

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2017-0346

In Re: Search Warrant for

1832 Candia Road, Manchester, New Hampshire

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE
SIXTH CIRCUIT DISTRICT DIVISION COURT

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

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(5-minute 3JX oral argument)

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ISSUES PRESENTED

I. Whether the trial court properly concluded that the affidavit in support of the warrant alleged criminal offenses where the affidavit stated that Exline had used the email addresses of other people without their knowledge and had forwarded a Craigslist post to those people without their consent.

II. Whether the trial court correctly concluded that the nexus between the emails sent and the property to be searched was sufficient.

III. Whether Exline's argument regarding the legislative history of the identity theft statute is preserved and is otherwise conclusive and whether the fact that the sender was a "noreply" address from Craigslist, but linked to Exline's Comcast account, should have prompted the trial court to reject the allegations of criminal activity found in the warrant.

STATEMENT OF THE CASE AND FACTS

On August 5, 2016, New Hampshire State Police Detective Sergeant David S. McCormack received an email from Department of Safety Assistant Commissioner Kevin O'Brien. DBA: 22. In the email, O'Brien told the detective that that the Department of Safety had been victim to a "little bit of a cyber-attack" and wanted the attack investigated. DBA: 22. The following Monday, Sergeant McCormack met with Department of Safety Deputy Director William Joseph. DBA: 23.

The sergeant learned from the deputy director that Department of Safety Director Elizabeth Bielicki had received a Craigslist post. DBA: 23. Director Bielicki forwarded the post to Deputy Director Joseph. The post read: "Vote No William Joseph reappointment at NH DMV." DBA: 23. The Craigslist post appeared to have been sent by Director Bielicki. DBA: 23. The post read:

From: noreply@craigslist.org
Sent: Friday, August 05, 2016 at 12:52 PM
To: Bielicki, Elizabeth
Subject: Vote No William Joseph reappointment at

The message read: "elizabeth.bielick@doh.nh.gov forwarded you this from craigslist". In fact, however, Director Bielicki had not forwarded the Craigslist post.

Deputy Director Joseph was "very upset" by the post because he was being considered for reappointment. DBA: 23. He told the detective that Suzanne Roy,

a department employee, and her boyfriend, Richard Exline, were probably responsible for the post. DBA: 23. He told the sergeant that other employees at the department had received copies of the Craigslist post. DBA: 23.

The sergeant then met with Director Bielicki. DBA: 26. Director Bielicki said that she had not forwarded the post from Craigslist, nor had she authorized anyone to use her email. DBA: 26. She told Sergeant McCormack that other staff members had received similar posts. DBA: 26.

Sergeant McCormack then interviewed Supervisor of Driver Licensing Jeffrey Oberdank. DBA: 26. Supervisor Oberdank had received a Craigslist post similar to that received by Director Bielicki, except that the comment identified Supervisor Oberdank as the person forwarding the post. DBA: 26. The supervisor said that he did not forward the post, nor did he authorize anyone to use his email address. DBA: 26. Donald Gerow, who worked for the Department of Information Technology also received the post. DBA: 26. The post purported to have been forwarded by Gerow, but he told the sergeant that he had not forwarded it, nor had he given anyone permission to use his email address. DBA: 26.

Sergeant McCormack later contacted Department of Safety Bureau of Operations Supervisor Kelly Brudniak, who had gathered similar Craigslist posts received by her staff. DBA: 27. In the course of his investigation, Sergeant McCormack learned that the post had been sent to 54 people. DBA: 30.

The Merrimack County grand jury issued a subpoena to Craigslist for information regarding the post. DBA: 28. In response, Craigslist provided information which included the poster email and the poster's IP address. DBA: 28-29. The email address matched the email address used by Cannon Real Estate Company, Inc., located at 1832 Candia Road in Manchester. DBA: 27-28. Through his investigation, Sergeant McCormack had learned that the email address had been used in May 2016 to send a disparaging email about Deputy Director Joseph to Governor Maggie Hassan's Communications Director. DBA: 25.

Sergeant McCormack contacted Craigslist Law Enforcement and Government Relations Director William Powell. DBA: 29. Director Powell told him that, in order to send the post to different email addresses, the sender would have to manually input each address. DBA: 29. In order to forward a post, the sender must select the "email a friend" option and provide the email address for the intended recipient, as well as the email address for the sender. DBA: 29. The director told Sergeant McCormack that, consistent with the Craigslist policy, the sender must refrain from sending posts containing "false, misleading, deceptive, or fraudulent content" and is prohibited from using another person's identifying information. DBA: 30.

Sergeant McCormack learned that Comcast provided service to the IP address. DBA: 30. The grand jury issued a subpoena to Comcast seeking

information about the account holder for the IP address. DBA: 30. Comcast responded and Sergeant McCormack learned that the account was held by Richard E. Exline of 1832 Candia Road, Manchester. DBA: 31.

Based on this information, on March 24, 2017, Sergeant McCormack sought and obtained a search warrant for computers, computer systems, mobile digital devices, cameras, routers, Wi-Fi devices, cellular telephones, Smart phones, and commercial software and hardware located at 1832 Candia Road. DBA: 20. On March 27, 2017, the warrant was executed and law enforcement seized: (1) four cellular telephones; (2) two external USB drives; (3) two laptop computers; (4) two desk top computers; and (5) one tablet. DBA: 21. In his affidavit, the sergeant identified RSA 638:26 (Identity Fraud) and RSA 638:3 (Tampering with Public or Private Records) as the possible crimes. DBA: 32.

On April 20, 2017, Exline filed a motion for the immediate return of the seized property. DBA: 4-7. In it, he argued that, while the affidavit had included reference to criminal statutes, it did not “contain even an attempt to apply the statutes to the facts alleged” in order to provide probable cause that a crime had been committed. DBA: 5. The motion further argued that the affidavit “failed to establish anything beyond the allegation that a Craigslist ad was created and posted by an email address connected to one of Mr. Exline’s many business ventures.” DBA: 5. The motion contended that “none of the ten or more variants of Identity Fraud appl[ied] to the alleged facts” of the case. DBA: 8. It further

contended that the affidavit did not support the charge of tampering with public or private records because the affidavit did not establish the elements of that offense.

DBA: 5. The State objected. DBA: 16-17. On May 11, 2017, the trial court (*Gordon, J.*) heard oral argument, 5/11/17 Tr.: 1, and, on May 17, 2017, issued an order denying the motion for return of property, DBA: 2-3.

This appeal followed.

SUMMARY OF THE ARGUMENT

1 The trial court properly concluded that the affidavit in support of the warrant alleged criminal offenses. The affidavit stated that Exline had used the email addresses of other people without their knowledge and had forwarded a Craigslist post to those people, using their email addresses without their consent.

2. The trial court correctly concluded that the nexus between the emails sent and the property to be searched was sufficient. The IP address used by Exline was associated with a Comcast account which listed his physical address as 1832 Candia Road.

3. Exline's argument regarding the legislative history of the identity theft statute is not preserved and is otherwise not persuasive. The fact that the sender was a "noreply" address from Craigslist, but linked to Exline's Comcast accounts, was sufficient for the trial court to conclude that the allegations of criminal activity found in the warrant were sufficiently alleged.

ARGUMENT

I. THE COURT PROPERLY CONCLUDED THAT THE AFFIDAVIT TO THE WARRANT INCLUDED EVIDENCE OF CRIMINAL ACTS.

Exline contends that the affidavit in support of the search warrant did not have “a single fact evidencing even the probability of criminal activity.” DB: 11. He argues that the search warrant affidavit provided the court with only suspicions of criminal activity. DB: 12. He further contends that the affidavit did not demonstrate that he used the identifying information of another “with the intent to pose as such a person.” DB: 13.

Under Part I, Article 19 of the New Hampshire Constitution, search warrants may be issued only upon a finding of probable cause. “Probable cause exists if a person of ordinary caution would justifiably believe that what is sought will be found through the search and will aid in a particular apprehension or conviction.” *State v. Ward*, 163 N.H. 156, 159 (2012) (citing *State v. Orde*, 161 N.H. 260, 269 (2010)). “Probable cause need not be tantamount to proof beyond a reasonable doubt. . . . Probability is the touchstone.” *United States v. Khounsavanh*, 113 F.3d 279, 283 (1st Cir. 1997) (citation omitted).

“To establish probable cause, the affiant need only present the magistrate with sufficient facts and circumstances to demonstrate a substantial likelihood that the evidence or contraband sought will be found in the place to be searched.” *Ward*, 163 N.H. at 159. The affidavit need not “establish with certainty, or even

beyond a reasonable doubt, that the search will lead to the desired result.” *State v. Fish*, 142 N.H. 524, 528 (1997) (quotation omitted). This Court employs a “totality-of-the-circumstances test to review the sufficiency of an affidavit submitted in an application for a search warrant.” *Ward*, 163 N.H. at 159.

This Court reviews the trial court’s legal conclusions *de novo*, but it will “afford much deference to a magistrate’s determination of probable cause and will not invalidate warrants by reading the supporting affidavit in a hypertechnical sense.” *Id.* This Court will review the affidavit “in a common-sense manner, and determine close cases by the preference to be accorded to warrants.” *Id.* (internal quotation marks and citation omitted).

“A person is guilty of identity fraud when the person... [p]oses as another person with the purpose to defraud in order to obtain money, credit, goods, services, or anything else of value.” RSA 638:26, I(a). Further, a person commits identity fraud if he “[o]btains or records personal identifying information about another person without the express authorization of such person, with the intent to pose as such person.” RSA 638:26, I(b). “A person is guilty of a misdemeanor if, knowing he has no privilege to do so, he falsifies, destroys, removes or conceals any writing or record, public or private, with a purpose to deceive or injure anyone or to conceal any wrongdoing.” RSA 638:3.

Although Exline minimizes the evidence linking him to the fraudulent emails to support issuing a search warrant, the record suggests otherwise. In

addition to the motives described by Exline, including the bad relationship between Roy and the Division of Motor Vehicles, DB: 11-12, there was significant corroborating evidence that Exline created the post and forwarded it. For example, Craigslist provided information which included the poster email and the poster's IP address. DBA: 28-29. The email address matched the email address used by Cannon Real Estate Company, Inc., located at 1832 Candia Road in Manchester. DBA: 27-28. The email address had been used in May 2016 to send a disparaging email about Deputy Director Joseph to Governor Maggie Hassan's Communications Director. DBA: 25. Comcast provided service to the IP address. DBA: 30. The grand jury issued a subpoena to Comcast seeking information about the account holder for the IP address. DBA: 30. Comcast responded and Sergeant McCormack learned that the account was held by Richard E. Exline of 1832 Candia Road, Manchester. DBA: 31.

Further, in order to forward the Craigslist post, Exline had to select the "email a friend" option and provide the email address for the intended recipient, as well as the email address for the sender. DBA: 29. In short, the State provided enough of a nexus between the alleged crime and the items to be searched. The use of the email addresses without permission of the people whose identities were associated with them, constituted identity fraud. *Cf. People v. Golb*, 15 N.E.3d 805, 812 (N.Y. Ct. App. 2014) ("a person who impersonates someone with the intent to harm the reputation of another may be found guilty" of criminal

impersonation); *State v. Baron*, 754 N.W.2d 175, 179 (Wis. Ct. App. 2008) (upholding identity theft conviction where the defendant “purport[ed] to be [another person] when he sent the emails”).

With respect to the elements of RSA 638:3, Exline clearly had no privilege to use the email addresses and he falsified the information in them because the emails gave the impression that someone else had sent each of them. The point was clearly to deceive the recipients and to injure the reputation of William Joseph. In sum, the affidavit contained sufficient information for the trial court to conclude that criminal activity with respect to both statutes had been alleged.

II. THE TRIAL COURT PROPERLY CONCLUDED THAT THERE WAS A SUFFICIENT NEXUS BETWEEN THE EMAILS AND THE PLACES TO BE SEARCHED.

Exline next suggests that the trial court erred in concluding that there was probable cause to link the emails to the items seized. DB: 14. He contends that the State offered “not a single fact demonstrating the probability of criminal activity” at his residence. DB: 15.

As noted above, this Court applies a totality-of-the-circumstances test to review the sufficiency of an affidavit submitted with a warrant application. *Fish*, 142 N.H. at 528. This Court has recognized that court issuing the warrant must “make a practical, common-sense decision whether given all the circumstances set forth in the affidavit before [it], including the ‘veracity’ and ‘basis of knowledge’ of persons supplying hearsay information, there is a fair probability that

contraband or evidence of a crime will be found in a particular place.” *Illinois v. Gates*, 462 U.S. 213, 238 (1983). To satisfy the constitutional requirements, “affidavits must establish a sufficient nexus between the illicit objects and the place to be searched.” *State v. Ball*, 164 N.H. 204, 207 (2012), quoting *Ward*, 163 N.H. 156 at 160. However, “an affidavit may establish probable cause without the observance of contraband at the location to be searched.” *Id.*

In this case, the State obtained a search warrant for computers, computer systems, mobile digital devices, cameras, routers, Wi-Fi devices, cellular telephones, smart phones, and commercial software and hardware all of which could have been used to send the fraudulent emails and all of which could have been located at 1832 Candia Road. DBA: 20. On March 27, 2017, the warrant was executed and law enforcement seized: (1) four cellular telephones; (2) two external USB drives; (3) two laptop computers; (4) two desktop computers; and (5) one tablet. DBA: 21. Each of these items could have been used to send the emails.

And, because the physical address assigned to the Comcast high-speed internet account and IP address was 1832 Candia Road, there was sufficient nexus between the place to be searched and the crimes alleged. *Cf. United States v. Grant*, 218 F.3d 72, 75 (1st Cir. 2000) (Because the internet account was associated with the defendant’s address, there was a “fair probability” that the

defendant was “the user and that evidence of the user’s illegal activities would be found in [his] home.”).

In *United States v. McLellan*, 792 F.3d 200, 205 (1st Cir. 2015), the United States Court of Appeals for the First Circuit considered a similar challenge. In that case, the First Circuit noted that the FBI was able to trace origin of a child pornography file to a single IP address. *Id.* The First Circuit found that the affidavit and warrant established probable cause in part because the IP address was registered to Verizon and, according to Verizon’s records, was assigned to the residential high speed internet service account associated with the defendant’s address. *Id.*

In challenging the court’s ruling, Exline directs this Court to its decisions in *State v. Ball* and *State v. Letoile*. DB: 15. He contends that, in both cases, witnesses had seen evidence of criminal acts on some of the devices to be searched. *See Ball*, 164 at 206, 208-09; *State v. Letoile*, 166 N.H. 269, 273-74 (2014). But both cases concluded that a warrant may be valid “without the observance of contraband at the location to be searched.” *Ball*, 164 N.H. at 207; *see also Letoile*, 166 N.H. at 275 (“Probable cause does not require conclusive proof of illegal activity.”). In this case, the trial court correctly ruled that the affidavit provided probable cause for the search of Exline’s residence for means of posting on Craigslist and using the email addresses of others to forward the post.

III. THE ARGUMENT REGARDING LEGISLATIVE HISTORY IS WAIVED AND IS OTHERWISE MERITLESS BECAUSE THE AFFIDAVIT PROVIDED SUFFICIENT INFORMATION TO CONCLUDE THAT THERE WAS PROBABLE CAUSE THAT THE ENUMERATED CRIMES HAD BEEN COMMITTED.

Finally, Exline contends that the legislature intentionally excluded emails from the identity theft or tampering with public or private records. He argues that the identity theft statute is limited to the items listed in RSA 638:25, I. DB: 16. He also argues that forwarding the Craigslist post by using other people's email addresses does not qualify as an offense under RSA 638:3. DB: 16-17.

At the outset, Exline makes an argument to this Court that he did not present to the trial court. The argument presented to the trial court was simply that the State had not satisfied the elements of the offense. *See* DBA: 8. The argument included no discussion of statutory construction, nor did it alert the court to the content of the legislative record. Nor did defense counsel raise it during the hearing. Instead, he told the court that he that there were "two glaring problems with probable cause," 5/11/17 Tr.: 2, and never made the statutory construction argument.

As a result, the claim concerning statutory instruction is waived. *See State v. Wilson*, 169 N.H. 755, 768 (2017) (this Court "will not review any issue that the defendant did not raise before the trial court") (internal quotation marks and citation omitted). This rule "reflects the general policy that trial forums should have an opportunity to rule on issues and to correct errors before they are

presented to the appellate court.” *Id.* (internal quotation marks and citation). This Court should decline to consider it.

But even if the argument is preserved, it is still unavailing. RSA 638:25, I provides:

“Personal identifying information” means any name, number, or information that may be used, alone or in conjunction with any other information, to assume the identity of an individual, including any name, address, telephone number, driver's license number, social security number, employer or place of employment, employee identification number, mother's maiden name, demand deposit account number, savings account number, credit card number, debit card number, personal identification number, account number, or computer password identification.

Further, RSA 638: 26, II provides: “‘Pose’ means to falsely represent oneself, directly or indirectly, as another person or persons.”

This Court reviews the trial court’s statutory interpretation *de novo*. *State v. Mayo*, 167 N.H. 443, 450 (2015). This Court will first “examine statutory language, and, where possible, [it will] ascribe the plain and ordinary meanings to the words used.” *State v. Kardonsky*, 169 N.H. 150, 153 (2016) (citing *State v. Maxfield*, 167 N.H. 677, 679 (2015)). This Court will “interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include.” *Id.*

In this case, the term “personal identifying information” means any name, number, or information that may be used, alone or in conjunction with any other information. The emails in question used the employees’ names and associated

them with the department's domain, thereby providing the name of each employee and his or her employment location. Giving the words their plain and ordinary meanings, the email addresses satisfied the ordinary meaning of the statute.

Exline contends, however, that the word "including" should be read as if it meant "including and limited to" specific items. To read the statute this way is to require the Court to add words that the legislature did not add. And the word "including" means that the list that follows is not exhaustive. *See, e.g., Samantar v. Yousuf*, 560 U.S. 305, 317 (2010) ("[U]se of the word 'include' can signal that the list that follows is meant to be illustrative rather than exhaustive."); *Graves v. North Eastern Servs.*, 345 P.3d 619, 630 (2015) ("Like *any, including* is an established term of art with an established meaning. Black's Law Dictionary 831 (9th ed. 2009) ('[I]ncluding typically indicates a partial list.');

United Rentals Nw., Inc. v. Yearout Mech., Inc., 237 P.3d 728, 732-33 (N.M. 2010) ("[U]se of the word 'includes' to connect a general clause to a list of enumerated examples demonstrates a legislative intent to provide an incomplete list of activities."); *State v. Kurtz*, 249 P.3d 1271, 1277 (Or. 2011) ("Typically, statutory terms such as 'including' . . . convey an intent that the accompanying list of examples be read in a non-exclusive sense.").

Exline contends that, under *State v. Washington*, 168 N.H. 689, 692-93 (2016), this Court declined to "broadly construe the term 'including' in RSA 625:11 in conjunction with 638:26, I(b) to include items not in the RSA 625:11

list.” DB: 19. But this assertion misconstrues the holding of *Washington*. In *Washington*, the State argued that RSA 625:11, II “should be construed expansively to include fictitious or synthetic identities.” *Washington*, 168 N.H. at 692. This Court declined to do so as the definition found in RSA 625:11, II was specific in that “person” included “any natural person and, a corporation or an unincorporated association.” *Washington*, 168 N.H. at 692.

This Court emphasized that its ruling addressed the “limited question” of whether the State was “required to prove that the identity assumed by the defendant belonged to an actual, rather than a fictitious, person.” *Id.* It did not address the meaning of the word “including” or whether word was meant to mean that the list that followed was exclusive.

Exline argues that, because the legislature did not include email addresses in the identity theft legislation, but included it in the harassment statute (RSA 644:4), it intended to exclude email addresses from identity theft. DB: 22. In doing so, he directs this Court to the legislative history. Because the wording of the statute is clear, however, this Court need not consider the legislative history. *See, e.g., In re Alex C.*, 161 N.H. 231, 235 (2010) (stating that this Court “will consider legislative history to aid [its] statutory analysis if a statute is ambiguous”).

But even considering the legislative history does not resolve the matter. This is because the legislative history is not clear on the meaning of the word

“including” or the term “personal identifying information.” The discussion among the senators and representatives focused on the distinction between the use of email addresses for obtaining money and using the addresses to harass. DB: 21-22. It left the question of whether email addresses constituted “personal identifying information” for purposes of the statute. Since the plain meaning of the words encompass email addresses, and since the legislative history does not resolve any ambiguity, this Court should affirm the ruling of the trial court.

Exline’s contention regarding RSA 638:3 is similarly flawed. Although he acknowledges that he posted the statement and forwarded it to the 54 recipients, he contends that the emails “claimed as unlawful demonstrated that they were not from the recipients.” DB: 17. He supports this contention by pointing out that the sender line reflected that it was from a “noreply” address at Craigslist. DB: 17. He states that the trial court could have concluded that email sender address was the actual sender and not the “arbitrary name appearing in the body of the email itself.” DB: 18.

This contention, however, ignores the facts that he posted the comment on Craigslist, that he had to enter each of the addresses to forward the post, and that the IP address used to make the post was assigned to an account that Comcast serviced in Exline’s name. All of these facts were contained in the affidavit in support of the warrant. In order for the trial court to conclude that “noreply” was the sender, the court would have had to ignore these other facts that were

presented in the affidavit. In short, Exline has not shown that the trial court committed error in concluding that the affidavit properly cited a violation of RSA 638:3 as a basis for issuing the warrant.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the judgment below.

The State requests a 5-minute 3JX oral argument.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

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December 27, 2017

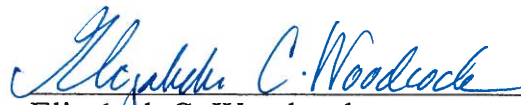


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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing were mailed this day, postage prepaid to counsel of record at the following address:

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