IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

STATE OF GEORGIA v. KENNETH JOHN CHESEBRO	Indictment No. 23SC188947

ORDER ON DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

On September 21, 2023, the Defendant filed a motion seeking suppression of any evidence obtained from his Microsoft Network ("MSN") email account. (Doc. 58). The Defendant argues that the State obtained the account information through an improper search warrant that violated O.C.G.A. § 17-5-32 ("Search and seizure of documentary evidence in possession of attorney"). The search warrant and sworn affidavit, signed July 20, 2023, are proffered and attached to the Defendant's motion as Exhibit B. After reviewing the motion and assuming the relevant proffered facts to be true, the Court nevertheless finds that the motion fails to raise sufficient questions of law or fact that would require an evidentiary hearing and DENIES the motion.

The statute allegedly violated outlines specific procedures the State must follow when obtaining a search warrant for documentary evidence possessed by an attorney:

> (b) Notwithstanding any other provision of law, no search and seizure without a warrant shall be conducted and no search warrant shall be issued for any documentary evidence in the possession of an attorney *who is not a criminal suspect*, unless the application for the search warrant specifies that the place to be searched is in the possession or custody of an attorney and also shows that there is probable cause to believe that the documentary evidence will be destroyed or secreted in the event a search warrant is not issued. *This Code section shall not impair the ability to serve search warrants in cases in which the search is directed against an attorney if there is probable cause to suspect such attorney has committed a crime.* This Code section shall not impair the ability to serve subpoenas on nonsuspect attorneys.
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> (c) In any case in which there is probable cause to believe that documentary evidence will be destroyed or secreted if a search warrant is not issued, no search warrant shall be issued or be executed for any documentary evidence in the possession or custody of *an attorney who is not a criminal suspect . . .*

O.C.G.A. § 17-5-32(b) & (c) (emphasis added). As highlighted, a plain reading of the statute demonstrates that its application is confined solely to situations where the State seeks to obtain evidence from a non-suspect attorney. From a law enforcement standpoint, this exception furthers an obvious policy goal - preventing early disclosure which could jeopardize an investigation by causing the destruction of evidence, prompting targets to flee, or driving illegal activities further underground.

The proper initial inquiry thus becomes whether the search warrant affidavit at issue articulated sufficient probable cause to establish the Defendant as a suspect. "[P]robable cause is a fluid concept - turning on the assessment of probabilities in particular factual contexts[.]" *Illinois v. Gates*, 462 U.S. 213, 232 (1983); *United States v. Grubbs*, 547 U.S. 90, 95 (2006) (finding a search warrant affidavit need only contain sufficient information to conclude that a fair probability exists). This assessment is not held to the evidentiary standard of a preponderance of the evidence. *Copeland v. State*, 314 Ga. 44, 49 (2022) ("less than a certainty but more than a mere suspicion of possibility - which by no means is to be equated with proof by even so much as a preponderance of the evidence") (citation omitted). Instead, a fair probability is determined by considering the totality of the objective facts and circumstances from the viewpoint of a reasonably prudent person. *State v. McClendon*, 362 Ga. App. 322, 327 (2022).

Here, the affidavit repeatedly refers to the Defendant as a "co-conspirator," "participant," "intermediary," and "liaison" working with several other charged defendants in this case to further a "false elector plot" in violation of several laws, including O.C.G.A. § 16-14-4 (RICO). (Doc. 58, Ex. B at 10-11, 14-15). The affidavit further provides several paragraphs of detail outlining actions allegedly performed by the Defendant, averring that he "went beyond merely providing a theoretical framework" and specifically advocated violations of Georgia law. (*Id.* at 11). Considering only the four corners of the document, the totality of the circumstances alleged within

the affidavit establish the lower standard of "a fair probability" to suspect the Defendant committed a crime.

Despite the search warrant affidavit's repeated references to the Defendant as a criminal suspect, the Defendant claims the State's decision not to provide him with a "target letter" when testifying before the Special Purpose Grand Jury ("SPGJ") singlehandedly establishes his designation as a non-suspect attorney. Defendant must know better: a target letter is simply an administrative creation of the U.S. Department of Justice. Its purpose is to advise a grand jury witness of his or her rights if the witness is a "target" or "subject" of a grand jury investigation. *See* U.S. Dep't of Just., Justice Manual, § 9-11.151 (2020) (defining a "target" as a person "the prosecutor or the grand jury has substantial evidence linking [] to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant"). Target letters are not a common feature of Georgia prosecutions, the term does not appear in our appellate precedent, and the existence or absence of such a letter's delivery has no legal effect. *Id.* at § 1.200 ("The Justice Manual provides internal DOJ guidance. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal."); *see also United States v. Washington*, 431 U.S. 181, 188-89 (1977) ("we do not understand what constitutional disadvantage a failure to give potential defendant warnings could possibly inflict on a grand jury witness"). In addition, the State's internal designation of the Defendant's status could well have changed after, and perhaps even because of, his SPGJ testimony.[1] This argument therefore has no bearing on triggering the requirements of O.C.G.A. § 17-5-32.

[1] As the special purpose grand jury dissolved on January 9, 2023, it necessarily predated by several months the July 20, 2023, search warrant application. (Order Entering Special Purpose Grand Jury's Final Report Into Court Record, 2022-EX-000024, Ex. A (Sep. 8, 2023)).

The Defendant also contends certain evidence referenced within the affidavit is privileged and should only have been reviewed by a "neutral and detached judge." Defendant has not sufficiently particularized why the attorney-client privilege applies, nor does he contend inclusion of these materials affected the viability of the warrant itself. *See generally St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, P.C.*, 293 Ga. 419, 429 (2013) (finding that the party asserting the attorney-client privilege has the burden to establish its applicability); *Zielinski v. Clorox Co*., 270 Ga. 38, 40 (1998) (same). And to the extent the Defendant challenges the filter method enacted by the search warrant, that is not a requirement of O.C.G.A. § 17-5-32, the sole particularized grounds of the motion.

Defendant's strained reading aside, O.C.G.A. § 17-5-32 limits its application in no uncertain terms to a non-suspect attorney. As the warrant itself contained sufficient probable cause to classify the Defendant otherwise, the motion fails to state a legal violation that would require suppression under O.C.G.A. § 17-5-32(d) and is DENIED.

SO ORDERED, this 29th day of September, 2023.

Judge Scott McAfee
Superior Court of Fulton County
Atlanta Judicial Circuit