

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH VI

BROWN COUNTY

STATE OF WISCONSIN

Plaintiff,

v.

GEORGE BURCH

Case number: 16-CF-1309

Defendant.

DEFENSE'S MOTION TO SUPPRESS EVIDENCE OBTAINED FROM MR. BURCH'S PHONE

Mr. Burch, through his attorneys, Jeffrey J. Cano, Scott L. Stebbins, and Lee D. Schuchart, appearing specially in order to preserve all jurisdictional objections, hereby files this Motion to Suppress Evidence Obtained from Mr. Burch's Phone. The State obtained this evidence through an illegal search and seizure and is therefore inadmissible.

FACTS

On June 8, 2016, a citizen notified the Green Bay Police Department of a missing red Chevrolet Blazer. Officer Robert Bourdelais responded to the scene. Upon arrival, Officer Bourdelais obtained information that Mr. Burch may have been involved in a hit-and-run with the missing red Blazer.¹ Officer Bourdelais spoke with Mr. Burch, who maintained his innocence. Mr. Burch allowed Officer Bourdelais to view his text messages and download data from his phone to prove his innocence. The implied scope of consent was limited to searching areas in his phone solely for investigating the alleged hit-and-run incident. Officer Bourdelais asked his forensic analyst to "retrieve any information from [the phone] including text messages, phone calls, Facebook posts, and photographs taken any time after 11:00 pm [on June 7, 2016]." The forensic analyst's report indicates that she was asked to "extract data and analyze the data for all content after 21:30 hours on Tuesday, June 7, 2017." In further investigation, Officer Scharenbrock obtained a statement from a witness who saw the person driving the red Chevrolet Blazer. The witness saw the driver standing outside the Blazer and described the driver as

¹ There were two ongoing investigations. Officer Bourdelais was investigating the missing vehicle and Officer Scharenbrock was investigating a hit-and-run that seemed to involve the missing vehicle. These two separate investigations really evolved into one investigation and will be treated as such.

standing 5'8" tall with short blonde hair.² On June 15, 2016, Officer Bourdelais concluded, "[a]t this time there is no information to prove [Mr. Burch] was the one driving the Blazer during the accident." As a result, officers closed the investigation.

Despite closing the investigation into Mr. Burch, the Green Bay Police Department kept the phone data. There is no indication that law enforcement told Mr. Burch it would store his phone data in perpetuity. In August of 2016, the Brown County Sheriff's Office (hereinafter "BCSO"), obtained the stored phone data from the Green Bay Police Department to use in its investigation into the murder of Nicole VanderHeyden. Neither the Green Bay Police Department nor the BCSO obtained Mr. Burch's consent for this use of the data. The BCSO never obtained a warrant to search through Mr. Burch's stored phone data. The State now offers the phone data as evidence in its prosecution of Mr. Burch.

Investigators used the phone data obtained from the initial phone extraction against Mr. Burch in at least two ways. First, the data shows that Mr. Burch viewed the news story of Nicole VanderHeyden's death on his phone several times near the date of the murder (May, 21, 2016). Second, law enforcement used the data to identify Mr. Burch's Google account name and eventually obtain a search warrant for the geolocation of his phone from May 20 through May 22.

Law

The Fourth and Fourteenth Amendments protect people and their property from unreasonable searches and seizures. Searches conducted without a warrant are per se unreasonable. *Katz v. United States*, 389 U.S. 347, 357 (1967). An exception to the warrant requirement is voluntary consent. *State v. Matejka*, 241 Wis.2d 52, 59 (2001). When law enforcement obtains voluntary consent to search, the scope of the search is limited by the terms of its authorization. *Walter v. United States*, 447 U.S. 649, 656 (1980). "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness –what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Florida v. Jimeno*, 500 U.S. 248, 251 (1991). The State bears the burden of establishing whether the search was within the scope of consent by clear and convincing evidence. *Matejka*, 241 Wis.2d at 59-60 (citing *State v. Kiefer*, 217 Wis.2d 531, 541-42 (1988)).

² Mr. Burch's booking information from September 7, 2016, describe him as 6'7".

Analysis

A person may limit the scope of a consent search. For example, if a person allows law enforcement to search their garage, law enforcement may not then search the person's home. Similarly, if a person allows law enforcement to search their car for a missing person, law enforcement cannot search the glove compartment and other areas where a person could not be. Finally, if a person allows law enforcement to search their vehicle only on Tuesday, law enforcement cannot return the following Monday to conduct a subsequent search. A search that exceeds the initial scope of consent is an unreasonable search under the Fourth Amendment. The BCSO's search of Mr. Burch's phone data was unreasonable for three reasons: (1) it lacked consent to search the phone data, (2) it exceeded the dates permitted by Mr. Burch's original consent, and (3) it exceeded the places within the data to be searched permitted by Mr. Burch's original consent. Brown County provides easy access to neutral magistrates for obtaining warrants. BCSO's failure to obtain a warrant compounds these errors. Therefore, the Court should exclude the evidence derived from Mr. Burch's phone.

The BCSO was not authorized to search Mr. Burch's phone. Mr. Burch gave consent to search his phone solely to the Green Bay Police Department. It is unreasonable to think that any other agency would be able to come sift through Mr. Burch's phone data for other purposes. Would any state agency be able to search the phone data? Would any federal agency be able to search the phone data? The IRS? The FBI? What about any private third party like the news or public? It would be objectively unreasonable that Mr. Burch's consent, solely given to the Green Bay Police Department, would be shared amongst all other agencies or entities; especially considering this phone data was turned over months after Mr. Burch's hit-and-run case was closed. The BCSO exceeded the scope of Mr. Burch's original consent.

Even if the BCSO had consent to search Mr. Burch's phone, its search exceeded the date ranges that Mr. Burch's consent allowed. Mr. Burch gave consent to search his phone to prove he was not involved in a hit-and-run. The hit-and-run allegedly happened on June 8, 2016. Officer Bourdelais specifically ordered his forensic analyst only to search the phone for information on the dates of June 7, 2016, and June 8, 2016. The BCSO's later search exceeds the timeframe that Mr. Burch consented to. By searching through other dates on Mr. Burch's phone, the BCSO exceeded the scope of Mr. Burch's original consent.

In addition, the BCSO exceeded the places within the data it could search in Mr. Burch's phone data. The purpose of Mr. Burch's consent was to exonerate himself from the alleged hit-and-run. Officer Bourdelais objectively understood the scope of Mr. Burch's consent when he ordered the forensic analyst to obtain any information from Mr. Burch's phone after 11:00 pm on June 7, 2016. The BCSO exceeded the places within the data they could search by exploring his web browser history and Google account. The BCSO exceeded the scope of Mr. Burch's original consent.

Conclusion

The Brown County Sheriff's Office violated the Fourth Amendment when they searched the phone data initially seized by the Green Bay Police Department. The Brown County Sheriff's Office blew past Mr. Burch's scope of consent, and likewise, obliterated any Fourth Amendment warrant exceptions. The Court should not take lightly how easy it would have been to get a warrant. All evidence obtained from the fruits of the unconstitutional search and seizure must be suppressed.

Dated at Green Bay, Wisconsin, this Thursday, January 25, 2018.

Respectfully submitted,

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