Recent Case Report

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U.S. v. Payton

(9th Cir. 2009) __ F.3d __ [2009 WL 2151348]

Issue

Did a warrant to search the defendant's home for documents pertaining to drug sales impliedly authorize a search of his computer?

Facts

Having probable cause to believe that Payton was selling drugs, an officer in Merced County obtained a warrant to search his home for, among other things, indicia and "sales ledgers showing narcotics transactions such as pay/owe sheets." The warrant did not expressly authorize a search of computers on the premises.

In Payton's bedroom, an officer saw a computer that was on screen-saver mode. So he jiggled the mouse, at which point an image of child pornography appeared on the screen. Payton was later charged in federal court with possession of child pornography and, when his motion to suppress the pornography was denied, he pled guilty.

Discussion

On appeal to the Ninth Circuit, Payton argued that the officer's act of jiggling the mouse constituted a "search" because it exposed to view something that Payton thought would be private. And he contended that it was an illegal search because the warrant did not expressly authorize a search of computers on the premises. The court agreed.

Although the documents listed in the warrant could have been stored on a computer, the court ruled that officers who are executing warrants to search for documents may not search computers on the premises unless they have express authorization to do so. The reason, said the court, was that "computers are capable of storing immense amounts of information and often contain a great deal of private information. Searches of computers therefore often involve a degree of intrusiveness much greater in quantity, if not different in kind, from searches of other containers."

The court also ruled, however, that a computer could be searched if officers saw something on the premises that reasonably indicated that some of the listed documents were stored in it. But because there was no such indication in Payton's house, the court ruled the search of his computer was unlawful, and that Payton's child pornography should have been suppressed.

Comment

It is settled that officers who are executing search warrants may search places and things in which any listed item may reasonably be found. As the First Circuit observed, "[A]s a general proposition, any container situated within residential premises which are the subject of a validly-issued warrant may be searched if it is reasonable to believe that

the container could conceal items of the kind portrayed in the warrant."[1] In fact, this principle, as it applies to vehicle searches, was the subject of one of the most quoted passages in the criminal law:

> When a legitimate search is under way, and when its purpose and its limits have been precisely defined, nice distinctions between . . . glove compartments, upholstered seats, trunks, and wrapped packages in the case of a vehicle, must give way to the interest in the prompt and efficient completion of the task at hand.[2]

Although the judge who wrote *Payton,* William Canby, was presumably aware of this principle, he decided it was not applicable when the thing that was searched was a computer because computers "are capable of storing immense amounts of information and often contain a great deal of private information."

It is also true, however, that "immense amounts" of personal information may be stored in desk drawers, closets, binders, bookcases, libraries, attics, basements, sheds, vaults, bins, lockers, and chests. And yet, it would be absurd to suggest that these places and things are off limits unless they were specifically listed in the warrant.

Apart from the silliness of trying to devise a constitutional distinction between "immense" and merely "large" amounts of personal information, Judge Canby faced a more serious problem. The Ninth Circuit had already rejected the precise argument that Payton was making. The case was *U.S.* v. *Giberson*—and just listen to what the court said:

> Giberson's principal argument is that computers are able to store "massive quantities of intangible, digitally stored information," distinguishing them from ordinary storage containers. But neither the quantity of information, nor the form in which it is stored, is legally relevant in the Fourth Amendment context. While it is true that computers can store a large amount of material, there is no reason why officers should be permitted to search a room full of filing cabinets or even a person's library for documents listed in a warrant but should not be able to search a computer.[3]

The court in *Giberson* also pointed out that restrictions on computer searches would "create problems in analyzing devices with similar storage capacities." Said the court, "If we permit cassette tapes to be searched, then do we permit CDs, even though they hold more information? If we do not permit computers to be searched, what about a USB flash drive or other external storage device? Giberson's purported exception provides no answers to these questions."

Judge Canby did not even try to refute this logic. Instead, he ruled that *Giberson* did not apply because the circumstances surrounding the search Payton's computer were not exactly the same as the facts surrounding the search of Giberson's computer. Here is what he said: "A reasonable negative inference is that, absent [the circumstances that existed in *Giberson*], a search of a computer not expressly authorized by a warrant is not a reasonable search."

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[1] *U.S.* v. *Rogers* (1C 2008) 521 F.3d 5, 9-10.

[2] *United States* v. *Ross* (1982) 456 U.S. 798, 821-22.

[3] (9th Cir. 2008) 527 F.3d 882, 888. ALSO SEE *U.S.* v. *Reyes* (10th Cir. 1986) 798 F.2d 380, 383 ["in the age of modern technology and commercial availability of various forms of items, the warrant could not be expected to describe with exactitude the precise form the records would take"]; *U.S.* v. *Gomez-Soto* (9th Cir. 1984) 723 F.2d 649, 655 ["[a] microcassette is by its very nature a device for recording information"].

In 2001, another Ninth Circuit judge, Ferdinand Fernandez, tried the same "negative inference" tactic. In *U.S.* v. *Knights*[4] he ruled that a probation search was necessarily unlawful because the facts were not exactly like a Supreme Court opinion that had upheld such searches. In reversing *Knights*, the Supreme Court observed that Judge Fernandez's ruling was based on "dubious logic," pointing out that courts may not conclude "that an opinion upholding the constitutionality of a particular search implicitly holds unconstitutional any search that is not like it."[5] And yet, this is exactly what Judge Canby did, which means the value of his opinion is, well, dubious.

Finally, there is an ironic twist to the story. Although the ruling in *Payton* was unsound, it is likely that, out of an abundance of caution, officers who seek warrants to search for documents will now automatically request authorization to search all computers on the premises. Thus, instead of protecting the privacy rights of criminals who use computers, Judge Canby's decision will undoubtedly result in a substantial increase in the number of computers that are searched. POV

[4] (9th Cir. 2000) 219 F.3d 1138.
[5] (2001) 534 U.S. 112, 117.