No. 94-30418

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

SCOTT DOUGLAS LACY,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF FOR THE UNITED STATES

GEORGE C.
Acting Chief
Child Support Enforcement
Section
Department of Justice
1001 G Street, NW
Washington, D.C.
(202) 514-4404

KATHRYN A.
Trial Attorney
Department of Justice
Child Support Enforcement
Section
1001 G Street, NW
Washington, D.C.
(202) 514-4404

No. 94-30439

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

SCOTT DOUGLAS LACY,

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF FOR THE UNITED STATES

GEORGE C. BURGASSER
Acting Chief
Child Exploitation and Obscenity
Section
Department of Justice
1001 G Street, NW, Suite 310
Washington, D.C. 20530
(202) 514-5780

KATHRYN ALBRACHT
Trial Attorney
Department of Justice
Child Exploitation and Obscenity
Section
1001 G Street, NW, Suite 310
Washington, D.C. 20530
(202) 514-5780

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

MISCELLANEOUS:

STATUTES:

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 94-30439

UNITED STATES OF AMERICA,

Appellee,

v.

SCOTT DOUGLAS LACY,

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF FOR THE UNITED STATES

JURISDICTION AND BAIL STATUS

This is an appeal by the former defendant in a criminal case from a district court order denying a motion for return of property and denying a motion to vacate dismissal of the information. The district court, which had jurisdiction under 18 U.S.C. § 1462, entered its order denying the defendant's motions on November 22, 1994. SER 3. The appellant filed a notice of appeal on November 30, 1994. SER 4. As set forth in this brief, the United States submits that this court does not have jurisdiction over this appeal. The appellant currently faces no criminal charges.

QUESTIONS PRESENTED

1. Whether the district court's order denying the appellant's motion for return of property is appealable.

2. Whether the appellant has standing to oppose the dismissal of the information even though it was not a final decision.

STATEMENT OF THE CASE

On September 16, 1994, the United States Attorney for the Western District of Washington issued an information against Scott Douglas Lacy (hereinafter "Lacy,") charging him with a violation of 18 U.S.C. § 1462(a). That information was dismissed without prejudice on October 26, 1994, at the request of the United States Attorney. Appellant then filed a Motion for Vacation of Dismissal and a Motion for Return of Property, both of which were denied in a Minute Order issued on November 22, 1994.[1] Although he is the subject of an ongoing investigation, Mr. Lacy currently faces no criminal charges.

STATEMENT OF FACTS

Scott Lacy is the subject of an ongoing child pornography investigation stemming from a U.S. Customs Service investigation known as "Operation Longarm." Longarm involves the identification

---

[1] Accordingly, the court did not hold a hearing on these issues. The record is limited to the Search Warrant affidavit, and the affidavits provided by the government, all of which are contained in the Supplemental Excerpts of Record.

and investigation of individuals living in the United States who have imported images of child pornography from a Danish computer bulletin board system ("BBS") known as BAMSE. This project was initiated when U.S. Customs agents, working with Danish authorities, seized BAMSE records which revealed the names, addresses, telephone numbers, and birth dates of United States residents who had accessed the BAMSE BBS. SER 3.

In February of 1993, U.S. Customs held a briefing at which agents from across the country were provided training for the execution of Operation Longarm. Agents were then assigned to investigate numerous individuals who had been implicated by the BAMSE records. Special Agent Kristina Laidler was asked to investigate a BAMSE subscriber who resided in Seattle, Washington, and used the alias "Jim Bakker."

"Jim Bakker" was identified as Scott Douglas Lacy when the address and phone number he had given in a BAMSE questionnaire were cross-referenced with utilities records. In addition, Mr. Lacy's birthdate as it appears on his driver's license was matched to the birthdate he listed in a BAMSE questionnaire. According to BAMSE records, Mr. Lacy downloaded 51 "GIF" pictures from the Danish BBS.[2] SER 5-6.

On March 6, 1993, the United States Customs Service executed a search warrant at the home of Scott Lacy. Agents seized all of Mr. Lacy's computer hardware as well as numerous computer disks.

---

[2] "GIF" stands for Graphic Interchange Format files, which are photographic images stored and transmitted through computer bulletin boards over telephone lines.

Stored on the computer hard drive and on the disks were hundreds of graphic sexual images, including images depicting children involved in sexually explicit conduct. Also stored in Mr. Lacy's computer equipment were text files describing hard-core sexual contact with minors. Because the appellant admits that the computer hardware seized from his apartment did not belong to him, but to his former employer, he only seeks return of the seized floppy disks. BR at 8.

SUMMARY OF ARGUMENT

I. The district court's denial of Mr. Lacy's motion for return of property is not appealable. The district court's order was not final. Furthermore, there exists no record on which to base an appeal. Fact-finding has not occurred in this case, and the appellate court is not the appropriate forum for creating a factual record. Even if jurisdiction were found, appellant has not stated a claim upon which relief can be granted.

II. The appellant has no standing to contest the district court's dismissal of the information. Even if standing is conferred, the district court correctly dismissed the information at the request of the United States Attorney.

ARGUMENT

I. THE DISTRICT COURT'S DENIAL OF MR. LACY'S MOTION FOR RETURN OF PROPERTY IS NOT APPEALABLE

A. The district court's order was not final.

The appellant seeks reversal of the district court's denial of his motion for return of property. BR at 33. However, the United States Supreme Court has long held that appeals may only be taken from decisions which are final. McLish v. Roff, 141 U.S. 661 (1891). In Di Bella v. United States, 369 U.S. 121 (1962), the Supreme Court specifically addressed the appealability of motions for return of property pursuant to Federal Rule of Criminal Procedure 41(e). The court held that review of Rule 41(e) orders is prohibited unless the motion for return of property is "is solely for return of property and is in no way tied to a criminal prosecution in esse." Id. at 131-32. This finality requirement, the Court held, prevents "piecemeal review" and "discourage[s] undue litigiousness and leaden-footed administration of justice, particularly damaging in criminal cases." Id. at 124.

In DeMassa v. Nunez, this Circuit analyzed what constitutes a "prosecution in esse." 747 F.2d 1283 (9th Cir. 1984). This court adopted a "liberal definition of when a prosecution is in esse," and determined that "an order denying the return of seized property is not appealable when a grand jury proceeding against the movant is underway." Id. at 1287. Specifically, this court held that where a grand jury investigation is underway, there exists a proceeding in esse. Id.

In the present case, there is an active grand jury investigation of Scott Lacy. (See attached affidavit.) This investigation has been ongoing since Mr. Lacy was identified as a customer of the BAMSE bulletin board system. As such, there is a proceeding in esse against Mr. Lacy, and the denial of his motion for return of property is not final, and therefore not appealable.

This court made a similar finding in In Re Grand Jury Subpoena Dated June 5, 1985, 825 F.2d 231 (9th Cir. 1987). In that case, the appellant sought return of his property before the case against him had been initiated. This court denied the appellant's request, and held that where there is a criminal prosecution pending, a motion to suppress, and not a criminal appeal, is the appropriate action to be taken. Id. at 235. Similarly in the present case, the appellant's claim is not currently justiciable.

B. There exists no factual record on which to base an appeal in this matter.

Due to the unusual procedural history of the present matter, there are no facts in the record on which to base an appeal. Because the information against Mr. Lacy was dismissed, a hearing to determine the sufficiency of the search warrant was never held. There have yet to be any findings as to the merits of the warrant other than the conjecture offered by defense counsel. In fact, the only factual information and sworn testimony offered to the court are the two affidavits of government lawyers and the affidavit in support of the Search Warrant.[3] SER 3. If this appeal is to go forward on the merits, those affidavits would amount to uncontroverted recitation of fact, and appellant's claim for relief would fail. Because there clearly needs to be an adversarial hearing to determine the sufficiency of the search warrant, this appeal must be rejected so that such a hearing can take place at the trial court level.[4]

---

[3] Please note that although the appellant's argument relies heavily on the contents of the Search Warrant, he has failed to provide this Court with a copy of that document. A copy of the Search Warrant, including all attachments, can be found in the government's Supplemental Excerpts of Record. Also included are affidavits from two of the government's lawyers.

[4] If the Court does wish to address the validity of the search warrant at this time, the government is prepared to submit a supplemental brief or present oral argument in support of the warrant.

c. Appellant fails to state a claim upon which relief can be granted.

This court has determined that motions for return of property pursuant to Rule 41(e) must be treated as civil equitable proceedings. United States v. Martinson, 809 F.2d 1364, 1369 (9th Cir. 1987). As such, "motions to return property are treated with caution and restraint, and the motion will be dismissed for want of equity if the moving party has an adequate remedy otherwise or if he cannot show irreparable injury." 2 Wright, Federal Practice and Procedure: Criminal 2d, § 673 at 762-63 (1982).

In the present case, the appellant cannot prove irreparable injury. Once Mr. Lacy has been indicted, he will have an opportunity to move the trial court to suppress evidence obtained at his home. In the meantime, the government has continuously made the seized disks, with the exception of those which contain contraband, available for the appellant to copy. Mr. Lacy can alleviate any harm he believes he is suffering by making arrangements to copy the seized disks. Because appellant fails to prove any irreparable harm caused by the denial of the 41(e) motion, and because he will have an opportunity to contest the search of his home when and if he is indicted, his appeal must be denied.

II. THE APPELLANT LACKS STANDING TO OPPOSE THE DISMISSAL OF THE INFORMATION AGAINST HIM

A. The dismissal of the information is not appealable because it is not a final decision.

The appellant seeks reversal of the district court's dismissal of the information. BR at 33. According to the United States Supreme Court, however, the dismissal of an indictment is not appealable by the defendant. Parr v. United States, 351 U.S. 513 (1955). The Parr Court noted that "only one injured by the judgment sought to be reviewed can appeal, and . . . petitioner has not been injured by its termination in his favor." Id. at 516-17. The Court went on to state that "it makes no difference whether the dismissal still leaves him open to further prosecution . . . ." Id. at 517. The reasoning is that only when the petitioner has been convicted of a crime has he been aggrieved. Id.

This court recently followed the ruling in Parr. In United States v. Woodruff, this court agreed that as to defendants, dismissals of indictments are not appealable because they are not final. 1995 WL 97479, 2 (9th Cir. 1995). If and when Mr. Lacy is convicted, he will have the opportunity to appeal. Currently, however, he faces no charges, has not been aggrieved, and has no standing to appeal the dismissal of the information against him.

B. The defendant need not be consulted in the decision to dismiss an information.

The appellant cites Federal Rule of Criminal Procedure 48(a) for the proposition that the government must involve the defendant

in its decision whether to pursue or dismiss a case. BR 25. The appellant has misinterpreted this rule. Rule 48(a) reads as follows:

> "The Attorney General or the United States attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant. (Emphasis added.)

Rule 48(a) clearly requires that once a trial has begun, the prosecution may not unilaterally terminate the proceedings. The same is not true, however, prior to the commencement of trial. As this court recognized in United States v. Valencia, consent of the defendant is not necessary when dismissing an indictment prior to trial. 492 F.2d 1071, 1074 (9th Cir. 1974). The same rationale holds true for criminal informations.

III. THE DISTRICT COURT CORRECTLY DISMISSED THE INFORMATION AT THE REQUEST OF THE UNITED STATES ATTORNEY.

A. The Prosecutor is Presumed Most Capable of Determining When an Information Should Be Dismissed.

The appellant argues that the dismissal of the information should be vacated. Contrary to the appellant's arguments, however, the prosecutor is given great deference regarding the decision to dismiss an indictment or an information. As one court stated:

> Because the prosecutor is presumptively the best judge of where the public interest lies, the initial determination of the public interest is for the prosecutor to make. Neither the trial court nor this Court on appeal can substitute its judgment for the prosecutor's determination or can second guess the prosecutor's evaluation.

United States v. Salinas, 634 F.2d 348, 351 (5th Cir. 1982). This presumption that the prosecutor is the best judge of the public interest can only be rebutted by proof that the prosecutor acted in bad faith. Id. at 352.

In the present case, the motivation for dismissing the indictment was the desire to await the outcome of United States v. X-Citement Video, which was then pending before the Supreme Court. The X-Citement Video decision, which was recently issued, upheld the constitutionality of 18 U.S.C. § 2252, the child-pornography statute. 115 S. Ct 464 (1994). The government believed that child pornography was the most appropriate crime with which to charge Mr. Lacy, and hoped that the Supreme Court's decision in X-Citement Video would allow it to do so.

This very motivation was approved in United States v. Evers, 552 F.2d 1119, 1123 (5th Cir. 1977), where the court stated that "there is no bad faith in the Government's gearing its prosecution to current applicable litigation. If uncertain law is to be made certain within the time frame of permissible prosecution, the Government may, within its discretion, await clarification." Because there is no indication that the government dismissed the information in bad faith, the dismissal must stand.

B. The appellant's reliance on the Speedy Trial Act is misguided.

Lacy claims that the dismissal of the information violates his right to a speedy trial. In United States v. Loud Hawk, however, the United States Supreme Court held that Sixth Amendment speedy

trial rights are not implicated when a person has been indicted and that indictment has been dismissed. 474 U.S. 302 (1986). The facts in Loud Hawk are similar to those in the present case. The government indicted the defendant, dismissed the indictment, and then recharged him. The court rejected Loud Hawk's contention that the government's actions violated his right to a speedy trial. Id. at 311.

The appellant is unable to cite a single authority for the proposition that the Speedy Trial Act entitled him to be prosecuted under the dismissed information. BR 31-32. He simply expresses the difficulty he is having in "getting on with his life." However, the Speedy Trial Clause of the Sixth Amendment "does not . . . limit the length of a pre-indictment criminal investigation even though 'the [suspect's] knowledge of an ongoing criminal investigation will cause stress, discomfort, and perhaps a certain disruption in normal life.'" Loud Hawk, 474 U.S. at 312, quoting United States v. Mac Donald, 456 U.S. 1, 9 (1982).

C. The appellant's due process claims are meritless.

Lastly, the appellant asserts that dismissal of the information deprives him of due process. As stated by the Fifth Circuit Court of Appeals in United States v. Evers, 552 F.2d 1119 (5th Cir. 1977), however, "[p]rosecutorial delay, not barred by the statute of limitations, solely for the purpose of ensuring the most fully developed view of the law, at the time of trial, cannot be said to be a denial of due process." The current investigation of

Mr. Lacy fits well within the five-year statute of limitations, and as such the appellant's Fifth Amendment arguments are misplaced.

CONCLUSION

This appeal should be dismissed for lack of jurisdiction. If the court finds that it has jurisdiction, the order of the District Court denying appellant's motion to vacate the dismissal of the information and motion for return of property should be affirmed. Alternatively, this case should be remanded for an evidentiary hearing.

RESPECTFULLY SUBMITTED, this 13th day of April, 1995.

GEORGE C. BURGASSER
Acting Chief
Child Exploitation and Obscenity
Section
Department of Justice

Katie Albracht

KATHRYN ALBRACHT
Trial Attorney
Child Exploitation and Obscentiy
Section
Department of Justice

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6 (9th Cir.), appellant states that there are no related cases pending before the United States Court of Appeals for the Ninth Circuit.

PROOF OF SERVICE

I certify that a copy of the accompanying Brief of the United States of America and a copy of the Excerpts of Record of the United States of America were served on this date on C. James Frush, Helsell, Fetterman, Martin, Todd & Hokanson, Post Office Box 21846, Seattle, Washington, 98111 by depositing copies of the same in the United States mail, first class postage prepaid, this 13th day of April, 1995.

Judy M. Le May

Judy M. Le May
Secretary