

The Honorable Robert J. Bryan

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UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

DAVID W. TIPPENS,

Defendant.

NO. CR16-5110 RJB

GOVERNMENT’S SURREPLY REGARDING
SECOND MOTION TO SUPPRESS

In his reply brief, Tippens lambasts the government for “baldly stating that the affidavit ‘says nothing about where [the Playpen pictures] would be stored or for how long.’” Second MTS Reply at 4 (quoting Gov. Response to Second MTS at 17). There is no doubt that the government did make that assertion. And a review of the affidavit shows that it is objectively correct. Thus, the government can hardly be criticized for making its assertion so *baldly*. Tippens then says, “not only was much of the affidavit directed to persuading the Magistrate Judge that illegal pictures had been sent from Playpen to the target computer, it made a host of assertions about where those images were stored and for how long.” Second MTS Reply at 4. But that assertion misstates the record.

The government certainly did try to persuade the magistrate judge that illegal pictures were sent from Playpen to “candygirl123’s” computer. Indeed, the affidavit

1 explained that “candygirl123” accessed multiple posts that contained illegal pictures.
2 The point was not that the user saved any particular picture, however. Rather, the point
3 was that the user would have seen them and accessed that content intentionally.

4 Tippens is free to challenge the government’s assertion about the affidavit, but he
5 must support his position with actual facts, not selective and misleading quotations. It is
6 one thing to question the accuracy of an affidavit or even to mistake inartfully drafted
7 language for misleading language. But it is another altogether to question an affiant’s
8 veracity by relying on verbal sleight of hand.

9 Tippens first says the affidavit states that illegal pictures from Playpen “*would be*
10 *found* ‘on the user’s computer.’” Second MTS Reply at 4 (quoting Shook Affidavit
11 ¶¶ 33, 34) (emphasis added). It does not. The affidavit actually says that the images
12 embedded in the posts accessed by “candygirl123” would have been “*displayed* on the
13 user’s computer.” Shook Affidavit ¶¶ 33, 34. (emphasis added). Tippens then says that
14 the affidavit claimed that “pictures would be retained ‘for many years’” and that
15 “downloads ‘are often maintained for several years.’” Second MTS Reply at 4 (quoting
16 Shook Affidavit ¶ 43(c), (d). Here, too, Tippens is playing fast and loose. These
17 statements have nothing to do with the affiant’s assertions about “candygirl123’s”
18 Playpen activity. That paragraph addressed known habits and practices of child
19 pornography collectors. The point is not where they get their material but what they do
20 with the material they seek out.

21 Tippens’s last example is perhaps the closest thing to an accurate representation
22 regarding the affidavit, though it does not actually prove his point. He notes that the
23 affiant explained, “data stored in a computer’s hard drive cache ‘is often maintained
24 indefinitely.’” Second MTS Reply at 4 (quoting Shook Affidavit ¶ 51). Still, context is
25 important. The affidavit actually says, “a computer user’s Internet activities *generally*
26 leave traces or ‘footprints’ in the web cache and history files of the browser used. Such
27 information is *often* maintained indefinitely *until overwritten by other data*. Shook
28 Affidavit ¶ 51 (emphases added). These are general statements about internet activity.

1 Indeed, the affidavit speaks about what happens in “general” and what is “often”
2 maintained. Certainly, that language leaves room for the possibility that web history will
3 not always be available or that users may take steps to cover their tracks. To be sure, the
4 affidavit could have made clearer that these statements apply most directly to traditional
5 web browsing and that things may differ where TorBrowser is concerned. But that lack
6 of such hyper-technical explanations hardly suggests some sinister motive on the part of
7 the affiant, particularly when, as Tippens concedes, use of TorBrowser renders forensic
8 examination of internet activity more difficult. It does not make it impossible.

9 At bottom, Tippens dispute with the government is founded not on a fair reading
10 of the affidavit or even a good faith dispute over the definition of a particular word.
11 Rather, he first remakes the affidavit as he would prefer it and then insists that the Court
12 must find falsehood. *Franks* cannot and should not be used in such a way, and the Court
13 should decline to let Tippens do so.

14 DATED this 10th day of February, 2017.

15 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the attorney(s) of record for the defendant.

s/Emily Miller

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