IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PA	: No. CR-288-2021
vs.	:
	:
	:
	:
Michael Fulger, Sr.	:
Defendant	: Omnibus Pretrial Motion

OPINION AND ORDER

Defendant is charged by Information filed on March 26, 2021, with one count of Criminal Use of a Communications Facility in violation of 18 Pa. C.S. § 7512. The charge arises out of searches that law enforcement conducted on the phone of Michael Fulger, Jr., Defendant's son. Based on what was discovered on the phone by way of conversations between Defendant and his son, the Commonwealth alleges that on or about September 20, 2020, Defendant utilized his cell phone to arrange the sales of narcotics between himself and his son.

On April 20, 2021, Defendant filed an Omnibus Pretrial Motion, which consisted of a Motion to Suppress evidence. Defendant asserted that the cell phone conversations were illegally obtained. A hearing and argument were held on June 23, 2021.

At the hearing, the Commonwealth presented the testimony of Detective Calvin Irvin and Officer Justin Segura. Further, the Commonwealth admitted in evidence the two search warrants at issue.

Officer Segura is an investigator for the Tiadaghton Valley Regional Police Department (TVRPD). On July 10, 2020, he took Fulger, Jr. into custody in connection with allegations of sexual misconduct involving a minor. While taking Fulger, Jr. into custody, Officer Segura seized Fulger Jr.'s cell phone. Given his experience in working sex cases and knowing that individuals often communicate via social media, he executed an Affidavit of Probable Cause and obtained a search warrant for the phone. The search warrant (SW-1), was approved by MDJ Lepley and authorized the search of "all data within the phone." The search warrant also authorized the seizure of, among other things, any and all calls, messages, conversations, photos and/or videos that established or provided details regarding the nature of the relationship between Fulger, Jr. and the victim.

After obtaining the warrant, Officer Segura provided it to Calvin Irvin, who is a detective for the Lycoming County District Attorney's Office. Detective Irvin utilized what he described as "Cellebrite", which is a digital intelligence program. He utilized the program to extract and unencrypt the items seized from Fulger Jr.'s phone. Among other things, the program enabled Detective Irvin to access social media messages including Snapchat messages. During the extraction, he observed written conversations between Fulger, Jr. and others, including "Dad," which referenced illegal narcotics transactions. While the messages were being observed, photographs were taken of them.

As a result of what he observed with respect to the suspected narcotics transactions, Detective Irvin advised Officer Segura of such. Officer Segura subsequently

obtained a second search warrant (SW-2) from MDJ Lepley. This search warrant authorized the search and seizure of conversations between January 1, 2020 and September 29, 2020 between the Fulgers with respect to illegal narcotics transactions. Based on the search warrant, Detective Irvin conducted another extraction and obtained the conversations forming the basis for the charge against Defendant.

Defendant argues in his Motion to Suppress that SW-1 was overbroad and if not, the execution of such exceeded the permissible scope of what was authorized. With respect to SW-2, Defendant argues that it lacks sufficient probable cause after excising the invalid or improperly obtained information from SW-1.

The Commonwealth disputes Defendant's contentions but also argues that Defendant lacks standing to attack the constitutionality of the search warrants and/or does not have a reasonable expectation of privacy in his son's phone.

Standing is a legal interest that empowers a defendant to assert a constitutional violation and thus seek to suppress the Commonwealth's evidence pursuant to the exclusionary rule under the United States and Pennsylvania Constitutions. *Commonwealth v. Enimpah*, 106 A.3d 696, 699 (Pa. 2014).

Deciding whether the "core rights" of the Fourth Amendment have been violated does not hinge on the use of phraseology such as "legitimately on the premises" or "standing." *Commonwealth v. Ferretti*, 577 A.3d 1375, 1379 (Pa. Super. 1990). Rather, the court must be "guided by markers requiring our determination of whether the person invoking its protection can claim a justifiable, a reasonable, or a legitimate

expectation of privacy that has been invaded by government action." *Id.* (citing *Smith v. Maryland*, 442 U.S. 735, 740, 99 S.Ct. 2577, 2580 (1979)). The "relevant focus" must be shifted from "standing" to whether the defendant has a "legitimate expectation of privacy in the invaded place." *Commonwealth v. Shabezz,* 166 A.3d 278, 280 (Pa. 2017).

The defendant bears the burden of demonstrating that he personally has an expectation of privacy in the [item] searched, and that this expectation is reasonable, i.e., one that has a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society. *Minnesota v. Carter,* 525 U.S. 83, 88, 119 S.Ct. 469, 472 (1998).

"An expectation of privacy will be found to exist when the individual exhibits an actual or a subjective expectation of privacy, and that expectation is one that society is prepared to recognize as reasonable." *Commonwealth v. Viall,* 890 A.2d 419, 422 (Pa. Super. 2005).

Defendant has failed to meet this burden of proof. First, the record is devoid of any evidence whatsoever as to Defendant's actual or subjective expectation of privacy in his messages to his son.

Second, the court will not conclude that, on the record, Defendant's expectation of privacy, if any, is one that society is prepared to recognize as reasonable.

While the courts have been careful to guard against the power of technology to shrink the realm of guaranteed privacy by emphasizing that privacy rights cannot be left at the mercy of advancing technology, but rather must be preserved and

protected as new technologies are adopted and applied by law enforcement, *see United States v. Jones,* 565 U.S. 400, 413-418 (2012) (Sotomayor, J. concurring), what is reasonable depends upon all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself. *United States v. Montoya DDE Hernandez,* 473 U.S. 531, 537, 105 S.Ct. 3304, 3308 (1985); *Shabezz,* 166 A.3d at 286.

Based on the record, the messages sent by Defendant to his son were through an app known as Snapchat. According to Detective Irvin, Snapchat-type messages are deleted automatically after a certain period of time. There was no evidence provided by Defendant as to whether Snapchat deletes messages automatically, how long it would take to delete them, or whether they are stored permanently through some other feature of the phone or feature involved with electronic communications in general.

Utilizing established case law from Pennsylvania as well as other jurisdictions, the court concludes that there is no reasonable expectation of privacy in the sent messages because, as with other forms of similar communication, delivery created a memorialized record of the communication that was beyond the control of the sender. A record is created through the sending of the message to the third party and that record is subject to perhaps instantaneous distribution by the recipient to others, which is well beyond the control of the sender. *See Commonwealth v. Diego*, 119 A.3d 370, 376-77 (Pa. Super. 2015); *Commonwealth v. Proetto*, 771 A2.d 823, 830 (Pa. Super. 2001).

Moreover, in addition to simply displaying the message to another person, the recipient could forward its contents to potentially thousands of people at once

or post a message on social media for anyone with an Internet connection to view. *State v. Patino,* 93 A.3d 40 (R.I. 2014), *cert. denied*, 574 U.S. 1081 (2015).

Numerous state and federal courts have examined this issue and have concluded similarly. *United States v. Payner,* 100 S. Ct. 2439, 2444 (1979)(search of an iPad belonging to another does not invade one's legitimate expectation of privacy); *United States v. Jones,* 149 F.App'x 954, 959 (11th Cir. 2005)(no reasonable expectation of privacy in a text message once it has been delivered and opened by the receiving party); *United States v. Bereznak,* U.S. Dist. Ct., No. 3:18-CR-39 (M.D. Pa. April 27, 2018)(courts appear to be in general agreement that there is no reasonable expectation of privacy in electronic content once they are on a recipient's device); *Commonwealth v. Benson,* 10 A.3d 1268, 1274 (Pa. Super. 2010), appeal denied, 24 A.3d 863 (Pa. 2011) (individual does not have a reasonable expectation of privacy in the records for a cellular phone owned by another); *Commonwealth v. Hawkins,* 718 A.2d 265, 266 (Pa. Super. 1998)(no objective reasonable expectation of privacy where the defendant meaningfully relinquished control, ownership and possessory interest in communication).

Accordingly, Defendant has failed to meet his burden of proving an expectation of privacy that would enable him to assert Fourth Amendment and Article I, Section 9 protections.

ORDER

AND NOW, this _____ day of October 2021, following a hearing and argument, Defendant's Motion to Suppress is **DENIED.**

By The Court,

_____
Marc F. Lovecchio, Judge

cc: Eric Williams, Esquire (ADA)
Matthew Welikovitch, Esquire
Gary Weber, Esquire
Judge Marc F. Lovecchio