

RECORD IMPOUNDED

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1052-21

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

C.J.L.,

Defendant-Respondent.

APPROVED FOR PUBLICATION

April 18, 2022

APPELLATE DIVISION

Argued March 1, 2022 – Decided April 18, 2022

Before Judges Fisher, DeAlmeida and Smith.

On appeal from an interlocutory order of the Superior Court of New Jersey, Monmouth County, Accusation No. 19-07-1053.

Monica do Outeiro, Special Deputy Attorney General/ Acting Assistant Prosecutor, argued the cause for appellant (Lori Linskey, Acting Monmouth County Prosecutor, attorney; Monica do Outeiro, on the brief).

Charles J. Uliano argued the cause for respondent (Chamlin Uliano & Walsh, attorneys; Charles J. Uliano, of counsel; Andrew T. Walsh, on the brief).

The opinion of the court was delivered by

SMITH, J.A.D.

The State appeals the denial of its motion to compel a cell phone passcode from defendant, C.J.L. The State argues the motion court erred by overlooking critical ownership evidence and misapplying the foregone conclusion doctrine, effectively importing Fourth Amendment principles into what is a Fifth Amendment inquiry. After examining the record in light of the recent decision in State v. Andrews, 243 N.J. 447 (2020), which extended the foregone conclusion doctrine to passcodes, we agree and reverse because the State presented sufficient evidence on the issue of ownership and possession.

I.

Detective Gregory Pancza of the Bradley Beach police department received two cyber tips, one reporting the uploading of child sexual abuse/exploitation materials via Dropbox using an iCloud email account containing defendant's last name and first initial, and the other reporting an image of child sexual abuse sent by way of an Instagram direct message. The detective investigated and learned that both tips were connected to defendant.

A Law Division judge authorized three search warrants – one each for defendant's home, defendant's car, and defendant's person – finding sufficient probable cause supporting each search for, among other things, electronic devices which could contain evidence of endangering the welfare of a child, N.J.S.A. 2C:24-4(b)(5)(a), or which could assist in identifying suspects or

additional victims. The warrant judge also authorized an on-site search, or field preview, of any seized electronic devices.

Det. Pancza and members of the Internet Crimes Against Children Task Force executed the three warrants at 6:00 a.m. on July 16, 2021, at defendant's residence. Defendant was located in his locked bedroom. He was the only occupant of the room, and he refused to open the door. Ultimately, the officers forced entry into defendant's bedroom.

During their search of defendant's bedroom, officers located three electronic devices: a Samsung cell phone, an Asus laptop, and an Apple iPhone 7. The iPhone was found in a pull string bag hanging on the back of a computer chair.¹

In accordance with the search warrant, Detective Brian Migliorisi attempted to access the iPhone 7, but he was prevented from doing so because the iPhone was passcode protected. The only information Det. Migliorisi could retrieve from the iPhone was its association with the same iCloud email account from the cyber tips, the one containing defendant's last name and first initial. Defendant was charged with third-degree endangering the welfare of children, N.J.S.A. 2C:24-4(b)(5)(b)(iii).

¹ Under the terms of a January 2020 sentence, defendant had been placed on probation and, as a condition of probation, the sentencing court prohibited him from possessing an iPhone.

In order to complete the iPhone search, the State filed a motion to compel defendant to produce the cell phone passcode. In support of its motion, the State submitted an affidavit from Det. Pancza, setting forth the facts of the investigation as well as those facts that constituted probable cause for issuance of the warrants. Defendant opposed the motion, arguing that the facts asserted by the State did not establish his ownership and operation of the iPhone. During oral argument, defendant did not contest probable cause. He did, however, ask the court to limit the scope of the warrant should it find the foregone conclusion exception applied. The State argued against this. It asserted that limiting the scope would be inappropriate for two reasons: (1) the lawfully obtained warrants were based on probable cause and authorized the entire contents of the electronics to be examined, and (2) the offense was one that could "only be committed by using an electronic device[.]"

The court denied the motion, concluding the State failed to establish defendant's ownership of the iPhone and knowledge of the passcode. The court found that officers locating the iPhone in "a backpack" in "a bedroom" was insufficient to prove defendant's ownership. The court also found "that the phone immediately being in the vicinity of the defendant at the time of the search" did not "conclusively demonstrate that . . . defendant own[ed] the

phone." The State appealed, arguing the motion court erred in denying the state's motion to compel the phone passcode.

II.

A.

For purposes of appellate review, we analyze the State's motion to compel defendant to turn over evidence using the same standard we employ to review a defendant's motion to suppress evidence. "[A] trial court's factual findings in support of granting or denying a motion to [compel] must be upheld when 'those findings are supported by sufficient credible evidence in the record.'" State v. A.M., 237 N.J. 384, 395 (2019) (quoting State v. Gamble, 218 N.J. 412, 424 (2014)). We will only disturb those findings "if they are so clearly mistaken that the interests of justice demand intervention and correction." State v. Williams, 461 N.J. Super. 80, 94 (App. Div. 2019) (quoting State v. Robinson, 200 N.J. 1, 15 (2009)). "We deferentially review the trial judge's factual findings, crediting those 'which are substantially influenced by [the] opportunity to hear and see the witnesses and to have the "feel" of the case, which a reviewing court cannot enjoy.'" State v. Alessi, 240 N.J. 501, 517 (2020) (alteration in original) (quoting State v. Elders, 192 N.J. 224, 244 (2007)). However, "we owe no deference to the trial judge's legal

conclusions, which we review de novo." Ibid. (citing State v. Hinton, 216 N.J. 211, 228 (2013)).

B.

The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. That right against self-incrimination "applies only when the accused is compelled to make a [t]estimonial [c]ommunication that is incriminating." Fisher v. United States, 425 U.S. 391, 408 (1976).

A privilege against compelled self-incrimination is not expressed in New Jersey's Constitution, but it "is deeply rooted in this State's common law and codified in both statute and an evidence rule." Andrews, 243 N.J. at 481 (quoting State v. Muhammad, 182 N.J. 551, 567 (2005)). The common law privilege "generally parallels federal constitutional doctrine," but also "offers broader protection than its federal counterpart" Id. at 483 (first quoting State v. Chew, 150 N.J. 30, 59 (1997); and then quoting Muhammad, 182 N.J. at 568). "[I]n contrast to federal law which distinguishes between Fourth and Fifth Amendment inquiries, New Jersey's common law views the privilege against self-incrimination as incorporating privacy considerations." Id. at 485.

Even when a communication is testimonial, there is an exception to the Fifth Amendment which arises when the act of production has minimal

testimonial value, because the information conveyed by the act is a foregone conclusion. Id. at 480. In Andrews, our Supreme Court held that the foregone conclusion doctrine, historically applied to documents, also applied to the production of passcodes. Ibid. ("concluding that compelled production of the passcodes falls within the foregone conclusion exception."). To fall under this exception, the State must demonstrate (1) the passcode's existence, (2) the defendant's possession and operation of the passcode-protected device, and (3) the passcode enables access to the cell phone's contents. Id. at 480-81. If all three requirements are met, then compelled disclosure of the passcode will not violate a defendant's Fifth Amendment protection against self-incrimination. Id. at 480.

Andrews found this doctrine applied to New Jersey's protections against self-incrimination. The Court agreed with our conclusion that once "the State has established the elements for application of the 'foregone conclusion' doctrine, New Jersey's common law [and statutory] privilege[s] against self-incrimination do[] not bar compelled disclosure of passcodes" Id. at 461 (citing State v. Andrews, 457 N.J. Super. 14, 24 (App. Div. 2018)); see also id. at 485. Accordingly, the Court determined that because all three elements of the foregone conclusion test were met, the production of the defendant's passcodes was not self-incrimination under New Jersey's protections. Ibid.

Andrews also addressed the relationship between Fourth Amendment privacy concerns and self-incrimination principles. In Andrews, the search and seizure of the devices was "authorized by . . . lawfully issued search warrants[.]" Id. at 465. As such, defendant did not argue that the warrants were unsupported by probable cause. Id. at 464. Instead, he claimed the "compelled disclosure of his . . . passcodes . . . violate[d] federal and state protections against self-incrimination." Id. at 465. Accepting the defendant's argument, the Court determined "the proper focus" for evaluating motions to compel passcodes was "the Fifth Amendment[,] and . . . Fourth Amendment[] privacy protections should not factor into [the] analysis" Id. at 479-80.

III.

A.

The State argues that the motion court erred by misapplying the foregone conclusion standard and importing Fourth Amendment principles into what is purely a Fifth Amendment inquiry. We agree. In its oral statement of reasons, the court summarized the State's burden as follows:

[t]he foregone conclusion analysis requires the State to establish with reasonable particular[ity] that it already knows that, one, the evidence sought exist[s]; two, the evidence was in the possession of the accused; and three, the evidence is authentic. That's Andrews[,] 243 N.J. at 460.

But the court cited to Andrews' procedural history, not its holding. The relevant holding states, "the foregone conclusion test applies to the production of the passcodes themselves, rather than to the [device's] contents." Id. at 479. The motion court articulated the incorrect standard for evaluating a motion to compel a passcode. The proper foregone conclusion standard, under Andrews, requires the State to prove the existence of the passcode, not the evidence it seeks to find on the device. Ibid. The motion court also erred by characterizing the State's search, which was authorized by a lawfully obtained warrant, as an "unfocused haphazard" fishing expedition. The narrow issue before the court was whether the foregone conclusion elements had been satisfied, so its findings and ultimate order curtailing the State's search for evidence of child endangerment were in error.

In addition to citing the wrong standard, the motion court also erred by importing Fourth Amendment principles into a Fifth Amendment inquiry. At the outset, the court acknowledged the warrants "clearly gave the State" authority to search and seize "all types of electronic things that may be capable of storing information or evidence of the alleged crime" But even after recognizing the validity of the search warrants, the motion court found that "[a]llowing the State to access the full contents of the phone would be [overbroad] and lead to a fishing expedition for incriminating information."

The breadth of a search is a Fourth Amendment principle, and Andrews is clear that "Fourth Amendment[] privacy protections should not factor into [the] analysis" for compelled passcode inquiries. Id. at 479-80. Compelling production of the passcode simply facilitates the execution of the warrant. Moreover, we note that the search warrants were inherently broad due to the nature of the underlying offense: third-degree endangering the welfare of a child. N.J.S.A. 2C:24-4(b)(5)(b)(iii). Under this statute, "[a] person commits a crime of the third degree if he knowingly possesses, knowingly views, or knowingly has under his control, through any means, including the [i]nternet, less than 1,000 items depicting the sexual exploitation or abuse of a child." Ibid. (emphasis added).

While we note that defendant did not contest the validity of the search warrants, we observe that twenty-first century communications technology provides near-limitless ways for an alleged perpetrator of child endangerment to view, possess, or control such items referenced in the statute. Given this reality, the broad scope of the warrant authorizing defendant's cell phone search is justifiable. We recognize the important privacy concerns that can be raised in circumstances such as this, however we find that valid and properly executed search warrants satisfactorily address any Fourth Amendment issues

which may arise. Andrews, 243 N.J. at 485. Consequently, we discern no privacy right of defendant implicated on this record.

B.

The State also contends that the motion court's finding on the ownership element of the foregone conclusion test was contrary to the weight of the evidence. We again agree, and we find that the court failed to consider evidence in the record concerning ownership and operation of the phone. We have had few opportunities to interpret the foregone conclusion doctrine in connection with cell phone passcodes since Andrews was decided. Moreover, it appears that the ownership/possession element of the foregone conclusion doctrine is an issue yet to be addressed post-Andrews.

The motion court found defendant was in the "vicinity" of the phone and concluded that this was insufficient to prove defendant's ownership or operation of it. We disagree, as the court overlooked credible evidence in the record when making its findings. At the time of the search the phone was in defendant's locked bedroom; he was the sole occupant and refused to let the police in. Significantly, the email address associated with the phone's iCloud account incorporates defendant's last name and first initial. These probative facts, which suggest that defendant owned and operated the iPhone, were omitted from the motion court's analysis.

IV.

We find the motion court's misapplication of the foregone conclusion standard and omission of probative facts from the ownership analysis to be mistakes so clear that "the interests of justice demand intervention and correction." Williams, 461 N.J. Super. at 94. We apply the foregone conclusion exception to the Fifth Amendment right against self-incrimination established by Andrews. The record, when considered in light of Andrews, contains ample credible evidence from which to conclude defendant was the owner and operator of the iPhone 7. We therefore find the court erred in denying the motion to compel and we vacate that order. We reverse and remand for the motion court to enter an order compelling production of the passcode.

Reversed 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