In The

UNITED STATES COURT OF APPEALS

For the Eighth Circuit

No. 02-1238

Criminal Brief

UNITED STATES OF AMERICA,

APPELLANT,

v.

DALE ROBERT BACH,

APPELLEE.

Appeal from the United States District Court for the

District of Minnesota

REPLY BRIEF OF APPELLANT

THOMAS B. HEFFELFINGER
United States Attorney

BY: Bridgid E. Dowdal

Attorney ID No. 0253716
District of Minnesota
600 United States Courthouse
300 South Fourth Street
Minneapolis, MN 55415
(612) 664-5600

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

CASES:

STATUTES:

ARGUMENT

I. § 3105 Is Not A Codification Of Fourth Amendment Protections Against Unreasonable Searches and Seizures

Without analysis or authority defendant's first argument hinges entirely on an unsupported assumption that § 3105 codifies a fundamental Fourth Amendment right against unreasonable searches and seizures. Id. at 9. Defendant clings solely to dicta in Ayeni v. C.B.S., Inc., 848 F.Supp. 362 (E.D.N.Y. 1994), for the proposition that § 3105 codifies the Fourth Amendment. Id. at 8. However, even the dicta cited by defendant in that case is undermined by the Second Circuit's holding on appeal that "§ 3105 is not determinative of the scope of the Fourth Amendment * * * ." See Ayeni v. Mottola, 35 F.3d 680, 687 (2nd Cir. 1994).

Further, Defendant argues that only law enforcement officers should be entrusted to actually find and download data from an ISP's computer system because "civilians for the internet service provider executing the search are immune from suit." Appellee's Br at 10. See Appellee's Br. at 10. According to defendant, simply having a law enforcement officer present isn't sufficient to protect his constitutional rights because an ISP employee could still engage in unfettered misconduct. Defendant's expansive argument is contrary to the plain language

of § 3105, the caselaw, and even the District Court's decision. See e.g., Dalia v. United States, 441 U.S. 238, 257 (1979); Appellant's Appx. at A11-15 (District Court acknowledged that the warrant "was not rendered unreasonable by the mere assistance of Yahoo employees.") Therefore, defendant's assertion that a search warrant is constitutionally infirm whenever a law enforcement officer requests assistance by an ISP to retrieve computer data, should be rejected by this Court.

II. It Was Not Unreasonable For A Technician At Yahoo To Gather Specific Electronic Data Stored Within Its Computer System Pursuant To A Valid Search Warrant

Defendant also argues that even if it was permissible to have a Yahoo! employee gather the data pursuant to the warrant, the fact that an officer wasn't physically present when the information was collected was constitutionally unreasonable because "Internet service providers may uphold the Constitution or run software extraction programs with immunity." Appellee's Br. at 11-14.

Here, as the District Court held, the computer technician at Yahoo! was complying with a legally obtained warrant that was based on probable cause and was written with enough specificity to protect the defendant's Fourth Amendment rights against a legally unfounded or overbroad search. See Appellant's Appx. at A10-A19. Nonetheless, defendant insists that his Fourth Amendment rights were violated because an officer was not physically standing at the computer when the technician located and downloaded the data. Again, defendant's argument is completely lacking in facts or law.

Defendant's legal authority does not support the proposition that the presence requirement of § 3105 embodies a Fourth Amendment right against general searches. Appellee's Br. at 12-13. For example, defendant cites to Morris v. State, a state

case out of Florida which found a warrant invalid where a police officer waited in a separate room while others conducted a search of an office. Morris, 622 So. 2d 67, 69 (Fla. App. 1993). That case is significantly different because the execution of the warrant did not involve unique or extraordinary circumstances that would require an expert to locate the items to be seized. Id. Additionally, in Morris, unlike in the present case, the investigators executing the search warrant had to exercise discretion in evaluating documents, they had to make decisions concerning where they could appropriately search and ultimately they determined what documents to seize. Id. By contrast, in the present case the computer technician did not exercise discretion, nor could the law enforcement officer provide any guidance concerning where to search for defendant's electronic data. See Commonwealth v. Sbordone, 678 N.E.2d 1184, 1189 (Mass. 1997)("there may be extraordinary circumstances, e.g., a search through computerized files or obtaining dental impressions, where it is necessary for a civilian with specialized knowledge actually to conduct the search."), citing United States v. Schwimmer, 692 F.Supp. 119, 126-127 (E.D.N.Y. 19988)(upholding search executed by civilian computer expert); Harris v. State, 401 S.E. 2d 263 (Ga. 1991)(upholding search executed by dentist); State v. Kern, 914

P.2d 114 (Wa. 1996)(search upheld where police officer unqualified to search bank records allowed disinterested bank employees to conduct warranted search for defendant's records outside of police supervision). By contrast, here the presence of an untrained, unfamiliar law enforcement officer at Yahoo! while a technician downloaded specified data pursuant to valid search warrant, does not offer any additional safeguard or protection.

In fact, here the District Court found the warrant satisfied the constitutional requirement for particularity because it described with adequate specificity the place to be searched and the things to be seized. Appellant's Appx. at A-11. As a result, Yahoo! complied with the warrant by simply downloading all of the electronic data from the specified account for the specified items and sent it to law enforcement. Yahoo! did not exercise discretion. Yahoo! did not decide what to send, but rather found the specified account and the specified items, namely all email and Internet Protocol addresses, and sent it to law enforcement. See Appellant's Appx. at A22. Law enforcement did not delegate any decision-making task to Yahoo! whatsoever. The fact that the information received by law enforcement from Yahoo! contained some emails that were evidence of a crime, and some which were not evidence of a crime, confirms that Yahoo!

simply collected the items specified in the warrant from the account specified in the warrant and provided all of it to law enforcement. In sum, Defendant's unfounded concerns and speculations are meritless and should be denied by this Court.[1]

[1] Defendant's First Amendment challenge fails because child pornography is not recognized as protected speech. New York v. Ferver, 458 U.S. 747, 764 (1982). Defendant's Due Process argument fails because a search warrant was legally obtained. See e.g., Walden v. Carmack, 156 F.3d 861 (8th Cir. 1998).

CONCLUSION

The district court's order suppressing evidence obtained from a valid search warrant should be reversed.

Dated:

Respectfully submitted,

THOMAS B. HEFFELFINGER
United States Attorney

BRIDGID E. DOWDAL
Assistant U.S. Attorney
Attorney ID No. 0253716