

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

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| UNITED STATES OF AMERICA |) | |
| |) | |
| v. |) | Criminal No. 06-40 E |
| |) | |
| SCOTT R. McCAUSLAND |) | |

DEFENDANT'S MOTION TO CLARIFY CONDITIONS OF SUPERVISED RELEASE

AND NOW, comes the defendant, Scott R. McCausland, by his attorney, Thomas W. Patton, Assistant Federal Public Defender, and respectfully files his Motion to Clarify Conditions of Supervised Release. In support thereof, counsel states:

Scott pled guilty to one count of conspiracy to commit copyright infringement and one count of copyright infringement. Scott had helped run a web site that made copyrighted movies and music available for download, and had downloaded copyrighted material without paying the copyright holder. Scott made no money from his criminal conduct.

This Court sentenced Scott to 5 months of imprisonment followed by 2 years of supervised release with the first 5 months being served on home confinement. In addition to the standard conditions of supervised release the Court imposed the following two conditions.

6. The defendant shall consent to the U.S. Probation Office conducting periodic unannounced examinations of his/her computer system(s), which may include retrieval and copying of all memory from hardware/software and/or removal of such system(s) for the purpose of conducting a more thorough inspection and will consent to having installed on his/her computer(s) for the purpose of conducting a more thorough inspection and will consent to having installed on his/her computer(s) at his/her expense, any hardware/software to monitor computer use or prevent access to particular materials. The defendant shall consent to periodic inspection of any such installed hardware/software to insure it is functioning properly.

7. The defendant shall provide the U.S. Probation Office with accurate information about his entire computer system (hardware/software); all passwords used by the defendant and his/her Internet Service Provider(s); and will abide by all rules of the Computer Restriction and Monitoring Program.

Scott has served his 5 months of imprisonment and is currently serving his term of supervised release.

After the government seized Scott's computer in May, 2005 as part of its initial investigation, Scott built himself a new computer from components he purchased from several different vendors. Because Scott did not want to pay the several hundred dollars it would cost to buy the Windows operating system, he began using a free, linux-based operating system called Ubuntu. A copy of the Ubuntu home page is attached as Defendant's Exhibit A. Least the Court, or anyone else, believe that Ubuntu is some crazy operating system unknown to the broader world, a copy of the Dell section of the Ubuntu home page is attached as Defendant's Exhibit B showing that Dell sells a line of computers that come with Ubuntu installed as the operating system. Ubuntu has all the normal software applications available in other operating systems. There is a word processor application, spreadsheet application, internet access application etc. Scott has been using this operating system for the past two years.

Scott has been regularly reporting to United States Probation Officer Matthew Rea since his release from prison. During these meetings Scott has provided complete and accurate information concerning his computer, has consented to monitoring of his computer, and has signed the Computer Restriction Monitoring Program Participation Agreement. Scott has not violated any condition of his supervision.

The probation office has a software application that it can install on a supervisee's computer that will monitor, in real time, the use of the computer. This program is designed to run on a computer using the Windows operating system. Counsel has been informed by the probation office

that the monitoring software will not work on any operating system other than Windows. Officer Rea has taken the position that Scott must purchase the Windows operating system and install it on his computer so that the probation office's monitoring software can be utilized and that failure to do so violates the conditions of Scott's release. Scott has politely refused to purchase Windows, as none of the conditions of his supervised release require him to do so.

Scott's conditions of supervised release, as they relate to his computer use, require him to 1) consent to periodic unannounced examinations of his computer system; 2) consent to having installed on his computer any hardware/software to monitor computer use or prevent access to particular materials and the periodic inspection of the software; 3) provide accurate information about his computer system including passwords and his Internet Service Provider; and 4) abide by all rules of the Computer Restriction and Monitoring Program. Scott has done all of these things.

The probation office has filed a Petition on Supervised Release alleging that Scott has violated the general provisions of the Computer Restriction and Monitoring Program. That is not true. The Computer Restriction and Monitoring Program Participant Agreement is attached as Defendant's Exhibit C. None of the general provisions of the Computer Restriction and Monitoring Program, which are contained on page 1, gives the probation office the authority to require Scott to purchase any particular hardware or software. Furthermore, neither Ubuntu or any other operating system are listed on page 2 of the Agreement as software requiring advance approval to purchase.

Counsel and Scott have tried to work with the probation office to reach some reasonable accommodation that does not require Scott to purchase Windows. Mr. Rea has taken the position that the only way in which Scott can use a computer without violating the terms of his supervised

release is to purchase and install Windows. When asked to identify the provision of supervised release that requires Scott to only access a computer using the Windows operating system, Mr. Rea has pointed to the requirement that Scott consent to the installation of monitoring software on his computer. When it has been pointed out to Mr. Rea that Scott has and continues to consent to the installation of any monitoring software the probation office wishes to place on his computer Mr. Rea finds the consent invalid because the probation office's monitoring software will only run on Windows.

While nothing in Scott's conditions of supervised release gives the probation office any authority to mandate the programs Scott runs on his computer, except for monitoring software, Mr. Rea has purported to use his authority under General Provision 3 of the Computer Restriction and Monitoring Program Participant Agreement to forbid Scott from using or possessing Ubuntu, in an attempt to force Scott to run Windows. This is ridiculous. Ubuntu is a free operating system that is widely used. It is not listed in the "Hardware/Software Requiring Advanced Approval" section of the Computer Restriction and Monitoring Program Participant Agreement, so the probation office has obviously concluded that there is nothing inappropriate in a supervisee using the software. The probation office is exercising its authority arbitrarily to try to achieve a result that it does not have the authority to impose. That is wrong.

While a sentencing court has discretion to impose special conditions of supervised release, 18 U.S.C. § 3583(d), those conditions must be reasonably related to the sentencing objectives set forth in 18 U.S.C. § 3553(a) and "must impose 'no greater deprivation of liberty than is reasonably necessary' to deter future criminal conduct, protect the public, and rehabilitate the defendant." United States v. Voelker, 489 F.3d 139, 143-44 (3rd Cir. 2007) (quoting 18 U.S.C. § 3583(d)(2)).

“Conditions of supervised release must be supported by some evidence that the condition imposed is tangibly related to the circumstances of the offense, the history of the defendant, the need for general deterrence, or similar concerns.” *Id.* at 144. In addition, when imposing conditions of supervision the Court may not delegate unfettered discretion to the probation office to resolve issues on an ad hoc and subjective basis. United States v. Loy, 237 F.3d 251, 266 (3rd Cir. 2001).

The danger of delegating too much responsibility to the probation office is highlighted here. Based upon a very broadly worded and interpreted Computer Restriction and Monitoring Program the probation office has sought to impose conditions upon Scott that are broader than those imposed by the Court that involve a greater deprivation of liberty than is reasonably necessary to deter future criminal conduct, protect the public, and rehabilitate Scott.

There is no doubt that some monitoring of Scott’s computer use is warranted by the circumstances of his offense. The conditions imposed by the Court allow the probation office to conduct unannounced inspections of Scott’s computer and to copy all of the memory from the computer. In United States v. Freeman, 316 F.3d 386, 392 (3rd Cir. 2003), the Third Circuit found these conditions sufficient to monitor the computer and internet usage of a defendant convicted of possessing child pornography on his computer and who had a history of sexually molesting young boys. If unannounced inspections of the computer were sufficient to monitor the computer use of a defendant convicted of using the computer to possess child pornography, the same condition must be sufficient to monitor Scott’s computer.

The only real difference between unannounced inspections of Scott’s computer and copying of all the memory and use of the monitoring software that requires Windows to operate is that the monitoring software allows the probation office to monitor computer usage in real time. The lack

of real time monitoring can't be the basis for finding a condition unenforceable, however, as none of Scott's other conditions of supervised release are monitored in real time. Scott has 13 standard conditions of supervision and none of those are monitored in real time. Scott has 9 additional conditions of supervision precluding Scott from illegally possessing a controlled substance, possessing a firearm or ammunition, and placing him on 5 months of home detention. The controlled substance and firearm conditions are not monitored in real time. Electronic monitoring provides real time information as to whether or not Scott is at home but does not give real time information on Scott's whereabouts when he is authorized to be away from home for school or other authorized reasons. Real time monitoring is not necessary for the probation office to monitor every condition of supervision. Given the nature of the offense in this case, copyright infringement for no pecuniary gain, real time monitoring of computer usage is not necessary, and requiring Scott to purchase a new operating system imposes a greater deprivation of liberty than is reasonably necessary to deter future criminal conduct, protect the public, and rehabilitate Scott.

One final aspect of the Computer Restriction and Monitoring Program must be addressed.

The final General Provision of the Program states:

I will provide copies of credit card billing records or other financial records monthly and will not open any new lines of credit without authorization of my supervising officer. I understand that my supervising officer has the authority to request my credit history information to confirm my compliance with the conditions of release and these program rules. My signature on this document signifies my consent for the release of the credit history information.

Defendant's Exhibit C. This condition has nothing to do with computer use. It could be argued that checking credit card billings could reveal whether a supervisee has joined a web site but in this case Scott's offense was uploading and downloading copyrighted materials from free sites. Even

without that distinction, imposing this broad of a financial restriction on a supervisee in the guise of a condition to monitor computer use is far outside the bounds of reasonableness.

WHEREFORE, the defendant, Scott R. McCausland, respectfully requests that this Honorable Court clarify to the probation office that he is not required to purchase the Windows operating system and is not required to provide any financial records or be restricted from opening new lines of credit.

Respectfully submitted,

/s/ Thomas W. Patton

Thomas W. Patton

Assistant Federal Public Defender

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