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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NOS. A-0468-21
A-0620-21

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

MARSHEA ANTHONY,
CHARLES JACKSON,
KARON NEVERS, and
TYDIS ROBERTSON,

Defendants-Respondents.

IN THE MATTER TO COMPEL
THE RELEASE OF THE
PASSCODES OF GILBERTO
LARA

Argued April 7, 2022 – Decided April 18, 2022

Before Judges Haas and Mawla.

On appeal from an interlocutory order of the Superior
Court of New Jersey, Law Division, Passaic County,
Indictment No. 19-02-0014.

Lila B. Leonard, Deputy Attorney General, argued the cause for appellant State of New Jersey (Matthew J. Platkin, Acting Attorney General, attorney; Lila B. Leonard, of counsel and on the brief).

Elizabeth C. Jarit, Deputy Public Defender, argued the cause for respondent Marshea Anthony (Joseph E. Krakora, Public Defender, attorney; Elizabeth C. Jarit, of counsel and on the brief).

Joseph E. Krakora, Public Defender, attorney for respondent Charles Jackson (Andrew R. Burroughs, Designated Counsel, on the brief).

Frank M. Gennaro, argued the cause for respondent Tydis Robertson (Joseph E. Krakora, Public Defender, attorney; Frank M. Gennaro, Designated Counsel, on the brief).

Michele E. Friedman, Assistant Deputy Public Defender, argued the cause for respondent Gilberto Lara (Joseph Krakora, Public Defender, attorney; Michele E. Friedman, of counsel and on the brief).

PER CURIAM

This matter returns to us after remand proceedings directed by our previous opinion. State v. Anthony, No. A-0714-19 (App. Div. Sept. 18, 2020). By leave granted in two appeals,¹ the State challenges the Law Division's August 12, 2021 and October 5, 2021 orders denying its motion to compel defendants Marshea Anthony, Charles Jackson, Karon Nevers, and Gilberto Lara to disclose

¹ We consolidate the two appeals for purposes of this opinion.

the passcodes to cell phones the State seized from them pursuant to Communications Data Warrants (CDWs). The State also appeals the court's decision to limit its access to the contents of defendant Tydis Robertson's cell phones after requiring him to provide the passcodes to those devices. Consistent with our Supreme Court's decision in State v. Andrews, 243 N.J. 447 (2020), we affirm the court's orders as to Anthony, Jackson, Nevers, and Lara, but reverse the court's decision limiting what the State can access from Robertson's cell phone.

I.

The parties are fully familiar with the procedural history and background facts of this matter, and we need only briefly summarize that material here. In July 2018, the State began investigating the members of an alleged drug distribution gang. The State identified defendants as members of the gang and believed they were using their cell phones to conduct drug transactions. During the course of the investigation, the State seized a number of cell phones from defendants and applied for CDWs allowing it to conduct a forensic examination of each device to search for evidence of crimes.²

² According to the CDWs, the State was investigating the following offenses: racketeering, N.J.S.A. 2C:41-1; possession of a controlled dangerous substance

After seizing the cell phones, the State discovered that a number of them were protected by passcodes. The State then filed motions seeking orders compelling defendants to disclose the passcodes needed to enable the State to access the information stored on the devices. In a series of August 27, 2019 orders, the trial court denied the motions as to Anthony, Jackson, Nevers, and Lara. The court granted the State's motion to require Robertson to disclose the passcode to his two cell phones, but limited the State's access to only the home screen of each device.

At the time of the trial court's decision, it did not have the benefit of the Supreme Court's recent decision in Andrews.³ Therefore, we remanded the matter for rehearing in light of the Court's decision. On remand, the court reached the same conclusions as it had on the State's original applications seeking the disclosure of the passcodes. We then granted the State's motions for leave to appeal.

II.

(CDS), N.J.S.A. 2C:35-10(a)(1); possession of a CDS with intent to distribute, N.J.S.A. 2C:35-5; distribution of a CDS, N.J.S.A. 2C:35-5; and conspiracy, N.J.S.A. 2C:5-2.

³ However, the trial court did have access to our decision in State v. Andrews, 457 N.J. Super. 14 (App. Div. 2018), which the Supreme Court affirmed.

On appeal, the State contends the trial court misapplied the test the Supreme Court established in Andrews to determine whether a defendant may be compelled to provide the passcode to a seized cell phone. In Andrews, the Court authorized the compelled disclosure of a cell phone passcode under the "foregone conclusion exception" to the Fifth Amendment. 243 N.J. at 480. The Court held that a trial court may require a defendant to disclose the passcode to his cell phone if the State can demonstrate that the passcode exists, that the defendant owned and operated the cell phone (thereby establishing his knowledge of the passcode), and that the passcode enables access to the cell phone's contents. Id. at 480-81. If the State establishes that the defendant's knowledge of the passcode is a "foregone conclusion," the defendant must provide it to the State, which may then use the passcode to unlock and search the contents of the device. Id. at 478-79 (finding "that the foregone conclusion test applies to the production of the passcodes themselves, rather than to the phones' contents.").

III.

The trial court conducted an evidentiary hearing when it first considered the State's motions and made detailed findings of fact concerning the

circumstances related to the State's seizure of each defendant's cell phones. The State presented seven witnesses at the hearing. Defendants did not testify and called no witnesses.⁴

The parties had the opportunity to supplement the record on the remand with additional testimony, but declined to do so. Anthony, slip op. at 2. We now summarize the court's findings as to Anthony, Jackson, Nevers, and Lara.

A. Anthony

Detective Benny Ramos testified he was present when two other officers arrested Anthony after they stopped the car he was driving. Ramos stated the

⁴ The State obtained indictments against Anthony, Jackson, and Nevers for various drug offenses and all three defendants pled guilty and were sentenced. The State agreed as part of the plea negotiations not to use any information obtained from the cell phones it seized from these defendants in a future proceeding. The State never obtained an indictment for either Lara or Robertson. The trial court concluded the question of whether defendants should be required to disclose the passcodes for the seized phones was moot because "[t]here is presently no immediate threatened harm to the parties, or an ongoing controversy." Nevertheless, the court proceeded to address the merits of the State's motion. We disagree with the court's legal analysis on this point. As the State made clear, the scope of the investigation included a number of potential suspects in addition to the five involved in this case. As set forth in the CDW applications, the State sought to search the phones seized from defendants for information linking them or other suspects to the drug distribution operation that was the subject of its investigation. Therefore, the issues presented were clearly not moot.

police recovered two cell phones from Anthony in a search incident to the arrest. Ramos never saw Anthony using either of the phones. He also did not know whether Anthony owned the devices.

Based on these facts, the trial court concluded the State failed to demonstrate it was a foregone conclusion that Anthony knew the passcodes for the two cell phones. Therefore, the court denied the State's motion to compel him to disclose the passcodes.

B. Jackson

Detective Keith Franco testified he arrested Jackson pursuant to a warrant. Franco searched Jackson and found eight cell phones in his coat and pants pockets. Detective Angel Gonzalez testified Jackson told the police that four of the phones belonged to his "brother," who police suspected was a deceased gang member, and the other four "were his[.]" The detectives did not differentiate between the phones and bagged them all together. Gonzalez also stated that if a gang member was arrested or killed, the member's cell phones would be passed along to other members. Neither detective saw Jackson use any of the cell phones.

The trial court concluded the State failed to establish it was a foregone conclusion that Jackson knew the passcodes needed to access the cell phones.

The court found that Gonzalez's testimony concerning Jackson's "alleged statement" about the phones was not credible because it was not supported by any of the contemporaneous reports the detectives prepared concerning their activities on the day of Jackson's arrest.

C. Nevers

Nevers fled when the police attempted to arrest him. Detective Toni Petreski testified the police gave chase and seized a cell phone when they caught Nevers. Petreski stated the police recovered a second phone that they believed Nevers discarded as he fled. However, the detective did not witness that event.⁵

The trial court concluded the State did not demonstrate it was a foregone conclusion that Nevers knew the passcode to the phone seized in the search incident to his arrest. The State presented no evidence that Nevers owned or operated this device.

D. Lara

Ramos testified he arrested Lara after police stopped his car. Ramos initially stated he "grabbed" a cell phone from the center console of the car. However, Ramos prepared a report stating he recovered the phone from Lara's

⁵ The State was later able to access the second phone without a passcode.

"body." When shown the report, Ramos testified he "made an error" and actually seized the phone from Lara when he got out of the car holding it in his hand. Ramos never saw Lara using the phone.

Based on these inconsistencies, the trial court gave no weight to the detective's testimony relating to Lara's possession of the phone prior to the seizure. The court found the foregone conclusion exception did not apply because the State did not prove Lara owned or operated the device.

E. Application of the Andrews Test

As noted above, the State argues the trial court erred by concluding the foregone conclusion exception to the Fifth Amendment did not require Anthony, Jackson, Nevers, and Lara to disclose the passcodes to the devices the State seized from them. We disagree.

On appeal, we uphold the findings of a trial court where "supported by sufficient credible evidence in the record." State v. Boone, 232 N.J. 417, 425-26 (2017) (quoting State v. Scriven, 226 N.J. 20, 40 (2016)). Factual findings warrant reversal only where "so clearly mistaken that the interests of justice demand intervention and correction." Id. at 426 (quoting State v. Elders, 192 N.J. 224, 244 (2007)). No deference is owed to the trial court's conclusions of law, which we review de novo. Ibid.

Applying this standard, we discern no basis for disturbing the trial court's determinations regarding these four defendants. In order for the foregone conclusion exception to apply, the State must establish both "ownership and control" of the cell phone. See Andrews, 243 N.J. at 482-83. While defendants may have possessed the cell phones because they were either on their persons or in their cars, the State presented no credible evidence that they owned or ever operated the devices. Therefore, it was not a foregone conclusion that Anthony, Jackson, Nevers, or Lara knew the passcodes to the cell phones.

The State contends the trial court erroneously applied ten "discretionary factors"⁶ in reaching its decision that were not grounded in the Supreme Court's decision in Andrews and, as a result, mistakenly denied its motions to compel defendants to disclose the passcodes. We agree with the State that the trial court's discussion of these factors was not necessary to its final determination. In Andrews, the Supreme Court confirmed that the foregone conclusion exception test is a relatively simple one that can readily be applied to the

⁶ In its written opinions, the trial court stated a court should consider ten factors in addressing foregone conclusion exception cases including: the nature and circumstances of the case; whether the State offered the defendant immunity; whether the State could obtain the information sought by alternative means; and whether the "compelled act implicitly conveys material facts not otherwise known to the State."

undisputed facts of this case. There was certainly no need for the trial court to develop these alternative elements of a test it appears to have crafted prior to the Court's decision.

However, the trial court clearly based its decision on the factual record and the Andrews test as outlined above. Each time the court mentioned these factors, it specifically stated:

Because the State has failed to establish the [f]oregone [c]onclusion exception, the court would ordinarily not reach the weighing of the discretionary factors in the third prong of the three-part rubric. However, assuming arguendo that these factors did apply, and for the sake of completeness, the court will outline them [below].

Thus, the trial court's recitation of the ten factors was merely an alternative analysis of the issue presented and did not detract from the court's overall conclusion that the State failed to demonstrate it was a foregone conclusion that Anthony, Jackson, Nevers, or Lara knew the passcodes to any of the devices.

The State also contends the trial court erred by focusing on the contents of the cell phones rather than the passcodes needed to access them. As discussed below, we agree this occurred with Robertson. However, the court clearly focused on the Andrews test in holding it was not a foregone conclusion that the other four defendants knew the passcodes to the cell phones. Therefore, we

reject the State's argument on this point and affirm the court's August 12, 2021 and October 5, 2021 orders as to Anthony, Jackson, Nevers, and Lara.

IV.

We now turn to the trial court's findings of fact and conclusions of law regarding two cell phones the State seized from Robertson. The State alleged Robertson was the leader of the drug distribution gang. In June 2018, Robertson was incarcerated in a halfway house. The resident supervisor walked into Robertson's room and saw him sitting on his bed using a cell phone. The supervisor confiscated the cell phone and sent it to the Department of Corrections (DOC).

In October 2018, the supervisor entered Robertson's room and again saw him sitting on his bed "browsing on" a cell phone. The supervisor took the second phone and forwarded it to the DOC.

The State seized both phones pursuant to a CDW. The phones were protected by passcodes and the State filed a motion to require Robertson to disclose the passcodes for the devices.⁷

⁷ The State also seized a third cell phone that the DOC confiscated from Robertson while he was in a different facility. The State was able to access that phone because it was not protected by a passcode.

Based upon these facts, the trial court concluded the State satisfied the Andrews test and established it was a foregone conclusion that Robertson knew the passcodes for both of his devices. Robertson did not seek a stay of the court's ruling, and he gave the court the passcodes for both cell phones during a November 12, 2019 in camera proceeding. Robertson did not file a notice of appeal from the court's order requiring him to disclose the passcodes. Under these circumstances, we discern no basis for disturbing the court's ruling concerning the passcodes.

However, the trial court went on to limit the State's ability to access the cell phones. The court found that even though the State demonstrated it was a foregone conclusion that Robertson knew the passcodes, the State did not establish it was a foregone conclusion that Robertson knew the contents of the phones or where this content was located. The court reasoned that the State's witness only testified he saw Robertson browsing the phones' home screens and did not know what additional applications or files Robertson had accessed. Therefore, the court limited the State's access only "to the two phones' unlocked home screens – nothing more and nothing less – since it is only a [f]oregone [c]onclusion that Robertson had bypassed the lock screens."

After our de novo review, we conclude that the trial court erred by limiting the State's access only to the home screens of the two devices. The CDW for each device permitted the State to conduct a complete forensic examination of the entire phone. Indeed, the State used a CDW to access the third cell phone it seized from Robertson without limitation. The only motion before the court was the State's motion to require Robertson and the other defendants to provide the passcodes for the cell phones. Thus, there was no reason for the court to address the scope of the CDW in this proceeding.

Moreover, the Andrews Court clearly held "that the foregone conclusion test applies to the production of the passcodes themselves, rather than to the phones' contents." 243 N.J. at 479. Accordingly, and contrary to the trial court's analysis, "the proper focus here is on the Fifth Amendment and . . . the Fourth Amendment's privacy protections should not factor into analysis of the Fifth Amendment's applicability." Id. at 479-80. In addition, the Court found that any privacy considerations under the common law privilege against self-incrimination "to those portions of the cell phones' contents of which disclosure has been ordered have already been considered and overcome through the unchallenged search warrants granted in this case." Id. at 485.

Because the trial court mistakenly limited the State's ability to examine the contents of Robertson's two cell phones, we reverse this portion of the August 12, 2021 order and remand to the trial court for further proceedings. On remand, the court shall provide the State with the passcodes Robertson disclosed in order to enable it to conduct the forensic examination previously authorized by the CDW for these devices.

Affirmed in part; reversed in part; and remanded. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION