

# The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2014

PHILADELPHIA, WEDNESDAY, NOVEMBER 5, 2014

VOL 250 • NO. 90 \$5.00 An **ALM** Publication

## Woolly Mammoth Tusk Leads to Child Porn Evidence

BY SARANAC HALE SPENCER  
*Of the Legal Staff*

The hunt for a stolen woolly mammoth tusk that led to a conviction for child pornography has now contributed to the Third Circuit's building case law against the suppression of evidence.

In the summer of 2009, the Bureau of Land Management sent an undercover agent to participate in an Alaskan expedition with a private excursion company that had been suspected of entering protected lands without permission, according to the opinion from the U.S. Court of Appeals for the Third Circuit. Robert Franz, of Plymouth Meeting, Pa., had been on several trips before and was on the 2009 trip when he unwittingly told the undercover agent that he had two mammoth tusks at home—one measuring 36 inches and

*Woolly Mammoth continues on 11*

## Woolly Mammoth

*continued from 1*

the other between six and eight inches.

That prompted the bureau to seek a warrant to search his home.

An attachment to the warrant listed the items to be seized, including the tusks, other artifacts, maps of Alaska, financial records, photographs, emails and any related information stored electronically, according to the opinion. A magistrate judge agreed to seal the warrant and accompanying papers to protect cooperating witnesses, a ruling that led the Bureau of Land Management's agent who executed the warrant to think that the attachment had been sealed, too. He did not give Franz a copy of the warrant or the attachment when Franz asked for them, but verbally explained what they included.

Agents searching the house found pamphlets with nude pictures of minors and files indicative of child pornography on his computer, according to the opinion. They referred the child pornography case to the Federal Bureau of Investigation.

Just over a week after the search, the FBI got a sealed warrant to search the digital storage devices and other things that the Bureau of Land Management had seized.

A year later, in August 2010, Franz pleaded guilty to theft of government property and conspiracy to defraud the United States for the smuggling of the tusk.

In January 2012, Franz was indicted for receipt and possession of child pornography. A jury returned a verdict of guilty on the receipt charge and not guilty on the possession charge. U.S. District Judge Berle M. Schiller of the Eastern District of Pennsylvania sentenced Franz to 60 months in prison in May 2013.

Franz raised several issues on appeal—among them was that the Bureau of Land Management's execution of its warrant was a violation of the Fourth Amendment since he wasn't given a list of particularized items to be seized. The Third Circuit agreed that it was a violation, but it decided that the conduct didn't warrant suppression of the evidence that was seized.

"The question before us is thus not whether there was a constitutional violation; there was," Judge Kent A. Jordan wrote on behalf of the unanimous three-judge panel of the Third Circuit. "The question is whether that violation necessitates the suppression of the evidence obtained pursuant to the Nardinger warrant."

Joseph Nardinger was the Bureau of Land Management agent who executed the warrant.

When the district judge weighed Franz's argument that the evidence should be suppressed, he, too, agreed that the execution of the warrant was a Fourth Amendment violation, but that it did not warrant suppression of the evidence.

"It based its decision on Nardinger's behavior," Jordan said, referring to the district

court. "Specifically, the court noted that Nardinger consulted with the United States Attorney's Office in deciding which documents the government would seek to seal, he verbally described to Franz the items to be searched for and seized when executing the warrant, and he allowed Franz to be present during the search. The court also noted that the warrant was the first that Nardinger had ever prepared or executed."

Franz argued to the Third Circuit that the district court had erred by looking past "the facial invalidity of the warrant and assessing Nardinger's culpability," according to the opinion.

"We disagree and hold that there is no need to exclude evidence based on Nardinger's mistake in failing to present Attachment B to Franz in executing the warrant. More particularly, we reject Franz's argument that a good-faith analysis is unnecessary," Jordan said.

Last month, the Third Circuit ruled in a split en banc decision that decisive evidence collected by police officers through a GPS tracking device in violation of the Fourth Amendment could be used at trial in a decision that magnified the significance of officers' good faith in carrying out investigations.

The 8-5 decision in *United States v. Katzin* was a reversal of the district court's ruling as well as the holding of the initial split three-judge panel of the appellate court that heard the first arguments on appeal. Both of those courts had ruled that the evidence should be

suppressed.

"Franz's argument that a facially deficient warrant renders Nardinger's culpability irrelevant thus runs counter to numerous cases emphasizing that, in examining the totality of the circumstances, we consider not only any defects in the warrant but also the officer's conduct in obtaining and executing the warrant and what the officer knew or should have known," Jordan said. "Nardinger's conduct was, on the whole, objectively reasonable."

Richard Q. Hark of Hark & Hark in Philadelphia represented Franz and doesn't yet know if he will seek rehearing, he said.

"Courts are leaning towards excusing governmental mistakes on the execution of warrants and otherwise unconstitutional searches at the expense of the Constitution," Hark said, referring to the building case law against suppression of evidence.

Patty Hartman, spokeswoman for the U.S. Attorney's Office for the Eastern District of Pennsylvania, which prosecuted the case, said the office is pleased with the decision.

Alicia Friend handled the case for the U.S. Attorney's Office.

*Saranac Hale Spencer can be contacted at 215-557-2449 or [sspencer@alm.com](mailto:sspencer@alm.com). Follow her on Twitter @SSpencerTLI.*

*(Copies of the 47-page opinion in United States v. Franz, PICS No. 14-1757, are available from The Legal Intelligencer. Please call the Pennsylvania Instant Case Service at 800-276-PICS to order or for information.)*