

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

STATE OF DELAWARE

v.

MATTHEW PHLIPOT,

§

§

§ ID 0903021873

§ SBI: 00

§

ORDER

_____ Upon Defendant's Motion to Suppress.
Denied.

NOW, THIS 11th day of JANUARY, 2010,

Pending before the Court is a motion to suppress filed by Defendant Matthew Philipot, who is charged with four counts of fourth degree rape, pursuant to 11 *Del. C.* § 770(a)(2).¹ During the course of the police investigation leading to Defendant's arrest, police seized electronic mail messages from Yahoo!, Inc., allegedly written between Defendant and the victim on an account created expressly for that purpose. Defendant argues that the search warrant affidavit was defective and moves to suppress the seized evidence. To the extent that the motion

¹Title 11 *Del. C.* § 770 (a)(2) provides in pertinent part:

A person is guilty of rape in the fourth degree when the person: . . .

(2) Intentionally engages in sexual intercourse with another person, and the victim has not yet reached that victim's eighteenth birthday, and the person is 30 years of age or older. . . .

attacks the veracity of the officer's sworn statement, an affidavit in support of the motion to suppress should have been submitted by Defendant pursuant to Super. Ct. Crim. R. 41(f) and *Franks v. State*.² No such affidavit was submitted. The Court considers the motion nonetheless because the issue as to veracity pertains to information which was undisputedly omitted rather than to overtly false statements included in the affidavit.

Contentions. Defendant argues first that the search warrant affidavit failed to state adequate grounds to seize the electronic mail messages. Second, Defendant argues that the police failed to investigate the source of the electronic messages apart from the victim's statements and a review of the messages themselves. Third, Defendant argues that the search warrant affidavit was defective because of the police failed to include information about the victim's statements denying sexual contact with Defendant. Based on these contentions, Defendant argues that the electronic messages were illegally obtained and must be excluded from evidence at trial.

Discussion. Defendant's first argument is that the probable cause affidavit failed to set forth sufficient grounds to justify a search warrant for the electronic mail messages. The test for probable cause in a search warrant is not rigorous,

²398 A.2d 783 (1979).

requiring only a probable showing of criminal activity.³ The four corners of an affidavit supporting a search warrant must set forth adequate facts for a magistrate to form a reasonable belief that an offense has been committed and the property to be seized will be found in a particular place.⁴

Defendant asserts that the affidavit lacks any statement by Detective Chambers as to why he believed that the requested electronic messages might reveal evidence of the charged crimes. In fact, section Affiant and Witness, Paragraph 3 of the affidavit states Detective Chambers' belief that Yahoo! was "holding records created by the suspect in this case [i.e., Defendant] that affiant believes to be evidence in this case." In the section History and Facts of the Complaint, Paragraph 11 states the officer's belief that the desired records may contain "evidence of a violation of 11 *Del. C.* § 0770 [sic], Rape Fourth Degree." Instead of explaining the details of the connection between the records and the alleged crime, Detective Chambers attached copies of electronic messages from the designated account provided by the victim. All these messages show Defendant's obsessive interest in the victim, and several include evidence of possible sexual involvement. The first such message relates an explicitly sexual dream about

³*Smith v. Sisson*, 883 A.2d 868 (Del. Super. Ct. 2005).

⁴*Morgan v. State*, 962 A.2d 248 (Del. 2008).

Defendant and victim. Another message refers to the fact that the victim apparently confided in a counselor about the sexual relationship. In a third message, Defendant states “I think I like Pi better if you get to eat pie. . . lol.”⁵ According to the victim, and as stated in the affidavit, Defendant set up the electronic messaging account as a means for Defendant and the victim to communicate, after he was barred from communicating with her by the Family Court. There is no evidence to show or even suggest that anyone else used or had access to the account. Electronic messages are a means of communication, and the Court finds that the affidavit made a probable showing that Defendant used the electronic messaging account to communicate with the victim about his feelings for the victim and the incidents of sexual intercourse reported by the victim.

Defendant’s second argument is that Detective Chambers made no independent investigation to link the electronic messages to Defendant apart from reliance on the victim’s statements. The affidavit provides the name of the account, which used the initials of Defendant’s and the victim’s first names, and various names that the writers used in the text of the messages. In the messages attached to the affidavit, the writer signed off variously as “Matt,” “Matthew Martin Phlipot,” “Wonderwall,” and “Your Superman.” The affidavit states that all

⁵“Lol” is shorthand for the phrase “laugh out loud.”

the messages were sent from “Bob Smith” to “KM Forever.” The affidavit states that during the third interview in March 2009, the child victim stated that the Yahoo! e-mail account was set up by Defendant subsequent to his guilty plea in the Family Court to facilitate communication between them since a condition of his sentence was to have no contact with the victim. The affidavit states that Defendant’s guilty plea to Endangering the Welfare of a Child, entered February 27, 2009, was based on the assistance he provided to the victim in her attempt to run away from home. The interview when the victim stated that Defendant set up the account for communication purposes took place on March 18, 2009, less than one month later. Based on the names used in the messages and the content of the messages submitted with the affidavit, the Court finds that the affidavit sufficiently established a link between Defendant and the Yahoo! account to justify a search warrant.

Defendant’s third argument is that the police omitted certain material information from the affidavit and that if it had been included the application for a search warrant would have been denied. If a defendant argues that the police omitted material facts and did so with a reckless disregard for the truth, then the

rationale of *Franks v. Delaware* applies.⁶ Defendant must first make a substantial preliminary showing that the alleged omissions were made knowingly, intentionally, or with a reckless disregard for the truth.⁷ If he makes that showing, the omitted material will be added and the affidavit reevaluated by the Court for probable cause.⁸ If the Court concludes that the affidavit does not establish probable cause, the seized evidence will be suppressed.

The victim was interviewed by the police on three separate occasions. Not until the third interview did she acknowledge and describe having sexual intercourse with Defendant. The affidavit describes only the subject matter of that third and final interview. Defendant asserts that the affidavit should have included details about the first interview, which was conducted when the victim was returned to Delaware after being held in a juvenile detention facility in West Virginia. She had been picked up by authorities while traveling by train to stay with relatives in Illinois. Under those circumstances the victim was upset and angrily denied having had any sexual intercourse with Defendant. To make matters

⁶*Blount v. State*, 511 A.2d 1030 (Del. 1986) (citing *Franks v. Delaware*, 438 U.S. 154 (1978)).

⁷*Id* at 1033-34.

⁸*Sisson v. State*, 903 A.2d 288, 300 (Del. 2006)(citing *Franks v. Delaware*, 438 U.S. 154 (1978)). *See also Smith v. State*, 887 A.2d 470 (Del. 2005).

worse, her father, the person she was trying to elude, was present during the interview. The record indicates that the victim was highly antagonistic toward her father and had even expressed a desire to cause him physical harm.

Defendant also believes that information about the second interview should have been included in the affidavit. This time the victim was accompanied by her grandmother, who told the officers that the victim was ready to admit the sexual intercourse with Defendant. However, the victim became upset when she learned that the officers she wanted to speak to were not present. She wanted to find out whether Defendant was responsible for disclosing her whereabouts to the authorities while she was traveling to Illinois. When she was told the officers were not available, she became contentious and uncooperative.

Defendant makes two related arguments about the first two interviews. He argues that the victim's behavior in running away from home, hating her father, and yelling at her grandmother and the police officers indicates that the information she provided to the police in her third interview, which forms the basis of the affidavit, was not reliable. He also argues that the information about all three interviews should have been included in the affidavit and that if it had been, the result would have been a denial of the application for a search warrant.

As to the victim's reliability, considering her behavior at all three interviews,

I find that her conduct is consistent with a troubled 17-year old child. She wanted to get away from her father, which meant either harming him or running away, and she was allegedly willing to do either. She was angry with the world in general and she engaged in, at a minimum, a romantic relationship with an adult male. In describing her sexual relationship with Defendant, the victim provided dates, times, places and specific acts. These facts were included in the affidavit. The fact that the victim did not initially provide this information does not render it unreliable. I find the victim's statements in the third interview to police to be credible.

Even assuming *arguendo* that the police acted recklessly in omitting information regarding the first and second interviews, I find that the victim's statements in those interviews, when she was speaking out of anger and desperation, are the ones lacking credibility.

Finally, I reject Defendant's argument that if all the information had been included in the affidavit there would have been no finding of probable cause. In fact, the full story strengthens the showing of probable cause. A narrative of the three interviews makes a compelling story of a teenager who had an unhappy home life and turned to the wrong places to resolve her problems, first to an older man, then to relatives living in a different state. It is no surprise that after spending time in a juvenile detention facility in West Virginia, after having been removed

from a train against her will, the victim was distraught and easily angered. In satisfaction of the analysis required by *Franks v. Delaware*,⁹ I conclude that the search warrant application would have been granted if the information regarding all three interviews was included.

For all these reasons, Defendant's motion to suppress is **DENIED**.

IT IS SO ORDERED.

Richard F. Stokes, Judge

Original to Prothonotary
cc: David Hume, IV, Esquire
Michael R. Sensor, Esquire

⁹438 U.S. 154 (1978).