

SEP 22 2009

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOHN ERIC CARPEGNA,

Defendant - Appellant.

No. 08-30024

D.C. No. CR-07-00013-DWM

MEMORANDUM\*

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOHN ERIC CARPEGNA,

Defendant - Appellant.

No. 08-30398

D.C. No. 9:08-CR-00014-DWM-1

Appeal from the United States District Court  
for the District of Montana  
Donald W. Molloy, District Judge, Presiding

Argued and Submitted September 1, 2009  
Seattle, Washington

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\* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Before: HAWKINS, McKEOWN and BYBEE, Circuit Judges.

John Eric Carpegna (“Carpegna”) appeals two criminal convictions, each for both the receipt and possession of child pornography. Carpegna challenges the district court’s denial of his motion to suppress in the first trial (“*Carpegna I*”), the denial of his motion to dismiss the second indictment (in “*Carpegna II*”), and his sentencing in *Carpegna I* for both receipt and possession of child pornography in violation of double jeopardy principles. We affirm the district court’s denial of the motion to suppress and the motion to dismiss the *Carpegna II* indictment. On the sentencing issue, per the government’s error concession, we reverse and remand.

**A. Motion to Suppress**

Officer Kluesner’s affidavit—which included GB’s (Carpegna’s girlfriend) observations of pornographic videos on Carpegna’s Whitehall computer, Carpegna’s continued payment for internet service after he destroyed his desktop computer, and his shopping for a laptop computer—provided the requisite probable cause that child pornography would be found at Carpegna’s residence, despite the sexual assault having taken place at the girlfriend’s home. *See United States v. Hill*, 459 F.3d 966, 970 (9th Cir. 2006) (citing *Illinois v. Gates*, 462 U.S. 213, 238 (1983)).

In addition, the search warrant specifically authorized the search for evidence to establish Carpegna’s “means, motive, and intent to commit said crime.” Officer

Kleusner’s affidavit provided the requisite probable cause connecting “the evidence sought” to Carpegna’s motive and the “violation of the [sexual assault] statute.” *See United States v. Rubio*, 727 F.2d 786, 793 (9th Cir. 1983). Therefore, the magistrate’s determination was not clearly erroneous.

#### **B. Motion to Dismiss Indictment**

The Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution prohibits a second prosecution for the same offense following a guilty plea. *U.S. Const. amend. V*. Two offenses are distinct in law if each charge requires proof of an element not required by the other. *Blockburger v. United States*, 284 U.S. 299, 304 (1932). Here, both indictments charge *exactly* the same two offenses *in law*—receipt of child pornography in violation of 18 U.S.C. § 2252A(a)(2), possession of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B), and a forfeiture count. Because both offenses are distinct *in fact* (Carpegna was accused of downloading two *separate* sets of images on two *separate* computers during two *distinct* time periods—one pre-arrest and one post-arrest while on release on bond), there is no double jeopardy violation in the bringing of the *Carpegna II* indictment.

#### **C. Sentencing for Both Receipt and Possession of Child Pornography**

The Fifth Amendment’s prohibition on double jeopardy protects defendants from being punished twice for a single criminal offense. *U.S. Const. amend. V*;

*Brown v. Ohio*, 432 U.S. 161, 165 (1977). In analyzing the double punishment issue here, the district court in *Carpegna I* did not have the benefit of intervening authority, which found under *Blockburger*, see 284 U.S. at 304, that one cannot be convicted of both the receipt and possession of the same images of child pornography without violating double jeopardy principles. See *United States v. Davenport*, 519 F.3d 940, 943 (9th Cir. 2008) (“It is impossible to ‘receive’ something without, at least at the very instant of ‘receipt,’ also ‘possessing’ it.”).

Because the district court sentenced Carpegna to 97 months in prison for both receipt *and* possession of the same pornographic images, it committed *Davenport* error. The district court could have rendered this error harmless by sentencing Carpegna under only one of the counts, but did not do so. As such, and because the government concedes error, we find plain error and remand to the district court for a hearing to make a discretionary determination as to which conviction should be vacated. While we appreciate the government’s error concession on this point, we reject its suggestion that the district court be ordered to dismiss the possession count. The ultimate determination of which conviction to vacate lies in the discretion of the district court, not with the prosecutor. See *United States v. Hector*, No. 08-30271, 2009 WL 2501935, at \*4 (9th Cir. Aug. 18, 2009).

**AFFIRMED IN PART and REVERSED AND REMANDED IN PART.**