July - August 2019 Volume 24.4

Police Law Bulletin

City Attorneys' Office Toni M. Smith, Senior Assistant City Attorney

In this issue:

31 Day Delay in Obtaining Search Warrant for Phone Was Unreasonable

United States v. Pratt, 915 F.3d 266 (4th Cir., Feb. 8, 2019).

FBI agents in the Carolinas investigated Samuel Pratt for running a prostitution ring that included juveniles. The agents found a post on Backpage.com in which Pratt advertised the sexual services of a seventeen-year-old girl, R.M., at a hotel in Columbia, South Carolina. An agent scheduled a "date" with R.M. at the hotel for February 3, 2016. When the agent entered the hotel room, he identified himself to R.M. as law enforcement. She agreed to speak with the agents. R.M. told them she was seventeen and working as a prostitute at the hotel. She said her "boyfriend" Pratt brought her across state lines from North Carolina. She also indicated that she had texted 3 nude photographs of herself to Pratt's phone. R.M. allowed FBI agents to take her cellphone.

When FBI agents approached Pratt in the parking lot, he was holding an iPhone. Pratt told agents that the phone was his and confirmed that it contained nude photos of R.M. One of the agents then seized the phone. The FBI did not get a warrant to search the phone until March 4th-31 days after seizing it. When agents finally searched the phone, they found nude images of R.M. and incriminating text conversations with R.M. and others.

A federal grand jury indicted Pratt for various offenses relating to sex trafficking and child pornography. During his initial appearance, the magistrate judge ordered him to have no contact with anyone who may be a witness or victim. Despite that order, Pratt repeatedly called his mother from prison to coordinate continued prostitution operations. In several calls, he had his mother put R.M. on the phone and repeatedly told R.M. not to testify or cooperate.

Before trial, Pratt moved to suppress evidence from his phone. Initially, he only contended that the seizure of the phone was unconstitutional. But at the suppression hearing, he also argued that the delay between the seizure and obtaining the search warrant was unconstitutional. The district court denied the motion.

At this point, the government attempted to secure R.M. as a witness but she became uncooperative and later could not be found. With R.M. unavailable, the government sought to introduce into evidence, and the trial judge allowed, the statements she had made to the FBI agents at the hotel. In addition, the

government introduced evidence from Pratt's cellphone which included 28 images of child pornography, metadata for the images, text messages, and advertisements Pratt placed for prostitution. The jury convicted Pratt and sentenced him to multiple life sentences. Pratt appealed the denial of his motion to suppress.

Pratt argued that the district court should have suppressed information from his cellphone because the FBI unreasonably delayed getting a search warrant. The 4th Circuit Court of Appeals agreed and held that the district court erred by denying the suppression motion and that error was not harmless regarding two of the eight charges.

The constitutional question before the court was whether the extended seizure of Pratt's phone was reasonable. A seizure that is "lawful at its inception can nevertheless violate the Fourth Amendment because its manner of execution unreasonably infringes possessory interests." To determine if an extended seizure violates the Fourth Amendment, the court balances the government's interest in the seizure against the individual's possessory interest in the object seized.

The government's only explanation for the 31-day delay in obtaining a warrant was that Pratt committed crimes in both North Carolina and South Carolina and agents had to decide where to seek a warrant. The court found this explanation insufficient to justify the extended seizure of Pratt's phone.

The court found that the situation paralleled *United States v. Mitchell*, 565 F.3d 1347 (11th Cir. 2009). There, an agent seized a computer but failed to obtain a search warrant for 21 days. The agent explained that he left town for a lengthy training and didn't think the warrant was urgent. The Eleventh Circuit considered the seizure unreasonable because the agent could have applied for a warrant before he left or passed the case to someone else. But the court noted that overwhelmed police resources or other "overriding circumstances" could justify extended delays.

The Eleventh Circuit applied this standard in two later cases. In *United States v. Vallimont*, 378 F. App'x 972, 975–76 (11th Cir. 2010), it upheld a 45-day delay in getting a search warrant for a seized computer. The delay was reasonable because the investigator was diverted to other cases, the county's resources were overwhelmed, and the defendant diminished his privacy interest by giving another person access to the computer. And in *United States v. Laist*, 702 F.3d 608 (11th Cir. 2012), the court upheld a 25-day delay in getting a search warrant for a seized computer. The delay was reasonable because the agents worked diligently on the affidavit; they were responsible for investigations in ten counties; and the defendant consented to the seizure and had been allowed to keep certain files, diminishing his privacy interest.

The court found Pratt's cases closest to *Mitchell* because the government had no persuasive justification for the delay. Unlike the agencies in *Vallimont* and *Laist*, the FBI's resources were not overwhelmed. The agents failed to exercise diligence by spending a whole month debating where to get a warrant. That decision should not have taken a month.

The court rejected the State's alternative argument that it could have retained the phone indefinitely because it had independent evidentiary value. The court disagreed noting that only the phone's files had evidentiary value. The agents could have removed or copied incriminating files and returned the phone.

Accordingly, the court vacated Pratt's convictions for two charges, affirmed his convictions for the remaining six charges, and vacated his entire sentence. On remand, the government may retry or dismiss the two counts of child pornography. Then, the trial court may resentence him based on the final convictions.

Marijuana Stems and Rolling Papers Found in Single Trash Pull Did Not Provide Probable Cause for Search Warrant to Search Defendant's Residence

U.S. v. Lyles, 910 F.3d 787 (4th Cir., Dec. 14, 2018).

Prince George's County Police discovered Tyrone Lyles' phone number in the contacts of a homicide victim's phone. Suspecting Lyles' involvement, law enforcement searched four bags of trash found at the curb of his home. Police found "three unknown plant type stems" [which later tested positive for marijuana], three empty packs of rolling papers, and mail addressed to the residence. On that basis, a search warrant for evidence of drug possession, drug distribution, guns, and money laundering was obtained. The warrant authorized the search of the home for any drugs, firearms, and documents and records of nearly any kind, various electronic equipment including cell phones, as well as the search of all persons and cars. Guns, ammunition, marijuana, and paraphernalia were found.

A federal grand jury indicted Lyles for possession of firearms as a convicted felon. Defendant asked the district court to suppress the evidence recovered from his home, arguing that the search warrant was issued without probable cause. The district court suppressed the evidence, finding that the presence of only three marijuana stems and rolling paper does not establish a fair probability that additional marijuana would be found in the home. The government appealed.

The Fourth Amendment provides that, "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." Probable cause determinations require a practical, common-sense decision, based on sworn facts, whether there is a fair probability that contraband or evidence of a crime will be found in a particular place. As always, the ultimate touchstone of the Fourth Amendment is reasonableness.

In this case, the search warrant application alleged drug possession, drug trafficking, and money laundering offenses as justifications for the search. On appeal, however, the government only argued that the affidavit supplied probable cause to search for marijuana possession and that once lawfully inside the home, firearm and ammunition evidence could have been seized under the plain view doctrine. The Fourth Circuit Court of Appeals disagreed.

The Court noted that the Supreme Court has held in *California v. Greenwood* that law enforcement may search trash left at the curb without a search warrant. 486 U.S. 35, 39-43 (1988). But because curbside trash is so readily accessible, trash pulls can be subject to abuse. Trash cans provide an easy way for anyone to plant evidence. Guests leave their own residue which often ends up in the trash. This does not mean that items pulled from trash lack evidentiary value, but the open and sundry nature of trash does require that items found in it be viewed with at least modest circumspection.

Moreover, the Court found it to be anything but clear that a scintilla of marijuana residue or hint of marijuana use in a trash can should support a sweeping search of a residence. In the government's view, a single marijuana stem would always provide probable cause to search a residence for drugs. The Court found this argument to have several shortcomings. A single trash is less likely to reveal evidence of recurrent or ongoing activity. And the tiny quantity of discarded residue from one trash pull gives no indication of how long ago marijuana may have been consumed in the home. The Court therefore concluded that the magistrate lacked a substantial basis on which to find probable cause.

The opinion continued, however, to express concern with the breadth of the search warrant, noting that it was "astonishingly broad," authorizing the search of items wholly unconnected with marijuana

possession. It permitted, the seizure of any computers, toiletries, or jewelry, and the search of every book, record, and document in the home. The warrant also allowed the search and seizure of any cell phones in the home, despite the fact that there was insufficient reason to believe that any cell phone in the home, no matter who owned it, would reveal evidence pertinent to marijuana possession. The Court found this was akin to a general search warrant and unreasonable for such a relatively minor offense.

The government asked, but the Court declined, to apply the good faith exception. Concluding, the Court stated, "What we have before us is a flimsy trash pull that produced scant evidence of a marginal offense but that nonetheless served to justify the indiscriminate rummaging through a household. Law enforcement can do better."

NORTH CAROLINA COURT OF APPEALS

Stalking Statute Unconstitutional As Applied to Defendant; Social Media Posts "About" the Victim But Not "Directed At" the Victim Are Protected Speech

State v. Shackleford, ___N.C. App.___, ___ S.E.2d___ (Mar. 19, 2019).

Brady Shackelford met "Mary" (a pseudonym) in April 2015 at a church service in Charlotte. Mary worked for the church's communications department and briefly chatted with Shackelford before the service began. Two weeks later, Shackelford emailed Mary asking for help with a company communications plan. Mary said she would be happy to help him and suggested a time to meet. Shackelford followed up with an email stating that he would pay Mary "100K out of the convertible note proceeds AND take [her] out to dinner at any restaurant in Charlotte." This email "set off a lot of red flags" for Mary. She emailed Shackelford to cancel the meeting. Shackelford tried to reschedule. Mary said she would not be able to meet and instructed Shackelford to contact her boss with further questions.

Two weeks later, Shackelford mailed a five-page handwritten letter to Mary at work telling her, among other things, that when he saw her he thought he had found his soul mate, that he was "highly attracted" to her and asking her to go on a date.

A week after that, Shackelford mailed a seven-page handwritten letter to Mary at her home address.

Mary showed both letters to her supervisors and asked for their help. A church minister contacted Shackelford in June 2015 and told him to stop contacting Mary.

That same month, Mary discovered posts that Shackelford had made on his Google Plus account (which was public) referring to her by name. He wrote that God had chosen Mary to be his soul mate and that he wanted God to please make Mary his wife. After the minister contacted Shackelford, he continued to post about his desire for Mary and his belief that she was his soul mate, but did not use her full name. (One post used her initials and another used a shortened version of her name.)

Then, in August, Mary received a box of cupcakes at her work with a note stating: "I never properly thanked you for the help you gave me regarding my company's communication plan, so, with these cupcakes, please accept my thanks."

After she received the cupcakes, Mary filed a police report. Shackelford was subsequently charged with and arrested for misdemeanor stalking. Nevertheless, he continued to post about his desire for Mary on his Google Plus account.

Mary petitioned for and was granted a no contact order on September 1, 2015. The order prohibited Shackelford from contacting Mary and from "posting any information about her on social media." Apparently undeterred, Shackelford continued to post, referring to Mary on multiple occasions as his "future wife" and on one occasion as his "wife." In November and December 2015, Shackelford emailed one of Mary's friends, referencing Mary and the protective order.

In accordance G.S. 14-277.3A(c), a person is guilty of stalking if he or she (1) willfully (2) without legal purpose harasses another person on more than one occasion or engages in a course of conduct directed at a specific person (3) knowing that the harassment or course of conduct would cause a reasonable person to fear for the person's safety or the safety of the person's immediate family or close personal associates or suffer substantial emotional distress by placing that person in fear of death, bodily injury, or continued harassment.

G.S. 14-277.3A(b)(2) defines *Harassment* as "knowing conduct, including written or printed communication or transmission . . . telephonic communication . . . and electronic mail messages or other computerized or electronic transmissions directed at a specific person that torments, terrorizes or terrifies that person and that serves no legitimate purpose."

G.S. 14-277.3A(b)(1) defines a C*ourse of Conduct* as "two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, is in the presence of, or follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property."

Stalking generally is a Class A1 misdemeanor. If, however, a person commits the offense of stalking after having previously been convicted of a stalking offense, the offense is a Class F felony. And stalking while a court order prohibiting stalking is in place is a Class H felony.

Based primarily upon his Google Plus posts, Shackelford was indicted and ultimately convicted of four counts of felony stalking. Shackelford appealed, alleging that prosecuting him for the content of his posts violated his constitutional right to free speech.

The Court of Appeals noted that posting information on the internet is speech and that the government generally has no power to restrict speech based on its content. Laws that target such speech are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve a compelling state interest.

Accepting for the sake of argument that G.S. 15A-277.3A serves a compelling government interest by preventing the escalation of stalking into more dangerous behavior, the court nevertheless determined that applying the statute to Shackelford's posts was not the least restrictive means of accomplishing that goal. The court noted that Mary had already sought and received a protective order that prohibited Shackelford

from approaching or contacting her. That order was a means less restrictive than criminal prosecution by which the State could prevent Shackelford from engaging in a criminal act against Mary.

Finding the provisions of G.S. 14-277.3A as applied to Shackleford's conduct unconstitutional, the court vacated his convictions.

It should be noted that while the court's holding effectively bars any stalking prosecution founded solely on indirect, public communication about a person, it did not invalidate the entire statute. Many provisions of the stalking statute regulate conduct rather than speech. For example, the course of conduct prohibited by the statute includes following, monitoring, observing, surveilling or threatening a person. None of these prohibitions raise constitutional concerns. Also, the statute's provisions prohibiting distressing and unwanted "one-to-one speech" did not appear to be of constitutional concern to the court since these laws are aimed at restricting speech *to* a person, not speech *about* a person and, as such, have generally been upheld against First Amendment challenge.

***The above summary and analysis was excerpted in part from the UNC School of Government Blog, North Carolina Criminal Law, "Court Vacates Stalking Convictions on First Amendment Grounds," Posted March 20, 2019 by Shea Denning.*