

JUN 23 2008

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DAVID STEIN,

Defendant - Appellant.

No. 07-50201

D.C. No. CR-05-00428-GPS-1

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
George P. Schiavelli, District Judge, Presiding

Argued and Submitted June 2, 2008
Pasadena, California

Before: **KOZINSKI**, Chief Judge, **D.W. NELSON** and **BEA**, Circuit Judges.

1. The affidavit of FBI agent Adrienne N. Mitchell supported the magistrate judge's finding of probable cause. See United States v. Meek, 366 F.3d 705, 712 (9th Cir. 2004).

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

2. Because defendant admitted that his computer contained contraband, the government could not have returned it to him when the original warrant expired. See United States v. Van Cauwenberghe, 827 F.2d 424, 433 (9th Cir. 1987). And before searching the computer, the government obtained an extension of the 60-day period.

3. Defendant was not in constructive custody during the search of his apartment, as he was repeatedly told he was free to leave. See United States v. Kim, 292 F.3d 969, 974 (9th Cir. 2002). And a suspect's request for a lawyer has legal effect only if the suspect is in custody. See Miranda v. Arizona, 384 U.S. 436, 477 (1966).

4. The district court did not abuse its discretion in sentencing defendant to 50 months' imprisonment, 7 months below the bottom of the Guidelines range for his offense level. See Gall v. United States, 128 S. Ct. 586, 594 (2007).

AFFIRMED.