FILED
United States Court of Appeals
Tenth Circuit

September 9, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MATTHEW HOLT,

Defendant - Appellant.

No. 19-1064
(D.C. No. 1:17-CV-01901-WJM &
1:15-CR-00245-WJM-NYW-1)
(D. Colo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **LUCERO**, **PHILLIPS**, and **EID**, Circuit Judges.

Applicant Matthew Holt seeks a certificate of appealability to appeal the district court's denial of his petition for relief under 28 U.S.C. § 2255. *See* 28 U.S.C. § 2253(c)(1)(A) (requiring a COA to appeal a final order in a habeas proceeding challenging a state-court detention). We conclude that Holt has not made the requisite substantial showing of the denial of a constitutional right, deny a COA, and dismiss the appeal.[1]

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* This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

[1] The district court denied Holt's motion to proceed in forma pauperis because the motion was not in the correct form. Holt has renewed his motion in this court. Given his limited resources and his representation that his total monthly expenses exceed his gross monthly pay, we grant Holt's motion.

In May 2015, police executed a search warrant at a home in Westminster, Colorado associated with an internet-protocol (IP) address that had shared images of child pornography. The warrant authorized the search and seizure of all computers, electronic media, and cell phones that might contain such images. Upon entering the home, officers discovered Holt residing in a basement room. After performing a cursory search of Holt's laptop, officers seized the device along with his cell phone, both of which were later found to contain hundreds of child-pornography images. Holt was arrested shortly thereafter.

In June 2015, a federal grand jury indicted Holt on 13 counts of producing, aiding and abetting the production of, and distributing child pornography, in violation of 18 U.S.C. §§ 2251(a) and 2252A(a)(2) and (b)(1). Holt initially pleaded not guilty to all counts, but in September 2015, he filed a notice of disposition and requested a change-of-plea hearing. In exchange for the United States dismissing the indictment, Holt agreed, at the advice of counsel, to plead guilty to a superseding information charging three counts of producing child pornography, in violation of § 2251(a). Holt also agreed to waive his rights to directly appeal or collaterally attack his conviction or sentence, with limited exceptions.

In February 2016, the district court held a change-of-plea hearing. Under oath, Holt represented that he had discussed the plea agreement with his attorney, that he admitted the plea agreement's factual allegations, that he understood the charges to which he was pleading guilty, and that he had voluntarily signed the plea agreement. Holt further stated that he was satisfied with his attorney's representation. Based on

Holt's statements, the court found that he was competent to enter an informed plea, that he understood the plea agreement and its ramifications, that he had voluntarily entered the plea agreement, and that he had been represented by competent counsel, without objection or complaint. The court then accepted Holt's guilty plea.

On August 17, 2016, the court sentenced Holt to 660 months' imprisonment, the total of three consecutive 220-month terms for each count of conviction. On August 4, 2017, Holt filed a pro se motion to vacate the sentence under 28 U.S.C. § 2255, arguing that his plea agreement was constitutionally invalid because his counsel had been ineffective. Holt alleged four instances of ineffective assistance of counsel, including that counsel had failed to (i) challenge the constitutionality of 18 U.S.C. § 2251; (ii) challenge the sufficiency of the evidence for his conviction under § 2251(a); (iii) move to suppress evidence that the police had obtained in violation of the Fourth Amendment; and (iv) challenge the United States' use of multiple charges to impose a sentence that exceeds the statutory maximum and violates the Fifth Amendment.

On referral, Magistrate Judge Nina Y. Wang recommended denying Holt's § 2255 motion, finding his counsel's representation constitutionally adequate. Holt timely objected, and the United States responded. On a de novo review, the district court adopted the magistrate judge's recommendation. The court thus denied Holt's § 2255 motion and denied a COA. In this timely appeal, Holt seeks a COA from this court.

We will issue a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." *Okyere v. Rudek*, 732 F.3d 1148, 1149 (10th Cir. 2013) (quoting 28 U.S.C. § 2253(c)(2)). Where, as here, the district court rejected the petitioner's constitutional claims on the merits, the petitioner must demonstrate that reasonable jurists would find the court's assessment "debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Holt fails to meet this standard.

Holt pursues just two of his previous ineffective-assistance-of-counsel claims in this appeal: (i) that counsel failed to object to evidence obtained in violation of his Fourth Amendment rights; and (ii) that counsel failed to object to the use of multiple charges in violation of the Fifth Amendment. To prevail on either claim, Holt must show that his counsel's performance was deficient and that the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). We review Holt's ineffective-assistance claims de novo. *See United States v. Fisher*, 38 F.3d 1144, 1146 (10th Cir. 1994).

As to the Fourth Amendment, Holt contends that the warrant issued for the Westminster home did not authorize the seizure of his laptop. A search warrant is valid under the Fourth Amendment if supported by probable cause and particularized to the things for which there is probable cause to seize. *See United States v. Russian*, 848 F.3d 1239, 1244 (10th Cir. 2017). In this case, Holt admits that the warrant was obtained based on probable cause that child pornography had been downloaded from the home's wireless router. And he doesn't seriously dispute that the warrant was particularized to items with a clear nexus to child pornography, *i.e.*, computers and

other devices and equipment "used to commit or facilitate the . . . Sexual Exploitation of Children." ROA at 315; *cf. United States v. Burke*, 633 F.3d 984, 992 (10th Cir. 2011) (deeming sufficiently particular a warrant for the seizure of computers and other "items related to child pornography in any media form"); *United States v. Grimmett*, 439 F.3d 1263, 1270 (10th Cir. 2006) (concluding that a warrant for the seizure of "any and all computer equipment" was sufficiently "directed at items related to child pornography").

Nevertheless, though his laptop has a nexus to the crime being investigated—child pornography—Holt posits that it falls outside the warrant's scope because the warrant lacks allegations that the laptop was connected to the home's wireless router when the illicit files were downloaded. Holt claims that he and his laptop were "not present" at the time, *see* Appellant's Br. at 1; at the district court, Holt claimed that he was a mere visitor in the home and had a legitimate expectation of privacy under *Minnesota v. Olson*, 495 U.S. 91 (1990).

Special concerns indeed arise when items to be seized belong to visitors rather than occupants of the premises. *See United States v. Thomas*, 372 F.3d 1173, 1176 (10th Cir. 2004) ("[G]uests have a reasonable expectation of privacy in the home of their host."). In that context, "searches may become personal searches outside the scope of the premises search warrant requiring independent probable cause." *United States v. Giwa*, 831 F.2d 538, 544 (5th Cir. 1987). But, as Holt admitted in his plea agreement, he had been residing in the Westminster home since about August 2014—ten months before the search warrant's execution in May 2015. Holt was not a mere

guest; he had a connection to the premises substantial enough that his laptop fell within the warrant's scope. *Cf. Ybarra v. Illinois*, 444 U.S. 85, 91 (1979) (finding a patron's mere presence at a bar to be searched insufficient for probable cause to search the person). Further, the absence of a specific record that Holt's laptop was connected to the home's wireless network at the time the child pornography was downloaded does not render the warrant invalid. *Cf. United States v. Perrine*, 518 F.3d 1196, 1202–04, 1205 (10th Cir. 2008) (rejecting a similar argument).

To the extent that Holt alleges a Fourth Amendment violation in the officers' initial search of his laptop before seizing it, he is mistaken. Holt admits giving the officers "limited consent" to perform a cursory search, and he doesn't suggest either that the consent was involuntary or that the search exceeded the consent's scope. *See* Appellant's Br. at 4–5. "A search does not require a warrant or probable cause if it is conducted pursuant to consent," *Patel v. Hall*, 849 F.3d 970, 980 (10th Cir. 2017), so whether the warrant authorized the initial search of Holt's laptop is constitutionally irrelevant. No reasonable jurist would debate the district court's conclusion that counsel did not perform deficiently by failing to attempt to suppress evidence from Holt's laptop.

As for his second claim, Holt argues that his child-pornography offenses are multiplicitous and thus violate his Fifth Amendment right not to be held in double jeopardy for an offense. Holt argues that the offenses are "parts of a common scheme or plan" and should have been consolidated. Appellant's Br. at 9. The Fifth Amendment indeed forbids "multiple punishments for the same offense imposed in a

single proceeding." *Jones v. Thomas*, 491 U.S. 376, 381 (1989) (citation and internal quotation marks omitted). Here, though, Holt was charged with 12 different instances of producing child pornography, in violation of 18 U.S.C. § 2251(a). As the district court noted, we have held that "each use of a minor to create a visual depiction constitutes a separate and distinct violation [of § 2251(a)], and thus represents the correct unit of prosecution." *United States v. Esch*, 832 F.2d 531, 541 (10th Cir. 1987). That the indictment charged Holt with multiple, parallel child-pornography offenses did not raise any double-jeopardy concerns, and counsel was not ineffective in failing to make such an argument.

We conclude that Holt has failed to show that reasonable jurists would find the district court's assessment of his § 2255 petition debatable or wrong. We therefore deny his application for a COA and dismiss the appeal.

Entered for the Court

Gregory A. Phillips
Circuit Judge