UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA,	)	
	)	
v.	)	Crim. No. 02-13-B-S
	)	
PHILIP BUNNELL,	)	
	)	
Defendant	)	

RECOMMENDED DECISION DENYING DEFENDANT'S MOTION TO SUPPRESS

The defendant, Philip Bunnell, is facing federal prosecution for the possession of child pornography. He has moved to suppress both physical evidence seized and statements he made. (Docket No. 10.) I recommend that the court **DENY** the motion as it relates to the property seized. I conclude that a brief evidentiary hearing may be warranted on the issue of whether or not the interview during which Bunnell made statements he now seeks to suppress was custodial.

Background

Philip Bunnell is charged in three separate counts with knowingly possessing an image of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B) on various dates stretching from June 10, 2000, to September 11, 2000. The facts relevant to this motion to suppress, viewed in the light most favorable to Bunnell as recited in his memorandum of law, are set forth below.

This matter first came to the attention of the Machias Police Department on July 3, 2000, when officials from the University of Maine at Machias, as a result of their own internal examination of their computers, alerted law enforcement officers to the

possibility that Bunnell used university computers to access pornographic materials on the internet. Bunnell previously obtained permission to use the university computer for research in connection with a course he was taking at the university. He obtained similar permission to use the computer under the direct control of his employer at Pleasant River Ambulance. Bunnell also used his home computer for this research. He maintains he did not download, copy, or save any images to a disk, but simply viewed and then deleted certain images that now form the basis of these charges.

Once the Machias police came to believe that Bunnell had viewed certain images, they alerted United States Customs' officials who conducted a preliminary review of the university computer allegedly used by Bunnell and concluded that the forensic examination revealed that the computer had been used to access images and listings associated with child pornography. Bunnell's use of the university computers came to the attention of law enforcement solely because it was reported to them by personnel associated with the Center for Life Long Learning at the university.

Scott Inman of the Machias Police Department then interviewed Bunnell on September 9, 2000, and Bunnell admitted to using the university computer to conduct research for a class on sexual abuse of children and incest he had taken. Bunnell told the officer that the professor who conducted the course knew nothing about his research and that he had also used his personal computer in his home to conduct additional research on the internet. Bunnell told the officer that his unfinished course paper was at his home.

Acting on the information he received during this interview, Inman sought and obtained, on September 11 and 12, 2000, two successive search warrants from a state court justice of the peace to search Bunnell's residential premises at 8 Harwood Street,

Machias, Maine. Contained within both search warrants was the following information: "Mr. Bunnell admitted to doing research for a class on sexual abuse of children and incest on that computer. [He] stated that these were the types of sites he was checking on for a research paper for a college class. [He] told me that he worked on his research paper at home." Evidence seized included not only computer information relating to pornographic images but also "normal" photographs of at least one child displayed in the hallway of the home believed to be similar in appearance to that of a child depicted in a pornographic image displayed on the computer. The indictment against Bunnell issued on February 12, 2002.

Discussion

I. Fourth Amendment Issues as Raised by Bunnell

A. Franks Hearing Based Upon Deliberately Misleading Statement by Affiant

Bunnell argues that he is entitled to an evidentiary hearing in this case under Franks v. Delaware, 438 U.S. 154, 155-56 (1978), because the affiant, Officer Scott Inman, made a deliberately misleading statement of a material fact in the affidavit he submitted to the state court justice of peace when he sought a search warrant to search Bunnell's residence in Machias, Maine. According to Bunnell, Inman's transgressions were that he failed to advise the issuing justice of the peace that the university computer contained information that was protected by 20 U.S.C. § 1232g, the Family Education Rights and Privacy Act ("FERPA") and he intentionally failed to inform the judicial officer that Bunnell was conducting research on the internet as part of a course at the university.

Bunnell has failed to make the kind of preliminary showing that would entitle him to a Franks hearing. As indicated above, the affidavit plainly recites that Bunnell told the affiant that he accessed the materials as part of his university course work. The officer's failure to alert the issuing justice of the peace to a potential legal issue under FERPA, a failure that the defendant attributes to the officer's lack of knowledge of the issue, does not amount to the sort of deliberate misstatement that would entitle a defendant to an evidentiary hearing.

B. "FERPA" Rights

In this section of Bunnell's memorandum he seeks: "To suppress any evidence obtained from the University of Maine in violation of FERPA, protecting academic rights, and evidence obtained without a warrant and any illegal fruits thereof." In another section of his memorandum Bunnell argues that to the extent FERPA was violated when university personnel gave law enforcement agents access to the recycle bin on a computer previously used by Bunnell, that resulting evidence should be suppressed. There is no argumentation to support the notion that the retrieval of this deleted information was a FERPA violation, but even if I assume that it was, there is no authority cited for the proposition that the exclusionary rule is applicable to evidence obtained in violation of FERPA. In fact, in a somewhat analogous situation, the First Circuit has said that evidence obtained when the government itself violates a regulatory provision does not result in suppression. United States v. Edgar, 82 F.3d 499, 510 –11 (1st Cir. 1996) (suppression of evidence is not a remedy for governmental violation of the Fair Credit Reporting Act). The present case is even further removed from the suppression issue

than was Edgar because the alleged violator of the regulatory provisions, an official at the university, was not even acting at the behest of law enforcement personnel.

C. Student Fourth Amendment Rights and University Computers

A student has no generic expectation of privacy for shared usage on the university's computers. United States v. Butler, 151 F.Supp.2d 82, 84 (D. Me. 2001) (Hornby, Chief J.) (analyzing Fourth Amendment expectation of privacy in a case involving university computers, concluding "that in 2001 there is no generic expectation of privacy for shared usage on computers at large"). Therefore each case is fact specific and the ultimate question becomes whether the claim to privacy from government intrusion is reasonable in light of all the surrounding circumstances. United States v. Angevine, 281 F.3d 1130, 1134 (10th Cir. 2002). The burden is on the defendant to show that his expectations were reasonable under the circumstances of the particular case. United States v. Kimball, 25 F.3d 1, 9 (1st Cir. 1994).

Bunnell makes an attempt to satisfy that burden by attaching to his memorandum university policies relating to student-user passwords. The policies, however, make clear that the passwords are intended to safeguard the university's system from unauthorized users. Furthermore, the documents that are the subject to this prosecution were not saved by Bunnell in a private folder. They were deleted onto the university's recycle bin when first viewed by university personnel who alerted law enforcement. Bunnell does not contest any of these essential facts and further evidentiary hearing is not required. He has failed to show a reasonable expectation of privacy in these deleted files.

Bunnell also argues that the university officials could not consent to the search of the computers after they notified law enforcement about the deleted files. This argument

turns again on Bunnell's claimed reasonable expectation of privacy in deleted files on the university's disks. For the reasons stated above, he has no such expectation.

D. No Copying, No Possession

As I understand Bunnell's argument under this section of his memorandum, he intends to suggest that the research he did on the university computers was never downloaded or copied by him and therefore was never in his possession. He argues, in fact, that the images were deleted and therefore he cannot be guilty of possession. He fails to elaborate, however, as to why this line of thought leads to the suppression of any evidence. I can discern no recognizable Fourth Amendment argument.

E. The Computers and Evidence Seized from Bunnell's Home

Bunnell mounts an attack on the facial sufficiency of the affidavits in support of the two search warrants. He suggests that the information contained within the affidavits was stale because the warrants were not sought until September, well after the July disclosure of information on the university computer. However, that argument ignores the fact that the affiant spoke with Bunnell on September 9, 2000, and he admitted that he had "research" material on his home computer. The information was not stale.

In his reply memorandum Bunnell mentions for the first time that the affidavit is deficient under United States v. Brunette, 256 F.3d 14 (1st Cir. 2001) because it was not accompanied by any photographs or detailed description of the nature of the alleged images. In Brunette the Court of Appeals found an affidavit fatally deficient not only because the issuing magistrate did not independently review the images, but also because the "affidavit did not adequately describe them." 256 F.3d at 15. The basis for the issuance of the warrant in Brunette was the contention that there was probable cause to

believe that Brunette had violated 18 U.S.C. § 2256(2)(E), a statute that prohibits the "lascivious exhibition of genitals." Id. at 17. The affiant had merely parroted the statutory language in conclusory fashion and had provided no further elaboration when describing the images. Id.

By contrast the warrant in this case was sought based upon the assertion that there was probable cause to believe that Bunnell had violated 17 M.R.S.A. § 2924 (West Supp. 2001), the Maine State crime of possession of sexually explicit materials. "Sexually explicit materials" is defined under § 2924(2)(A) to include visual images depicting a person engaging in sexually explicit conduct with another person who has not attained the age of fourteen years. "Sexually explicit conduct," as defined under § 2924(1)(A), means, among other things, a sexual act. "Sexual act" is a term defined in Maine's Criminal Code, 17-A M.R.S.A. § 251(1)(C) (West Supp. 2001), and includes, among other things, any act between two persons involving the direct physical contact between the genitals of one and the mouth of the other.

The affiant in this case recited that he showed certain pictures to Bunnell and Bunnell identified one of them as a photo he had previously seen while doing his research on the internet. Bunnell also told the affiant that he had done similar research on his home computer (the computer that was the subject of the search warrant). The affiant described the photo to the justice of the peace as that of an adult female performing oral copulation on a minor male child. Unlike the photo description given by the affiant in Brunette, this affiant did not merely recite a legal conclusion, he provided a complete description. While the "lascivious exhibition of genitals" might be a matter of opinion, direct physical contact between the mouth of an adult and the genitals of a child is

descriptive and is a determination of fact rather than a conclusion of law. United States v. Getzel, 2002 WL 628623, *5 (D.N.H. 2002) (concluding that affiant's description of images as portraying "forms of sexual intercourse, oral sex, genital-genital contact, oral-genital contact, and also masturbation" "were sufficiently detailed and factual for the court to assess their nature" and thus satisfied Brunette); see also United States v. Chrobak, __ F.3d __, 2002 WL 857548, *1-2 (8th Cir. May 7, 2002) (noting that there are very few pictures of actual children engaged in sexual acts that are not pornography and affiant's description of children engaged in sexual acts satisfied requirement that conduct be described with particularity).[1] The affidavit in this case was facially sufficient.

F. Pleasant River Ambulance Company Computer

Bunnell's final Fourth Amendment challenge relates to evidence seized from a computer at the Pleasant River Ambulance Company. Apparently Bunnell was employed as an Emergency Medical Technician while attending classes at the university. He obtained permission from his employer to use the company computer during the time he was awaiting ambulance calls. A co-employee gave him a password and apparently he did additional "research" while at work. At some point in time an employee of the ambulance company called law enforcement and reported that the computer contained illegal material. The computer was then turned over to the police and with the consent of Pleasant River it was searched for images of child pornography. The submissions do not clearly state when this occurred, but, significantly, no mention of this computer is made in either affidavit submitted in support of the search warrants and therefore it did not form the basis of the issuing justice of the peace's probable cause determination.

[1] As reflected in Chrobak the Eighth Circuit parts ways with the First Circuit in its conclusion that particularity is satisfied if the warrant describes the material in the terms of the statute, for example, depictions of "minors engaged in sexually explicit conduct." Id.

As already noted Judge Hornby stated in Butler "that in 2001 there is no generic expectation of privacy for shared usage on computers at large." 151 F.Supp.2d at 84. Though it can be argued that a computer at one's place of work is not "at large" in the same way that shared computers at a university are, I conclude that the facts as alleged by Bunnell do not take this case outside the parameters of Butler. This is not even a case in which Bunnell had a computer assigned to him by his employer which was his alone to use on a regular basis. See Muick v. Glenayre Elecs., 280 F.3d 741, 743 (7th Cir. 2002) (analyzing privacy expectation in an employer issued laptop computer, observing: "If the employer equips the employee's office with a safe or file cabinet or other receptacle in which to keep his private papers, he can assume that the contents of the safe are private.")[2] Bunnell's usage of his employer's computers is not dissimilar to cases involving computers accessed in a university computer room or a library; Bunnell was borrowing the equipment (for purposes unrelated to his employment) and had to get special permission for his use. He was aware that other employees used the computer. His employer came across the suspect material as proprietor of the computer; there is no indication that any special effort was undertaken to track Bunnell's usage. I conclude that if Bunnell had an expectation that his use of this computer would be private it was not a reasonable expectation within the meaning of Fourth Amendment jurisprudence.

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[2] In Muick the Seventh Circuit, while recognizing that there could theoretically be an expectation of privacy in a work computer, concluded that the employee did not have a reasonable expectation in the laptop. It reasoned:

> The laptops were [the employer's] property and it could attach whatever conditions to their use it wanted to. They didn't have to be reasonable conditions; but the abuse of access to workplace computers is so common (workers being prone to use them as media of gossip, titillation, and other entertainment and distraction) that reserving a right of inspection is so far from being unreasonable that the failure to do so might well be thought irresponsible.

Id. at 743.

Based upon the foregoing, I recommend that the Court **DENY** the motion to suppress physical evidence seized from Bunnell's residence and computers at the Univeristy of Maine at Machias and the Pleasant River Ambulance Company.

II. Motion to Suppress Statements

Bunnell has moved to suppress statements he made to Scott Inman on September 9, 2000. Inman visited Bunnell's residence to interview him about the images found on the university computer. Bunnell was in his yard with his wife when Inman arrived. When Inman told him the subject matter of his visit, Bunnell about Bunnell asked if they could talk in a more private place. Inman suggested they go into the house but Bunnell asked if they could talk in the cruiser. They did, for approximately thirty-five minutes. The interview was tape recorded. At the beginning of the conversation Inman told Bunnell he could leave at any time and he was not in custody. No other officers were present or participated in the interview. When the men finished talking Bunnell left the area.

Based upon these unchallenged assertions by the United States I fail to see how Bunnell can suggest that the interview was a custodial interrogation under United States v. Trueber, 238 F.3d 79, 93 (1st Cir. 2001). I do not believe that there was any Miranda v. Arizona, 384 U.S. 436 (1966) violation in this case. Nevertheless, Bunnell suggests that his statements were not voluntary because of coercive police conduct. Specifically he argues that Inman's tactics of describing himself as the Washington County expert on child pornography was a coercive tactic that amounted to police overreaching, rendering his statement involuntary. See generally Colorado v. Connelly, 479 U.S. 157, 169-70 (1986).

A brief evidentiary hearing limited solely to issues raised regarding the voluntariness of Bunnell's statements and the question of whether the thirty-five minute interview was custodial may be required. If the evidence corresponds to the assertions in the United States' response I would recommend that the court **DENY** the motion.

CONCLUSION

In light of the discussion above I recommend that the Court **DENY** Bunnell's motion to suppress the evidence seized from his residence and from the computers belonging to University of Maine at Machias and the Pleasant River Ambulance Company. With respect to Bunnell's attempts to suppress statements he made to Inman, I recommend that the Court hold a brief evidentiary hearing to determine whether the conversation at issue was custodial.

NOTICE

> A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.
>
> Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

_____

Margaret J. Kravchuk
U.S. Magistrate Judge

May 10, 2002.

CJACNS

U.S. District Court
District of Maine (Bangor)
CRIMINAL DOCKET FOR CASE #: 02-CR-13-ALL

USA v. BUNNELL Filed: 02/12/02

Dkt# in other court: None
Case Assigned to: Judge GEORGE Z. SINGAL

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Pending Counts: Disposition
18:2252A.F ACTIVITIES RE MATERIAL CONSTITUTING/CONTAINING CHILD PORNO (1 - 3)
Offense Level (opening): 4
Terminated Counts: NONE
Complaints: NONE
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