

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

KATHRYN LESOINE,	:	
	:	
Plaintiff,	:	NO: 3:CV-98-0764
	:	
v.	:	
	:	(JUDGE CAPUTO)
COUNTY OF LACKAWANNA, et al.,	:	
	:	
Defendant.	:	

MEMORANDUM

Plaintiff Lesoine brought this civil rights case alleging, *inter alia*, that Lackawanna County officials unlawfully searched her house and seized photographs, a computer and computer-related items. (Complaint, Doc. 1.) On May 3, 2000, this court determined, by summary adjudication, that the search warrants on which the officers relied were not founded on probable cause and failed to state with reasonable particularity the items to be seized. (Memorandum and Order, Doc. 61.) Presently before this court are Defendants' motion pursuant to Federal Rule of Civil Procedure 59(e) for reconsideration of the summary adjudication. (Motion for Reconsideration, Doc. 67; Motion for Reconsideration, Doc. 70.)¹

¹ Defendants Michael J. Barrasse, Eugene M. Talerico, Amy Shwed, John Fox, Joseph Jordan and James M. Reilly filed a motion reconsideration on June 6, 2000. (Motion for Reconsideration of This Court's May 3, 2000 Order Pertaining to the Plaintiff's Motion for Summary Judgment or, in the Alternative, Motion for Summary Adjudication Re Declaratory Judgment, Doc. 67). On the following day, June 7, 2000, Defendant County of Lackawanna filed a motion for reconsideration which expressly relied upon and adopted the prior one. (Motion for Reconsideration, Doc. 70.) This court will treat the two motions together, as if one motion.

BACKGROUND

The undisputed facts of the case, set forth in this court's memorandum of May 3, 2000, are reiterated here. In July of 1995, Plaintiff took photographs of her step-daughter and two friends while vacationing at Plaintiff's residence in Martha's Vineyard, Massachusetts. (Plaintiff's Statement of Undisputed Material Fact, Doc. 26 at ¶1; Defendants' Response to Plaintiff's Statement of Undisputed Material Fact, Doc. 52 at ¶ 1.) The photographs depict the girls, ages 15, 16 and 16, standing nude under an outdoor shower and on the beach. (Id. at ¶2.) The photographs were taken with the knowledge of the girls. (Id. at ¶ 3.)

In April 1996, Trish Heil ("Heil"), an amateur photographer, visited Plaintiff's home and art studio for the stated purpose of borrowing a mat cutter. (Id. at ¶ 4.) During her visit, Plaintiff showed Heil much of her photographic work, including prints of the photographs taken in Martha's Vineyard, and answered Heil's questions concerning Plaintiff's photographic techniques. (Id. at ¶¶ 5, 6.) Heil recognized the girls in the photographs as the children of parents with whom she was acquainted. (Plaintiff's Statement of Undisputed Material Fact, Doc. 26 at ¶7; Defendants' Response to Plaintiff's Statement of Undisputed Material Fact, Doc. 52 at ¶7.) Heil then contacted the parents of the girls to inform them of the photographs. (Id.)

_____ Upon learning of the photographs, the parents contacted the Lackawanna County District Attorney's Office ("DA's Office") and requested that the office investigate. (Id. at ¶11.) On May 9, 1996, Defendants Reilly and Jordan went to

Plaintiff's home and identified themselves as detectives from the DA's Office. (Id. at ¶12.) Plaintiff signed a "Consent to Warrantless Search" form and helped Defendants search her home studio. (Plaintiff's Statement of Undisputed Material Fact, Doc. 26 at ¶7; Defendants' Response to Plaintiff's Statement of Undisputed Material Fact, Doc. 52 at ¶7.) During the search, Defendants Reilly and Jordan seized a box of Plaintiff's photographic prints. (Receipt/Inventory of Seized Property Form, Doc. 26, Exhibit D.)

Later that day, Defendants returned with a search warrant issued by a local district justice. (Search Warrant and Affidavit, Doc. 26, Exhibit B.) The warrant described the items to be searched for and seized as: "Photographs, nude and semi-nude photographs of minor children, business records pertaining to photography business, computers and computer equipment and records, telephone logs or records." (Id.) The search resulted in the seizure of numerous photographs, including some depicting nude and semi-nude persons. (Receipt / Inventory of Seized Property Form, Doc. 26, Exhibit E.) On May 10, 1996, the following day, Defendants returned with a second search warrant, identical to the first, and seized Plaintiff's personal computer, software, floppy disks and digital audio tapes. (Receipt/Inventory of Seized Property Form, Doc. 26, Exhibit F.) Defendants presently seek reconsideration of this court's determination that the search warrants were unsupported by probable cause and lacked the requisite particularity.

STANDARD OF REVIEW

“The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence.” Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985). Because the courts have sometimes treated motions to reconsider under Federal Rule of Civil Procedure 59(e) as a motion for the amendment of judgment, and at other times under Rule 60(b) as a motion for relief from judgment or order, a request for reconsideration may be treated either as a Rule 59(e) motion or as a Rule 60(b) motion. See General Refractories Co. v. Travelers Ins. Co., 1999 WL 80287 (E.D. Pa.); Broadcast Music, Inc. v. La Trattoria E., Inc., 1995 WL 552881 (E.D. Pa.).

Under Rule 59(e) of the Federal Rules of Civil Procedure, a motion for reconsideration must be predicated upon one of the following: (1) an intervening change in controlling law; (2) new evidence not previously available; or (3) the need to correct a clear error of law or to prevent manifest injustice. McDowell Oil Serv. v. Interstate Fire and Casualty Co., 817 F. Supp. 538, 541 (M.D. Pa. 1993) (citing Atkins v. Marathon LeTourneau Co., 130 F.R.D. 625, 626 (S.D. Miss. 1990)). It should be noted in regard to the third ground for a motion for reconsideration, that a mere point of disagreement between the court and a litigant will not constitute a clear error of law. See Dodge v. Susquehanna University, 796 F.Supp. 829, 830 (M.D. Pa. 1992). “Moreover, a Rule 59(e) motion is not to be used as a means ‘to reargue matters already argued and disposed of’ by prior rulings ‘or to put forward additional arguments which [the

litigant] could have made but neglected to make before judgment.’” Id. (quoting Davis v. Lukhard, 106 F.R.D. 317, 318 (E.D. Va. 1984)). In deference to the strong interest in the finality of judgments, motions for reconsideration should be granted sparingly. Continental Casualty Co. v. Diversified Indus., Inc., 884 F. Supp. 937, 943 (E.D. Pa. 1995).

DISCUSSION

Defendants urge this court to accept three propositions inconsistent with its May 3, 2000 Memorandum and Order: 1) that the warrants were supported by probable cause to believe the items described were evidence of a violation of 18 Pa. C.S.A. § 6312, which prohibits the sexual abuse of children; 2) that the warrants were supported by probable cause to believe the items described were evidence of a violation of 18 Pa. C.S.A. § 6301, which prohibits the corruption of minors; and 3) that the warrants stated with reasonable particularity the items to be seized. (Brief in Support of Motion for Reconsideration, Doc. 68.) However, as Defendants have failed to carry their heavy burden of showing new facts, new controlling law or clear error, the motion for reconsideration will be denied.

I. Probable Cause Under § 6312. The law pertaining to probable cause under the Fourth Amendment was set out in detail in the May 3, 2000 memorandum. (Doc. 61 at 7-11.) It will suffice here to note that the reviewing court need only ensure that the magistrate who issued the warrant had a substantial basis for concluding, under the totality of the circumstances, that there was a fair probability that the items to be seized would be evidence of a

crime or contraband. See generally Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983).

The relevant provision of § 6312 prohibits knowingly photographing a nude child “if such nudity is depicted for the purpose of sexual stimulation or gratification of any person who might view such depiction.”² In arguing that the affidavit incorporated in the warrant provided the magistrate with a substantial basis for finding probable cause, Defendants point to two cases upholding a finding of probable cause to believe that certain images of children were evidence of a § 6312 violation. However, as this court has already explained, the present case is factually dissimilar from Defendants’ precedent.

The first of these two cases is Commonwealth of Pennsylvania v. Savich, 716 A.2d 1251 (Pa. 1998). Defendants assert that the Savich court “held, based simply on a citizen’s complaint, nude depictions of children on defendant’s film and covert filming of the children, that there was probable cause.” (Brief in Support of Motion for Reconsideration, Doc. 68 at 10.) However, it should be emphasized that not every nude photograph of a child is a violation of § 6312. A recording is illegal only if done “for the purpose of sexual stimulation or gratification.” In Savich, the key fact undoubtedly was the covert filming of the nude children. There, the criminal defendant had surreptitiously positioned a video camera at a beach bathhouse in order to record children changing into

² See Memorandum and Opinion, Doc. 61 at 12, for the complete text of the relevant provisions.

and out of their swimsuits. 716 A.2d at 1253. It was not simply the filming of nude children, but more importantly the *manner* in which nude children were filmed, that indicated that it was done “for the purpose of sexual stimulation or gratification.” Under the totality of the circumstances, there was a fair probability that the filming had violated § 6312, and thus that the videotape was evidence of a crime.

In the present case, there was nothing in the affidavit indicating that the photographing of the children was done “for the purpose of sexual stimulation or gratification.” Certainly there was nothing about the manner in which Plaintiff took her photographs that suggested a prurient motive. Plaintiff did not hide her camera, but photographed the children with their knowledge. (Doc. 52 ¶ 3.) Consequently, the present case is distinguishable from Savich.

In the other case cited by Defendants, United States v. Cochran, 806 F.Supp. 560, 562-64 (E.D. Pa. 1992), the district court upheld a finding of probable cause based on eyewitness reports that the criminal defendant possessed nude photos of children who were “posed” and who were not members of the defendant’s family, extensive camera and video equipment including eleven VCRs and three camcorders, and a voluminous pornography collection. One moving company employee stated that most of what the movers transported for the criminal defendant was pornography, and that very little was furniture or household goods. Id. at 562. Thus, while merely taking a family picture is not illegal, the circumstances in Cochran placed the possession of

nude photos of children in an entirely different light, and made it fairly probable that they were taken “for the purpose of sexual stimulation or gratification.”

In the instant case, there was no suggestion in the affidavit that the children had been “posed,” nor that Plaintiff possessed extensive camera and video equipment or a massive pornography collection. The evidence before the magistrate was wholly consistent with the Plaintiff’s having no prurient motive whatsoever. Consequently, there was no substantial basis for the magistrate to believe, under the totality of the circumstances, that there was a fair probability that the photos were taken for the purpose of sexual stimulation or gratification. Since, then, there was no fair probability that the taking of the photos was a violation of § 6312, it follows that there was no probable cause to believe the photos were evidence of a § 6312 violation.

II. Probable Cause Under § 6301. Defendants also insist that the warrant was supported by probable cause to believe the photos were evidence of a violation of § 6301. However, although § 6301 is listed on the search warrant, it was not raised by Defendants in their brief. (See Defendants’ Brief in Opposition to Plaintiff’s Motion for Summary Judgment, Doc. 51.) As Defendants may not raise a new legal argument in their motion for reconsideration that they could have raised during the court’s initial consideration, see Dodge v. Susquehanna University, 796 F.Supp. 829, 830 (M.D. Pa. 1992), this court will not accept Defendants’ § 6301 argument as grounds for reconsideration.

III. Reasonable Particularity. Defendants also challenge this court's determination that listing "photographs, nude and semi-nude photographs of minor children" on the warrant fails to describe the items to be seized with reasonable particularity. The Fourth Amendment's requirement that a search warrant describe with reasonable particularity the places to be searched and things to be seized "makes general searches ... impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." United States v. Christine, 687 F.2d 749, 752 (3d Cir. 1982) (quoting Marron v. United States, 275 U.S. 192, 196, 48 S.Ct. 74, 76, 72 L.Ed. 231 (1927)). See also United States v. Johnson, 690 F.2d 60, 64 (3d Cir. 1982).³ As noted above, not all photographs of nude children are unlawful and subject to seizure. Accordingly, a warrant must identify the photos that are subject to seizure with sufficient specificity to ensure that only those photos evidencing a crime are seized, and that "nothing is left to the discretion of the officer executing the warrant." Christine, 687 F.2d at 752.

Defendants argue that "the nude photographs could have been evidence of the crimes of [sic] 18 Pa. C.S.A. § 6312. If they were depicted for purposes of sexual stimulation or gratification of the viewer, they would have been key evidence in a prosecution for a violation of section 6312." (Doc. 68 at 14.) This

³ The reasonable particularity requirement is treated more thoroughly in this court's May 3, 2000 memorandum. (See Doc. 61 at 16-18.)

argument is inapposite. It is not enough that certain “photographs” would be evidence of a crime, should it subsequently be determined that they were taken for the purpose of sexual stimulation or gratification. Assuming here that the magistrate had probable cause to believe that certain photographs had been taken for such a purpose, those photos should have been identified with as much particularity as was reasonably feasible, so that no other photographs would be seized. A district court must review the constitutionality of a warrant “by measuring the scope of the search and seizure authorized by the warrant against the ambit of probable cause established by the affidavit upon which the warrant was issued.” United States v. Christine, 687 F.2d 749, 753 (3d Cir. 1982). If, then, the magistrate thought there was a fair probability that photographs had been taken for the purpose of sexual stimulation or gratification, because, for example, they depicted young females in erotic poses, then the warrant should have authorized the seizure only of such photographs. If probable cause was based on the fact that the photographs had been taken surreptitiously by a hidden camera secreted at a beach bathhouse, the warrant should have covered only photographs involving the beach, bathhouses or the changing of clothes. It is very difficult to imagine a scenario, however, in which it would not be overbroad to authorize the seizure of any or all of Plaintiff’s photographs. Authorizing the seizure of all nude photographs in Plaintiff’s possession “is impermissibly overbroad because it specifically requests the seizure of lawfully possessed material of no evidentiary value.” United States v.

Cochran, 806 F.Supp. 560, 562-64 (E.D. Pa. 1992).

Defendants next argue that, “[r]ead as a whole, the search warrant limits the search to items related to sexual abuse of children and corruption of minors.” (Doc. 68 at 14.) It is true that a search warrant must be read as a whole, and that where an affidavit is incorporated into the warrant, the affidavit may be used to construe the scope of the warrant and supply the necessary particularity. See United States v. Johnson, 690 F.2d 60, 64 (3d Cir. 1982); Andresen v. Maryland, 427 U.S. 463, 479-82, 96 S.Ct. 2737, 2748-49, 49 L.Ed.2d 627 (1976). See also United States v. Conley, 4 F.3d 1200, 1208 (3d Cir. 1993). However, because the affidavit failed to set forth circumstances establishing probable cause to believe certain photographs were taken for a prurient purpose, it also fails to provide a basis for distinguishing lawful and unlawful photos of nude children, and does not limit the discretion of the officers conducting the search. See United States v. Christine, 687 F.2d 749, 752 (3d Cir. 1982) (citing Marron v. United States, 275 U.S. 192, 196, 48 S.Ct. 74, 76, 72 L.Ed. 231 (1927)). Therefore, because the probable cause and particularity issues are inextricably intertwined, the affidavit here is unable to supply the particularity lacking in the warrant’s general terms: “photographs, nude and semi-nude photographs of minor children.” This court’s determination that the warrant was impermissibly overbroad will stand.⁴

4 It should be noted that this court need not reach the reasonable particularity issue at all; because the warrant was not supported by probable cause, the search violated the Fourth Amendment of the Constitution.

IV. Conclusion. Defendants have not carried their burden of showing new law, newly discovered facts or clear error. For the most part, Defendants either raise new arguments they could have raised initially, or make the same arguments this court rejected in its May 3, 2000 memorandum. As new arguments or mere points of disagreement between the court and a litigant are not proper bases for a motion for reconsideration, see Dodge v. Susquehanna University, 796 F.Supp. 829, 830 (M.D. Pa. 1992), Defendants' motion will be denied.

An appropriate order will follow.

November 20, 2000
Date

A. Richard Caputo
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

KATHRYN LESOINE,	:	
	:	
Plaintiff,	:	NO: 3:CV-98-0764
	:	
v.	:	
	:	(JUDGE CAPUTO)
COUNTY OF LACKAWANNA, et al.,	:	
	:	
Defendant.	:	

ORDER

NOW, this 20th day of November, 2000 IT IS HEREBY ORDERED that:

1. Defendants', Michael J. Barrassé, Esq., Eugene M. Talerico, Esq., Amy Shwed, Esq., John Fox, Joseph Jordan and James M. Reilly, Motion for Reconsideration of This Court's May 3, 2000 Order Pertaining to the Plaintiff's Motion for Summary Judgment or, in the Alternative, Motion for Summary Adjudication Re Declaratory Judgment (Doc. 67) is **DENIED**;
2. Defendant County of Lackawanna's Motion for Reconsideration (Doc. 70) is **DENIED**.

A. Richard Caputo
United States District Judge

Filed 11/21/2000