STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC. **SUPERIOR COURT**

(Filed: August 16, 2012)

STATE OF RHODE ISLAND	:	
	:	
vs.	:	**C.A. No. K2-10-422A**
	:	
RUSSELL SMITH	:	

DECISION

LANPHEAR, J. Defendant, Russell Smith, moved to suppress "all evidence obtained by the State derived from the unlawful, illegal search of the Defendant's email account and other searches." Succinctly, Mr. Smith contends that a Stonington, Connecticut police officer improperly entered his private email account and searched his email. Allegedly, the results of this search formed the basis of a search warrant on Mr. Smith's computer to procure additional evidence. Mr. Smith suggests that the emails, the attachments to the emails, and the subsequent results of the search of Mr. Smith's home computer should all be suppressed.

I

Findings of Fact

The Court makes the following findings of fact for purposes of the motion to suppress only. These facts were determined after an evidentiary hearing and by a preponderance of the evidence.

For several years, Mr. Smith lived with Selena Deeghan in Stonington, Connecticut. In 2006 or 2007, Mr. Smith gave the password for his email account to Ms. Deeghan. Shortly thereafter, their relationship failed and Mr. Smith moved to Warwick,

Rhode Island. Mr. Smith and Ms. Deeghan became embroiled in Family Court litigation. Mr. Smith was requesting custody rights for Ms. Deeghan's daughter, though Ms. Deeghan questions whether Mr. Smith is the father. Oddly, while visiting the child, Mr. Smith occasionally left his computer at the Deeghan home, so Ms. Deeghan's new companion could repair it. Ms. Deeghan acknowledges accessing the computer when the computer was at her home in June 2009.

In October 2009, Mr. Smith was given visitation rights for Ms. Deeghan's daughter. Within days of this order, Ms. Deeghan accessed Mr. Smith's email account,[1] though she was not in possession of Mr. Smith's computer. Mr. Smith had never changed his password on the email account. In the next few days, Ms. Deeghan took pictures to the Stonington Police Department, claiming that they were printed from an attachment of Mr. Smith's email. She described the pictures to Officer Marley, who viewed them. Believing it important to verify where the images were located, and how they were transmitted, Officer Marley allowed Ms. Deeghan to use his department computer to type in the password and access Mr. Smith's email, or he typed in the password himself.[2]

Substantial time passed as the complaint was processed through the various Stonington and Rhode Island police departments. After a Rhode Island State Police Officer submitted a court affidavit concerning what Officer Marley learned from Ms. Deeghan (including the email attachments), a Rhode Island search warrant was issued

[1] Ms. Deeghan alleges that she accessed this email one time, in order to locate birthday pictures of the child, and when she did so she found several photographs of child pornography, printed them and took them to the Stonington Police. Given her lack of credibility, the Court cannot adopt this statement as a finding of fact.

[2] While the question of who accessed the email is important, the Court cannot make findings of fact on this issue except to conclude that either Officer Marley or Ms. Deeghan accessed Mr. Smith's email account at the police station. Unfortunately, the testimony was so contradictory and the officer's recollection was limited that the Court cannot make such a finding.

for Mr. Smith's computer.[3] By the time the Rhode Island search warrant was served in August 2010, the internet service provider discontinued the email account. The State did not produce proof of this account, or any independent records of the specific emails at the hearing.

II

Presentation of Witnesses

The high court encourages hearing tribunals to "articulate [their] assessment of the witnesses' credibility." State v. Forbes, 925 A.2d 929, 935 (R.I. 2007).

Ms. Deeghan's credibility is very low, particularly in any matter concerning Mr. Smith. She acknowledges that she is engaged in a custody battle with Mr. Smith, she had been to Family Court "so many times" to try to stop him from seeing her daughter, and she would do "anything and everything" to keep her daughter. She has also accused a second man of fondling one of her daughters, and a third man of rape.[4] Her direct testimony was kept concise. On cross-examination, she became extremely uncooperative and reluctant. This was reflected in her words and demeanor. As she was knowledgeable of computers, her version of the facts seemed odd—that she went on Mr. Smith's email only once, (though she had significant access to the computer itself and continued to have access to his email). It was also odd that she immediately went to an email allegedly containing child pornography. This occurred promptly after Mr. Smith acquired visitation rights for the first time. With the Court questioning her credibility and without any internet provider records to verify her testimony, the Court liberally allowed cross-

[3] The warrant was based on an affidavit as shown in the Court file. However, the warrant application was never placed in evidence.
[4] The Court has no knowledge of whether these accusations were proven.

examination to test her credibility. As indicated, the Court concludes her testimony lacks reliability or credibility.

Officer Marley, the Stonington police officer, was very familiar with Ms. Deeghan but had limited recall of a significant event: Ms. Deeghan's visit to his office with the pornography. While the Officer first testified that he accessed Mr. Smith's email from the police station, he changed his testimony on cross-examination to say that he allowed Ms. Deeghan to use the police department's computer to access the email and the pornography.[5] Officer Marley had no recollection of the location of the images and did no follow-up with the internet provider. Stonington police reports were introduced, but do not reflect what happened at the police department. The Court is not convinced that he recalled much of anything from his meeting with Ms. Deeghan. Given his qualified, inconsistent descriptions of who accessed the email at the police department, the Court can make no findings of fact to a preponderance of evidence—all evidence on the view of the email at the police department is in doubt.

Detective Sheppard from the Rhode Island State Police appeared quite consistent and credible. There is no need to question her credibility. However, she revealed no facts concerning the events in Connecticut or what Officer Marley reported to the Rhode Island authorities. She was unable to explain why the case took so long to be processed to the search warrant.

III

Analysis

"It is well settled that 'a search conducted pursuant to a valid consent is constitutionally permissible.'" State v. Texter, 923 A.2d 568, 576 (R.I. 2007) (quoting

[5] This key fact is central to the question of whether the search was public or private.

State v. Hightower, 661 A.2d 948, 960 (R.I. 1995)). To ensure that the requirements of the Fourth Amendment are fulfilled, the State bears the burden of proving, by a preponderance of the evidence, that a defendant has freely and voluntarily given consent to a search. United States v. Matlock, 415 U.S. 164, 177 94 S. Ct. 988, 996, 39 L. Ed. 2d 242 (1974); State v. Shelton, 990 A.2d 191, 199-200 (R.I. 2010); State v. O'Dell, 576 A.2d 425, 427 (R.I. 1990). However, this is not a time for the defendant to sit idle:

> The proponent of a motion to suppress has the burden of establishing that the challenged seizure violated his own Fourth Amendment rights. . . . It is not enough for a defendant seeking to suppress evidence to show that a Fourth Amendment violation has occurred; rather, some personal infringement must be established. . . . To determine whether a defendant should be allowed to assert infringement of his Fourth Amendment rights, we examine whether the individual had a legitimate expectation that those rights would be safeguarded. State v. Wright, 558 A.2d 946, 948 (R.I. 1989).

Mr. Smith seeks to suppress the emails themselves and any evidence from the resultant search of the computer. He does so, focusing on the odd method by which the State obtained the information via Ms. Deeghan. Concluding it was a Rhode Island matter (though the pictures were found and printed in Connecticut), Officer Marley decided he was "not going to do a report on every detail," so it is unclear what was done at the police station. The Officer never even checked which computer Ms. Deeghan used to locate the pornography.

A request for suppression of an email may be novel, but is becoming more commonplace in our technological world. The Sixth Circuit noted:

> [C]omputers hold [a great deal of] personal and sensitive information touching on many private aspects of life. We recognize individuals have a reasonable expectation of privacy in the content of emails stored, sent, or received through a commercial internet service provider. United States v. Warshak, 631 F.3d 266, 288 (6th Cir. 2010).

See also U.S. v. Yousef, 2011 WL 2899244, 10 (S.D.N.Y. 2011); and U.S. v. Ali, 2012 WL 2190748, 21 (D.D.C. 2012).

With this incomplete set of established facts, it is challenging for the Court to consider the context of the motion to suppress. If Ms. Deeghan performed all of the search independently, merely reporting the final details to the police, it is likely that the search was not conducted by the police at all, and the government merely accumulated the results of what had already been discovered. While the Fourth Amendment prohibits a warrantless entry into a person's home to perfect an arrest or perform a search, Illinois v. Rodriguez, 497 U.S. 177, 181, 110 S. Ct. 2793, 111 L. Ed. 2d 148 (1990), the amendment applies only to a state action, that is, a search or entry by the government. Burdeau v. McDowell, 256 U.S. 465 (1921).

In State v. Von Bulow, 475 A.2d 995 (R.I. 1994), a syringe was located by a private detective and then tested by a private laboratory, at the expense of a family member of the victim. The results were then given to the prosecution. The Court first noted the "Government may not exceed the scope of the private search unless it has the right to make an independent search," Von Bulow, 475 A.2d at 1018 (quoting Walter v. United States, 447 U.S. 649, 647 (1984)). All of the testing of the syringe and other items completed by the individuals were found to be admissible,[6] while the subsequent testing by the State was not, as it significantly expanded the search. The State testing was therefore an unreasonable search without a warrant. Von Bulow at 1018.

[6] "No matter how egregious their actions may appear in a society whose fundamental values have historically included individual freedom and privacy, the exclusionary rule cannot be invoked by the defendant to bar the introduction of evidence that was procured by Alex and Lambert while acting as private citizens." Von Bulow, 475 A.2d at 1012.

Mr. Smith proffers that the computer inquiry at the police station resulted in verification that the images were from Mr. Smith's email, thereby significantly expanding the search results delivered by Ms. Deeghan. Because the child pornography statute requires proof of possession by the defendant, where the pornography was located is of significant importance. This is an "arguably 'private' fact." United States v. Jacobsen, 466 U.S. 109, 123, 104 S. Ct., 1652, 1662, 80 L. Ed. 2d 85 (1984). Consistent with the holding which followed in Jacobsen, our high court had already promulgated a test to measure whether the government has significantly expanded a private search:

> In determining whether the field test constituted a significant expansion of the private search, the trial justice should consider several factors: (1) the experience and expertise, if any, of the agent who first viewed the contents of the plastic bag after the private search; (2) the question of whether in light of the agent's expertise he formed an opinion with a reasonable degree of certainty concerning the nature of the substance without a field test; (3) the extent of the intrusion required in order to perform the field test; and (4) the question of whether such intrusion impinged upon any further expectation of privacy that remained after the exposure of the contents by private persons. Having considered these factors in the context of evidence already presented in the case and such further evidence as the court may deem relevant and necessary, the court may determine whether the agent's application of a field test to the discovered substance was a significant expansion of the private search. State v. Eiseman, 461 A.2d 369, 377 (R.I. 1983).

Here, the expertise of Officer Marley in dealing with computerized pornography was never established. It was never demonstrated that he had formed any opinion regarding whether Mr. Smith "possessed" the pornography. In fact, neither party ever established sufficiently that Officer Marley verified that the images were from Mr. Smith's email account (the alleged "arguably private fact"). We do know, however, that Mr. Smith's privacy was intruded by Ms. Deeghan's alleged review of his email to some degree.

The Circuit Court of Appeals has held that where a boyfriend and girlfriend appear to share a computer, and the girlfriend expands her private search of a computer in their presence but "without the knowledge or encouragement of police," the girlfriend's "apparent authority" justified the private search and the police "reasonably relied" on the girlfriend's "apparent consent to view the images." United States v. Hyatt, 383 Fed. App. 900, 906-907, 2010 WL 2490913 (C.A. 11, 2010).[7]

The forestay for the constitutional requirement of a warrant is to protect the expectation of privacy. This case becomes further nuanced by Mr. Smith's alleged release of his email's password to his former girlfriend. The email address is rarely private, but the password (as its name connotes) protects unauthorized entry into the mail (transmitted and received). By releasing his password to Ms. Deeghan and never changing it thereafter, Mr. Smith authorized Ms. Deeghan's entry into the email.[8]

> [W]e employ a two-step process to determine from the record "whether a legitimate expectation of privacy sufficient to invoke Fourth Amendment protection exists." First we determine whether the defendant "exhibited an actual (subjective) expectation of privacy" and if that expectation is established, then we consider 'whether, viewed objectively,' the defendant's expectation was reasonable under the circumstances." State v. Briggs, 756 A.2d 731, 741 (R.I. 2000) (internal citations and quotations omitted).

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[7] See also State v. Briggs, 756 A.2d 731, 743 (R.I. 2000) where the Court found that once trash was discarded into a communal dumpster, the subjective expectation of privacy was lost.

[8] There are exceptions to the Fourth Amendment's warrant requirement to enter into a home. A warrant is not required in "situations in which voluntary consent has been obtained, either from the individual whose property is searched . . . or from a third party who possesses common authority over the premises. . . ." Rodriguez, 497 U.S. at 181, 110 S. Ct. 2793. The Court found the consent of one "who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared." United States v. Matlock, 415 U.S. 164, 170, 94 S. Ct. 988, 39 L. Ed. 2d 242 (1974). As common authority was sufficient to support the search of a dwelling, it would be valid on a computer email when a third party has "mutual use of the property by persons generally having joint access or control for most purposes. . . ." Id. at 171 n.7, 94 S. Ct. 988. See also State v. Barkmeyer, 949 A.2d 984, 996-997 (R.I. 2008).

In Wright, 558 A.2d at 949, the Court found several factors to be significant in measuring whether the expectation of privacy is diminished, including: "possession or ownership of the area searched or property seized, prior use of the area searched or property seized, the ability to control or exclude others' use of the property, and legitimate presence in the area searched." Here, Mr. Smith no longer had exclusive possession of the email, computer or attachments. He no longer retained the ability to control or exclude others from using the email (though he would have, had he changed the password), and Ms. Deeghan was legitimately allowed to review the email by the use of the password. Mr. Smith no longer had an objective or subjective expectation of privacy so the State did not need a warrant—if it had Ms. Deeghan's consent.

Even if he did retain some right of privacy in the emails, it was never established that the State went on the emails, or went on the email site to verify the location of the pornography. Such a fact is not contained in the State's disclosures, discovery in the court file, the bill of particulars, or the search warrant application. It appears the State will not attempt to prove this alleged fact at trial.

IV

Conclusion

Mr. Smith's Motion to Suppress is denied.