10 August 2012

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

Airman First Class (E-3)
ADAM G. COTE,
UNITED STATES AIR FORCE,
Appellant.

Crim. App. No. 37745
USCA Dkt. No. 12-0522/AF

Brief on Behalf of Appellant

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TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

Issue Presented

WHETHER EVIDENCE FOUND ON APPELLANT'S COMPUTER SHOULD BE SUPPRESSED BECAUSE IT WAS FOUND PURSUANT TO A SEARCH THAT VIOLATED THE TERMS OF THE WARRANT.

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66(c), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (2006). This Honorable Court has jurisdiction to review this case pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2006). On July 12, 2012, review of the issue stated above was granted.

Statement of the Case

On 11 June 2010, Appellant was tried by general court-martial by a panel of officer and enlisted members at Minot Air Force Base, North Dakota. The charges and specifications on

which he was arraigned, his pleas, and the findings of the court-martial were as follows:

Chg	Art UCMJ	Spec	Summary of Offense	Plea	Finding
	134			NG	NG
		1	Did, a/n Minot AFB, North Dakota, o/a 30 May 08, knowingly possess visual depiction of minors engaging in sexually explicit conduct, such conduct being of a nature to bring discredit upon the armed forces.	NG	NG
		2	Did, a/n Minot AFB, North Dakota, o/a 2 Jul 08, knowingly possess visual depictions of minors engaging in sexually explicit conduct, such conduct being of a nature to bring discredit upon the armed forces.	NG	NG
Add'l Chg	134			NG	NG
			Did, a/n Minot AFB, North Dakota, o/a 30 May 08, knowingly distribute sexually explicit visual depictions of minors, such conduct being of a nature to bring discredit upon the armed forces.	NG	NG
2nd Add'l Chg	134			NG	G
			Did, a/n Minot Air Force Base, North Dakota, btw	NG	G

Chg	Art UCMJ	Spec	Summary of Offense	Plea	Finding
			o/a 3 Jun 07 and o/a 13 Nov 07, knowingly possess visual depictions of minors engaging in sexually explicit conduct, such conduct being of a nature to bring discredit upon the armed forces.		

On 11 June 2010, a panel of officer and enlisted members sentenced Appellant to a bad-conduct discharge, confinement for twelve months, forfeiture of all pay and allowances, and reduction to Airman Basic. J.A. 111. On 28 September 2010, the convening authority approved the sentence as adjudged but did not approve the forfeiture of all pay and allowances. J.A. 12. Pursuant to Article 58b(b), UCMJ, 10 U.S.C. § 858b (2006), all of the mandatory forfeitures were waived for a period of six months or until release from confinement, whichever occurred sooner, and were directed to be paid to Appellant's wife for the benefit of herself and the appellant's daughter.

On 28 March 2012, AFCCA affirmed the findings and the sentence. J.A. 1-8. On July 12, 2012, this Honorable Court granted review of the issue stated above.

Statement of Facts

On 19 June 2009, an Article 39(a) was convened and Appellant was arraigned on the Charge, its specifications and the Additional Charge. J.A. 42. Appellant deferred pleas and motions and the court-martial was adjourned. *Id*. On 3 November 2009, the court-martial reconvened and Appellant was re-arraigned to include the Second Additional Charge. J.A. 43-44. Prior to entering his plea, defense counsel moved to suppress evidence obtained through unlawful search and seizure. J.A. 45, 112-138.[1] The military judge agreed with the defense counsel, granted the motion and dismissed the charges. J.A. 104-107. On 6 April 2010, the Air Force Court of Criminal Appeals vacated the military judge's ruling and remanded the case for further proceedings. J.A. 168-175. On June 3, 2010, the Court of Appeals for the Armed Forces denied Appellant's emergency motion for an order to stay the proceedings of the court-martial pursuant to R.C.M. 908(c)(3).[2] The court-martial resumed on 8 June 2010.

Additional facts necessary for the disposition of the issue granted are referenced below.

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[1] Since Appellant was acquitted of the Charge and its specifications, and the Additional Charge, the discussion in this brief regarding this motion is limited to the evidence seized from the Western Digital external hard drive, which was relied upon to convict Appellant on the Second Additional Charge.
[2] *United States v. Cote*, 69 M.J. 178, No. 10-6007 (C.A.A.F. June 3, 2010)

Summary of Argument

Evidence found on Appellant's computer should have been suppressed because it was found pursuant to a search that violated the terms of the warrant, which required completion of the electronic search of the computer and related hardware within ninety days.

Argument

EVIDENCE FOUND ON APPELLANT'S COMPUTER SHOULD BE SUPPRESSED BECAUSE IT WAS FOUND PURSUANT TO A SEARCH THAT VIOLATED THE TERMS OF A WARRANT.

Additional Facts

Special Agent Harstad, a criminal investigator for the North Dakota Bureau of Criminal Investigation, whose primary responsibilities involved computer forensics and cyber crime, testified that he started an on-line investigation on crimes against children. J.A. 47-48. During the course of that investigation, he tracked down an Internet Protocol (IP) address that belonged to Appellant. J.A. 49-50. He forwarded the information to SA Brian Novelsky of Immigration and Customs Enforcement in Minot, N.D., to obtain a subpoena. J.A. 50. On 1 July 2008, a United States Magistrate, Judge Charles Miller of the United States District Court for the District of North Dakota, issued a federal search warrant. J.A. 84-85, 139-142. The warrant authorized the search of Appellant's dorm room and

the seizure of items from that room which could potentially contain child pornography. J.A. 139-142. The warrant provided that the agents had to seize any property within 10 days and that any search regarding electronic devices, storage media, and electronic data "shall be completed within 90 days of the warrant." J.A. 85-86, 142. The warrant did provide for an exception to this ninety day requirement if good cause could be shown to extend this time period. J.A. 142. The warrant also stated "[s]hould the government not locate in an Electronic Device or Storage Media any of the items specified in the warrant, the government shall promptly return the Electronic Device or Storage Media not containing such items to the owner." *Id*. No extension was requested even though SA Harstad acknowledged that extensions had been sought and granted in other cases. J.A. 87-88.

Pursuant to the warrant executed on 2 July 2008, SA Harstad seized the Western Digital external hard drive [hereinafter WD] and attempted to preview it but was unable to start or get it to work. J.A. 50-52. On 18 August 2008, SA Harstad again tried to get the WD to work but was unsuccessful. J.A. 56-57. On 8 September 2009, 434 days after the warrant was issued, the government submitted a request to the Defense Computer Forensics Laboratory to repair the WD. J.A. 153.

Scott Lallis, a senior forensic technician and Deputy Section Chief of Imaging and Extraction at the Defense Computer Forensic Laboratory (DCFL), also testified on behalf of the Government. J.A. 93. Mr. Lallis' analysis of the WD took place between 15 September 2009 and 2 October 2009. J.A. 155-159. After repairing the hard drive he was able to read the information from the WD, created a forensic digital image of the drive, and sent a copy to SA Harstad. J.A. 99-100.

SA Harstad received the image of the WD from the DCFL on 6 October 2009. J.A. 90, 131. On 9 October 2009, 465 days after the warrant was issued, SA Harstad used the image of the hard drive created by DCFL and found twenty-one videos believed to contain child pornography. J.A. 131-132.

Standard of Review

A military judge's ruling on a motion to suppress is reviewed for an abuse of discretion. *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995). An abuse of discretion exists if the military judge misapprehended the law or found clearly erroneous facts. *United States v. Leedy*, 65 M.J. 208, 213 (C.A.A.F. 2007).

Law and Argument

After considering evidence and argument from both sides, the trial judge ruled, in part, that the October 2009 search of

the data on Appellant's WD was done well outside the time specifically stated by the magistrate judge in the 1 July 2008 warrant. As such, the search was unlawful. Therefore, any evidence seized during the search was inadmissible.

In *United States v. Conklin*, 63 M.J. 333, 338 (C.A.A.F. 2006), this Court held that an individual sharing a dorm room has a reasonable expectation of privacy in files kept on a personally owned computer. It follows, then, that Appellant had a reasonable expectation of privacy in files kept on his WD in his dorm room. As recognized by the Air Force Court of Criminal Appeals (A.F.C.C.A.) in its own precedent, "when dealing with search warrants for computers, there must be specificity in the scope of the warrant which, in turn, mandates specificity in the process of conducting of the search. Practitioners must generate specific warrants and search processes necessary to comply with that specificity[.]" *United States v. Osorio*, 66 M.J. 632, 637 (A.F.Ct.Crim.App. 2008). The Court in *Osorio* went on to hold that when investigators violate the terms of a warrant, suppression of the evidence is appropriate. *Id*.

Appellant had a reasonable expectation of privacy in the data stored in his computer and on the WD hard drive. The search warrant in this case did not totally extinguish Appellant's expectation of privacy. Instead, the warrant

authorized a limited intrusion into those files for only ninety days. At the end of those ninety days, Appellant regained his expectation of privacy in those files, absent the government returning to the magistrate to request an extension to the ninety day period for good cause.

In *United States v. Brunette*, 76 F.Supp. 2d 30 (D. Me. 1999), *aff'd*, 256 F. 3d 14 (1st Cir. 2001), the District Court held that where the government fails to complete its forensic analysis within the time period set forth in a search warrant, the evidence obtained in the search must be suppressed. In *Brunette*, a magistrate authorized agents to seize computer evidence, but added the condition that the forensic analysis must occur within thirty days. *Id*. at 42. Before the thirty day period lapsed, the agents obtained a thirty day extension. *Id.* They examined one of the seized computers before the extension expired and found child pornography. *Id.* However, the agents did not begin examining the second computer until after the extension period lapsed. *Id*. The district court held, "because the Government failed to adhere to the requirements of the search warrant and subsequent order, any evidence gathered from the [second] computer is suppressed." *Id*.

As noted in *Brunette*, it is well settled that search and seizure of evidence, conducted under a warrant, must conform to the requirements of that warrant. *Id.* at 42, citing *Massachusetts v. Sheppard*, 468 U.S. 981, 988 n.5 (1984); *United States v. Upham*, 168 F.3d 532, 536 (1st Cir. 1999). Otherwise, were the police "'allowed to execute [a] warrant at leisure, the safeguard of judicial control over the search which the Fourth Amendment is intended to accomplish would be eviscerated.'" *Brunette*, 76 F. Supp. 2d at 42, quoting *United States v. Bedford*, 519 F.2d 650, 655 (3rd Cir. 1975); *see also United States v. Mitchell*, 565 F.3d 1347 (S.D. Ga. 2007)(twenty-one day delay in obtaining a search warrant after seizure of computer evidence was unreasonable under the Fourth Amendment); *cf. United States v. Hernandez*, 181 F.Supp. 2d 468, 480 (D.P.R. 2002)(finding no unlawful execution of warrant when twenty six floppy disks were seized within the time specified for execution of the warrant but examined thirty-six days later).

In *United States v. Sims*, 428 F.3d 945, 955 (10th Cir. 2005), the accused objected to a search of his office and office computer that occurred one day after the terms of the warrant. The warrant allowed a search "on or before" 24 January 2000, but was not executed until 25 January 2000. *Id*. at 955. While acknowledging that the Fourth Amendment does not specify that

search warrants contain “expiration dates,” the Court nonetheless noted that violations of Rule 41, Federal Rules of Criminal Procedure, could lead to the exclusion of evidence if (1) there was prejudice in the sense that the search might not have occurred or would not have been so abrasive if the Rule had been followed, or (2) there is evidence of intentional and deliberate disregard of a provision in the Rule. *Sims,* 428 F.3d at 955 citing *United States v. Pennington*, 635 F.2d 1387 (10th Cir. 1980). And although the *Sims* case dealt with a violation of the warrant itself, rather than a violation of Rule 41, the Court applied the same analysis to uphold the search. 428 F.3d at 955.

The same cannot be said in Appellant’s case. Applying the same analysis as was applied in the *Sims* case, the Appellant’s case is distinguishable in that, had Rule 41 been followed, the search would not have occurred and the Government clearly disregarded the language in the warrant that required it to get an extension to search beyond the ninety days. The language in Rule 41(e)(2)(B) states that “unless otherwise specified, the warrant authorizes a later review of the media...consistent with the warrant.” In this instance, the warrant did specify that any review of the media had to occur within ninety days.

It is important to note that in Appellant's case, the time limit in Rule 41 was not violated. Instead, it was the terms of the warrant itself that were violated. SA Harstad admitted that the government had sought extensions of search warrants in the past (from the same judge) but did not do so in this case. This is evidence of the government's knowing disregard of the language in the warrant. More than a year after the WD was seized, and after Appellant's initial arraignment, the Government decided to have the WD analyzed in direct violation of the terms of the expired warrant. The fact that the government did nothing with the WD from August 2008 until September 2009 evinces its clear disregard of the terms of the warrant.

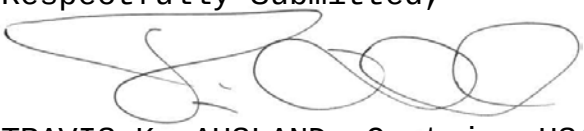
The search warrant in this case required investigators to stop searching after ninety days and return all seized items to the Appellant. Thus, Appellant's expectation of privacy was never totally extinguished and Appellant had a reasonable expectation of privacy that the WD would not be searched after the ninety days and that any copies made by the government would not be viewed after ninety days.

The Air Force Court did not recognize that a valid Fourth Amendment policy exists in setting a reasonable time limit for law enforcement agents to conduct a forensic analysis of

computers. In this case, the federal magistrate sought to balance the privacy interest of a citizen against the lawful intrusions of government, by setting a time limit and by permitting the government to request additional time with appropriate justification. Where the government can so easily and intentionally flout the orders of a federal magistrate after such a long period of time, then there is little to stop law enforcement agents in the future from disregarding judicial orders in other searches or from otherwise complying with the demands of the Fourth Amendment.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside and dismiss the findings of guilty of the Second Additional Charge and the Specification thereunder and set aside the sentence.

Respectfully Submitted,



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