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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA,)	Docket No. CR16-5110RJB
Plaintiff,)	Tacoma, Washington
vs.)	March 15, 2017
DAVID TIPPENS,)	
Defendant.)	DAY 3

TRANSCRIPT OF BENCH TRIAL
BEFORE THE HONORABLE ROBERT J. BRYAN
SENIOR UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

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Proceedings recorded by mechanical stenography, transcript produced by Reporter on computer.

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1 Wednesday, March 15, 2016 - 9:30 a.m.

2 (Defendant present.)

3 THE CLERK: All rise. This United States District
4 Court, the Honorable Robert J. Bryan presiding, is now in
5 session.

6 THE COURT: Please be seated. Okay. It's apparent
7 from the motion filed by the government this morning that I
8 didn't make my ruling yesterday as clear as it should have
9 been, and I have started an "explanation further opinion" that
10 will clarify hopefully the ruling I made. So that's in
11 process. But you are asking for a delay in the trial, so if
12 you want to be heard on that, why, now is your chance.

13 MR. HAMPTON: Thank you, Your Honor. The reason for
14 the request for a brief adjournment is twofold. First --
15 well, the request is twofold, and the Court has noted it does
16 plan to issue an order providing the government some further
17 clarity, but obviously the exhibits from yesterday, they
18 appear to have some bearing on where we stand.

19 So the government would ask for that additional time to
20 further evaluate those exhibits and try to get a better handle
21 on exactly what they are, what is involved, what the
22 implications and concerns may be with them and, of course,
23 depending on the clarity provided in the Court's order,
24 possibly seek reconsideration, if that is appropriate.

25 So that is the basis for the government's request. Given

1 the timing of this information coming to light yesterday
2 afternoon, unfortunately the government just was not in a
3 position to respond and address these matters as fully and as,
4 I think, completely as it could have been. And so we just
5 would ask for that time to make sure we do this the right way.

6 MR. FIEMAN: Just briefly, Your Honor. In terms of
7 the timing issue, I do want to point out one thing that we
8 didn't touch upon is that the initial timing on the disclosure
9 of this information rested with the government. The Rule 16
10 obligations and *Brady* obligations that they operate under are
11 unaffected by CIPA.

12 They are still required to inform the defense of any
13 information that's potentially material, and we never received
14 notification that in fact the documents and information that
15 the Court has already found is material, were even in
16 existence. So we were indeed combing through thousands of
17 pages of Wiki documents at the last minute as a result of the
18 government's not making any disclosure whatsoever that this
19 information existed.

20 I would also note, Your Honor, one aspect of this that was
21 very troubling to me as I reflected upon it last night, which
22 is that the government has in fact been affirmatively
23 misleading about some of this information. Even up through
24 yesterday, the government was maintaining that the way to get
25 at certain essential information that was discussed in the

1 course of the case was for us to reverse engineer the hard
2 drives. Without going into details, there is substantial
3 evidence that the government itself can take steps to prevent
4 that from happening.

5 So I am troubled by that because it has been a main thread
6 of their argument. In fact, they were aware of at least
7 certain technical obstacles to that, that were in their
8 possession and obviously in existence, that were never in any
9 way disclosed in the course of making the arguments.

10 So, Your Honor, in terms of any scheduling issues, we
11 believe the Court has entered the correct orders. The
12 government has the right to appeal it, and they had argument
13 and you made your finding of materiality.

14 Frankly, we can't just postpone this trial. Unless you
15 need any additional information from me, Your Honor, that's
16 all I have to say in response.

17 THE COURT: Any reply?

18 MR. HAMPTON: Your Honor, unfortunately I cannot
19 fully or really in any meaningful way, I think at this point,
20 respond to the defense allegation about what information may
21 or may not have been in the government's control and what it
22 was because we still haven't even figured out what these
23 documents are, what their authenticity is, what their status
24 is.

25 We know what they appear to be and what they appear to

1 relate to, but I don't want to leave the Court wanting, and I
2 do not mean to not be helpful, but I can't really say much,
3 other than the little bit I know, and what we learn may of
4 course be sensitive, and we have to deal with that once we
5 figure it out.

6 THE COURT: Well, the motion seeking clarification,
7 to that extent, it will be granted. I will try to clarify my
8 order in writing. If you think I am in error on that, you can
9 file a motion to reconsider. It's not uncommon. You can file
10 it any time, as far as I am concerned. But I don't know why
11 we need to delay the trial in order to do that. The
12 government has rested. I gather from yesterday that there's
13 not much more to go on in this trial, and we ought to finish
14 it. If there's an error, we'll deal with it timely on any
15 post-trial motions.

16 So the motion to delay is denied. We'll proceed with the
17 case.

18 MR. HAMPTON: Thank you, Your Honor. At a minimum,
19 before the Court renders a final verdict, could I have a few
20 minutes just to make sure I can speak with my own management?
21 My concern about proceeding to a full verdict -- and I just
22 don't have all the research or information at hand -- is
23 whether or not there would be an option to remedy, if the
24 government does indeed believe there is an error, and I would
25 simply like to have a phone call if we proceed to a verdict.

1 THE COURT: Okay. What do you anticipate? The ball
2 is in your court.

3 MR. FIEMAN: Your Honor, at this point in the process
4 of the trial, I am going to waive opening argument.
5 Mr. Tippens elects not to testify. We will not be putting on
6 a defense case, and I will be waiving closing argument with
7 Counts 1 and 3 dismissed. That leaves the Court to render a
8 verdict on Count 2.

9 THE COURT: Yes.

10 MR. FIEMAN: And that's where we are at.

11 THE COURT: All right. If you need a few minutes, go
12 ahead and don't take too long.

13 MR. HAMPTON: Yes, Your Honor. Thank you.

14 (Brief recess.)

15 THE CLERK: All rise, Court is again in session.

16 THE COURT: Please be seated. Okay, Mr. Hampton,
17 anything else now?

18 MR. HAMPTON: Your Honor, firstly, thank you. Thank
19 you for the Court's indulgence both yesterday and today so we
20 can try to deal with these matters. It is very much
21 appreciated.

22 First, we are ready to proceed, and I will just offer
23 brief preliminary matters. The government would urge the
24 Court in issuing its order on dismissal to issue that order
25 without prejudice.

1 Second, the matter of forfeitures does need to be
2 addressed in this case. I believe defense counsel has
3 indicated that rather than have those considered as part of
4 the verdict, he would ask that --

5 THE COURT: I am sorry, I missed part of what you
6 said. The forfeiture --

7 MR. HAMPTON: Pardon me, I will step closer.

8 Defense counsel has indicated that rather than have
9 forfeiture considered along with the Court deliberations at
10 this time, that we should instead set a hearing, which I
11 believe is -- is that accurate?

12 MR. FIEMAN: Your Honor, I will stipulate to the
13 forfeiture once we work up the paperwork, so if we defer until
14 sentencing, it will be done.

15 MR. HAMPTON: Then the third matter is whether the
16 Court will allow me to just briefly summarize the government's
17 argument on the possession count, and I will be brief.

18 THE COURT: Oh, sure. You have that right. We are
19 not there yet.

20 All right, Mr. Fieman, you told me what you plan to do,
21 but you didn't actually do it.

22 MR. FIEMAN: I am sorry. Well, I need to rest the
23 defense case, I guess, is what you are looking for, Your
24 Honor. Those magic words did not appear, so I do rest.

25 THE COURT: All right. Mr. Tippens, have you

1 discussed the question of whether you should testify with
2 Mr. Fieman?

3 THE DEFENDANT: Yes, Your Honor.

4 THE COURT: Are you satisfied with those discussions?

5 THE DEFENDANT: Yes, Your Honor.

6 THE COURT: What is the result of those discussions?
7 Do you wish to testify or to remain silent?

8 THE DEFENDANT: Remain silent, Your Honor.

9 THE COURT: All right. Okay. And argument,
10 Mr. Hampton?

11 MR. HAMPTON: Thank you, Your Honor. May it please
12 the Court, defense counsel: Count 2 charges the defendant
13 with possessing -- knowingly possessing child pornography on
14 or about February 11, 2016. The evidence overwhelmingly
15 establishes that Mr. Tippens was masturbating and actively
16 watching a video of child pornography identified as Exhibit 18
17 at the time of the search.

18 That video, as Mr. Tippens has stipulated, did involve the
19 use of a minor engaged in sexually explicit conduct. That
20 video was recovered from a Dell laptop, which Mr. Tippens has
21 also acknowledged and stipulated was not manufactured within
22 Washington State, and necessarily was transported in
23 interstate commerce prior to being here. That alone will
24 support the elements of the possession count, and that alone
25 will prove his guilt of that crime.

1 The evidence at trial shows a great deal more.
2 Mr. Tippens confessed to a years-long enjoyment of child
3 pornography. He acknowledged that he was sexually excited by
4 child pornography, that he masturbated to it and he had at
5 least a terabyte of child pornography on one of the Western
6 Digital hard drives that was recovered from his home, and that
7 was identified as item 1B14.

8 At trial, the government introduced 23 separate exhibits
9 of child pornography. Exhibits 1 and 2 were recovered from a
10 Western Digital hard drive, identified as QSE2, 1B2, recovered
11 from Mr. Tippens's home.

12 Exhibits 3 through 17 were recovered from another Western
13 Digital hard drive, recovered from Mr. Tippens's bedroom,
14 connected to Mr. Tippens's Dell laptop, and containing
15 numerous other videos and images of child pornography.

16 Finally, Exhibits 18 through 23 were recovered from
17 Mr. Tippens's Dell laptop connected to the large-screen TV in
18 his bedroom, and it was actively playing the video of child
19 rape on an infinite loop at the time of the search of
20 Mr. Tippens's home.

21 There is simply no doubt, given Mr. Tippens's confession,
22 given the devices, given the evidence recovered, given the
23 stipulations in this case, that every one of those exhibits, 1
24 through 23, constitutes child pornography, that it involved a
25 minor engaged in sexually explicit conduct, and there is no

1 dispute that every one of those exhibits was recovered from a
2 device that Mr. Tippens has acknowledged was manufactured
3 outside of the state of Washington.

4 Those depictions were therefore unquestionably produced
5 using materials that had been shipped and transported in
6 interstate commerce. The government has easily and
7 overwhelmingly met its burden of proof, and there is no
8 contrary evidence to suggest otherwise, and the government
9 respectfully asks the Court to return a verdict of guilty on
10 Count 2.

11 THE COURT: Thank you, Mr. Hampton.

12 MR. FIEMAN: Your Honor, after consulting with
13 Mr. Tippens, we waive closing argument.

14 THE COURT: Well, as to Count 2, I have got to make
15 appropriate findings of fact. It seems beyond doubt that
16 Mr. Tippens is guilty of that offense.

17 The findings here are somewhat simple, really. The
18 stipulations I would adopt as part of my findings of fact.
19 Mr. Tippens's statement at the time of the search warrant on
20 11 February also is an important part of the basis for
21 findings in the case. The exhibits as well, particularly
22 Exhibit 18, show clearly that he possessed child pornography.

23 With those facts in mind, we get to the pointed
24 conclusions of law, and it is my finding that Mr. Tippens
25 knowingly possessed matter that he knew contained a visual

1 depiction of a minor engaged in sexually explicit conduct,
2 that he knew that the visual depiction showed a minor engaged
3 in sexually explicit conduct, that he knew that the production
4 of such visual depictions involved the use of a minor engaged
5 in sexually explicit conduct, and the visual depiction and the
6 equipment upon which it was viewed or stored had been shipped
7 or transported in interstate or foreign commerce, and the
8 material as well as the equipment had been shipped or
9 transported in interstate or foreign commerce by computer or
10 by other means.

11 Those are the necessary conclusions of law that lead to
12 the ultimate conclusion that the defendant is guilty as
13 charged of Count 2. In regard to the forfeiture, that should
14 be continued to the date of sentencing and should be resolved
15 at that time along with sentencing, and I will order a date
16 for sentencing and also a presentence report.

17 Dara, do you have a date?

18 THE CLERK: June 9th, at 9:30.

19 THE COURT: Is that agreeable?

20 MR. FIEMAN: Yes, Your Honor.

21 MR. HAMPTON: Your Honor, I believe so.

22 THE COURT: All right. We'll set sentencing for
23 June 9th, at 9:30, and I will sign the order for a presentence
24 report.

25 Mr. Tippens, you should understand that a probation

1 officer will prepare a presentence report, and that will cover
2 information about you and your offense and sentencing and make
3 a recommendation to the Court about how the sentencing
4 guideline should apply and make a recommendation as to
5 sentence.

6 You should cooperate with the probation officer in
7 preparation of that report, but you still have the right to
8 remain silent. If anything comes up that you feel you should
9 not answer, you have that right but you should talk to your
10 lawyer about that if that should come up, because it can
11 affect the presentence report and the recommendations in it.

12 I think that's all. Do you have an order prepared? We'll
13 sign an order and get it to you forthwith, and I will proceed
14 with the other work I described that is in the process here.

15 MR. FIEMAN: Thank you, Your Honor.

16 MR. HAMPTON: Thank you, Your Honor.

17 (Proceedings concluded at 10:10 a.m.)

18 * * * * *

19 C E R T I F I C A T E

20

21 I certify that the foregoing is a correct transcript from
22 the record of proceedings in the above-entitled matter.

23

24 /S/ Teri Hendrix

March 20, 2017

25 Teri Hendrix, Court Reporter

Date