

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS.

SUPERIOR COURT

The State of New Hampshire

v.

Shannon Walters
Docket Nos. 04-S-2103-2107

The State of New Hampshire

v.

Erin Wylie
Docket Nos. 2117-2121

ORDER ON DEFENDANTS' MOTIONS TO SUPPRESS

The defendants are each charged with one count of theft by receiving stolen property, one count of conspiracy to commit burglary, one count of conspiracy to commit theft, and two counts of cruelty to animals. The allegations arose in connection with the drowning of a miniature dachshund dog, which allegedly occurred in Portsmouth, New Hampshire on May 18, 2004. The defendants now move to suppress all evidence the police obtained after their vehicles were stopped at the Dairy Queen in Kittery, Maine, alleging that the police were prohibited from relying on information contained in certain emails to effectuate the stops. Specifically, they claim the emails were obtained in violation of the wiretap statute and thus, any evidence derived from the emails must be suppressed. The State objects. For the reasons stated in this order, the defendants' motions are DENIED in part and GRANTED in part.

Facts

1. Discovery of the Emails

In April, 2003, Traci and James York moved into a duplex at 7 Nichols Avenue in Newmarket, New Hampshire. The Yorks' three daughters and James York's mother lived there as well. Sometime during the late summer of that year, defendant Walters moved into the other half of the duplex with her daughter and a roommate, Veronica.

Over time, Traci and the defendant became friends. Because the Yorks were unable to afford internet service, Traci agreed to baby sit for the defendant's daughter in exchange for sharing an internet account at the defendant's expense. From the fall of 2003 through the early spring of 2004, the Yorks and the defendant shared internet accounts, and provided each other with passwords to access the accounts.

Approximately one month before the defendant's arrest, the defendant and Traci York had a falling out over Traci's suspicions that the defendant and James York were romantically involved. As a result, the defendant changed her internet user password and instructed Traci not to use any of her internet user passwords.

Though there was conflicting testimony presented at the hearing, the court finds, after considering the credibility of the witnesses, that either Traci or James York installed a keylogger program onto the defendant's computer.¹ The keylogger is a device which allowed Traci to intercept and record the defendant's internet user password. After

¹ The court considered several factors in making this determination. First, the court found that Traci York had a significant motive to lie about the manner in which she discovered the emails. In addition, her explanation of how the emails were discovered was inconsistent with other evidence presented. The court also relied on the testimony of Dan Able in determining that Traci York was not credible. Able testified that after the Yorks were evicted from the duplex, defendant Walters asked him to service her computer because its operation appeared sluggish. At that time, Able discovered the keylogger program and told the defendant he removed it. Walters appeared shocked that the program existed. Once Able told the Yorks that he had informed defense counsel of his discovery, the Yorks changed their stories about how the emails were discovered.

surreptitiously obtaining the defendant's password, Traci logged on to the defendant's email account on May 21, 2004, and read a series of email exchanges between defendants Walters and Wylie. The content of those emails revealed that the defendants had stolen a miniature dachshund dog ("the dog") and killed it by drowning it in a bathtub at defendant Wylie's home. One of the emails indicated that the two planned on meeting at the Dairy Queen in Kittery later that night to dispose of the body.

After discussing the emails, the Yorks decided to contact their friend Dan Able, who persuaded his wife, Nicole, to call the police and report the discovery of the emails.

2. Police Investigation

Later during the evening of May 21, 2004, Officer Wayne Stevens was on routine patrol in Newmarket, New Hampshire when he received a call from dispatch requesting him to contact Nicole Able. Ms. Able had just reported the discovery of the email conversations between defendants Walters and Wylie, in which their involvement in the drowning of the dog was revealed. Officer Stevens contacted Ms. Able and she told him that in addition to describing the drowning of the dog, the email conversations indicated defendants Walters and Wylie planned on meeting at the Dairy Queen in Kittery, Maine at 10:00 p.m. that night to dispose of the dog's body. She also told the officer that the dog belonged to Wylie's boyfriend, Pat Collins. Finally, Ms. Able provided a description of the truck, including the license number, color, make and model.

After determining that no dogs had been reported missing in Newmarket, Officer Stevens contacted Kittery dispatch and learned that Pat Collins had recently reported his dog missing to the Elliot police. Detective Jeffery Shisler of the Kittery Police Department was then dispatched to the Dairy Queen and informed that the driver of a pick-up truck

would be meeting another individual in the parking lot to dispose of the body of a stolen dog. The detective was provided with a description of the truck and informed that the dog was located in the bed of the truck, possibly in a toolbox.

At approximately 9:30 p.m., Detective Shisler arrived at the traffic circle and waited in the parking lot of a sandwich shop located across from the Dairy Queen. Twenty minutes after his arrival, he observed headlights of a truck, which was pulling into the Dairy Queen parking lot. The truck matched the description provided by dispatch, including the plate number. At the time the detective observed the truck, the Dairy Queen was closed and no other cars were in the lot. The detective drove around the circle and pulled his cruiser into the Dairy Queen parking lot directly in front of the truck. His lights were not activated.

Detective Shisler then approached the driver's side of the truck, identified himself, and asked the driver, later identified as defendant Walters, why she was in the parking lot. The defendant produced her license and told the detective she was waiting for a friend. The detective then asked the defendant whether there was anything in the truck that should not be there. The defendant said, "No, go ahead and look."

At some point during their exchange, Detective Shisler asked the defendant to get out of the car. He then began illuminating the inside of the truck with his flashlight in search of the dog. When he reached the bed of the truck, he attempted to open an attached toolbox. The defendant became nervous and asked the detective what he was looking for. He told her he was looking for a dead dog. In response, the defendant pointed to a white plastic kitchen trash bag located in the open bed of the truck and told the detective the dog was inside. The detective was able to observe the shape of a small dog through the

plastic. As a result of the observations, the detective radioed dispatch and informed them of his discovery.

The detective then asked the defendant why there was a dead dog in the back of her truck. The defendant told the detective she and her friend discovered the dead dog and were going to deposit it on the side of the road in the hopes that someone would find the dog and dispose of it properly. After hearing her story, the detective told the defendant he did not believe her and further explained that he had been informed the dog was stolen from a residence in Elliot, Maine and subsequently killed. He then asked the defendant if the dog in the truck was the same one that had been reported stolen. The defendant responded that it was.

By the time the detective discovered the dog, other officers had arrived on scene, including Officer Jay Durgin. As Detective Shisler briefed Officer Durgin of the status of the investigation, defendant Wylie, whom Shisler recognized, drove by the Dairy Queen toward route 236. Detective Shisler directed Officer Durgin to stop the Wylie vehicle and inform her that the detective wanted to talk to her at the police station. As requested, Officer Durgin followed defendant Wylie's vehicle onto route 236 and activated his emergency lights. After stopping the car, Officer Durgin approached the driver's side, identified himself, and told defendant Wylie that defendant Walters was under arrest for the drowning of the dog. He asked defendant Wylie whether she would be willing to meet Detective Shisler at the police department to answer questions. Defendant Wylie agreed and drove to the police station where she waited for Detective Shisler.

In the meantime, Detective Shisler arrested defendant Walters, handcuffed her and placed her in the back of his cruiser. The detective testified that approximately 10 – 15 minutes elapsed from the time he stopped the defendant to the time of her arrest.

After placing the defendant in the cruiser, the detective provided her with Miranda warnings and specifically read each Miranda right from a standard statement form. The detective then asked the defendant whether she was willing to talk to him without a lawyer present and she agreed. Subsequently, the defendant provided a statement in which she admitted her involvement in the drowning of the dog. Detective Shisler then transported the defendant to the police station where she was processed. Again, the detective provided the defendant with Miranda warnings and she gave a written statement confirming her previous oral admissions.

After Detective Shisler completed the interview with defendant Walters, he returned to the lobby of the police station where defendant Wylie was waiting to be interviewed. The detective told defendant Wylie that defendant Walters was under arrest for her involvement in the drowning of the dog, and he asked Wylie whether she was willing to meet with him and discuss the events of the past several days. Defendant Wylie agreed. Before the interview began, Detective Shisler advised the defendant that she was not under arrest and that she was free to leave the station at any time. He then provided the defendant with written Miranda warnings and was present when she signed the waiver portion and agreed to an interview. After waiving her rights, the defendant told the detective she and defendant Walters broke into the victim's home, stole the dog and other items, and drowned the dog in a bathtub. Wylie was then arrested and charged with the pending offenses.

Analysis

The defendants challenge the admissibility of the evidence, including the dog and their statements, on several grounds. First, the defendants claim that use of any evidence derived in contravention of the wiretap statute would violate due process under both the State and Federal constitutions and therefore, the evidence must be suppressed. Second, defendant Walters claims that any statements she made at the scene of the traffic stop must be suppressed because she was in custody at the time and Detective Shisler failed to provide Miranda warnings before he questioned her. In a similar argument, defendant Wylie claims she was not provided proper Miranda warnings before making incriminating statements. Finally, defendant Walters claims that any statements she provided after the initial unwarned statements are fruits of the poisonous tree and must likewise be suppressed. The court will consider each argument in turn.

The defendants claim that because Traci York violated the wiretap statute by illegally intercepting defendant Walters' password and using the password to read her emails, the police were prohibited from relying on information contained in the emails to stop Walters' truck on May 21, 2004. As a result, the defendants claim all evidence derived from the emails, including the dog and their subsequent statements, should be suppressed. In contrast, the State first argues that the Yorks did not intercept the email password and thus, the wiretap statute does not apply. Second, the State claims that even if the emails were improperly intercepted, the evidence should not be suppressed because the police did not participate in the intercept and were unaware that the emails were improperly intercepted at the time of the stop.

First, the court considers the State's argument that the Yorks did not illegally intercept the internet password. As previously stated, the court finds that either Traci or James York installed a keylogger program onto defendant Walters' computer and used that program to record Walters' internet password and access her email. Further, using this program to record the password is an "intercept" within the meaning of RSA 570-A. RSA 570-A:1, III 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 any electronic, mechanical, or other device." In this case, the Yorks used a device, the keylogger program, to record Walters' password, in violation of RSA 570-A:2, I(a).

In the alternative, the State argues that even if the court found the emails were illegally intercepted State v. MacMillan, __ N.H. __ (April 1, 2005) (slip op.), would permit the introduction of the emails if the Yorks could independently recall the contents. The court disagrees. In MacMillan the officer who intercepted the communication was simultaneously conversing with the defendant through instant messaging. Thus, had the officer never recorded the information, he nonetheless would have had an independent recollection of his instantaneous conversation with the defendant. Here, the Yorks were not party to the email conversations simultaneous with their interception. Instead, they illegally obtained the information after the conversations had occurred. Thus, had there been no intercept, the Yorks would have no knowledge of the contents of the emails.

Next, the court determines the admissibility of the intercepted information and the evidence derived from the Yorks' intercept of the password. The exclusionary provision of the wiretapping statute states:

Whenever any telecommunication or oral communication has been intercepted, no part of the contents of such communication and no

evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court . . . if the disclosure of that information would be in violation of this chapter.

RSA 570-A:6.² The plain language of the statute requires suppression of the intercepted emails and any evidence derived from the emails, in this case, the dog and the defendants' admissions. The State, however, urges the court to adopt a "good faith" or "clean hands" exception to the exclusionary provision of RSA 570-A:6. Specifically, the State argues that where, as here, the police are not involved in the intercept and have no knowledge that the emails were obtained illegally, the statute should not apply.

Although the question of whether to apply such an exception to RSA 570-A:6 is one of first impression in New Hampshire, the issue has arisen in numerous courts regarding the federal wiretapping statute. Courts are divided on whether to apply the clean hands principle to 18 U.S.C. § 2515, with a majority of the courts rejecting the principle. Compare United States v. Vest, 813 F.2d 477, 481 (1st Cir. 1987) (declining to read a clean hands exception into section 2515 because to do so "would eviscerate the statutory protection of privacy from intrusion by illegal private interception") (quotation and citation omitted) with United States v. Murdock, 63 F.3d 1391, 1402-03 (6th Cir. 1995) (applying clean hands exception because "[t]here is nothing in the legislative history which requires that the government be precluded from using evidence that literally falls into its hands" and suppression of the evidence would have no deterrent effect).

The court finds more persuasive the reasoning of those jurisdictions rejecting the clean hands exception. As in the federal statute, the plain meaning of RSA 570-A:6 "mandates the suppression of any intercepted wire or oral communication and any 'evidence derived' from that communication if the disclosure of that information would be in

² This language mirrors the exclusionary language of the federal wiretapping statute, 18 U.S.C. § 2515.

violation of [RSA 570-A].” Commonwealth v. Damiano, 444 Mass. 444, ___ (2005) (quotation and citation omitted). Moreover, “[n]othing in the literal language of the statute indicates that [RSA 570-A] permits the government, in cases such as this, to disclose the contents of an illegally intercepted wire or oral communication when the government was not the unlawful interceptor of the communication.” Id.

Those courts rejecting a good faith exception have also considered the legislative history of the federal wiretap statute in concluding that a literal interpretation of the statute is appropriate. That is because “the basic purpose of the statute is to protect the privacy of wire and oral communications.” Id. (quotation, citation and brackets omitted); see also Vest, 813 F.2d at 481 (“protection of privacy from invasion by illegal private interception as well as unauthorized governmental interception plainly ‘play[s] a central role in the statutory scheme’”).

This conclusion is consistent with the New Hampshire Supreme Court’s rejection of a good faith exception in the Fourth Amendment context. In State v. Canelo, 139 N.H. 376, 386-87 (1995), the New Hampshire Supreme Court discussed the history of the federal exclusionary rule beginning with Weeks v. United States, 232 U.S. 383 (1914) through those cases adopting exceptions to the federal rule and the purpose of the exclusionary rule expressed in those opinions. Canelo, 139 N.H. at 383-85. The New Hampshire Supreme Court recognized a shift in the stated purpose of the federal rule, from a remedy for those whose Fourth Amendment rights were violated to a greater emphasis on the rule’s function to deter police misconduct while conducting searches and seizures. Id. Finally, in 1984, the United States Supreme Court decided United States v. Leon, 468 U.S. 897 (1984) and adopted the good faith exception to the federal exclusionary rule. In Leon, the

Court stated that the sole purpose of the federal exclusionary rule was to deter police misconduct and, thus, if an officer relied upon a warrant in good faith, there was nothing to deter. Canelo, 139 N.H. at 384-85 (quoting and citing Leon, 468 U.S. at 916, 921).

The Canelo Court then distinguished the evolution of the exclusionary rule under the New Hampshire Constitution, viewing “the exclusionary rule as a logical and necessary corollary to achieve the purposes for which prohibitions against unreasonable searches and seizures were constitutionalized.” Id. at 386. While recognizing “that deterrence of police misconduct is a central aim of the exclusionary rule,” the New Hampshire exclusionary rule also serves to protect “our citizens’ strong right of privacy inherent in part 1, article 19” and the probable cause requirement for the issuance of warrants. Id. at 387 (citations omitted). The Court thus concluded a good faith exception was incompatible with and detrimental to the range of purposes served by the constitutional exclusionary rule. Id.

In conclusion, the court declines to adopt a clean hands exception here. The language of the statutory exclusionary provision is clear and contains no such exception. In addition, the wiretap statute evinces a purpose to protect the public’s privacy interests from private as well as government intrusion.

The court’s analysis, however, does not end here. Because the court finds the statements the defendants made at the police station were sufficiently attenuated from the initial intercept, they were not “derived” from the illegal interception and are therefore admissible. The analysis contained in Commonwealth v. Damiano, supra, is instructive. In that case, the Supreme Judicial Court of Massachusetts considered a factually similar scenario in determining the admissibility of evidence allegedly “derived” from an illegal interception. The Damiano Court recognized that “[i]n using the language ‘no evidence

derived therefrom' in § 2515, 'Congress expressly adopted a "the fruit of the poisonous tree" doctrine for wiretap evidence,' and with it the correlative attenuation rule." Id. (citations omitted).

"The 'fruit of the poisonous tree' doctrine requires the exclusion from trial of evidence derivatively obtained through a violation of Part 1, Article 19 of the New Hampshire Constitution." State v. Cobb, 143 N.H. 638, 650 (1999) (citation omitted). "[T]he question to be resolved is whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Id. (quotation and citation omitted).

In this case, the primary illegality is the unlawful interception of Walters' password and the use of the password to read the emails. The police based their stop of both defendants on the information contained in those emails. Thus, the discovery of the dog in Walters' truck and Walters' statements at the scene of the stop were dependent upon the illegal intercept. See Damiano, 444 Mass. at _ (finding marijuana seized during arrest that was based upon information gained through an illegal intercept by a private actor was dependent on the underlying illegality). Accordingly, the dog and the statements defendant Walters made at the scene and in the cruiser are suppressed.

The admissibility of the defendants' statements at the police station post-Miranda requires further analysis. To determine whether a confession has been tainted by a prior unlawful arrest, the New Hampshire Supreme Court has applied the following test:

For the defendant's statements to be admissible, we must determine whether the act of giving the statement was sufficiently a product of the defendant's free will so as to break the causal connection between the illegality and the confession. In making this determination, we consider

the following four factors: (1) whether Miranda warnings were given; (2) the temporal proximity of the arrest and the confession; (3) the presence of intervening circumstances; and (4) the purpose and flagrancy of the official misconduct.

State v. Cowles, ___ N.H. ___, ___ (June 21, 2005) (slip op. at 2). The court “look[s] to these factors for guidance, albeit in the context of a different form of illegality, and one not involving the police or other government officials.” Damiano, 444 Mass. at ___.

Defendants’ statements at the police station were made after both defendants were read and waived their Miranda rights. See id. (stating “the administration of Miranda warnings clearly favors admissibility of the defendant[s]’ statements” (quotation and citation omitted)). Walters was read and waived her Miranda rights twice, once in the police cruiser at the scene of the stop and later at the police station where she gave a written statement. Although the court determines that Walters’ post-Miranda statements at the scene of the stop should be suppressed because of the wiretap violation, the reading and waiver of those rights is an intervening factor weighing in favor of the admissibility of her later statements made at the police station. In addition, the interviews were brief and conducted in a non-coercive manner.

Defendant Wylie voluntarily drove herself to the police station to answer questions after being stopped by the police. At the station, the police informed her she was not under arrest and was free to leave. Then, she was read her Miranda rights and effectively waived them prior to giving her statement. Thus, with respect to both defendants, Miranda warnings were given, supporting a finding that the statements were a product of each defendant’s free will.

Next, the court considers the temporal proximity of the arrest and the confession. Although it is unclear exactly how much time elapsed between the illegal intercept and

the defendants' statements at the police station, "the span of time, by itself, is not determinative of admissibility." Id. at 3. It appears that several hours elapsed from the time Traci York read the emails to the stop in Kittery. From that point, Detective Shisler testified 10-15 minutes elapsed until Walters was arrested and read her Miranda rights for the first time. Her subsequent statement at the station was taken shortly thereafter. Wylie's statement was taken following the completion of Walters' interview. Though the elapse of time is not a strong indicator in this case, the lack of immediate temporal proximity between the stop and the second statement supports a finding of admissibility.

Finally, the court considers the purpose and flagrancy of the police misconduct. In this case, the police did not instigate or participate in the illegal intercept. Nor did the police have any knowledge of the illegality of the information they received at the time of the stop and subsequent statements of the defendants. Indeed, the police believed Traci York obtained the information from an email account she shared with defendant Walters. "[T]he complete lack of police involvement in the underlying illegal interception is not an insignificant fact in assessing the necessary reach of the exclusionary rule and the adequacy of the attenuating circumstances in the context of a criminal investigation and prosecution." Damiano, 444 Mass. at ___ (citation omitted). In addition, the police had a duty to act on the tip of illegal activity that they received. They received the tip the same evening that the meeting at the Dairy Queen was to take place, leaving the police with little to no time to determine the legality of the email information. See id. Balancing these four factors, the court finds the defendants' statements at the police station to be purged of the taint of the illegal intercept.

In summary, the court determines that the Yorks' interception of Walters' password and their subsequent copying and reading of the emails violated the wiretap statute. As a result, the contents of the emails may not be admitted at trial through the testimony of any witness. In addition the court finds that the initial statements Walters made at the scene, and the discovery of the dog constitute "evidence derived" from the intercepts and are therefore inadmissible. Finally, the court determines that the statements made at the police station were sufficiently purged of the original taint resulting from the intercepts as to be admissible.

Because the court has determined that defendant Walters' statements at the scene of the stop must be suppressed under RSA 570-A:6, the court does not address her argument these statements should be suppressed for alleged Miranda violations.

So Ordered.

Date: June 23, 2005

Tina L. Nadeau
Presiding Justice