

**IN THE COURT OF COMMON PLEAS
LYCOMING COUNTY, PENNSYLVANIA
CRIMINAL DIVISION**

COMMONWEALTH	:	
	:	
v.	:	No.: 03-11,314
	:	
DAYLE WHEELOCK,	:	
Defendant	:	

OPINION AND ORDER

Before the Court is the Defendant's Motion to Suppress, which was heard on January 26, 2004. Defendant alleges in his motion that the Search Warrant issued in this case was improper as the requesting officer lacked probable cause to believe that a crime was being committed within the Defendant's residence.

The testimony provided at the suppression hearing shows that on July 22, 2003, the Defendant was living in an apartment located in the same building as Papa's Pizza, a restaurant in Picture Rocks, Lycoming County, Pennsylvania. On that day, the co-owner of the restaurant, Greta Evans, was at her business when she was alerted to a large amount of smoke coming from a back room. She believed that the building was on fire and called for assistance. The dispatcher to whom she spoke asked that she attempt to evacuate the building. She therefore grabbed a set of pass keys maintained by her father, the owner of the building, and went through the apartment area of the building, knocking on doors of the seven apartments there and doing her best to be certain that no one was inside. At two of the

apartments, she did not receive an answer to her knock. The first time this happened, she used the pass key to enter the apartment and go completely to the area farthest from the door to discover an occupant asleep in bed. She roused this person so that she could leave the building. The second time that Ms. Evans received no answer to her knock was at the Defendant's apartment. Again she used the pass key to enter the apartment and went through to the other end of the apartment, the Defendant's bedroom, to be certain that no one was there. Along the way to the Defendant's bedroom and eventually inside of the Defendant's bedroom, Ms. Evans observed what she felt were disturbing photographs of young boys of about the ages of one through seven, many of whom were nude and/or posed in sexually provocative positions. Many of the photographs were arranged in collage form and displayed primarily in the Defendant's bedroom, although some were also located in the living room. Ms. Evans testified that she quickly left the apartment as the building was on fire and she still had to make sure that other apartments were empty. She further testified that after the fire department declared the building safe she was too disturbed by the things she had seen in the Defendant's apartment to return to work and decided instead to call the Pennsylvania State Police. A search warrant was obtained later that same day based solely upon the information that Ms. Evans provided. The search warrant affidavit was also presented at the suppression hearing. The Defendant now claims that the information provided by Ms. Evans was insufficient to provide probable cause that

evidence of a crime was located within the Defendant's apartment. Specifically, he alleges that certain dolls that were seized from the apartment were not pornography as defined by Pennsylvania statute and that the photographs described above were not "immediately classifiable" as pornography.

Defendant in this case has been charged under 18 Pa.C.S. Section 6312(d), the Possession of Child Pornography section of the Sexual Abuse of Children statute, which provides that

(1) Any person who knowingly possesses or controls any book, magazine, pamphlet, slide, photograph, film, videotape, computer depiction or other material depicting a child under the age of 18 years engaging in a prohibited sexual act or in the simulation of such act commits an offense.

The statute defines a "prohibited sexual act" under Section 6312(a) as "sexual intercourse as defined in section 3101 (relating to definitions), masturbation, sadism, masochism, bestiality, fellatio, cunnilingus, lewd exhibition of the genitals or nudity if such nudity is depicted for the purpose of sexual stimulation or gratification of any person who might view such depiction." Pornography is not specifically defined within the statute. However, it is clear that photographs of nude children under the age of eighteen where the nudity is depicted for the purpose of the sexual stimulation or gratification of the viewer of the photograph are pornography for purposes of 18 Pa.C.S. Section 6312.

At the suppression hearing, Ms. Evans described the photographs she saw as disturbing, and indicated that they depicted young boys of about

the ages of one through seven, children who were clearly under the age of eighteen. She further described the subjects of the photographs as nude and/or posed in sexually provocative positions. She testified that she described the photographs in even greater detail to the Pennsylvania State Police. Additionally, Ms. Evans provided information to the Pennsylvania State Police that the photographs were located primarily in the Defendant's bedroom, although there was at least one in the living room of the apartment. She described them as being displayed as one would display photographs in a scrapbook, with cut-out letters pasted onto the various collages, spelling out such statements as "Things I Like". At the hearing, the Commonwealth also presented one of the collages, along with photographs of the room as it would have been observed by Ms. Evans on that day. This Court is satisfied after reviewing the exhibits presented, there was sufficient probable cause for the Pennsylvania State Police to believe that a crime was being committed within the Defendant's apartment and that evidence of that crime was located there. The Court therefore finds that the search warrant was properly issued.

At the time of the suppression hearing, the Defendant also suggested that the search warrant was invalid because Ms. Evans, the witness who contacted the Pennsylvania State Police, illegally entered the apartment and therefore any information she passed on to the Pennsylvania State Police was tainted. The Court rejects this contention. It is clear to the Court from the testimony presented at the suppression hearing that Ms. Evans

motivation for entering the Defendant's apartment was to make sure that he would not be harmed if the fire she believed was in the building spread to his apartment. There was no answer to Ms. Evans' knock on the Defendant's door, so she entered, not at the request of any law enforcement agency, but to ensure the safety of the Defendant or anyone else who may have been visiting in his apartment. The Court finds that Ms. Evans acted appropriately and that once inside the Defendant's apartment she did not linger any longer than necessary to be sure the apartment was empty. The items which Ms. Evans described to the Pennsylvania State Police were in plain view and although she noticed them, she did not stop and study them for any length of time but left the apartment quickly so that she could alert people in other apartments that they needed to leave the building to be safe. Therefore, the Court is satisfied the information which formed the basis of the search warrant obtained by the State Police was not tainted.

ORDER

AND NOW, this _____ day of February, 2004, after hearing and argument in this matter, the Defendant's Motion to Suppress filed October 15, 2003 is DENIED.

By the Court,

Nancy L. Butts, Judge J.

xc: DA (RF)
PD (Cleland)
Hon. Nancy L. Butts
Diane L. Turner, Esquire
Gary Weber, Esquire