

## ISSUES

(1) Was there probable cause to search the defendant's computer? (2) Did the search warrant adequately describe the evidence to be seized?

## FACTS

Raymond Wong lived in Pinole with his girlfriend Alice Sin. Wong had another girlfriend, Jessica Tang. Sin became pregnant. During the pregnancy, she and Wong fought. On November 22, 1999, before Sin gave birth to the child, Wong reported to Pinole police that Sin had been missing since November 21st. He claimed that he and Sin were married; he did not tell them that Sin was pregnant. Within a few days after Sin was reported missing, Tang moved in with Wong. Officers learned that Tang had recently threatened Sin.

On November 24<sup>th</sup>, Sin's car was found abandoned about a half-mile from Wong's house. A police cadaver dog alerted to the trunk, indicating it contained "decaying human flesh." During a consensual search of Wong's house, officers found a nine millimeter gun. On November 30<sup>th</sup>, Wong agreed to take a polygraph test. The results showed he was 99% deceptive when he said he did not know what happened to Sin.

On January 24, 2000, Sin's body was discovered in Churchill County, Nevada. She had been shot four times. Officers found nine millimeter shell casings near the body. Also near the body was some Monopoly money marked with the letters "NWO" and "ZOG" which, officers learned, have meaning to some white supremacy groups.

Based on this information, Pinole police, on January 26<sup>th</sup>, obtained a warrant to search Wong's house. Among other things, the warrant authorized the seizure of the following:

- Writings or documents that display the letters "NWO" and "ZOG."
- Maps, receipts, or writings depicting Churchill County, Nevada.
- Identification and documents belonging to Alice Sin.
- Computer data "as it relates to this case."

During the search, officers seized, among other things, two Palm Pilots, a computer tower, and six laptops. They also found evidence that Sin was using the computers access the Internet.

On January 28<sup>th</sup>, officers obtained a warrant that specifically authorized a search of the computers. In the application for this warrant, the affiant incorporated the affidavit for the January 26<sup>th</sup> warrant and added the following information: (1) officers learned that Sin stored personal information in the Palm Pilots and that she used computers for e-mail and writing; and (2) based on the affiant's training and experience, people "can use the internet to make travel reservations and research items such as white supremacy groups." The warrant stated that the computers were to be searched by a computer forensic specialist with the California Department of Justice.

Because the listed items could have been stored in plain text, special text, or graphics files, the specialist searched all three types. While searching graphics files, he found child pornography. Wong was convicted of possessing child pornography and was sentenced to 27 months in prison. [It appears that Wong was never charged with the murder of Alice Sin.]

## DISCUSSION

Wong contended the child pornography should be suppressed because: (1) probable cause for the warrants did not exist, and (2) the warrant to search the computers was

overbroad because they did not contain a sufficiently detailed description of the data to be seized.

#### Probable cause

Probable cause for a warrant exists if a common-sense reading of the affidavit establishes a “fair probability” that the listed evidence will be found at the place to be searched.<sup>1</sup> In most cases, the first step in establishing probable cause to search is to establish probable cause that a certain person committed the crime under investigation.

In *Wong*, probable cause to believe the Wong murdered Sin was based on circumstantial evidence. On appeal, Wong contended the circumstances didn’t add up to probable cause. The court disagreed, noting the circumstantial evidence was both detailed and persuasive:

Alice Sin disappeared and was later found murdered. When Wong first reported Sin missing, he withheld information from the police [that Sin was pregnant]. Wong also appeared deceptive during a polygraph test when asked about Sin’s murder. Although Sin shared a home with Wong in California, and her car was found near that home, her body was discovered in Churchill County, Nevada. Sin had been shot four times and nine millimeter shell casings were found near her body. During a consensual search of Wong’s home, Sergeant Carmichael had seen a nine millimeter gun in Wong’s bedroom. Tang, Wong’s second girlfriend, had moved into Sin and Wong’s home shortly after Sin disappeared. Sin and Wong had argued in the months before her disappearance and Tang had threatened Sin.

Although these facts established probable cause to believe Wong had murdered Sin, Wong argued that the affidavit did not contain sufficient proof that any of the listed evidence would be found in the computers or computer discs.

Proof that certain documents are stored on computers in a home or office can be based on direct or circumstantial evidence. An example of direct evidence would be a statement from a reliable witness that he had recently seen the documents on computer files.

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<sup>1</sup> See *Illinois v. Gates* (1983) 462 US 213, 231[“Perhaps the central teaching of our decisions bearing on the probable-cause standard is that it is a practical, nontechnical conception. In dealing with probable cause, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.”]; *Illinois v. Rodriguez* (1990) 497 US 177, 184 [“But ‘reasonableness,’ with respect to [the Fourth Amendment], does not demand that the government be factually correct in its assessment that that is what a search will produce. Warrants need only be supported by probable cause, which demands no more than a proper assessment of probabilities in particular factual contexts.”]; *People v. Garcia* (1981) 115 Cal.App.3d 85, 100 [“(I)t is axiomatic that the courts are to interpret the affidavit in a common sense, nontechnical manner.”]; *Bailey v. Superior Court* (1992) 11 Cal.App.4th 1107, 1111 [“Courts should not invalidate search or arrest warrants by imposing hypertechnical requirements rather than a commonsense approach to probable cause.”]; *United States v. Cortez* (1981) 449 US 411, 418 [“(A) trained officer draws inferences and makes deductions—inferences and deductions that might well elude an untrained person.”]; *United States v. Arvizu* (2002) 534 US \_\_ [151 L.Ed.2d 740, 749-50][“This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person.”]; *People v. McFadin* (1982) 127 Cal.App.3d 751, 767 [“Defendant would apply the axiom that a chain is no stronger than its weakest link. Here, however, there are strands which have been spun into rope. Although each alone may have insufficient strength, and some strands may be slightly frayed, the test is whether when spun together they will serve to carry the load of upholding the action of the magistrate in issuing the warrant.”].

In most cases, however, officers will not know for sure where the evidence is being stored. But they know, as we all know, that people nowadays store many, if not most, of their documents and graphics in computers. For this reason, the courts have ruled that when there is probable cause to search for documents, officers may usually infer that some or all of those documents will be found in computers.<sup>2</sup>

Consequently, the court in *Wong* ruled it was reasonable to believe that the listed documents—all of which “directly related to Sin’s murder”—might have been stored in a computer. Said the court:

Because Sin was found in Churchill County, Nevada, maps or other information about that location could have been located in Wong’s computer. Evidence of travel arrangements to Nevada could also be found on the computer. Monopoly money depictions or information related to the letters “NWO” and “ZOG” could have been stored on a computer.

#### Overbroad warrant

As noted, the January 26<sup>th</sup> warrant authorized a search for computer data “as it relates to this case.” Wong contended that “data as it relates to this case” is overbroad because it effectively authorized a search for a broad range of items, including items for which probable cause did not exist.

The court ruled, however, that the broad language “as it relates to this case” was effectively limited to the specific types of data listed elsewhere on the warrant; e.g., data relating to Churchill County, Nevada, “NWO” and “ZOG.” Said the court, “The executing officers would have been aware from the language [data “as it relates to this case”] that they could search the computers only for those particular items previously listed in the warrant.”

Wong’s conviction was affirmed.

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<sup>2</sup> See *United States v. Ross* (1982) 456 US 798, 821, 824-5; *U.S. v. Hunter* (1998) 13 F.Supp.2d 574, 581 [“Today computers and computer disks store most of the records and data belonging to businesses and attorneys.”]; *U.S. v. Gomez-Soto* (9<sup>th</sup> Cir. 1984) 723 F.2d 649, 655 [“A microcassette is by its very nature a device for recording information in general . . . The failure of the warrant to anticipate the precise container in which the material sought might be found is not fatal.”]; *U.S. v. Lucas* (8<sup>th</sup> Cir. 1991) 932 F.2d 1210, 1216 [warrant authorizing search for documents impliedly authorized search of cassette tapes because documents could be stored on tapes]; *People v. Lorie* (1995) 165 Misc.2d 877, 881 [“Indeed, the computer and the discs were the most likely place the police could expect to find the records.”]; *U.S. v. Simpson* (10<sup>th</sup> Cir. 1998) 152 F.3d 1241, 1248; *U.S. v. Upham* (1<sup>st</sup> Cir. 1999) 168 F.3d 532, 535-6.