No. 13-15948-DD

In the United States Court of Appeals for the Eleventh Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MICHAEL MEISTER,
Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
NO. 8:10-CR-339-T-26AEP

BRIEF OF THE UNITED STATES

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Certificate of Interested Persons and Corporate Disclosure Statement

In addition to the persons and entities identified in the Certificate of Interested Persons and Corporate Disclosure Statement in Meister's principal brief, the following persons have an interest in the outcome of this case:

1. McNamara, Linda Julin, Assistant United States Attorney, Deputy Chief, Appellate Division; and

2. Minor victims whose identities are being protected.

Statement Regarding Oral Argument

The United States does not request oral argument. Although defendant Michael Meister suggests that this appeal presents novel Fourth Amendment issues involving the search of computer data, in fact Meister was convicted at a bench trial on stipulated facts that did not refer to any information discovered during the alleged search that Meister had contested in his suppression motion. Therefore, oral argument will not aid this Court in resolving this appeal.

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Statement of Jurisdiction

This is an appeal from a final judgment of the United States District Court for the Middle District of Florida in a criminal case. That court had jurisdiction. *See* 18 U.S.C. § 3231. The court entered a judgment against Michael Meister on December 20, 2013, Doc. 297, and an amended judgment on January 7, 2014, Doc. 305. Meister filed a notice of appeal on December 30, 2013, Doc. 302, which was timely as to the original judgment and premature but timely as to the amended judgment. *See* Fed. R. App. P. 4(b)(2). This Court has jurisdiction over this appeal. *See* 28 U.S.C. § 1291.

Statement of the Issue

Did the district court convict Meister based only on evidence found on Meister's laptop computer during the execution of a properly obtained search warrant and not on any evidence that Meister asserts was obtained in violation of the Fourth Amendment?

Statement of the Case

This is an appeal from Michael Meister's convictions following a bench trial on three charges arising from his possession and distribution of child pornography on his laptop computer. In his brief, Meister challenges the district court's refusal to suppress the child pornography that computer-repair technicians had transferred from Meister's computer to their store's hard drive at Meister's direction. As explained below, however, the district court did not rely on that evidence when convicting Meister of the charges in the indictment, and the police conducted no search that violated Meister's Fourth Amendment rights.

Course of Proceedings

A federal grand jury returned an indictment charging Meister with two counts of knowingly possessing images that had been transported in interstate

commerce, the production of which had involved the use of a minor engaging in sexually explicit conduct, in violation of 18 U.S.C. § 2252(a)(4)(B); and with one count of knowingly distributing a visual depiction that had been shipped in interstate commerce, the production of which had involved the use of a minor engaging in sexually explicit conduct, in violation of 18 U.S.C. § 2252(a)(2). Doc. 1.

Meister moved to suppress evidence that law enforcement authorities had found on his computer, which, he claimed, had been found pursuant to a search that violated the Fourth and Fifth Amendments. Doc. 61. After conducting a two-day evidentiary hearing, Docs. 91, 92, the district court denied the motion, Doc. 129.

Meister proceeded to a bench trial, during which he renewed his motion to suppress. Doc. 193. The district court denied the motion and found Meister guilty as charged in the indictment. Doc. 193.

The district court sentenced Meister to serve 84 months' imprisonment, to be followed by a life term of supervised release, and ordered him to pay $28,000 in restitution. Doc. 296. This appeal followed. Doc. 302.

Statement of the Facts

On July 30, 2007, Meister brought his laptop computer in for repair at a store called True North Systems. Doc. 92 at 4. He met with the shop's owner, Todd Zadnick, who told him that the computer could not be fixed and that Meister would have to buy a new one. Doc. 92 at 4–5. Meister purchased a new computer and directed Zadnick to transfer the data contained on his old computer's "desktop" and in his "My Documents" folder onto the new computer. Doc. 92 at 5. Zadnick and Meister did not discuss the method that True North would use to transfer the data, and Meister never told Zadnick that he could not open or access any of his files. Doc. 91 at 232; Doc. 92 at 6–7, 13.

When the store's only other employee, Sean Kuchle, arrived for work later that morning, Zadnick directed him to move the data from Meister's laptop to one of the store's computers, for eventual transfer to Meister's new computer. Doc. 91 at 189–90. (At that time, True North had no way to transfer the data directly from Meister's old, broken laptop to a new computer. Doc. 91 at 229–30.) As he was monitoring the data transfer, Kuchle noticed computer files that disturbed him, so he brought them to Zadnick's attention. Doc. 91 at 189. When the data transfer was finished, Kuchle and Zadnick investigated the files to determine whether they actually contained disturbing material. Doc. 91

at 189. After examining some of the material on the computer, they immediately called the Kenneth City Police Department. Doc. 91 at 191.

Kenneth City Police Officer Michael Vieno responded to the call. Doc. 91 at 108–10. At the store, Zadnick told Officer Vieno how he and Kuchle had discovered child pornography on Meister's computer. Doc. 91 at 112, 124–25. They offered to show the material to Officer Vieno, but he adamantly refused to view it. Doc. 91 at 214. Officer Vieno obtained written statements from both Zadnick and Kuchle. Doc. 91 at 113; Def. Exs. 7C, 7D.

Officer Vieno then contacted Kenneth City's acting police chief, Sergeant Kevin Matson, and told him what he had learned. Doc. 91 at 126–27, 248–49. Sergeant Matson, in turn, contacted Lieutenant Michael Baute from the Florida Attorney General's Office in the Child Predator Cyber Crime Unit to ask for assistance in the investigation.[1] Doc. 91 at 12, 249. Lieutenant Baute advised Sergeant Matson to tell Zadnick that, if the computer contained child pornography, it should be treated as contraband and turned over to the police. Doc. 91 at 24–25, 53, 251–52. He said that the officers should secure the

[1]Lieutenant Baute was more experienced in child pornography cases; he has been a member of the Child Predator Cyber Crime Unit of the Attorney General's Office since August 2005. Doc. 91 at 7.

computer at the Kenneth City Police Department and that he would go there the next day to pick it up. Doc. 91 at 249, 253.

Sergeant Matson called back Officer Vieno and told him to take custody of the computer. Doc. 91 at 129, 132, 151. So Officer Vieno took the computer, left True North at about 2:30 p.m., and, at Sergeant Matson's direction, placed the computer in his own padlocked locker at the Kenneth City Police Department.[2] Doc. 91 at 23–24, 65–66, 151, 170–71. Before putting the computer in the locker, he placed it in a sealed, tamper-proof evidence bag, which he initialed and dated. Doc. 91 at 151–52. (He also took a surveillance videotape of the activity at the store that day, but that tape is not at issue in this appeal. Doc. 91 at 132–33.)

Lieutenant Baute met with Officer Vieno the next day, July 31, 2007, to discuss Vieno's preliminary findings.[3] Doc. 91 at 14. The officers returned to

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[2]Meister does not contend on appeal that the seizure of the computer was unreasonable or unlawful or that the police violated his Fourth Amendment rights by storing the computer in Officer Vieno's locked locker before obtaining a search warrant. *See* Meister's brief at 39 n.15.

[3]In a written report of the incidents of July 31, 2007, Officer Vieno mistakenly stated that those events had occurred on July 30, 2007. Doc. 91 at 139–40; Def. Ex. 7B. During the suppression hearing, he testified that "it was a typo. It should have been the 31st rather than the 30th." Doc. 91 at 139.

True North that afternoon to interview Zadnick and Kuchle—by that time, Kuchle had transferred Meister's data from the True North hard-drive onto two DVDs and had erased the offensive data from True North's hard drive.[4] Doc. 91 at 14, 45, 55, 57–58, 202–03, 217. Kuchle gave the DVDs to the officers either that day or the previous day, and Officer Vieno brought them back to the Kenneth City Police Department, where he secured them in his locker for safe-keeping until the officers could obtain a search warrant. Doc. 91 at 48–49, 147; *see* Doc. 91 at 59. At the suppression hearing, Officer Vieno could not recall whether he had obtained the two DVDs during his first visit on the afternoon of July 30, 2007, or on his return visit on the afternoon of July 31, 2007, and his written report was not clear on that point. Doc. 91 at 154–55. Neither Zadnick nor Kuchle could recall when Kuchle had created the DVDs or when he had had given them to the police. Doc. 91 at 196–97, 256. (Indeed, Zadnick testified that he had not even known about the creation of the DVDs

[4]The officers never seized the hard drive that True North had used to transfer the data from Meister's computer. Doc. 91 at 60. Believing that the best evidence of the material that Meister's computer contained was Meister's computer itself, Lieutenant Baute ordered True North to wipe the child pornography off its hard drive so that no remnants of that contraband would remain on their system. Doc. 91 at 61–63.

until he had heard about them during the course of the investigation. Doc. 91 at 256.)

Within a few days of his visit to True North, Officer Vieno filed an "Offense/Incident Report," stating that the computer, a power cord, one DVD, and the surveillance video all had been submitted to the Kenneth City Police Department property room.[5] Doc. 91 at 88, 116; Def. Ex. 7A. Later in the report, Officer Vieno clarified that he had taken "the computer, DVD, and surveillance video back to the Kenneth City Police Department and [had] packaged those items in secure evidence bags." Def. Ex. 7A at 2. He said, "I then placed the above items in locker #10 which I was the only one having the key or access to." Doc. 91 at 90; Def. Ex. 7A at 2.

On August 1, 2007, based on Zadnick's statements, Lieutenant Baute obtained a warrant to search the contents of Officer Vieno's locker.[6] Doc. 91 at 14–15. When he executed the warrant that day, Officer Vieno opened his locker and handed over Meister's computer and the two DVDs, all of which

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[5]Officer Vieno referred to only one DVD, although, in fact, he had taken custody of two DVDs. Doc. 91 at 88–89. He testified at the suppression hearing that he recalled taking custody of only one DVD case but, unbeknownst to him, the case may have contained two DVDs. Doc. 91 at 160–63.

[6]In this appeal, Meister does not challenge the issuance or execution of the search warrant.

remained in the sealed, signed, and dated evidence bags that Officer Vieno had originally used to package those items. Doc. 91 at 47, 90–91, 180–81; Doc. 92 at 50–51. After that, the computer and DVDs were submitted to the Attorney General's Cyber Crime Unit, where they remained until the computer was released back to Officer Vieno on August 15, 2007, to arrange for the FBI to conduct a forensic analysis. Doc. 92 at 151–52. The FBI kept the computer until it was submitted to the Florida Department of Law Enforcement for further forensic analysis. Doc. 92 at 152. The FDLE's analysis showed that the computer had not been tampered with in any way between the time that Officer Vieno had seized it from True North and the time of its analysis. Doc. 91 at 105–06. (Even Meister's expert witness testified at the suppression hearing that Meister's computer had been "handled properly all the way through." Doc. 92 at 119.) No law enforcement expert ever examined the information on the two DVDs because the best evidence of what was on Meister's computer was the hard drive on that computer itself. Doc. 91 at 63.

Prior to the suppression hearing, Meister hired a computer forensics expert to examine the computer data derived from Meister's computer. Doc. 92 at 39. From his examination, the expert confirmed that about 1700 computer files had been copied from Meister's computer to the True North

hard drive on July 30 at 11:53 a.m., just as Zadnick and Kuchle had testified. Doc. 92 at 46–48. That process had not affected the original data on Meister's computer; it merely had updated the information on Meister's computer showing when that data had been most recently accessed. Doc. 92 at 48–49. The original data remained on Meister's computer, while an exact copy had been transferred to the True North hard drive. Doc. 92 at 65.

Having also examined the two DVDs that True North had created from Meister's computer data, the expert testified that his analysis had revealed that the DVDs had been created on July 31, 2007, at 10:25 a.m. and 10:40 a.m., despite that Officer Vieno's written report supposedly suggested that he had seized those DVDs on the afternoon of July 30. Doc. 92 at 51, 87. He claimed that it appeared that the DVDs had been modified to make it seem as if they had been created on July 30, 2007, at 6:10 p.m. Doc. 92 at 103–04. (Lieutenant Baute testified that, when the DVDs were viewed on a Windows-based computer, they indicated that they had been created on July 30 at 6:00 p.m., but, when those DVDs were viewed on a Macintosh-based system, they indicated that they had been created on July 31 at 6:10 p.m. Doc. 91 at 78–79.)

The expert also testified that his examination of the two DVDs had revealed that a search of Meister's data on True North's hard drive (which had

been transferred to the DVDs) had occurred at 5:04 p.m. on July 30, 2007, and again at 8:21 a.m. on July 31, 2007. Doc. 92 at 95–100. Although Lieutenant Baute testified that Kuchle had told him that police officers had returned to True North early on the morning of July 31 to ensure that True North removed any contraband from their own computer system, Doc. 91 at 71–72, Kuchle testified that he did not remember Officer Vieno coming to the store on July 31st or telling Lieutenant Baute that he had, Doc. 91 at 205–07. No other testimony or evidence placed any law-enforcement officer at True North at 5:00 p.m. on July 30 or on the morning of July 31.

Meister argued that he had a reasonable expectation of privacy in the information on his computer and that the evidence at the suppression hearing proved that Officer Vieno, with Kuchle's assistance, had searched Meister's data on True North's hard drive after Meister's laptop had been seized on July 30 and before officers had procured a search warrant on August 1. Doc. 61 at 13; Doc. 99 at 12, 14. He asserted that the police had intentionally covered up Officer Vieno's pre-warrant searches of Meister's data on the True North hard drive—searches that he claimed had occurred at 5:04 p.m. on July 30 and again at 8:21 a.m. on July 31. Doc. 99 at 14. He alleged: "Officer Vieno and Sean Kuchle (and perhaps Todd Zadnick, who says he never knew about the

disks) went through the MEISTER computer data on the True North system together. We know for a fact that this was done both in the evening of July 30th and the morning of July 31st." Doc. 99 at 21. He accused Officer Vieno of "directing the search (as he is computer illiterate)" and Kuchle of "acting as his IT person." Doc. 99 at 21. He argued he had suffered a violation of his Fourth Amendment rights as a result of the warrantless searches that he accused Officer Vieno of conducting and a violation of his Fifth Amendment rights as a result of Officer Vieno's supposed filing of a false police report stating that he had taken the DVDs from True North on July 30 and covering up the true date of the creation of the DVDs. Doc. 129 at 8.

In its order denying Meister's motion, the district court wholly rejected Meister's accusations of a warrantless search and an ensuing cover-up. *See* Doc. 129. The court found first that True North had discovered the child pornography on Meister's computer during a private search, unrelated to any law-enforcement activity, and ruled that the private search was not protected by the Fourth Amendment. Doc. 129 at 9–10. The court said that "[t]he issue becomes, therefore, whether the police, specifically Officer Vieno, searched the data before the warrant was executed, and if he did, whether that search exceeded the scope of the private search." Doc. 129 at 11.

The district court found that the evidence showed that (1) Officer Vieno had gone to True North on July 30 at about 1:30 p.m., (2) when he had left that day, he had taken with him at least Meister's computer and the surveillance videotape, and (3) he did not remember whether he had also seized the DVDs that day. Doc. 129 at 11. The court found further that Kuchle remembered making the DVDs but did not remember whether he had made them on July 30 or 31 and that Zadnick did not recall the DVDs at all. Doc. 129 at 12. The court did not find anything incredible in Officer Vieno's, Kuchle's, or Zadnick's testimony about these events.

Regarding whether Officer Vieno had searched Meister's data on True North's hard drive or on the two DVDs before obtaining a search warrant, the district court found, "There is no evidence at all that places Officer Vieno at True North on 5:04 p.m. on July 30th," Doc. 129 at 13, which was when, according to Meister's expert, the data had been searched, *see* Doc. 92 at 95–100. Regarding whether Officer Vieno had been at True North either at the time of the supposed 5:04 p.m. search on July 30 or the 8:21 a.m. search on the morning of July 31, the court found, "All the evidence, with the exception of Kuchle's statement, shows that Officer Vieno went to True North only the afternoons of July 30th and July 31st, and it shows that he left long before 5:04

p.m. on July 30th." Doc. 129 at 13. The court found, therefore, "There is no evidence that any law-enforcement officer was physically present at True North at either 5:04 p.m. on July 30th or 8:21 a.m. on July 31st." Doc. 129 at 14.

Regarding Meister's contention that Officer Vieno had lied in his report when he had suggested that he had seized both the computer and the DVDs on July 30, the court said:

> It is conceivable, however, that Officer Vieno thought he was writing a clear report a couple of days [after the seizure], when he in fact was not. He testified that he might not have remembered that he actually retrieved the DVDs on July 31st instead of July 30th. (Vol. I., Tr. at 116, 153–157). Officer Vieno noted that the paragraph stating that he took all three items back to the police station is not dated. (Vol. I, Tr. at 155–159). Based on this record, the Court concludes that the government did not exceed the scope of the original private search.

Doc. 129 at 15.

The district court also rejected as "without merit" Meister's contention that he had had a reasonable expectation of privacy in the child pornography that had been on his computer when he had left it at True North. Doc. 129 at 15. The court found that, when Meister had asked True North to transfer his data to a new computer, there had been "simply no discussion about how the transfer was to be accomplished." Doc. 129 at 16–17. Meister "could have

questioned exactly how the transfer would be performed and then told True North to return his old laptop instead of transfer the data to a new computer," but he had not done that. Doc. 129 at 17. The court noted that "[t]he cases involving individuals who take their personal computers to a computer repair shop for repair, without more, show that, without government action, those individuals do not, in general, enjoy a reasonable expectation of privacy in the personal files on their computer." Doc. 129 at 17. The court concluded, "That Defendant never inquired about [True North's] practices, never confirmed that the manner of transfer would not divulge his files, and never took any precautionary measures to protect his files, belies his position that he maintained a subjective expectation that he had a right to privacy in his files containing child pornography." Doc. 129 at 20. The court held, therefore, that "True North's consent to turn over the data was unnecessary because no expectation of privacy existed under the facts of this case." Doc. 129 at 20.

Finally, because the court concluded that the officers in this case had not violated Meister's Fourth Amendment rights, the court rejected also Meister's contention that the conduct of the law-enforcement officers in this case violated his Fifth Amendment rights because it "shocked the conscience." Doc. 129 at 20–21.

Meister proceeded to a bench trial on stipulated facts. Docs. 193, 196. After the district court had denied his renewed motion to suppress, See Doc. 193, Meister stipulated, among that things, that a "forensic analysis of [his] computer's hard drive[] showed that [he had] knowingly possessed numerous visual depictions, including images and videos, the production of which depictions involved the use of minors engaging in sexually explicit conduct and which were of such conduct, in short, 'child pornography,'" Doc. 196 at 1. The stipulated facts did not mention the creation of the two DVDs or rely on information discovered during any search of the DVDs or of the True North hard drive. *See* Doc. 196. The stipulated facts mentioned only the material that law-enforcement officers had found during a forensic examination of the hard drive on Meister's computer. *See* Doc. 196. The district court found Meister guilty based on those stipulated facts. Doc. 197.

Standard of Review

This Court reviews "a district court's denial of a motion to suppress evidence as a mixed question of law and fact, with rulings of law reviewed de novo and findings of fact reviewed for clear error, in the light most favorable to the prevailing party in district court." *United States v. Lindsey*, 482 F.3d 1285, 1290 (11th Cir. 2007). Because the United States prevailed in the district court,

this "Court must construe the facts in the light most favorable to ... the Government." *United States v. Holloway*, 290 F.3d 1331, 1334 (11th Cir. 2002).

Summary of the Argument

The district court convicted Meister of the charges in the indictment based solely on evidence uncovered from Meister's own computer during the execution of a properly obtained search warrant. The court did not consider any evidence supposedly found during a search of his data on the True North hard drive. Therefore, any alleged Fourth Amendment violation resulting from the supposed search of that hard drive was harmless.

In any event, Meister failed to prove that he had suffered any such violation. Despite the dearth of evidence showing who had supposedly searched his computer data on the True North hard drive, Meister accuses Officer Vieno of searching that data without a warrant and then lying in a police report and falsifying evidence to cover his tracks. As the district court found, the evidence at the suppression hearing did not support these wild accusations.

Moreover, Meister concedes that the child pornography on his computer was discovered initially when private parties viewed that material during their efforts to transfer data from his old computer to a new one. Meister had no

reasonable expectation of privacy in that material, given that it was discovered because he had presented his computer to a shop for repair, had directed the computer technicians to transfer his data from one computer to another, and had placed no restrictions on their ability to access information on his computer. And even if any law-enforcement officer actually searched that material before obtaining a search warrant, that search could not have exceeded the scope of the original, private search, because the only data available to search was the material originally contained on Meister's computer "desktop" and in his "My Documents" folder.

Therefore, the district court properly denied Meister's motion to suppress, and he is not entitled to relief from his conviction.

Argument and Citations of Authority

The district court convicted Meister based only on evidence found on Meister's laptop computer during the execution of a properly obtained search warrant and not on any evidence that Meister asserts was obtained in violation of the Fourth Amendment.

In his brief, Meister argues that he had a reasonable expectation of privacy in the information stored in his laptop computer when he brought the computer to True North for repair. Meister's brief at 21–30. He says, therefore, that law-enforcement officers violated his Fourth Amendment right to be free

from unreasonable search and seizure when they supposedly searched the information copied from that computer onto True North's hard drive before obtaining a search warrant. Meister's brief at 30–44. But, even if Meister were correct, he is not entitled to relief because the district court convicted Meister at a bench trial based only on evidence gleaned directly from Meister's computer following the execution of a properly obtained search warrant, not from any search of True North's hard drive.

"The Fourth Amendment guards the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures' and imposes a warrant requirement on most searches and seizures." *United States v. Laist*, 702 F.3d 608, 613 (11th Cir. 2012) (quoting U.S. Const. amend. IV). But a temporary warrantless seizure supported by probable cause and designed to prevent the loss of evidence while the police obtain a search warrant is reasonable so long as "the police diligently obtained a warrant in a reasonable period of time." *Illinois v. McArthur*, 531 U.S. 326, 334, 121 S. Ct. 946, 951–52 (2001).

In this case, Officer Vieno seized Meister's computer after two True North employees reported that they had discovered child pornography on the computer. Doc. 91 at 23–24, 65–66, 151, 170–71. Meister does not challenge

the constitutionality of this seizure. Only two days after Officer Vieno had seized the computer, Lieutenant Baute obtained a warrant to search the contents of the computer. Doc. 91 at 14–15. Meister also does not contest the issuance of the warrant or the validity of the ensuing search of his computer.

Instead, he contends that, after Officer Vieno had lawfully seized his computer but before he had obtained a search warrant, he had secretly returned to the computer store and searched the data that had been transferred from Meister's computer onto True North's hard drive and two DVDs. Meister's brief at 34–38. He contends that this search of his private information on the store's hard drive violated his Fourth Amendment rights. Meister's brief at 40–42.

But Meister fails to note that, when convicting Meister during his bench trial, the district court relied exclusively on the evidence gleaned directly from Meister's computer upon the officers' execution of the lawfully obtained search warrant. *See* Docs. 196, 197. The stipulated facts on which the district court relied said nothing about the information that had been transferred to True North's hard drive (or from the hard drive to the two DVDs) that Officer Vieno supposedly had searched. *See* Doc. 196; *see also* Doc. 91 at 64, 69 (Lieutenant Baute testifying at the suppression hearing: "All I can tell you is the

contraband … was recovered from Mr. Meister's hard drive," and "These CDS, DVDs aren't even used in this case.")

Therefore, even if Officer Vieno had conducted a warrantless search of True North's hard drive, anything that he might have learned from that search did not contribute to Meister's conviction. "A constitutional error does not necessarily result in an automatic reversal of the conviction." *United States v. Khoury*, 901 F.2d 948, 960 (11th Cir. 1990). Because "the harmless error doctrine applies to a fourth amendment violation," "[t]he question … is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Id.* (internal quotation marks omitted). The error is harmful only if the jury, or the court in a bench trial, "might have relied on the unconstitutional evidence in reaching its verdict" and, even then, only if the other evidence of guilt was not overwhelming. *Id.* Because, in convicting Meister, the district court did not rely on anything except evidence obtained pursuant to a lawfully-obtained and executed search warrant, Meister has failed to establish that he suffered a harmful Fourth Amendment violation. *See United States v. Harrison*, 461 F.2d 1127, 1131 (5th Cir. 1972) (if district court erred in denying motion to suppress defendant's statement, that error was harmless because that statement was not introduced at trial); *accord United*

States v. Razz, 240 F. App'x 844, 847 (11th Cir. 2007) ("even if the district court erred in its analysis of [defendant's] pre-trial motion to suppress, any resulting error was unquestionably harmless beyond a reasonable doubt because the decision on the motion to suppress could not possibly have contributed to [defendant's] conviction, where the jury never heard the statement"); *United States v. Civella*, 666 F.2d 1122, 1130 (8th Cir. 1981) (denial of motion to suppress was harmless where "[n]one of the material [at issue] was introduced into evidence").

In any event, as the district court found, the evidence did not support Meister's accusation that Officer Vieno, or any other law-enforcement officer, had searched Meister's private computer data without first securing a warrant. *See* Doc. 129 at 14. No witness testified that any law-enforcement officer had been at True North at the time of either of the supposed searches of Meister's data on the store's hard drive (July 30 at 5:04 p.m. and July 31 at 8:21 a.m.).[7] *See* Doc. 92 at 97, 99; Doc. 129 at 14. The evidence at the suppression hearing

[7]In his brief at page 22, Meister also claims that two more searches occurred when his data was transferred from the store's hard drive to the two DVDs, but no witness testified that any search had occurred at that time. Kuchle testified that he merely had transferred the data from the hard drive to the DVDs, not that he (or anyone else) had searched or even viewed the data at that time. *See* Doc. 91 at 197, 204–05.

established that Officer Vieno had arrived at True North at around 1:30 p.m. on July 30 and had left there by about 2:30 p.m., having refused to look at any of the material on Meister's computer, and no evidence suggested that he had returned that day and conducted a search of the data at 5:04 p.m., as Meister suggests. *See* Doc. 91 at 24–25, 115, 119, 213–24; Def. Exs. 7A, 7B. To the contrary, Officer Vieno testified that he had gone off-duty at 3:00 p.m. and that he had not returned to the computer store that day. Doc. 91 at 175. And Kuchle testified that he and Zadnick had tried to get Officer Vieno to look at the child pornography on Meister's computer but he had been "very adamant about not wanting to look at it." Doc. 91 at 214.

Furthermore, although Lieutenant Baute testified that, on the afternoon of July 31, 2007, Kuchle had told him that an officer had come by True North earlier that day to ensure that the store did not have any contraband on its computer system, Doc. 91 at 71–72, Kuchle testified that he did not recall having seen Officer Vieno at the store at all on July 31, Doc. 91 at 200. Indeed, he testified, "The only one that I remember interfacing with is Kenneth Matson," the police chief. Doc. 91 at 197. He testified that his normal work day began at 9:00 a.m., anyway, while the supposed search on that day had

occurred at 8:21 a.m., when Kuchle would not have been at the store to encounter Officer Vieno. Doc. 91 at 202.

Kuchle also testified that no law-enforcement officer had ever instructed him to view Meister's computer data or had ever returned to the store to look at any of that data. Doc. 91 at 215–16. He testified further that, even if Officer Vieno had returned to the store on the morning of July 31, he and Officer Vieno absolutely would not have accessed Meister's data on the store hard drive or on the two DVDs that Kuchle had created. Doc. 91 at 207. He also testified that he had not searched the DVDs himself. Doc. 91 at 211–12. He testified further that he did not recall ever accessing Meister's data on the store's hard drive after he and Zadnick had first discovered the child pornography on the morning of July 30. Doc. 91 at 212–13. And he said that, immediately after he had transferred the data from the store's hard drive to the DVDs, he had securely deleted the data from the store's hard drive. Doc. 91 at 207–08, 210.

Officer Vieno testified that he did not recall returning to the computer store at all on the morning of July 31, although he also could not remember when he had picked up the two DVDs that the store had created. Doc. 91 at

175–77. He testified further that he had never instructed either Zadnick or Kuchle to search Meister's computer data. Doc. 91 at 176.

Thus, no evidence at the suppression hearing even suggested that Officer Vieno had been present at the computer store at the time of the two alleged warrantless searches or had directed any private party to conduct those searches. Still, Meister notes at pages 8–9 of his brief that his computer expert testified that someone had backdated the information on the DVDs that showed when the data on the hard drive had last been accessed to make it appear as though no one had accessed Meister's data after July 30 at 6:10 p.m. despite that the DVDs had not been created until 10:25 a.m. and 10:40 a.m. on the following day. But no one, not even the expert, testified that any law-enforcement officer had backdated the information on the DVDs or had directed someone else to do so. To the contrary, Lieutenant Baute suggested a less sinister explanation for the conflicting dates on the DVDs—he testified that, when the DVDs were viewed on a Windows-based computer, they indicated that they had been created on July 30 at 6:00 p.m. (the supposed "backdate"), but, when those DVDs were viewed on a Macintosh-based system, they indicated that they had been created on July 31 at about 10:00 a.m. (the time when Meister's expert claimed they had been created). Doc. 91

at 59, 78–79. This testimony suggested that the conflicting dates on the DVDs may have simply resulted from the use of different operating systems to view the DVDs.

But, even disregarding Lieutenant Baute's testimony, absolutely no evidence proved Meister's preposterous proposition that, even though Officer Vieno had already seized Meister's actual computer in anticipation of obtaining a search warrant, he then had forged ahead and searched Meister's data on the True North hard drive, falsifying evidence afterward to cover his tracks. Absent any evidence that any law-enforcement officer or private party on behalf of a law-enforcement officer had searched Meister's private data without a warrant, Meister failed to show that he had suffered a Fourth-Amendment violation. *See United States v. Grimes*, 244 F.3d 375, 383 (5th Cir. 2001) (no Fourth Amendment violation where images on defendant's computer were first viewed during a search by repair technician); *United States v. Scott*, 387 F. App'x 334, 336 (4th Cir. 2010) (where no evidence showed that law-enforcement officer had directed computer technician to open file on defendant's computer, district court properly denied defendant's motion to suppress).

Yet, even if a law-enforcement officer had searched Meister's data on the computer store's hard drive without first obtaining a warrant, and even if that data—rather that the data lawfully obtained from Meister's own computer—had been used at trial, Meister still would not be entitled to relief. As the district court found, Meister's "argument that he had a reasonable expectation of privacy in the child pornographic data on his laptop when he left it at True North is without merit." *See* Doc. 129 at 15. And, even if a search of True North's hard drive did occur, that search could not have exceeded the scope of the original, purely private search.

To successfully challenge a search under the Fourth Amendment, a defendant must establish that he had both a subjective and an objective expectation of privacy in the thing that was searched. *United States v. Segura-Baltazar*, 448 F.3d 1281, 1286 (11th Cir. 2006). "The subjective component requires that a person exhibit an actual expectation of privacy, while the objective component requires that the privacy expectation be one that society is prepared to recognize as reasonable." *United States v. Epps*, 613 F.3d 1093, 1097–98 (11th Cir. 2010) (quotation marks and citation omitted).

In this case, the evidence established that Meister had taken his computer to True North for repair because it would not "boot up." Doc. 92 at

4. When Zadnick had told him that the computer could not be repaired, Meister had purchased a new computer and had directed Zadnick to transfer the data from his old computer's "desktop" and "My Documents" folder to the new computer. Doc. 92 at 4–5. Meister had not inquired about how Zadnick or Kuchle would accomplish this task or whether they would have to view or access his data to do so. Doc. 91 at 227–28, 233–34. Indeed, Meister testified that Zadnick had not told him anything about how the data would be transferred from one computer to the other, Doc. 92 at 7, and Zadnick testified that Meister had not placed any limitations on the material in Meister's computer that Zadnick or Kuchle could view when accomplishing the data transfer, Doc. 91 at 232–33. Although Meister claimed at the suppression hearing that he would not have taken the computer to True North if he had known that someone would view the material on his computer, Doc. 92 at 5–6, the district court found, "There was simply no discussion about how the transfer was to be accomplished. [Meister] could have questioned exactly how the transfer would be performed and then told True North to return his old laptop instead of transfer the data to [the] new computer." Doc. 129 at 16–17.

Given that Meister took no measures to ensure that the True North employees could not and would not access the material on his computer while

they were diagnosing and perhaps repairing its malfunction, and given that he specifically directed a store employee to transfer the data from his computer onto a new one, Meister did not display a subjective expectation of privacy in the material on his computer. He could have anticipated that, in completing the transfer of the data from one computer to another, a store employee would check to see that the transfer was being completed properly and that all the material had been transferred as Meister had requested. He also could have anticipated that, in doing so, store employees might view at least some of the material on his computer, including the incriminating names of some his files (for example, "14 year old boys," *see* Def. Ex. 7C). Under these circumstances, the district court correctly found that Meister had not displayed a subjective expectation of privacy in the material on his computer.

Yet, even if Meister did have an expectation of privacy in the material on his computer, that expectation was extinguished once Kuchle and Zadnick had accessed that material during their purely private search. *See United States v. Bomengo*, 580 F.2d 173, 175–76 (5th Cir. 1978) (no Fourth-Amendment violation where apartment staff entered defendant's apartment, found guns in closet, and notified police, who then searched closet and seized guns); *accord Grimes*, 244 F.3d at 383 (no Fourth-Amendment violation where computer-

repair technician viewed child pornography on defendant's computer and then told police, who viewed previously found images); *United States v. Pierce*, 893 F.2d 669, 673–74 (5th Cir. 1990) (no Fourth-Amendment violation where airline employees opened suspicious package and notified police about contents before officers searched package). The Fourth Amendment's limitations on searches and seizures do not apply to private action, *see United States v. Jacobsen*, 466 U.S. 109, 113–14, 104 S. Ct. 1652, 1656 (1984), and, "[o]nce frustration of the original expectation of privacy occurs [via private action], the Fourth Amendment does not prohibit governmental use of the now-nonprivate information," 466 U.S. at 117, 104 S. Ct. at 1658. Instead, the Fourth Amendment "is implicated only if the authorities use information with respect to which the expectation of privacy has not already been frustrated." *Id.* "The additional invasions of respondents' privacy by the government agent must be tested by the degree to which they exceeded the scope of the private search." 466 U.S. at 115, 104 S. Ct. at 1657; *see also* 466 U.S. at 119, 104 S. Ct. at 1660 ("The agent's viewing of what a private party had freely made available for his inspection did not violate the Fourth Amendment.").

In this case, Meister does not dispute that employees of True North discovered the child pornography on his computer during a purely private

search of his data. *See* Meister's brief at 39. At the time Kuchle found the material, he was working on the computer pursuant to Meister's directions, not for any law-enforcement purpose. *See* Doc. 91 at 215. In his written statement prepared during Officer Vieno's first visit to the store, Kuchle explained that he had been "told to transfer data, desktop, and my docs," and that, while awaiting the completion of the data transfer, he had seen the names of files that "didn't look good." Def. Ex. 7C. He then had "inspected the data" and had "found the porn." Def. Ex. 7C. He said, "The data was right on the desktop in folders new folder and new folder 2." Def. Ex. 7C. He said that he also had seen "things in my docs but never investigated." Def. Ex. 7C.

Even if, as Meister surmises, a law-enforcement officer did search this material after it had been transferred from Meister's computer to True North's hard drive, that search could not have exceeded the scope of Kuchle's original, private search because only the material from Meister's "desktop" and "My Documents" folder had been transferred to the True North hard drive. *See* Doc. 91 at 57–58; *see* Doc. 92 at 96, 126; Def. Ex. 7C. Therefore, the police would have learned nothing from a search of Meister's data on the True North hard drive that Kuchle had not already discovered. In that circumstance, no Fourth Amendment violation occurs. *See United States v. Tosti*, 733 F.3d 816,

821–22 (9th Cir. 2013) (police did not exceed scope of private computer search by enlarging thumbnail photos that computer technician had already viewed).

This case is much like *Grimes,* 244 F.3d at 377, in which the defendant's wife had taken the defendant's computer to a repair shop, where she had signed a work authorization, indicating the computer would not "boot up." She later had authorized a repair technician to remove temporary files and other files not needed on the computer. *Id.* Just as Kuchle had discovered the child pornography on Meister's computer as he had completed his work, the computer technician in *Grimes* had discovered images of child pornography on that defendant's computer and had reported his findings to his supervisor. *Id.* at 377–78. The supervisor, in turn, had reported the matter to the police. *Id.* at 378. A detective had arrived at the store, where he had viewed the images on the defendant's computer (unlike Officer Vieno who never viewed Meister's data at True North). *Id.* The technician then had copied the images onto a floppy disk, which he had given to the detective. *Id.* The detective had faxed the images to an FBI agent, who then had obtained a warrant to search the computer. *Id.* The defendant challenged the issuance of the warrant, asserting that it had been based on an illegal search and seizure, but the district court

denied the motion. *Id.* This United States Court of Appeals for the Fifth Circuit affirmed that ruling, stating:

> The pre-warrant images viewed by [the detective and FBI Agent] were discovered during a private-party search, completed following standard company practice; were within the scope of the original private-party search; and were in an area where Grimes no longer possessed a reasonable expectation of privacy. For three reasons, then, the images are immune to Grimes's Fourth Amendment challenge.

Id. at 383.

Likewise in this case, the pornographic images were discovered during Zadnick and Kuchle's private search of Meister's computer, any later law-enforcement search did not exceed the scope of that search, and, in any event, Meister no longer possessed a reasonable expectation of privacy in the material at the time of the supposed law-enforcement search. Consequently, even if Meister had presented evidence showing that a law-enforcement officer had searched his computer data on True North's hard drive without a warrant, he still would not have been entitled to suppression of the child pornography found there.

Meister attempts to distinguish *Grimes* and other private-search cases from this case by noting that, at the time of the supposed law-enforcement search of the True North hard drive, Officer Vieno had already seized

Meister's original computer and was holding it until he could obtain a search warrant. *See* Meister's brief at 39. But that computer was never searched until the officers had obtained a search warrant. *See* Doc. 91 at 14–15, 76–77, 90–91; Doc. 92 at 151–52. Although Meister contends that Officer Vieno searched the True North hard drive, Meister had already lost any expectation of privacy in the information on the hard drive by the time of that alleged search because, as discussed above, Kuchle and Zadnick had already seen it. Therefore, Meister would not have suffered a Fourth-Amendment violation, even if his allegations are true.

Accordingly, Meister is not entitled to relief from his conviction based on his claim that the district court erred in denying his motion to suppress.

Conclusion

For these reasons, the United States requests that this Court affirm the judgment of the district court.

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