UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

United States of America, Crim. File No. 01-221 (PAM/ESS)

Plaintiff,

v. **MEMORANDUM AND ORDER**

Dale Robert Bach,

Defendant.

This matter is before the Court on objections by both parties to the Report and Recommendation ("R&R") of Magistrate Judge E.S. Swearingen dated October 24, 2001. In the R&R, Magistrate Judge Swearingen recommends suppressing evidence obtained pursuant to a warrant which was faxed to Yahoo! Inc. ("Yahoo") and evidence obtained pursuant to a warranted search of Bach's residence. The Court must conduct a de novo review of any portion of the Magistrate Judge's opinion to which specific objections are made. 28 U.S.C. § 636(b)(1). Based on a review of the record and the submissions of the parties, the Court affirms the R&R in part and reverses it in part.

BACKGROUND

The specific facts in this case are throughly laid out in the R&R. The Court adopts the R&R's factual findings and need not repeat them here. It is sufficient for the purposes of this Order to note that on August 7, 2001, through a grand jury indictment, Defendant Dale Robert Bach was charged with possession, transmission, receipt, and manufacturing of child pornography. The evidence gathered against Bach was obtained in three ways: (1) an October 11, 2000, letter sent by Sgt. Brook Thomas Schaub of

the City of Saint Paul police department to Yahoo requesting that Yahoo refrain from deleting any incoming or outgoing e-mail messages from Bach's e-mail account; (2) a search warrant from a Ramsey County District Court that was faxed to Yahoo requiring Yahoo to send Schaub information about Bach's Yahoo account; and (3) a search warrant from Hennepin County District Court allowing Schaub to search Bach's residence.

Bach filed a motion to suppress the evidence from the Ramsey County and Hennepin County search warrants on September 25, 2001. In his reply memorandum, Bach also requested that the Court suppress evidence obtained by Schaub's October 11 letter to Yahoo. The Magistrate Judge rejected Bach's claim that Schaub's October 11 letter constituted an illegal seizure, but granted Bach's motion to suppress evidence from the Ramsey County warrant. Because the evidence from the Ramsey County warrant was suppressed, the Magistrate Judge presumed that evidence from the Hennepin County warrant should also be suppressed under the "fruit of a poisonous tree" doctrine. Bach now objects to the Magistrate Judge's ruling regarding the October 11 letter and the narrow grounds on which his motion to suppress was granted. The Government objects to the Magistrate Judge's suppression of evidence from the Ramsey County warrant.

DISCUSSION

A. Bach's Objections

1. October 11 Letter to Yahoo

Defendant Bach contends that Sgt. Schaub's October 11 letter to Yahoo constitutes a seizure that should have been accompanied by a warrant. 18 U.S.C. § 2703(f)(1) states that "[a] provider of wire or

electronic communication services or a remote computing service, upon the request of a governmental entity, shall take all necessary steps to preserve records and other evidence in its possession pending the issuance of a court order or other process." The Court agrees with the Magistrate Judge that under this section, an officer need not issue a warrant before requesting that a service provider retain evidence. In addition, the officer need not limit a request to a certain number of days. See 18 U.S.C. § 2703(f). Schaub's October 11 request to Yahoo satisfies the requirements of the statute and therefore withstands Bach's challenge.

2. Ramsey County Warrant

Bach argues that the R&R mistakenly limited the reasons for suppressing evidence obtained from the Ramsey County Warrant. Bach contends that there are three additional reasons why the evidence from that warrant should be suppressed: it lacked probable cause, it lacked particularity, and it was based on an unconstitutional statute.

Contrary to Bach's assertions, however, the Magistrate Judge correctly found that probable cause existed for the issuance of the warrant. Probable cause exists if there is a fair probability that evidence of a crime will be found. United States v. Hartje, 251 F.3d 771, 774 (8th Cir. 2001). In this case, Schaub presented the Ramsey County judge with a transcript of an internet "chat" between AM, a minor, and Bach in which Bach asked to see AM "again." Combined with the evidence gleaned from Schaub's interview with AM, the Ramsey County judge had sufficient probable cause to issue the warrant.

Bach also failed to show that the warrant lacked particularity. A search warrant must particularly describe the place to be search and the things to be seized. Maryland v. Garrison, 480 U.S. 79, 84

(1987). In this case, the warrant adequately described Bach's Yahoo account as the place to be searched and e-mail and Internet Protocol addresses as the things to be seized.

Finally, Bach failed to show that section 2703 is unconstitutional under the First, Fourth and Fifth Amendments. Bach's First Amendment challenge fails because child pornography is not recognized as protected speech. New York v. Ferber, 458 U.S. 747, 764 (1982). Bach's Fourth and Fifth Amendment challenges fail because communications may be searched without violating the Constitution so long as the officer obtains a legal search warrant. 18 U.S.C. § 2703.

B. Government's Objections

The Government objects to the R&R, arguing that the evidence gathered from the Ramsey County warrant should not be suppressed. The Court, however, agrees with the Magistrate Judge's recommendation to grant Bach's motion to suppress this evidence because the Ramsey County warrant was improperly executed. As the Magistrate Judge points out, "[t]he manner in which a warrant is executed is always subject to judicial review to ensure that it does not traverse the general Fourth Amendment proscription against unreasonableness." Hummel-Jones v. Strope, 25 F.3d 647, 650 (8th Cir. 1994) (citations omitted). Although the Ramsey County warrant was not rendered unreasonable by the mere assistance of Yahoo employees, see, e.g., United States v. Schwimmer, 692 F. Supp. 119, 126-27 (E.D.N.Y. 1988) (upholding a search executed by a civilian computer expert), 18 U.S.C. § 3105 requires that an authorized officer be present and acting in the warrant's execution when a third party assists in a search. In this case, Schaub was not present and acting in the warrant's execution when the Yahoo

employees searched and seized information from Bach's Yahoo account. Schaub's absence rendered this search and seizure unreasonable.[1]

The Government essential argues that section 3105 does not apply to state officers executing state warrants when there was no federal involvement. See States v. Applequist, 145 F.3d 976, 979 (8th Cir. 1998) ("Only the Fourth Amendment governs the suppression of evidence seized by state and local officials"). Because the Magistrate Judge found that under the circumstances in this case, it was not unreasonable for Fourth Amendment purposes for Schaub to execute the warrant by fax, the Government contends that the evidence from the Ramsey County warrant should not be suppressed for a violation of section 3105.

This Court disagrees with the Magistrate Judge to the extent that he determined that the execution of the Ramsey County warrant was reasonable under the Fourth Amendment. While state officers executing a state warrant without any assistance from federal authorities may not be required to comply with section 3105, protections analogous to those provided for by section 3105 exist under the Fourth Amendment. See Ayeni v. C.B.S., Inc., 848 F. Supp. 362, 367 (E.D.N.Y. 1994) (noting that section 3105 was enacted as a codification of the Fourth Amendment requirements for lawful searches and seizures). Contrary to the Government's contention, the court in Applequist did not disagree. In Applequist, the court merely held that the fact that reporters were allowed into the defendant's home to videotape seized drugs was not sufficiently unreasonable to justify suppression because the otherwise valid search was already completed. Applequist, 145 F.3d at 979. There is nothing in this holding to suggest

[1] Without reciting the Magistrate Judge's thorough statutory analysis, the Court agrees that section 2703 is not an exception to and does not provide for an alternative mode of execution from section 3105.

that the protections afforded by section 3105 are entirely absent when state officers are conducting a search based on a state warrant. Indeed, the requirement that an officer be present and acting in a warrant's execution when a third party is assisting the officer helps to effectuate the fundamental Fourth Amendment protection against general searches and seizures.

In reaching this conclusion, the Court is mindful of the fact several courts analyzing state statutes that are analogous to section 3105 have recognized that "[a]lthough adequate police supervision ensures that the warrant is properly executed and its scope is not exceeded, the required level of supervision varies depending on the circumstances." Commonwealth v. Sbordone, 678 N.E.2d 1184, 1189 (Mass. 1997). The circumstances of this case, however, do not justify Schaub's choice to fax the warrant to Yahoo and allow Yahoo employees to conduct the search and seizure without any supervision or instruction. Police officers have taken an oath to uphold federal and state Constitutions and are trained to conduct a search lawfully and in accordance with the provisions of a warrant. Id. Civilians, on the other hand, are not subject to any sort of discipline for failure to adhere to the law. In fact, an internet service provider is immune from suit so long as it is providing assistance in accordance with the terms of a warrant. 18 U.S.C. § 2703(e). Without an officer present, this conditional grant of immunity may become an irrefutable protection for internet service providers to conduct searches that traverse the clearly defined limits of a warrant. In the particular context of this case, there were no safeguards ensuring that the Yahoo employees conducting the search and seizure of information in Bach's e-mail account were cautiously abiding by the terms of the Ramsey County warrant. Accordingly, the execution of the Ramsey County warrant does not pass constitutional muster.

The evidence gathered pursuant to the Ramsey County warrant must also be suppressed under the rule established in United States v. Moore, 956 F.2d 843, 848 (8th Cir. 1992). In Moore, the Eighth Circuit determined that when state officials, acting without federal involvement, seize evidence that is eventually used in a federal prosecution, the state officials must comply with both state law and Fourth Amendment search and seizure requirements. Id. Like federal law, Minn. Stat. §§ 626.13 and 626A.06 require that a law enforcement officer be present at the execution of a warrant. Accordingly, Schaub's absence during the execution of the warrant violates Minnesota law.

The Government contends that it is immaterial whether Schaub violated state law because evidence seized by state officers in conformity with the Fourth Amendment should not be suppressed in a subsequent federal prosecution. See United States v. Bieri, 21 F.3d 811, 816 (1994) (quoting Moore, 956 F.2d at 847). Alternatively, the Government contends that even if Schaub violated state law, suppression is not proper unless there is a finding that the violation resulted in prejudice or deliberate disregard of the rule. United States v. Young, 129 F.3d 439, 443 (8th Cir. 1997). In essence, this second argument distills to a claim that Schaub's absence when the warrant was executed amounts to a mere technical violation of the law which does not rise to the level necessary to justify suppression.

The Government's first argument fails because, as has been discussed, Schaub's absence during the execution of the Ramsey County warrant violated the Fourth Amendment. It is worth noting, however, that the Government's expansive reading of Bieri and Moore is also untenable. As the Eighth Circuit noted in Moore, the general principle that evidence obtained by state officers in violation of state law should not necessarily be suppressed is "based on the proposition that, 'states are not free to impose on Federal courts requirements more strict than those of the Federal laws or Constitution.'" Moore, 956 F.2d at 847

(quoting United States v. Combs, 672 F.2d 574, 578 (6th Cir. 1982)). Here, sections 626.13 and 626A.06 do not impose requirements more strict than those of federal law. In fact, these sections impose requirements identical to those imposed on federal authorities under section 3105, a section which is codifying the requirements of the Fourth Amendment. Accordingly, Schaub's violation of Minnesota law renders the evidence suppressible.

The Government's reliance on Young is also unavailing. The court in Young remanded the case so that the district court could determine whether officers deliberately violated an Arkansas rule of criminal procedure. At most, Young stands for the unsurprising proposition that the violation of certain state procedures during the execution of a warrant only justifies suppression when the violation is deliberate. In the present case, there is no question that Schaub intentionally faxed the warrant. Not only was Schaub's action deliberate, but it is disingenuous to characterize his absence during the execution of the warrant as a mere technical violation of the law. Schaub's presence was indispensable under both state and federal law.

The Government concludes by objecting to the R&R on the grounds that suppression is unjustified in this case because under United States v. Leon, 468 U.S. 897, 921 (1984) Schaub acted in good faith reliance on the warrant when he faxed it and that, in any event, suppression is unavailable under the Electronic Communications Privacy Act ("ECPA"), 18 U.S.C. § 2701 et seq. See 18 U.S.C. § 2708 ("The remedies and sanctions described in this chapter are the only judicial remedies and sanctions for nonconstitutional violations of this chapter").

The good faith exception of Leon, however, does not apply in this case because the warrant itself was not defective. Rather, the execution of the warrant by Schaub was defective, and there is no argument

that Schaub reasonably relied on the express terms of the warrant when he faxed it to Yahoo. Finally, the Court adopts the finding and reasoning of the Magistrate Judge with regard to the applicability of section 2708. Because Schaub's absence when the warrant was executed amounts to a violation of both federal and state law that implicates the Fourth Amendment of the Constitution, Schaub's absence cannot be deemed to be a "nonconstitutional" violation. Accordingly, section 2708 does not apply to this case.

C. Hennepin County Warrant

Concluding that he did not have sufficient evidence to decide the issue, the Magistrate Judge presumed that evidence obtained from the Hennepin County warrant would be suppressed by way of the fruit of the poisonous tree doctrine. The "fruit of the poisonous tree" doctrine requires suppression of evidence obtained from constitutional violations. Wong Sun v. United States, 371 U.S. 471, 488 (1963). In determining whether the evidence constitutes the "fruit of a poisonous tree," the court primarily examines whether it is likely that the evidence would have been obtained in the absence of the illegality. Id.

In this case, it is very likely that Schaub would have obtained the Hennepin County warrant even without the evidence procured through the Ramsey County warrant. There was independent probable cause for the issuance of the Hennepin County warrant. Schaub obtained Bach's home address through an administrative subpoena issued to another internet service provider. Bach has raised no challenges to this subpoena or to the information that was received from that subpoena. With an address in hand, Schaub had all of the information that he needed to request the Hennepin County warrant. This warrant was essentially based on the same set of facts as those that provided probable cause for the Ramsey County warrant. The only arguable reason for suppressing information gleaned from the Hennepin County warrant is that this warrant also authorized the authorities to search for child pornography. Schaub's

affidavit, however, makes it clear that based upon his 23 years of experience, child pornography is frequently associated with the enticement of children on the internet. Based on this affidavit, the subscriber information obtained from the administrative subpoena, and the other evidence used to establish probable cause for the Ramsey County warrant, the judge issuing the Hennepin County warrant was justified in authorizing authorities to search Bach's residence not only for evidence associated directly with the enticement of children but also for child pornography. Thus, the evidence obtained from the Hennepin County warrant should not be suppressed.

CONCLUSION

Pursuant to statute, the Court has conducted a de novo review of the record. 28 U.S.C. § 636(b)(1); Local Rule 72.1(c)(2). Based on that review and after carefully reviewing both parties' objections, the Court adopts in part the Report and Recommendation (Clerk Doc. No. 20) as set forth above.

Accordingly, **IT IS HEREBY ORDERED** that Defendant's Motion to Suppress Evidence Obtained as a Result of Search and Seizure (Clerk Doc. No. 10) is **GRANTED IN PART** and **DENIED IN PART** as follows:

1. Evidence obtained as a result of the Ramsey County Warrant is suppressed; and

2. Evidence obtained as a result of the Hennepin County Warrant is not suppressed.

Dated: December 14, 2001

Paul A. Magnuson
United States District Court Judge