Recent Case Report

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Dougherty v. City of Covina

(9th Cir. 2011) __ F.3d __ [2011 WL 3583404]

Issue

If officers have probable cause to believe that a person engaged in "inappropriate touching" of children, do they automatically have probable cause to believe he possesses child pornography?

Facts

Officers in Covina developed probable cause to believe that a sixth grade teacher, Bruce Dougherty, had engaged in "inappropriate touching" of several female students, and that he may have attempted to molest a student three years earlier. Based on this information, an officer sought a warrant to search Dougherty's home and computer for child pornography. In his affidavit, the officer established that he had substantial experience in investigating sex crimes against minors; and that, based on his training and experience, it was his opinion that "subjects involved in this type of criminal behavior have in their possession child pornography." A judge issued the warrant, but the search was unproductive.

Dougherty later sued the affiant and another officer, claiming the warrant was invalid because their affidavit did not establish probable cause to believe that he possessed child pornography. The district court disagreed, however, and dismissed the suit. Dougherty appealed to the Ninth Circuit.

Discussion

One of the fundamental principles of search and seizure law is that probable cause to search a place or thing for evidence of a crime can exist only if there was reason to believe the evidence exists.[1] While such a belief is often based on direct proof (e.g., an undercover officer saw drugs or illegal firearms in the suspect's house) it may also be based on circumstantial evidence, especially if the conclusion is supported by the opinion of an officer who has significant training and experience in investigating such crimes. For example, proof that the suspect recently visited child pornography websites might support an expert opinion that he has child pornography on the premises.[2]

In *Dougherty*, however, the only circumstantial evidence that there was child pornography in the defendant's house was that he reportedly engaged in "inappropriate touching" of several female students, and that he allegedly attempted to molest a student three years earlier. And the court concluded that this was insufficient—ruling that there

[1] See *Illinois* v. *Gates* (1983) 462 US 213, 238 [probable cause to search exists if "there is a fair probability that contraband or evidence of a crime will be found in a particular place"].

[2] See *U.S.* v. *Wagers* (6th Cir. 2006) 452 F.3d 534, 540 ["[E]vidence that a person has visited or subscribed to websites containing child pornography supports the conclusion that he had likely downloaded, kept, and otherwise possessed the material."].

must be some link between the circumstantial evidence and child pornography.[3] Among other things, the court pointed out:

> The affidavit contains no facts tying the acts of Dougherty as a possible child molester to his possession of child pornography. The affidavit provides no evidence of receipt of child pornography. No expert specifically concludes that Dougherty is a pedophile. . . . The affidavit provides no indication that Dougherty was interested in viewing images of naked children or of children performing sex acts. There is no evidence of conversations with students about sex acts, discussions with children about pictures or video, or other possible indications of interest in child pornography.

Consequently, the court ruled the warrant lacked probable cause and was therefore invalid. It also ruled, however, that the officers were entitled to qualified immunity because, until now, the court had not decided the issue. POV

[3] ALSO SEE *U.S.* v. *Weber* (9th Cir. 1990) 923 F.2d 1338, 1343; *U.S.* v. *Falso* (2nd Cir. 2008) 544 F.3d 110, 123 [the "crime allegedly involved the sexual abuse of a minor, it did not relate to child pornography"]; *U.S.* v. *Hodson* (6th Cir. 2008) 543 F.3d 286, 292 [the affidavit "established probable cause to search for evidence of one crime (child molestation) but designed and requested a search for evidence of an entirely different crime (child pornography)."]. BUT ALSO SEE *U.S.* v. *Colbert* (8th Cir. 2010) 605 F.3d 573, 578 ["There is an intuitive relationship between acts such as child molestation or enticement and possession of child pornography."].