IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

United States of America,

 Criminal Action Number

versus 1:15-CR-390-MHC

William Bryant Wheeler. UNDER SEAL

**Motion to Withdraw Plea**

On March 11, 2016, pursuant to a plea agreement, Mr. Wheeler pleaded guilty to Count Two of the indictment, a violation of 18 U.S.C. § 2252(a)(4)(B). (Doc. 30). Sentencing is set for June 14, 2016. (Doc. 32). As detailed below, prior to Mr. Wheeler’s change of plea, undersigned counsel failed to identify a Fourth Amendment violation by law enforcement in this case, and thus failed to inform Mr. Wheeler of the same. Now aware of the violation, Mr. Wheeler moves the Court to allow him to withdraw his plea of guilty and litigate a motion to suppress.

1. Seizure of information from Mr. Wheeler’s computer

The FBI seized digital media containing the evidence underlying the charges in this case from Mr. Wheeler’s home, pursuant to a search warrant from this district. (Application and affidavit attached as Exhibit 1). The affidavit describes how the FBI identified Mr. Wheeler’s residence as associated with an IP address from which someone was accessing a dark-web child pornography website. (*Id.* ¶¶ 7-11, 27, 32-33).

The affidavit further describes how the FBI was able to discover that IP address as the source of contact with the website by using a “Network Investigative Technique” (“NIT”). (*Id.* ¶ 24). The NIT is computer code inserted into the website, which sent communications to any website user who logged in, causing the user’s computer to send back various information, including its true IP address. (*Id.*)

The FBI deployed the NIT pursuant to an earlier search warrant signed by a magistrate judge in the Eastern District of Virginia. (Attached as Exhibit 2). In combination, these two search warrants show that without the warrant from the Eastern District of Virginia, the FBI would never have been able to identify Mr. Wheeler’s IP address as the source of communications with the child porn website, would never have been able to identify his residence, and would never have been able to get or execute the warrant from this district leading to seizure of the evidence underlying these charges.

1. *United States v. Levin*

In United States v. Levin, (D. Mass. #15-10271), the defendant is charged with possession of child pornography in circumstances which, for Fourth Amendment purposes, are identical to those of this case. The FBI identified Mr. Levin’s IP address by use of the same NIT, deployed on the same website, pursuant to the same Eastern District of Virginia search warrant at issue here. *United States v. Levin*, 2016 WL 1589824, \*2 (D. Mass. April 20, 2016) (attached as Exhibit 3). That information allowed the FBI to likewise identify Mr. Levin’s residence, obtain a search warrant for it, and seize alleged child pornography from his computer. *Id.*

In that case, the District Court granted a defense motion to suppress the evidence seized from Mr. Levin’s home, because the Eastern District of Virginia search warrant exceeded the geographical scope of the issuing magistrate judge’s authority. *Id.* at \*4 (analyzing the Federal Magistrates Act, 28 U.S.C. § 636(a), and Fed. R. Crim. P. 41(b)). The court’s opinion is careful and thorough, and considers and rejects each of the arguments made against suppression in that case by the Department of Justice, presumably the same arguments it would raise here.

1. Argument

Rule 11(d) of the Federal Rules of Criminal Procedure provides that a defendant may withdraw his plea prior to sentencing if he “can show a fair and just reason for requesting the withdrawal.” Fed. R. Crim. Proc. 11(d)(2)(B).

A motion to withdraw a plea that is filed before sentencing must be liberally construed. *United States v. Buckles*, 843 F.2d 469, 471 (11th Cir. 1988); *see also United States v. McCarty*, 99 F.3d 383, 385 (11th Cir. 1996). This Court must examine the totality of the circumstances presented in order to determine if Mr. Wheeler has presented a fair and just reason to withdraw his plea. *Buckles*, 843 F.2d at 471-72. Factors to consider include whether “close assistance of counsel was available,” whether the plea was knowing and voluntary, whether judicial resources would be conserved, and whether the government would be prejudiced by the withdrawal of the plea. *Id.* at 472.

The burden is on Mr. Wheeler to demonstrate that his plea should be withdrawn. His “good faith, credibility and the weight of [his] assertions in support of a motion” to withdraw are issues for this Court to decide. *Id.* “While the defendant is not permitted to withdraw his plea simply on a lark, the fair and just standard is generous and must be applied liberally.” *United States v. Mayweather*, 634 F.3d 498, 504 (9th Cir. 2010) (internal quotation marks and citations omitted); *see also* *Government of Virgin Islands v. Berry*, 631 F.2d 214, 219 (3rd Cir. 1980) (“[M]otions to withdraw guilty pleas made before sentencing should be liberally construed in favor of the accused and should be granted freely.”).

1. Assistance of counsel

The right to have the representation of counsel at every critical stage of the proceedings is essential to a fair trial or an informed plea. In *McCoy v. Wainwright*, 804 F.2d 1196, 1198 (11th Cir.1986), the court explained that a guilty plea is not knowing and voluntary if the defendant did not receive, “reasonably effective assistance of counsel in connection with the decision to plead guilty”. “Ineffective assistance of counsel can render a plea agreement involuntary, and in such a case, it is a valid basis for withdrawing a guilty plea.” *United States v. Peleti*, 576 F.3d 377, 383 (7th Cir. 2009); *see also United States v. Murphy*, 572 F.3d 563, 568 (8th Cir. 2009) (same).

In *Strickland v. Washington*, 466 U.S. 668, 687 (1984), the Supreme Court held that in collateral proceedings, to show ineffective assistance, a defendant must show, (1) that counsel’s performance fell below the threshold level of competence; and (2) that counsel’s errors prejudiced the defendant. In *Hill v. Lockhart*, 474 U.S. 52, 58 (1985), the Supreme Court held that the *Strickland* test applies to challenges to guilty pleas based on ineffective assistance.

Here, undersigned counsel simply failed to spot the issue that the Eastern District of Washington search warrant exceeded the magistrate’s authority. Counsel never discussed the issue with Mr. Wheeler, and on the contrary advised that he did not see any issues with the warrant. Mr. Wheeler relied on counsel’s advice on this issue in deciding to plead guilty. At the plea colloquy, counsel also advised the Court that to his knowledge Mr. Wheeler was not pleading guilty based on any evidence illegally obtained by the Government. Had counsel been aware of the warrant’s deficiency, he would not have answered the same.

1. Knowing and Voluntary Plea

*Buckle* also instructs the Court to consider whether Mr. Wheeler’s plea was knowing and voluntary. Courts have held that where a defendant sought to withdraw his plea because of newly discovered evidence, it is error to deny the motion. *See, e.g., United States v. Garcia*, 401 F.3d 1008 (9th Cir. 2005). Here, this factor weighs in favor of granting this motion, but the analysis collapses into that of assistance of counsel, discussed above; Mr. Wheeler’s plea was not knowing and voluntary, because he did not receive effective assistance of counsel in discussing a possible motion to suppress.

1. Judicial Resources

The third factor the Court must consider is the conservation of judicial resources. Here, it is true that granting the motion to withdraw the plea will mean the Court will have to expend resources adjudicating the motion to suppress. However, if the Court denies the motion, the Eleventh Circuit will have to adjudicate an appeal of the denial of the motion to withdraw. If that is denied, Mr. Wheeler will probably file a collateral attack on the conviction pursuant to 28 U.S.C. § 2255, and the district court will end up adjudicating the same issues now before the Court on this motion. It will be more efficient to grant the motion and allow the parties to litigate the motion to suppress now, and fairer to Mr. Wheeler to give him the opportunity to gain relief sooner rather than later.

1. Prejudice to the Government

Finally, the Court must consider prejudice to the Government if it grants the motion. In *Buckles*, the defendant had been a fugitive for three years after entry of the plea, and government witnesses had scattered. The court found that the time and expense which would be required to reassemble them for trial weighed against granting the motion to withdraw. *Buckles*, 843 F.2d at 474; *see also* *United States v. Brehm*, 442 F.3d 1291, 1298 (11th Cir. 2006) (prejudice to the government properly found where government limited its investigation after reliance on a plea that occurred eight months previously).

Here, Mr. Wheeler entered his plea of guilty approximately six weeks ago. (Doc. 30). If a motion to suppress is denied, the case is unlikely to go to trial. If it were to go to trial, all of the prosecution witnesses would be law enforcement agents, and thus it would not require significant resources to assemble and prepare them for trial.

1. Conclusion

Mr. Wheeler has demonstrated a “fair and just reason” to withdraw his guilty plea, as he based his decision to plead guilty on erroneous advice of counsel regarding the absence of grounds for a motion to suppress.

 Dated: This 26th day of April, 2016.

 Respectfully submitted,

 s/ Colin Garrett, Esq.

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CERTIFICATE OF SERVICE

 I hereby certify that I served the foregoing *Motion to Withdraw Plea* by hand on counsel for the Government:

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 Dated: This 26th day of April, 2016.

 s/ Colin Garrett, Esq.

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