

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA,

v.

GARY WOODROW BOWMAN,
Defendant

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No. CR 1488-2015

Brian B. Gazo, Esq.

Counsel for Commonwealth
Assistant District Attorney

Paul Levy, Esq.

Counsel for Defendant

MEMORANDUM OPINION AND ORDER

Matika, J. - June 27, 2019

I. INTRODUCTION.

This Memorandum Opinion addresses the September 5, 2018 "Suppression Motion" filed by Defendant Gary Woodrow Bowman (the "Suppression Motion").

In accordance with the Order that follows this Memorandum Opinion, the Suppression Motion shall be **DENIED**.

II. FACTUAL AND PROCEDURAL BACKGROUND.

A. The Underlying Charges.

Defendant Gary Woodrow Bowman ("Defendant" or "Mr. Bowman") has been charged with:

- Disseminating Photographs of Child Sex Acts

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(18 Pa.C.S.A. §6312(c));

- Possession of Child Pornography
(18 Pa.C.S.A. §6312(d));
- Criminal Use of a Communication Facility
(18 Pa.C.S.A. §7512(a)); and
- Selling Obscene Sexual Materials
(18 Pa.C.S.A. §5902(a)(2)).

B. Factual Background.

1. Synchronoss Technologies, Inc., the National Center for Missing and Exploited Children, the Cloud, the CyberTipline Reports Provided to the Pennsylvania State Police, and Obtaining the Search Warrant.

On July 8, 2015 and July 19, 2015, Synchronoss Technologies, Inc. ("Synchronoss"), the Cloud manager for Verizon Wireless accounts, detected the upload of twenty-four computer file images appearing to be child pornography.¹ A private company, Synchronoss provides remote online storage capacity for pictures, documents, and other information in the Cloud.

Pursuant to federal law, Synchronoss provided two "cybertips" to the National Center for Missing and Exploited Children

¹ In common parlance, the "Cloud" refers to a remote server. Defendant contends that "[t]he Cloud has become the primary storage system for vast amounts of personal information including pictures, videos, messages, emails, internet search histories, and countless other private information." See Brief in Support of Suppression Motion ("Defendant's Brief") at 1.

("NCMEC").² NCMEC, a federal governmental agency, receives and forwards tips of suspected child abuse to appropriate law enforcement agencies. Synchronoss provided NCMEC with the twenty-four images that it believed could be child pornography. No evidence has been set forth in this matter with respect to the manner in which Synchronoss discovered the images to consist of potential child pornography.

Defendant contends in his Suppression Motion that "NCMEC opened these photographs and confirmed it was child pornography." See Suppression Motion at ¶ 7. Defendant also contends that "[a]ccording to its tips, NCMEC did not view the images in question." See Defendant's Brief at 6, n.1.³ NCMEC undertook an investigation into the possible possessor of the photographs and

² With respect to the statutory federal child pornography reporting system, 18 U.S.C. 2258A(a) mandates that internet service providers ("ISPs") that "obtain[] actual knowledge of any facts or circumstances" evincing "apparent" child pornography violations must submit, "as soon as reasonably possible," reports to the "CyberTipline." See 18 U.S.C. § 2258A(a). An ISP may include in the report information about the identity and geographic location of the individual involved; historical reference information regarding the uploading, transmittal, or receipt of the apparent child pornography, or regarding the circumstances of the ISP's discovery of the apparent child pornography; any image of apparent child pornography relating to the incident in the report; as well as "[t]he complete communication containing any image of apparent child pornography." See *Id.* § 2258A(b). ISPs that "knowingly and willfully" fail to make a report to the CyberTipline face financial sanctions. See *Id.* § 2258A(e). The statute requires NCMEC to forward each report it receives to federal law enforcement agencies and permits NCMEC to forward the reports to state and local law enforcement. See *Id.* § 2258A(c).

³ Whether NCMEC viewed the files with the human eye, through some other methodology, or not at all, does not impact the Court's analysis.

matched the telephone number associated with the Synchronoss account to Defendant. Having done so, NCMEC provided Corporal Peter Salerno ("Corporal Salerno") of the Pennsylvania State Police Southeast Computer Crime Unit with two "CyberTipline Reports" of child pornography. Corporal Salerno received these NCMEC tips through a data base which he accessed through use of a username and password. In providing these tips, NCMEC provided Corporal Salerno with hyperlinks to the suspected images of child pornography. Within this system, when Corporal Salerno customarily clicks on a hyperlink an image appears. In the instant matter, Corporal Salerno, without yet having obtained a search warrant, clicked on the hyperlinks provided by NCMEC and viewed the images at issue. Upon doing so, Corporal Salerno confirmed that which Synchronoss originally discovered - that the images could constitute child pornography.

After examining the tips and viewing the accompanying images, Corporal Salerno conducted an investigation into the identity of the possessor of the images. Through both internet searches and inspection of subpoenaed telephone records, Corporal Salerno confirmed that the telephone number included with the tips belonged to Defendant. Corporal Salerno further confirmed Defendant's residence address of 809 East Paterson Street, Lansford, Pennsylvania. Based upon the images and his confirmation of the

possessor thereof, Corporal Salerno sought and received from a Magisterial District Judge a search warrant for Defendant's 809 East Paterson Street residence.

2. Execution of the Search Warrant.

On or about August 12, 2015, Corporal Salerno and several others executed the search warrant. Defendant answered the door after Corporal Salerno knocked on the door. Corporal Salerno advised Defendant as to the reason for the search and interviewed Defendant at Defendant's kitchen table while others examined different computer devices within the home. Corporal Salerno neither took Defendant into custody nor arrested Defendant prior to the kitchen table question and answer session. Corporal Salerno did not Mirandize Defendant prior to conducting the interview. During the interview, Defendant admitted that he possessed the phone number at issue in the tip and further admitted that he found the subject pornographic images on the internet and that he saved those images on his Amazon Kindle Fire. At the conclusion of the search, Corporal Salerno seized not only this Amazon Kindle Fire but also a telephone, a computer tower, two cameras, a flat screen television, a network adapter, and a Chromecast digital media player. Defendant admitted that he owned each of these items. Upon further investigation, the Pennsylvania State Police determined that only the Amazon Kindle Fire and the computer tower

contained child pornography. The aggregate amount of child pornography consisted of sixty-nine images contended by the Commonwealth to constitute child pornography.

C. Procedural Background: The Charges Filed and the Instant Motion.

Based upon the foregoing, Corporal Salerno charged Defendant with the above-delineated charges.

Defendant, through the Suppression Motion, characterizes issues raised for this Court's consideration thusly:

- "Whether Corporal Salerno conducted an unreasonable search under the United States and Pennsylvania Constitution when he digitally opened and viewed the images that Mr. Bowman saved on his online storage Cloud?

- "Whether the statements alleged to have been taken by (sic) Mr. Bowman were in violation of Mr. Bowman's PA Constitution (Article 1 Section 9) and U.S. Constitution (5th Amendment Rights) Miranda v. Arizona 384 U.S. 436 (1966)"

See Defendant's Brief at 4.⁴ Broadly speaking, "[i]n this suppression motion, Mr. Bowman is challenging Corporal Salerno's

⁴ This Court finds that "[w]hether the statements alleged to have been taken by (sic) Mr. Bowman were in violation of Mr. Bowman's PA Constitution (Article 1 Section 9) and U.S. Constitution (5th Amendment Rights) Miranda v. Arizona 384 U.S. 436 (1966)[,]" having not been raised by Defendant in the Suppression Motion, has been waived by Defendant and does not constitute an issue before the Court. See Suppression Motion at ¶¶ 19-24; Pa.R.Crim.P. 581(b) ("Unless the opportunity did not previously exist, or the interests of justice otherwise require, such motion shall be made only after a case has been returned to court and shall be contained in the omnibus pretrial

act of opening and viewing images that Mr. Bowman saved to his Cloud" and that "[i]t is this act that Mr. Bowman claims was an unreasonable and unconstitutional search." See Defendant's Brief at 4.⁵

III. DISCUSSION.

A. The United States Constitution and Pennsylvania Constitution Proscriptions Against Unreasonable Searches and Seizures.

In this matter, Corporal Salerno did not possess a search warrant at the time that he clicked upon the hyperlinks existing within the CyberTipline Reports that he received from the NCMEC and viewed the images revealed once he clicked the hyperlinks.

"Both the Fourth Amendment of the United States Constitution and Article 1, Section 8 of the Pennsylvania Constitution

motion set forth in Rule 578" and "[i]f timely motion is not made hereunder, the issue of suppression of such evidence shall be deemed to be waived."). See also *Commonwealth v. Douglass*, 701 A.2d 1376 (Pa.Super. 1997) (Suppression issue waived if not so moved). Even had Defendant not waived the *Miranda* issue, the Court does not believe *Miranda* to be implicated in this matter insofar as the record contains no indicia that a custodial interrogation occurred. See generally *Miranda v. Arizona* 384 U.S. 436 (1966).

⁵ In his Suppression Motion, Defendant contends that "NCMEC downloading and viewing these images without a warrant, or applicable exception, was an unreasonable search and seizure," "Corporal Salerno likewise performed an illegal search and seizure when he downloaded and viewed these images without a warrant or an exception to the warrant requirement," and "[t]hese illegal searches and seizure by NCMEC and Corporal Salerno rendered Corporal Salerno's subsequent investigat[ion] tainted." See Suppression Motion at ¶¶ 19-21.

'guarantee individuals freedom from unreasonable searches and seizures.'" See *Commonwealth v. Bostick*, 958 A.2d 543, 550 (Pa.Super. 2008) citing *Commonwealth v. El*, 933 A.2d 657, 660 (Pa.Super. 2007).⁶ A search occurs when police - i.e., the government as opposed to a private individual or entity - "...intrude[s] upon a constitutionally protected area without the individual's explicit or implicit permission." See *Commonwealth v. Fulton*, 179 A.3d 475, 487-488 (Pa. 2018). See also *United States v. Jacobson*, 466 U.S. 109 (1984) (explicating the "private search doctrine" - in search conducted by a private citizen not protected by the Fourth Amendment). "As a general rule, a search or seizure without a warrant is deemed unreasonable for

⁶ The Fourth Amendment to the United States Constitution states "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." See U.S. Const., Amend. IV.

Article I, Section 8 of the Pennsylvania Constitution provides that "[t]he people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant." See Pennsylvania Const., Art. I, §8.

As is the practice of the Pennsylvania Supreme Court, this Court shall assume for purposes of analysis that, in the absence of any contention to the contrary, the Fourth Amendment and Article I, Section 8 of the Pennsylvania Constitution offer the same protection under the circumstances presented. See *Commonwealth v. Jon Eric Shaffer*, No. 16 WAP 2019 at 7, nn. 9, 10 (Pa. June 18, 2019).

constitutional purposes." See *Commonwealth v. Holzer*, 389 A.2d 101, 106 (Pa. 1978) citing *Coolidge v. New Hampshire*, 403 U.S. 443, 454 (1971). This general rule does not apply when a search or seizure has been "conducted pursuant to a specifically established and well-delineated exception to the warrant requirement." See *Commonwealth v. Key*, 789 A.2d 282, 287 (Pa.Super. 2001). In this matter, neither the Commonwealth nor Defendant contend that any such exceptions exists.

B. The Private Search Doctrine and the Analytical Framework Set Forth by the Pennsylvania Supreme Court in Private Search Doctrine Cases.

1. The Private Search Doctrine.

The "private search doctrine" embodies the concept that "[t]he Fourth Amendment's proscriptions on searches and seizures are inapplicable to private action." See *United States v. Jacobsen*, 469 U.S. 109, 113-114 (1984). "Once frustration of the original expectation of privacy occurs, the Fourth Amendment does not now prohibit governmental use of the now-nonprivate information. See *United States v. Jacobsen*, 469 U.S. at 117. Instead, the Fourth Amendment "is implicated only if the authorities use information with respect to which the expectation of privacy has not already been frustrated." See *United States v. Jacobsen*, 469 U.S. at 117. Accordingly, any "additional invasions of ...privacy by the

government agent must be tested by the degree to which they exceed[] the scope of the private search." See *United States v. Jacobsen*, 469 U.S. at 115. See generally *Commonwealth v. Jon Eric Shaffer*, No. 16 WAP 2019 at 18-22; *United States v. Tosti*, 733 F.3d 816, 821 (9th Cir. 2013).

The Pennsylvania Supreme Court recently and explicitly has adopted and applied the private action doctrine, noting that "...we find persuasive the decisions of the federal circuit courts of appeals that have applied the *Jacobsen* construct to the private search of a computer in a similar manner." See *Commonwealth v. Jon Eric Shaffer*, No. 16 WAP 2019 at 28. In so doing, the Pennsylvania Supreme Court emphasized the government or non-government status of the individual or entity that initially "**discovered**" or "**disclosed**" the images of potential child pornography and whether the scope of any subsequent government encounter with said pornographic images, without regard to the methodology employed to facilitate such initial discovery or disclosure and subsequent encounter, constituted a mere "**re-examin[ation]**," "**observation**," or "**after-the-fact confirmation of a private search**." See *Commonwealth v. Jon Eric Shaffer*, No. 16 WAP 2019 at 26, 29, 31 (emphasis added). As the Pennsylvania Supreme Court reinforced, "[s]tated differently, when the governmental viewing is limited to the scope of the private search,

the magnitude of the confidential files and information contained in one's computer is protected from the prying eyes of the government unless and until a warrant is obtained..." and "[a]bsent a warrant, the government may view only those files that were disclosed pursuant to the private search." See *Commonwealth v. Jon Eric Shaffer*, No. 16 WAP 2019 at 29; 29-30. See also *United States v. Lichtenberger*, 786 F.3d 478 (6th Cir. 2015) (cited with approval by the Pennsylvania Supreme Court for emphasizing the "virtual certainty" or "substantial certainty" that officer's review would not exceed scope of an initial private search when police viewed only images that had been the subject of a private search).⁷

⁷ The Pennsylvania Supreme Court in *Commonwealth v. Jon Eric Shaffer* further emphasized that:

"[a]dditional federal circuit court decisions have applied the *Jacobsen* private search construct to searches of digital information stored on electronic devices. See e.g. *United States v. Reddick*, 900 F.3d 636 (5th Cir. 2018) (applying *Jacobsen* to an officer's viewing of the defendant's computer files and concluding that because the child pornography files were deemed suspicious by a private actor and police did not expand the private actor's search, the Fourth Amendment was not violated); *United States v. Johnson*, 806 F.3d 1323 (11th Cir. 2015) (applying *Jacobsen* to the private search of a cell phone and concluding that the police exceeded the scope of the private search when the officer viewed a video that the private actor had not viewed); *United States v. Goodale*, 783 F.3d 917 (8th Cir. 2013) (holding that it is immaterial to application of the private search doctrine under *Jacobsen* whether the private party who conducted the search of the defendant's computer had the defendant's consent to turn over to police illegal images discovered on the defendant's computer; so long as the police officer did not exceed the scope of the private search, the

2. The Pennsylvania Supreme Court's Analytical Framework in Private Search Doctrine Cases.

The Pennsylvania Supreme Court counsels that, in cases involving potential applicability and interplay of the "private search doctrine" and a defendant's reasonable expectations of privacy, a court shall first examine the applicability of the private search doctrine. See *Commonwealth v. Jon Eric Shaffer*, No. 16 WAP 2019 at 18.⁸

The Pennsylvania Supreme Court explained that it first analyzes "...assertion[s] regarding applicability of the private search doctrine because if we determine that the doctrine applies, that conclusion would be dispositive..." See *Commonwealth v. Jon Eric Shaffer*, No. 16 WAP 2019 at 18. Any determination as to

Fourth Amendment was not violated); *United States v. Cameron*, 699 F.3d 621 (1st Cir. 2012) (holding that the Fourth Amendment was not violated when Yahoo!, Inc. searched an account after receiving an anonymous tip that it contained images of child pornography because there was no evidence that the government had any role in investigating or participating in the private search); *Commonwealth v. Jarrett*, 338 F.3d 339 (4th Cir. 2003) (holding that the search of the defendant's computer conducted by a hacker did not implicate the Fourth Amendment because the hacker was not acting as an agent of the government when he conducted the search)."

See *Commonwealth v. Jon Eric Shaffer*, No. 16 WAP 2019 at 29; 29-30.

⁸ In *Commonwealth v. Jon Eric Shaffer*, the Pennsylvania Supreme Court confronted a fact pattern in which a private entity discovered child pornography on a laptop computer (1) that defendant had delivered for repair and (2) the hard drive of which defendant authorized the private entity to replace. See generally *Commonwealth v. Jon Eric Shaffer*, No. 16 WAP 2019 (Pa. June 18, 2019).

whether a defendant retained a reasonable expectation of privacy in a computer or computer-like device presumes that the **government** as opposed to a private individual or entity invaded a defendant's privacy by conducting the initial search. See *Commonwealth v. Jon Eric Shaffer*, No. 16 WAP 2019 at 18. Accordingly, "...once it is determined that the search was conducted absent state action, the inquiry becomes whether the police exceeded the scope of the private search" and further analysis of a defendant's reasonable expectation of privacy becomes irrelevant. See *Commonwealth v. Jon Eric Shaffer*, No. 16 WAP 2019 at 18-19, n.11, 32.^{9 10}

⁹ The Pennsylvania Supreme Court, in *Commonwealth v. Jon Eric Shaffer*, explained that "[f]or this same reason, the federal cases of *United States v. Jones*, 565 U.S. 400 (2012), and *Carpenter v. United States*, 138 S.Ct. 2206 (2018), are inapplicable as they involve government searches and not searches conducted by a private individual." See *Commonwealth v. Jon Eric Shaffer*, No. 16 WAP 2019 at 32.

¹⁰ The Pennsylvania Supreme Court further explained that this analytical order emanated from its observation "that the ramifications of applying an abandonment [of the reasonable expectation of privacy] theory... are profound, as the abandonment theory, unlike the private search doctrine, lacks the constitutional safeguard of a restricted scope of the government's subsequent examination of the evidence discovered." See *Commonwealth v. Jon Eric Shaffer*, No. 16 WAP 2019 at 33.

"Once that expectation of privacy has been abandoned, there is no constitutional protection to be afforded, and the officer who responds to a report of child pornography found on a computer could potentially search every file on it without restriction." See *Commonwealth v. Jon Eric Shaffer*, No. 16 WAP 2019 at 33.

The Pennsylvania Supreme Court sought to afford the greatest protection to defendants and noted that "application of the private search doctrine... more narrowly tailors the scope of the governmental examination of the information revealed by the private search and offers

C. In this Matter, a Search Did Not Occur within the Meaning of the Fourth Amendment.

In the instant matter, no dispute exists that Synchronoss - a private entity - initially discovered, though indeterminate means, that the twenty-four subject images could potentially constitute child pornography. Synchronoss' initial discovery, then, involved no state action. In turn, Synchronoss, as required by the statutory federal child pornography reporting system, provided the images to NCMEC, a governmental creation, through two cybertips. Defendant alleges both that NCMEC did - and did not - examine the twenty-four subject images. Giving the benefit of the greatest possible NCMEC intrusion to the Defendant - i.e., assuming that NCMEC physically viewed the twenty-four images - would still only mean that NCMEC at most engaged in "after-the-fact confirmation" - the concept approved in *Commonwealth v. Jon Eric Shaffer* - that the images did indeed consist of potential child pornography. Similarly, Corporal Salerno, upon receipt of the same twenty-four images of potential child pornography, did nothing more than engage in "after-the-fact confirmation" that the images consisted of potential child pornography. Accordingly, the Court finds that the initial discovery by Synchronoss occurred in

greater protection of the privacy interests involved." See *Commonwealth v. Jon Eric Shaffer*, No. 16 WAP 2019 at 33.

the absence of state action, that neither NCMEC nor Corporal Salerno exceeded the scope of Synchronoss' permissible private search, and that no search occurred for Fourth Amendment purposes.

Because this Court concludes that the initial search conducted by Synchronoss occurred in the absence of state action, this Court has confined its analysis to whether NCMEC or Corporal Salerno exceeded the scope of Synchronoss' private search, further analysis of Defendant's reasonable expectation of privacy becomes irrelevant and unnecessary. See generally *Commonwealth v. Jon Eric Shaffer*, No. 16 WAP 2019 (Pa. June 18, 2019).

Additionally, having found that the initial search conducted by Synchronoss occurred in the absence of state action and that neither NCMEC or Corporal Salerno exceeded the scope of Synchronoss' permissible private search, the Court finds that no illegality exists to taint the remainder of Corporal Salerno's investigation. Accordingly, Corporal Salerno had probable cause to support the search warrant that he ultimately executed and he validly obtained Defendant's confession regarding possession of the images at issue. See Defendant's Brief at 16.

IV. CONCLUSION.

In the instant matter, this Court has applied the Pennsylvania Supreme Court's adoption and interpretation of the *United States v. Jacobsen* criteria and concludes (1) that Synchronoss acted as

a private entity when it discovered possible child pornography on Defendant's computer files, (2) that NCMEC examined and confirmed - if at all - the existence of potential child pornography on only those files initially provided to it by Synchronoss, (3) that Corporal Salerno examined and confirmed the existence of potential child pornography on only those files provided to him by NCMEC as initially provided to it by Synchronoss, and that (4) no violation of the Fourth Amendment or Article I, Section 8 of the Pennsylvania Constitution occurred.

For the foregoing reasons, Defendant Gary Woodrow Bowman's Suppression Motion shall be **DENIED**.

BY THE COURT:



Joseph J. Matika, J.

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COMMONWEALTH OF PENNSYLVANIA,

v.

GARY WOODROW BOWMAN,
Defendant

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No. CR 1488-2015

Brian B. Gazo, Esq.

Counsel for Commonwealth
Assistant District Attorney

Paul Levy, Esq.

Counsel for Defendant

ORDER OF COURT

AND NOW, this 27th day of June, 2019, upon consideration of

- the September 5, 2018 "Suppression Motion" filed by
Defendant Gary Woodrow Bowman,

- the March 22, 2019 "Brief in Support of Suppression
Motion" filed by Defendant Gary Woodrow Bowman,

- the April 2, 2019 "Commonwealth's Brief in Response to
Defendant's, Gary Woodrow Bowman, Omnibus Pretrial
Motion,"

upon consideration of the January 22, 2019 hearing thereon, and
upon comprehensive review of this matter, it is hereby **ORDERED and**
DECREED that the Suppression Motion filed by Defendant Gary Woodrow
Bowman is **DENIED**.

BY THE COURT:



Joseph J. Matika, J.