

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

<p>UNITED STATES OF AMERICA,</p> <p>Plaintiff,</p> <p>vs.</p> <p>PAUL WARREN WELLS,</p> <p>Defendant.</p>	<p>No. 3:08-cr-0003-JAJ</p> <p>ORDER</p>
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This matter comes before the court pursuant to the defendant's May 6, 2008, Motion to Suppress Evidence [dkt 21]. The court held an evidentiary hearing on this motion on June 17, 2008, at which the defendant was present and represented by David Treimer. The government was represented by Assistant United States Attorney Joel Barrows.

In the motion, the defendant challenges a search warrant for his residence, alleging that false statements were made in the affidavit in support of the warrant. He further contends that the police did not receive knowing and voluntary consent from the defendant's wife to search the residence. Finally, he contends that the consent given did not authorize the police to search a computer for photographic images. The court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

In the early morning hours of July 7, 2003, Davenport police were dispatched to the defendant's residence at 3331 W 29th Street, Apartment 5, in Davenport, Iowa. When police arrived at the scene, they found the defendant beaten and bloody. His wife, Velky Wells, was hysterical. The police soon became suspicious that the manner in which the

apartment was ransacked and the defendant beaten indicated that the incident was drug-related. The first focus of the police was to get basic information and to secure medical attention for the defendant.

The defendant's wife, Velky, was interviewed at least twice in the early morning hours of July 7. She is a citizen of Panama who came to the United States in February of 2001, when she was thirty-five years old. At the time she arrived, she spoke little English and was unable to read it. She enrolled in an English class at Scott County Community College.

After Velky Wells¹ calmed down from her initial hysteria, she was interviewed twice by Eric Gruenhagen, a patrol officer with the Davenport Police Department. The conversation took place at a slower speed than ordinary conversational English but Officer Gruenhagen was able to understand Ms. Wells and it appeared to him that she understood him as well. Velky Wells was interviewed again at the hospital where the defendant was being treated. This time, Officer Gruenhagen used the services of interpreter Carla Jackson from Translations Unlimited. Gruenhagen covered the same subject matters as he had earlier discussed with Ms. Wells, this time using the assistance of the interpreter. The information that he received in the second interview was consistent with what he had learned in the first interview. From this, the court concludes that Ms. Wells was able to effectively converse in English with Officer Gruenhagen.

Officer Gruenhagen told Ms. Wells that the police wanted to search the apartment

¹Velky Wells currently resides in Panama. The court attempted to contact her to take her testimony by telephone but no one answered the telephone at the appointed hour. As a result, the parties stipulated what her testimony would be had she been called. While she admits that she was interviewed at the hospital with the benefit of an interpreter, she claims that the interpreter did not translate the consent form and that she was told that the police would just look for "evidence of people". She would further testify that she grew up in Panama when it was still ruled by General Manuel Noriega. According to her proposed testimony, people in Panama were accustomed to giving consent whenever requested by a government official.

for evidence of drug trafficking. He carries a consent form as a part of his ordinary practices as a police officer. He also has a consent form that is written in Spanish. He discussed the consent form with Ms. Wells and filled out the consent form asking for permission to search for "illegal drugs, drug paraphernalia, pipes, scales, bagies [sic,] large amounts of cash, logs, notebooks, ledgers, records related to drug sales/trafficking [sic]". Govt's Ex. 2. The consent to search form was signed at 8:06 a.m., witnessed by another police officer and Officer Gruenhagen.

Officer Lance Denger, a criminal investigator at the Davenport Police Department, arrived at the Wells' residence at approximately 8:00 a.m. on July 7, 2003. He and other officers began searching the residence at approximately 8:20 a.m. While searching the apartment for the items set forth in the consent form, Officer Denger observed a computer on a table. He accessed a file folder containing pictures and opened approximately three pictures in a ten minute period.² Upon observing images of child pornography in these photographs, Officer Denger notified other officers at the Davenport Police Department who secured a search warrant for the Wells' residence. In the search warrant affidavit, Officer Rich Tubbs stated the following:

The suspect in this case, Paul Warren Wells, M/W 02-07-67. He is a registered sex offender. He was convicted for having sex with a girl under age of 16. While officers were serving a consent to search on the suspect's address they saw child pornography on the computer's display. The computer monitor was sitting on the a [sic] table.

Later, Officer Denger wrote an investigative report that he now admits was

²An examination of the computer indicates that these files were accessed between 8:40 and 8:50 a.m. on July 7, 2003. Counsel for the government was unwilling to stipulate that the files were opened at those precise times as there was a problem associated with the clock on the computer at some point. It is clear, however, that the files were accessed during a ten minute period and access between and 8:40 a.m. and 8:50 a.m. is consistent with the commencement of the search at approximately 8:20 a.m.

"inaccurate". In that report, Officer Denger stated that he had accidentally bumped the computer while searching for drug evidence and that the computer's screen saver was deactivated and an image of child pornography immediately appeared on the computer monitor. His report indicates that he immediately called other officers who secured a search warrant and that he did not access the other two images until after a search warrant had been issued. None of that is true. However, the only information that Officer Tubbs had when applying for the warrant was the truthful information contained in the warrant affidavit. Officer Tubbs did not know about Officer Denger's fabricated report until approximately one month ago.

CONCLUSIONS OF LAW

The Franks v. Delaware challenge to the warrant is denied. If the scope of the consent to search was exceeded, then the warrant fails as fruit of the poisonous tree. However, the statements made by the affiant in support of the warrant are true. The fact that Officer Denger later fabricated a report about the sequence of events does not change the truth of the statements made in support of the warrant and the fabrication was done after the warrant was signed. The court turns to the issue of consent to search the apartment.

1. Validity of Velky Wells' Consent

The defendant contends that his wife, Velky Wells, did not give voluntary consent to search the couple's home because of her language difficulties and cultural differences. Police officers may search a person's home without a warrant or probable cause if a person possessing the property gives consent. Illinois v. Rodriguez, 497 U.S. 177, 181 (1990). Consent does not need to be given by the suspect, it may be given by a person with "common authority" over the home. Georgia v. Randolph, 547 U.S. 103, 109 (2006). This includes persons such as co-tenants or spouses whom police officers "reasonably

believe” have common authority over the home. Rodriguez, 497 U.S. at 189.

Consent is valid if it is freely and voluntarily given. Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973). Voluntariness is a factual determination that “depends upon the totality of the circumstances in a particular case, including ‘both the characteristics of the accused and the details of the interrogation.’” United States v. Chaidez, 906 F.2d 377, 381 (8th Cir. 1990) (quoting Schneckloth, 412 U.S. at 225). The government has the burden to establish voluntary consent. United States v. James, 353 F.3d 606, 613 (8th Cir. 2003). In Chaidez, the Eighth Circuit Court of Appeals laid out several factors to consider in determining the characteristics of the consent-giver:

- (1) their age;
- (2) their general intelligence and education;
- (3) whether they were intoxicated or under the influence of drugs when consenting;
- (4) whether they consented after being informed of their right to withhold consent or of their Miranda rights; and
- (5) whether, because they had been previously arrested, they were aware of the protections afforded to suspected criminals by the legal system.

Chaidez, 906 F.2d at 381 (citations omitted). Environmental factors that bear upon voluntariness include whether the consent-giver:

- (1) was detained and questioned for a long or short time,
- (2) was threatened, physically intimidated, or punished by the police,
- (3) relied upon promises or misrepresentations made by the police,
- (4) was in custody or under arrest when the consent was given,
- (5) was in a public or a secluded place,
- or (6) either objected to the search or stood by silently while the search occurred.

Chaidez, 906 F.2d at 381 (citations omitted). Analyzing these factors in relation to Ms. Wells, the Court finds that she voluntarily gave consent to search her home.

Language Difficulties. Ms. Wells is a native of Panama. At the time of the incident, Ms. Wells was around thirty-seven years old and had been living in the United States for over two years. The following factors lead the court to believe that her language

limitations did not preclude a voluntary consent: (1) she had taken English classes; (2) she was able to express herself to Officer Gruenhagen in English; (3) in the first interview, Officer Gruenhagen spoke slowly; and (4) in the second interview, Officer Gruenhagen used the aid of an interpreter from Translations Unlimited. Taken together, the court believes that Ms. Wells understood what Officer Gruenhagen communicated to her.

Cultural Factors. Ms. Wells grew up under the Noriega dictatorship in Panama. In her stipulated testimony, she stated that in Panama at that time, people routinely had to give consent to whatever government officials requested of them. The court does not believe that this evidence contributed to her decision.

Environmental Factors. Ms. Wells was not under arrest during either interview with Officer Gruenhagen. Her conversations with him were of her own free will. While the first interview took place in her home, the second interview was at a public place – the hospital where the defendant was being treated. There is no evidence that the police either threatened Ms. Wells, or made her promises in exchange for consent.

Viewing the totality of the circumstances, Ms. Wells voluntarily consented to the search of their home. While her experiences in Panama could have made her more fearful or easily intimidated by police, the extensive precautions and length of time that Officer Gruenhagen spent with Ms. Wells mitigated these concerns. The court finds that her consent was voluntary and not the product of undue pressure or coercion.

2. Scope of the Consensual Search

The defendant next argues that even if his wife gave consent to search their home, her consent did not extend to searching photographic “JPG” images on his computer.

“A consensual search cannot exceed the scope of consent given.” United States v. Rudolph, 970 F.2d 467, 468 (8th Cir. 1992). The standard for determining the scope of consent “is that of ‘objective’ reasonableness – what would the typical reasonable person have understood by the exchange between the officer and suspect?” Florida v. Jimeno,

500 U.S. 248, 250 (1991). “The scope of a [consensual] search is generally defined by its expressed object.” *Id.* at 251.

Here, the expressed object of the search was “illegal drugs, drug paraphernalia, pipes, scales, bagies [sic,] large amounts of cash, logs, notebooks, ledgers, records related to drug sales/trafficking [sic].” Govt.’s Ex. 2. A search for documents relating to drug trafficking could easily be stored on a computer and could be in a .jpg or .pdf file. In United States v. Turner, the First Circuit Court of Appeals suppressed “JPG” files of child pornography, finding that the officer’s search of picture files exceeded the consent given by the suspect. 169 F.3d 84, 88 (1st Cir. 1999). “[A]n *objectively reasonable person* assessing the actual exchange between the detectives and Turner would not have understood that such images were within the ‘expressed object’ of the intended search for evidence of an aggravated assault.” *Id.* “The critical consideration in this regard is that the detectives never announced, *before Turner gave his consent*, that they were investigating a sexual assault or attempted rape.” *Id.* Viewing the totality of the circumstances surrounding the suspect’s consent, the court found it unreasonable for officers to believe that the suspect gave consent to search the JPG picture images. *Id.*

Similarly, in United States v. Stierhoff, the United States District Court for the District of Rhode Island found that officers exceeded the scope of a consent search when they searched clearly labeled computer files detailing offshore accounts and tax evasion. 477 F. Supp. 2d 423, 442 (D.R.I. 2007). There, the defendant only gave consent to search for poems related to a stalking investigation. “In light of the conversations between [law enforcement] and Defendant, the Court finds that a reasonable person would conclude that the statement by Defendant that the poems were located on the ‘D: Drive’ in the ‘My Files’ directory, ‘Creative Writing’ folder limited the scope of Defendant’s consent to the search of his computer to that particular file folder.” *Id.*

Applying the reasonable expectations standard to the consent given by Ms. Wells,

the court finds that searching for photographic child pornography images was outside the scope of consent. The object of the consent included drugs, drug paraphernalia or documents related to drug trafficking. The consent-giver could reasonably expect that the sort of information found on a computer would include spread sheets of payments or sales, receipts, or communications regarding the buying or selling of drugs. A reasonable person would not expect the consent to include photographic images, particularly not pornographic images.

Having established that searching pornographic images is outside the scope of consent, the next question is whether Officer Denger *purposefully* searched for pornographic images, or whether his discovery was inadvertent in the process of his drug-trafficking search.

In United States v. Carey, the Tenth Circuit Court of Appeals suppressed over 200 “JPG” picture files of child pornography as exceeding the scope of a warrant for evidence relating to drug trafficking.³ In Carey, the officer stumbled upon a JPG picture file of child pornography. Instead of stopping his search and obtaining a search warrant for child pornography, the officer proceeded to open over 200 JPG files, a process that lasted approximately five hours. The court found that such an “abandonment” of the object of the authorized search – evidence of drug trafficking – constituted an illegal search. In so deciding, the court emphasized the subjective intent of the officer:

In [the officer’s] own words, . . . his suspicions changed immediately upon opening the first JPG file. After viewing the contents of the first file, he then had ‘probable cause’ to believe the remaining JPG files contained similar erotic material. Thus, because of the officer's own admission, it is plainly evident each time he

³ Carey deals with exceeding the scope of a *search warrant* rather than exceeding the scope of consent. However, the standard is the same. When determining whether an officer exceeded the scope of a warrant search, the standard is that of objective reasonableness – what is a reasonable interpretation of the items described in the search warrant. Thus, cases involving the scope of a search warrant are instructive in consent cases.

opened a subsequent JPG file, he expected to find child pornography and not material related to drugs. Armed with this knowledge, he still continued to open every JPG file to confirm his expectations. Under these circumstances, we cannot say the contents of each of those files were inadvertently discovered. Moreover, Detective Lewis made clear as he opened each of the JPG files he was not looking for evidence of drug trafficking. He had temporarily abandoned that search to look for more child pornography, and only ‘went back’ to searching for drug-related documents after conducting a five hour search of the child pornography files.

...

Thus, until he opened the first JPG file, he stated he did not suspect he would find child pornography. At best, he says he suspected the files might contain pictures of some activity relating to drug dealing.

United States v. Carey, 172 F.3d 1268, 1273 (10th Cir. 1999).

After Carey, the Tenth Circuit made clear that when an officer comes across child pornography during an unrelated search, he or she should obtain a new search warrant or consent to search files related to child pornography. Such was the case in United States v. Walser where the officer stumbled upon an “avi” video file of child pornography while searching for evidence of drug trafficking. 275 F.3d 981 (10th Cir. 2001). Unlike Carey, however, the officer stopped his search and “return[ed] to the magistrate for a new warrant before commencing a new search for evidence of child pornography.” Id. at 987. The Tenth Circuit approved that procedure and did not suppress the initial JPG image of child pornography. Id.

Following Carey, the Eighth Circuit Court of Appeals in United States v. Hudspeth found that officers did not abandon their consensual search for evidence of illegal pseudoephedrine distribution when they observed child pornography on the defendant's computer. 459 F.3d 922 (8th Cir. 2006), rev'd in part and reinstated in part, 518 F.3d 954 (8th Cir. 2008). While examining Hudspeth's computer, officers found “several

images” of child pornography on “two or three CDs.” Id. at 928. The officer then stopped the search, called the United States Attorney’s office and obtained a new warrant “authorizing the search of Hudspeth’s home and business computer hard drives and CDs for child pornography.” Id. at 928. The court concluded that the officer appropriately stopped the search to obtain a new warrant and therefore, the search did not exceed the scope of consent. Id.

In the present case, there is no evidence that Officer Denger abandoned his search for evidence related to drug trafficking. This was not a five-hour search that revealed over 200 pictures of child pornography like the search in Carey. Officer Denger did not even find as many images as the officers in Hudspeth, a search that the Eighth Circuit Court of Appeals approved. Officer Denger looked at three photos of child pornography over a ten-minute period, at which time he stopped his search and telephoned the Davenport Police Department to seek assistance in obtaining a new search warrant.

Further, there was nothing in the name or location of the files that suggested they were photographic images of children or pornography. In both Turner and Carey, it was abundantly clear to officers *before* they opened the JPG files that the files were either sexual in nature and/or involved children. In Turner, many of the images the officer searched had file names such as “young” or “young with breasts.” Turner, 169 F.3d at 86. In Carey, many of the files names contained something like “teen” or “young.” Carey, 172 F.3d at 1271. This put them on notice that there was little or no likelihood that the file contained evidence of drug trafficking. Here, however, the defendant presented no evidence that the file names or the folders they were found in suggested images of pornography or children.⁴

⁴ The court recognizes that a sophisticated computer-user can easily disguise, move or rename files. See United States v. Adjani, 452 F.3d 1140, 1150 (9th Cir. 2006) (“The government should not be required to trust the suspect's self-labeling.”). The fact that the files were not conspicuously labeled is just one factor in the court’s determination that Officer

(continued...)

Accordingly, the court finds that Officer Denger did not exceed the scope of Ms. Wells's consent when he opened three images of child pornography on the defendant's computer. While purposeful searching for images of child pornography would have been outside the scope of Ms. Wells's consent, Officer Denger's discovery of the photographs was inadvertent and did not constitute an abandonment of the authorized search. He appropriately halted the search and obtained a new search warrant for evidence of child pornography.

Upon the foregoing,

IT IS ORDERED

That the defendant's Motion to Suppress Evidence [dkt 21] is denied.

DATED this 15th day of July, 2008.



JOHN A. JARVEY
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF IOWA

⁴(...continued)

Denger reasonably opened the files while searching for evidence of drug trafficking.