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Case Number 205,2015

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CHRISTOPHER WHEELER, Defendant Below, Appellant,	)	
v.	)	No. 205, 2015
STATE OF DELAWARE, Plaintiff Below, Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. THE SUPERIOR COURT ERRED IN DENYING WHEELER'S MOTION TO SUPPRESS.

A) The search warrant affidavits failed to establish probable cause that Mr. Wheeler had committed the crimes of witness tampering.

Asserting that ample probable cause existed within the four corners of the Superior Court search warrants that authorized a boundless search of Mr. Wheeler's home, office, and entire digital world for evidence of witness tampering, the State writes, "*Prior to October 22, 2013, the Wilmington Police Department received reports from multiple sources that Wheeler had engaged in and was continuing to engage in a pattern of sexually abusing minor male children whom he thereafter offered to compensate or 'pay off.*'" Ans. Brief at p. 11[1]. However, the State's claim is not supported by the information contained within the search warrants. [A26-29, 38-42].

The Wilmington Police never received a single complaint related to Mr. Wheeler nor interviewed a single witness. Rather, the search warrants were orchestrated and drafted by the Attorney General's Office, whose own "in house"

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[1]In defending the search warrants, the State again writes on pages 12-13 of their Answering Brief, "*As a result of the information received by the Wilmington Police Department, a pattern of behavior emerged whereby Wheeler would sexually abuse minor boys and then pay them off or offer to do so.*"

investigators interviewed the Wagner brothers and the other persons identified in the search warrant affidavits. The affidavits accurately reflect that the reason the Wagner brothers approached the Attorney General's Office in October 2013, was to inform Delaware about what occurred in Pennsylvania over 30 years prior, when Wheeler lived with the Wagner family. The Wagners never alleged that they were being bullied or intimidated by Wheeler.

The only other "source" was Kolya Wheeler, who was not interviewed by any Delaware law enforcement officer. Rather, Kolya[2] on October 8th, 2013, while intoxicated and in police custody for a psychological evaluation, allegedly remarked to a South Carolina police officer that he had been molested by Wheeler, yet never reported the abuse "*because his father would pay him off*," further indicating "*it occurred when they lived in Illinois.*" [A28, 40-41]. Absent any effort by Delaware authorities to speak with Kolya to corroborate the allegations or obtain any context as to the alleged "pay offs," the State's assertion that Wheeler "*was continuing to engage in a pattern of sexually abusing minor male children whom he thereafter offered to compensate or 'pay off,'*" is groundless.

Defending the proposition that Wheeler's "*conduct ... constitute[d] violations of the Act of Intimidation statute, 11 Del. C. §3532, and the Tampering*

[2]Age 23 at the time.

With a Witness statute, 11 Del. C. §1263(3),"[3] the State fails to identify any act of malice or intimidation perpetrated by Wheeler. Yet, the State asserts, "*Most notably, the affidavits stated that, when corresponding with S.W.* (Sam Wagner), *Wheeler acknowledged his responsibility for sexual abuse when S.W. was 12 or 13 years old, and, he (Wheeler) would await further instructions concerning the payment of 'restitution' to S.W.*" State's Ans. Brief at p. 13. Above and beyond the fact that Sam Wagner was the party who first mentioned restitution,[4] there is nothing "criminal" about resolving matters through restitution or civil redress. As this Court is aware, 10 Del.C. §8145 (Delaware's Child Victim's Act), allows plaintiffs to file civil suits against perpetrators of childhood abuse. See generally McLeod v. McLeod, 2015 WL 854299. Del. Super., Brady, J. (Feb. 26, 2015); Sheehan v. Oblates of St. Francis DeSales, 15 A.3d 1247 (Del. 2011). Since this statute was created in 2007, victims of sexual molestation have reached financial settlements regarding claims against their perpetrators. Whether such settlements are executed in good faith or perhaps because the parties seek to avoid public scrutiny, one's offer to pay restitution, particularly after confessing to the past wrongdoing in writing, is perfectly permissible under Delaware statute.

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[3]State's Ans. Brief at p. 13.

[4]Sam Wagner wrote, "*What role (if any) should you play in determining appropriate resolution to and restitution for the abuses you have caused*?" [A27, 39].

Absent any information within the four corners of the search warrant to substantiate that Wheeler "knowingly and with malice" attempted to prevent a witness from reporting a crime, the State cannot make the jump that "a common sense reading of the affidavit" established probable cause that evidence of witness tampering would be found inside Wheeler's house and office. State's Answering Brief at p. 14. Would the State take the same position, assuming the underlying complaint involved Wheeler stealing jewelry from the Wagner household 30+ years ago? Assume the Wagners wrote to Wheeler in July 2013 confronting him about betraying their family trust by stealing their mother's jewelry decades ago. Assume further that Wheeler responded, writing a contrite letter acknowledging his wrongdoing and offering to pay restitution. Assume that Kolya, while in South Carolina police custody in October 2013, alleged that Wheeler also stole a necklace from Kolya's mother when they lived in Illinois, but that Kolya never reported the theft because Wheeler "paid him off." Would the State still insist that probable cause existed in October 2013 to search Wheeler's house, office, and entire digital world for evidence of witness tampering?

B) <u>The State deliberately or recklessly omitted information from the affidavit that was material to the finding or probable cause by the issuing judge</u>.

Because the four corners of the affidavits failed to provide the Superior

Court with probable cause that Wheeler was engaged in the crimes of witness tampering/intimidation, much less that evidence of such crimes would be found in the "places to be searched," this "reverse - Franks" issue remains largely "academic." Nevertheless, the State, while maintaining that the four corners of the search warrants provided sufficient probable cause to search for evidence of witness tampering, argue that the omitted information would not have been material to the Superior Court's probable cause determination.

The alleged crimes of witness tampering/intimidation required that Wheeler "knowingly and with malice" attempted to prevent a witness from reporting a crime. Any omitted information that dispels that premise would certainly be "material" and fits squarely within the category of information "*that a reasonable magistrate would want to know.*" Rivera v. State, 7 A.3d 961, 969 (Del. 2010). In this case, the trial court noted that "*the omitted items may have made it less likely that probable cause existed, but would not have entirely vitiated the Issuing Judge's determinations regarding probable cause.*" Ex. "A" to Opening Brief at p. 21. [underscore added]. However, as the State correctly states in their Answering Brief at p. 17, Rivera requires that the omitted information "undermine the finding of probable cause," as opposed to "vitiate." Rivera, 7 A.3d at 970.

As outlined in Wheeler's Opening Brief, the issuing judge was not made aware of the following: (1) no one ever claimed they were victims of witness tampering; (2) none of the Wagner brothers ever mentioned to Wheeler they were contemplating contacting law enforcement; (3) a complete account of Mr. Wheeler's contrite July 2013 reply letter to Sam Wagner revealing a total absence of any malice or intent to intimidate Sam for confronting Wheeler; (4) an accurate account of Tom Wagner's emotional face-to-face meeting with Mr. Wheeler; (5) Wheeler, in his reply letter to Sam Wagner, volunteered he would tell both Kolya and Wagner's parents about the abuse he perpetrated against Michael and Sam Wagner years earlier; and (6) Michael Wagner's remarks to the State that Wagner's parents "*had some questions regarding Koyla's credibility.*" [A148, 154].

The sum and substance of the omitted information is (1) there was zero suggestion of any witness tampering afoot regarding Wheeler's interaction with the Wagners between July - October 2013, and (2) there were questions about Kolya's credibility in general. It is difficult to fathom how such information would not have undermined a probable cause determination, particularly when the existing four corners of the search warrants failed to identify any malicious acts of intimidation or tampering committed by Wheeler. Contrary to the State's

conclusion that the omitted information "may have provided a fuller context for the Superior Court to consider,"[5] the full context does matter, given that the purpose of the search warrant was to find evidence of witness tampering.

C) The search warrant affidavits failed to establish a nexus that evidence of witness tampering would be found in "the items to be searched for and seized."

Here is where the State begins their daredevil leap across the Snake River Canyon, in an attempt to draw a "logical nexus" between the evidence sought to establish witness tampering and the places to be searched. Yet, as outlined below under the next subheading, the State later argues that the boundaries of a computer/electronic search can be limitless.

In their Answering Brief, the State focuses solely upon the written and electronic communications between the Wagners and Wheeler. Not surprisingly, the State fails to mention any sought item of witness tampering connected to Kolya, who provided zero context to the South Carolina police officer, as to when, where, and how, any alleged "pay off" ever occurred. The search warrants contain no information that any alleged "pay off" to Kolya was ever memorialized in written or digital fashion, or occurred after 2005, when Wheeler and Kolya moved from Illinois to Delaware. Consequently, there could not possibly be any

[5]State's Answering Brief at p. 19.

identified evidence sought in the "places to be searched" pertaining to Kolya.

As to the Wagners, the State correctly notes that the search warrant affidavits reflect that Wheeler wrote a reply letter to Sam Wagner in July 2013.[6] Putting aside that the State already had access to the original letter authored by Wheeler, the State's argument hinges upon that letter constituting evidence of "witness tampering." As outlined above, that single written communication by Wheeler to Sam Wagner does not contain any language suggesting that Wheeler "knowingly and with malice" attempted to prevent Sam Wagner from reporting a crime. It is nothing more than a contrite apology letter. It is not evidence of criminal "witness tampering."

The only other communications identified in the search warrants were e-mails and phone calls initiated by Tom Wagner to Wheeler, in setting up a face-to-face meeting at Wheeler's house on July 25th, 2013. [A28, 40]. Assuming arguendo that there were allegations that Wheeler threatened or intimidated Tom at that face-to-face meeting, perhaps the e-mails and phone calls might have some relevance. However, neither the search warrants nor the State allege that Wheeler threatened or intimidated Tom Wagner on any occasion.

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[6]The affidavits reflect that Sam Wagner was in possession of Wheeler's original letter to Sam, plus the FedEx envelope. [A28, 40].

Without establishing that any particular item sought in the search warrants would constitute evidence of "witness tampering" (e.g. bloody clothing in an assault case; bed sheet stains or hair fibers in a rape case; stolen jewelry in a burglary case), there cannot possibly be a nexus between the alleged crime and the places to be searched. Hence, the State's broad stroke assertion that "there was a clear nexus"[7] establishing that Wheeler's internet history, e-mails, cell phone texts, call logs, and any written or electronic communication, would contain evidence of "witness tampering" is unfounded. Nevertheless, the bigger problem with the search warrants is that the authorized scope was much more vast than simply a search for the July 2013 communications between Wheeler and the Wagner brothers.

D) The search warrants were constitutionally overbroad in scope.

In their Answering Brief, the State devotes the bulk of their argument defending the actions of Sgt. Perna, arguing that Perna's forensic examination did not exceed the scope of the search warrants. Once again, Wheeler is not challenging whether Sgt. Perna exceeded the scope of the October 22nd original search warrants. The issue raised in this appeal is that the search warrants' scope and authorized search parameters were boundless, which is presumably why the

[7]State's Answering Brief at p. 24.

ACLU felt compelled to file an amicus brief in this case.

The State writes, "*Here, the warrants were specifically tailored to authorize a search for evidence related to the witness tampering/intimidation investigation.*" State's Answering Brief at p. 28. Yet, the State freely acknowledged to the Superior Court that the search warrants' authorized shopping list was "copied 'n pasted" from an off-the-shelf search warrant for child pornography. [A192, 196-197, 230]. Moreover, the search warrants failed to set any limitations that would otherwise narrow the forensic search to seek out the July 2013 letter from Wheeler to Sam Wagner, coupled with the e-mails and texts between Wheeler and Tom Wagner.

The State failed to address how Wheeler's iMac, last used in September 2012, - ten months prior to the Wagners communicating with Wheeler, would contain evidence of alleged witness tampering that transpired in July 2013. Under the State's view, any criminal allegation in which the parties communicated via computer or cell phone, invites law enforcement, armed with a search warrant similar to this case, to seize any and all household digital devices and perform a "Full Monty" forensic examination regardless of relevant dates and/or files/documents pertaining to the investigation.

Stated differently, the State seemingly takes the position that any household

computer or digital device is fair game in a search for electronic communications, even assuming a particular computer or device could not possibly contain evidence relevant to an investigation. For example, if police are investigating a harassment complaint where a high school student, using social media (e.g., Facebook or Instagram), is harassing or threatening a classmate, Delaware law enforcement, using the same "items to be searched for and seized" template used in the Wheeler search warrants,[8] could seize every computer, tablet, and cell phone from the student's household and conduct a full forensic examination of each device, regardless of which family member uses the device and regardless of when the device was last used. Even assuming only one device is seized (the student's cell phone), the Wheeler template would allow law enforcement to search every file type and piece of data stored on that cell phone.

Bradley v. State, 51 A.3d 423 (Del. 2012) has no application in this case, as the challenge in Bradley had to do with whether the police exceeded the scope of the search warrant, as opposed to whether the warrant was overbroad.[9] Fink v. State, 817 A.2d 781 (Del. 2003) is distinguishable as unlike this case, the "items to

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[8][A19, 31].

[9]Specifically, Bradley challenged the police's actions in searching outbuildings on his property, which this Court ruled were covered by the warrant, Bradley at 434. Bradley also challenged the police searching his computers, which this Court held were also covered by the warrant in search of patient files. Bradley at 435.

be searched" were consistent with that investigation - "client files including but not limited to [named clients], banking or financial records of [named accounts], ... personal banking records ... court documents or other related documents indicating legal action taken by or for Kenneth Fink personally ..." Fink at 785.

Echoing the sentiments in Wheeler's Opening Brief and the ACLU's amicus brief, the Superior Court, in issuing the October 22nd, 2013 search warrants, could easily have set parameters related to time and file type, that would have narrowed the electronic search for documents relevant to the alleged July 2013 "witness tampering" communications with the Wagners, as required by the Fourth Amendment's "particularity" requirement. Maryland v. Garrison, 480 U.S. 79 (1987); Andresen v. Maryland, 427 U.S. 463 (1976); Coolidge v. New Hampshire, 403 U.S. 443 (1971). Because the authorized scope of these search warrants was wide open and without any limitations, the trial court had a duty to grant Wheeler's Motion to Suppress, even assuming there was sufficient probable cause to believe that Wheeler was engaged in "witness tampering" and further assuming there was probable cause to believe that evidence of "witness tampering" would be located on Wheeler's computers.

II. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT WHEELER FOR DEALING IN CHILD PORNOGRAPHY ABSENT EVIDENCE THAT WHEELER WAS AWARE OF THE IMAGES' EXISTENCE IN HIS NEWSGROUP CACHE.

The State contends that Wheeler's "*subscription to newsgroups which were dedicated to the exchange of child pornography*" reflects that there was sufficient forensic evidence to convict him. State's Answering Brief at p. 30. The State follows up, writing, "*Here, the evidence presented at trial established that Wheeler actively sought and received child pornography from the internet and stored it in his computers.*" State's Answering Brief at p. 32.

It appears the State (on Appeal) is under the mistaken impression that this was an Internet case. It is not, as Sgt. Perna and the State below agreed. [A247]. Moreover, "NetShred X" is software that is solely related to deleting Internet history and cookies. [A238]. Sgt. Perna agreed that there is nothing unlawful about the software, and further agreed that the Internet adult websites and chatrooms visited by Wheeler, were perfectly lawful. [A238, 244]. The bottom line is that the Internet is irrelevant to this case. There is no allegation whatsoever that Wheeler ever accessed child pornography via the Internet.

Hence, the State's reliance on Commonwealth v. Diordoro, 932 A.2d 172 (Pa. Super. 2007) seems misplaced. Diordoro was an Internet case, where the

defendant admittedly and intentionally sought out and viewed child pornography via the Internet, using child pornography search terms in his web browser. Diordoro's request to appeal the above cited decision by the Pennsylvania Superior Court was granted by the Pennsylvania Supreme Court. Commonwealth v. Diodoro, 939 A.2d 290 (Pa. 2007). The issue on appeal was whether accessing and viewing child pornography constituted "control", meaning "possession." The Pennsylvania Supreme Court ruled in the affirmative. Commonwealth v. Diodoro, 970 A.2d 1100 (Pa. 2009).

Unlike Diodoro, the State agreed that there was no forensic evidence that Wheeler ever viewed child pornography nor evidence that Wheeler ever accessed the newsgroups that contained images of child pornography. [A251-253]. Even assuming Wheeler did view the content, Judge Davis ruled that "viewing" is not prohibited by 11 Del. C. §1109(4). Ex. "B" to Opening Brief at p. 24.

It may be easier for this Court to think about the trial record through a different lens, using Sirius XM radio by analogy. Assume that a Sirius XM subscriber pre-selects 20 channels on his car's computerized dashboard. Assume that every time this driver starts his car (regardless of whether he is listening to Sirius XM radio), every song (dating back 900 days) for all 20 pre-selected channels automatically uploads to a hidden cache that the driver cannot see, listen,

or touch, and does not even know exists. Can we say that the driver knowingly possesses every song that played during the last 900 days on all of his 20 pre-selected channels, without any evidence that the driver ever listened to a single channel, much less listened to a single song on any channel? In that same spirit, Wheeler could not knowingly possess the indicated images of child pornography without evidence that Wheeler was aware of their existence inside the newsgroup cache on his computers.

Circling back to the State's premise that the newsgroups themselves are unlawful, the State argues that Wheeler's pre-selection ("subscribing") of the 20 Sirius XM channels is all that is required to prove possession. Without ever addressing any First Amendment issues, the State, in essence, throughout this case, takes the position that subscribing to newsgroups, by itself, is sufficient proof to convict a person for knowingly possessing child pornography, if a particular selected ("subscribed to") newsgroup is later deemed to contain unlawful content.

Sgt. Perna acknowledged he had limited knowledge regarding newsgroups, yet agreed newsgroups themselves are legal. [A243, 247]. Perna had never used newsreader software, and was unaware that the software has a dedicated download button. [A243, 248]. Sgt. Perna agreed that had Wheeler downloaded content

from the newsgroups, that "downloaded" content would have forensically appeared on Wheeler's computers in places other than the newsgroup cache, proving that Wheeler, like Diodoro, was taking affirmative steps to access the content onto his screen. [A249, 252]. But, no such evidence existed in this case.

Given the trial record, there was insufficient evidence to convict Wheeler.

CONCLUSION

For the reasons and upon the authorities set forth herein, it is respectfully requested that Mr. Wheeler's convictions and sentence be vacated, and the case remanded to Superior Court for a dismissal.

Respectfully submitted,

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Appellee.	)	

CERTIFICATE OF SERVICE

I, Thomas A. Foley, Esquire, do hereby certify that on this 26th day of October, 2015, pursuant to Rules 10.1 and 10.2, have had electronically served via Lexis Nexis File/Serve, a copy of Appellant's Reply Brief upon the following individual at the following address:

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