

COMMONWEALTH OF MASSACHUSETTS**SUFFOLK, ss.****SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
No. SJ-2009-0212****IN RE: MATTER OF A SEARCH WARRANT EXECUTED ON MARCH 30, 2009 AT
THE RESIDENCE OF MOVANT RICCARDO CALIXTE****MEMORANDUM OF DECISION AND ORDER**

Riccardo Calixte brings this petition pursuant to Mass. R. Crim. P. 15(a)(2), seeking the return of property that was seized pursuant to a search warrant issued by a clerk magistrate in the Newton District Court, and seeking relief from the denial, by a judge of that court, of his motion to quash the search warrant. The search warrant was for computer and other electronic equipment in Calixte's student residence at Boston College (BC). It was issued, executed and returned on March 30, 2009, and its execution resulted in the seizure of twenty-three items, including three laptops and various data storage devices. No criminal charges have yet resulted from the search. Calixte requests that the warrant be "quashed," that the property be returned, and that any evidence flowing from the search and seizure be suppressed.

The relevant background is as follows. On March 30, 2009, BC Detective Kevin Christopher requested a search warrant to search Calixte's room, and seize (inter alia) his laptop computer and all other objects capable of storing digital data. The request indicated that there was probable cause to believe that these items were "intended for use or ha[d] been used as the means of committing a crime," and were "evidence of a crime or . . . of criminal activity" – in particular, the crimes of obtaining computer service by fraud or misrepresentation, G. L. c. 266,

§ 33A¹, and unauthorized access to a computer system, G. L. c. 266, § 120F.²

The portion of the affidavit giving the basis of probable cause first relates information provided by Jesse Bennefield, Calixte's roommate at the time. According to the affidavit, Bennefield spoke with Detective Christopher on January 28, 2009 (i.e., two months before the date of the search warrant affidavit), as a result of "domestic issues" between the two roommates. The affidavit states that Bennefield had been "a reliable witness" in another unnamed investigation. He informed Detective Christopher that Calixte was a computer science major employed by the BC information technology department (IT department), and described Calixte's laptop computer. He stated, among other things, that "he has observed Mr. Calixte hack into the BC grading system that is used by professors to change grades for students"; he also told Christopher that "Mr. Calixte has a cache of approximately 200+ illegally downloaded movies as

¹ General Laws c. 266, § 33A, provides in relevant part as follows:

"Whoever, with intent to defraud, obtains, or attempts to obtain, . . . any commercial computer service by false representation, false statement, . . . by installing or tampering with any facilities or equipment or by any other means, shall be punished As used in this section, the words 'commercial computer service' shall mean the use of computers, computer systems, computer programs or computer networks, or the access to or copying of the data, where such use, access or copying is offered by the proprietor or operator of the computer, system, program, network or data to others on a subscription or other basis for monetary consideration."

² General Laws c. 266, § 120F, provides in pertinent part:

"Whoever, without authorization, knowingly accesses a computer system by any means, or after gaining access to a computer system by any means knows that such access is not authorized and fails to terminate such access, shall be punished

...

"The requirement of a password or other authentication to gain access shall constitute notice that access is limited to authorized users."

well as music from the internet."

The affidavit does not reveal any investigatory steps taken as a result of this January 28, 2009, conversation between Bennefield and Christopher. Rather, the bulk of the affidavit is devoted to a discussion of two email messages, apparently sent from the Google and Yahoo email services to a BC mailing list between March 1 and March 7, 2009, which the affidavit states falsely claimed that Bennefield was a participant on a gay dating website. The affidavit describes in detail the investigative steps taken by BC authorities, and the evidence showing that one of those emails probably was sent from Calixte's laptop computer.

The requested search warrant was issued, executed and returned on the same day it was applied for, March 30, 2009. Among items seized were Calixte's laptop computer; two laptops possibly loaned to Calixte by the IT department or other students; two iPods; two cellular telephones; a digital camera; and a number of hard drives, flash drives, and compact disks. The Commonwealth has begun, but not completed, examination of most of the items seized, but has as yet been unable to access the data on the hard drive of Calixte's laptop.³

In early April, Calixte filed a motion in the Newton District Court to quash the search warrant; for return of his property; and to suppress any evidence deriving from the search. A judge in that court denied the motions, holding that, while the email potentially sent from Calixte's computer would not constitute a violation of G. L. c. 266, § 33A or § 120F, the affidavit was supported by probable cause to believe that Calixte gained unauthorized access to the BC computer system to change grades for students, and that he had committed illegal downloads and

³ At the hearing on this matter, the Commonwealth agreed to return the iPods, cellular telephones, and camera, which it had determined were not of evidentiary value. The record reflects that this return has been effected.

illegal internet use. Calixte thereafter filed his appeal in this court.

Discussion

1. The Commonwealth argues that none of Calixte's three motions is properly appealable at this point, where the Commonwealth has already executed the search warrant and has not yet filed any criminal charges. I agree with respect to Calixte's request that any evidence flowing from the execution of the search warrant be suppressed; these suppression issues can be more appropriately considered in the context of a future criminal proceeding, if there is one. However, I do not agree that Calixte's motion to quash the search warrant is moot. It is true that the warrant was executed and returned on March 30, 2009. See G. L. c. 276, § 3A (search warrant must be returned within seven days); Commonwealth v. Kaupp, 453 Mass. 102 (2009) (search warrant for computers and electronic data storage devices "executed" when written return listing the devices is filed, rather than when examination completed). However, the Commonwealth's ongoing examination of the items seized is undertaken pursuant to the warrant. See id. at 106-107 n.7. The validity of the search warrant therefore remains a live issue.

Calixte's request for return of property is also properly before me. Leave to appeal from denial of a motion for return of seized property, prior to filing of criminal charges, should be sought in the same manner as in the case of a denial or grant of a motion to suppress evidence pursuant to Mass. R. Crim. P. 15(a)(2). See Matter of Lavigne, 418 Mass. 831, 833 (1994). A single justice may grant such leave, and hear an interlocutory appeal, where the administration of justice would be facilitated. Mass. R. Crim. P. 15(a)(2).⁴ I determine that the administration of

⁴ In addition, see Rule 61 of the Rules of the Superior Court; cf. Fed. R. Crim. P. 41(g). Rule 61 provides:

justice will be facilitated by hearing Calixte's appeal in this case, given that Calixte is about to leave BC – he was scheduled to graduate – and at issue is the Commonwealth's continued possession of Calixte's legitimate property, namely, his computer and related items. Cf. Richey v. Smith, 515 F.2d 1239, 1243 (5th Cir. 1975) (Federal district courts have discretion to hear suits for return of seized property prior to criminal proceedings, whether flowing from Fed. R. Crim. P. 41(e) [now rule 41(g)], or general equitable jurisdiction).

Both the motion to quash the search warrant and the motion for return of property turn on Calixte's argument that the search warrant lacked probable cause.

"Under the Fourth Amendment and art. 14, a search warrant may issue only on a showing of probable cause. In determining whether probable cause exists for a search warrant to issue, our inquiry always begins and ends with the four corners of the affidavit. To establish probable cause to search, the facts contained in an affidavit, and reasonable inferences that may be drawn from them, must be sufficient for the magistrate to conclude that the items sought are related to the criminal activity under investigation, and that they reasonably may be expected to be located in the place to be searched at the time the search warrant issues" (quotations and citations omitted).

Commonwealth v. Anthony, 451 Mass. 59, 68 (2008). The Commonwealth argues that the affidavit establishes probable cause to believe that Calixte was involved in three sorts of criminal

"Motions for the return of property . . . shall be in writing, shall specifically set forth the facts upon which the motions are based, shall be verified by affidavit, and shall otherwise comply with the requirements of Mass. R. Crim. P. 13. . . ."

Rule 41(g) of the Federal Rules of Criminal Procedure provides:

"A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return. The motion must be filed in the district where the property was seized. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings."

activity: he allegedly sent the two false emails; downloaded illegal files; and gained unauthorized access to the BC grading system.⁵ The first two types of alleged criminal conduct do not require substantial discussion. As the judge observed, the sending of emails from public email services does not seem to constitute the crimes of obtaining computer services by fraud or misrepresentation, G. L. c. 266, § 33A, or unauthorized access to a computer system, G. L. c. 266, § 120F. The Commonwealth's claim that such an email might be unlawful because it violates a hypothetical internet use policy maintained by BC both goes well beyond the reasonable inferences that may be drawn from the affidavit, and would dramatically expand the appropriate scope of G. L. c. 266, § 120F. As to the second argument concerning downloaded movie and music files, the possession of such files may or may not constitute one of the cited crimes,⁶ but the affidavit is plainly insufficient for the purpose, failing as it does to state Bennefield's basis of knowledge that Calixte has in fact downloaded files to his computer, or that they are "illegal." Contrast Commonwealth v. Beliard, 443 Mass. 79, 85 (2004) (named

⁵ The Commonwealth's two memoranda are at best unclear about whether indeed the Commonwealth does argue that the search warrant affidavit establishes probable cause to believe the described email activity constitutes a violation of G. L. c. 266, § 33A or § 120F. However, at the hearing in this matter, the Commonwealth argued orally that the email activity violates § 120F, and that the search warrant affidavit reflects probable cause to search for evidence of this crime.

The Commonwealth also suggested, in its reply brief, that Calixte might be guilty of larceny, criminal harassment, or a civil rights violation. At the same time, the Commonwealth has acknowledged that the affidavit does not establish probable cause to believe that any of these three crimes had occurred. That would seem to be the end of the matter; certainly the Commonwealth does not mean to suggest that without having established probable cause in the warrant application, it should nonetheless be permitted to retain and search Calixte's property in order to determine whether there might be some evidence there that could be used to support a determination of probable cause in the future.

⁶ See 17 U.S.C. § 301 (largely preempting state law as to copyright).

informant's basis of knowledge established by firsthand observation, furnished with detail and specificity).

The Commonwealth's primary argument is that the affidavit establishes probable cause to believe that Calixte gained unauthorized access to the BC grading system – activity that, as Calixte acknowledges, would be in violation of G. L. c. 266, § 120F, and therefore criminal. However, it is reasonably clear that the affidavit was not written in order to establish probable cause for such a charge. The entire factual support for the charge in the affidavit, whose "Basis of Probable Cause" section is four and one-half pages long, is a clause from a longer sentence:

"Mr. Bennefield reported to me [on January 28, 2009] that he has observed Mr. Calixte hack into the B.C. grading system that is used by professors to change grades for students, he has 'fixed' computers so that they cannot be scanned by any system for detection of illegal downloads and illegal internet use, 'jail breaks' cell phones, possibly stolen ones, for people so that the phones can be used on networks other than they are meant for and downloaded program software against the licensing agreement for free" (emphasis added).⁷

The factual "basis" thus appears as part of a listing of alleged activities that do not appear to be unlawful, are listed with no showing as to the basis of Bennefield's knowledge, or both. Moreover, although Bennefield reported this allegedly criminal conduct in late January, Detective Christopher did not seek a search warrant until March 30, 2009, two months later, and the affidavit does not reveal any effort to verify or follow up on any of the complaints, even by asking Bennefield for further details. By contrast, the claim that Calixte sent false emails is supported by two pages of detailed information, listing the steps taken to determine who sent the

⁷ The affidavit also states that, the day before Bennefield spoke with Detective Christopher, he informed another officer that Calixte "has changed grades for other students by accessing the [BC] computer system." This conclusory statement does not provide any independent support for the Commonwealth's position.

emails, the time they were sent, and the evidence suggesting that they were sent from Calixte's computer.

In sum, the principal focus of the affidavit was on the emails. Faced with the reality that the alleged email activity was probably not illegal, the Commonwealth now seeks to justify the search warrant, post hoc, based on an affidavit that fails to indicate either the time or the place of the criminal activity its informant claims to have witnessed, and that reflects no effort or attempt to verify the sketchy information supplied. The Commonwealth argues that Bennefield is a named informant, and it is true that when an informant's name appears in the affidavit that fact weighs in favor of his or her reliability. E.g., Commonwealth v. Alvarez, 422 Mass. 198, 204 (1996), quoting Commonwealth v. Burt, 393 Mass. 703, 710 (1985). "That a person is named . . . is one factor which may be weighed in determining the sufficiency of an affidavit."

Commonwealth v. Atchue, 393 Mass. 343, 347 (1984), quoting United States v. Spuch, 518 F.2d 866, 870 (7th Cir.1975)(emphasis supplied by Atchue). See Commonwealth v. Mullane, 445 Mass. 702, 706 (2006) (finding named informant reliable because of level of detail of her statement). However, the reliability of an informant is rarely based solely on the fact that he or she is named in the affidavit. See, e.g., Commonwealth v. Alvarez, supra at 204-205 (considering at length whether statement by named informant was against penal interest, and therefore reliable); Commonwealth v. Atchue, supra at 347 (finding named informant reliable, because not confronted solely by fact that informant was named). Instead, the reliability of named informants is typically shored up by the detail of their statements, see Commonwealth v. Mullane, supra; Commonwealth v. Burt, supra at 393 Mass. 703, 710-711 (1985); by corroboration by others, see Commonwealth v. Beliard, 443 Mass. at 85; or by subsequent police

investigation, see Commonwealth v. Burt, supra at 711. None of those factors is present here. The affidavit does state that Bennefield was "a reliable witness in another investigation which he brought to our attention," but that conclusory statement does not provide any information with which the magistrate could evaluate his reliability, which is of course the purpose of a warrant affidavit. See Commonwealth v. Rojas, 403 Mass. 483, 486 (1988). The affidavit contains some details that might be known to any person sharing a room with Calixte, such as a description of his computer and the operating systems he was using (two months before the search warrant affidavit was written), but the complete lack of both detail and corroboration as to the alleged crime itself makes Bennefield's statement insufficient, in the unusual circumstances of this case, to allow it to be relied on as the sole basis for a warrant.

Furthermore, apart from the issue of Bennefield's reliability in relation to the charge of unauthorized hacking into the BC grading system, there is a significant issue about the sufficiency of the nexus between the "places" to be searched, that is, Calixte's laptop computer and the other described "objects capable of storing digital data in any form," and evidence relating to this unauthorized access charge. Compare Commonwealth v. Anthony, 451 Mass. at 69-73 (discussing nexus requirement in relation to evidence of child pornography that Commonwealth claimed was probably stored on defendant's computer or computers).⁸ Detective Christopher's affidavit says that on January 28, 2009, Bennefield reported "that he has observed"

⁸ The affidavit in Commonwealth v. Anthony rested in part on the statement that "individuals who collect child pornography tend to keep this information in various media forms, including computers[, and] rarely dispose of such materials." Commonwealth v. Anthony, 451 Mass. 59, 71 (2008). The affidavit here does not give probable cause to believe that Calixte would transfer evidence of his alleged crime from the computer on which he committed it, whichever one that may be, to the various digital storage media seized.

Calixte hack into the BC grading system. Bennefield did not identify when he made the observation, where he and Calixte were, or what computer Calixte was using to perform the hacking activity. The Commonwealth asserts that, read in a common sense way, the affidavit supports the inference that the computer being used was Calixte's laptop, and that if so, the computer was likely to be in Calixte's college room, and would continue to retain, two months later, at least evidence of whether Calixte had ever accessed the BC grading system site. The affidavit, however, also indicates that Calixte is a college student in a college that the Commonwealth argues has computer labs; that he works in the college IT department; and that he works on other computers, belonging to unknown people or other students. In these particular circumstances, without any indication of time or place or computer, it is questionable whether the affidavit has established the requisite nexus.

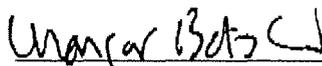
To conclude: taking into account the troublingly weak evidence of (1) Bennefield's reliability in connection with the allegation of unauthorized access to and hacking into the BC grading system, and (2) nexus, the search warrant affidavit fails to establish probable cause. Accordingly, because the search and seizure were not conducted pursuant to a lawful warrant, all ongoing forensic analysis of the items seized from Calixte must cease, see Commonwealth v. Kaupp, 453 Mass. at 106-107, n.7 ([valid] search warrant required to search seized computer), and the items must be returned forthwith. See Commonwealth v. Sacco, 401 Mass. 204, 207 and n.3 (1987). Cf. Matter of Lavigne, 418 Mass. at 836. With respect to the two seized laptop computers and any other property that the Commonwealth claims do not belong to Calixte⁹, the

⁹ I infer from the information and representations made at the hearing in this matter that Calixte does not argue the other computers are his.

Commonwealth is to undertake to identify the owner(s) of this property, and, with prior notice to Calixte, return the items to those owners.

ORDER

For the foregoing reasons, it is **ordered** that the motion to quash the search warrant and the motion for return of property are **allowed**. It is **further ordered** that the Commonwealth forthwith cease any ongoing search of Calixte's seized property, and return the property to Calixte. The motion to suppress evidence is **denied**.



Margot Botsford

Justice of the Supreme Judicial Court

Dated: May 21, 2009