

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,)
)
 5.)
)
KENNETH E. FINK,)
(ID. No. 0005008005))
)
 Defendant.)

Submitted: December 4, 2000
Decided: March 30, 2001

Donald R. Roberts, Esq., Wilmington, Delaware. Attorney for the State.

Edmund D. Lyons, Jr., Esq., Wilmington, Delaware. Attorney for Defendant.

Upon Consideration of Defendant's
Motion to Suppress
DENIED

VAUGHN, Resident Judge

ORDER

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Upon consideration of the defendant's motion to suppress evidence, the state's response, and the record of this case, it appears that:

1. The defendant, Kenneth E. Fink, an attorney, came to the attention of the Attorney General's office as a result of allegations of misuse of client funds. An investigation into his activities developed enough information for the state to obtain a warrant to search his residence for client records, legal documents and financial information. During the execution of the warrant, law enforcement authorities seized two "tower" desktop computers, two computer hard drives, 42 "zip" diskettes, two CD Rom's and three floppy disks. They did not search these computer items at that time. The next day they obtained a second warrant specifically authorizing a search of the computer units and disks for the same types of client records, legal documents and financial information described in the initial warrant. The search of the computer items was conducted by Robert Carmine, a special investigator with the Department of Justice. While searching one of the compact disks, he found a file which contained a child pornography picture. At that point he stopped, and the Department of Justice applied for and obtained a third warrant, this one to search the computer units and disks for child pornography. The third search revealed a total of about 200 images of child pornography. The defendant has been indicted on 15 counts of Unlawfully Dealing in Materials Depicting a Child Engaged in a Prohibited Act and 15 counts of Possession of Child Pornography.

2. In his motion, the defendant seeks suppression of the one child pornography image discovered during the execution of the second search warrant and all of the child pornography discovered during the search pursuant to the third warrant. He

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contends that the discovery of the first child pornography picture was beyond the scope of the second warrant; that the discovery of the child pornography during the execution of the second warrant was not within the plain view exception to the warrant requirement; that the second warrant was defective in that it did not limit the search to areas in the units and disks where the evidence being searched for might reasonably be found; that the second warrant contained errors in the description of the items to be searched; that the search under the second warrant was not conducted in accordance with certain guidelines for computer searches that were attached to the warrant application; that the issuance of the third warrant and subsequent discovery of other child pornography pictures was the fruit of the overbroad execution of the second warrant; that the third warrant was defective in that it contained errors in the description of the items to be searched with the result that computer items that were not mentioned in the warrant were searched; and that all of the child pornography evidence should be suppressed. The state contends that all of the child pornography evidence has been lawfully discovered and seized.

3. At a hearing on the motion, Officer Carmine testified that after the Court issued the warrant for a search of the computer media, he started with the two computer “towers”. Eventually he came to one of the compact disks. At that point he had not found anything relevant to his search for evidence of financial impropriety. He inserted the compact disk in his computer and double-clicked on the E-drive under “My Computer”. Four directories came up. One of them was named Dd. He opened Dd, but Dd turned out to be corrupt files which wouldn’t open. He attempted

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to open the next one, which was named Dreamnet. The computer gave a message that the folder was not accessible. He then moved on to the next one, which was Pipeplus. He opened Pipeplus and saw two rows of folder icons plus rows and rows of file icons. He went through the folder icons and found nothing of significance. He then started through the file icons. Although Officer Carmine did not count them at the time, there were over 1000 files, all ending with the suffix “.jpg”, which denotes a picture or graphics file. They were all in alphabetical/numerical order. The first file was named 11a.jpg. He opened it and saw a pornographic picture of a man. He then continued to go through the files. Examples of the file names are Dave3.jpg, Home13.jpg, Legal5.jpg and N960327.jpg. His search was in part random and in part systematic. Many of the files were in groups where several files would have names that began with the same letters or numbers and were differentiated only by different ending letters or numbers. He went through the files in order, but sometimes he would open only one file in a group. Due to the sheer volume of all of the computer files, he was concerned about completing his search within the 10 days when a return would be due. Sometimes, for the sake of time, he would skip a group. By the time he reached the “p’s”, he had opened about 60 files. Each one had contained one pornographic image. When he reached the “p’s”, he saw a file named Pre-Teen.jpg. Like some other files, it was not part of a group. In other words, there were no files just before it or just after it that had similar names. He opened that file and found a picture of child pornography. As stated, there were over 1000 files under Pipeplus. There were approximately 700 before Pre-Teen.jpg and approximately 500 after it. When he found the child pornography picture under Pre-Teen.jpg, he stopped

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searching and obtained the third warrant.

4. Turning first to the defendant's contention that both warrants two and three contained errors in the description of the computer items seized and the description of the computer items to be searched, the defects complained of relate to the description and number of computer items involved in this case. The caption of the affidavit and application for the second search warrant referred to 40 computer floppy diskettes (whereas there were apparently only three diskettes of that description), and three computer compact disks (whereas only two had been seized), as well as the tower computers. The affidavit itself refers to the search of two computers, 40 computer disks and two compact disks. The warrant authorized the search of "40 computer floppy diskettes and three computer discs," thus carrying forward the error in the caption of the affidavit and application. One of the items of computer media named in the warrant was not mentioned in the affidavit. The third search warrant authorized a search of "42 computer floppy diskettes and two computer disks", whereas the affidavit in support of that warrant stated that 40 computer disks and two compact disks had been seized. Ultimately, child pornography was found on the one compact disk described above and three zip disks. The warrant did not specifically refer to zip disks. Despite these descriptive errors, I find that it was intended that the applications for the warrants and the warrants themselves were intended to apply to all of the computer items seized from the defendant's residence. It does not appear that there has ever been any genuine dispute as to what was seized. Scrivener, clerical

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or technical errors will not invalidate a warrant and ¹

¹ *Jensen v. State*, Del. Supr., 482 A.2d 105 (1984); *Pierson v. State*, Del. Supr., 338 A.2d 471 (1975); *U.S. v. McClellan*, 165 F.3d 535 (7th Cir., 1994); *Oregon v. Dalton*, Ore. App., 887 P.2d 379 (1994).

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5. I therefore conclude that the second warrant authorized Officer Carmine to search all of the computer units and disks seized from the defendant's home for the evidence described in the warrant, including client records, legal documents and financial information. The evidence at the hearing on this motion established that computer data can be hidden in files through the use of misleading file names. For example, as stated, the suffix ".jpg" ordinarily denotes picture or graphic content, as opposed to the suffix ".txt" which ordinarily denotes textual content. There are various other types of suffixes as well. However, these and other suffixes do not necessarily give a true indication of what a the file actually contains. A text file can be named with a ".jpg" suffix, a graphics file can be named with a ".txt" suffix, and so on. Thus files can be disguised or masked in an effort to conceal their contents. It therefore follows that when one reads a file name, one cannot actually draw any inference as to what the file contains. It also follows that in order to conduct a complete search for particular evidence in a computer, it may be necessary to take a look at the contents of every file. I therefore conclude that the second warrant authorized Officer Carmine to view the contents of every file to determine whether it contained evidence which he was authorized to seize.² For the same reasons, the defendant's contention that the warrant should have somehow restricted the areas within the computer items that could be searched, or limited the search to those areas

² *U.S. v. Gray*, 78 F. Supp.2d 524 (E.D. Va., 1999); *Wisconsin v. Schroeder*, Wisc. Ct. App., 613 N.W.2d 911 (2000).

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where the evidence being searched for may “reasonably” be found, must be rejected.

6. While an officer may view each file to determine whether it contains any of the evidence which he is authorized to seize, a computer search must not be permitted to degenerate into a search for other objects or a general search.³ Based upon the testimony presented at the hearing, Officer Carmine did intend, originally, to go through all of the computer units and disks and exam each folder and file to see whether it contained evidence he was authorized to seize. Because of the volume of files, however, he skipped over files, and where several files, one after the other, had similar names he might open only one. In doing so however, he nonetheless was going through the files in alphabetical order and opened Pre-Teen.jpg only as he was going through the “p’s”. He opened it because it stood by itself, with no similarly named files on either side of it. This was consistent with his approach to that point, one of opening files that had different names and skipping over files having names similar to one already opened. Based upon my assessment of Officer Carmine’s testimony, I am persuaded that he was not forming judgments as to what any file contained before he opened it. I am also persuaded that as he went through the files in Pipeplus, he was searching for evidence described in the warrant. He was not searching for child pornography. In addition, despite the suggestive nature of the file name Pre-Teen.jpg, I am persuaded, based upon my assessment of his testimony, that Officer Carmine opened that file as part of his search for evidence described in the

³ *U.S. v. Carey*, 172 F.3d 1268 (10th Cir., 1999) (where a search for drug related evidence shifted to a search for child pornography).

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warrant and not in a search for child pornography. I conclude that Officer Carmine inadvertently discovered the evidence of child pornography in Pre-Teen.jpg during the course of a lawful search for the evidence described in the warrant,. The incriminating nature of the child pornography was obvious.

7. The defendant's next contention is that the search of the second warrant was not conducted in accordance with certain guidelines set forth in the affidavit and application for the warrant. Paragraph 42 of the affidavit and application for the second warrant contained the following:

The search procedure of the electronic data contained in computer operating software, hardware or memory devices will be performed in a controlled environment and may include the following techniques:

- (a) Surveying various file "directories" and the individual files they contain (analogous to looking at the outside of a file cabinet for the markings it contains and opening a drawer believed to contain pertinent files);
- (b) "Opening" or reading the first few "pages of such files in order to determine their precise contents;
- (c) "Scanning" storage areas to discover and possibly recover deleted data;
- (d) "Scanning" storage areas for deliberately hidden files; and/or
- (e) Performing keyword searches through all electronic storage areas to determine whether recurrences of language contained in such storage areas exist that are related to the subject matter of the investigation.

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The defendant contends that Officer Carmine was obligated to conduct the search in accordance with these parameters, that he did not do so, and that his failure to do so renders the search unreasonable. The defendant concedes, however, that paragraph 42 provides only that the search procedure “may” include the specific, listed techniques. The warrant did not require that the methods mentioned in paragraph 42 be used, or that the search be conducted using a particular method. In addition, paragraph 42 does refer to files being surveyed and opened to see whether they contain evidence authorized to be seized, which is, in substance, what Officer Carmine was doing. The defendant’s contention that the evidence should be suppressed on this basis is rejected.

8. Finally, the defendant contends that the search should have been conducted using the “find” function. It was clear at the hearing that Officer Carmine had very little, if any, knowledge concerning the use of the “find” function. Based upon the evidence presented at the hearing, it would appear that the “find” function is an imprecise search function and not conducive to a complete search, at least if the searcher is not highly skilled in the use of that function. For example, if the defendant’s computer contained client information on an alleged client victim who was not yet known to Officer Carmine, such data may not have been found using the “find” function. I conclude that Officer Carmine was not required to use the “find” function.

THEREFORE, the defendant’s motion to suppress is *denied*.

IT IS SO ORDERED.

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oc: Prothonotary

cc: Order Distribution