PLAIN VIEW

United States v. Stierhoff, 477 F.Supp.2d 423 (D.R.I.,2007.) **Computer**

Facts: Defendant was investigated for stalking and gave officer consent to search his computer for evidence of that crime. When looking at computer, officer saw folder entitled "offshore" and decided to look at the title of the documents. Based upon the titles, he obtained a search warrant related to tax evasion charges.

Government exceeded scope of consent to computer search, given by defendant arrested for stalking, when conducting authorized search of "creative writing" file authorities saw reference to "offshore" file, which they opened without warrant, discovering evidence of tax evasion.

Plain view doctrine did not allow admission of evidence, in tax evasion suit, obtaining through warrantless search of defendant's computer file "offshore," conducted after discovering existence of file through consensual search of file "creative writing," which police were examining to gather evidence on stalking charge for which defendant had been arrested; term "offshore" was not sufficiently reflective of criminal activity to allow search without first securing warrant.

United States v. Walser, 275 So.2d 981 (10th Cir. 2001):

Officer obtained a search warrant to seize drugs and related evidence from defendant's hotel room. While searching the computer at the police station, he saw a file named "bsfit.avi." He viewed a thumbnail of the file and noticed it looked like child pornography. He then opened the file to be sure. After confirming it was child pornography, he sought a second warrant to continue searching for more pornography. The defense argued that there was no reason for looking at a video file while searching for evidence of drug dealing and thus, the officer exceeded the scope of the warrant. The appellate court ruled that the officer was justified at looking at the one picture and did the correct thing in seeking a second warrant. It should be noted that this case falls somewhere in between Carey and Gray. Unlike Carey, the officer sought a second warrant upon finding evidence of the child pornography. Unlike Gray, the officer was not doing a systematic forensic analysis of the computer that allowed him to claim that he had to look at every file to properly search the computer. In any event, this case seems to favor the second warrant approach.

United States v. Gray, 78 F.Supp.2d 524 (E.D. Virginia, 1999):

Under plain view doctrine, FBI agent's viewing of subdirectories in defendant's computer which turned out to contain suspected child pornography was within scope of search warrant which sought unrelated evidence of "hacking" or unauthorized entry into government agency library, where agent opened subdirectories in course of systematic

search for evidence of hacking, and did not abandon original search upon inadvertent discovery of pornography files in order to begin unauthorized search; agent was entitled to examine each subdirectory, at least briefly, to determine if it was covered by warrant.

Discussion: This case basically allows the investigator or analyst to view every file on a computer. The court recognized that files may be intentionally mislabeled to hide their content and consequently, the investigator is allowed to briefly view each file in order to determine if it is relevant under the warrant.

The main point stressed by the court, however, is that the investigator never abandoned his original search for evidence of hacking. The investigator was systematically viewing the contents of every directory according to procedure. He did not specifically focus on the "Teen" or "Tiny Teen" directories. After completing his search for hacking data, a subsequent warrant was obtained to search for more pornography. The court distinguished this case from United States v. Carey, 172 F.3d 1268 (10th Cir. 1999), where that court held that the investigator impermissibly searched for additional child pornography after he found his first picture while executing a warrant on a narcotics case. The distinction lies in the fact that the investigator in Carey abandoned his original search and shifted his focus to child pornography. In the instant case, the investigator never abandoned his search for hacking material, but continued to give each file a cursory review for relevant evidence. If he happed to view more child pornography, it was legitimately in plain view.

Arizona v. Hicks, 107 S.Ct. 1149 (1987):

Officer's actions, in moving stereo equipment in order to locate serial numbers and determine if equipment was stolen, constituted "search," notwithstanding that officer was lawfully present within apartment where equipment was located in plain view. Probable cause was necessary to justify moving equipment to view serial number.

Discussion: Keep this in mind when searching for computer data or images. Opening a file or directory is considered a search and the contents found therein are not in plain view. Probable cause or valid consent must be prior to opening the file or directory.

U.S. v. Wong, 334 F.3d 831 (9th Cir. 2003):

Child pornography discovered on defendant's computer during search for evidence linking defendant to his girlfriend's murder, pursuant to warrant, was in plain view; police were lawfully searching for evidence of murder in graphics files that they had legitimately accessed, and where child pornography was located, and incriminating nature of files containing pictures of children as young as age three engaged in sexual acts was immediately apparent.

United States v. Carey, 172 So.2d 1268 (10th Cir. 1999): **Computer**

Facts: Police officers executed an arrest warrant charging the defendant with a drug offense. During the execution of the warrant, he consented to a search of his apartment. The consent form stated, "to have conducted a complete search of the premises and property located at …" It further stated, "I do freely and voluntarily consent and agree that any property under my control…may be removed by the officers…if said property shall be essential in the proof of the commission of any crime in violation of the Laws of the United States…" Armed with this consent, the officers searched his home. In addition to finding drug evidence, they also discovered and took two computers, which they believed would either be subject to forfeitures of evidence of drug dealing. After bringing the computers to the police station, the officers obtained a search warrant allowing them to search the files on the computers for "names, telephone numbers, ledger receipts, addresses, and other documentary evidence pertaining to the sale and distribution of controlled substances." During the subsequent search of the computer, the detective did not find any relevant text file, but he did find "JPG" image depicting child pornography. He then continued to search for more "JPG" files and found numerous other such images. The defendant argues that the search of the computer exceeded the scope of the warrant.

Holding:

- Consent defendant gave to the search of his apartment did not carry over to the contents of his computer files, where the arresting officer sought permission to search only the "premises and property located at" a specified address; seizure of the computer was permitted by the consent to remove property that shall be essential to the proof of any crime, but the agreement did not permit the officer to open the files contained in the computer.

Discussion: For a more detailed analysis of this case, see the Particularity Requirements chapter.

Rimmer v. State, 825 So.2d 304 (Fla. 2002):

Officers did not exceed scope of warrant authorizing search of vehicle defendant was driving at time of his arrest by opening organizer which was in plain view but which was not listed in warrant where warrant authorized search for trace evidence, shell casings, blood or bodily fluid.

Discussion: This case is a good resource on this topic. The court reviews several US Supreme Court opinions and gives us helpful language. In essence, the court ruled that the ledger was a place where trace evidence, shell casings and body fluids could be located so the officer was justified in searching it. The court cited this particularly helpful observation from Coolidge v. New Hampsire, 403 U.S. 443, 465 (1971):

The State, in this case, should not be held to the strict requirement that only those things particularly described in the warrant may be seized. This would fly in the face of the universally accepted ``plain view'' exception to the warrant requirement of the Fourth Amendment. The police are not required to close their eyes and turn their heads away from evidence inadvertently discovered during the course of a lawful search, the presence of which they had no prior knowledge.