

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION**

ROCKY CREED KELLY,	:	MOTION TO VACATE
BOP Reg. No. 73284-019,	:	28 U.S.C. § 2255
Movant,	:	
	:	CRIMINAL ACTION NO.
v.	:	2:20-CR-0030-SCJ-AWH-1
	:	
UNITED STATES OF AMERICA,	:	CIVIL ACTION NO.
Respondent.	:	2:25-CV-0120-SCJ-AWH

FINAL REPORT AND RECOMMENDATION

Movant Rocky Creed Kelly, a federal prisoner currently confined at the Federal Correctional Institution in Fort Dix, New Jersey, has filed a counseled 28 U.S.C. § 2255 motion to vacate his 2023 convictions and sentences in this Court for receipt of child pornography, in violation of 18 U.S.C. §§ 2252(a)(2) and (b)(1), distribution of child pornography, in violation of 18 U.S.C. §§ 2252(a)(2) and (b)(1), and possession of child pornography, in violation of 18 U.S.C. §§ 2252(a)(4)(B) and 2252(b)(2). Doc. 135 at 1; see also Doc. 120 at 1. The matter is before the Court on the § 2255 motion, the government's response, and Movant's reply. Docs. 135, 137, 138. For the reasons stated below, **IT IS**

RECOMMENDED that the § 2255 motion be **DENIED**, and that a certificate of appealability be **DENIED**.

I. PROCEDURAL HISTORY

On October 9, 2019, a magistrate judge issued a warrant to search Movant’s residence at 107 Whitestone Road in Talking Rock, Georgia, for computers, computer peripherals, electronic media storage devices, and other evidence of possession of child pornography in violation of 18 U.S.C. § 2252(a)(4). Doc. 18-2 at 2. The warrant was executed on October 15, 2019, and federal law enforcement officers seized a cell phone, a hard drive, two Xbox consoles, and some miscellaneous papers from Movant’s home. *Id.* at 3. On July 8, 2020, a federal grand jury indicted Movant for receipt and possession of child pornography, and subsequently charged him with receipt of child pornography, in violation of 18 U.S.C. §§ 2252(a)(2) and (b)(1) (“Count 1”), distribution of child pornography, in violation of 18 U.S.C. §§ 2252(a)(2) and (b)(1) (“Count 2”), and possession of child pornography, in violation of 18 U.S.C. §§ 2252(a)(4)(B) and 2252(b)(2) (“Count 3”). Doc. 1 at 1–2; Doc. 71 at 1–2.

Prior to trial, Movant filed a motion to suppress evidence seized from the search of his residence and requested an evidentiary hearing pursuant to Franks v.

Delaware, 438 U.S. 154, 165 (1978), based on alleged omissions and misrepresentations in the search warrant affidavit. Doc. 18. The magistrate judge entered a recommendation that the motion to suppress be denied and that no Franks hearing was necessary. Doc. 28. Movant did not file objections to the report and recommendation, and the District Court adopted the report and recommendation as the order of the Court, denying Movant's motion to suppress without a Franks hearing. Doc. 38 at 1.

Movant proceeded to a three-day jury trial in September 2022. Docs. 97, 99, 100. Movant absconded on the last day of trial, and the trial continued in absentia. See Doc. 131 at 3–17. The jury found Movant guilty of all counts. Doc. 102 at 1. The District Court entered a warrant for Movant's arrest, and Movant was arrested in West Virginia on February 2, 2023. Docs. 105, 106, 111. The District Court sentenced Movant an aggregate of 180 months' imprisonment. Doc. 120 at 2.

Movant appealed, raising one claim that the district court erred in denying his motion to suppress because the search warrant was not supported by probable cause and the good faith exception did not apply. See United States v. Kelly, No. 23-12222, 2024 WL 390296, at *1 (11th Cir. 2024) (per curiam). The Eleventh Circuit determined that Movant had waived this claim by failing to object

to the magistrate judge's report and recommendation, and summarily affirmed Movant's convictions and sentences. Id.

The instant § 2255 motion followed. Doc. 135. The government has filed a response to the § 2255 motion, and Movant has filed his reply. Docs. 137, 138.

II. 28 U.S.C. § 2255 MOTION

A federal prisoner may file a motion to vacate his sentence “upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.” 28 U.S.C. § 2255(a). “[T]o obtain collateral relief a prisoner must clear a significantly higher hurdle than would exist on direct appeal.” United States v. Frady, 456 U.S. 152, 166 (1982). No evidentiary hearing is required if the record conclusively demonstrates that the § 2255 movant is not entitled to relief. See Diaz v. United States, 930 F.2d 832, 834 (11th Cir. 1991).

In his § 2255 motion, raises two related grounds for relief. First, Movant asserts that the District Court erred in denying his motion to suppress evidence taken from his home and in denying him a Franks hearing. See Doc. 135 at 4. Movant states that there was no nexus connecting the suspected offense to his

residence, the object of the search warrant, and, as a result, there was no probable cause to support the search of his home, or to sustain the search based on the “good faith” exception. Doc. 135 at 4; Doc. 138 at 3–7. In his second ground, Movant argues that his counsel rendered ineffective assistance for failing to raise the nexus argument in his suppression motion and for failing to object to the magistrate judge’s report and recommendation. Id. at 5. Movant contends that he would have been granted a Franks hearing and his motion to suppress would have been granted but for counsel’s ineffectiveness, and that the case against him was substantially built on evidence obtained from the search of his residence. Id.; Doc. 138 at 9.

With respect to Movant’s substantive claim in Ground 1 that the District Court erred in denying his motion to suppress, “[o]nce a matter has been decided adversely to a defendant on direct appeal it cannot be re-litigated in a collateral attack under section 2255.” United States v. Nyhuis, 211 F.3d 1340, 1343 (11th Cir. 2000). Movant presented this claim on direct appeal, and the Eleventh Circuit found that it was waived based on his failure to object to the magistrate judge’s report and recommendation. See Kelly, No. 23-12222, 2024 WL 390296, at *1. Accordingly, this claim is not cognizable on § 2255 review. However, Movant’s claim of

ineffective assistance of counsel in Ground 2 is properly presented in a § 2255 motion. See Massaro v. United States, 538 U.S. 500, 509 (2003).

The Sixth Amendment right to counsel includes the right to the effective assistance of competent counsel. McMann v. Richardson, 397 U.S. 759, 771 & n.14 (1970). To make a successful claim of ineffective assistance of counsel, a defendant must show that (1) his counsel’s performance was deficient, and (2) the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). Counsel’s performance is deficient only if it falls below the wide range of competence demanded of attorneys in criminal cases. See id. at 687–88. Prejudice occurs when there is a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id. at 694.

A magistrate judge issuing a search warrant must “make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him . . . , there is a fair probability that contraband or evidence of a crime will be found in a particular place.” Illinois v. Gates, 462 U.S. 213, 238 (1983). A “fair probability” is not interpreted as connoting any particular mathematical degree of probability. See Maryland v. Pringle, 540 U.S. 366, 371 (2003) (“The probable-cause standard is incapable of precise definition or

quantification into percentages because it deals with probabilities and depends on the totality of the circumstances Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence . . . have no place in the probable-cause decision.” (internal quotation omitted)). Probable cause can be inferred by considering the type of crime, the nature of the items sought, the suspect’s opportunity for concealment, and normal inferences about where a criminal might hide the fruits of his crime. See United States v. Lebowitz, 647 F. Supp. 2d 1336, 1354 (N.D. Ga. 2009), aff’d, 676 F.3d 1000 (11th Cir. 2012) (citation omitted); see also United States v. Lockett, 674 F.2d 843, 846 (11th Cir. 1982) (“[T]he nexus between the objects to be seized and the premises searched can be established from the particular circumstances involved and need not rest on direct observation.” (citing United States v. Charest, 602 F.2d 1015 (1st Cir. 1979))). Probable cause may be predicated on hearsay or other evidence that would not otherwise be admissible at a trial. United States v. Ventresca, 380 U.S. 102, 108 (1965). “Reliance on the opinions and conclusions of trained and experienced law enforcement officers is appropriate.” United States v. Pineda, No. 1:11-CR-00006-CAP, 2012 WL 2906758, at *9 (N.D. Ga. June 4, 2012) (collecting cases), R&R adopted, 2012 WL 2907447 (N.D. Ga. July 16, 2012).

The warrant affidavit in this case provided that a user on the messaging application Kik, XCGDEADPOOL13, was detected by software to be in possession of a known child pornography image. Doc. 18-1 at 7–8. The email address associated with the user XCGDEADPOOL13 was “xcgdeadpool13@hotmail.com,” and the user provided December 10, 1987, as his date of birth when registering the account, which is the same as Movant’s date of birth. Id. at 8. A Pinterest account “xcgdeadpool13” listed its owner as “Rocky Kelly.” Id. at 8. IP address information for XCGDEADPOOL13 corresponded to an Ellijay Telephone Company account belonging to Movant’s mother at 105 Whitestone Road in Talking Rock, Georgia. Id. at 8–9. Public records revealed that Movant’s parents lived at 105 Whitestone Road, and that Movant, who was a convicted sex offender with a prior conviction for possession of a child pornography, lived next door at 107 Whitestone Road. Id. at 9. There was no internet service at 107 Whitestone Road. Id. at 10. The averring officer checked the addresses at 105 and 107 Whitestone Road and determined that the two houses were located in close proximity to each other, sharing the same driveway and mailbox stand, and separated by a gravel road ten feet wide. Id. at 9–10. There were two wireless networks available in the vicinity. Id. The officer observed Movant walk across the driveway from 107 Whitestone Road to 105

Whitestone Road. Id. The affidavit set out the officer’s training and experience in investigating federal criminal violations related to child pornography, and the officer further averred that, in his previous investigative experience, individuals who intend to view, possess, collect, receive, distribute child pornography “almost always” possess and maintain their copies of child pornographic material in their home or some other secure location. Id. at 4–5, 12.

Here, Movant argues strenuously that there was no information in the warrant affidavit establishing that he accessed or possessed child pornography from his home at 107 Whitestone Road, which did not have an internet connection, and, thus, that there was not a sufficient nexus between the suspected offense and the location searched. Doc. 135 at 4–5; Doc. 138 at 3–9. However, “[p]robable cause does not require direct evidence linking a crime to a particular place. Instead, issuing judges are entitled to draw reasonable inferences about where evidence is likely to be found given the nature of the evidence and the type of offense.” United States v. Wiley, 475 F.3d 908, 916 (7th Cir. 2007) (internal citation omitted). The averring officer recounted the tendency of child pornography possessors to store such material on digital storage devices at their residences, see Doc. 18-1 at 11–13, consistent with numerous similar findings by courts. See, e.g., United States v.

Trader, 981 F.3d 961, 969 (11th Cir. 2020) (“Child pornographers typically keep stashes of child pornography in their houses.”); United States v. Vincent, No. 3:21-cr-00010-TCB-RGV2022, WL 1401463, *3–4, 7 (N.D. Ga. May 3, 2022) (finding affiant’s testimony that people with a sexual interest in minors “[o]ften maintain their collections that are in digital or electronic format in a safe, secure, and private environment, such as a computer, smartphone, or memory device,” and “use online resources to retrieve and store child pornography,” established probable cause to search devices within defendant’s residence); see also United States v. Hampton, 504 F. App’x 402, 404 (6th Cir. 2012) (stating that “[c]ollectors of child pornography . . . rarely if ever dispose of such material, and store it for long periods in a secure place, typically in their homes.” (internal quotation marks omitted)); United States v. Perrine, 518 F.3d 1196, 1206 (10th Cir. 2008) (“The observation that images of child pornography are likely to be hoarded by persons interested in those materials in the privacy of their homes is supported by common sense and the cases.” (internal quotation omitted)), cited with approval by United States v. Vanbrackle, 397 F. App’x 557, 561 (11th Cir. 2010) (per curiam).

As a result, Courts repeatedly have found that a sufficient nexus existed to search a suspect’s residence based on evidence that the suspect was the owner of an

online account that interacted with child pornography, even in the absence of specific evidence connecting the conduct to that residence. See, e.g., United States v. Kinison, 710 F.3d 678, 683–84 (6th Cir. 2013) (noting that “an IP address connecting the subscriber to a particular location is not dispositive” in establishing the requisite nexus to support the search of a home for child pornography); United States v. Terry, 522 F.3d 645, 648–49 (6th Cir. 2008) (finding that probable cause existed to search a home even though the affidavit did not contain direct evidence the child pornography was accessed at home, and only established the individual had at some point forwarded an email containing child pornography); United States v. Wagers, 452 F.3d 534, 540 (6th Cir. 2006) (“[E]vidence that a person has visited or subscribed to websites containing child pornography supports the conclusion that he has likely downloaded, kept, and otherwise possessed the material.”); United States v. Chobrak, 289 F.3d 1043, 1046 (8th Cir. 2002) (evidence connecting defendant to online moniker that posted child pornography provided sufficient nexus to search his home because “he lived there and . . . pedophiles maintain their child pornography in a secure place”), cited with approval by Vanbrackle, 397 F. App’x at 561.

In this case, the warrant affidavit supported a “fair probability” that evidence of possession of child pornography would be found at Movant’s home. Kik user XCGDEADPOOL13 was detected to be in possession of a known child pornography image. Doc. 18-1 at 7. IP address information connected XCGDEADPOOL13 to an internet subscriber at 105 Whitestone Road, Movant’s parents’ house. Id. at 8–9. The date of birth associated with the XCGDEADPOOL13 account, Movant’s use of the same username on a different site, and Movant’s prior conviction for possessing child pornography supported that Movant, not one of his parents, was XCGDEADPOOL13. See id. at 7–10; see also United States v. Raymonda, 780 F.3d 105, 114 (2d Cir. 2015) (“[E]vidence that such persons possessed child pornography in the past supports a reasonable inference that they retain those images—or have obtained new ones—in the present.”). Movant lived at 107 Whitestone Road, which was next door to 105 Whitestone Road and separated by a ten-foot-wide gravel road. Doc. 18-1 at 9–10. Movant had access to both properties. Id. at 10–11. Two wi-fi networks were detectable in the vicinity. Id. at 11. The issuing court was entitled to rely on the opinions and conclusions of a trained and experienced law enforcement officer, and its own experience and common sense, that child pornography possessors typically

keep such materials on digital storage devices at their homes. Id. at 13. These facts supported a “practical, common sense” conclusions that Movant was XCGDEADPOOL13, that Movant accessed child pornography using his parents’ wi-fi or while at his parents’ house, and that there was a “fair probability” that Movant stored these materials on digital storage devices in his home. See Pineda, No. 1:11-CR-00006-CAP, 2012 WL 2906758, at *9. As a result, a sufficient nexus existed to search Movant’s residence, and the search warrant was supported by probable cause. See Gates, 462 U.S. at 236 (“So long as the magistrate [judge] had a ‘substantial basis for . . . conclud[ing]’ that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more.” (quotations omitted)); United States v. Clark, 673 F. Supp. 3d 1245, 1268 (D. Kan. 2023) (“The issuing judge made a commonsense conclusion, based on the affidavit and her everyday knowledge, that those who possess and send child pornography likely retain those images and videos on their electronic devices.”).

Nor was Movant entitled to a Franks hearing. Under Franks, a search warrant may be invalidated only where (1) it contains false statements made with either knowledge of their falsity or reckless disregard for the truth; and, (2) the remaining information contained in the warrant is insufficient to establish probable cause. 438

U.S. at 155–56. In cases involving alleged omissions, the defendant must show that, if the omitted facts were included, then probable cause would be lacking. United States v. Mathis, 767 F.3d 1264, 1275 (11th Cir.2014), abrogated on other grounds by Lockhart v. United States, 577 U.S. 347 (2016). If the warrant would still support probable cause, then no Franks hearing is necessary. United States v. Capers, 708 F.3d 1286, 1296 (11th Cir.2013).

Movant asserts that a Franks hearing was required because the warrant application omitted information that another captured IP address for XCGDEADPOOL13 geolocated to Birmingham, Alabama.¹ See Doc. 135 at 4–5, Doc. 138 at 7–9. However, Movant has not shown that the inclusion of this information would have defeated probable cause. As stated above, other evidence, including other IP address information, Movant’s date of birth, and Movant’s use of the same username on other platforms supported that Movant was XCGDEADPOOL13, and this evidence was sufficient to support a probable cause

¹ Because this is the only potential basis for a Franks hearing briefed by Movant, see Doc. 138 at 7–9, the Court deems any other potential grounds to be abandoned. See Sepulveda v. U.S. Att’y Gen., 401 F.3d 1226, 1228 n.2 (11th Cir. 2005) (“When [a party] fails to offer argument on an issue, that issue is abandoned.”).

finding. See United States v. Ringland, No. 8:17CR289, 2019 WL 77276, at *3 (D. Neb. Jan. 2, 2019) (omission of information of other captured IP addresses with other geographic locations from warrant affidavit in child pornography case did not require Franks hearing where other information related to the suspect's identity established probable cause).

Consequently, because the search warrant was supported by probable cause, and because he was not entitled to a Franks hearing, Movant has not shown that his counsel's performance was deficient or that he was prejudiced by counsel's failure to raise the nexus argument and/or to file objections to the magistrate judge's recommendations. See, e.g., Bolender v. Singletary, 16 F.3d 1547, 1573 (11th Cir. 1994) ("[I]t is axiomatic that the failure to raise nonmeritorious issues does not constitute ineffective assistance."). Accordingly, none of the grounds presented warrant relief and **IT IS RECOMMENDED** that the § 2255 motion be **DENIED**.

III. CERTIFICATE OF APPEALABILITY

Pursuant to Rule 11(a) of the Rules Governing Section 2255 Proceedings, "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. . . . If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C.

§ 2253(c)(2).” Section 2253(c)(2) states that a COA may issue “only if the applicant has made a substantial showing of the denial of a constitutional right.” A substantial showing of the denial of a constitutional right “includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the [motion to vacate] should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” Slack v. McDaniel, 529 U.S. 473, 484 (2000) (quotation omitted). Because reasonable jurists would not debate the resolution of the issues presented, **IT IS FURTHER RECOMMENDED** that a COA be **DENIED**. See id. If the District Court adopts this recommendation and denies a COA, Movant is advised that he “may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22.” 28 U.S.C. foll. § 2255, Rule 11(a).

IV. CONCLUSION

For the reasons stated above, **IT IS RECOMMENDED** that the 28 U.S.C. § 2255 motion [135] be **DENIED** and that a COA be **DENIED**.

The Clerk of Court is **DIRECTED** to terminate the referral to the undersigned United States Magistrate Judge.

SO RECOMMENDED, this 13th day of February, 2026.

A handwritten signature in black ink, appearing to read 'Anna W. Howard', written over a horizontal line.

Anna W. Howard
United States Magistrate Judge