Kan. App. 2d 113, 115 (2000) where the Kansas Court of Appeals reviewed the following information in an affidavit in order to determine whether it supported probable cause to search for child pornography:

On Monday, January 13, 1997, Michael Lum contacted Scanners Escort Service, 3445 E. 47th Street South, Wichita, Kansas for the services of a woman who would engage in 'domination' activities with him. The service sent Karen Moore who arrived at 646 Prairie Lane, Salina, Kansas about 7:15 p.m. At this house she met a male who identified himself a [sic] Michael Lum. Once inside the house Lum took her to a room on the second floor where a personal computer was located. He turned the computer on and displayed to her a white female wearing a garter belt with black stockings. No other clothing was worn and Lum told her the female depicted in the photograph was 13 years old. The second set of photos displayed was a nude female around the age of 5 or 6 years old with dishwater blond hair sitting on a beach. The third set of photos depicted a blond female about 10 years old wearing bikini style clothing similar to those worn by exotic dancers. Lum also told her that he preferred sexual partners to be 12 years old and older.

Both the district court and the Court of Appeals found that the affidavit was insufficient. *Id.* at 118. In addition, the defendant cites *United States v. Weber*, 923 F. 2d 1338 (9th Cir. 1991) in which the Ninth Circuit reversed the district court's denial of a suppression motion. The affidavit in support of the search warrant contained the following information:

On August 12, 1985, almost two years prior to the date of the warrant, an unknown customs inspector seized a parcel addressed to "P. Weber" at the same address where the defendant resided on the day the warrant was requested. The parcel contained two pieces of advertising material, which the customs inspector concluded "apparently depict[ed] the sexual exploitation of children." Customs notified Weber of the seizure of the parcel via certified mail. Weber acknowledged receipt of the notice but did not attempt to claim the material.

Approximately 20 months later, on March 9, 1987, Customs sent Weber an undercover test advertisement containing the name and address of a purported distributor of sexually explicit materials in Canada. The purported distributor was, in fact, a fictitious creation of the United States and Canada Customs Services set up as part of a reverse "sting" operation. The advertisement contained a list of photographs for sale, including, among others, "Piccolo" and "Chicken." The ad said the pictures featured "boys and girls in sex action."

On April 6, 1987, Weber, having seen only the advertisement, and not the pictures themselves, placed an order for four sets of pictures (*Piccolo # 16, Piccolo # 31, Piccolo # 37, and Chicken # 11*). The pictures the government intended to send depicted minors displaying their genitals or engaging in various sexual acts such as fondling, masturbation, and oral and anal sex.

The Ninth Circuit held that while the affidavit established probable cause for the four picture sets, it did not establish probable cause to cease any other items seized, in this case magazines containing child pornography. The Court cited Professor LaFave's treatise for the principle that "probable cause to believe that some incriminating evidence will be present at a particular place does not necessarily mean there is probable cause to believe that there will be more of the same." *Id.* at 1344, citing 2 *LaFave, Search and Seizure* § 3.7(d), at 113 (2d ed. 1987).

In the present case, the link between what was stated in the affidavit and the request to search for pornographic images was even more remote than the connection between the affidavit and the requested items in the search warrants in *Lum* and *Weber*. Detective Ludolph makes no reference to child pornography in his affidavit nor does he assert any expert's opinion that individuals who engage in sexual solicitation of a minor will have pornography in their possession. This court finds that there was no probable cause to search

for pornographic images. The court grants the motion to suppress as to any pornographic images which were seized in the search of defendant [REDACTED]'s residence, automobile, or cellphone.

Issue II

Defendant alleges that the affidavit failed to establish a nexus between the evidence to be located and the place to be searched, *ie.* the residence at [REDACTED], Kansas. The defendant argues that the warrant application must show that the relevant evidence is likely to be located at the place to be searched. Detective Ludolph relates in his affidavit that [REDACTED] stated that he lived at [REDACTED], Topeka (sic), Shawnee County, Kansas.

Using the standard cited by the defendant in his brief from the case *State v. Barlett*, 14 Kan. App. 2d 237, 242, 787 P.2d 1211 (1990), this court finds that this affidavit satisfies the nexus element that a man of reasonable caution would believe that the articles sought would be located at the place searched, *ie.*, [REDACTED]'s residence. It is reasonable to assume that computers and other electronic items used by a subject would be found at the subject's residence.

Issue III

The defendant argues that the search warrant was impermissibly overbroad.

The search warrant for defendant's residence limits the search to "any computer, CPU, keyboard, external media, disk drives, photographs or photographic equipment, DVDs vides (sic), or any types (sic) of computer devices used to operate store or in any way assist in the processing of information, which could possibly contain pornographic images." This

court has already granted the motion to suppress as it applies to any pornographic images. Therefore, defendant's arguments regarding the vagueness or broadness of the phrase pornographic images is moot. The remainder of the search warrant consists of various computer or electronic devices used to operate, store or in any way assist in the processing of information. This court finds that the descriptions of those items are not overly broad.

The defendant also argues that the phrase "any other evidence that supports relations with minors" that is included in the search warrant of defendant's car is overly broad. The same phrase is not included in the search warrant for defendant's residence. While the defendant's argument could have been somewhat persuasive with regard to defendant's home, it is less persuasive when reviewing the search warrant of defendant's car. Counsel for defendant suggests that law enforcement officers would be required to conduct a general search and seize "anything that, in his judgment, might be evidence of sexual relations with minors. Depending on the officer, that could include notes from a girlfriend, a Playboy magazine, his Rolodex or phone number and address book, tissues found in a trash can, comic books, clothes and bed sheets," etc. While certainly such a search arguably might be exhaustive and invasive in one's residence, the smaller area of the interior of an automobile and the unlikelihood that many of those items would ordinarily be found in an automobile substantially narrows the search. Therefore this court finds that a search of defendant's vehicle to locate "any evidence to support sexual relationships with minors" is not overly broad.

Issue IV

The defendant further argues that the warrant did not authorize the search for or seizure of chat room dialogue, e-mails, or other text files.

The search warrants on the house, vehicle, and cellphone all authorize searches of “any computer, CPU, keyboard, external media, disk drives, photographs or photographic equipment, DVDs, vides (sic) or any type of computer devices used to operate store or in any way assist in the processing of information, which could possibly contain pornographic images.”

The language of the search warrants does not exclude text files. The language in the warrant which refers to “computer devices used to operate store or in any way assist in the processing of information” certainly includes text files such as chat room dialogue and e-mails. The language related to pornographic images in this court’s opinion does not limit the search to pornographic images. Instead the pornographic image language is an example of what could “possibly be found.”

Issue V

The defendant argues that the warrant had expired by the time that the computer hard drive was searched.

Pursuant to K.S.A. § 22-2506 a search warrant has to be executed within ninety-six hours after the issuance and any warrant not executed within such time frame is void. In this case, the warrants were executed within the ninety-six hour time frame. The warrants were issued on August 9, 2006, at 8:30 p.m. The search warrant on the residence was executed

on August 9, 2006, at 9:13 p.m. and the search warrant on defendant [REDACTED]'s vehicle was executed on August 10, 2006 at 10:30 a.m.

The issue, however, raised by the defendant is that the computer hard drive search was not completed within ninety-six hours of the issuance of the warrant. The state argues in response that execution of a warrant does not include all the forensic examinations of the evidence seized. For example, the state points out by analogy that analysis of hair, blood, saliva for DNA is not completed within ninety-six hours and neither is the analysis of drugs by the Kansas Bureau of Investigation. This court concurs with the state's argument that the deadline for execution of the warrant does not include within the time limit the complete forensics analysis of the evidence seized.

Issue VI

Defendant alleges that the police conducted an impermissible general search of the hard drive. The defendant argues that the court has a duty to control a search for evidence that may be intermingled with private papers of a suspect.

In a case which dealt with the wholesale seizure of a large volume of paper business records, the court outlines the procedure that should be followed. *United States v. Tamura*, 694 F. 2d 591 (9th Cir. 1982). The court suggested the procedure set out in American Law Institute's Model Code of Pre-Arrest Procedure (1975) in which documents are sealed and held pending approval by a magistrate for a further search. The 10th Circuit Court of Appeals adopted the *Tamura* procedure at least in part when a computer is seized and searched pursuant to a search warrant. *United States v. Carey*, 172 F. 3d 1268 (10th Cir. 1999); *United States v. Campos*, 221 F. 3d 1143 (10th Cir. 2000).

Thus, when officers come across relevant computer files intermingled with irrelevant computer files, they “may seal or hold” the computer pending “approval by the magistrate of the conditions and limitations on a further search” of the computer. *Carey*, 172 F. 3d at 1275. Officers must be clear as to what it is they are seeking on the computer and conduct the search in a way that avoids searching files of types not identified in the warrant. *Id.* at 1276.

United States v. Walser, 275 F. 3d 981, 986 (10th Cir. 2001).

The Kansas Supreme Court also has adopted the reasoning from *Carey* and its progeny in *State v. Rupnick*, 280 Kan. 720, 125 P.3d 541 (Kan. 2005). However, Kansas courts have not yet considered the remedy for a violation of this procedure.

In the present case, the exact procedure followed by officers is unknown to this court. While no additional authority has been sought by the officers, such authority is necessary only if there are intermingled files. No evidence has been presented to this court that the officers discovered intermingled files. Therefore, this court denies the motion to suppress on this issue.

Issue VII

The defendant withdrew Issue VII.

Issue VIII

The defendant alleges that the good faith exception does not apply to this case. The defendant’s argument is based on the alleged facial deficiency of the warrant regarding the lack of probable cause to support searching for pornographic images and the vagueness of the phrase “pornographic image.” The court has suppressed any evidence of pornographic images due to lack of probable cause and therefore that issue should not be the basis for

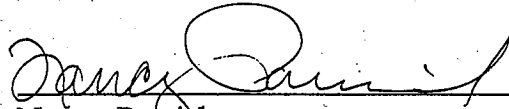
rejecting the application of the good faith exception to the remainder of the warrant. The court has found that the remainder of the warrant is valid and was based on probable cause. However, if the court's finding is overturned, the good faith exception should apply.

Conclusion

The court denies the defendant's motion to suppress in part and grants it in part (as to any evidence related to pornographic images) as more specifically set out above. The above constitutes this court's ruling on defendant's Motion to Suppress and no further journal entry is required.

IT IS SO ORDERED.

Dated this 20th day of March, 2007.



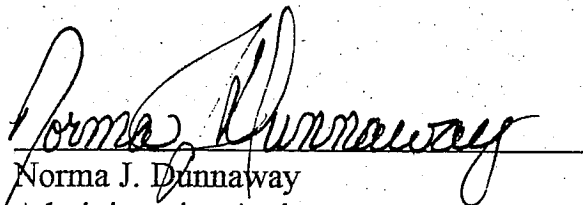
Nancy Parish
District Judge, Third Judicial District
Division Fourteen

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Memorandum Decision and Order was hand-delivered, faxed, or mailed on the 20th day of March, 2007 to the following:

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