

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 v. ) No. 4:01 CR 258 SNL  
 ) DDN  
 ALOIS LARRY WOLK, JR., )  
 )  
 Defendant. )

**ORDER AND RECOMMENDATION  
OF UNITED STATES MAGISTRATE JUDGE**

This action is before the Court upon the pretrial motions of the parties which were referred to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b). An evidentiary hearing was held on August 2, 2001. Defendant ordered a transcript of the evidentiary hearing and the parties filed post-hearing memoranda.

**1. Motion in limine.**

Defendant Alois Larry Wolk, Jr., has moved in limine to preclude introduction of irrelevant, prejudicial, inadmissible evidence, prosecutorial misconduct, and improper prosecutorial comment (Doc. No. 13). This motion is premature. It asserts an objection to an expected offer of evidence at trial, which evidence may not be offered at trial. The undersigned will deny the motion without prejudice to defendant reasserting it at trial for consideration by the district judge in the context of the trial evidence.

**2. Motion to dismiss.**

Defendant has moved to dismiss (Doc. No. 14) upon three grounds. First, defendant alleges that certain described

constitutional rights were violated. At the hearing on this matter, defendant offered no evidence or argument to support his allegations. Second and third, respectively, he argues that, if the court sustains his motions to quash the search warrant and to suppress evidence, the government would be left without legally sufficient evidence to sustain a guilty verdict at trial. These arguments are best deferred to the district judge for ruling at trial.

### **3. Suppression issues.**

The government has moved for a pretrial determination of admissibility pursuant to 18 U.S.C. § 3501 (Doc. No. 11). Defendant Wolk has moved to suppress evidence and statements (Doc. No. 15) and to quash the search warrant and to suppress evidence (Doc. No. 18).

From the evidence adduced at the hearing, the undersigned makes the following findings of fact and conclusions of law:

#### **FACTS**

1. On November 9, 2000, Federal Bureau of Investigation Special Agent Gerald Bell applied for and received a search warrant from Magistrate Judge Lawrence O. Davis for the residence at 6 Shadow Lane, St. Peters, Missouri, and for computers and computer media found therein. Gov. Exhs. 1 and 2. The affidavit submitted to Judge Davis by Agent Bell recounted the investigation conducted by Palos Heights, Illinois, Police Sergeant Michael Zaglifa. The affidavit stated that on September 22, 2000, Sgt. Zaglifa participated in an undercover investigation on the Internet using his police computer. In this investigation he posed as a 13-year-old girl from Chicago under the name of "Ashley\_S13" (Ashley) and entered an electronic chat room. In that capacity he was invited into a file server of someone who identified himself as "^fish-^"

(Fish) using Internet Protocol address 204.184.55.3. "Fish" instructed "Ashley" how to access the graphic image files in his file server and "Ashley" downloaded photographs of late teenage girls and photographs of child pornography. The Internet connection session was interrupted and reestablished with "Fish" assigned to Internet Protocol (IP) address 204.184.55.66. Further investigation by Sgt. Zaglifa determined that "Fish" was using the Internet access provider Westplex Information Network (Westplex) in St. Peters, Missouri. The officer then contacted Danny Hughes, the Westplex System Administrator, who ultimately determined and advised that the Internet access account with which Sgt. Zaglifa communicated on September 22, 2000, belonged to a Larry A. Wolk at 6 Shadow Lane, St. Peters, Missouri. The affidavit submitted by Agent Bell further described expert technical automation opinions which established the need to access the computer facilities at 6 Shadow Lane in a secure fashion to seize evidence of the illegal transmission of the child pornography which was observed by Sgt. Zaglifa. The affidavit also stated that the records of the Missouri Department of Revenue were reviewed and listed two motor vehicles registered to Larry A. and Melynna L. Wolk at 6 Shadow Lane. The search warrant affidavit and the search warrant itself described the place to be searched as the residence at 6 Shadow Lane, St. Peters, Missouri, 63376, and the computers and computer media found in the residence. A two-page attachment to the warrant and the affidavit specifically described the items sought. After considering the affidavit, at 2:10 p.m. on November 9, 2000, Judge Davis issued his search warrant.

2. On November 16, 2000, the search warrant was executed at 6 Shadow Lane by seven law enforcement personnel. Federal law enforcement personnel, led by Special Agent Bell, took the leading roles in executing the warrant. Also participating in the search activity were F.B.I. Special Agents Michael R. Johnson and Scott

Skinner, Postal Inspector Dale Roberts, St. Peters Police Lt. Brad North, Police Det. Todd Roth, and Officer Malawy (the only officer in uniform). At approximately 9:30 a.m., the officers arrived at the residence in several government vehicles, one of which was a marked police car. The officers first knocked on the front door of the residence. Melynna Wolk answered the door. The officers identified themselves and stated that they were there to execute a search warrant for child pornography. Mrs. Wolk allowed the officers to enter the residence without objection. Although none of the officers had a weapon drawn, she could see that they were armed.

3. All of the officers entered defendant's two-story residence. Mrs. Wolk was the only person at home. The officers first made a cursory observation of each room in the house for the officers' safety. Nothing was found that appeared to risk the officers' safety.

4. The officers asked about the location of defendant. Mrs. Wolk said her husband was at an employment training session. Because she believed he should be there with her, at 9:40 a.m. she attempted to call his pager. She did so by going into the kitchen and using the telephone there. Her husband, later identified as defendant Alois Larry Wolk, did not respond to her several calls. At 9:45 a.m. the officers began to execute the warrant. At this time, Agent Bell asked Mrs. Wolk where exactly her husband was; the officers wanted to advise him of the search warrant execution. She said he was at a training seminar given by H & R Block at a location not far from the house. Lt. North and Postal Inspector Roberts left the residence to locate defendant.

5. After making the telephone calls, Mrs. Wolk remained in the kitchen-dining room area of the home with Police Officer Malawy. There they conversed on topics that included her craft work. Mrs. Wolk also was asked where the computers in the home

were located. She gave the agents this information. Agent Skinner went through the home and located and inspected the several computers there.

6. Lt. North and Inspector Roberts drove approximately one mile to the H & R Block facility in an unmarked vehicle. The officers entered the H & R Block office and saw several people seated around a table. Lt. North asked whether Mr. Wolk was there. When defendant identified himself, Lt. North asked him whether they could speak with him. Defendant agreed to accompany the officers outside. Outside the office the officers introduced and identified themselves with their badges and told him that the F.B.I. was at his home to execute a search warrant and that his wife asked that he come home. The officers told defendant that he was free to return home, if he wanted, and that, if he decided to go home, they would meet him there. Defendant decided to do so and drove home by himself in his own vehicle. The officers also returned to 6 Shadow Lane in their own vehicle.

7. Defendant arrived at 6 Shadow Lane at approximately 10:10 a.m., shortly thereafter followed by Lt. North and Inspector Roberts. Defendant entered the house and identified himself to Agent Bell. He was directed into the living room. There Agent Bell introduced himself and explained that the law enforcement officials were there to execute a search warrant regarding the distribution of child pornography. Defendant was then told that the officers would like to interview him, that any statement by him would have to be voluntary, that he was free to leave at any time, that he was not obligated to talk to the officers, and that he was not under arrest. Defendant responded by saying he was willing to talk with them. Agent Bell motioned for defendant to be seated and then took the lead in questioning him.

8. In the ensuing conversation, questions, and answers, defendant made several oral statements. Defendant was advised of

the specific nature of the investigation and the officers' information about defendant's involvement with child pornography. During this interview, defendant made incriminating statements. Defendant specifically answered the questions put to him and then expanded his answers in a narrative fashion. He identified certain photographs and wrote his initials on them. Defendant was asked about the location of his computer and CD ROMs to which he had backed up some data. Defendant led the officers to his den, which was adjacent to the kitchen area where his wife was located. There he pointed out the equipment. At one time, when discussing the multitude of pornographic images in his computer equipment, defendant broke into tears.

9. During the interview, Agent Bell asked defendant whether he would make a written statement. Bell stated that any such statement would have to be voluntary and that defendant did not have to write one. Defendant said he wanted to make a written statement. Agent Bell provided defendant with several pieces of blank paper and asked him to write about the matter under investigation. At the top of the first piece of paper Agent Bell hand printed the date and the following introductory paragraph: "I \_\_\_\_\_ voluntarilly (sic) give this written statement. I understand I am under no obligation to give this statement & I give it freely." Gov. Exh. 4. Agent Bell then handed the paper to defendant and asked him to describe what had happened and what his role in it was. Defendant wrote his name on the blank line and printed a statement on the rest of the first page. He signed his name on the second page. Id. Agent Skinner was present through most of the interview and witnessed defendant signing his name. Skinner, however, did not sign his name as a witness on the statement until several days later.

10. At no time during the interview, or during the oral or written statements, was any threat or promise made to defendant to

induce him to cooperate and to make his statements. Throughout the interview, defendant did not request an attorney; he was never handcuffed or formally arrested or physically confined. At no time did defendant state to the officers that he did not want to make a statement.<sup>1</sup> At no time on November 16, 2000, did the officers advise defendant of his constitutional rights to remain silent and to counsel as set out in Miranda v. Arizona.

11. During the search of the residence the agents seized three CD ROMs, one IBM Aptiva computer, one keyboard, one computer mouse, and one digital camera. Gov. Exh. 3. These items were within the categories of the items described in the Attachment to the warrant which listed the items to be seized. See Gov. Exh. 2 at ¶¶ 1 and 9. At 11:30 a.m. the search was concluded and all of the officers left the residence. Thereafter, F.B.I. forensic investigators reviewed the data on the equipment that was seized.

#### DISCUSSION

##### The search warrant

Defendant Wolk argues that the search warrant issued for his residence was not supported by probable cause and was not lawfully executed. The undersigned disagrees.

The search warrant for 6 Shadow Lane was lawfully issued. The issue before this court when reviewing the legal sufficiency of the basis for the issuance of a search warrant is whether the issuing judge had a substantial basis for concluding that probable cause existed for the issuance of the warrant. Illinois v. Gates, 462 U.S. 213, 238-39 (1983); United States v. Luloff, 15 F.3d 763, 768 (8th Cir. 1994).

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<sup>1</sup>The undersigned does not credit the testimony of defendant that he told the officers that he did not want to make a written statement. Trans., filed August 7, 2001, at 157-59.

Under the Fourth Amendment, probable cause for the issuance of a search warrant exists when there is a "fair probability that contraband or evidence of a crime will be found in a particular place." United States v. Horn, 187 F.3d 781, 785 (8th Cir. 1999), cert. denied, 529 U.S. 1029 (2000) (quoting Illinois v. Gates, 462 U.S. at 238). A "fair probability" is less than an absolute certainty. Mason v. Godinez, 47 F.3d 852, 855 (7th Cir.), cert. denied, 516 U.S. 840 (1995).

In this case the affidavit of Special Agent Bell described specific facts learned from Police Sgt. Zaglifia about his observations that "Fish" was involved in the Internet communication of child pornography. Agent Bell learned from Danny Hughes, the System Administrator of Westplex Information Network, that the Internet access account used by "Fish" at the time the child pornography was communicated belonged to a Larry Wolk who resided at 6 Shadow Lane. Agent Bell corroborated through the Missouri Department of Revenue the accuracy of the Hughes' information that identified Larry Wolk's name with 6 Shadow Lane. All of this information was sufficient to establish probable cause to believe that 6 Shadow Lane held evidence of the unlawful distribution of child pornography. Judge Davis clearly had a substantial basis for finding probable cause.

Defendant argues that the affidavit information failed to advise the issuing judge that Agent Bell had had no prior experience with Hughes or Westplex and that Bell conducted no investigation about whether Westplex had a security program in place to prevent someone from assuming a Westplex account holder's identity on the Internet. Defendant argues that this failure to investigate and report to the issuing judge about the possibility that someone other than defendant communicated with Sgt. Zaglifia demonstrates bad faith on the part of Agent Bell. The undersigned disagrees.

By this argument, defendant appears to be invoking the holding of Franks v. Delaware, 438 U.S. 154 (1978). Under Franks, a defendant may be entitled to the suppression of evidence seized pursuant to a search warrant, if the government intentionally included false material statements in its warrant affidavit, or included false material statements with that reckless disregard for the truth that is the legal equivalent of intentional falsehood. United States v. Garcia, 785 F.2d 214, 222 (8th Cir.), cert. denied, 475 U.S. 1143 (1986).

A facially sufficient affidavit may be challenged also on the ground that the affiant deliberately or recklessly omitted material information. United States v. Lucht, 18 F.3d 541, 546 (8th Cir.), cert. denied, 513 U.S. 949 (1994); United States v. Reivich, 793 F.2d 957, 960 (8th Cir. 1986). In this regard, defendant Wolk must prove

(1) that the police omitted facts with the intent to make, or in reckless disregard of whether they thereby made, the affidavit misleading, . . . and (2) that the affidavit if supplemented by the omitted information would not have been sufficient to support a finding of probable cause.

United States v. Lucht, 18 F.3d at 546 (quoting United States v. Reivich, 793 F.2d at 960).

In this case, it is clear that the affidavit information provided by Agent Bell was not false, inaccurate, or misleading. Hughes' position as the administrator of the Internet access provider established the reasonable reliability of the information he provided. Nothing in the affidavit implied that there was no likelihood another location could have been involved in the communications with Sgt. Zaglifa. Nothing in the record reasonably indicated to Sgt. Zaglifa or to Agent Bell that the person with whom Zaglifa communicated in the chat room was other than the person to whom the Westplex account was registered and who resided at 6 Shadow Lane. In the circumstances of this case, the

speculative possibility that someone else was responsible for providing the child pornography did not diminish the probable cause to believe that 6 Shadow Lane was involved as reported by Danny Hughes.

Defendant argues that the search warrant did not specifically describe the place to be searched and the items to be seized. The undersigned disagrees. Under the Fourth Amendment the language of a search warrant must describe the items to be seized with particularity: "the language must be sufficiently definite to enable the searcher to reasonably ascertain and identify the things authorized to be seized." United States v. Saunders, 957 F.2d 1488, 1491 (8th Cir.), cert. denied, 506 U.S. 889 (1992). See also United States v. Horn, 187 F.3d at 788. The standard is one of "practical accuracy," recognizing that the specificity required hinges on the circumstances of each case. United States v. Strand, 761 F.2d 449, 453 (8th Cir. 1985). A warrant naming only a generic class of items may suffice if the individual goods to be seized cannot be more precisely identified at the time that the warrant is issued. Horn, 187 F.3d at 788.

In this case the search warrant affidavit and the search warrant itself sufficiently described the place to be searched as the residence at 6 Shadow Lane, St. Peters, Missouri, 63376, and the computers and computer media found in the residence. A two-page attachment to the warrant and the affidavit specifically described the items to be searched for.

Defendant argues that the officials seized items outside the scope of the search authorized by the warrant. The undersigned disagrees. The items seized by the agents were specifically within the categories of things authorized by the warrant to be seized.

The search warrant was constitutionally issued and executed.

Defendant's statements

Defendant argues that his statements should be suppressed because they were not voluntary and were not preceded by an advise of rights pursuant to Miranda v. Arizona, 384 U.S. 436 (1966). The undersigned disagrees.

The government has the burden of establishing the admissibility of a defendant's pretrial statements by a preponderance of the evidence. Lego v. Twomey, 404 U.S. 477, 489 (1972); United States v. Astello, 241 F.3d 965, 966 (8th Cir.), cert. denied, 121 S. Ct. 2621 (2001).

A defendant who was not given his Miranda warnings, such as defendant Wolk, may be entitled to the suppression of the statements he made in response to police interrogation while he was in custody. He is not entitled to such relief, if he was not "in custody" when interrogated. Miranda v. Arizona, 384 U.S. at 477-78; Illinois v. Perkins, 496 U.S. 292 (1990). In this case the parties dispute whether defendant Wolk was "in custody" when he was interviewed and made his statements on November 16, 2000.

Generally, a person is "in custody" "when he has been formally arrested or his freedom of movement has been restrained to a degree associated with a formal arrest." United States v. Goudreau, 854 F.2d 1097, 1098 (8th Cir. 1988). To be considered "in custody" for Miranda purposes, a person need not have been formally arrested. In Stansbury v. California, 511 U.S. 318 (1994), the Supreme Court held:

In determining whether an individual was in custody, a court must examine all of the circumstances surrounding the interrogation, but "the ultimate inquiry is simply whether there [was] a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." California v. Beheler, 463 U.S. 1121, 1125 (1983) . . . .

511 U.S. at 322.

Our decisions make clear that the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned. . . . "[It is] the compulsive aspect of custodial interrogation, and not the strength or content of the government's suspicions at the time the questioning was conducted, which [has] led the Court to impose the Miranda requirements with regard to custodial questioning." [Beckwith v. United States, 425 U.S. 341, at 346-347 (1976)]. . . .

Id. at 323 (emphasis added).

. . . "the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." [Berkemer v. McCarty, 468 U.S. 420, 442 (1984)]. . . .

Id. at 324.

. . . . Even a clear statement from an officer that the person under interrogation is a prime suspect is not, in itself, dispositive of the custody issue, for some suspects are free to come and go until the police decide to make an arrest. The weight and pertinence of any communications regarding the officer's degree of suspicion will depend upon the facts and circumstances of the particular case.

Id. at 325.

In United States v. Griffin, 922 F.2d 1343 (8th Cir. 1990), the Eighth Circuit enumerated six indicia of custody:

- (1) whether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was free to leave or request the officers to do so, or that the suspect was not considered under arrest;
- (2) whether the suspect possessed unrestrained freedom of movement during questioning;
- (3) whether the suspect initiated contact with authorities or voluntarily acquiesced to official requests to respond to questions;
- (4) whether strong arm tactics or deceptive stratagems were employed during questioning;
- (5) whether the atmosphere of the questioning was police dominated; and
- (6) whether the suspect was placed under arrest at the termination of the questioning.

Id., 922 F.2d at 1349. The presence of the first three factors tends to mitigate the existence of custody at the time of questioning; the last three factors tend to indicate custody. Id. See also United States v. Brown, 990 F.2d 397, 399 (8th Cir. 1993).

Other factors relevant to the issue of whether or not an interrogation was custodial are the length of the interrogation and the place and purpose of the interrogation. United States v. McKinney, 88 F.3d 551, 554 (8th Cir. 1996).

Defendant Wolk's first statements were made to the officers outside the H & R Block office. There defendant was clearly not "in custody." The officers identified themselves as such and put defendant on notice that they were involved in a criminal investigation of him. Although they communicated his wife's desire that he return home, they expressly told him he did not have to do so. Nevertheless, without coercion he returned home.

From the factual record, the undersigned finds and concludes that defendant also was not "in custody" when he made the oral and written statements inside his residence. Regarding the first Griffin factor, defendant was told and he understood that any statement he made would have to be voluntary, that he was free to leave at any time, that he was not required to speak with the officers, and that he was not under arrest. The first factor militates strongly against custody.

Regarding the second Griffin factor, the agents directed defendant into the living room of the residence. However, he led them from the living room into his den to point out some equipment. There is no evidence that defendant was prevented from otherwise moving about or leaving his house or that the officials in any way indicated to him that he could not do so. There is no evidentiary basis for finding that his freedom of movement, exercised by him when he drove his automobile home alone, was not extended to him inside his home. Regarding the third Griffin factor, the record is

clear that defendant told the officials that he was willing to speak with them. He knew he did not have to do so. Regarding the fourth Griffin factor, there is no evidence that the officials in any way used strong arm tactics against him or in any way deceived him during the interrogation. These factors militate against a finding of custody.

Regarding the fifth Griffin factor, there is no doubt that there was a substantial police presence inside his home when defendant made his statements. However, defendant knew the officers were there to execute a search warrant, which tended to indicate a reason for their presence other than to interview him. Further, he had been repeatedly told he did not have to go home or to give statements to them. In this context, this factor does not militate toward a finding of custody.

The sixth Griffin factor tends to indicate that defendant was not in custody for Miranda purposes. He was not arrested at the conclusion of the interrogation or at the conclusion of the search and he had been previously told he was not under arrest. Finally, the interview lasted no longer than one and one-half hours and occurred in the defendant's own residence.

Under the circumstances of defendant's interrogation, a reasonable man would not have understood or believed that he was in custody or that his freedom of movement was limited to the degree associated with a formal arrest or that he could not go about his own business rather than give statements to the officers.

Defendant argues that United States v. Hanson, 237 F.3d 961 (8th Cir. 2001), supports his position. Hanson was convicted of arson at an abortion clinic. On appeal, among other arguments, he asserted that he was in custody when interviewed by federal agents, but was not given his Miranda warnings. The Court of Appeals, over Judge Morris Arnold's dissent, agreed and reversed his conviction. The facts relied on by the Court of Appeals to warrant Hanson's

reversal are inapposite to the facts of defendant Wolk's case. In Hanson's case the federal agents transported him in the locked back seat of their vehicle to their office, although he had not been formally arrested; the interview took place in the agents' small interview room; the interview lasted approximately two hours; Hanson did not know at the outset that the agents were going to interrogate him about the arson which had occurred some time earlier; Hanson was dependent upon the agents returning him to his residence; the agents threatened him with prison if he did not cooperate; and the agents engaged in coercive and deceptive tactics. 237 F.3d at 964.

Defendant Wolk's case is more like that of United States v. Helm, 769 F.2d 1306 (8th Cir. 1985). In that case, Glick and others were convicted of conducting an illegal gambling business. On appeal, Glick argued that the statements he made to the F.B.I. should have been suppressed because they were custodial and the agents did not give him his Miranda warnings. The Court of Appeals affirmed the District Court's determination that the statements were non-custodial. In that case the federal agents went to Glick's home to execute a search warrant. They telephoned him and requested that he come home, which he did. Upon arrival he was searched, he went into the kitchen, he was told he was not under arrest, and he had freedom to move about the house. The interview lasted up to two hours. Of great relevance to the court were the facts that the interview occurred in Glick's residence and that he was not deprived of his freedom of action. 769 F.2d at 1320-21. Such facts, although not the whole of the factual context, are more similar to defendant Wolk's case than they are dissimilar.

Defendant Wolk's oral and written statements were voluntary. Statements are voluntary, if they were not the result of government overreaching, such as coercion, deception, or intimidation, regardless of the mental condition of the defendant. Colorado v.

Connelly, 479 U.S. 157, 169-70 (1986); Moran v. Burbine, 475 U.S. 412, 421 (1986); United States v. Jordan, 150 F.3d 895, 898 (8th Cir. 1998), cert. denied, 526 U.S. 1010 (1999); United States v. Goudreau, 854 F.2d at 1099. In this case, the government officials did not act in any way that coerced, deceived, or intimidated defendant Wolk. No evidence indicated that his emotional reaction to the child pornography discussed by him and the agents in any way diminished his ability to cooperate with the agents or not as he determined.

For these reasons,

**IT IS HEREBY ORDERED** that defendant's motion in limine to preclude introduction of irrelevant, prejudicial, inadmissible evidence, prosecutorial misconduct, and improper prosecutorial comment (Doc. No. 13) is denied without prejudice.

**IT IS HEREBY RECOMMENDED** that the motion of defendant to dismiss (Doc. No. 14) be denied.

**IT IS FURTHER RECOMMENDED** that the motions of defendant to suppress evidence and statements (Doc. No. 15) and to quash the search warrant and suppress evidence (Doc. No. 18) be denied.

**IT IS FURTHER RECOMMENDED** that the motion of the government for a pretrial determination of admissibility pursuant to 18 U.S.C. § 3501 (Doc. No. 11) be denied as moot.

The parties are advised they have ten days in which to file written objections to this Order and Recommendation. The failure to file timely objections may result in a waiver of the right to appeal issues of fact.

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**UNITED STATES MAGISTRATE JUDGE**

Signed this \_\_\_\_\_ day of August, 2001.