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United States District Court,S.D. Texas.
UNITED STATES of America, Plaintiff,
v.

Donad M. CARLSON, Defendant.
Criminal Case H-99-178.

June 28, 2002.

On motion to suppress evidence seized from suspected pedophile's residence, the District Court, Hughes, J., held that: (1) affidavit supplied by customs officer was insufficient to support issuance of search warrant for suspect's residence; (2) officer's testimony regarding information he obtained by informant, in application for search warrant, would be stricken; (3) under criminal procedure rule and the Fourth Amendment, particularized list of items that customs officer intended to seize from suspect's residence had to be attached to search warrant; (4) evidence derived from illegal search of suspect's residence would be suppressed.

Ordered accordingly.

West Headnotes

[1] Searches and Seizures 349 🔗113.1

349 Searches and Seizures

349II Warrants

349k113 Probable or Reasonable Cause

349k113.1 k. In General. Most Cited Cases

Before magistrate may issue search warrant, requesting officer must supply her with facts under oath, and such facts must be of weight and reliability that would lead reasonable person learned in the law to conclude that law has probably been violated, and facts must support conclusion that specific items relate to commission of that crime and are to be found in place to be searched. U.S.C.A. Const.Amend. 4.

[2] Searches and Seizures 349 🔗112

349 Searches and Seizures

349II Warrants

349k112 k. False, Inaccurate or Perjured

Information; Disclosure. Most Cited Cases

When false, irrelevant, nonspecific parts of application for search warrant are eliminated, what remains must support finding of probable cause, and abstract psycho-sociological "data" is insufficient. U.S.C.A. Const.Amend. 4.

[3] Searches and Seizures 349 🔗124

349 Searches and Seizures

349II Warrants

349k123 Form and Contents of Warrant;

Signature

349k124 k. Particularity or Generality and

Overbreadth in General. Most Cited Cases

Search warrant that describes items for seizure beyond hard information in application is invalid. U.S.C.A. Const.Amend. 4.

[4] Searches and Seizures 349 🔗124

349 Searches and Seizures

349II Warrants

349k123 Form and Contents of Warrant;

Signature

349k124 k. Particularity or Generality and

Overbreadth in General. Most Cited Cases

Search warrant clothed in mindless enumeration of baseless specifics is general warrant, and as such is void. U.S.C.A. Const.Amend. 4.

[5] Searches and Seizures 349 🔗112

349 Searches and Seizures

349II Warrants

349k112 k. False, Inaccurate or Perjured

Information; Disclosure. Most Cited Cases

Searches and Seizures 349 🔗114

349 Searches and Seizures

349II Warrants

349k113 Probable or Reasonable Cause

349k114 k. Particular Concrete Applications.

Most Cited Cases

Searches and Seizures 349 ↪ 124

349 Searches and Seizures

349II Warrants

349k123 Form and Contents of Warrant;

Signature

349k124 k. Particularity or Generality and Overbreadth in General. Most Cited Cases

Affidavit supplied by customs officer was insufficient to support issuance of search warrant, allowing search of suspected pedophile's residence; information in affidavit did not provide probable cause for search, e.g., affidavit contained false representations regarding reliability of confidential informant, affidavit contained irrelevant stereotypes and profiles about pedophiles, without attempting to connect such information to suspect's activities, and affidavit did not satisfy particularity requirement. U.S.C.A. Const.Amend. 4.

[6] Searches and Seizures 349 ↪ 118

349 Searches and Seizures

349II Warrants

349k115 Competency of Information; Hearsay

349k118 k. Anonymous or Confidential

Informants. Most Cited Cases

When probable cause for search warrant is based on confidential informant's information, magistrate must assess informant's reliability before issuance of search warrant, and reliability can be assessed by considering informant's record in other cases and considering additional evidence that corroborates reliability of informant's material. U.S.C.A. Const.Amend. 4.

[7] Searches and Seizures 349 ↪ 105.1

349 Searches and Seizures

349II Warrants

349k105 Complaint, Application or Affidavit

349k105.1 k. In General. Most Cited Cases

In determining whether to issue search warrant, evidence about behavior of class of person is relevant

only if affidavit shows that target of search is member of class, otherwise, description is mere fluff designed to inflame passions of magistrate against alleged criminal. U.S.C.A. Const.Amend. 4.

[8] Searches and Seizures 349 ↪ 112

349 Searches and Seizures

349II Warrants

349k112 k. False, Inaccurate or Perjured

Information; Disclosure. Most Cited Cases

Custom officer's affirmations regarding information he obtained by informant, in application for search warrant of suspected pedophile's home, would be stricken, where officer omitted mentioning that informant was equally at fault, had a criminal record, and would be paid for his information; without such information, officer's representations regarding reliability of informant were misleading. U.S.C.A. Const.Amend. 4.

[9] Searches and Seizures 349 ↪ 125

349 Searches and Seizures

349II Warrants

349k123 Form and Contents of Warrant;

Signature

349k125 k. Objects or Information Sought.

Most Cited Cases

Under criminal procedure rule and the Fourth Amendment, particularized list of items customs officer intended to seize from suspected pedophile's residence had to be attached to search warrant, so as to provide suspect with notice and ability to determine legality of search. U.S.C.A. Const.Amend. 4; Fed.Rules Cr.Proc.Rule 41(d), 18 U.S.C.A.

[10] Criminal Law 110 ↪ 394.4(6)

110 Criminal Law

110XVII Evidence

110XVII(I) Competency in General

110k394 Evidence Wrongfully Obtained

110k394.4 Unlawful Search or Seizure

110k394.4(5) Search Under Warrant

110k394.4(6) k. Affidavit or

Complaint; Probable Cause. Most Cited Cases

Evidence seized in illegal search is not suppressed if

officer executing warrant had objectively reasonable belief that warrant was valid; faith in warrant's validity is not reasonable where affidavit, supporting issuance of warrant, wholly lacks required probable cause showing. U.S.C.A. Const.Amend. 4.

[11] Criminal Law 110 ↪ 394.4(6)

110 Criminal Law

110XVII Evidence

110XVII(I) Competency in General

110k394 Evidence Wrongfully Obtained

110k394.4 Unlawful Search or Seizure

110k394.4(5) Search Under Warrant

110k394.4(6) k. Affidavit of

Complaint; Probable Cause. Most Cited Cases

Criminal Law 110 ↪ 394.4(10)

110 Criminal Law

110XVII Evidence

110XVII(I) Competency in General

110k394 Evidence Wrongfully Obtained

110k394.4 Unlawful Search or Seizure

110k394.4(10) k. Home or Place of

Residence. Most Cited Cases

Evidence derived from illegal search of suspected pedophile's residence would be suppressed, given customs officer, who provided affidavit to support issuance of search warrant and executed warrant, could not have had good faith belief that warrant was valid, and no reasonable magistrate in good-faith discharge of her constitutional responsibilities would have authorized late, superficial, and unconnected search warrant of residence. U.S.C.A. Const.Amend. 4.

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Joel M. Androphy, Houston, TX, for Defendant.

Opinion on Suppression

HUGHES, Judge.

1. *Introduction.*

This case co-mingles the novel-the Internet, chat rooms, user names-with the venerable-freedom from random government searches. When a federal agent bases his affirmation on dubious information from an unreliable source, the ensuing warrant is invalid, and so is the search.

2. *Search Warrants.*

[1][2][3][4] Freedom from general searches is a fundamental right, and search warrants issue only on probable cause. U.S. Const. amend. IV; see Marron v. United States, 275 U.S. 192, 195, 48 S.Ct. 74, 72 L.Ed. 231 (1927). Before a magistrate may issue a warrant, the officer must supply her with facts under oath. These facts must be of a weight and reliability that would lead a reasonable person learned in the law to conclude that the law has probably*688 been violated. See Steele v. United States, 267 U.S. 498, 504-05, 45 S.Ct. 414, 69 L.Ed. 757 (1925); Stacey v. Emery, 97 U.S. 642, 645, 24 L.Ed. 1035 (1878). Next, the facts must support the conclusion that the specific items relate to the commission of that crime and are to be found in the place to be searched. See Aderhold v. United States, 132 F.2d 858, 859 (5th Cir.1943); United States v. Maestas, 546 F.2d 1177 (5th Cir.1977).

Then the warrant must describe-in a particularity congruent with the supporting facts-the place to be searched and the things to be seized. U.S. Const. amend. IV; see United States v. Shugart, 117 F.3d 838 (5th Cir.1997). When the false, irrelevant, nonspecific parts of an application are eliminated, what remains must support a finding of probable cause. See Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). Abstract psycho-sociological "data" is insufficient. A warrant that describes items for seizure beyond the hard information in the application is invalid. A warrant clothed in mindless enumeration of baseless specifics is still a general warrant-still void.

3. *Affidavit for the Search Warrant.*

[5] Special Agent Robert M. Sherman of the United States Customs Service filed an affidavit on March 12, 1998, supporting an application for a search warrant for

Don M. Carlson's home.

A. Probable Cause.

Based on information an informant, Harry Conners, sent to Customs on October 29, 1997, Sherman swore that Carlson sent two pornographic images of children through the Internet on October 4, 1997, and received two more images through the Internet on October 23, 1997. Sherman did not specify from whom Carlson received the images or to whom he sent them. Further, Sherman made no statement about the informant's veracity, reliability, or the basis of his knowledge.

Sherman corroborated that the screen names used to receive and send the images were Carlson's, concluding that the fictitious names concealed his identity so he could communicate anonymously with young boys. Sherman then verified that the children in the images were minors and that their poses were pornographic.

Last, Sherman said that he monitored Carlson in an Internet chatroom at 11:00 p.m. on February 28, 1998, baldly asserting that the chatroom was frequented by homosexual males interested in young boys. Sherman said he arrived at Carlson's home at 11:45 p.m. and saw lights on inside the house and Carlson's car parked in the driveway. He stated that Carlson disconnected from the Internet at 11:50 p.m. Sherman said he knocked on Carlson's door forty minutes later, and Carlson answered.

Sherman then excerpted six pages from another agent's study of pedophiles, child pornographers, and preferential child molesters. He included details of how pedophiles seduce and molest children. He said that computers were a fast-growing medium for pedophiles. None of this—none—was case-specific. Sherman never connected the profiles to Carlson or the information Conners provided. He never alleged that Carlson was a pedophile. He described the behavioral patterns of pedophiles and child molesters without describing how Carlson fit the patterns.

B. Particularity.

Beyond computerized images, Sherman's catalogue of

items he wanted to seize included films, videotapes, books, and magazines containing child pornography.*689 He listed items like envelopes, letters, and address books used to send and receive child pornography through the mail, plus “all computer systems,” including scanners, operating manuals, monitors, and printers—none of which can store electronic images.

Sherman continued, wanting to seize motion picture cameras, production equipment, still cameras, camera film, and video cassette recorders and players. He also listed receipts, checks, money orders, contracts, and invoices that could be used to distribute pornography. He wanted to seize advertisements, posters, pamphlets, lists, or notebooks that contained a reference to child pornography. He also wanted to seize all records showing that Carlson owned the home or the seized items.

Sherman said he wanted to seize child erotica, even legal, that demonstrated Carlson's disposition toward pedophilia. This included items Carlson could use to entice children to visit or trust him—books about children or pedophiles, toys, dolls, games, children's books, and video games.

Out of eleven paragraphs, Sherman addressed the issue at hand—computer images sent over the Internet—in only one. With some particularity in paragraph six, Sherman said he wanted to seize computer files with images of child pornography. None of the other items had been shown to be part of anything Sherman “knew” about Carlson or his home. Sherman's indiscriminate list was far too broad. *See Stanford v. Texas*, 379 U.S. 476, 485, 486, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965).

4. No Probable Cause.

A. Unreliability of the Confidential Informant.

[6] When probable cause for a search warrant is based on a confidential informant's information, the magistrate must assess the informant's reliability. Otherwise, the government could search the home of whomever it wanted with fictitious or unreliable information. One lying citizen could unleash the full

force of the state and its ability to disrupt someone's home. Reliability can be assessed by considering the informant's record in other cases and considering additional evidence that corroborates the reliability of the informant's material. *See Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983).

Although it is clear that no one could have asserted anything useful about Connors, Sherman never averred that Connors was truthful or that his information was reliable. Even though Sherman had the government's resources at his disposal, he never furnished evidence that would have indicated Connors's character or corroborated his information, the veracity of which is suspect at best.

Sherman says that Carlson's activity in the chatroom corroborates Connors's story, making the information reliable. The chatroom Carlson frequented was legal, so his presence there corroborates no illegal activity. Second, the claim that people who use the chatroom are homosexual pedophiles seeking to molest young boys is wholly speculative. Sherman presented no evidence whatsoever to this effect. Third, Connors frequented the same chatroom. Under the government's analysis, Connors would be a homosexual male interested in young boys. Even assuming the chatroom were illegal, Sherman presented no evidence connecting Connors's information to Carlson's chatroom activity-activity that occurred four months *after* Connors furnished the information to Sherman.

*690 A cursory review of the electronic mail headers that Connors sent to the government reveals that Connors and Carlson were simultaneously receiving the same images from the same third person. Sherman knew this but did not include this data for the magistrate to use in assessing Connors's reliability. He never said how Connors knew that Carlson sent and received the images. He said only that Connors told Customs that Carlson sent and received two images of child pornography.

Connors took 25 days to report that Carlson sent images of child pornography and six days to report that Carlson received images of child pornography. As time passed, Connors's information became more unreliable and his motives more suspect.

Sherman also omitted Connors's criminal record, despite his ready access to the information as a federal officer. Connors has never been convicted, but he has

a felony arrest for possession of marijuana and six misdemeanor arrests, including assault with the intent to cause physical injury, driving under the influence of alcohol, and resisting arrest. His brushes with the law should have been considered in assessing his reliability. In a last ditch effort, the government says that Connors's reliability was not crucial because he was a concerned citizen, not a confidential informant. The assertion contradicts the facts. The government called Connors a "confidential informant" in its affidavit and wanted Connors to remain confidential at the outset of the case. Although the government paid Connors the \$200 for his information after the search, Connors knew about the potential reward when he supplied the information.

Sherman did not offer evidence supporting Connors's reliability. He omitted that Connors was *in pari delicto*, had a criminal record, and would be paid for the information.

B. Irrelevant Stereotypes and Profiles.

The stereotypes and profiles do nothing to show that a search would probably reveal evidence of a crime. Assuming they were true, Sherman did not connect the profiles and stereotypes to Carlson's activities.

(1) Irrelevant Stereotypes.

Sherman made several blanket assertions that just promote blanket assumptions. He said Internet users with fictitious screen names conceal their identities to communicate with young boys. There are countless reasons for Carlson to wish to remain anonymous, including a wish to talk with others-anonymously-about sex with children. The conversations are neither illegal nor evidence of illegality. Assuming the stereotypes were true, Sherman presented no evidence that Carlson involved these children on the Internet with the images he sent and received.

Sherman also said that homosexual men interested in young boys frequented the chatroom Carlson used. Again, Sherman presented no evidence to corroborate this or that Carlson involved children with the images

he sent and received.

(2) *Irrelevant Profiles.*

[7] Sherman explained the profiles of three groups of unwholesome individuals: pedophiles, preferential child molesters, and child pornographers. Ignorant of a crucial distinction-pedophilic acts are illegal, but it is not illegal to be a pedophile-Sherman continued his six-page exegesis on child pornographers and molesters. He even explained, in *691 detail, how pedophiles seduce children. Evidence about the behavior of a class of people is relevant only if the affidavit shows that the target of the search is a member of the class. Otherwise, the description is mere fluff designed to inflame the passions of the magistrate against the alleged pedophile. See *United States v. Weber*, 923 F.2d 1338, 1345 (9th Cir.1990).

Sherman did not present one scintilla of evidence that Carlson produced child pornography, targeted children for molestation, or was improperly involved with children. If he had scrutinized the facts, as another court has commented, he might have noticed that his boilerplate did not refer to Carlson, the search of Carlson's home, or the likelihood that Carlson fit one of the three profiles. See *id.*

5. *No Particularity.*

Assuming Conners's information was reliable, the list of things to be seized was too broad because it sought items used to produce pornography and act as a pedophile. Sherman had only unverified evidence that Carlson sent and received two images of child pornography over the Internet. He had nothing evincing pedophilic acts or the production of child pornography.

A search for motion picture cameras, production equipment, still cameras, camera film, and video cassette recorders and players is similarly too broad because Sherman presented no evidence that Carlson did anything suspicious except communicate over the

Internet. A search for indicia of trade-envelopes, address books, receipts, checks, or contracts-is too broad because Sherman had evidence linking Carlson only to the Internet. A search for films, videotapes, or magazines with child pornography or advertisements or pamphlets for them is too broad because Sherman had no evidence tying Carlson to these media, and the advertisements are not illegal.

Similarly, a search for toys, dolls, games, books about children, children's books, and video games is ridiculously too broad because Sherman did not present evidence that Carlson involved children in illegal activity. Millions of homes contain children's toys for wholly licit reasons. If there is a relation between possession of children's playthings and possession of child pornography, Sherman did not show it. He certainly did not relate Carlson's possession of these things to images of child pornography.

6. *False Representations.*

[8] Assuming Conners's information was intrinsically reliable, the omission that Conners was *in pari delicto*, had a criminal record, and would be paid for his information makes Sherman's representations about him misleading. Sherman's testimony in the application for the search warrant must be struck.

With the Conners portions of Sherman's affidavit struck, there is insufficient evidence that a search of Carlson's home would probably reveal evidence of a crime. Without information about Carlson's sending and receiving images of child pornography over the Internet, there is no reason-corroborated or otherwise-to believe that a search of Carlson's home would reveal computer images of child pornography.

7. *Stale.*

Sherman received the information from Conners on October 29, 1997, but did not apply for a search warrant until March 12, 1998. The longer the delay, the less likely the information connects its subject to a crime. The government presented no explanation for

the lag. The stale information is insufficient to show probable cause. *692 See United States v. Freeman, 685 F.2d 942 (5th Cir.1982).

Assuming Connors's information was initially reliable, its strength evaporated after four and a half months. After striking the irrelevant profiles from Sherman's affidavit, it leaves no reason to believe that Carlson would still have the incriminating images. The likelihood that a person will buy a new computer or replace a hard drive is extremely high. The government admitted that there was no continuing investigation of the people on the headers of the electronic messages Carlson sent and received, so the delay was not necessary to protect potential sources of additional information.

Monitoring Carlson in the chatroom four months after the government received the information neither corroborates Connors's information nor makes it more probable that a search will reveal evidence of a crime.

Waiting for Carlson to visit a chatroom is not a reasonable explanation for the delay; it shows the weakness of the connection the government wants to make.

8. Execution of the Search.

[9] Sherman executed the warrant in as slapdash a manner as he applied for it. The warrant Sherman used to search Carlson's home did not have attached the list of items he intended to seize. This is a violation of the federal rules, and, more importantly, the Constitution. U.S. Const. amend. IV; Fed.R.Crim.P. 41(d). Without the list of particular items to be seized, the execution of the warrant was unreasonable because Carlson had no notice. A citizen can confirm that an officer's search is legal only if the warrant particularly describes the place to be searched and the things to be seized. Sherman's warrant did not, contravening the Constitution's requirements.

9. Good Faith.

[10] Evidence seized in an illegal search is not

suppressed if the officer executing the warrant had an objectively reasonable belief that the warrant was valid. Faith in the warrant's validity is not reasonable where the affidavit wholly lacks the required probable cause showing. See United States v. Leon, 468 U.S. 897, 922-23, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). Sherman knew that the affidavit lacked specific allegations against Carlson. He knew that the list of items to be seized bore no relation to the evidence he possessed. He knew that his informant was unreliable and *in pari delicto* with Carlson. The magistrate did not tell Sherman that she had edited the proposed warrant to pare it back to what probable cause allowed. See Massachusetts v. Sheppard, 468 U.S. 981, 986, 104 S.Ct. 3424, 82 L.Ed.2d 737 (1984). Sherman's reliance on the warrant to search Carlson's home was entirely unreasonable.

10. Conclusion.

Connors was not trustworthy, and his information was unreliable. Sherman acted on Connors's tip without trying to corroborate his information or credibility. Instead, Sherman sat on the information for more than four months, watched Carlson enter a perfectly legal chatroom, and then sought a warrant. Sherman's supporting affidavit academically details the behavior of pedophiles, yet offers no evidence that Carlson acted as one. The affidavit also implied the informant was tried and true, omitting reference to the \$200 payoff or his history of criminal activity. Calling Connors a "confidential informant" grossly misrepresented his true nature. Once the affidavit's false representations are struck, what remains cannot support a finding of probable cause.

*693 [11] The warrant also fails the particularity requirement. Sherman had evidence of one thing—that Carlson possessed computer images containing child pornography. The warrant should have been limited to that. Instead, Sherman's list of articles to be seized included a plethora of unrelated items. Sherman searched Carlson's home hoping to find evidence of crimes he had no good reason to suspect. No reasonable magistrate in the good-faith discharge of her constitutional responsibilities would have authorized

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this late, superficial, and unconnected warrant. The evidence derived from the search will be suppressed.

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