"THE FEDERAL CORNER"

The Private Search Doctrine Did Not Help the Government

Buck Files

Aron Lichtenberger will not be prosecuted for his possession of child pornography because his lawyer prevailed on a Fourth Amendment issue. *United States v. Lichtenberger*, 2015 WL 2386375 (6th Cir. May 20, 2015) [Panel: Circuit Judges Merritt, Stranch and Donald (who authored the opinion)].

A Synopsis of the Facts

Lichtenberger lived with Karley Holmes -- his girlfriend -- at her mother's residence. When it was learned that he had been previously convicted of child pornography offenses, the police were called to escort him from the premises. Officer Douglas Huston, from the Cridersville Police Department, was one of the officers who responded to the call. He determined that Lichtenberger had an outstanding warrant for his arrest for failing to register as a sex offender and took him into custody.

After the officers and Lichtenberger left, Holmes became curious and accessed Lichtenberger's computer. She discovered different folders that contained thumbnail images of adults engaging in sexual acts with minors. After showing some of these to her mother, Holmes again called the Cridersville Police Department and Huston again responded. Huston requested that Holmes show him what she had discovered on Lichtenberger's computer. In response to that request, she opened several folders and clicked on some of the thumbnail images that she saw. Huston recognized these images to be child pornography. After consulting with his police chief, he asked Holmes to retrieve other electronic devices belonging to Lichtenberger. She gave him a cell phone, flash drive, and some marijuana. Huston left with these items and the computer.

After Lichtenberger was indicted, his lawyer filed a motion to suppress the evidence obtained from the computer. At the suppression hearing, Holmes testified that she had viewed approximately one hundred images of child pornography on Lichtenberger's computer. She also testified that she showed Huston "a few pictures" from these files. She could not be certain as to whether the images that she showed Huston were images that she had seen in her original search of the computer. Huston testified that Holmes had shown him "probably four or five photographs." United States District Judge James G. Carr of the United States District Court for the Northern District of Ohio granted Lichtenberger's motion to suppress and the Government appealed. *See United States v. Lichtenberger,* 19 F.Supp.3d 753, 754-55 (N.D.Ohio 2014).

Judge Donald's opinion reads, in part, as follows:

[The Private Search Doctrine]

… the government argues that Officer Huston's review and subsequent seizure fall within the ambit of the private search doctrine as articulated by *Jacobsen.*

***

The private search doctrine originated from the Supreme Court's decision in *United States v. Jacobsen,* 466 U.S. 109, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984). As with any Fourth Amendment case, the facts underlying the *Jacobsen* case are key to its holding. In 1981, Federal Express ("FedEx") employees were inspecting a package—a box wrapped in brown paper—that had been damaged in transit. *Id.* at 111. The employees opened the box and discovered that it contained a duct-tape tube about ten inches long nestled among wadded sheets of newspaper. *Id.* The employees removed the tube from the box and cut a slit in the end of the tube. *Id.* Inside, they found multiple zip-lock bags of a white, powdery substance. *Id.* The employees placed the bags back in the tube, put the tube back in the box, and called the Drug Enforcement Administration ("DEA"). *Id* . A DEA agent arrived and found the box open on a desk. *Id.* The agent observed that the tube inside had a slit cut into it, and removed the bags from the tube. *Id.* He then opened each bag and removed a trace amount of the powder for an on-site field test. *Id.* at 11112. The test positively identified the substance as cocaine. *Id.* at 112. Based on the agent's findings, the DEA procured a warrant to search the place to which the package had been addressed and subsequently arrested the defendants. *Id.*

The question before the Supreme Court was whether the DEA agent's search of the package and field test of its contents—both conducted without a warrant—violated the Fourth Amendment. If so, the package and any evidence obtained pursuant to the warrant based on its contents were inadmissible. The Court began with the fundamental principle that the Fourth Amendment protects "an expectation of privacy that society is prepared to consider reasonable." *Id.* at 113. When a government agent infringes on this reasonable expectation, a "search" occurs for the purposes of the Fourth Amendment, and the government must obtain a warrant or demonstrate that an exception to the warrant requirement applies. However, the Fourth Amendment only protects against "governmental action; it is wholly inapplicable 'to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official.' " *Id.* at 113–14 (quoting *Walter v. United States,* 447 U.S. 649, 662, 100 S.Ct. 2395, 65 L.Ed.2d 410 (1980) (Blackmun, J., dissenting)); *see also id.* at 115 ("The initial invasions of [defendants'] package were occasioned by private action…. Whether those invasions were accidental or deliberate, and whether they were reasonable or unreasonable, they did not violate the Fourth Amendment because of their private character.") (footnote omitted). [Emphasis added]

Applying these principles, the Supreme Court distinguished between the invasion of privacy that resulted from the FedEx employees' search of the package and the invasion that resulted from the DEA agent's subsequent review, because "[o]nce frustration of the original expectation of privacy occurs, the Fourth Amendment does not prohibit governmental use of the now-nonprivate information ." *Id.* at 117. *The Court held that, in a situation where "a governmental search ... follows on the heels of a private one[,]" "[t]he additional invasions of [a person's] privacy by the government agent must be tested by the degree to which they exceeded the scope of the private search." Id. at 115. In other words, the government's ability to conduct a warrantless follow-up search of this kind is expressly limited by the scope of the initial private search. Id. at 116 ("[T]he Government may not exceed the scope of the private search unless it has the right to make an independent search.").* [Emphasis added]

The Court therefore analyzed whether the DEA agent's after-occurring search had exceeded the scope of the FedEx employees' initial search of the package. The Court found that the agent's removal of the cocaine from the package remained within the scope—and was therefore permissible under the Fourth Amendment—because he was merely confirming what the employees had told him and there was a "virtual certainty" that he was going to find contraband and little else in the package. *Id.* at 118–20 (footnote omitted) (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 487–90, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971) and *Burdeau v. McDowell*, 256 U.S. 456, 475–76 (1921)). *The Court then evaluated whether the cocaine field test conducted by the agent exceeded the scope of the initial private search and found that it had because the FedEx employees had taken no similar action. Id. at 121. However, the Court concluded that the field test—which would merely confirm or refute that the powder was cocaine—could not disclose any facts in which the defendants had a legitimate privacy interest protected by the Fourth Amendment, and was therefore independently permissible to the extent it exceeded the scope of the initial private search. Id. at 122–26.* [Emphasis added]

***

[The Issue Here]

… the correct inquiry is whether Officer Huston's search remained within the scope of Holmes' earlier one.

[The Second Search Exceeded the First Search]

We find that the scope of Officer Huston's search of Lichtenberger's laptop exceeded that of Holmes' private search conducted earlier that day. This is, in large part, due to the extensive privacy interests at stake in a modern electronic

device like a laptop and the particulars of how Officer Huston conducted his search when he arrived at the residence.

We evaluate "[t]he reasonableness of an official invasion of the citizen's privacy … on the basis of the facts as they existed at the time that invasion occurred." *Jacobsen,* 466 U.S. at 115. Under the private search doctrine, the critical measures of whether a governmental search exceeds the scope of the private search that preceded it are how much information the government stands to gain when it re-examines the evidence and, relatedly, how certain it is regarding what it will find.

***

… we have declined to apply the private search doctrine where an officer's search of a physical space goes beyond the scope of the initial private search.

***

[Searches of Complex Electronic Devices]

However, searches of physical spaces and the items they contain differ in significant ways from searches of complex electronic devices under the Fourth Amendment. On this point, we find the Supreme Court's recent decision in *Riley v. California*, —– U.S. ——–, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014), instructive. The *Riley* decision arose from two cases in which officers had found cell phones on the defendants during searches incident to arrest, secured and searched the data on those cell phones without warrants, and subsequently discovered evidence used against the defendants at trial. *Id.* at 2480–82. The *Riley* Court held that the search-incident-to-arrest exception, which permits law enforcement to search items found on a suspect's person or in a suspect's vehicle at the time of arrest without a warrant, did not extend to the data on a cell phone. *Id* . at 2485. Instead, the Court declared the searches unconstitutional, and emphasized that "officers must generally secure a warrant before conducting such a search." *Id.*

We reach the same conclusion regarding the private search doctrine in the case at bar. As with any Fourth Amendment inquiry, we must weigh the government's interest in conducting the search of Lichtenberger's property against his privacy interest in that property. That the item in question is an electronic device does not change the fundamentals of this inquiry. But under Riley, the nature of the electronic device greatly increases the potential privacy interests at stake, adding weight to one side of the scale while the other remains the same. Id. at 2488.

[The "Virtual Certainty" Requirement]

This shift manifests in Jacobsen 's "virtual certainty" requirement. For the review of Lichtenberger's laptop to be permissible, Jacobsen instructs us that Officer Huston's search had to stay within the scope of Holmes' initial private search. 466 U.S. at 119. To accomplish this, Officer Huston had to proceed with "virtual certainty" that the "inspection of the [laptop] and its contents would not tell [him] anything more than he already had been told [by Holmes.]" Id. That plainly was not the case. As the district court found, "there was absolutely no virtual certainty that the search of Lichtenberger's laptop would have" revealed only what Officer Huston had already been told. Lichtenberger.

***

[No "Virtual Certainty" Here]

Considering the extent of information that can be stored on a laptop computer—a device with even greater capacity than the cell phones at issue in Riley—the "virtual certainty" threshold in Jacobsen requires more than was present here. When Office Huston arrived, he asked Holmes to show him what she had found. While the government emphasizes that she showed Officer Huston only a handful of photographs, Holmes admitted during testimony that she could not recall if these were among the same photographs she had seen earlier because there were hundreds of photographs in the folders she had accessed. And Officer Holmes himself admitted that he may have asked Holmes to open files other than those she had previously opened. As a result, not only was there no virtual certainty that Officer Huston's review was limited to the photographs from Holmes's earlier search, there was a very real possibility Officer Huston exceeded the scope of Holmes's search and that he could have discovered something else on Lichtenberger's laptop that was private, legal, and unrelated to the allegations prompting the search—precisely the sort of discovery the Jacobsen Court sought to avoid in articulating its beyond-the-scope test.

All the photographs Holmes showed Officer Huston contained images of child pornography, but there was no virtual certainty that would be the case. The same folders—labeled with numbers, not words—could have contained, for example, explicit photos of Lichtenberger himself: legal, unrelated to the crime alleged, and the most private sort of images. Other documents, such as bank statements or personal communications, could also have been discovered among the photographs. So, too, could internet search histories containing anything from Lichtenberger's medical history to his choice of restaurant. The reality of modern data storage is that the possibilities are expansive.

[The Lack of Virtual Certainty is Dispositive]

We find that Officer Huston's lack of "virtual certainty" when he reviewed the

contents of Lichtenberger's laptop is dispositive in this instance. However, we also note that, like the cases in *Riley*, the situation here lacked some of the risks that support an immediate search. *Riley*, 134 S.Ct. at 2486–88. The need to confirm the laptop's contents on-site was not immediate. Lichtenberger was nowhere near the premises, having been arrested earlier that day; the images were not in danger of erasure, deterioration, or tampering. *Id.* at 2586 ("[O]nce law enforcement officers have secured a cell phone, there is no longer any risk that the arrestee himself will be able to delete incriminating data from the phone."). The laptop presented no cognizable, immediate threat to Officer Huston, Holmes, or anyone else when Officer Huston arrived at the Holmes residence to review it. *Id.* at 2485 ("Digital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee's escape. Law enforcement officers remain free to examine the physical aspects of a phone to ensure that it will not be used as a weapon[.]") These circumstances were knowable to Officer Huston at the time he arrived.

[Lichtenberger Wins]

In light of the information available at the time the search was conducted, the strong privacy interests at stake, and the absence of a threat to government interests, *we conclude that Officer Huston's warrantless review of Lichtenberger's laptop exceeded the scope of the private search Holmes had conducted earlier that day, and therefore violated Lichtenberger's Fourth Amendment rights to be free from an unreasonable search and seizure.* The laptop evidence and evidence obtained pursuant to the warrant issued on the basis of its contents must be suppressed. [Emphasis added]

My Thoughts

- This case presents an interesting contrast between a case where the private search doctrine was enunciated by the Supreme Court (*Jacobsen*) and this case where that same doctrine was found not to support the search.
- The lesson in this case -- as in so many search cases -- is that taking the time to obtain a search warrant will, in many cases, cut off the defendant's opportunity to raise a valid Fourth Amendment issue.
- As long as officers fail to learn that lesson, lawyers will have the opportunity to raise an issue of Constitutional dimension -- and prevail.