U.S. v. Tosti

(9th Cir. 2013) 733 F.3d 816

Issues

(1) Did the defendant have a reasonable expectation of privacy in child pornography images on a computer he left at a CompUSA store for repair? (2) Did the defendant's wife have apparent authority to consent to a search of digital storage devices located in the family home?

Facts

A computer technician at CompUSA in San Rafael notified police that he had been repairing a computer when he discovered that it contained images of child pornography. When officers arrived, the computer was on and they could see "numerous images [of child pornography] appearing on the computer monitor in a very small 'thumbnail' format." The officers directed the technician to "open the images in a 'slide show' format so that they would appear as larger images viewable one by one." One of the officers testified that, even in a thumbnail format, it was apparent that the images were of child pornography. The computer belonged to Donald Tosti, a Marin psychologist. The detectives seized the computer, obtained a warrant to search it, and thereafter copied the relevant images.

Dr. Tosti's wife thereafter notified the FBI that, while looking for some financial records at her husband's request, she found photos of child pornography in Tosti's home-office. Ms. Tosti explained that, although she and Dr. Tosti were estranged, she lived with him in the house and had "full access throughout the residence." In addition to the photos, Ms. Tosti gave the agents a Dell computer, several hard drives, and numerous DVDs, saying she did not want them in the house. None of these devices were password protected. She also gave them written consent to search these items in which officers found more child pornography. Tosti was arrested and filed a motion to suppress all of the pornographic images. With one exception, the motion was denied and Tosti was convicted of possessing child pornography. He appealed to the Ninth Circuit.

Discussion

Dr. Tosti contended that the images that were seized from his computer at the CompUSA store should have been suppressed because the detective's act of directing the technician to open the thumbnail images—and thereby enlarging them—constituted an illegal warrantless search. The court disagreed.

Under the Fourth Amendment, a "search" results if an officer intruded into a place or thing in which a person had a reasonable expectation of privacy.[1] But once that expectation of privacy is lost through no fault of law enforcement, an officer's examination of the place or thing does not constitute a search. Thus, in *United States v.*

[1] See *Katz v. United States* (1967) 389 U.S. 347, 252; *United States v. Jacobsen* (1984) 466 U.S. 109, 113 ["A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed."]. **NOTE**: Even if the owner did not have a reasonable expectation of privacy in a place or thing, a "search" of it occurs if officers intruded upon it for the purpose of obtaining incriminating evidence against him. See *United States v. Jones* (2012) __ U.S. __ [132 S.Ct. 945, 949]. This was not an issue in *Tosti* because neither of the detectives intruded upon any computer files as all of the images were in plain view when they arrived.

Jacobsen, the Supreme Court ruled that "[t]he agent's viewing of what a private party had freely made available for his inspection did not violate the Fourth Amendment."[2] Accordingly, the Ninth Circuit ruled that the officers' act of viewing the images on the monitor did not constitute a search because the CompUSA technician had already seen them, and the detectives examined only those images that the technician had already seen. In other words, said the court, "[The technician's] prior viewing of the images had extinguished Tosti's reasonable expectation of privacy in them."

Nonetheless, Tosti argued that the detective's act of directing the technician to enlarge the images and then viewing them in a slide-show format constituted a search because the technician had not yet viewed the enlarged images. In rejecting the argument, the court pointed out that the details in the enlarged photos were also visible in the thumbnails and, therefore, the officers "learned nothing new" by viewing the enlarged images.

Finally, Tosti argued that his wife did not have the authority to consent to a search of his home-office or the digital storage devices that she had given to the FBI agents. As a general rule, it is reasonable for officers to believe that a spouse has the authority to consent to a search of every room and container in the family home unless there was reason to believe otherwise.[3] In applying this rule, the court in *Tosti* pointed out "there were no objective indications that Ms. Tosti's access to the office was limited. There were no locks or other signs that Tosti tried to keep his wife out of the office." Furthermore, neither the computer, the hard drives, nor the DVDs were password protected or encrypted.

Consequently, the court ruled that all of the computer files in the case were seized legally. POV

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[2] *United States v. Jacobsen* (1984) 466 U.S. 109, 119.

[3] See *People v. Duren* (1973) 9 Cal.3d 218, 241 ["[S]ince a wife normally exercises as much control over the property in the home as the husband, police officers may reasonably assume that she can properly consent to a search thereof."]; *U.S. v. Duran* (7th Cir. 1992) 957 F.2d 499, 505 ["a spouse presumptively has authority to consent to a search of all areas of the homestead; the nonconsenting spouse may rebut this presumption only by showing that the consenting spouse was denied access to the particular area searched"]; *U.S. v. Clark* (8th Cir. 2005) 409 F.3d 1039, 1044 ["[S]herry's statement that [her husband] hid things in the closet did not establish that she lacked access to the space or that [her husband] had exclusive access to it."].