IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

STATE OF FLORIDA,

Appellant,

v.

AARON STAHL,

Appellee.

Case No. 2D14-4283

ON APPEAL FROM THE CIRCUIT COURT
OF THE TWELFTH JUDICIAL CIRCUIT,
IN AND FOR SARASOTA COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND FACTS

Appellee was arrested and charged with video voyeurism, in violation of §810.145(2)(c), Florida Statutes (2014). (R2, 33-35) According to the probable cause affidavit (R3-4), the victim stated that she was shopping with her children when she observed a man conversing with them. While she was looking at items on a shelf, she observed the man crouching down with his arm extended and holding a cell phone under her skirt. She also observed illumination from the cell phone. She confronted the man and attempted to restrain him until assistance arrived. A struggle ensued and the man was able to free himself and flee the store. Law enforcement viewed surveillance video, which was consistent with the victim's statements. The video also showed the man entering the store with a cell phone in his hand. The video further showed the man run to a vehicle in the parking lot and drive away, despite attempts by a bystander to stop him. Law enforcement used the vehicle's license plate number to determine that Appellee was the registered owner. Using his driver license photograph and the video, law enforcement positively identified Appellee as the man involved in the incident.

Law enforcement subsequently obtained a search warrant for the contents of Appellee's cell phone. (R89-91) The cell phone was described as an Apple iPhone 5 with a cracked screen and a piece of glass missing from the top right corner and its color,

phone number, and service provider were specified. (R85, 90) The search warrant affidavit contained the details from the probable cause affidavit and added that the victim stated that Appellee claimed he dropped his phone when she confronted him. (R86) The affidavit also noted that, after his arrest, Appellee admitted he was present in the store but denied taking any inappropriate images of the victim. (R87) Appellee verbally consented to a search of his cell phone, confirmed the phone number, and provided its location. (R87) After law enforcement retrieved his cell phone, Appellee rescinded his consent to search it. (R87)

The State later filed a motion to compel Appellee to produce the passcode for his cell phone. (R22-26) The motion argued that production would not be a testimonial communication implicating the Fifth Amendment privilege against self incrimination because the sought after evidence was a foregone conclusion and, alternatively, because production would be an act that did not require use of the contents of the mind. (R23-25) The motion also argued that compelling production of the passcode was analogous to compelling a homeowner to open a locked door. (R25)

At the hearing on the motion to compel, the State relied on the facts presented in the affidavits. (R64-65) The State argued that production of the passcode would not be a protected testimonial communication because it was akin to having a search warrant for someone's home and asking them to unlock the door so

it would not have to be battered down. (R65-66) The State asserted that it would not be feasible to attempt to bypass the passcode since the evidence could be destroyed (because the cell phone could shut itself down) or rendered useless (because of chain of custody issues inherent in sending the cell phone to the manufacturer). (R66-67) The State analogized compulsion of production of the passcode to compulsion of production of the combination for a safe, which would not implicate the Fifth Amendment. (R68-69) The State argued that the contents of the cell phone were a foregone conclusion because the location, existence, and authenticity of the sought after evidence were known with reasonable particularity. (R69, 71-73) The State asserted that it was not asking Appellee to locate individual files or decrypt them. (R70, 72-74) The State confirmed that it would not use the fact that Appellee provided the passcode (i.e., the act itself) as evidence against him. (R71)

The trial court denied the motion to compel, finding that production of the passcode would require use of the contents of the mind and that the requirements of the foregone conclusion doctrine had not been met. (R29-31) The order denying the motion to compel explicitly relied on the factual assertions in the two affidavits by law enforcement. (R29-30) The State filed a timely motion for rehearing, noting that the denial of the motion to compel resulted in suppression of evidence. (R36-38) The trial

court denied the motion for rehearing. (R42) The State then filed a timely notice of appeal. (R44)

SUMMARY OF ARGUMENT

The trial court's order denying the State's motion to compel Appellee to produce the passcode for his cell phone was functionally an order suppressing evidence lawfully seized pursuant to a search warrant. Although the act of production would have communicated that the cell phone existed and that Appellee owned the cell phone, those statements would not constitute testimonial communication protected under the Fifth Amendment because those statements were foregone conclusions since the State had already established the existence and ownership of the cell phone. Therefore, the trial court erred by denying the State's motion to compel production of the passcode.

ARGUMENT

ISSUE: DID THE TRIAL COURT ERR BY DENYING THE MOTION TO COMPEL APPELLEE TO PRODUCE THE PASSCODE FOR HIS CELL PHONE, WHICH FUNCTIONALLY SUPPRESSED THE LAWFULLY SEIZED CONTENTS OF THE CELL PHONE?

The State appeals the trial court's order denying the State's motion to compel Appellee to produce the passcode for his cell phone. The contents of Appellee's cell phone were lawfully seized pursuant to a valid search warrant.

The denial of the motion to compel effectively denied the State access to the lawfully seized contents of Appellee's cell phone and prevented use of the evidence in the pending criminal case against Appellee. Therefore, the order denying the motion to compel was functionally an order suppressing evidence obtained by search and seizure. State v. Crumbley, 143 So. 3d 1059, 1065-66 (Fla. 2d DCA 2014) (holding that an order sealing records seized by law enforcement under a search warrant was functionally an order suppressing evidence obtained by search and seizure). Therefore, the order is appealable under Florida Rule of Appellate Procedure 9.140(c)(1)(b). Id.

When reviewing a suppression ruling, appellate courts defer to the trial court's findings of fact. Everett v. State, 893 So. 2d 1278, 1282-83 (Fla. 2004). However, appellate courts must independently review mixed questions of law and fact that ultimately determine constitutional issues. Id. (citation omitted). Appellee did not present any evidence at the hearing

on the motion to compel and the trial court explicitly relied on the facts asserted by the State. Therefore, the trial court's ruling was purely legal and must be reviewed de novo. Id.

The trial court ruled that production of the passcode to Appellee's cell phone would constitute a testimonial act because it would require use of the contents of the mind and because the requirements of the foregone conclusion doctrine had not been met, finding that the State had not demonstrated with reasonable particularity that it already knew of the evidence.

The Fifth Amendment provides that no person shall be compelled to be a witness against himself. U.S. Const. Amend. V. For the Fifth Amendment to be applicable, three factors must be present: 1) compulsion, 2) testimonial communication, and 3) incrimination. United States v. Ghidoni, 732 F.2d 814, 816 (11th Cir. 1984), citing United States v. Authement, 607 F.2d 1129, 1131 (5th Cir. 1979); see also Fisher v. U.S., 425 U.S. 391, 408 (1976) ("the Fifth Amendment does not independently proscribe the compelled production of every sort of incriminating evidence but applies only when the accused is compelled to make a Testimonial Communication that is incriminating.)" An act of producing evidence may have communicative aspects because it may be tacit concession of the existence, possession, or control of the evidence. Fisher, 425 U.S. at 410. However, an act of production is not testimonial

where the communicated statement of fact is a foregone conclusion that does not add to existing evidence. Id. at 411.

By producing the passcode for his cell phone, Appellee would tacitly admit to the existence of the cell phone and to his ownership of the cell phone. These facts would tend to incriminate Appellee if evidence of the charged crime was found on the cell phone. However, these facts were already known to law enforcement. According to the State's affidavits, the victim stated that she saw Appellee holding a cell phone. She further stated that Appellee claimed that he dropped his cell phone when he was confronted. Review of video surveillance confirmed that Appellee was holding a cell phone, both during the incident and while entering the store. Therefore, the State clearly established the existence of the cell phone. Moreover, Appellee consented to a search of his cell phone and provided its location, description, and phone number. Therefore, Appellee did not dispute the existence of the cell phone and confirmed his ownership of the cell phone. Therefore, the statements of fact that would be communicated by production of the passcode to the cell phone were foregone conclusions because the statements would only tell the State what it already knows.

Since the statements of fact that would be communicated by production of the passcode were foregone conclusions, production would not be testimonial communications protected by the Fifth

Amendment. See Commonwealth v. Gelfgatt, 11 N.E. 3d 605 (Mass. 2014) (holding that production of encryption keys for seized computers was not testimonial communication protected by the Fifth Amendment because defendant already admitted existence and ownership of computers and reversing denial of motion to compel decryption) U.S. v. Fricosu, 841 F. Supp. 2d 1232, 1237 (D. Colo. 2012) (holding that production of unencrypted contents of computer was not testimonial communication protected by the Fifth Amendment because defendant already admitted existence and ownership of the computer and granting application to require defendant to assist in execution of search warrant); and In re Boucher, No. 2:06-MJ-91, 2009 WL 424718, *2-4 (D. Vermont 2009) (holding that production of unencrypted contents of computer was not testimonial communication protected by the Fifth Amendment because defendant already admitted existence and ownership of the computer and denying motion to quash subpoena). Therefore, the trial court erred by denying the State's motion to compel Appellee to produce the passcode for his cell phone.

CONCLUSION

Based on the foregoing discussions, Appellant respectfully requests that this Honorable Court reverse the trial court's order denying the State's motion to compel Appellee to produce the passcode for his cell phone.

CERTIFICATE OF SERVICE

I certify that the foregoing document has been furnished to: Brandon M. Daniels, 1348 Fruitville Rd Ste 201, Sarasota, FL 34236, brandon@dhlawfirm.org, by e-mail on January 27, 2014.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted and certified,
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