

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH :
 :
 vs. : No. CR-784-2017
 :
 CARLOS R. CASTRO, JR., :
 Defendant : Omnibus Pretrial Motion

OPINION AND ORDER

Defendant is charged by Information filed on May 19, 2017 with, among many other charges, two counts of rape of a child as well as several counts of photographing sexual acts.

The Commonwealth intends on utilizing against Defendant evidence obtained pursuant to two separate search warrants that were executed on a Samsung S5 cellphone and a SanDisc 2 GB microcard (SD card), which includes a variety of videos.

On July 21, 2017, Defendant filed an omnibus pretrial motion, which included two motions, to suppress requesting that the evidence obtained from the items be suppressed. A hearing and argument were held before the court on August 31, 2017.

At the hearing, both search warrants, which included the affidavits of probable cause and returns, were introduced and marked respectively as Commonwealth Exhibits 1 and 2. No testimony was taken. Both parties agree that the suppression issues are issues that may be resolved by applying the applicable law to the “four corners” of the affidavit.

In Defendant’s written motion, Defendant argues that the warrants are overbroad and insufficient to establish probable cause. The Commonwealth counters in its

brief in response to Defendant's motions to suppress that the warrants and supporting affidavits are narrow in scope and provide clear, succinct and sufficient probable cause.

Commonwealth's Exhibit 1 constitutes a search warrant regarding a black Samsung Galaxy S5 cellphone with a specified model and serial number. The items to be searched for include: any and all photographs, videos and other visual depictions that are stored on the phone or any part of the phone contained within it that may be of children, under the age of 18, in the state of undress or partial undress that may or may not be engaged in the performance of sexual acts. Time period to be searched is 1/1/16 through 12/5/16.

Commonwealth's Exhibit 2 constitutes a search warrant regarding a SanDisc 2 GB micro SD card that had been used as a storage device within the Galaxy cellphone with the specified model and serial numbers. The items to be searched for include: any and all photographs, videos, and any other visual depictions that are stored on the SanDisc 2 GB micro SD card that may be of children, under the age of 18, in the state of undress or partial undress that may or may not be engaged in the performance of a sexual act. I am asking to search the timeframe consisting of January 1, 2016 until December 5, 2016.

The affidavits of probable cause attached to the warrants are the same except for different paragraphs depicting how the items came into the possession of law enforcement.

Both affidavits include the following: On December 3, 2016, Victoria Clements came to the police station and made a report of suspected child pornography to Officer Mark Lindauer. Clements stated that she has been involved in an intimate

relationship with Carlos Castro for the past several months. She recently had the opportunity to take possession of a phone owned by Castro. She indicated that Castro has owned the phone prior to them dating. She further stated that she does not believe that it currently has actual cellular service and that he utilizes the phone as a camera and to access social media sites via Wi-Fi.

Clements reported that she turned on the phone and gained access to stored photographs and videos stored within it. She observed media that depicted a young girl, who is believed by Clements to be Castro's 12 year-old daughter, in the state of undress and partial undress as she exited the shower and began clothing herself. She also observed media that depicted a male's penis being inserted between the legs of a young girl, also believed to be Castro's 12 year-old daughter. Clements advised that Castro has been residing with his daughter at 1131 Charles Street for approximately the last year.

With respect to the phone, it was previously turned over to Officer Lindauer and was in his possession at the police barracks. With respect to the SD card, Ms. Clements previously removed the card, failed to insert the card back into the phone prior to delivering the phone to law enforcement. Ms. Clements subsequently provided the SD card to Officer Lindauer.

At the hearing and argument in this matter, Defendant clarified his position with respect to the motion. Specifically, Defendant's sole argument is that the warrant authorizing the search was "temporally overbroad." Defendant argues that the supporting affidavit of probable cause does not justify the search of the items over a period of "an entire

year.”

The warrants were issued on the basis of the supporting affidavits which described in detail the Commonwealth’s grounds for probable cause. Defendant essentially argues that the warrants were unconstitutional because they authorized the seizure of property over a period of time for which the affidavits did not show probable cause. Even more specifically, Defendant argues that the warrant is overbroad because it permits documents to be seized that were allegedly generated outside of the timeframe of the alleged offense.

The court disagrees with Defendant’s argument.

In this case, the affidavits are most logically read as suggesting that Defendant was having inappropriate sexual contact with a young girl, believed to be Defendant’s 12 year-old daughter who Defendant has been residing with for approximately the last year.

A search warrant must be supported by probable cause. U.S. Const. Amend. IV; Pa. Const. Art. I, Section 8.

The United States Supreme Court established the “totality of the circumstances” test for determining whether a request for a search warrant under the Fourth Amendment is supported by probable cause....[The Supreme Court of Pennsylvania] adopted the totality of the circumstances test for purposes of making and reviewing probable cause determinations under Article I, Section 8.

Commonwealth v. Jones, 605 Pa. 188, 988 A.2d 649, 655 (2010).

The task of an issuing authority [deciding whether to issue a warrant] is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit [of probable cause] before him, including the “veracity” and “basis of knowledge” of persons supplying ...information, there is a fair

probability that contraband or evidence of a crime will be found in a particular place.

Commonwealth v. Gray, 509 Pa. 476, 503 A.2d 921, 925 (1985) (quoting *Illinois v. Gates*, 462 U.S. 213, 238-39 (1983)).

“The affidavit supporting the search warrant must set forth a substantial nexus between the crime and the place to be searched.” *Commonwealth v. Funds in Merrill Lynch Account*, 777 A.2d 519, 523 (Pa. Super. 2001) (citing *Commonwealth v. Fisher*, 545 Pa. 233, 681 A.2d 130, 136 (1996)).

The duty of a court reviewing a probable cause determination “is simply to ensure that the magistrate had a ‘substantial basis...for concluding that probable cause existed.’” *Gray*, 503 A.2d at 925 (quoting *Gates*, 462 U.S. at 238-39).

“As our United States Supreme Court stated: ‘A grudging or negative attitude by reviewing courts towards warrants...is inconsistent with the Fourth Amendment’s strong preference for searches conducted pursuant to a warrant; courts should not invalidate warrants by interpreting affidavits in a hypertechnical, rather than a commonsense manner.’” *Jones*, 988 A.2d at 655-56 (quoting *Gates*, 462 U.S. at 236).

In this particular case, Magisterial District Judge (MDJ) Page had a substantial basis for concluding that there was a fair probability that evidence of a crime would be found on the cellphone over a period of at least one year during which Defendant resided with his 12 year-old daughter.

With respect to Defendant’s overbreadth challenge, to the extent it may be different than the probable cause argument, “no warrant to search any place or to seize any

person or things shall issue without describing them as nearly as may be..." Pa. Const. Art. I, § 8.

In *Commonwealth v. Orië*, the Pennsylvania Supreme Court explained the "as nearly as may be" requirement of Article I, Section 8:

It is a fundamental rule of law that a warrant must name or describe with particularity the property to be seized and the person or place to be searched...the particularity requirement prohibits a warrant that is not particular enough and a warrant that is overbroad. A warrant is unconstitutional for its overbreadth authorizing clear or specific terms the seizure of an entire set of items or documents, many of which will prove unrelated to the crime under investigation. An overbroad warrant is unconstitutional because it authorizes a general search and seizure. *Orië*, 88 A.3d at 102-3 (quoting *Commonwealth v. Rivera*, 816 A.2d 282, 290-291 (Pa. Super. 2003)).

Contrary to what Defendant argues, the court is satisfied that the scope of the warrant was sufficiently narrow as to exclude evidence of non-criminal behavior. It includes the timeframe in which the defendant resided with his minor daughter and would have had the ability to photograph and video record any elicited behaviors with her.

ORDER

AND NOW, this ____ day of September 2017, following a hearing and argument, Defendant's omnibus pretrial motion in the nature of a motion to suppress the data recovered from the Samsung Galaxy S5 cellphone and the SD card, is **DENIED**.

By The Court,

Marc F. Lovecchio, Judge

cc: Scott Werner, Esquire (ADA)
Joshua Bower, Esquire, (APD)
John Pietrovito, Esquire
Work file
Gary Weber, Esquire, Lycoming Reporter