U.S. v. Perkins

(9th Cir. 2017) __ F.3d __ [2017 WL 957205]

Issues

(1) Was a search warrant affidavit intentionally or recklessly misleading? (2) If so, did probable cause exist despite the misleading information? (3) If a warrant to search for child pornography was based on a photo, must the photo be included in the affidavit?

Facts

Charles Perkins was stopped at the Toronto International Airport by agents with the Canadian Border Services Agency. The reason for the stop was that Perkins was a registered sex offender, although he had committed his crimes 20 years earlier. The agents searched his laptop and found a photographic image they believed constituted child pornography. Perkins was arrested and transported to a local police station. The next day, a constable who specialized in the investigation of child exploitation crimes obtained a warrant to search the laptop and, other than the one photo, found nothing incriminating. Furthermore, after reviewing the photo, he determined it was not pornographic under Canadian law, so Perkins was released.

A report of the arrest was forwarded to an agent of the U.S. Department of Homeland Security in Washington state who believed the photo constituted pornography under U.S. law, so he wrote an affidavit for a warrant to search Perkins' home and electronic devices for child pornography. The judge signed the warrant and, during the subsequent search, agents found a several images of child pornography. Perkins was arrested and charged.

Although the DHS agent's affidavit contained much of the information gathered by the Canadian agent, there were certain discrepancies and omissions. First, although the DSH agent mentioned that the arresting officers thought the photo was pornographic, he omitted the fact that the constable—who specialized in child exploitation cases—determined it was not. Second, he did not mention that Canada declined to prosecute Perkins. Third, the DHS agents description of the image as pornographic was exaggerated. Fourth, the DHS agent's affidavit did not include a copy of the photo.

Perkins filed a motion to suppress the pornographic images on grounds that the DHS agent's affidavit was fatally inaccurate. The trial court denied the motion and Perkins was convicted. He appealed to the Ninth Circuit.

Discussion

Evidence obtained during the execution of a search warrant will be suppressed if (1) the affiant intentionally or recklessly misrepresented or distorted the facts upon which probable cause was based, and (2) probable cause would not have existed without the errors and omissions.[1] Perkins argued that his motion to suppress should have been granted because both of those circumstances existed. The court agreed.

As to the first issue, the court ruled that the DHS agent's description of the contents of the photo was misleading, citing a federal rule that "[d]etails about the placement and prominence of genitalia is highly relevant to determining whether an image is lascivious."[2] Specifically, the agent said the girl's genital area was "clearly visible" when,

[1] See *Franks v. Delaware* (1978) 438 U.S. 154; *People v. Luttenberger* (1990) 50 Cal.3d 1, 9.
[2] *U.S. v. Overton* (9th Cir. 2009) 573 F.3d 679, 686.

in fact, only a "small portion" of the girl's vagina could be seen and, according to the court, it was a "minor aspect" of the photo. As the court noted, "Because of the [camera] angle, her head and torso predominate the image and cast a shadow on the genital area, which is pictured in the far bottom right-hand corner." Thus, the court ruled that the agent "omitted relevant information from the affidavit that resulted in the misleading impression that the [photo] was unequivocally child pornography."

The court also ruled it was misleading for the DHS agent to state that the arresting officers thought the photo was pornographic but omit the fact that the constable did not—and that he specialized in these types of cases. It was also significant that the affiant failed to mention that Canada declined to prosecute Perkins even though the Canadian and U.S. definitions of pornography as to the crime with which Perkins was prosecuted are quite similar. Specifically, Canada law requires that the image serve a "sexual purpose" and that the genital or pubic area must have been the "prominent feature" of the photo, while the U.S. requires that it constitute a "lascivious exhibition of the genitals or pubic area."[3] It appears therefore that any image that did not constitute pornography in Canada would not constitute pornography in the U.S. Thus, the court ruled that there was no "meaningful difference" between the two definitions, and that the DSH agent's testimony that the laws are "extremely different" was "not plausible."

Finally, the court ruled that the DHS agent's failure to include a copy of the photo with the affidavit was a significant omission. Although the agent testified that it was the "general practice" of the Western District of Washington not to include photos with affidavits in pornography cases, the court ruled that a photo is required when, as here, the pornographic nature of the photo was not obvious.[4]

Consequently, the court concluded that "[b]y providing an incomplete and misleading recitation of the facts and withholding images, [the agent] effectively usurped the magistrate's duty to conduct an independent evaluation of probable cause."[5] Moreover, the court said the DHS agent's misrepresentations and omissions "reveal a clear, intentional pattern" of selectively including information bearing on probable cause, "while omitting information that did not."

As noted, even if a court finds that a search warrant affidavit was intentionally or recklessly misleading, suppression is not required if probable cause still existed after the errors and omissions were corrected. The court ruled, however, that probable cause would not have existed even with the corrections. Although it is true that some crimes, like possession of child pornography, are more apt to continue over time. Still, the court pointed out that a corrected affidavit would have failed to establish probable cause because it would have been based solely on Perkins' convictions for incest and child

[3] See 18 U.S.C. 2256(2)(v). Also see Pen. Code § 311(b)(5).

[4] Also see *U.S. v. Brunette* (1st Cir. 2001) 256 F.3d 14, 19 ["ordinarily a magistrate judge must view an image in order to determine whether it depicts the lascivious exhibition of a child's genitals"].

[5] **NOTE**: In her dissenting opinion Judge Mary Murugia said that probable cause would have been established by the DHS agent's statement that "I have reviewed these images of suspected child pornography and would conclude that the image [in the photo]' meets the federal definition of child pornography." Because this determination is a legal question, we think it must be based on the magistrate's opinion, not the agents'.

molestation which occurred 20-years earlier.[6] Said the court, "In short, a warrant application explaining that an individual with two 20-year old convictions was in legal possession of two non-pornographic images while traveling through Canada is insufficient to support probable cause to search his home computers in Washington for child pornography." Consequently, the court ruled that Perkins' motion to suppress should have been granted, and it vacated his conviction. POV

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[6] See *U.S. v. Falso* (2nd Cir. 2008) 544 F.3d 110, 123 [the length of time that elapses between a prior crime and the suspected offense is relevant in the probable cause analysis].