

FILED UNDER SEAL

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

UNITED STATES OF AMERICA §

v. §

JASON GANDY §

§
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§
§

No. 4:12-CR-503

**DEFENDANT’S MOTION TO SUPPRESS EVIDENCE SEIZED
PURSUANT TO SEARCH WARRANTS**

Defendant, JASON GANDY, files this Motion to Suppress evidence and requests a hearing on the same based on the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. As stated in Gandy’s Motion to Suppress filed on April 1, 2013 (D.E. 34), while in custody and being interrogated at the Bush Intercontinental Airport, Gandy invoked his right to counsel. Gandy’s requests to have an attorney present were ignored by Government agents as they unconstitutionally pried statements from him. Gandy’s attorneys have learned, through subsequent discovery, that Gandy’s illegally obtained statements were used as probable cause to secure search warrants for Gandy’s home, vehicle, and an unattached structure behind Gandy’s residence. These illegally obtained statements are the bulwark of the affidavits. Without them, the warrants are unsupported by sufficient probable cause and the agents would not have sought warrants. Gandy now submits that all evidence seized pursuant to the warrants

must be suppressed pursuant to the exclusionary rule. In support, Gandy would show the following:

BACKGROUND

The facts relating to the illegal custodial interrogation of Gandy are fully explained in Gandy's Motion to Suppress that was filed on April 1, 2013 (D.E. 34). On July 19, 2012, after arriving at the Houston International Airport along with a minor passenger, KV, Gandy was subjected to a prolonged interrogation by government agents who, in disregard for Gandy's constitutional rights and *Miranda v. Arizona*, subjected Gandy to prolonged custodial interrogation despite Gandy's repeated requests for an attorney. These requests included:

- "Can I call my attorney now?"
- "I just wish my attorney was sitting next to me, that's all I am asking."
- "At this point I probably do want [an attorney]. Did he call my attorney?"
- "I need to call my attorney back, can I push redial on that phone?"

In fact, Gandy had reached legal counsel and counsel had come to the airport to meet with Gandy. The agents, however, obstructed Gandy's access to counsel, refusing to permit his lawyer from entering the interrogation room because he was not a "criminal attorney," although the lawyer was.

Since filing his prior Motion to Suppress (D.E. 34), Gandy has learned that government agents used the statements from the illegal interrogation to support

two search warrants. One of the warrants sought to search Gandy's private residence and vehicle. Ex. 1, Warrant and Affidavit for Residence and Vehicle. The other warrant was for an "unattached structure" located behind Gandy's private residence. Ex. 2, Warrant and Affidavit for Unattached Structure. The warrant affidavits concluded that there was probable cause to search and seize evidence of transportation of a minor for illegal purposes and for child pornography. Ex. 1, Warrant Affidavit ¶¶ 24, 29; Ex. 2, Warrant Affidavit ¶¶ 27, 32.

DISCUSSION

Both affidavits relied heavily on Gandy's illegally obtained statements regarding KV and the purpose of their traveling to the United Kingdom. These statements were wrongly used to convince a U.S. Magistrate that probable cause existed to issue the warrants. Therefore, the evidence seized pursuant to the warrants must be suppressed as fruit of the poisonous tree.

It is well settled that, "[i]f officers illegally obtain evidence of criminal conduct and then use that information in an affidavit that causes a warrant to issue for a search or seizure, the ostensibly legal, warranted invasion of privacy falls under the exclusionary rule." *United States v. Butts*, 729 F.2d 1514, 1518 (5th Cir. 1984). However, the warrant may stand as valid if supported by sufficient probable cause from an independent source that is untainted by the illegally

obtained evidence—here, Gandy’s statements. *United States v. Runyan*, 290 F.3d 223, 235 (5th Cir. 2002). In determining whether the independent source doctrine applies, the court must perform a two-part analysis: (1) does the warrant affidavit, when purged of tainted information contain sufficient remaining facts to constitute probable cause; and (2) did the evidence obtained from the illegal conduct affect or motivate the officers’ decision to request the search warrant. *Id.*; *United States v. Hassan*, 83 F.3d 693, 697 (5th Cir. 1996).

In this case the answer to the first question is “no”; therefore evidence seized pursuant to the warrants must be suppressed. And, providing another basis to suppress, the answer to the second question is “yes.” Thus, any and all evidence seized from both warrants must be suppressed pursuant to the exclusionary rule.

I. The Warrants Are Insufficient When Purged Of The Tainted Information.

A. When purged of the tainted information the affidavits do not contain sufficient facts supporting probable cause to search for evidence of child pornography and to seize electronic media.

The Fourth Amendment requires “a nexus between the item to be seized ... and criminal behavior.” *Warden v. Hayden*, 387 U.S. 294, 307 (1967); *United States v. Griffin*, 555 F.2d 1323, 1325 (5th Cir. 1977). The warrants here authorize the seizure of electronic devices to search for evidence of child pornography. Because the affidavits must be purged of Gandy’s statements, there is no probable

cause to believe that any crime involving child pornography occurred and there is no nexus to electronic storage devices.

As the warrant affidavits state, inspection of Gandy's computer by government agents at the airport uncovered no images characteristic of child pornography. Ex. 1 ¶ 17; Ex. 2 ¶ 17. Information supporting probable cause for the search of electronic devices and for child pornography came from the statements of Gandy and Gandy alone. The only evidence appearing in the warrant affidavits that could arguably establish probable cause concerning illegal pornography or evidence of a crime on any electronic media was a statement by Gandy that he took a photograph of KV's backside on one occasion. Ex. 1 ¶ 16; Ex. 2 ¶ 16.¹

Without this statement, the warrant affidavit is so lacking in indicia of probable cause to seize electronic media and search for child pornography that no reasonable officer could rely on its validity. *United States v. Leon*, 468 U.S. 897, 923 (1984). Thus, any evidence seized from electronic media storage devices, or evidence of child pornography must be suppressed.

¹ Although in the warrant affidavit for the unattached structure, KV states that he has seen pornography on Gandy's computer. There is no such statement concerning pornography on Gandy's computer in the warrant affidavit to search Gandy's private residence and vehicle. The affidavit does not state whether the pornography was illegal child pornography or perfectly legal adult pornography. It further does not specify whether Gandy showed such alleged pornography to KV, if KV viewed it himself, or if Gandy was even present when KV saw it. Ex. 2 at ¶ 26. Perhaps most importantly, this statement from KV provides no support whatsoever for the conclusion in the affidavits that Gandy engaged in the *production* of child pornography.

B. When purged of the tainted information there is insufficient probable cause to support the warrants.

Without the illegally obtained statements, the required nexus between any alleged crime and Gandy's residence, vehicle, or the unattached structure evaporates. KV was also interviewed and provided information concerning the purpose of his and Gandy's trip to London and his relationship with Gandy. But purging Gandy's statements from the affidavit results in this information from KV being largely uncorroborated. Uncorroborated statements from a witness are "rarely sufficient to provide probable cause for a warrant." *Kohler v. Englade*, 470 F.3d 1104, 1110 (5th Cir. 2006) (citing *Illinois v. Gates*, 462 U.S. 213, 227 (1983)).

Although there was arguably incriminating evidence found in Gandy's luggage, there was no nexus between any purportedly illegal conduct at the airport and Gandy's private residence other than uncorroborated statements of KV. Moreover, even *with* the statements from KV and Gandy, the warrants fail to establish probable cause that evidence of *transporting* a child for illegal conduct would be found in any of the property subject to the warrants. No nexus exists between the information obtained at the airport and Gandy's private property subject of the warrants.

II. Without the illegally obtained statements the warrants would not have been sought, especially not for production of child pornography.

Another issue, separate from whether the warrants hold sufficient probable cause without Gandy's statements, is whether the tainted information "influenced or motivated" the decision to seek a warrant. If so, the evidence seized must be suppressed. *United States v. Restrepo*, 966 F.2d 964, 965, 971 (5th Cir. 1992) (discussing *Murray v. United States*, 487 U.S. 533 (1988)). This too supports suppression.

It cannot be rationally contended that the Government would have been motivated to seek a warrant for Gandy's private property without his illegally obtained statements. They most certainly would not have sought a warrant for evidence of child pornography or for the search and seizure of electronic devices without Gandy's statement that he once photographed KV. Without that statement there was no basis to search electronic storage devices and no reasonable officer would believe that probable cause existed for such a search without this statement from Gandy.

CONCLUSION

The search warrants relied on statements obtained in violation of the law. Without such statements the warrants are not supported by probable cause and the Government would not have sought warrants. Gandy asks that the Court grant this

Motion to Suppress and order that no evidence seized pursuant to the two search warrants subject to this motion can be used at trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on November 26, 2013, I electronically filed the foregoing document under seal with the clerk of court of the U.S. District Court for the Southern District of Texas, using the electronic case filing system of the court. Thereafter, a copy of this motion and exhibits were sent to Sheri Zack, Assistant United States Attorney, via electronic mail.

/s/ Dan Cogdell _____
DAN COGDELL