IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA	**CRIMINAL ACTION FILE**
v.	**NO. 1:15-CR-390-MHC-JFK**
WILLIAM BRYANT WHEELER,	
Defendant.	

ORDER

I. BACKGROUND

On October 27, 2015, a two-count indictment was returned against Defendant for knowingly receiving child pornography, in violation of 18 U.S.C. §§ 2252(a)(2) and (b)(1) (Count One), and knowingly possessing child pornography, in violation of O.C.G.A. §§ 2252(a)(4)(B) and (b)(2) (Count Two). Indictment [Doc. 8]. On March 11, 2016, Defendant entered a plea of guilty to Count Two of the Indictment based upon a plea agreement with the Government. Guilty Plea and Plea Agreement [Doc. 31]; Mar. 11, 2016, Tr. of Change of Plea Hr'g [Doc. 39] ("Tr."). Sentencing was scheduled for June 14, 2016. Notice of Sentencing [Doc. 32.]

On April 27, 2016, Defendant filed a Motion to Withdraw Plea [Doc. 35] ("Def.'s Mot."). Defendant's written motion is based on the claim that his counsel erred by failing to advise him prior to his plea that the legality of a search warrant issued in this case could have been challenged through a motion to suppress evidence based upon the decision in United States v. Levin, No. 15-10271-WGY, 2016 WL 1589824 (D. Mass Apr. 20, 2016), opinion amended and superseded by 2016 WL 2596010 (D. Mass. May 5, 2016). Def.'s Mot. at 3-6. In addition, Defendant contends that his plea "was not knowing and voluntary, because he did not receive effective assistance of counsel in discussing a possible motion to suppress." Id. at 7. Finally, Defendant contends that allowing him to withdraw the plea will conserve judicial resources by preventing a later collateral attack on the conviction pursuant to 28 U.S.C. § 2255, and that withdrawal of the plea will not prejudice the Government. Id. at 7-9. The Government opposes the motion to withdraw. Gov't's Resp. to Def.'s Mot. [Doc. 40]. The Court continued the sentencing hearing and scheduled responsive briefing on the motion. May 12, 2016, Order [Doc. 37]. The Court conducted a hearing on Defendant's Motion to Withdraw Plea on June 22, 2016.

II. LEGAL STANDARD

A defendant has no absolute right to withdraw a guilty plea before sentencing. United States v. Medlock, 12 F.3d 185, 187 (11th Cir. 1994). Withdrawal may be permitted after a guilty plea has been accepted but prior to sentencing if "the defendant can show a fair and just reason for requesting the withdrawal." United States v. Brehm, 442 F.3d at 1291, 1298 (11th Cir. 2006) (quoting FED. R. CRIM. P. 11(d)(2)(B)). Whether a fair and just reason exists requires consideration of the totality of the circumstances surrounding the plea, including: "'(1) whether close assistance of counsel was available; (2) whether the plea was knowing and voluntary; (3) whether judicial resources would be conserved; and (4) whether the government would be prejudiced if the defendant were allowed to withdraw his plea.'" Id. (quoting United States v. Buckles, 843 F.2d 469, 471-72 (11th Cir. 1988). When a defendant has received close assistance of counsel and pleaded guilty knowingly and voluntarily, the court need "not give considerable weight or attention to the third and fourth factors." United States v. Harrison, 505 F. App'x 876, 880 (11th Cir. 2013) (citing United States v. Gonzales-Mercado, 808 F.2d 796, 801 (11th Cir. 1987)).

A plea may be involuntary when the defendant "has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission

of guilt." Marshall v. Lonberger, 459 U.S. 422, 431 (1983) (quotation marks and citation omitted). A guilty plea also is not knowing and voluntary if the defendant was denied the effective assistance of counsel under the standards of Strickland v. Washington, 466 U.S. 688 (1984). See McCoy v. Wainwright, 804 F.2d 1196, 1198 (11th Cir. 1986) (per curiam). In the context of a guilty plea, the defendant must establish that his counsel's performance was deficient, and that a reasonable probability exists that he would not have pleaded guilty but for his counsel's errors. See id. A court must "judge the reasonableness of counsel's conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Roe v. Flores-Ortega, 428 U.S. 470, 477 (2000) (quoting Strickland, 466 U.S. at 690).

> Counsel must be familiar with the facts and the law in order to advise the defendant of the options available. The guilty plea does not relieve counsel of the responsibility to investigate potential defenses so that the defendant can make an informed decision. Counsel's advice need not be errorless, and need not involve every conceivable defense, no matter how peripheral to the normal focus of counsel's inquiry, but it must be within the realm of competence demanded of attorneys representing criminal defendants.

Scott v. Wainwright, 698 F.2d 427, 429 (11th Cir. 1983) (citations omitted).

It is within the trial court's purview to ascertain the "good faith, credibility, and weight of a defendant's assertions in support of a" withdrawal request. Brehm, 442 F.3d at 1298 (quotation marks and citation omitted). A defendant's statements made under oath at his plea colloquy are presumptively true. See Medlock,

12 F.3d at 187. Consequently, a defendant "bears a heavy burden to show his statements were false." United States v. Rogers, 848 F.2d 166, 168 (11th Cir. 1988) (*per curiam*).

Finally, a further consideration of the Court concerns the timing of the motion to withdraw. United States v. Durham, 172 F. App'x 261, 265 (11th Cir. 2006) (citing United States v. Rogers, 848 F.2d 166, 168 (11th Cir. 1988)). Long delays between a plea and withdrawal motion are disfavored, and "the longer the delay between the entry of the plea and the motion to withdraw it, the more substantial the reasons must be as to why the defendant seeks withdrawal." Buckles, 843 F.2d at 473.

III. DISCUSSION

Much of the evidence against Defendant in this case is a result of the execution of a search warrant on Defendant's home that was signed by Magistrate Judge Baverman on October 21, 2015. Appl. and Aff. for Search Warrant [Doc. 35-1] ("Georgia Warrant"). The affidavit in support of the search warrant states that an internet account at Defendant's residence was linked to an online community of individuals who sent and received child pornography through an anonymous website identified as "Website A." Id. at ¶ 6.

On or about February 20, 2015, the computer server hosting "Website A" was seized by the United States. For approximately fourteen days, from February 20, 2015, through March 4, 2015, law enforcement agents administered "Website A" from a government-controlled computer server based upon a search warrant issued by a United States Magistrate Judge for the Eastern District of Virginia, which authorized the deployment of a "Network Investigative Technique" ("the NIT") in order to identify actual IP addresses used to access "Website A." Id. ¶ 24; see also Search & Seizure Warrant, In the Matter of the Search of Computers That Access upf45jv3bziuctml.onion, No. 1:15-SW-89, (E.D. Va., Feb. 20, 2015) [Doc. 35-2] ("the NIT Warrant"). Based upon the deployment of the NIT Warrant, a user with the user name of "Hellraiser" was observed engaging in certain activity involving child pornography on "Website A." Georgia Warrant ¶¶ 25-31. Additional investigation revealed that the user "Hellraiser" was linked to an IP address assigned by an internet service provider to a person receiving internet services at Defendant's home address. Id. ¶¶ 32-34.

A number of defendants facing federal charges of possession and distribution of child pornography that resulted from identification through the use of the NIT Warrant have filed motions to suppress evidence challenging the authority of the NIT Warrant. The earliest decision appears to be from the United

States District Court for the Western District of Washington on January 28, 2016 (six weeks prior to Defendant's guilty plea in this case), which concluded that although the NIT Warrant "technically violates the letter, but not the spirit, of Rule 41(b)" of the Federal Rules of Criminal Procedure, suppression of evidence against the individual defendant was not justified, because the defendant was not prejudiced, there was no deliberate disregard of Rule 41(b), and the warrant was executed in good faith. United States v. Michaud, No. 3:15-cr-5351-RJB, 2016 WL 337263, at *6-7 (W.D. Wash. Jan. 28, 2016). Other decisions, issued both prior and subsequent to Defendant's guilty plea, also denied motions to suppress evidence based upon challenges to the NIT Warrant notwithstanding the technical violation of Rule 41(b). See United States v. Darby, No. 2:16cr36, 2016 WL 3189703, at *14 (E.D. Va. June 3, 2016) (finding that "the NIT Warrant did not violate Rule 41(b) and even if it did suppression is not warranted"); United States v. Werdene, No. 1:15-434, 2016 WL 3002376 (E.D. Pa. May 18, 2016) (finding that "the Government's nonconstitutional violation of Rule 41 does not offend concepts of fundamental fairness or due process and [the defendant's] motion to suppress cannot be granted on prejudice grounds."); United States v. Epich, No. 15-cr-163-PP, 2016 WL 953269, at *2 (E.D. Wis. Mar 14, 2016) (finding that suppression of evidence is not required based upon a Rule 41 violation because

there was probable cause for the warrant to issue); United States v. Stamper, No. 1:15cr109, 2016 WL 695660, at *3 (S.D. Ohio Feb. 19, 2016) (finding a sufficient nexus between the user who registered for an account on "Website A" and the defendant's residence). Other courts have rejected accused child pornographers' challenges to the government accessing their IP addresses, holding that users of the Tor anonymity network[1] have no reasonable expectation of privacy in those IP addresses. See, e.g., United States v. Frater, No. CR-14-1517-PHX-DGC, 2016 WL 795839, at *3-4 (D. Ariz. Mar. 1, 2016); United States v. Farrell, No. CR15-029RAJ, 2016 WL 705197, at *2 (W.D. Wash. Feb. 23, 2016).

However, in decisions issued subsequent to Defendant's guilty plea, two district courts have granted motions to suppress based upon the illegality of the NIT Warrant. See United States v. Arterbury, No. 15-CR-182-JHP, 2016 U.S. Dist. LEXIS 67091, at *19-35 (N.D. Okla. Apr. 25, 2016), R & R adopted by 2016 U.S. LEXIS 67092 (N.D. Okla. May 17, 2016) (finding that the NIT Warrant was issued in violation of Rule 41(b), was not just a technical violation, and the good faith exception did not apply); Levin, 2016 WL 1589824 (D. Mass. April 20, 2016), opinion amended and superseded by 2016 WL 2596010 (D. Mass. May 5,

[1] The Tor anonymity network is a system that enables users to browse the Internet anonymously without revealing their true IP addresses. United States v. Cottom, No. 8:13CR108, 2015 WL 9308226, at *2 (D. Neb. Dec. 22, 2015).

2016) (finding that neither the Federal Magistrates Act nor Rule 41(b) authorized the issuance of the NIT Warrant and that the good faith exception did not apply because the warrant was void *ab initio*). See also United States v. Matish, No. 4:16cr16, 2016 WL 3143829, at *3 (E.D. Va. June 2, 2016) ("Even though the NIT Warrant has faced numerous challenges around the country, courts have resolved the challenges differently.").

Defendant contends that he can show a fair and just reason to withdraw his plea because he did not receive the close assistance of counsel due to said counsel's "fail[ure] to spot the issue that the Eastern District of Washington search warrant [in Levin] exceeded the magistrate [judge's] authority" and counsel instead advised Defendant "that he did not see any issues with the warrant." Def.'s Mot. at 6. In addition, because Defendant relied upon his counsel's advice that there was no evidence illegally obtained by the Government in deciding to plead guilty, his plea was not knowing and voluntary. Id. at 6-7. The Government contends that Defendant waited seven days after learning of the Levin decision to file his motion to withdraw, that Defendant is simply "making a calculated decision trying to improve his position" by now relying on Levin, and the plea colloquy confirms that Defendant's plea was knowing and voluntary. Gov't's Resp. at 2-7.

A. Whether Close Assistance of Counsel Was Available

Defendant has been represented by counsel throughout this case. Defendant testified at the change-of-plea colloquy that he was satisfied with his attorney's representation.

> Q. Mr. Wheeler, do you feel you've had sufficient time to think about and discuss this matter fully with your attorney before entering your plea of guilty?
>
> A. Yes, sir.
>
> Q. Are you satisfied with the representation of your lawyer in this case?
>
> A. Yes, sir.

Tr. at 14-15. "There is a strong presumption that the statements made during the [plea] colloquy are true." Medlock, 12 F.3d at 187. Defendant "bears a heavy burden to show his statements [under oath] were false." Rogers, 848 F.2d at 168. Based upon Defendant's demeanor and testimony during the guilty-plea colloquy, the Court found, and still finds, that Defendant was satisfied with his attorney's representation.

There is a "strong presumption" that an attorney makes "all significant decisions in the exercise of reasonable professional judgment." Chandler v. United States, 218 F.3d 1305, 1314 (11th Cir. 2000) (en banc) (quoting Strickland, 466 U.S. at 669). Strategic choices, even those "made after less than complete

investigation," are evaluated for their reasonableness and "counsel's reliance on particular lines of defense to the exclusion of others—whether or not he investigated those other defenses—is a matter of strategy and is not ineffective unless the petitioner can prove the chosen course, in itself, was unreasonable." Id. at 1318 (citing Strickland, 466 U.S. at 690-91).

At the hearing conducted by this Court on June 22, 2016, the Court made further inquiries of Defendant's counsel to ascertain the actual scope of said counsel's knowledge concerning the potential grounds for challenging the NIT Warrant. According to Defendant's counsel's representations to this Court, he was unaware of any of the challenges that were made to the NIT Warrant in other jurisdictions prior to the entry of Defendant's guilty plea, and it was only after learning of the decision in Levin that he became aware of the existence of that potential challenge. Thus, this is not a case of Defendant's counsel making a tactical decision not to file a motion to suppress based upon prior court rulings that went against his client's position and then "changing his tune" based upon a favorable ruling in a subsequent case. Indeed, during the plea colloquy on March 11, 2016, Defendant's counsel affirmatively indicated that he advised Defendant concerning the legality of any evidence the Government may have against him and, to his knowledge, Defendant was not pleading guilty because of any illegally

obtained evidence. Tr. 13-14. Defendant's counsel indicates that, had he been aware of the challenges made to the NIT Warrant prior to the guilty plea hearing, he would not have answered the Court's questions the same way. Def.'s Mot. at 6.

The Court finds that Defendant's counsel failed to file a motion to suppress evidence arising from the NIT Warrant not as a matter of trial strategy, but because he was deficient in failing to properly research and investigate the potential challenge to the warrant's validity. This Court does not find that Defendant's counsel has rendered ineffective representation; indeed, the fact that he brought this matter to the Court's attention shortly after learning of his failure to advise his client appropriately belies any current or future claim of ineffective assistance of counsel. Nevertheless, the failure of Defendant's counsel to investigate the feasibility of challenging the NIT Warrant was not the exercise of reasonable professional judgment, as is evident by the number of recent challenges filed throughout the country.

The Government argues that this Court should not entertain Defendant's Motion because the motion to suppress will fail. However, the Court cannot definitively conclude at this time that the motion to suppress will be unsuccessful. It is certainly not a frivolous motion; although a majority of courts that have considered similar challenges have denied such motions, the Court is aware of two

district courts which have granted such motions, and none of the cases on either side of the ledger constitute binding precedent in this Circuit.

Therefore, the Court finds that, as to the availability of a challenge to the legality of the NIT Warrant, close assistance of counsel was not available to Defendant prior to the entry of his guilty plea.

B. Whether the Plea Was Knowing and Voluntary

A knowing and voluntary plea has three requirements: "(1) the guilty plea must be free from coercion; (2) the defendant must understand the nature of the charges; and (3) the defendant must know and understand the consequences of his guilty plea." United States v. Mosley, 173 F.3d 1318, 1322 (11th Cir. 1999). During the plea colloquy, Defendant testified that no one had made any promises other than the plea agreement that induced him to plead guilty and that no one had threatened or coerced him into pleading guilty. Tr. 13. Defendant also testified that he understood the elements of the charge that the Government would have to prove beyond a reasonable doubt in order to convict him at a trial and the factual basis for his plea. Id. 15-17. Finally, Defendant testified that he understood the consequences of his guilty plea. Id. 18-21.

Defendant does not dispute the foregoing, but instead argues that "the analysis [as to whether the plea was knowing and voluntary] collapses into that of

assistance of counsel," thereby rendering the plea "not knowing and voluntary." Def's Mot. at 7. Based upon the plea colloquy, Defendant's plea meets the three requirements prescribed in Mosley for a knowing and voluntary plea. That said, based upon the Court's prior finding concerning the lack of close assistance of counsel, this Court also finds that had Defendant's counsel properly advised him of the possible challenge to the NIT Warrant, Defendant may have chosen not to enter his plea of guilty until after the motion to suppress was filed and denied.

C. Whether Judicial Resources Will Be Conserved and the Government Would Be Prejudiced

Defendant's Motion to Change Plea was filed six weeks after entry of the plea, within seven days after the issuance of the Levin decision, and almost two months prior to the scheduled sentencing. Although this might not be considered a "swift change of heart," it also was not made on the eve of sentencing or after a prolonged delay. Compare United States v. Pitts, 463 F. App'x 831, 833 (11th Cir. 2012) (denying motion to withdraw plea filed four months after guilty plea and "on the heels of receiving the presentence investigation report, the day before the scheduled sentencing hearing"); United States v. Luczak, 370 F. App'x 3, 5 (11th Cir. 2010) (denying motion to withdraw plea filed seven months after plea, which "showed that [defendant's] true motive was dissatisfaction with the guidelines sentence range recommended in the final presentence report"). Given the seven

days that elapsed between the issuance of Levin, which triggered Defendant's counsel's awareness of the potential challenge to the NIT Warrant, the Court does not believe the filing of the motion was unreasonably delayed.

The motion to suppress can be filed and resolved expeditiously. Moreover, the Government admitted at the motion hearing that it will not suffer any prejudice should the motion be granted beyond the relatively minor delay. Should this case go to trial, all witnesses for the Government will be law enforcement officers who will be available to testify. Defendant will continue to be incarcerated during the pendency of the motion to suppress until the resolution of this case. In addition, deciding the motion to suppress now will avoid a collateral attack on the conviction based upon counsel's failure to file the motion to suppress at the outset of the case.

As a final matter, this Court must address Defendant's argument in his motion that "[i]f a motion to suppress is denied, the case is unlikely to go to trial." Def.'s Mot. at 8-9. As the Government stated at the motion hearing, the plea agreement that was previously negotiated by the parties will no longer be in effect once the plea is withdrawn. Consequently, if Defendant's motion to suppress is denied, it is unknown whether this case will ultimately be resolved by a plea or whether the case will go to trial. At the motion hearing, Defendant's counsel

represented to this Court that the possible implications of the withdrawal of the plea upon the disposition of Defendant's case, both positive and negative, have been discussed by counsel with Defendant, and Defendant still wishes to maintain his position that the plea should be withdrawn and the motion to suppress pursued regardless of the ultimate disposition of this case.

Based upon the four criteria for withdrawal of a plea, the Court finds that Defendant did not receive close assistance of counsel with respect to the decision as to the sufficiency of a challenge to the NIT Warrant; that if Defendant was advised of the potential challenge, he may have chosen not to enter the plea at that time; and that permitting Defendant to withdraw his plea and file a motion to suppress evidence would conserve judicial resources and not prejudice the Government.

IV. CONCLUSION

Based on the foregoing, it is hereby **ORDERED** that Defendant's Motion to Withdraw Plea [Doc. 35] is **GRANTED**. Defendant's plea of guilty entered on March 11, 2016, is hereby **WITHDRAWN**.

It is further **ORDERED** that Defendant shall file his motion to suppress evidence based upon the NIT Warrant within fourteen (14) days of the date of this Order.

It is further **ORDERED** that Defendant's motion to suppress shall be referred to Magistrate Judge King for the issuance of a Report and Recommendation, and that Judge King shall enter any other necessary pre-trial orders relating to the disposition of that motion.

It is further **ORDERED** that the time between the date this case was declared ready for trial on February 18, 2016, and the Order of this Court that decides whether to adopt the Magistrate Judge's Report and Recommendation on Defendant's motion to suppress evidence, shall be excluded in calculating the date on which the trial of this case must commence under the Speedy Trial Act because the Court finds that the delay is for good cause, and the interests of justice in granting the continuance outweigh the right of the public and the right of the defendant to a speedy trial, pursuant to 18 U.S.C. § 3161, *et seq*.

IT IS SO ORDERED this 23rd day of June, 2016.

MARK H. COHEN
United States District Judge