COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS. **SUPERIOR COURT DEPARTMENT**
NORFOLK SUPERIOR COURT
DOCKET NO. 2282CR0117

COMMONWEALTH

v.

KAREN READ

COMMONWEALTH'S OPPOSITION TO DEFENDANT'S REQUEST FOR EVIDENTIARY HEARING ON MASS. R. CRIM. P. 17

Now comes the Commonwealth and respectfully moves that this Honorable Court deny the defendant's request for an evidentiary hearing on "Defendant's motion for order pursuant to Mass. R. Crim. P. 17 directed to Brian Albert, Verizon, and AT&T". The Commonwealth incorporates hereinto all arguments raised in its May 1, 2023 written memorandum and May 3, 2023 argument before this Honorable Court in opposition to the merits of the defendant's motion.

Under the Massachusetts Rules of Criminal Procedure, the defendant is not entitled to an evidentiary hearing on a Mass. R. Crim. P. Rule 17 motion for the production of "books, papers, documents, or other objects designated therein." Mass. R. Crim. P. 17 (a) (2). See Commonwealth v. Lampron, 441 Mass. 265, 268 (2004). At a Lampron, hearing, "the judge shall hear from all parties, the record holder, and the third-party subject, if present. The record holder and third-party subject shall be heard on whether the records sought are relevant or statutorily privileged." See Massachusetts Practice Series Section 1108: Access to Third-Party Records Prior to Trial in Criminal Cases (Lampron-Dwyer Protocol), 20 Mass. Prac. Evidence St. 1108 (3d ed. February 2023). In regards to this motion, notice and the opportunity to be heard extends only to the parties, record holder, and third party subject. Here, the court may hear from Verizon;

AT&T; and third party, Mr. Brian Albert, as to whether or not the records are relevant or covered by a statutory privilege. Commonwealth v. Dwyer, 448 Mass. 122 (2006).

The Commonwealth is under the impression that the defendant is seeking to expand Mass. R. Crim. P. 17 (a) (2) and call witnesses, including their forensic examiner, who are neither record holders nor third-party subjects. The Commonwealth is aware that the defendant has summonsed civilian witness Jennifer McCabe and Massachusetts State Troopers Michael Proctor and Nicholas Guarino. These witnesses are not the record holders of Brian Albert's cellphone and by summonsing these witnesses, it is evident that the defendant is using Mass. R. Crim. P. 17 as "a disguised attempt to undermine [Mass. R. Crim. P.] [R]ule 14 by launching an improper fishing expedition. See Commonwealth v. Mitchell, 444 Mass. 786, 792 (2005).

The Supreme Judicial Court has repeatedly emphasized that Mass. R. Crim. P. 17 (a) (2) is not a discovery tool to be "invoked merely for the exploration of potential evidence." Commonwealth. v. Sealy, 467 Mass. 617, 627 (2014); Lampron, 441 Mass. at 268. The four requirements of Mass. R. Crim. P. 17; relevance, admissibility, necessity, and specificity are intended to "guard against intimidation, harassment, and fishing expeditions for possible relevant information." Mitchell, 444 Mass. at 792; Commonwealth v. Dwyer, 448 Mass. 122, 145 (2006). The purpose of Mass. R. Crim. P. 17 is solely to prevent undue delay of the trial occasioned by multiple, or lengthy, requests for documents. See Mitchell, 444 Mass. at 792.

The defendant's motion is simply an improper attempt to burden and harass the witnesses in this case. The Commonwealth has a compelling interest in protecting witnesses from unnecessary harassment, caused by burdensome, frivolous, or otherwise improper discovery requests. See Commonwealth v. Lam, 444 Mass. 224, 230 (2005) ("A complainant or witness should be forced neither to retain counsel nor to appear before a court in order to challenge, on the basis of a partial view of the case, potentially impermissible examination of [ ] personal effects and the records of [ ] personal interactions.")

As demonstrated by the procedural history of RC v. Chilcoff, defense counsel has previously attempted to obtain a witness' cellphone and cellphone records for an indecorously purpose. (Exhibit A). In RC v. Chilcoff, similar to the strategy employed by defense counsel here, the defendant filed two Mass. R. Crim. P. 17 (a) (2) motions. The

first was for "a variety of records and information" maintained by Apple related to a rape victim's cellphone records. That motion was denied as the defendant failed to satisfy Lampron. See RC v. Chilcoff, SJ-2020-0081. The second motion, again consistent with the defendant's request here, sought the "victim-witness to produce her cellular telephone to a defense expert for a forensic examination to recover information from the victim-witness's cell phone from December 8, 2017 to December 19, 2017 relating to her electronic communications . . . ." (Exhibit A).

Justice Cypher, sitting as the single justice, ruled that the defendant's requests "contravene[d] the principle that Rule 17 is not a discovery tool" and emphasized that where the defendant's request offered nothing more than speculation that there may be relevant evidence in the records sought, the defendant's motion fails to satisfy Lampron. See RC v. Chilcoff, SJ-2020-0081; see also Commonwealth v. Jones, 478 Mass. 65, 68–69 (2017) (defendant must make factual showing that the documentary evidence has rational tendency to prove or disprove issue in case; potential relevance and conclusory statements regarding relevance are insufficient); Commonwealth v. Caceres, 63 Mass. App. Ct. 747, 749–50 (2005) (affidavit in support of defendant's motion "may contain hearsay provided that that the *source of the hearsay is identified, the hearsay, is reliable*, and the affidavit establishes with specificity the relevance of the requested documents." (Emphasis added).

In her ruling, Justice Cypher highlighted a similar case from Minnesota, State v. Yildirim, (In re B.H.), 946 N.W.2d 860, 865 (2020) where the court there concluded that because "'[c]ell phones differ in both a quantitative and a qualitative sense from other objects' that a person might possess," a suggestion that a cell phone could contain exculpatory information was insufficient to order its production for examination. Yildirim at 870-871; quoting from Riley v. California, 573 U.S. 373, 393 (2014). Similarly, in People v. Spykstra, 234 P.3d 662 (Col. 2010), a Colorado court had ordered the victim's parents to permit a forensic expert to access their computer to search for email communications. The Colorado Supreme Court concluded that the order "improperly converted the subpoenas into the functional equivalent of search warrants" that were not authorized by the rules of criminal procedure and that the defendant had failed to make showings of relevance or specificity, which were "underscored by the lack

of supporting evidence" that relevant materials even existed, and the "lack of specificity in providing a broad date range." Id. at 671-2.[1]

The defendant's motion and supporting affidavit contain speculative claims that are without factual support or identifiable sources that form the basis for their "good faith belief[s]" that Mr. Brian Albert has "destroyed evidence" or is a third party culprit, responsible for the victim's death . See "Affidavit of Alan J. Jackson, Esq. in support of motion for order pursuant to Mass. R. Crim. P. 17 Directed to Brian Albert, Verizon, and AT&T."; Sealy, 467 Mass. at 627 (potential relevance and conclusory statements regarding relevance are insufficient to meet R. 17 standard). A generalized claim, supported only by a narrow and likely misinterpreted view of the evidence, does not satisfy Lampron and is more appropriately an issue left to the trier of fact whose role will be to assess the weight and credibility of the evidence. See Commonwealth v. Forte, 469 Mass. 469, 481 (2014); Commonwealth v. AdonSoto, 475 Mass. 497, 510 (2016) ("assessment of the weight and credibility of the evidence [is] properly left to the jury.")

Furthermore, supporting Justice Cypher's ruling in RC v. Chilcoff was the fact that the "Supreme Judicial Court has recognized that cell phones often contain an immense amount of personal information". See Id.; Commonwealth v. Fulgiam, 477 Mass. 20, 32 (2017) ("modern cellular telephones contain vast quantities of [digital] personal information" [quotations omitted]); Commonwealth v. White, 475 Mass. 583, 591 (2016), quoting Riley v. 573 U.S. at 395 ("many of [those] ... who own a cell phone [in effect] keep on their person a digital record of nearly every aspect of their lives"). The Court has also recognized that, as a result, individuals have significant privacy interests at stake in their cell phones. See Commonwealth v. Dorelas, 473 Mass. 496, 502 n. 11 (2016). The Court further emphasized that "it is important to remember that the rule is a rule of production, not a rule of discovery." Id.; citing from Commonwealth v. Sealy, 467 Mass. 617, 627 (2014), quoting Lampron at 269.

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[1] Notably, consistent with other state's rules of criminal procedure, Mass. R. Crim. P. 17 is modeled after the federal rule. See Lampron, 441 Mass at 270 ("Because our rule was modeled after Fed. R. Crim. P. 17(c) and is intended to address the same circumstances, we adopt the standards articulated by the Federal courts regarding the issuance of a subpoena for production of documentary evidence.").

Therefore, "when ruling on a request under Rule 17 for a victim-witness's cell phone or cell phone records, the judge must include a consideration of these inherent privacy concerns." RC v. Chilcoff, SJ-2020-0081. "A victim-witness does not surrender [ ] privacy rights by filing a complaint or by cooperating with a police investigation." Id. Nor, as Rule 17 clearly states, should the hearing be allowed to proceed if it is being "used to subvert the provisions of Rule 14," as it is here.

CONCLUSION

The procedure set forth in Mass. R. Crim. P. 17 (a) (2) allows for a judge, only in the appropriate circumstances to direct a non-party to produce documentary evidence prior to trial. Lampron, 441 Mass. at 270. The Commonwealth does not dispute that the defendant is entitled to a hearing before this honorable court on the merits of her motion and to hear relevant objections, if desired to be communicated to the Court, from Verizon; AT&T; and third party, Mr. Brian Albert. The Commonwealth's objection pertains to her attempts to embark on an evidentiary hearing with expert and non-interested witnesses, in an attempt to broaden the scope and powers of Mass. R. Crim. P. 17 (a) (2) and to harass and intimidate the witnesses. Lam, 444 Mass. at 224.

Respectfully Submitted
For the Commonwealth,

MICHAEL W. MORRISSEY
DISTRICT ATTORNEY

By: _____

Date: May 19, 2023

Adam C. Lally
Assistant District Attorney

/s/ Laura A. McLaughlin
Laura A. McLaughlin
Assistant District Attorney

Exhibit A

2020 WL 8079734
Only the Westlaw citation is currently available.
Supreme Judicial Court of Massachusetts,
Suffolk County..

R. C.

v.

Ryder CHILCOFF and the Commonwealth of Massachusetts

Docket No. SJ-2020-0081, Docket No. 1880CR00020
|
Dated: December 15, 2020

Memorandum of Decision and Judgment on Victim-Witness's Petition for Relief under G. L. c. 211, § 3

Elspeth B. Cypher, Associate Justice

***1** The victim-witness in the above-captioned matter has petitioned for relief from an order of the Hampshire Superior Court (Carey, J.). The order (1) directed the victim-witness to produce her cellular telephone (cell phone) and any potential "back-ups" to a court-appointed expert, so that the expert can conduct a forensic exam and recover incoming and outgoing texts, emails, photos, phone calls, and any other communications sent or received by the victim-witness from December 8, 2017 to December 19, 2017; (2) ordered the victim-witness to produce the names and login information of any third-party service providers that were in possession of the requested information; and (3) instructed Facebook and Instagram to provide information related to the victim-witness from December 8, 2017 to December 19, 2017. The victim-witness requests that the Superior Court order be narrowed to encompass December 8, 2017 through 10:00 a.m. on December 9, 2017 with regard to the first and third parts of the order and that the second part of the order be vacated.

Background. According to the record provided by the parties, the evidence will show that in December 2017, the defendant, Ryder Chilcoff, and the victim-witness both attended the same college in Massachusetts. They also both lived in the same dormitory on campus, with the victim-witness living in a room one floor directly below the defendant's room, with both rooms having the same layout. On the night of December 8, 2017, the victim-witness consumed alcoholic beverages with her friends at a different residential building; she became intoxicated and does not have a recollection of leaving that residential building or of anything else that occurred that night. Other sources provide a recount of what else happened to the victim-witness that night.

The victim-witness and some of her friends who were also at the other residential building attended a fraternity party. She eventually left the party. Other students from the party walked her back to her dormitory and she arrived there after midnight.

In the early morning of December 9, 2017, the defendant was in his dormitory room watching a movie with his roommate and his friend. The victim-witness entered the defendant's dormitory room, and spoke with the defendant, his roommate, and his friend. The defendant, his friend, and his roommate did not know the victim-witness. They learned that she lived on the floor below the defendant's, but the defendant's roommate was unable to locate her friends when he went downstairs. They tried to convince her to leave, and eventually she did, but she returned a short time later.

The second time she entered the defendant's room, she lay down on the defendant's bed, took off her shirt, got under the covers, and appeared to go to sleep. The defendant's friend tried to get her to put her shirt back on and the victim-witness told him that she was in her own room. He eventually left to return to his residence. As the defendant and his roommate were trying to get the victim-witness to leave the room, she took the defendant's hands and put them on her breasts. The defendant's roommate

told the defendant that this was a "gray area" and that he was going to contact the resident assistant. However, the defendant told him not to do so. The roommate later told the police the defendant heavily implied that the roommate should leave the room; when the roommate asked the defendant "what do you want me to do?" the defendant "didn't say anything and he looked at the door and he like gestured." The roommate left the room and while he was out, the defendant and the victim-witness engaged in sexual intercourse.

*2 In an interview with campus police after the incident, the defendant's roommate told the police that when the victim-witness was in the room, she was "stumbling [and] slurring her words," he and the friend told the defendant that the victim-witness was drunk and would probably throw up in his bed, and that when she started putting the defendant's hands on her body that the roommate "could tell, obviously, she was just too drunk to comply with anything."

Later that morning, the defendant left his room while the victim-witness was still sleeping, as he had to travel to another state. When the victim-witness woke up in the morning, she was not wearing pants or underwear. The victim-witness felt weird and had chest pain. The defendant's roommate and the victim-witness searched the room for her underwear but were unable to find it. They did find a used condom on the floor. She found out from the defendant's roommate who the defendant was and he showed her a photograph of the defendant. The victim-witness did not know the defendant.

After returning from his trip, the defendant returned the victim-witness's underwear and earring to her by leaving a bag containing the items outside of her dormitory room. On December 12, 2017 the victim-witness disclosed to her sister what had happened. Her sister then vandalized the defendant's dormitory room by, in part, pouring laundry detergent onto the room's entryway door and leaving a note that read "you fucked with the wrong person." The defendant alerted police about his room being vandalized, and when asked who might have done it, the defendant said it may have been a boyfriend of the victim-witness, who he had sexual relations with on December 8, 2017. He provided the victim-witness's information. Campus police left a voicemail for the victim-witness asking to speak with her about vandalism reported by the defendant. On December 13, 2017 the victim-witness went to campus health services for a sexual assault evaluation.

As part of the investigation into the vandalism and the possible sexual assault, a campus police officer took a recorded statement from the defendant. The defendant first told the officer that he met the victim-witness at a party, but then told the officer that was not what happened and to "cross all that out." He then admitted that he did not know the victim-witness, he had not been drinking alcohol in his dormitory room on the night in question, nor was he under the influence of drugs, he heard the victim-witness make statements that she thought she was in her own room, he could smell alcohol on her breath, and he engaged in sexual intercourse with the victim-witness after his roommate left the room.

The defendant was indicted on one count of rape.

As discussed below, the defendant sought to obtain certain information from the victim-witness's cell phone. During its investigation, the Commonwealth received screenshots of select messages and phone records from the victim-witness's cell phone. One message was sent by the victim-witness to a friend and stated that on the night of December 8, 2017, she had "blacked out" and did not remember what had happened. Screenshots showed that she received calls during the hours in question but did not answer. The defendant argued in his motions and in his opposition to the present petition, in part, that the victim-witness's cell phone contained communications and other information that is relevant to the case. The victim-witness reported that her cell phone was stolen at an airport in May 2018.

*3 Procedural history. a. First motion. In March 2019, the defendant filed a Mass. R. Crim. P. 17(a)(2) motion seeking the production of a variety of records and information, including a request for Apple, Incorporated (Apple) to produce all text messages sent by the victim-witness from December 8, 2017 to March 2019. A Superior Court judge denied the motion for text-related records because the motion failed to satisfy Commonwealth v. Lampron, 441 Mass. 265 (2004).

b. Second motion. In September 2019, the defendant filed a second motion pursuant to Mass. R. Crim. P. 17(a)(2) for, in part, the victim-witness to produce her cellular telephone to a defense expert for a forensic examination to recover information from the victim-witness's cell phone from December 8, 2017 to December 19, 2017 relating to her electronic communications and her use of social media, including Facebook and Instagram.

On January 27, 2020, after a hearing, a Superior Court judge ordered the victim-witness to produce her cell phone to a forensic expert designated by the court so that the expert can extract "incoming and outgoing text messages, emails, photographs, Snapchats, Facebook messages, Instagram messages, usage records, telephone calls, and/or other communications sent and/or received by [the victim-witness] between December 8, 2017 and December 19, 2017"; that if the victim-witness no longer had possession of the cell phone she used in December 2017, she must produce any electronic devices in her possession that contained a backup of the referenced information and provide the expert with any passwords required to access the information; the victim-witness to produce the names and log-in information of any third-party service providers that were in possession of the referenced information; and Facebook to produce Facebook and Instagram data associated with the victim-witness's accounts during the specified time period, including specific IP logs, content and records of messages, comments, photographs and any other communications sent and/or received by the victim-witness from December 8, 2017 to December 19, 2017. The order also stated that "[t]he Court will review all information produced to this court pursuant to [the order] and release to the defense and the Commonwealth all records it deems relevant."

Discussion. The January 27, 2020 order is the subject of this petition. The victim-witness asks me to (1) narrow the date range for her cell phone and potential back-ups and for the Facebook and Instagram data to December 8, 2017 through December 9, 2017 at 10:00 a.m., and (2) vacate that portion of the order that requires the victim-witness to provide the names and log-in information for third party service providers. The Commonwealth joined the victim-witness's petition.

a. Review under G. L. c. 211, § 3. Exercise of this court's superintendence power under G. L. c. 211, § 3 is warranted in this case because the victim-witness has asserted a substantial claim of a violation of a substantive right, namely that the trial court judge erred as a matter of law or abused his discretion by failing to properly weigh the privacy concerns or properly apply Lampron, and this error or abuse of discretion cannot be remedied through the normal appellate process, in part because the victim-witness is not a party to the case. Commonwealth v. Vega, 449 Mass. 227, 229 (2007).

*4 b. The discovery order. Mass. R. Crim. P. 17 governs the procedure a party must follow to produce material in the possession of a third party for use at trial. The Massachusetts rule is modeled after Fed. R. Crim. P. 17[1] and is generally in accord with prior Massachusetts law. Reporter's Notes to Mass. R. Crim. P. 17. "Because our rule was modeled after Fed. R. Crim. P. 17(c) and is intended to address the same circumstances, we adopt the standards articulated by the Federal courts regarding the issuance of a subpoena for production of documentary evidence." Commonwealth v. Lampron, 441 Mass. 265, 270 (2004).

A successful motion under Rule 17[2] requires that the moving party "establish good cause, satisfied by a showing: (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' " (quotation omitted). Lampron, supra at 269. The Lampron requirements are intended to serve as a "guard against intimidation, harassment, and fishing expeditions for possible relevant information." See Commonwealth v. Dwyer, 448 Mass. 122, 145 (2006). See also Commonwealth v. Lam, 444 Mass. 224, 229 (2005) (acknowledging the legitimate interest "in preventing unnecessary harassment of a complainant ... caused by burdensome, frivolous, or otherwise improper discovery requests"). These four requirements have been summarized as "relevance, admissibility, necessity, and specificity." Commonwealth v. Mitchell, 444 Mass. 786, 792 (2005).

There is no case law in Massachusetts addressing the use of Rule 17 to obtain a victim-witness's cell phone communication or third-party service providers. Nevertheless, the Supreme Judicial Court has recognized that cell phones often contain an immense amount of personal information. See Commonwealth v. Fulgiam, 477 Mass. 20, 32 (2017) ("modern cellular telephones contain

vast quantities of [digital] personal information" [quotations omitted]); Commonwealth v. White, 475 Mass. 583, 591 (2016), quoting Riley v. California, 573 U.S. 373, 395 (2014) ("many of [those] ... who own a cell phone [in effect] keep on their person a digital record of nearly every aspect of their lives"). We have also recognized that, as a result, individuals have significant privacy interests at stake in their cell phones. See Commonwealth v. Dorelas, 473 Mass. 496, 502 n.11 (2016). See also White, supra at 592 n.11 ("these interests exist even where ... the device does not appear to have all the capabilities of an upmarket 'smart phone' "). Indeed, "the privacy interests implicated in smartphone searches 'dwarf' those in cases in which a limited information is contained in a finite space." Dorelas, supra, citing Riley, supra at 392-398. In protecting this heightened privacy interest, "[i]t is not enough to simply permit a search to extend anywhere the targeted electronic objects possibly could be found." Dorelas, supra at 502. See Commonwealth v. Broom, 474 Mass. 486, 495-496 (2016). Thus, when ruling on a request under Rule 17 for a victim-witness's cell phone or cell phone records, the judge must include a consideration of these inherent privacy concerns. See Hardy vs. UPS Ground Freight, Inc., U.S. Dist. Ct., No. 3:17-cv-30162-MGM (D. Mass. July 22, 2019). A victim-witness does not surrender her privacy rights by filing a complaint or by cooperating with a police investigation.

*5 In a similar case from Minnesota, State v. Yildirim (In re B.H.), 946 N.W.2d 860, 865 (2020) the court concluded that because " '[c]ell phones differ in both a quantitative and a qualitative sense from other objects' that a person might possess," that the cell phone could contain exculpatory information was insufficient to order its production for examination. Yildirim, 946 N.W.2d at 870-871, quoting Riley, 573 U.S. at 393. Similarly, in People v. Spykstra, 234 P.3d 662 (Col. 2010), the lower court had ordered the victim's parents to allow a forensic expert to access their computer to search for certain email communications. The Colorado Supreme Court concluded that the order "improperly converted the subpoenas into the functional equivalent of search warrants" that were not authorized by the rules of criminal procedure and that the defendant had failed to make showings of relevance or specificity, which were "underscored by the lack of supporting evidence" that relevant materials even existed, and the "lack of specificity in providing a broad date range." Id. at 671-672.

Federal courts have come to the same conclusion regarding their Rule 17. See United States vs. Murray, U.S. Dist. Ct., No. 3:18-cr-30018-MGM-1 (D. Mass. May 6, 2019), quoting Bowman Dairy Co. v. United States, 341 U.S. 214, 220 (1951) (refusing request to create a forensic image of cell phone of a "critical government witness whose impeachment will be important to the defense" because "Rule 17(c) was not intended to provide an additional means of discovery"; request was overbroad, and lacked specificity); United States vs. Delay, U.S. Dist. Ct., No. CR15-175RSL (W.D. Wash. Oct 2, 2017) (denying request for Fed. R. Crim. P. 17 subpoena to obtain records and documents from social media service associated with victim witness's email addresses, including her communications with other users of service where defendant's request would sweep in great deal of irrelevant or inadmissible information); United States vs. Guild, U.S. Dist. Ct., No. 1:07cr404 (JCC) (E.D. Va. Jan. 8, 2008) (denying request for cell phone records of two minor victims where defendant stated only that emails would allow him to "investigate more detailed facts" surrounding the allegations).

It is also important to remember that the rule is a rule of production, not a rule of discovery. Commonwealth v. Sealy, 467 Mass. 617, 627 (2014), quoting Lampron, 441 Mass. at 269. The rule is "intended to expedite trial proceedings by avoiding delay caused by the often onerous task of responding to a summons of documents." Lampron, supra at 270. Here, the defendant has offered nothing more than speculation that there may be relevant evidence in the information he seeks.[3] A "generalized claim that the victim could have fabricated her account of the rape" does not satisfy the Lampron standard. Sealy, 467 Mass. at 628.[4]

The order that the victim-witness produce a list of the "the names of any third-party service providers, including Apple and/or Samsung Cloud, that are in possession of the requested information, along with the email, Apple ID, and/or other subscriber information associated with those accounts" was improper. Not only does such an order contravene the principle that Rule 17 is not a discovery tool, it is also essentially an interrogatory that the judge is requiring the victim-witness to answer. Massachusetts criminal procedure rules do not provide for this kind of discovery. Compare Mass. R. Crim. P. 14. See also Reporter's Notes to Mass. R. Crim. P. 35 (permitting depositions in limited circumstances to preserve testimony, not as a discovery tool); Commonwealth v. Tanso, 411 Mass. 640, 648 (1992).

*6 The order that Facebook produce Facebook and Instagram data associated with the victim-witness's accounts during the specified time period, including specific IP logs, content, records of messages, comments, and any other communications sent or received from December 8, 2017 to December 19, 2017 refers to data that is controlled by the Stored Communications Act (SCA).[5] 18 U.S.C. § 2701-13. The SCA creates criminal and civil liability for certain types of unauthorized access to private digital communications. See Low v. LinkedIn Corp., 900 F. Supp. 2d 1010, 1022 (N.D. Cal. 2012); Facebook, Inc. v. Wint, 199 A.3d 625, 628–629 (D.C. 2019). Generally, this liability precludes compliance with court orders otherwise requiring disclosure of private information. See Wint, supra. The SCA includes specific, enumerated exceptions when an electronic service provider may disclose private communications; a subpoena requested by a criminal defendant is not one of those exceptions. 18 U.S.C. §§ 2702-03. See Wint, supra. The SCA does not preclude a subpoena directed at the author or recipient of a message, but prevents subpoenas directed at third parties, such as Facebook, that transmit them. See Wint, supra ("[T]he SCA does not prohibit subpoenas directed at senders or recipients rather than providers"). Accordingly, any court order must comply with the SCA. The order requiring Facebook to produce Facebook and Instagram data associated with the victim-witness's accounts does not comply with the SCA.

Finally, the last statement in the order, "[t]he Court will review all information produced to this court ... and release to the defense and the Commonwealth all records it deems relevant" is not a procedure contemplated by Lampron. Rather it is a procedure that we expressly rejected in Dwyer. There, we concluded that "trial judges cannot effectively assume the role of advocate when examining records." Dwyer, 448 Mass. at 144. "Despite their best intentions and dedication, trial judges examining records before a trial lack complete information about the facts of a case or a defense to an indictment, and are all too often unable to recognize the significance, or insignificance, of a particular document to a defense." Id. Accordingly, any records produced to the court shall be inspected only by defense counsel of record who summonsed the records. Defense counsel is prohibited from "copying any record or disclosing or disseminating the contents of any record to any person, including the defendant." Dwyer, supra at 146. Disclosure of the contents of the records to any other person is permitted only if "[the] judge subsequently allows a motion for a specific, need-based written modification of the protective order." Id. The judge is permitted to review the record in camera in conjunction with a motion for modification of the protective order. See id. at 146 n.29.

Conclusion. The victim-witness is no longer in possession of the cell phone she had on the night of the alleged rape, therefore the order requiring that the victim-witness produce her cell phone is vacated. The order that the victim-witness produce any electronic devices in her possession that contain a back-up of incoming and outgoing text messages, emails, photographs, Snapchats, Facebook messages, Instagram messages, usage records, telephone calls, and other communications sent or received by the victim-witness from December 8, 2017 to December 19, 2017 and relevant passwords is narrowed to December 8 to December 9, 2017 at 10:00 a.m. The defendant's November, 2020 motion to modify the order for compliance with the SCA is denied. The order that the victim-witness disclose the names and log-in information of any third party service providers that were in possession of her incoming and outgoing text messages, emails, photographs, Snapchats, Facebook messages, Instagram messages, usage records, telephone calls, and other communications sent or received by the victim-witness is vacated. The order that Facebook produce Facebook and Instagram data associated with the victim-witness's accounts during the specified time period, including specific IP logs, content and records of messages, comments, and any other communications sent or received from December 8, 2017 to December 19, 2017 is vacated. The part of the order that states the judge will review the material for relevance is stricken. The stay entered in this Court is vacated.

*7 So ordered.

All Citations

Not Reported in N.E. Rptr., 2020 WL 8079734

Footnotes

1 The Federal rule contains a subsection concerning subpoenas "for Personal or Confidential Information About a Victim." See Fed. R. Crim. P. 17(c) (3). That provision states, in part, that "a subpoena requiring the production of personal or confidential information about a victim may be served on a third party only by court order." Massachusetts does not have a similar provision.

2 I refer to the Massachusetts rule as Rule 17.

3 The defendant argues that he needs the material to "effectively defend himself against these allegations." RA-0027. The defendant did not explain how his cross-examination as to the victim-witness's motive to lie would be impeded without access to the victim-witness's cell phone communications.

4 The defendant may cross-examine the victim-witness as to the timing of her disclosures to her sister and police, and he may argue that the vandalism investigation formed a motivation to lie.

5 The defendant filed a motion to modify the order stating that "the [SCA] stands as an impediment to the effective satisfaction of the Order as currently written." The defendant filed the same motion in the Superior Court. The Superior Court has not acted on that motion.

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