



The Eighth Circuit affirms the District Court's denial of a Defendant's motion to suppress after concluding that the Defendant's pre-arrest interview was not custodial and after finding that the Defendant did not clearly and unequivocally assert his Fifth Amendment right to counsel during the post-arrest interview



January 2018

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Article Source : http://www.patc.com/weeklyarticles/2018_us_v_giboney_chapman.shtml

In *United States v. Giboney*, 863 F.3d 1022 (8th Cir. 2017), the United States Court of Appeals for the Eighth Circuit was asked to consider whether the District Court had erred in denying Defendant Craig Kendall Giboney's motion to suppress his pre- and post-arrest statements that he made to law enforcement officials. The relevant facts are as follows.

In January 2015, FBI Special Agent Kevin Matthews was working undercover investigating the sexual exploitation of children on the website GigaTribe. GigaTribe is a peer-to-peer online forum for sharing videos, images, and music files. A GigaTribe user can create a private network which the user controls by inviting "friends" to join. Once a friend accepts an invitation to join the user's network, both users can browse and download files from each other's shared folders. Additionally, any GigaTribe user can create a "tribe" of users to share files with or to find other users that have similar interests.

On the morning of January 8, 2015, Agent Matthews was logged into GigaTribe from an undercover account with the username "Pedocchio." While posing as Pedocchio, Agent Matthews observed a tribe called "Boytoys" that described itself as a tribe "[a]ll about the boys, young vids, pics, BIBCAMS." "BIB" stands for "boys in bedroom" and "BIBCAM" typically indicates webcam videos of young boys. Among the 551 users in the Boytoys tribe was "Jizzlobber11." Agent Matthews, acting as Pedocchio, invited Jizzlobber11 and other members of Boytoys to join his private network. Jizzlobber11 accepted, thereby granting Pedocchio access to Jizzlobber11's shared files. Agent Matthews downloaded 73 files directly from Jizzlobber11. These files contained images and videos depicting minor children engaged in lascivious displays of their genitals or involved in sexual acts.

Agent Matthews was able to determine the IP address utilized by Jizzlobber11 and, after further investigation, traced the IP address to a residence in St. Charles, Missouri. Police obtained a search warrant for that residence, and on February 26, 2015, six officers arrived at the residence to execute the warrant. Several individuals occupied the house, including Giboney, who was found asleep on a couch in the basement. The officers woke Giboney and escorted him upstairs to join the other occupants in the garage. The officers then seized media equipment from the basement including a laptop (which was found on a table in front of the couch where Giboney was sleeping), two thumb drives, two cell phones, and one external hard drive.

While the other officers executed the search warrant, Detective Jacob Walk, an officer with the Missouri Internet Crimes Against Children Task Force, conducted an audio-recorded interview of Giboney in the living room of the residence. Detective Walk advised Giboney repeatedly during the interview that he was not under arrest and that he was free to leave. Giboney was not placed in handcuffs or otherwise physically restrained, and no weapon was drawn against him. Detective Walk was the only officer questioning Giboney during the

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interview, although another officer interrupted at one point to ask Giboney for the username and password of the laptop in the basement. Giboney provided the information, allowing the officer to log into the laptop and view its content.

While Detective Walk interviewed Giboney, officers learned that the laptop's IP address matched the IP address captured during Agent Matthews's undercover activity on GigaTribe. Sergeant Bosley informed Detective Walk of the match, which suggested to Detective Walk that the basement laptop was the computer that had been sharing videos and images of child pornography on GigaTribe. Detective Walk decided to Mirandize Giboney at that time, but before he could do so, Giboney asked to use the restroom. After confirming with other officers that the restroom had been cleared, Detective Walk informed Giboney that (1) Detective Walk had to accompany Giboney to the restroom because a search warrant was being executed; (2) Giboney could not walk freely around the house; and (3) Detective Walk was not finished questioning Giboney; but (4) it was Giboney's decision whether to continue the interview.

After using the restroom, Giboney stated that he wanted to go outside to smoke a cigarette. Detective Walk accompanied Giboney to the garage where he confirmed that Giboney was still willing to talk to him. Detective Walk then advised Giboney that he had developed new information and wanted to read Giboney his rights before asking more questions. Giboney stated that, if he was going to be arrested, he would "take off," and Detective Walk would "have to come get [him]." Detective Walk replied, "I'm not saying I'm going to arrest you; I was just wanting to know . . . if you wanted to talk." Giboney then began walking down the street. Detective Walk and two other officers followed Giboney and took him into custody after informing Giboney that he was under arrest.

At the police station, Detective Walk conducted a video-recorded interview of Giboney. No lawyers were present. Detective Walk began by reading Giboney his Miranda rights from a form titled "Your Constitutional Rights." Giboney initialed each right after Detective Walk read the right to him out loud. Giboney also verbally acknowledged that he understood each right as it was read to him. When Detective Walk asked whether Giboney understood his right to talk to a lawyer before the interview and to have one present during the interview, Giboney jokingly asked "[s]o does it stop now if I want to get an attorney?" Detective Walk responded, "[I]f at any time you want to stop, man, just tell me and we'll stop."

Detective Walk then asked Giboney to read the section of the form titled "Waiver" out loud. Giboney complied but stated that he would not initial the waiver because the waiver stated: "I do not want a lawyer at this time." Seeking clarification, Detective Walk asked, "[A]re you saying that you don't want to talk to me without an attorney?" Giboney responded, "No, that's not what I'm saying. I'm saying I do want a lawyer and that's saying I do not want a lawyer.... And that's why I do not want to initial that because I do want an attorney if I'm going to be charged with this." Seeking further clarification, Detective Walk asked, "So you want an attorney with you during questioning here. Is that what you're saying? ... So are you saying that you want a lawyer at this time?" Giboney replied, "Oh, at this time. Alright.... Sorry." Giboney then initialed the waiver section of the form, and Detective Walk asked, "[W]ith this waiver in mind, do you want to talk to me?" Giboney replied, "I'll talk to you." The interview proceeded and, though he denied any wrongdoing at first, Giboney ultimately admitted that he had been viewing child pornography for fifteen years.

In March 2015, a federal grand jury returned a two-count indictment charging Giboney with receipt and possession of child pornography. A superseding indictment was later returned adding a charge of transportation of child pornography. Three days before the start of trial, Giboney pled guilty to the three charges in the superseding indictment but reserved his right to appeal. The District Court accepted the plea and sentenced Giboney to thirteen years in prison followed by a lifetime of supervised release.

On appeal, Giboney asserted three arguments in support of his contention that the District Court erred in denying his motion to suppress and erred in denying his pro se motion that the District Court should have dismissed the superseding indictment because the District Court lacked subject matter jurisdiction. As for his pro se jurisdictional argument, the Eighth Circuit found that the argument had “no merit.” According to Giboney, the federal child pornography statutes were unconstitutionally applied in him because the child pornography at issue was transmitted over the internet and, thus, did not physically cross state lines. But, the Eighth Circuit explained that the Constitution’s Commerce Clause confers regulatory authority over the channels and instrumentalities of interstate commerce, and “[t]he Internet is an instrumentality and channel of interstate commerce.” *United States v. Haylik*, 710 F.3d 818, 824 (8th Cir. 2013). Accordingly, the Eighth Circuit held that the District Court correctly rejected Giboney’s pro se jurisdictional argument.

Next, the Eighth Circuit rejected Giboney’s argument that the District Court erred in denying his motion to suppress his pre-arrest statements. Giboney argued that his pre-arrest statements should be suppressed because Detective Walk extracted those statements without first advising Giboney of his Miranda rights. The Eighth Circuit began its analysis by noting that the Fifth Amendment requires that Miranda warnings be given when a person is interrogated by law enforcement after being taken into custody. Because there was no question that Giboney was interrogated by Detective Walk at Giboney’s residence, the only issue was whether the interrogation was custodial.

The ultimate question in determining whether a person is in “custody” for purposes of Miranda is whether there is a formal arrest or restraint on freedom of movement of the degree associated with formal arrest. This determination is not based on the interrogator’s perspective; instead, the only relevant inquiry is how a reasonable man in the suspect’s position would have understood his situation. Courts use six factors in determining whether a suspect is in custody: (1) whether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was free to leave or request the officers to do so, or that the suspect was not considered under arrest; (2) whether the suspect possessed unrestrained freedom of movement during questioning; (3) whether the suspect initiated contact with authorities or voluntarily acquiesced to official requests to respond to questions; (4) whether strong arm tactics or deceptive stratagems were employed during questioning; (5) whether the atmosphere of the questioning was police dominated; and (6) whether the suspect was placed under arrest at the termination of the questioning.”

Here, the Eighth Circuit opined that the facts weighed against a finding that Giboney was in custody when questioned by Detective Walk. Detective Walk repeated told Giboney that he was free to leave and that he was not under arrest, and Giboney confirmed his understanding of this communication. Moreover, the Eighth Circuit held that Giboney’s freedom of movement was not restrained. And, Giboney voluntarily answered Detective Walk’s questions. The Eighth Circuit concluded that the remaining factors also weighed in a determination that Giboney was not in custody, and therefore, the Eighth Circuit concluded that the District Court did not err in denying Giboney’s motion to suppress based upon the fact that Detective Walk questioned him before giving Giboney his Miranda warnings prior to Giboney’s arrest.

Finally, the Eighth Circuit rejected Giboney’s argument that the District Court erred in denying his motion to suppress his post-arrest statements that he made at the police station. According to Giboney, the District Court should have suppressed those statements because the post-arrest interview continued after he invoked his Fifth Amendment right to counsel. The Eighth Circuit disagreed.

The Eighth Circuit began by noting that only a clear and unequivocal request for the assistance of counsel may serve to invoke a defendant’s right. According to the Eighth Circuit, Giboney’s statements were, at best, ambiguous as to whether he desired to have an attorney present for the interview. Therefore, the Eighth Circuit held that Giboney failed to sufficiently invoke his right to counsel, and Detective Walk was not required

to cease the questioning. Accordingly, the Eighth Circuit found that the District Court correctly denied Giboney's motion to suppress his post-arrest statements.