

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	NO. CR – 1166 – 2006
	:	
vs.	:	CRIMINAL DIVISION
	:	
NICKOLAS FALVO,	:	
Defendant	:	Motion to Suppress Evidence

OPINION AND ORDER

Before the Court is Defendant's Motion to Suppress Evidence, filed April 26, 2007. A hearing on the motion was held October 2, 2007.

Defendant was charged with one count of Sexual Abuse of Children under Section 6312(d) of the Crimes Code, Possession of Child Pornography,¹ after a search of his computer revealed a pornographic video involving a minor. In the instant motion to suppress, Defendant contends the search warrant pursuant to which the search was conducted was not supported by probable cause. The Court does not agree.

In determining whether probable cause for a search has been presented, the Court is to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit, there is a fair probability that contraband or evidence of a crime will be found in a particular place. United States v. Brunette, 256 F.3d 14 (1st Cir. 2001). In the instant case, the Affidavit of Probable Cause submitted in support of the Application for Search Warrant indicates, in pertinent part, as follows:

On 12-8-05 Penn College Technical Support Manager Gallahad Mallery reported a student named Nickolas A. Falvo brought his personal computer to the Help Desk at Penn College in the Aths on 12-6-05 to be repaired because it was not working properly. On 12-7-05 Mallery began to look at the computer to try to fix it when he noticed several (20-30) photo files labeled as 11 year old girls naked, 12 year old girls naked, etc. Mallery was in the process of copying the personal computer files as a backup so they would not be lost during the repair. He did not want to copy these files if they were in fact what they were labeled as so he opened the files hoping they were falsely labeled. Mallery said that they were not labeled wrong. He said they were mostly naked photos of

¹ 18 Pa.C.S. Section 6312(d)(1).

girls who appeared to be under 15 years old and at least one appeared to be closer to 11 years old. He said there are also videos on the computer with similar titles such as 11 years (sic) old girls naked having sex but he did not open those files. After he found these files he immediately stopped working on the computer and turned it of. (sic) He put the computer into a storage room located at Aths E219. The room was secured. Falvo plans to pick up the computer today from the Help Desk.

Inasmuch as the statute prohibits a person from possessing a “videotape ... depicting a child under the age of 18 years engaging in a prohibited sexual act or in the simulation of such act... ,” the Court finds the affidavit sufficient to support a finding of probable cause. The person who examined the computer saw a video file with a title which indicated it was of a child under the age of 18 years engaging in a prohibited sexual act,² and although he did not view the video, since he also saw photos of naked girls who appeared to be under 15 years old in files with titles which read “11 year old girls naked, 12 year old girls naked, etc.”, it could reasonably be concluded that the video file would contain images in accordance with its title.

Defendant argues that the magistrate could not rely on Mr. Mallery’s observations but instead was required to view the images himself, citing United States v. Brunette, *supra*. The Court believes Defendant’s reliance on Brunette is misplaced, however. While the Court there did state that ordinarily, a magistrate judge must view an image in order to determine whether it depicts sexually explicit conduct, the Court also allowed for the possibility of an “assessment based on a reasonably specific description.” Id. at 19. In Brunette, the affidavit “did not specify with any detail the basis for believing the images were pornographic”, but instead simply set forth the officer’s “legal conclusion parroting the statutory definition.” Id. at 17. In the instant case, Mr. Mallery has described the video file title specifically as “11 year old girls naked having sex”. The Court finds this description specific enough to allow the magistrate to conclude that the images contained therein were pornographic.

Defendant also argues that the affidavit contains no indicia of the reliability of the reporting person, Gallahad Mallery. Such indicia are not necessary, however, where the reporting person is a named citizen, as “[i]dentified citizens who report their observations of

² “ As used in this section, “prohibited sexual act” means sexual intercourse... .” 18 Pa.C.S. Section 6318(a).

criminal activity to the police are assumed to be trustworthy, in the absence of special circumstances.” Commonwealth v. Hayward, 756 A.2d 23 (Pa. Super. 2000). Since Mr. Mallery is named, and is also identified as the Penn College Technical Support Manager, and since it is also explained how Mr. Mallery came to be viewing the images on Defendant’s computer, the Court finds Defendant’s argument in this regard without merit.

Accordingly, since the search warrant was indeed supported by probable cause, the evidence seized during the execution of such warrant need not be suppressed.

ORDER

AND NOW, this 10th day of October 2007, for the foregoing reasons, Defendant’s Motion to Suppress is hereby DENIED.

BY THE COURT,

Dudley N. Anderson, Judge

cc: DA
Edward J. Rymza, Esq.
Gary Weber, Esq.
Hon. Dudley Anderson