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CLERK U.S. DISTRICT COUR
SOUTHERN DISTRICT OF IOW

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Criminal No. 01-152
	)	
vs.	)	
	)	
DAVID ALAN PETERSON,	)	ORDER
	)	
Defendant.	)	

Before the Court is a motion to suppress filed by defendant on October 1, 2001. The government filed a resistance to this motion on October 12. A hearing was held on October 24, and both parties filed additional briefs on October 26. The matter is fully submitted.

I. BACKGROUND

In May 2000, Special Agents of the United States Customs Service Attache' Office in Moscow, Russia, Marshall Heeger and Sergei Kishkinsky, in conjunction with Russian law enforcement officials, began investigating an Internet site referred to as the "Blue Orchid" site. The Internet site offered for sale videotapes containing child pornography. Customers would request videotapes by e-mail after viewing the Blue Orchid site. After payment was received, the operators of the site would mail out the requested video tapes to customers from various countries.

On December 10, 2000 Russian officials seized 400 videotapes from the residence of an individual who was connected with the Blue Orchid site, Solntsev Elbe. Elbe identified another individual, Sergey Gromov, as connected with the Blue Orchid site and organization. On

December 14, 2000 Agent Heeger of the United States Customs Sercvice Attache' Office viewed the confiscated videotapes and determined that they contained images of persons under the age of 18 engaged in sexually explicit conduct. Agent Heeger determined that the videotapes were labeled with both letters and numbers and were often "in professionally printed National Geographic paper sleeves and were still shrink-wrapped." *See* Application and Affidavit for Search Warrant, Attachment C at ¶¶ 7-12 (by Special Agent Sherry Erickson, February 21, 2001). Then, on December 19, 2000 Sergey Garbko was arrested by Russian authorities who seized videotapes, documents, and a computer from his residence. *Id.* at ¶ 11.

During the course of the on-going investigation in Russia, on December 13, 2000, Special Agent Sherry Erickson[1] of the Customs Service received a report detailing Russian officials and the Customs Service's investigation of the Blue Orchid Internet site in Russia. The name of the defendant, David A. Peterson of Council Bluffs, Iowa, was included as a Blue Orchid customer in this report.

Later, on January 10, 2001, Agent Erickson received a faxed copy of a spreadsheet detailing some of Blue Orchid's orders from customers. *See* Application and Affidavit for Search Warrant, Exhibit 1. This spreadsheet listed the names of Blue Orchid customers in the United States from March 2000 through September 2000. The spreadsheet showed that David Peterson had purchased two videotapes from the Blue Orchid site. The spreadsheet showed the orders were placed by David Peterson of 2629 Chestnut Road, Council Bluffs, Iowa 51501 in June and September 2000. The email address of David Peterson was listed as daprdave@gateway.net. The spreadsheet showed that the amount of each order was $200, and

[1] Special Agent Erickson has since changed her last name to Zwart. The Court will refer to her by her former name throughout the Order.

that Peterson first ordered a video labeled "RF9," and then ordered a video labeled "rf3." The spreadsheet also listed a "Trace #" for each order. *Id.; see also* Application and Affidavit for Search Warrant, Attachment C at ¶ 13.

Agent Erickson then began an investigation of Peterson. It was determined that the trace numbers listed in the spreadsheet referenced Western Union wire transfer numbers. Peterson wired the first $200 on June 29, 2000 and the second $200 on August 31, 2000. The transfers listed Peterson's Council Bluffs address, and were sent "will call" to two different individuals in Russia.[2] Agent Erickson later determined that a mobile home, separate from the main residence, was on the property at 22629 Chestnut Road, Council Bluffs, Iowa. The mobile home had two telephone lines with separate numbers. One of the numbers, which was unlisted, matched the phone number from which Western Union had received the wire transfer requests from David Peterson to representatives of Blue Orchid. Further, it was discovered that mail was delivered to both the residence at the Council Bluffs address, and to the mobile home. *See* Application and Affidavit for Search Warrant, Attachment C at ¶¶ 14-15, 20; *see also* Application and Affidavit for Search Warrant, Exhibits 2a and 2b (Western Union transfer records).

Agent Erickson also contacted Federal Express, as she was aware that Blue Orchid often used its service to deliver its products. However, Agent Erickson was not able to locate any records indicating videotapes purchased from Blue Orchid were delivered to David Peterson. *See* Application and Affidavit for Search Warrant, Attachment C at ¶ 17. In her affidavit, Agent Erickson stated:

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[2] Agent Erickson indicated at the hearing that the two individuals authorized by Peterson to pick up the funds were identified by Russian authorities as those persons responsible for such duty on behalf of Blue Orchid.

> there is probable cause to believe that David PETERSON did receive at least the videotape ordered in late June 2000 since he ordered the second videotape in late August 2000. I am aware of other means by which the videotapes could have been delivered to David PETERSON including through the United States mails and by other private carriers. I do know that the wire transfers were made by David PETERSON and were received by the Blue Orchid organization.

Id.[3]

Additionally in her affidavit, Agent Erickson included information about "individuals involved in the possession, distribution or production of child pornography." *See* Application and Affidavit for Search Warrant, at ¶¶ 24-25. This information included patterns that child pornographers have in maintaining collections, and provided reasons why a "thorough examination of the contents of videotapes" discovered during the search was necessary. *Id.* Agent Erickson also provided detailed information regarding why it was necessary for the warrant to allow law enforcement officials to search and seize computer materials based on the information known regarding Peterson's use of the Internet to contact Blue Orchid. *Id.* at ¶¶ 26-29.

On February 21, 2001 United States Magistrate Judge Celeste Bremer issued a warrant pursuant to Agent Erickson's application and affidavit.[4] The warrant allowed for the search of the mobile home located at 22629 Chestnut Road, Council Bluffs, Iowa along with all outbuildings located on the property, but excluded the 1 ½ story frame single family residence

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[3] The spreadsheet included a category that listed various United Parcel Service, Federal Express and possibly other services' shipping numbers for many, but not all, of the orders made by Blue Orchid customers. Neither of the orders attributed to Peterson in the spreadsheet included this shipping number information.

[4] As explained by Agent Erickson at the hearing, the warrant was issued on February 21, 2001 as the filed stamp indicates. It was mistakenly dated February 22, 2001.

which was also on the property.[5] *See* Warrant, Attachment A ("Places to Be Searched"). The warrant stated that the property to be seized included "videotapes, documents, books, ledgers, records, files, computer software, including but not limited to, disks, magnetic tapes, programs, and computer printouts, and any and all printed correspondence in the name of David PETERSON and the e-mail name of daprdave@gateway.net and any other aliases and/or e-mail names he is using . . . in violation of Title 18, United States Code, Sections 2252(a)(1), 2252(a)(2), and 2252(a)(4)(B)." *See* Warrant, Attachment B ("Property to be Seized"). The warrant went on in the following ten paragraphs to detail the items that would be in violation of the aforementioned federal statutes, and were thus subject to seizure within the boundaries of the warrant. *Id.*

The warrant was executed on February 22, 2001. Seized were numerous videotapes, magazines, computer equipment, and documents. The Blue Orchid videos were not found, but other material containing alleged child pornography was discovered.

Peterson was indicted by the grand jury on August 15, 2001. Count I of the indictment alleges receipt of child pornography in violation of 18 U.S.C. section 2252(a)(2). Count II alleges possession of child pornography in violation of 18 U.S.C. section 2252(a)(4)(B). Count III is a forfeiture count.

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[5] Agent Erickson believed that David Peterson's father resided in the 1 ½ story house on the property, while David Peterson resided in the mobile home. Separate pictures of the mobile home and the 1 ½ story house were included with both the application and the warrant itself.

II. APPLICABLE LAW & DISCUSSION

A. Standard of Review

"The Fourth Amendment to the United States Constitution provides that the Federal Government shall not violate 'the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures.'" *Vernonia Sch. Dist. 47J v. Acton*, 115 S.Ct. 2386, 2390 (1995). A search warrant must be based on the existence of underlying factual circumstances that establish probable cause exists to conduct a search and to seize "incriminating evidence, the instrumentalities or fruits of a crime, or contraband." *See United States v. Winningham*, 953 F.Supp. 1068, 1077 (D. Minn. 1996) (citing *Warden v. Hayden*, 387 U.S. 294 (1967) (other citations omitted)). Probable cause exists if, in light of all circumstances supporting the law enforcement officer's affidavit, there is "a fair probability that contraband or evidence of a crime will be found in a particular, designated place." *Winningham*, 953 F.Supp. at 1077 (citing *United States v. Gladney*, 48 F.3d 309, 313 (8th Cir. 1995) (other citation omitted)). An application for a warrant and affidavits in support thereof are to be "examined under a common sense approach and not in a hypertechnical fashion." *United States v. Williams*, 10 F.3d 590, 593 (8th Cir. 1993) (citation omitted). Additionally, great deference is to be awarded the judicial officer who issued the warrant. *See United States v. Maxim*, 55 F.3d 394, 397 (8th Cir. 1995), cert denied, 116 S.Ct. 265 (1995).

The necessary probable cause for issuing a search warrant "'must exist at the time it is issued.'" *Winningham*, 953 F.Supp. at 1077 (quoting *United States v. Ozar*, 50 F.3d 1440, 1446 (8th Cir. 1995), cert. denied, 116 S.Ct. 193 (1995). A delay in time can make information stale, but "'there is no bright-line test for determining when information is stale.'" *Winningham*, 953

F.Supp. at 1077 (quotations omitted). If the affidavit indicates "'the presence of an ongoing, continuous criminal enterprise, the passage of time between the receipt of information and the search becomes less critical in assessing probable cause.'" *United States v. Rugh*, 968 F.2d 750, 754 (8th Cir. 1992). "[P]robable cause 'cannot be quantified by simply counting the number of days between the occurrence of the facts supplied and the issuance of the warrant . . . .'" *Winningham*, 953 F.Supp. at 1078 (quotation omitted).

B. Whether the Search Warrant was Stale

Defendant argues that the information in Agent Erickson's application and affidavit was stale and uncorroborated. The verified email contacts and Western Union transmissions between defendant and Blue Orchid occurred in the summer months of 2000, and a warrant was not sought until February 21, 2001.

This delay was not fatal to the validity of this warrant, especially in light of the criminal activity involved and the kind of property subject to the search. *See United States v. Maxim*, 55 F.3d 394, 397 (8th Cir. 1995) (importance of lapse in time between when information is provided and when search warrant is executed is minimized when possession of a firearm, a continuing offense, is at issue). Not unlike the possession of a firearm at issue in *Maxim*, possession of two videotapes containing child pornography is a continuing offense, and hence the delay in time is of little significance. *See also United States v. Smith*, 2001 WL 1111475, __ F.3d __ (8th Cir. September 24, 2001) (holding delay of approximately three months between last drug purchase by a confidential informant and application for warrant did not make the information stale).

As stated by Agent Erickson in her affidavit and application, the primary type of property at issue in this case – child pornography videos – is often collected and maintained.

> The observation that images of child pornography are likely to be hoarded by persons interested in those materials in the privacy of their homes is supported by common sense and the cases. Since the materials are illegal to distribute and possess, initial collection is difficult. Having succeeded in obtaining images, collectors are unlikely to quickly destroy them. Because of their illegality and the imprimatur of severe social stigma such images carry, collectors will want to secret them in secure places, like a private residence.

United States v. Lamb, 945 F.Supp. 441, 460 (N.D.N.Y. 1996). In this case, Agent Erickson's affidavit showed verified information that defendant had purchased two videos from an Internet site known to traffic in child pornography videos. This is a similar type of information to that supporting the affidavit for the warrant in *United States v. Koelling*, 992 F.2d 817 (8th Cir. 1993). In *Koelling*, law enforcement received a tip from a photo finishing business that the defendant was processing film with child pornography. *Id.* at 818. The Eighth Circuit found this one set of pictures was enough to indicate that the defendant was exhibiting behavior of a person who was "maintaining a pornography collection without disposing of the contents."[6]

Therefore, the information presented to Magistrate Judge Bremer on February 21, 2001 regarding defendant's contacts with Blue Orchid was not stale in view of the strong likelihood that the material was still in Peterson's possession. *See also United States v. Bateman*, 805

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[6] The Court notes that in *Koelling*, the defendant's behavior was labeled as that "common to a pedophile" as the defendant was assumed to have been the person actually taking the photographs he was attempting to have developed. *Koelling*, 992 F.2d at 823. In this case, the Court recognizes that there was no information known to law enforcement or present in Agent Erickson's affidavit to indicate Peterson was directly involved in taking sexually explicit pictures of children, or involved in any kind of sexual acts with children. The Court, however, finds that a person's status as a suspected pedophile does not necessarily make him more likely to collect and maintain a child pornography collection than a person who merely orders child pornography videos over the Internet – both persons are likely to collect such items. *See Lamb*, 945 F.Supp. at 461 (holding that "the magistrate need not have concluded that defendant was a pedophile, preferential child molester, or child pornography collector in order to decide that evidence of crime would likely be found at defendant's house").

F.Supp. 1041 (D.N.H. 1992) (holding information in affidavit in child pornography case was not stale even though seven months elapsed between last contact by confidential informant and time that local police opened investigation).

C. Whether the Search Warrant Lacked Probable Cause

Defendant asserts that beyond the staleness of the information supporting the warrant, probable cause to issue the search warrant was lacking.[7] Defendant asserts the information contained in Agent Erickson's affidavit did not indicate the child pornography video tapes were delivered from Blue Orchid to defendant, and that Agent Erickson never confirmed defendant ever received the tapes. Defendant also argues Agent Erickson's investigation did not uncover facts to indicate defendant was the "type" of person who would possess or collect child pornography, and that nothing to support such a label was in the affidavit.

This Court finds that while law enforcement officials could have done more to investigate Peterson – such as making more attempts to determine whether he received the videos from Blue Orchid, and whether he fit the profile of a person who collected child pornography – there was sufficient information in Agent Erickson's affidavit to allow Magistrate Judge Bremer to determine there "was a 'substantial basis for . . . conclud[ing]' that a search would uncover evidence of wrongdoing.'" *United States v. Horn*, 187 F.3d 781, 785 (8th Cir. 1999) (citations omitted) (involving anticipatory warrant). In *Horn*, a police detective used an

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[7] Defendant has also asserted that the warrant in this case amounts to a general search warrant because authority to conduct a computer search was included. This Court disagrees. Agent Erickson's affidavit credibly indicated to Magistrate Judge Bremer that Peterson used the Internet – and hence, most likely a computer – in an attempt to attain child pornography videos from the Blue Orchid site. *See United States v. Tyler*, 238 F.3d 1036, 1039 (8th Cir. 2001) (citations omitted) ("[A] search warrant is adequately specific if it calls for the seizure of property involved in the defendant's commission of crimes.").

alias and established contact with defendant. *Id.* at 784-85. The two exchanged letters in which the defendant admitted to enjoying types of child pornography. *Id.* at 285. The defendant sent the detective two videotapes, but neither contained any child pornography and defendant's letters indicated he had difficulty acquiring such material. *Id.* In one letter, however, the defendant indicated he was corresponding with a woman in Texas, with three children, who might provide him with some child pornography. *Id.* When law enforcement sough a warrant, they included information about the woman in Texas, and the warrant that was issued stated that the following items were subject to seizure at the defendant's residence: "any and all envelopes, letters, records documents, correspondence, videotapes, published materials, and other objects relating to contact with an unidentified woman in Texas who has two daughters 7 and 12 years of age and a son 10 years of age." *Id.* The Court found the information about the Texas woman created probable cause to allow law enforcement to search for such information, based on the totality of the circumstances surrounding the letters exchanged between the defendant and the undercover detective. *Id.* at 786.

In the case now before this Court, there was credible information in Agent Erickson's affidavit that Peterson used the Internet to not only order two child pornography videotapes from Blue Orchid, but that he sent payment via Western Union. The investigation in Russia of the Blue Orchid site, of which Agent Erickson had knowledge, revealed that child pornography videotapes were available from the company and for sale on that site. It also showed that Blue Orchid had sent numerous child pornography videos to customers in several countries. David Peterson was a customer of Blue Orchid who ordered and paid for child pornography video tapes.

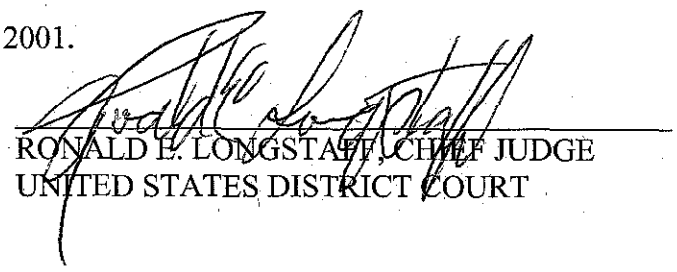
Agent Erickson could have established a stronger basis for a finding of probable cause if she had been able to confirm that the video tapes had indeed been delivered from Blue Orchid to Peterson. However, this Court finds that there was probable cause in Erickson's affidavit for Magistrate Judge Bremer to believe child pornography would be found at Peterson's mobile home. In *Horn*, the source of the child pornography was a nameless individual, and information provided to law enforcement only indicated that the defendant "hoped" that the source would "eventually provide him with pornographic material involving children." *Horn*, 187 F.3d at 787. Blue Orchid was an on-going international business, and Peterson was a paying customer on two occasions over more than a two month time span in the summer of 2000. It was reasonable for the magistrate judge to presume that Peterson would not have made the second purchase from Blue Orchid, in the amount of $200, had he not received the first video from the company.[8]

III. CONCLUSION

Defendant's motion to suppress is denied.

IT IS SO ORDERED.

Dated this 27 day of November, 2001.



RONALD E. LONGSTAFF, CHIEF JUDGE
UNITED STATES DISTRICT COURT

[8] The Court notes that even if it were to find the warrant defective in this case, the *Leon* good-faith exception would apply and evidence seized during the search would still not be suppressed. *See United States v. Rugh*, 968 F.2d 750 (8th Cir. 1992) (citing *United States v. Leon*, 468 U.S. 897, 913 (1984)).