

New Hampshire Superior Court

State of New Hampshire)

v.)

MacMillan)
_____)

No. 03-S-342

ORDER

ROBERT E.K. MORRILL, Presiding Justice.

Defendant, Roland MacMillan, is charged with one count of Certain Uses of Computer Service Prohibited for allegedly using an online instant messenger service to solicit an individual he believed to be under the age of sixteen to engage in a sexual act. See RSA 649-B:4 (Supp 2003). Defendant now moves to exclude the online chat from evidence. The court held a hearing on the matter on February 10, 2004.

On August 22, 2002, Detective Frank Warchol of the Portsmouth Police Department signed on to a general chat room using America On-Line and posed as a fourteen-year-old girl. Defendant allegedly contacted Detective Warchol and solicited him for sexual acts. Detective Warchol captured the on-screen communication using Camtasia software and by subsequently copying and pasting the on-screen dialog into a word-perfect document. Detective Warchol did not receive authorization from the attorney general to intercept this communication.

Defendant argues these acts were an illegal intercept of the online communication and, thus, must be excluded from evidence under RSA 570-A:6 (2001). RSA 570-A:1 (2001 & Supp 2003) defines "intercept" as "the aural or other acquisition of, or the recording of, the contents of any telecommunication or oral communication through the use of an electronic, mechanical, or other device." Here, the court finds Detective Warchol illegally recorded the contents of his online conversation. The Camtasia software functions as an "on-screen recording," analogous to a tape recorder, preserving the online conversation so it can be played back in "real time." In addition, Detective Warchol acquired the contents of the conversation by copying, pasting and saving it in another computer program. If Detective Warchol had not taken these acts, the words of the online communication would no longer exist after the program was exited or the computer was shut down. Accordingly, defendant's motion in limine is GRANTED.

So ORDERED.

February 23, 2004