State of New York Court of Appeals

Summaries of cases before the Court of Appeals are prepared by the Public Information Office for background purposes only. The summaries are based on briefs filed with the Court. For further information contact Gary Spencer at (518) 455-7711 or gspencer@nycourts.gov.

To be argued Tuesday, February 7, 2017

No. 16 Matter of 381 Search Warrants Directed to Facebook, Inc. (New York County District Attorney's Office)

In 2013, while investigating an extensive scheme by former New York City police officers, firefighters and others to fraudulently obtain Social Security disability benefits, the Manhattan District Attorney's Office applied under the federal Stored Communications Act (SCA) for bulk search warrants requiring Facebook, Inc. to find and turn over all information contained in the Facebook accounts of 381 individuals. In support of the application, it filed an affidavit alleging that the suspects obtained benefits by submitting false claims that they suffered mental disabilities due to the trauma of responding to the September 11, 2001 terrorist attacks, and stating that photographs, messages and other postings in the Facebook accounts could contradict their claims. The fraud scheme was allegedly headed by Long Island attorney Raymond Lavallee, who ultimately pled guilty to fourth-degree conspiracy in 2015. Supreme Court issued the warrants in July 2013. It also ordered Facebook, pursuant to 18 USC § 2703(b) of the SCA, not to notify the account holders of the existence or execution of the warrants to prevent interference with the criminal investigation.

In September 2013, Supreme Court denied Facebook's motion to quash the warrants, finding they were supported by probable cause and the district attorney "followed all of the requisite procedures" under the SCA. It also said Facebook failed to establish standing to challenge the warrants because only the account holders "could assert an expectation of privacy" in their accounts. Facebook appealed, but also complied with the warrants and turned over the data. After 62 of the targeted Facebook users and 70 other individuals were indicted in 2014, the court granted the district attorney's motion to unseal the warrants and supporting affidavit. It also allowed Facebook to notify its users of the warrants. When prosecutors refused to release the affidavit, on the ground that the criminal proceedings were not entirely resolved, Facebook moved to compel disclosure. Supreme Court denied the motion in August 2014.

On appeal, Facebook challenged the constitutionality of the bulk warrants, contending they violate the Fourth Amendment because they are overbroad and lack sufficient particularity regarding the information sought. It also argued the warrants' "gag provisions" violate the First Amendment and the SCA by barring Facebook from informing its users of the digital searches.

The Appellate Division, First Department dismissed the appeals, ruling "Facebook cannot litigate the constitutionality of the warrant pre-enforcement on its customers' behalf" because the orders are not appealable. The warrants were issued in a criminal proceeding, it said, and the Criminal Procedure Law does not provide "a mechanism for a motion to quash a search warrant, or for taking an appeal from a denial of such a motion." It said "the sole remedy for challenging the legality of a warrant is by a pretrial suppression motion" and, if the motion is denied, "appellate relief is limited to raising the issue upon direct appeal" from a conviction.

Facebook argues the SCA warrants are more akin to civil subpoenas, which can be challenged before they are executed. Citing Matter of Abrams (62 NY2d 183), it says, "This Court has held that a third party may move to quash Government demands for information in its possession -- even when those demands occur in the context of a criminal investigation -- and that the denial of such a motion is an appealable order." It also argues the SCA "specifically allows Facebook to move to quash an order issued under 18 USC § 2703 -- the very section on which the trial court relied in ordering execution of the warrants." It says dismissal of its appeals would shield any abuse of the SCA warrant process from appellate review.

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For respondent: Manhattan District Attorney Cyrus R. Vance, Jr. (212) 335-9000

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No. 17 People v Matthew Slocum

Matthew Slocum was charged with fatally shooting his mother and stepfather, Lisa and Daniel Harrington, and his stepbrother Joshua O'Brien at their Washington County home and then setting fire to the house on July 13, 2011. On the afternoon of the murders, the Public Defender's Office sent letters to the District Attorney's Office and police agencies which said it was representing Slocum in an unrelated criminal case and he "would qualify for representation on any additional charges;" asked that it be contacted if he was arrested or detained in the murder case; and requested that Slocum "not be questioned or interrogated without counsel present." Slocum was arrested later that evening in New Hampshire, where he had fled with his girlfriend, Loretta Colegrove, and their three-month-old son, and a sheriff's investigator and a state trooper were sent to interview him. The district attorney advised them that, despite the public defender's letter, they could question Slocum until he asked for an attorney. At the outset of the interview, one of the officers asked Slocum if he felt he should have an attorney or wanted to be represented by the public defender. Slocum replied, "Yeah, probably." After briefly discussing Slocum's dissatisfaction with his representation by a public defender in a prior case, the officers advised him of his Miranda rights, Slocum waived his rights and ultimately confessed to the murders.

County Court refused to suppress his statements, finding Slocum "knowingly and intelligently waived his Miranda rights." It said he "did not unequivocally request the assistance of counsel" by responding, "Yeah, probably," when asked if he should have an attorney. Slocum was convicted of second-degree murder (three counts), third-degree arson, and lesser charges.

The Appellate Division, Third Department reversed and ordered a new trial, finding he unequivocally invoked his right to counsel when he said, "Yeah, probably," before the questioning began. "The word 'probably' is defined as 'very likely' or 'almost certainly'...," it said. "It is difficult to conceive of circumstances where 'probably' would mean 'no,' particularly here, where the police knew that defendant was currently represented, albeit on unrelated charges, and also knew that counsel was so clearly attempting to protect his current client's constitutional rights. Defendant's demeanor and tone when saying 'Yeah, probably' was his simple expression, in everyday language, that he was not competent or capable to deal with the officers' questioning." It said, "Even if a reasonable officer could have interpreted 'Yeah, probably' to be equivocal," the public defender's letter "created a situation where [the officers] were required to inquire further to see if the indelible right to counsel had attached...."

The prosecution argues the reversal "is flawed for three reasons. First, defendant did not issue an unequivocal request for counsel; no credible evidence at the hearing supports a different conclusion. Second..., the Appellate Division failed to apply the proper standard...: it required the People to prove that defendant refused counsel rather than determining whether he unequivocally requested counsel; and it evaluated defendant's words by a subjective standard ... by taking into account information known by police but not defendant, while at the same time disregarding the evidence ... about defendant's demeanor and actions. Third, it wrongly held that the letter compelled additional action by police...."

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To be argued Tuesday, February 7, 2017

No. 18 People v Norman Whitehead, Jr.

In 2011, Norman Whitehead was charged along with more than 30 other people with conspiracy and multiple counts of criminal possession and sale of cocaine after a six-month investigation by the Attorney General's Organized Crime Task Force (OCTF) and Albany Police Department of a drug trafficking network that operated in Albany, Schenectady and New York City. The investigation relied heavily on wiretaps and surveillance. Whitehead was convicted in Albany County Court and is serving an aggregate term of 23 years in prison.

Whitehead argued on appeal that, among other things, there was insufficient evidence to support his convictions on four drug possession counts because the investigators never recovered any of the cocaine he allegedly possessed.

The Appellate Division, Third Department rejected his claim. "Defendant stresses that the People failed to recover or produce at trial any cocaine actually possessed by him. Significantly, however, two individuals who had been indicted with defendant eventually cooperated with the People and testified against defendant. These individuals clearly had knowledge of cocaine, they were involved in cocaine transactions with defendant and they indicated that defendant supplied a drug that they used and/or resold and that they knew to be cocaine," the court said, citing its 1990 ruling in People v Christopher (161 AD2d 896), which held that, where an illegal drug "is not available for analysis, drug users who can demonstrate a knowledge of the narcotic are competent to testify." It said sufficient evidence to support Whitehead's convictions "was provided by the combination of, among other proof, the extensive phone records, the explanation of the drug-related street language used therein, coinciding transactions (some observed by police), and testimony of cooperating witnesses who had been participants in various transactions."

Whitehead argues there was insufficient evidence of drug possession because the alleged cocaine was never tested or weighed. "[T]he prosecution was required to prove, *inter alia*, the existence of cocaine, and that it was in appellant's possession. Since the cocaine was never recovered, or even seen in appellant's possession, the prosecution was unable to establish any of these four possessory offenses. Recorded telephone calls, even if they contain overt admissions of narcotics possession, cannot establish the actual possession of a controlled substance," he said, citing People v Martin (81 AD3d 1178).

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