

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPREME JUDICIAL COURT
No. SJ-2009-212
NEWTON DISTRICT COURT
No. 0912SW03

IN RE: MATTER OF SEARCH WARRANT ISSUED AND EXECUTED ON
MARCH 30, 2009, AT THE RESIDENCE OF MOVANT RICCARDO CALIXTE

COMMONWEALTH'S OPPOSITION TO PETITIONER'S EXPEDITED
APPLICATION FOR LEAVE TO APPEAL THE DENIAL OF HIS
MOTION FOR EMERGENCY RELIEF TO QUASH THE WARRANT
AND FOR RETURN OF PROPERTY

INTRODUCTION

Now comes the Commonwealth and opposes the petitioner's application, pursuant Mass. R. Crim. P. 15(a)(2), for interlocutory relief from the denial of his motion to quash warrant and for return of property. As reasons therefor, the Commonwealth states that the administration of justice will not be facilitated by granting the petitioner leave to appeal at this stage of the proceedings because: (1) the issues which the petitioner raises are moot, the motion is premature, a trial on the merits will be neither protracted nor costly and none of the petitioner's appellate rights will be abridged by a denial of his application; and (2) the judge properly denied the petitioner's motion.

PRIOR PROCEEDINGS¹

On March 30, 2009, the Newton District Court issued a warrant authorizing the Boston College Police Department to search the dormitory room of Riccardo F. Calixte, the petitioner, and to seize various electronic media belonging to him capable of storing digital information. The petitioner subsequently filed on April 10, 2009, in Newton District Court a Motion for Emergency Relief to Quash the Warrant and for Return of Property (see Attachment B). The Commonwealth filed a written opposition on April 21, 2009 (see Attachment C). Also on April 21, 2009, a non-evidentiary hearing on the motion was held before First Justice Dyanne J. Klein. The judge denied the motion from the bench and issued written findings the following day (see Order Re: Motion for Emergency Relief to Quash Search Warrant 0912SW03 and for Return of Property, attached to Petitioner's Application for Expedited Appeal, hereinafter "Order").

On April 27, 2009, the petitioner filed the instant Expedited Application for Leave to Appeal the Denial of his Motion for Emergency Relief and for Return of Property (hereinafter, "Petitioner's Application"). The petitioner

¹ Information contained in this section is taken from the Newton District Court Docket Sheet for 0912SW03 (see Attachment A).

had sent a letter to Newton District Court indicating his intent to appeal the judge's ruling (see Attachment D).

FACTS

Unless otherwise indicated, the following facts are taken from the affidavit of Boston College Police Detective Kevin Christopher (see Exhibit A to Affidavit of Attorney Adam J. Kessel, attached to Petitioner's Application, hereinafter "Christopher Affidavit"). On January 27, 2009, a Boston College student, _____, reported that he was experiencing difficulties in his relationship with his roommate, Riccardo F. Calixte, the petitioner. (Christopher Affidavit, ¶ 4(a)). On January 28, 2009, _____ met with Detective Christopher to discuss allegations that the petitioner is involved in computer hacking. (Christopher Affidavit, ¶ 4(b)). Detective Christopher described that _____ had been a reliable witness in another investigation. (Christopher Affidavit, ¶ 4(a)).

_____ told Detective Christopher that he had seen the petitioner hack into the Boston College grading system and change grades for other students. (Christopher Affidavit, ¶ 4(b)). _____ further stated that the petitioner has more than 200 illegally downloaded movies and music from the Internet on his computer. (Christopher Affidavit, ¶ 4(b)). _____ made a number of other

allegations that the petitioner was involved in unsavory activities, which may or may not be illegal. (Christopher Affidavit, ¶ 4(b)). [redacted] further described the petitioner's laptop computer with great particularity, and stated that the petitioner uses two different operating systems. (Christopher Affidavit, ¶ 4(b)). [redacted] described them both and described nicknames which the petitioner uses to identify his computer. (Christopher Affidavit, ¶ 4(b)).

[redacted] further advised that an email had been distributed recently to the Boston College community which made certain allegations regarding [redacted] personal life and activities. (Christopher Affidavit, ¶ 4(d)). A profile on a web site had been created in [redacted] name, which was also emailed to the Boston College community. (Christopher Affidavit, ¶ 4(d)). The Boston College Information Technology services traced the emails through their Internet Protocol addresses to the petitioner's computer and further found that the petitioner's computer was the only machine in the dormitory which had accessed the web site during the five days prior to when the email was sent. (Christopher Affidavit, ¶ 4(f)). Investigators also learned that the computer which had been used to send the email operates on the Ubuntu Linux

system, which is an uncommon operating system, and one that the petitioner uses. (Christopher Affidavit, ¶ 4(f)).

Finally, investigators also learned that the computer which had accessed the web site and sent the emails to the campus community was identified by a nickname, which matched the nickname that [redacted] told Detective Christopher.

(Christopher Affidavit, ¶ 4(f)).

ARGUMENT

- I. THE ISSUES RAISED BY THE PETITIONER ARE MOOT, THE MOTION IS PREMATURE, A TRIAL ON THE MERITS WILL BE NEITHER PROTRACTED NOR COSTLY AND NONE OF THE PETITIONER'S APPELLATE RIGHTS WILL BE ABRIDGED BY A DENIAL OF HIS APPLICATION.

An interlocutory appeal "may be appropriate when the alternative[] [is] a prolonged, expensive, involved or unduly burdensome trial." Commonwealth v. Cavanaugh, 366 Mass. 277, 279 (1974). However, "interlocutory appeals . .

. . . should not be permitted to become additional causes of the delays in criminal trials which are already too prevalent[.]" Commonwealth v. Lewin, 408 Mass. 107, 150 (1990), quoting Cavanaugh, 366 Mass. at 279. In addition, Massachusetts courts endeavor to "avoid piecemeal appellate consideration of criminal cases." Id. Here, the petitioner argues that an interlocutory appeal is necessary because he cannot complete his school work, cannot communicate with friends and family, and has been otherwise harmed by the

forensic analysis of his electronic media (Petitioner's Application, p. 6). These arguments are unconvincing.

There were three parts to the petitioner's motion in District Court: a request to quash the search warrant; a request for return of property; and a request to suppress evidence found as a result of forensic analysis of the petitioner's property (see Attachment B). As to the request to quash the search warrant, it is largely moot - the warrant has already been executed, the petitioner's property has been seized, and forensic analysis of that property is underway.

As to the request for return of property, G.L. c. 276, § 3 states that when a law enforcement officer finds the properties described in a search warrant, he "shall seize and safely keep them, under the direction of the court or justice, ~~so long as necessary to permit them to be produced~~ or used as evidence in any trial." G.L. c. 276, § 3. The petitioner's claim of inconvenience asks this Court to presume that although he attends a prestigious college that he has no access to a public computer lab, either through the college or even a public library. His position further asks this Court to presume that he is unable to use payphones or borrow the phone of a friend, or use any other phone on campus. Moreover, the petitioner is no worse off

than any criminal defendant whose property is seized by law enforcement for investigation. Police frequently seize cars, computers, cell phones, money, and other property from defendants accused of dealing drugs, possessing child pornography, and numerous other crimes, all of whom are inconvenienced by the loss of their property. Allowing the petitioner's appeal at this stage would open the floodgates to similar appeals from similarly-situated defendants.

As to the petitioner's request for suppression of evidence, it is premature because at this point there is no criminal case pending against this petitioner and therefore no evidence to suppress. If no charges are brought against this petitioner, or if charges are brought and the petitioner prevails by winning a motion to dismiss or securing an acquittal, then this issue will be moot. If charges are brought, the petitioner may well be able to raise the suppression issue again, and if the petitioner is ultimately found guilty of some crime, he will be able to raise all of these issues in a direct appeal. Further, the investigation into allegations against the petitioner is ongoing and even if the petitioner is successful in suppressing evidence recovered from his property seized as a result of the search warrant at issue, he may nevertheless be charged. Thus, an appeal from the denial the

petitioner's motion at this stage, while there is no criminal case pending, will not "contribute more to the reasonably prompt disposition of the case than it would to delay" a trial on the merits. Commonwealth v. Vaden, 373 Mass. 397, 399 (1977); see also Reporter's Notes to Mass. R. Crim. P. 15(a)(2).

Finally, as detailed below, the petitioner's application lacks merit because the judge ruled correctly. Furthermore, after a trial on the merits, all rights of appeal will be preserved. Appealing a conviction after trial is a more efficient means to raise the issue presented in the instant interlocutory appeal and will avoid piecemeal review of the issues raised. Accordingly, the administration of justice will not be facilitated by granting the petitioner's application for leave to appeal.

II. THE MOTION JUDGE PROPERLY DENIED THE PETITIONER'S MOTION ON THE MERITS.

In the present application, as he did in the District Court below, the petitioner challenges the validity of the search warrant on essentially four bases: he claims that the affidavit does not establish probable cause that a crime was committed; that it does not establish a nexus to the petitioner's room or property; that the information contained in the affidavit is stale; and that the affidavit did not establish basis of knowledge and

veracity sufficient for the magistrate to rely on the information he gave to police. The judge found that [redacted] information was reliable, and that the affidavit established both probable cause to believe a crime had been committed as well as a nexus to the petitioner's property (see Order, pp. 1-2). The motion judge's rulings were correct.

Probable cause that a crime has been committed must be established within the four corners of an affidavit in support of a search warrant. Commonwealth v. O'Day, 440 Mass. 296, 297 (2003). The affidavit is to be read in a commonsense, not hypercritical, manner. Commonwealth v. Harmon, 63 Mass. App. Ct. 456, 461 (2005). Detective Christopher's affidavit establishes that [redacted], a named, citizen-informant who was the petitioner's roommate, personally observed the petitioner hack into the grading system at Boston College and change grades for other students. [redacted] also observed illegally downloaded movies and music on the petitioner's computer. The judge correctly concluded that these activities establish probable cause to believe that the petitioner committed at least one of the two crimes cited in the affidavit, obtaining computer services by fraud or unauthorized access to a computer

system (see Christopher Affidavit, ¶ 4(h)).² Further, the illegally downloaded material could constitute evidence of the crime of larceny, see G.L. c. 266, § 30; police are also still investigating [redacted] allegations against the petitioner and may yet bring a criminal harassment charge - the sending of the emails could constitute part of the pattern of conduct to support such a charge, see G.L. c. 265, § 43A(a). See Commonwealth v. Cruz, 430 Mass. 838, 844 (2000) (reviewing court may affirm denial of a motion to suppress on grounds other than those relied on by motion judge).

The petitioner expounds at length about information that is not in the affidavit, such as specific dates and times from [redacted], and whether the police followed up the grade-changing allegation with professors. However, ~~that is not relevant to the issue of whether the information~~ contained in the affidavit establishes probable cause that a crime was committed. The petitioner has not alleged that Detective Christopher left out any material, exculpatory information; lied in the affidavit; or misrepresented any facts contained in the affidavit. Thus, the only issue is simply whether the affidavit establishes probable cause.

² The affidavit cites the same statute for both of these offenses, G.L. c. 266, § 120F. The petitioner as well as the judge presumed that the affidavit intended to cite G.L. c. 266, § 33A in addition to G.L. c. 266, § 120F.

Contrary to the petitioner's assertion (Petitioner's Application, p. 5), the judge did not say that the sending of the emails did not constitute a crime. Specifically, the judge found that "that activity would not in itself appear to constitute a violation of either G.L. c. 266 §§ 33A or 120F." (Order, p. 2). The Commonwealth contends that the sending of the email could constitute part of a criminal harassment case, see G.L. c. 265, § 43A(a), or possibly a civil rights violation, see G.L. c. 265, § 37. Moreover, where the judge found that hacking into the grade system could constitute unauthorized access, implicit in that finding is an inference that Boston College has a policy regarding access to and use of its network and that certain activities, such as hacking into the grading system, violate that use policy. See Commonwealth v. Beckett, 373 Mass. 329, 341 (1977) (inferences drawn from the facts in an affidavit need only be reasonable and possible, but need not be necessary or inescapable). One could similarly infer that sending of the emails purporting to be from another individual also violated the Boston College computer use policy, and therefore would constitute the crime of unauthorized use of a computer.

The petitioner's claim that the affidavit does not establish a timely nexus to his property is similarly

unpersuasive. See Commonwealth v. Cruz, 430 Mass. 838, 843 (2000) (“[f]acts supporting probable cause must be closely related to the time of the issue of search warrant so as to justify a finding of probable cause at that time”). [redacted] [redacted] was the petitioner’s roommate and personally observed him hack into the grading system; it is reasonable to infer that [redacted] [redacted] observed the petitioner engage in this criminal activity in his dormitory room and on his own computer, particularly where the affidavit establishes that the petitioner used his own computer to engage in other illegal activities. Specifically, [redacted] [redacted] stated that he observed more than 200 illegally downloaded movies and music on the petitioner’s laptop, and the Boston College IT department traced the emails back to the petitioner’s laptop and dorm room. Even if this Court were to conclude ~~that the illegal downloads and the sending of the email do~~ not constitute the crimes cited in the affidavit, they are still evidence that the petitioner used his own laptop to engage in illicit activities, supporting the nexus between the petitioner’s computer and his criminal activities.

The petitioner’s claim that the nexus to the dormitory room is faulty because the petitioner must have moved out (Petitioner’s Application, p. 14, n.3) is wholly speculative. It may be inferred that the petitioner and [redacted]

_____ were no longer roommates at the time of the search from the fact that the petitioner and _____ had been having problems, and that _____ name was not on the door of Room 207 in Gabelli Hall, although several other names were, including "Riccardo". However, there is absolutely no basis to assume that it was the petitioner who changed rooms rather than _____.

Further, although _____ made his initial complaint in late January, 2009, and did not identify exactly when he observed the illegal downloads or the petitioner hacking into the grading systems, the information in the affidavit is not stale. The affidavit contains information, from a trained, experienced computer forensic expert, which explains how such information remains on a computer and can be located even after the owner/user "deletes" it. Thus, there is no concern that the information which the police sought under the warrant would no longer be present on the petitioner's property.

Finally, as to the petitioner's claim that the search is a "fishing expedition" (Petitioner's Application, p. 15), the affidavit specifically states that digital information can be transferred from one piece of hardware to another (Christopher Affidavit, ¶ 6(i)) and specifically requested permission to seize any object capable of storing digital

data (Christopher Affidavit, ¶ 2(a)(1)). The petitioner also cites a list of student emails and a letter between the petitioner and [redacted] that are included in the search warrant return as further proof that the warrant is a "fishing expedition" (Petitioner's Application, p. 15).³ The petitioner did not raise any issue with those items below and moreover, even if seizure of those items is outside the scope of the warrant, that circumstance has no bearing on whether the affidavit itself establishes probable cause, which was the only ground for suppression that the petitioner raised below.

The petitioner erroneously suggests that this Court should strictly apply the Aguilar-Spinelli standard in evaluating [redacted] reliability (Petitioner's Application, pp. 9-14). While the Aguilar-Spinelli test is ~~still commonly applied in Massachusetts, it generally~~

³ The petitioner additionally claims that police seized a "post-it" note on which he was making notes regarding the conduct of police during the search (Petitioner's Application, p. 5); this note is not included in the return. Because the petitioner has not filed an affidavit and there was no evidentiary hearing below, it is unclear whether the note, assuming the police did seize it as the petitioner alleges, falls within the parameters of the search warrant (see Christopher Affidavit, ¶ 2(a)(3-4), requesting permission to seize passwords and access codes, as well as evidence of ownership and control). In any event, as discussed infra, even if seizure of the note exceeds the parameters of the search warrant, that is irrelevant to the question of whether the affidavit establishes probable cause.

pertains to unnamed, confidential informants. See Commonwealth v. Burt, 393 Mass. 703, 710 (1985); Commonwealth v. Harding, 27 Mass. App. Ct. 430, 434 (1989). Massachusetts courts do apply the Aguilar-Spinelli test to named informants as well, but less rigorously. See Commonwealth v. Mullane, 445 Mass. 702, 705-706 (2006). Here, the affidavit establishes [redacted] reliability as to both his basis of knowledge and his veracity.

As to the basis of knowledge prong, the informant was a named witness who met face-to-face with police and described his first-hand observations of the suspect's activities, which [redacted] learned because he was the petitioner's roommate. This is certainly sufficient to meet the Aguilar-Spinelli requirement for basis of knowledge. See Commonwealth v. Alfsonso A., 438 Mass. 372, 374 (2003) (informant observes evidence on premises); Commonwealth v. Ilges, 64 Mass. App. Ct. 503, 508 (2005) (informant observes suspect's illegal activities).

As to the veracity prong, [redacted] was also an eyewitness to one of the suspect's crimes and had provided information to the police in the past. See Mullane, 445 Mass. at 706 (named informant); Burt, 393 Mass. at 710 (Aguilar-Spinelli test relaxed for victims and witnesses); Commonwealth v. Bowden, 379 Mass. 472, 477 (1980)

(eyewitness presumed credible; Commonwealth v. Vynorius, 369 Mass. 17, 22 (1975) (informant previously provided information to police); Commonwealth v. Martin, 6 Mass. App. Ct. 624, 628 (1978) (affiant's opportunity to observe informant important factor in determining reliability)). This meets the Aguilar-Spinelli standard for veracity because [redacted] has placed his anonymity at risk in order to assist the police with this investigation.

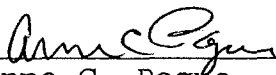
Further, it is possible to compensate for deficiencies in either basis of knowledge or reliability through independent police corroboration. Commonwealth v. Va Meng Joe, 425 Mass. 99, 103 (1997). Here, the police not only traced the emails back to the petitioner's computer, but also confirmed that the petitioner was using the same nickname for his computer which [redacted] had reported to police.

CONCLUSION

For the foregoing reasons this Court should deny the petitioner's application for interlocutory relief from the denial of his emergency motion to quash the warrant and for return of property.

Respectfully Submitted
for the Commonwealth,

GERARD T. LEONE, JR.
DISTRICT ATTORNEY



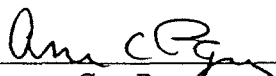
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Dated: May 4, 2009

CERTIFICATE OF SERVICE

I, Anne C. Pogue, Assistant District Attorney, served the preceding document and all attachments on counsel for the petitioner by placing a copy in our office depository for mailing, first-class, postage pre-paid, to the following address, on the date noted below.

Dated: May 4, 2009



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