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NORFOLK, ss

NORFOLK SUPERIOR COURT
DOCKET. 2282cr000117

COMMONWEALTH

v.

KAREN READ

OPPOSITION OF BRIAN ALBERT TO THE DEFENDANT'S RULE 17 MOTION FOR CELLULAR DEVICES AND RECORDS

The defendant is seeking the cellular devices of Brian Albert. To accomplish this, the defendant has filed a document purporting to be a new motion under Rule 17, but which is really a motion for reconsideration of a prior motion that was denied by the court. One might presume that the caption of the document was simply a mistake – that the defendant meant to ask the court to reconsider the earlier decision based on new evidence – except after reading the motion and accompanying affidavits, it appears that the defendant and her attorneys have instead chosen to create reasonable doubt by creating an alternate version of reality. Their "truth" begins by ignoring the fact that this court denied the very same motion last year. Then, to add depth and texture to their fictional account, the defense has manufactured their own set of "facts," passed them off as gospel, and are now asking the court to rely on their assertions to invade the privacy of civilians. This motion to reconsider the previous court ruling should be denied.

PROCEDURAL HISTORY

The defendant filed a motion under Mass. R. Crim. P. 17 on September 16, 2022, requesting "any cell phones" possessed by Brian Albert (and others) for a period inf January and February of 2022. That motion was denied on October 5, 2022, with the following notation from

the court: "The Court is not satisfied that the requested phones contain information that is evidentiary and relevant nor is the Court satisfied that the application is made in good faith and is not intended as a general fishing expedition. (Cannone, RAJ)."

The instant motion was filed on April 12, 2023, with accompanying affidavits of Alan Jackson and Richard Green submitted the following day.

RELEVANT CASE LAW

A defendant seeking pretrial production pursuant to Rule 17 must make a demonstration of relevance, admissibility, necessity, and specificity in order to sustain her burden. Commonwealth v. Mitchell, 444 Mass. 786, 795 (2005). To satisfy her burden, the defendant must show (1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general 'fishing expedition.' Commonwealth v. Lampron, 441 Mass. 265, 269 (2004).

In this particular case, the defense is seeking the physical cellular devices – and cloud-based content – of Brian Albert, among others. This is not a minimal, limited intrusion that is being requested; this inquiry implicates significant privacy considerations that the Supreme Judicial Court has highlighted in their case law. "[A]n individual has a compelling privacy interest in the contents of his or her electronic devices." Commonwealth v. Feliz, 486 Mass at 510, 516 (2020); see also, Commonwealth v. Fulgiam, 477 Mass. 20, 32-33 (2017). The Court has spoken about individual electronic devices containing a "vast store of sensitive information,"

and noted that intrusions into them "would expose...far more than the most exhaustive search of a house." Feliz at 516, quoting Riley v. California, 573 U.S. 373, 403 (2014).

Rule 17 is not a discovery tool, though that is clearly the strategy behind the defense motion: troll for any material that can be spun or misconstrued to fit the defense narrative. In reality the purpose of Rule 17 is to avoid delay at trial by permitting advance review of materials likely to be offered at trial. Lampron at 269-270; Commonwealth v. Dwyer, 448 Mass. 122, 145 (2006). A judge reviewing a Rule 17 motion has an initial gatekeeper role. Part of the court's responsibility is to determine if the affidavit and any hearsay is reliable. But "assertions of potential relevancy and of conclusory statements will not suffice." Commonwealth v. Mitchell, 444 Mass. 786, 791 (2005).

ARGUMENT

The defense needs to show, among other things, that the evidence sought "has a rational tendency to prove or disprove an issue in the case." Lampron at 269-270. What the defense has done here is make up a story – unsupported by any actual evidence – and then deem that story to be an "issue in the case." This is precisely the danger that Lampron identified in considering Rule 17 motions: the defense can use them to fish for irrelevant, inadmissible information that can be used to support a fabricated narrative. Potential relevance and conclusory statements are not sufficient to satisfy the defense burden under Rule. Mitchell, 444 Mass. at 791. See also Jones, SJC-1225, slip op. October 4, 2017. No showing has been made, and no credible evidence has been identified, that supports the claim that relevant, admissible evidence will be found on Brian Albert's cell phone or in the cloud-based storage of his phone records.

The defense has tried to repackage the speculation of its September 2022 motion by emphasizing its theory of the case with bold, italicized, and underlined statements.[1] The prose is written in broad, confident terms, with literary flourishes designed to imply that something has been "newly discovered" by the defense. This is done to try to make the defense fabrication sound credible, and to gloss over the court's ruling in October. In denying the same defense motion on relevance grounds, this court questioned if the application was even "made in good faith" or whether it was "intended as a general fishing expedition." Court Order of October 5, 2022. The same concerns apply to the instant motion.

Here, a new affidavit of Attorney Alan Jackson complies with the affidavit requirement of Mass. R. Crim. P. 13 for approximately 3 of the 10 pages, before devolving into narrative format and re-argumentation, parroting the same exaggerated language of the motion itself.[2] "The defense clearly has a good faith belief that exculpatory evidence supporting her third party culpability defense will be found in Mr. Albert's cell records." 4/13/23 Affidavit of Alan Jackson at 9. "I have a good faith belief that the [information being sought] will unquestionably lead to relevant, admissible evidence that will support Ms. Read's third-party culpability defense." 4/13/23 Affidavit of Alan Jackson at 7. "This reliable, data-driven information undeniably

[1] The language, format, and structure used by the defense is important to consider in light of the court's prior ruling. The original Rule 17 motion and affidavit totaled 19 pages; that motion was denied. The instant motion adds an additional 24 pages of spin, coupled with 92 pages of "affidavit" and exhibits from counsel and 37 pages of affidavit from a purported defense expert. The volume of pages needed to make an argument does not equate to quality – or reliability. Sometimes, it's the opposite. Once the hundreds of pages are reviewed and the inaccuracies begin to surface, it becomes clear that the defense attempt at reconsideration here is the definition of a fishing expedition. Lampron at 269.

[2] Mr. Jackson's second and third paragraphs assert: "(2) I submit this affidavit on personal knowledge in support of Defendant's Motion for Order Pursuant to Mass. R. Crim. P. 17 Directed to Brian Albert, Verizon, and AT&T (3) I have carefully reviewed the discovery produced by the Commonwealth in this case, including all police reports, grand jury minutes, crime scene photographs, and other evidence. The factual assertions and reasonable inferences set forth in the Defendant's Motion for Order Pursuant to Mass. R. Crim. P. 17 Directed to Brian Albert, Verizon, and AT&T fairly reflect the statements summarized in the discovery produced by the Commonwealth." 4/13/23 Affidavit of Alan Jackson at 1.

suggests that Jennifer McCabe and Brian Albert are the third parties responsible for O'Keefe's death and that additional inculpatory information will be found in the cellular data requested." 4/13/23 Affidavit of Alan Jackson at 7. "Reliable;" "data-driven;" "undeniably" – as if the flimsiness of the claims can be bolstered by emphatic verbiage. Despite the language being used, the defense narrative carries no reliability. Repeated conclusory declarations such as these do absolutely nothing to establish relevance.

Why will there "unquestionably" be evidence supporting his third-party culprit defense? Why is the defense so confident? The premise of their strategy is to absorb information – however benign – and then weaponize it to help the cause. No matter what is discovered in a phone or cloud storage device, the defense will come up with a way to use it to their advantage. Any information will be spun and reshaped to fit the narrative.

No matter how many affidavits and pages of defense theory are submitted, there is no connection between Brian Albert's cell phone and any actual issue in the case. But that doesn't stop the defense from pretending there is a connection. The instant motion spends dozens of pages analyzing (inaccurately) Jennifer McCabe's cell phone records. And still there is no record of – nor has the defense claimed – any phone conversations between Brian Albert and Jennifer McCabe on January 28 and 29, 2022. By presupposing a conspiracy between Jennifer McCabe and Brian Albert in its argument, however, the defense hopes the court will make the same mistake in order to conclude that misinterpreted cell phone records of Jennifer McCabe justify an intrusion into the private cellular devices and information of Brian Albert. This is illogical.

Why is this happening? It appears that Brian Albert has been chosen by the defense as one of the scapegoats. Therefore, everything he does can be misinterpreted to benefit the defense theory of the case – even the most benign actions. In late 2021, prior to the death of John

O'Keefe, Mr. Albert and his wife decided to sell their home. Brian Albert made minor improvements to the house – at the suggestion of his real estate agent who walked through the property – in order to maximize the value when he listed it for sale. The decision paid off, and the house was sold in early 2023 for an 80+% return on the investment.

The defense spin: he is selling a crime scene.

> "On November 17, 2022, mere months after the defense first publicly accused the Alberts of being implicated in O'Keefe's murder, Brian Albert made the decision to list his childhood home and longtime residence for sale, which had been in the Albert family for multiple generations...Brian Albert's decision to transfer documented ownership of his longtime family residence is yet additional evidence of consciousness of guilt."
>
> 4/12/23 Rule 17 Motion at 17.

The defense hopes that the court and general public miss the absurdity of its logic: the house was not sold for more than a year after January 28, 2022, not exactly a hasty attempt to cover something up. The "transfer [of[documented ownership" does nothing to make the home inaccessible to law enforcement (or the defense), and the decision to sell the home pre-dated John O'Keefe's death.

But that doesn't matter when the goal is to concoct reasonable doubt. So instead of a couple down-sizing their home as empty-nesters after their 5 children have left, the sale of a home takes on a nefarious purpose in the defense motion.

"I have a good faith belief that Mr. Albert has already taken affirmative steps to destroy evidence (namely, getting rid of his K-9 German Shepherd Chloe) and will take actions to similarly destroy any inculpatory evidence on his cell phone." 4/13/23 Affidavit of Alan Jackson at 9. And in the motion itself:

> "[A]ctions taken by Brian Albert and his family to destroy evidence and engage in witness intimidation over the course of the last year should be extremely troubling to the court, and should unquestionably further support the necessity of immediately issuing a summons for Brian Albert's cell phone and phone records.

...
Considerable circumstantial evidence suggests that Brian Albert's dog was responsible for the scratch and/or bite marks on John O'Keefe's right arm. It is not a coincidence that that Brian Albert got rid of his family dog of seven years due to a reported violent skin-piercing incident four months after John O'Keefe's death."

4/12/23 Rule 17 Motion at 16.

Note the prose and dramatic language – "destroy evidence," "extremely troubling," "unquestionably further support." And focus in particular on the characterization of the evidence: "a reported violent skin-piercing incident." Id. By saying "violent skin-piercing incident four months after John O'Keefe's death," the defense is asking the reader to conclude that the dog in question has a history of attacking human beings, and that it was sent away because it was violent toward people.

As with other defense assertions, this is not true. Mr. Albert's dog escaped from a fenced yard and went after a neighbor's pet 4 months after John O'Keefe's death. There are witnesses to the incident, and animal control paperwork documenting the ordeal. When the Alberts asked the neighbor how they could reassure her, she expressed an ongoing concern for walking her dog. After difficult family conversations, the Alberts chose to re-home the dog but remained in touch with the new owner. They remain in touch with her to this day.

In the context of a defense motion accusing an innocent person of murder, the phrasing here is entirely intentional. If this is what the defense means by "good faith belief," the court should be cautious about relying on any defense assertion.

Defense counsel attempt to support their arguments with photographs which they also characterize for the court. In one example, Attorney Alan Jackson's affidavit claims: "Attached hereto as **'Exhibit A'** are photographs which clearly establish a longstanding close familial relationship between the government's seminal witnesses in this case (i.e. the Alberts and the

McCabes) and the lead detective responsible for investigating this case, Trooper Michael Proctor." 4/13/23 Affidavit of Alan Jackson at 1-2. And "Even more alarmingly, Brian Albert has an intimate personal relationship with Massachusetts State Police Trooper Michael Proctor...the lead investigator assigned to this case." 9/16/22 Rule 17 Motion at 2.

These statements are wrong. The photos referenced by the defense do not depict Jennifer McCabe's children. More importantly for this motion, they certainly do not depict Brian Albert, or his wife, or his children, or his dog, or his home. Contrary to the defense's sworn claims, Brian Albert and Michael Proctor did not know each other prior to this incident. Brian Albert introduced himself to Trooper Proctor for the first time when he was interviewed on the 29th of January 2022. Once again, the defense assertion of a "fact" is mistaken. Or inaccurate. Or worse.

If the defense's repeated assertions about houses, and dogs, and photographs, and personal relationships are wrong – and they are – what does that say about the defense motion and accompanying materials more broadly? The defense has used sworn affidavits to allege facts that they argue are "clearly established" and has repeated claims like this over and over again. When those "facts" turn out to be untrue, how can anything else asserted by the defense be relied upon?

CONCLUSION

The concern about frivolous Rule 17 motions is one that the Supreme Judicial Court has taken very seriously. In Dwyer, the Court explained: "We emphasize that the standard for summonsing third-party records for inspection before trial is intended to guard against intimidation, harassment, and fishing expeditions for possibly relevant information." Dwyer at 145. This Rule 17 motion – an attempt to request reconsideration of a prior ruling – is exactly the

type of filing the SJC was concerned about in Dwyer. Accordingly, Mr. Albert requests that this court deny, again, the defendant's Rule 17 motion.

Respectfully Submitted,

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