People v Covlin
2017 NY Slip Op 33415(U)
June 12, 2017
Supreme Court, New York County
Docket Number: Index No. 04339/15
Judge: Daniel Conviser
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY CRIMINAL TERM: PART-95

THE PEOPLE OF THE STATE OF NEW YORK

Ind. No.: 04339/15

-against-

DECISION & ORDER

RODERICK COVLIN,

Defendant.

DANIEL P. CONVISER, J.:

The Defendant moves to controvert seventeen search warrants[1] issued by courts of concurrent jurisdiction and suppress physical evidence connected to the issuance of those warrants as having been obtained in violation of his rights under the Fourth Amendment to the United States Constitution. In the alternative, the Defendant moves for a hearing pursuant to *Mapp v. Ohio*, 367 US 643 (1961) to determine whether physical evidence attributable to the Defendant was lawfully obtained. For the reasons outlined below, the Court holds that the Defendant does not have standing to contest 15 of the 17 search warrants at issue here. For that reason, the motions directed to those 15 warrants are denied.

The Court is reserving decision regarding the two warrants for which the Court (and the People) believe the Defendant does have standing (which are denominated here as Warrants ## 2 & 3.). The Court will contact the parties to schedule an on-the-record conference with respect to

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[1] Though the Defendant's moving papers state that this motion is made with respect to 19 search warrants (*see* Defense Counsel's Affirmation in Support of Omnibus Motion, at p. 22, ¶ 52), there are only 17 search warrants specifically challenged. The Court will refer to the 17 warrants as they are listed in Exhibit "O" of the People's Affirmation in Opposition to Defendant's Omnibus Motion (the "People's Affirmation").

those warrants because the Court would like additional information about what content from the Defendant's computer (with respect to Warrant # 2) and cell phone (with respect to Warrant # 3) the People believe was validly seized during those warrant executions.

Search Warrant #1

The first warrant at issue here was executed at the home of the Defendant's parents, where the Defendant previously resided. A defendant must show that he has a legitimate expectation of privacy in the area or objects searched by the police prior to having standing to suppress any physical evidence seized by law enforcement. *People v. Ponder*, 54 NY2d 160 (1981). The burden of establishing a reasonable expectation of privacy in support of a finding of standing falls on the defendant. *People v. Rodriguez*, 69 NY2d 159 (1987).

A defendant need not necessarily acknowledge possession or ownership of items seized in a residence to have standing conferred; rather, he may articulate other factors of connectedness and privacy, such as a change of clothes or sharing expenses or household burdens, which may alone or in combination support his position that he has a reasonable expectation of privacy which is protected by the Fourth Amendment. *People v. Rodriguez*, *supra* at 163.

A defendant has no standing to controvert or challenge a search warrant for a residence if he fails to demonstrate that he resides or has a reasonable expectation of privacy in the residence. *People v. Geraghty*, 212 AD2d 358 (1st Dept 1995), *appeal denied*, 85 NY2d 938. Where a defendant has failed to establish standing to controvert a search warrant substantive arguments concerning its validity need not be addressed. *People v. Prodromidis*, 276 AD2d 912 (3d Dept 2000).

The former residence of a defendant where his parent currently resides and in which he is

physically present at the time of the execution of a search warrant, without more, does not establish a sufficient expectation of privacy to confer standing to controvert the search warrant. *People v. Glenn*, 140 AD2d 623 (2d Dept 1988), *appeal denied*, 72 NY2d 918; *see also*, *People v. Leach*, 21 NY3d 969 (2013) (no standing for grandchild defendant in guest room reserved for grandchildren in grandmother's home). In *People v. Ortiz*, 83 NY2d 840 (1994) the Court found no standing where the defendant visited his girlfriend's apartment once or twice a week and only stayed overnight at times, despite the fact that the Defendant paid expenses for the apartment. In *People v. Mason*, 248 AD2d 751 (3d Dept 1998), *lv denied*, 100 NY2d 564 (2003), on the other hand, standing was found where the Defendant stayed at a third party location at least four times per week and kept extra clothes there.

Here, concerning Search Warrant #1 (authorizing a search of 23 Carriage Court - the residence of the Defendant's parents) the Defendant relies in part on representations by the People that the Defendant was observed at the location on "multiple occasions"[2] between April 29th and May 8th of 2010, that he played with his children in the yard of the location, and that the location is listed in Verizon records as the account address for the Defendant.[3] The warrant was signed on May 28, 2010. In this Court's view, these assertions are insufficient to establish an

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[2] Though not specified in Defendant's moving papers, the affidavit in support of a search warrant for 23 Carriage Court of Detective Carl Roadarmel states that based on information provided by an investigator, Anthony Romano, the Defendant was observed by him exiting the residence on May 8, 2010 and that Mr. Romano was informed by another investigator known to him that the Defendant again exited the residence on the evening of May 1, 2010 at approximately 7:58 P.M. after having played with his children in the yard of the location that same afternoon. *See* Affidavit in Support of Search Warrant of Detective Carl Roadarmel (Roadarmel Affidavit), ¶19.

[3] *Id.*, ¶¶ 24, 25.

expectation of privacy in the residence to confer standing on the Defendant to controvert Search Warrant #1.[4]

In this Court's view, the authorities cited by Defendant in support of his claim that he has standing to controvert Search Warrant #1 are inapposite.[5] In *People v. Lewis*, 94 AD2d 44 (1st Dept 1983) the Court rejected the People's claim that the Defendant could not have standing in an apartment he did not live in and noted that the question with respect to such standing issues was whether the defendant had a reasonable expectation of privacy in a premises. In *Lewis,* however, the defendant maintained a change of clothes in the residence which was confirmed by recovery of the defendant's pants in a dresser drawer. He was found lying on a bed in a bedroom of the apartment which was searched. No equivalent facts exist here.

In *Davis-Payne v. Galie*, 2015 WL 7573241 (WDNY 2015), also cited by the Defendant, the court found that a reasonable expectation of privacy in a third party's residence was established by the defendant, who was physically present inside the location at the time the police entered the residence, on the grounds that she was an overnight guest. Evidence was presented that the defendant and her children were frequent overnight guests at the location, that the defendant had been entrusted to remain alone at the location numerous times, and that the defendant and her children together kept clothing in the location as well as stayed there for multiple days and nights at a time.

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[4] Though the Court has not personally seen it, the Roadarmel Affidavit states that New York State Supreme Court, Civil Term (J. Gesmer) issued an order barring the Defendant from 23 Carriage Court with the exception that he visit with his children at the location at specified times. *Id.*, ¶¶17, 18.

[5] *See* Defendant's Reply to People's Affirmation in Opposition to Omnibus Motion, p. 11, ¶¶29-31.

Finally, in *People v. Moss*, 168 AD2d 960 (4th Dept 1990) standing was established with respect to a residence that the defendant had been thrown out of two weeks prior to the search. In that case, the Defendant continued to keep clothing and personal effects inside the residence and returned several times to see his children there. The defendant also had access to the home when the lessee was not present and was in fact present at the home on three separate occasions on the date of the search, the last of which was 20 to 25 minutes before the search. The court also found it relevant that the defendant may have slept overnight in the residence the night before the search and that there was no evidence that the defendant maintained any other place of residence.

There has been no evidence adduced that Mr. Covlin was physically present inside his parents' home when the police entered to execute Search Warrant #1. Though reference has been made to the Defendant playing with his children in the yard prior to the execution of Search Warrant #1, no facts have been presented to establish the Defendant spent any significant time inside the residence either by himself, while caring for his children, or spending time with his parents. Nothing establishes that he ever stayed overnight or that his parents trusted him to be alone inside their home.

The fact that the Defendant's cell phone had his parents' home listed as the address for his cell phone account is certainly a relevant fact to consider here. However, given the absence of other indicia linking the Defendant to his parents' address the Court does not find this controlling. There is no evidence the Defendant had a utility bill, cable bill, tax bill or other indicia of ownership, rental or control of his parents' property. Even if it is assumed that the Defendant by virtue of his filial relationship was authorized to have access to the interior of his parents' residence there is no indication that he in fact availed himself of such access to the

degree that it may be said that he had a reasonable expectation of privacy. *See People v. Harris*, 96 AD3d 502 (1st Dept 2012), *affirmed on other grounds*, 21 NY3d 739 (2013). Since the Defendant does not have standing to contest the legality of search warrant #1 his motion with respect to that warrant is denied.

Search Warrants ##4-17[6]

As stated above, the threshold question concerning the Defendant's application to controvert these warrants is whether he has a reasonable expectation of privacy in the place searched. In each of these warrants, the place searched is the computer server of an internet service provider (ISP). The servers contain stored digital content of information transmitted by users such as the Defendant. The Defendant refers collectively to these search warrants as the "Data Search Warrants" and complains of their overbreadth at encompassing over four-years worth of digital communications between the Defendant and his family.

The mere surrendering of property to a third party does not of itself always terminate a legitimate expectation of privacy; however, the burden rests with the Defendant to establish such an expectation. *People v. Whitfield*, 81 NY2d 904 (1993). In the case of *In re 381 Search Warrants Directed to Facebook, Inc.*, 132 AD3d 11, 21 (1st Dept 2015), *affirmed*, 2017 NY Slip Op. 02586, the First Department stated:

> [U]sers generally entrust the security of online information to a third party, an ISP. In many cases, Fourth Amendment doctrine has held that, in so doing, users relinquish any expectation of privacy (*see Smith v. Maryland*, 442 U.S. 735, 99 S.Ct. 2577, 61 L. Ed2d 220[1979]). The Third-Party Doctrine holds that knowingly revealing information to a third party relinquishes Fourth

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[6] These warrants will be addressed together since the nature of the materials sought in each consists of documentation from non-party internet companies.

> Amendment protection in that information . . . While a search warrant and probable cause are required to search one's home, under the Third-Party Doctrine only a subpoena and prior notice (a much lower hurdle than probable cause) are needed to compel an ISP to disclose the contents of an email or of files stored on a server.

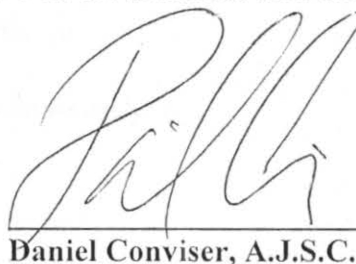
In its decision in *People v. Thompson*, 51 Misc3d 693, 709-715 (New York County Supreme Court 2016) this Court provided an extended critique of the First Department's assertion that the third-party doctrine precludes Fourth Amendment protections when a person's sensitive personal information is provided to an internet service provider, as, for example, when a person establishes an e-mail account. The application of the third-party doctrine to abrogate Fourth Amendment protections in such situations is contrary to the conclusions other courts have reached on the identical issue and this Court continues to respectfully believe the First Department's position on the issue is incorrect.

Judge Wilson's single judge dissenting opinion in *Facebook* also addressed this issue in an extended footnote, which referenced this Court's decision in *Thompson* (n.6, [Wilson, J., dissenting]). There, Judge Wilson said the First Department's conclusion on the third-party issue "should be vacated or regarded as dicta" and cited this Court's *Thompson* decision for the proposition that the First Department has "misled our trial courts" on the issue.

In this Court's view, however, the First Department's clearly stated, recent unanimous six judge conclusion on the third-party issue should be followed here, despite this Court's disagreement with it. There is certainly an argument that the First Department's conclusions on the issue can be considered *dicta,* and those conclusions were not the basis on which the Court of Appeals affirmed the First Department's judgment in the *Facebook* case. But that does not mean

that this Court should not abide by those conclusions here. Notably, in this Court's view, neither the Court of Appeals' four judge majority, nor Judge Rivera's concurring opinion expressed any concern about the First Department's third-party doctrine assertions or expressed any agreement with Judge Wilson's assertions on the issue, although they obviously could have done so. This Court may be technically empowered to reach a contrary conclusion on the third-party doctrine. In light of the First Department's and Court of Appeals' recent jurisprudence on the issue as reflected in the *Facebook* decisions, however, this Court declines to do so.

Application of the third-party doctrine as applied by the First Department in *Facebook* means the Defendant has no standing to challenge Search Warrants ##4-17. The Defendant also lacks standing with respect to some of the materials seized pursuant to those warrants for other reasons. Some of these seizures concern accounts other than the Defendant's and must be denied for the additional reason that he has no standing to contest seizures of accounts which are not his own.[7] Some concern Facebook postings which are designed to be disseminated to at least some third parties. The motion to suppress those seizures is therefore denied. For all of those reasons, the Defendant's motions directed to Search Warrants ##1 & 4-17 are denied in their entirety.



June 12, 2017

Daniel Conviser, A.J.S.C.

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[7] *See* People's Affirmation, ¶ 21 (outlining accounts included in the warrants of the Defendant's two children, Anna and Miles Covlin and the Defendant's former girlfriend, Debra Oles.)