

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PA

: No. CR-1473-2016

vs.

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COLIN BEST,
Defendant

: **Omnibus Pretrial Motion/
: Motion to Suppress**

OPINION AND ORDER

Defendant is charged by Information filed on September 2, 2016 with one count of obscene and other sexual materials, a misdemeanor of the first degree and one count of invasion of privacy, a misdemeanor of the third degree. The Commonwealth alleges that Defendant videotaped a neighbor by drilling a hole through the kickboard of adjacent steps, while the neighbor, only 14 years old, was nude and getting dressed.

Defendant filed an omnibus pretrial motion, which consisted of two motions to suppress. The hearing and argument were held on March 29, 2017.

Prior to beginning the hearing and taking testimony, the Court clarified from defense counsel, defendant's suppression claims. Defendant asserts that his constitutional rights were violated when the Commonwealth copied the video of the nude girl off of his wife's phone without obtaining consent or a search warrant.

Preliminarily, prior to the hearing proceeding, defense counsel claimed that there might be an issue regarding the ownership of the phone and who, in fact, may have had a possessory interest in it. Defendant did not pursue such an argument following the hearing.

Patrolman Kyle Fera of the Tiadaghton Valley Regional Police Department testified that on August 3, 2016, he was dispatched to Defendant's residence for a domestic

disturbance. Upon arriving, he came in contact with a handful of individuals who were arguing about a videotape that Defendant allegedly had made of B.A., a 14 year old neighbor.

While Defendant was speaking with a different officer, the young girl, her mother and Melissa Best (Defendant's wife) were together and speaking with Officer Fera.

Melissa Best explained that she had previously spoken with the young girl's mother and was informed of her husband's alleged activity. As a result, while she and her husband were at Walmart, she went into the bathroom with her husband's phone. He had given it to her to use and had previously provided her with the passcode. While in the bathroom, she located the video and "sent it" to her phone.

Officer Fera asked if he could watch the video. While all three of the females were present, Melissa Best showed the video to Officer Fera. He could not recall whether she held it for him or whether she gave him the phone and he then viewed it.

In viewing the video on the phone, Officer Fera concluded that it was evidence of a crime. He either gave the phone back to Melissa Best or she maintained possession of it.

A brief investigation took place after which Defendant was placed under arrest. Officer Fera indicated to Melissa Best that he needed the phone for evidence. She gave the phone to Officer Fera and provided him with the passcode so he could access the video.

The evidence was clear that the phone belonged to Melissa Best. She represented it as being her white iPhone which had a separate passcode. Her husband's phone was a black iPhone which had a different passcode.

Sergeant Brian Fioretti, also of the Tiadaghton Valley Regional Police Department, next testified. After Defendant was taken into custody on August 3, 2016, Sergeant Fioretti went to the station and spoke with Defendant.

After speaking with Defendant, Sergeant Fioretti then went to the residence and spoke with the minor, her mother and Melissa Best. Melissa Best explained how she found the video on her husband's phone and then transferred it to her phone.

According to Sergeant Fioretti, Melissa was cooperating completely and provided the passcode for both her phone and Defendant's phone. Both phones had been taken into custody and seized by the police.

A few days later, Sergeant Fioretti spoke with Defendant at the Lycoming County prison after Defendant was Mirandized. Defendant told Sergeant Fioretti that there was no need to "dump the phone." Defendant admitted that everyone knew what was on the phone; they just didn't know how it got there.

Sergeant Fioretti prepared a search warrant application which included an affidavit of probable cause. While a portion of the search warrant referenced both cell phones, the specific description of the item to be searched was limited to the black phone recovered and seized from Defendant on August 3, 2016.

A search warrant was issued on September 21, 2016 and the phone was dumped on September 26, 2016 but nothing of significance was found on it.

A day earlier on September 20, 2016, utilizing the passcode Melissa Best had provided, a different officer with the Tiadaghton Police Department opened the file on Melissa Best's phone and copied the subject video for use as evidence.

Defendant claims that he has standing to contest the alleged seizure and search of his wife's phone because he is charged with a "possessory" crime. Defendant further alleges that his wife did not consent to the search of the phone and that the phone was illegally searched on September 20, 2016 without a search warrant.

Contrary to what defendant claims, the Commonwealth argues that Defendant does not have standing. Secondly, the Commonwealth argues that the phone was not searched; rather it was opened and the video was copied with the consent of Melissa Best. Finally, the Commonwealth argues that the evidence of the crime clearly was seen on the phone possessed by Melissa Best and that it would inevitably be discovered either through the execution of the first search warrant or a subsequent search warrant.

The court finds that Defendant is not entitled to suppression because the actions of law enforcement did not violate Defendant's constitutional rights.

Defendant is not entitled to suppression based on the victim looking through his phone and viewing the video or his wife taking his phone and then viewing and copying the video to her phone. To be entitled to suppression, there must be some action by law enforcement or other government officials that violated a defendant's rights. *United States v. Jacobsen*, 466 U.S. 109, 114-15 (1984)(Fourth Amendment "is wholly inapplicable to searches, even unreasonable ones, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official"); *Commonwealth v. Harris*, 817 A.2d 1033, 1047 (Pa.

2002)(“The proscriptions of the Fourth Amendment and Article 1, §8, do not apply to searches and seizures conducted by private individuals.”).

Defendant also is not entitled to suppression based on Melissa Best showing to the police the video that she copied from Defendant’s phone to her phone or providing her phone to the police. First, Defendant does not have a reasonable expectation of privacy in his wife’s phone. All of the evidence presented at the hearing showed that the phone belonged to Melissa Best. No evidence was presented that in any way suggested that Defendant was the owner of the phone. To be entitled to suppression, a defendant must have an expectation of privacy that society accepts as reasonable in the place or item searched or seized. *Commonwealth v. Peterson*, 636 A.2d 615, 617 (Pa. 1993)(having had his standing acknowledged, appellant was then required to “demonstrate that he had a privacy interest which was actual, societally sanctioned as reasonable, and justifiable in the place invaded...”).

Second, the evidence showed that Melissa Best voluntarily showed the video to the police and provided her phone to them so that the video on her phone could be used as evidence. The police were not required to get a warrant to seize Melissa Best’s phone, because she consented to the police taking her phone. *Commonwealth v. Cleckley*, 738 A.2d 427, 429 (Pa. 1999)(“Certain specifically established exceptions, one of which is a valid consent, may render an otherwise illegal search permissible.”).

Third, assuming for the sake of argument that Melissa Best did not consent to the seizure of her phone, Defendant still would not be entitled to relief. If the police seized Melissa Best’s phone without her consent, it would be the rights of Melissa Best that were

violated, not Defendant. A defendant may not vicariously assert the constitutional rights of another person. *Commonwealth v. Hawkins*, 718 A.2d 265 (Pa. 1998)

The search of Defendant's phone was conducted pursuant to a warrant. Even if the police had not viewed the video or taken possession of Mrs. Best's phone during their response to the domestic call, they would have had probable cause to obtain a warrant to search Defendant's phone based on Melissa Best's, the victim's, and the victim's mother's statements regarding their viewing of the video. Furthermore, when Defendant's phone was searched, nothing of significance was found on it.

Accordingly, the court will deny the motions to suppress contained in Defendant's omnibus pretrial motion.

ORDER

AND NOW, this ___ day of April 2017, the court **DENIES** the motions to suppress contained in Defendant's omnibus pretrial motion.

By The Court,

Marc F. Lovecchio, Judge

cc: Melissa Kalaus, Esquire (ADA)
Ravi Marfatia, Esquire (APD)
Gary Weber, Esquire (Lycoming Reporter)
Work file