

FILED DISTRICT COURT  
Third Judicial District

FEB 11 2010

SALT LAKE COUNTY

By \_\_\_\_\_ Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

-----

STATE OF UTAH,	:	MEMORANDUM DECISION AND ORDER
Plaintiff,	:	CASE NO. [REDACTED]
vs.	:	
[REDACTED]	:	
Defendant.	:	

-----

This matter is before the Court on defendant's Motion to Suppress. Defendant has asked this Court to suppress evidence and statements gathered by police as violations of state and federal constitutional protections. The defendant contends: (1) that the officers' entry and search were based on an unlawful ruse; (2) that the seizure was without consent or probable cause and exigent circumstances; (3) that the search warrant violated Rule 40, Utah Rules of Criminal Procedure; (4) that the officers failed to read defendant his rights under Miranda v. Arizona; and (5) that statements made to officers were the fruit of an illegal search and seizure.

This matter came for hearing on January 7, 2010. The State was represented by Paul Amann. Defendant was present and represented by Anne Marie Taliaferro. Having reviewed the pleadings, exhibits, including the transcript of the preliminary hearing, and argument of counsel, this Court makes the following:

FINDINGS OF FACT

1 The Utah Attorney General's Office conducted an investigation identifying the Internet Protocol ("IP") addresses of computers viewing child pornography.

2 The task force identified an IP address registered to [REDACTED].

3 On July 12, 2007, special agents David White and Ed Spann approached the [REDACTED] home just before 8:00 p.m., and Ms. [REDACTED] answered the door.

4 The agents identified themselves and told Ms. [REDACTED] that the visit was regarding an investigation into potential identity theft and asked whether her husband, Mr. [REDACTED] (defendant), was home.

5 Ms. [REDACTED] was concerned because her husband's wallet had been stolen recently.

6 Ms. [REDACTED] stated that defendant was not home, called him and permitted Agent White to speak with him. Agent White informed defendant of the identity fraud issue, and defendant stated he would return home soon.

7 The agents waited outside the home and, when defendant returned home, the agents and he entered the house together.

8 Defendant was still under the impression that the agents were present to discuss the issue of victims of identity fraud.

9 The agents learned that the family computer was in the bedroom.

10 The [REDACTED] children were present and the agents asked to speak privately.

11 The agents entered the bedroom with defendant and Ms. [REDACTED], and Agent White asked to speak with defendant alone.

12 Ms. [REDACTED] left.

13 With the bedroom door shut behind them, Agent White told defendant that the agents' visit regarded child pornography, not identity theft. Agent White told defendant that he was not in custody, nor under arrest, and that he would not be arrested.

14 Miranda admonitions were not given, and defendant was not informed he did not have to speak with the agents.

15 For 20 to 30 minutes defendant answered the agents' questions regarding child pornography, including disclosing the existence of a DVD in the home safe and a second computer.

16 At approximately 9:00 p.m., the agents seized the computers and DVD as evidence.

17 The agents did not ask for defendant's consent to seize the property, nor did they obtain a search warrant.

18 When defendant asked if the agents needed a warrant, they responded that they did not because they had probable cause.

19 Agent White testified that he did not need a warrant because he had probable cause

20 On December 27, 2007, approximately five and one-half months later, Agent White sought a search warrant for the computer equipment and DVD, and the warrant was issued.

21 The statement of probable cause accompanying the Information states that the seized items were delivered to the Regional Computer Forensic Lab ("RCFL") on January 5, 2008.

22 The RCFL reports, however, indicate that the evidence was actually submitted to the lab on January 15, 2008.

23 On January 28, 2009, the RCFL issued its report regarding the contents of the seized items, finding child pornography.

24 On March 3, 2009, defendant was charged with ten counts of Sexual Exploitation of a Minor, Utah Code Ann., § 76-5A-3 (1953, as amended), all second degree felonies.

#### DISCUSSION

Both the Utah Constitution, Article I, Section 14, and the Fourth Amendment of the United States Constitution provide that people have a right to be "secure in their persons, houses, papers and effects against unreasonable searches and seizures," and that "no warrant shall issue but upon probable cause supported by oath or affirmation." Both constitutions have been broadly interpreted to prohibit law enforcement from entering a home to conduct a search without a warrant. ("Nowhere

is this principle more zealously guarded than in a person's home[.]” Brigham City v. Stuart, 122 P.3d 506, 511 (Utah 2005); see also, State v. Earl, 2004 UT App 163, ¶ 23, 92 P.3d 167 (“It is axiomatic that the ‘right to be free from unreasonable searches and seizures embodied in the Utah and United States Constitution is one of the most fundamental and cherished rights we possess.’”) (citing State v. Trane, 2002 UT 97, ¶ 21, 57 P.3d 1052 (citation omitted).) Defendant argues that the State has violated these constitutional provisions in numerous ways.

I. Entry and Search Based on Unlawful Ruse

Defendant first contends that the agents' entry into his home and the subsequent search are based on an unlawful ruse and that because of the ruse the officers were given information regarding the use and location of computers, gained entrance to the room containing the computer, and were given the ability to question defendant privately. The State, relying only on its own probable cause statement, argues that defendant gave explicit consent to speak with the agents and search his home only after they had disclosed the true nature of the visit. In fact, defendant permitted entry into his residence based on the agents' representation that he may be a victim of identity theft. As noted supra, defendant did not consent.

In United States v. Bosse, 898 F.2d 113, 115 (9<sup>th</sup> Cir. 1990), a federal ATF agent accompanied a local officer on an inspection of the defendant's property as part of an application process to buy and sell

firearms. The local officer told Bosse that the ATF agent was "with me" and gave no indication that the federal agent was really present to look for violations of federal law. The Court held that agents may not misrepresent the purpose of a government agent who is known to be a government agent, stating:

Special limitations apply when a government agent obtains entry by misrepresenting the scope, nature or purpose of a government investigation. Access gained by a government agent, known to be such by the person with whom the agent is dealing, violates the fourth amendment's bar against unreasonable searches and seizures if such entry was acquired by affirmative or deliberate misrepresentation of the nature of the government's investigation.

Id. at 115, citing United States v. Little, 753 F.2d 1420, 1438 (9<sup>th</sup> Cir. 1984).

Once government agents disclose their role as agents, they may not conceal the true purpose of an encounter. The Fifth Circuit Court of Appeals explained that this is to preserve trust between citizens and government.

When a government agent presents himself to a private individual, and seeks that individual's cooperation based on his status as a government agent, the individual should be able to rely on the agent's representations. We think it clearly improper for a government agent to gain access to records which would otherwise be unavailable to him by invoking the private individual's trust in his government, only to betray that trust.

SEC v. ESM Government Securities, Inc., 645 F.2d 310, 316 (5<sup>th</sup> Cir. 1981).

The Court finds that the agents' ruse was unlawful, in violation of both Article I, Section 14 of the Utah Constitution and the Fourth

Amendment of the United States Constitution. Specifically, their access, "acquired by affirmative and deliberate misrepresentations of the nature of...[the State's]...investigation." Bosse, 898 F.2d at 115.

II. Warrantless Search and Seizure Without Exception to  
Warrant Requirement

As noted earlier, warrantless searches and seizures involving one's home are presumptively unreasonable. Two exceptions exist to a warrant requirement. First, a warrant is not required when officers have probable cause of illegal activity, coupled with exigent circumstances, and second, when a suspect voluntarily consents to the search. State v. Larocco, 794 P.2d 460, 468 (Utah 1990). The State argues that both exceptions are present here.

Probable Cause and Exigent Circumstances

The probable cause exception to the warrant requirement demands that there also be exigent circumstances, so that obtaining a search warrant is impractical. Generally this means that the evidence is in danger of being destroyed by a suspect. The State contends that the agents did not need a search warrant because they had probable cause to suspect illegal activity based on defendant's statements. They also claim that if the agents had not seized the evidence, defendant might have erased the data or harmed the evidence. Even if this Court were to agree with the State that it could rely on defendant's statements as a source of probable cause, the Court cannot accept the existence of any exigent

circumstances. One of the two officers visiting the [REDACTED] home could have secured the home while the other sought a warrant. *See, e.g., State v. Duran*, 2005 UT App 409, 131 P.3d 246 (Utah App. 2005). Moreover, police cannot create the exigency themselves (i.e., alerting the defendant to the investigation) to justify a warrantless search, which is what the two agents did in this instance. Absent the agents' visit, the defendant did not know of the investigation and, therefore, was not at risk to destroy the evidence. The burden is on the State to demonstrate that exigent circumstances override the presumption of unreasonableness with a warrantless search. *State v. Parson*, 599 F.Supp.2d 592, 601 (W.D. Pa. 2009) (citing *Welsh v. Wisconsin*, 466 U.S. 740 (1984)). Because the State provides no evidence of exigent circumstances justifying a warrantless search, the Court finds that the State may not rely on the exigent circumstances exception to a warrant requirement.

#### Consent

The other exception to the warrant requirement is when the suspect consents to the search. *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973). The State argues that defendant verbally agreed to speak with the agents only after the officers disclosed the true nature of their visit and that, therefore, the consent and subsequent disclosures were voluntary. Defendant contends that his talking to the agents was not

voluntary and was the product of the ruse employed by the agents to enter his home and gain his trust.

The presumption against waiving one's right against an unlawful search and seizure is strong, and the evidence of a valid waiver must be convincing. State v. Webb, 790 P.2d 65, 82 (Utah App. 1990). Consent may not be based on mere acquiescence to authority. See, Bumper v. North Carolina, 391 U.S. 543, 549 (1968); U.S. v. McCurdy, 40 F.3d 1111, 1119 (10<sup>th</sup> Cir. 1994); and U.S. v. Mabe, 330 F.Supp.2d 1234 (D. Utah 2004). Consent must be "unequivocal and specific" and "freely and intelligently given." State v. Ham, 910 P.2d 433, 439 (Utah Ct. App. 1996). The State attempts to distinguish the facts in this case from other cases where courts have found consent to agency ruses involuntary because the ruse was not coercive, did not involve a life-or-death emergency, and the officers disclosed their true purpose prior to getting defendant's consent. Accordingly, the State argues that consent was voluntary and separate from the ruse.

The record is devoid of information concerning the scope of defendant's consent or even if it was explicitly given. Defendant did speak with the agents after being informed of their true purpose, but he did not consent to search or seizure of his property. Under any interpretation of the facts of this case, any consent given by defendant was through acquiescence to authority and neither "unequivocal and

specific" nor based on the absence of evidence "freely and intelligently given."

Based on the totality of the circumstances, this Court finds that no exigent circumstances exist that would justify a warrantless search and seizure of defendant's home and property. Defendant's consent, if given, was not unequivocal and specific, or freely and intelligently given. Accordingly, the Court concludes that the seizure of defendant's property was done in violation of Article I, Section 14 of the Utah Constitution and the Fourth Amendment of the United States Constitution.

### III. Search Warrant

Although this Court has already found that the agents' entry into defendant's residence was based on an unlawful ruse and that the warrantless search and seizure of defendant's property was unlawful because it lacked either exigent circumstances or consent, this Court will address defendant's further argument that the search warrant is void. This Court is gravely concerned about several aspects of the State's management of the search warrant supporting the forensic examination of the computers.

Defendant argues that the search warrant is invalid for three reasons. First, the Affidavit of David White in support of the application for a search warrant did not mention that the agents gained entry to the home through the use of a ruse. Evidence must be suppressed if the probable cause for a warrant cannot stand alone, independent of

the prior illegal search. Bosse, 899 F.2d at 116. The U.S. Supreme Court held that a defendant is entitled to an evidentiary hearing to determine whether the affidavit in support of the search warrant, minus evidence collected as a result of the ruse, would have had sufficient independent probable cause. Franks v. Delaware, 438 U.S. 154 (1978). An evidentiary hearing is unnecessary in the instant matter because the Court has already determined that the agents entered the home through an unlawful ruse.

Next, defendant contends that the search warrant was procedurally void under Rule 40, Utah Rules of Criminal Procedure. Rule 40(e)(2) requires a search warrant to be served within ten days of issuance or else it is void and must be returned to the court as not executed.<sup>1</sup> Rule 40(g) additionally requires that after the search warrant is executed, the officer must promptly make the signed return of the warrant to the issuing court.<sup>2</sup> The search warrant in this instance was signed on December 27, 2007. The State's statement of probable cause accompanying the Information asserts that the warrant was executed on January 5, 2008,

---

<sup>1</sup>"The search warrant shall be served within ten days from the date of issuance. Any search warrant not executed within this time shall be void and shall be returned to the court or magistrate as not executed." Rule 40(e)(2), Utah Rules of Criminal Procedure.

<sup>2</sup>"The officer, after execution of the warrant, shall promptly make a signed return of the warrant to a magistrate of the issuing court and deliver a written or recorded inventory of anything seized, stating the place where it is being held." Rule 40(g), Utah Rules of Criminal Procedure.

when the seized evidence was taken to the RCFL computer lab. However, the RCFL report states that the exam was requested on January 15, beyond the ten days required by Rule 40. In addition, defendant has provided evidence that the State failed to return the search warrant to the Court. As of October 30, 2009, no return had been filed with this Court. The Court, accordingly, finds that the search warrant violated Rule 40. Therefore, the search warrant is void, and any information obtained from the forensic search is deemed to be a warrantless search, without justification and in violation of Article I, Section 14 of the Utah Constitution, and the Fourth Amendment of the United States Constitution.

Third, defendant argues that the warrant was not sought or executed within a reasonable time after seizure. Five and one-half months had passed between the time of the seizure and the warrant request. The 11<sup>th</sup> Circuit Court of Appeals held that a three week delay between seizing the defendant's computer and seeking a warrant was unreasonable. United States v. Mitchell, 565 F.3d 1347, 1350-51 (11<sup>th</sup> Cir. 2009). In that case, the court noted that individuals often keep important information on their personal computers, and the State had no compelling justification to delay returning the computer to the defendant. The court distinguished computers from other kinds of seized items stating, "[i]f anything, this consideration applies with even greater force to the hard drive of a computer which 'is the digital equivalent of its owner's home, capable of holding a universe of private information.'" Id. (citing

Kansas v. Rupnick, 280 Kan. 720, 125 P.3d 541, 552 (Kan. 2005).) The State provides no justification for waiting more than five months to seek the warrant. Nor has the State explained why it took an additional one year to complete a forensic examination. The Court finds that both delays are unreasonable.

#### IV. Miranda violations

Defendant contends that the agents violated his right to be given Miranda warnings prior to questioning. The State counters that Miranda is required only when a suspect is in custody, and defendant was neither arrested nor placed in custody. Having previously found that any consent that the defendant may have given was neither unequivocal and specific, nor freely and intelligently given, and the result of an unlawful ruse, the Court finds that the Miranda issue is moot.

#### CONCLUSIONS OF LAW

This Court finds that the State has violated Article I, Section 14 of the Utah Constitution, and the Fourth Amendment of the United States Constitution by unlawfully entering defendant's residence through an illegal ruse and seizing defendant's property without a warrant, and without either exigent circumstances or consent. The Court further finds that the search warrant used to obtain the forensic examination of defendant's computer is void, as having been managed in violation of Rule 40, Utah Rules of Criminal Procedure. Therefore, the Court grants

defendant's Motion to Suppress. All statements made by defendant and evidence seized are suppressed.

This Decision will constitute a final Order of the Court.

Dated this 11 day of February, 2010.

151  
\_\_\_\_\_  
JUDITH S. H. ATHERTON  
DISTRICT COURT JUDGE