IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR FLAGLER COUNTY, FLORIDA

CASE NO: 2015 CF 000387

STATE OF FLORIDA,

v.

KIMBERLE WEEKS,

Defendant.
_____/

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE DUE TO OVERBREADTH OF SEARCH WARRANT

THIS MATTER came before the Court on November 17, 2017 for hearing upon Defendant's Motion to Suppress Evidence Due to Overbreadth of Search Warrant filed pursuant to Fla.R.Crim.P. 3.190(b)(Doc. #155). Defendant seeks to suppress evidence obtained as a result of the search and seizure of her cell phone and all evidence derived from the search and seizure of the recordings from that cell phone. The Court reviewed and considered the Motion, heard argument of counsel and considered the case law submitted by counsel. Upon being fully advised in the premises, the Court finds as follows:

1. On October 2, 2014, an Affidavit for Search Warrant was prepared and sworn to by Investigator Philip W. Lindley of the Florida Department of Law Enforcement. The Affidavit outlined the events that led him to obtain and listen to a recorded conversation involving officials associated with a canvassing board meeting on August 25, 2014 that may have been illegally recorded. The Affidavit does not mention any other illegal recording or any other alleged criminal behavior by Defendant.
2. After reviewing the Affidavit for Search Warrant, The Honorable J. Michael Traynor issued a Search Warrant on October 2, 2014. The Search Warrant referred to and

incorporated the Affidavit for Search Warrant. The Search Warrant specified the alleged violation of "F.S. 934.03 Interception and Disclosure of Oral Communications and F.S. 838.022 Official Misconduct" and specified the property to be seized as:

> "Computer(s), hard drive(s), multiple cellphone(s) with different operating "platforms", email transaction records, stored electronic communications including electronic mail – to include any attachments thereto, data, recordings, electronic recording equipment, compact discs, memory devices, data in the form of images, so-called zip files, documents, notes or equipment related to passwords and data security, devices which may restrict access to hardware, software, or data, and related items printed copies of data and papers associated with electronic data sought, as well as any information in any form related to ownership of domain name 'flaglerelections.com'. Specifically included in this application are any and all devices and materials related to and associated with electronic mail accounts…, and any data regardless of form, which might be accessible at the location, but maintained through connections "off-site" or maintained "in the cloud."

3. Law enforcement executed the Search Warrant and, among other items listed in the Search Warrant, seized Defendant's cell phone. Law enforcement searched the data on the cell phone, including every recording, and listened to those recordings.
4. Based on what law enforcement discovered by listening to those recordings, further investigation and interviews were conducted with individuals involved in those recorded conversations. The recordings and subsequent investigations resulted in other charges being filed in this case based upon recordings other than the original recording provided to Investigator Lindley and identified in the Affidavit and the Search Warrant.
5. In her Motion, Defendant alleges that because the Affidavit for Search Warrant only references the August 25, 2014 recorded conversation and, without further identification of other recorded conversations, the Search Warrant did not provide law enforcement

sufficient information to decide with reasonable certainty what they were allowed to search. *See*, Green v. State, 688 So.2d 301 (Fla. 1996)(insufficient description of clothing failed to limit the officer's discretion when executing a search); *see also*, Russ v. State, 185 So.3d 622 (Fla. 5th DCA 2016)(all burglary tools or stolen items pertaining to any recent burglary was not sufficiently specific). In Polakoff v. State, the Fifth District Court of Appeal held that a search warrant authorizing the search and seizure of documents relating to the extension of credit to a particular individual did not sufficiently explain what documents might constitute evidence of that extension of credit. 586 So.2d 385, 392 (Fla. 5th DCA 1991). The Court stated that "[n]othing should be left to the discretion of the officers executing the warrant as to what should be seized or taken." Id.

6. On the other hand, the particularity requirement of a search warrant "must be given reasonable interpretation consistent with the type or character of the property sought." Carlton v. State, 449 So.2d 250, 252 (Fla. 1984). For example, a search warrant that identified one controlled substance was not found to be overbroad when it authorized law enforcement to seize all controlled substances. Calhoun v. State, 449 So.2d 250, 252 (Fla. 1984). Defendant argues that what is a controlled substance is easily identifiable and a reasonably interpreted "consistent with the character of the property sought", unlike an illegally intercepted oral communication at issue in this case. However, the Fifth District Court of Appeal has held that a paragraph in a warrant, utilizing language almost idnetical to the search warrant language in this case, did not leave anything to the discretion of the officers executing the warrant. State v. Nuckolls, 617 So.2d 724, 726-28 (Fla. 5th DCA 1993); *accord* State v. Tanner, 534 So.2d 535 (La.

Ct. App. 5th Cir. 1988)(authorization for seizure of ''all other computer related software" was tempered by the instruction that it bear a specific name; police officers also did not go beyond the terms of the warrant in their search); Com. v. McDermott, 448 Mass. 750,864 N.E.2d 471 (2007)(warrant limited search of defendant's Internet activity to specific subject matters delineated). Several federal cases have found the search of a computer and related storage appropriate upon search warrant language that was not overbroad in cases involving possession of computer images of child pornography. *See, e.g.*, U.S. v. Upham, 168 F. Ed. 352 (1st Cir. 1999)(sufficient connection that search would find "some needles in the computer haystack"; actual recovered items were within the terms of the warrant); U.S. v. Hall, 142 F.3d 988 (7th Cir. 1998)(items on computer sufficiently identified by phrases that related to the crime so that officers were not unguided and free to rummage through everything on computer); U.S. v. Lamb, 945 F. Supp. 441 (N.D.N.Y. 1996)(actual content of an identified computer file could not be determined until the file was opened). The results in these cases may be that the "type or character of the property sought" is easily identifiable.

7. Complicating the analysis of the particularity requirement in this case is the fact that the recorded conversations were located on Defendant's cell phone. Courts recognize that a modern day cell phone is a computer; because a computer holds so much personal and sensitive information there is a greater likelihood of "inter-mingled" documents that lead to an invasion of privacy when police execute a search on a computer. Smallwood v. State, 113 So.2d 724, 732 (Fla. 2013); *see also,* Riley v. California, 134 S. Ct. 2473, 2485 (2014). Both Smallwood and Riley were cases that held law enforcement may not

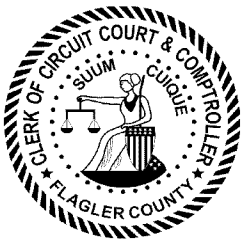
search a cell phone found on a Defendant's person incident to an arrest without a search warrant.

8. There is a lack of jurisprudence in the area of the particularity requirement for a search warrant of a cell phone. However, because Smallwood and Riley both equate a cell phone to a computer, this court will look to the cases involving the particularity requirement for a computer search to supply the necessary guidance in this context.

9. The language used in both the Affidavit for Search Warrant and the Search Warrant in this case satisfies the particularity requirement for a computer search. State v. Nuckolls, 617 So.2d at 728. Although another paragraph of the warrant in Nuckolls failed the particularity test, the warrant's paragraph E., which is closely similar to the language in the warrant at issue here, was held to be sufficiently particular. Id. In addition, the type and character of property sought in this case was sufficiently identified and, therefore, easily identifiable without interpretation. Polakoff v. State, 586 So.2d at 392. The Search Warrant referenced the specific alleged criminal activity and the objective of the search. Law enforcement was not at liberty to look through Defendant's personal files unless they were identifiable as related to the interception and disclosure of oral communications. Nuckolls, 617 So. 2d at 728. Although officers may have had to listen to recordings to determine if they met the criteria, the recordings that were recovered and resulted in additional charges were clearly identifiable based on either the lack of disclosure of the conversation being recorded or an affirmative statement by another party that they did not want to be recorded. As such, law enforcement's discretion was limited by the context of the specific activity identified.

For the foregoing reasons, it is **ORDERED AND ADJUDGED** that the Motion to Suppress Evidence Due to Overbreadth of search Warrant is **DENIED.**

DONE AND ORDERED in Chambers, in Bunnell, Flagler County, Florida, this _____ day of December, 2017.



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Margaret N. Hudson

e-Signed 12/14/2017 3:10 PM 2015 CF 000387

CIRCUIT JUDGE