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Outside Counsel

Court of Appeals' 'Facebook' Decision Leaves Many Questions Open

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In a newsworthy case in which retail giant Amazon and social media developer Foursquare Labs, among others, submitted friend of the court briefs, the New York Court of Appeals on April 4, 2017, affirmed the decisions of the Supreme Court and the Appellate Division, First Department, which denied Facebook's motion to quash warrants issued to it by the Manhattan District Attorney's Office and denied Facebook's motion to compel disclosure of the district attorney's supporting affidavit to its warrant application.

Despite the potential for addressing broad substantive issues of privacy and freedom from unreasonable search and seizure, and issues of federalism and the applicability of a federal statute which establishes procedures a government body can use to compel information, the court hewed to the narrow procedural framework of the case and declined to address the broader issues—as the court put it "while it may be tempting for this Court to address these issues … we must first ascertain whether we possess the necessary jurisdiction." *Matter of 381 Search Warrants Directed to Facebook*, 2017 N.Y. Lexis 767, 2; 2017 NY Slip op. 02586, 2 (N.Y. April 4, 2017).

Background

The facts are straightforward. In 2013, as it was investigating Social Security disability fraud, the Manhattan District Attorney's Office applied for, and the Supreme Court issued, 381 warrants directed to Facebook for, in essence, the entire digital histories of 381 users on Facebook including all profile information, all texts, messages, photos, videos and all information on their Facebook "timelines" (which obviously swept numerous other people not targets of the investigation into the district attorney's dragnet).

The warrants also prohibited Facebook from informing its subscribers of the existence and execution of the warrants.

Facebook moved to quash the warrants, arguing that they were constitutionally defective because they were overbroad and lacking in particularity. Facebook also sought to lift the nondisclosure aspect of the warrants.

The Supreme Court denied Facebook's motion, holding that Facebook lacked standing to assert any expectation of privacy or Fourth Amendment challenge on behalf of its subscribers, and that the warrants were supported by probable cause and were not overbroad. Supreme Court also rejected Facebook's challenge to the nondisclosure aspect of the warrants and directed Facebook to comply immediately with them.

Facebook appealed the Supreme Court's order and sought a stay of the order pending its appeal. The Appellate Division denied Facebook's request for a stay and Facebook then complied with the warrants.

While its appeal was still pending, some of the targets of the investigation were indicted for fraud and the warrants and the investigator's supporting affidavit were unsealed by Supreme Court order, and Facebook was allowed to notify the targets of the existence of the warrants. The District Attorney's Office refused, however, to disclose the supporting affidavit to Facebook or to the general public. Facebook then moved for an order to compel disclosure of the affidavit. Supreme Court denied Facebook's motion to compel disclosure of the affidavit and Facebook appealed that order also.

The Appellate Division, First Department, dismissed both of Facebook's appeals in a single order on the ground that they were both taken from orders which were nonappealable because New York criminal procedure law contains no provisions for the appeal of a denial of a motion to quash a search warrant. In its decision, the Appellate Division rejected Facebook's request that the court treat the warrants as civil subpoenas for appeal purposes.

Decision

In *Matter of 381 Search Warrants Directed to Facebook*, the Court of Appeals affirmed the Appellate Division's order, with one justice concurring and one justice dissenting. In doing so, the court's majority implicitly acknowledged that a federal statute applied in conjunction with New York criminal procedure law (CPL). The federal statute, a 1986 law, is named the Stored Communications Act (SCA).[1] The majority noted that the warrants in controversy were issued under the authority of the New York CPL §690 and "pursuant to" the provisions of the SCA. The majority spends time in its decision addressing the specific provisions of the SCA, which sets out three ways the government can get disclosure under the Act. These are: a warrant, issued pursuant to federal or state criminal procedure law; a subpoena; or a court order.

The majority emphasizes that the SCA makes a distinction between warrants and subpoenas and notes that this distinction is crucial and case-determining because no provision of the New York CPL allows any sort of appeal from an order denying a motion to quash or vacate a search warrant.

The majority addresses and rejects Facebook's contention, also asserted by the dissent, that the "warrants" in the SCA should be considered analogous to subpoenas. If considered as akin to subpoenas, then Facebook would have a right of appeal of its motion to quash under New York civil procedure law and could indeed start a separate civil proceeding to adjudicate that question. As the majority holds:

> Based on a review of the nature of the proceeding and the relief sought—not merely on strict adherence to the term "warrant" as the dissent claims—we conclude that the orders below related to criminal search warrants issued in connection with a

> criminal investigation and, therefore, the order denying Facebook's motion to quash is one made in a criminal proceeding. Thus the order is not appealable.

Matter of 381 Search Warrants Directed to Facebook, 2017 N.Y. Lexis 767 at 15.

The majority only tangentially addresses the issue of federal preemption by addressing and rejecting the dissents' arguments but specifically declining "to opine on the propriety of a motion to quash a warrant under 18 U.S.C. §2703(d)," id. at 16, that section of the SCA which does allow for a "service provider" such as Facebook to move to quash any "order" pursuant to 18 U.S.C. §2703 by asserting that the records requested are "unusually voluminous" or compliance with such an order would cause an "undue burden." 18 U.S.C. §2703(d).

In a footnote, the majority does note that none of the parties to the appeal raised a federal preemption argument and that the court—quite rightly—generally does not adjudicate an issue not raised by the parties in their briefs. *Matter of 381 Search Warrants Directed to Facebook*, 2017 NY LEXIS 767 at 16.

The majority returns to the federal preemption question a few pages later in its discussion of the dissents' arguments by stating:

> Nor are we persuaded that federal law would otherwise preempt our dismissal of these appeals, which rests squarely on neutral state rules for administering state court jurisdiction.

Matter of 381 Search Warrants Directed to Facebook, 2017 NY LEXIS 767 at 20.

In concluding its decision, the majority acknowledges that "while Facebook's concerns, as a third party, about overbroad SCA warrants may not be baseless," it attempts to balance this concern against a danger of excessive protracted litigation in criminal matters which would frustrate speedy resolution of such cases.

Finally, the majority lays resolution of the issue at the doorstep of the Legislature, finding that if there is to be any change in the current procedural scheme which prevents appeals of warrants in criminal cases, that change must be addressed by the Legislature, holding that "we may not resort to interpretive contrivances to broaden the scope and application of unambiguous statutes to create a right to appeal out of thin air in order to fill a void without trespassing on the Legislature's domain." 2017 NY LEXIS 767, 22; 2017 NY Slip op. 02586, 11.

The court further holds that Facebook "may explore" other procedural avenues to raise its claims, citing its case of *Newsday v. Morgenthau*, 3 N.Y.3d 651 (2004), where the court similarly denied a news organization's appeal of a denial by Supreme Court of the news organizations' application to obtain access to underlying documents supporting a search warrant. In *Morgenthau*, the court held that Newsday could have filed a Freedom of Information Law request or started an Article 78 action.

The majority's final comment leaves open five unaddressed issues which the majority stated it had no opportunity to consider in light of its holding:

• Whether Facebook has standing to assert Fourth Amendment claims on behalf of its users.

• Whether an individual has a reasonable expectation of privacy in her electronic communications.

• The constitutionality of the warrants at issue.

• The propriety of the district attorney's refusal to release the supporting affidavit.

• The question whether 18 U.S.C. §2703(d) authorizes a motion to quash an SCA warrant in the first instance.

The majority held that these issues remained open because, given the facts and applicable law in the case, they had no jurisdiction to address them.

The Concurrence

The concurrence by Justice Jenny Rivera agrees with the majority's conclusion that the order denying Facebook's motion to quash was not appealable, but, as she describes it "on the narrower basis" that Facebook did not assert the plain grounds available to it in 18 U.S.C. §2703(d)[2] and therefore pursuant to the provisions of 18 U.S.C. 2703(a), the order appealed from was subject to New York state rules of criminal procedure which did render the order unreviewable.[3]

The concurring justice also declared her agreement with two parts of the dissent, which she described as "comprehensive" and "well-reasoned."

Justice Rivera did agree with the dissent point that §2703(d) by its text gives service providers standing to move to quash and that the

> plain language of this subsection expressly applies to service providers like Facebook, and to any order issued pursuant to section 2703, including the warrants on Facebook under the authority of section 2703(a).

Matter of 381 Search Warrants Directed to Facebook, 2017 NY LEXIS 767 at 24-25 (emphasis added).

She also chides the majority for ignoring what she described as "the balance of interests" contained in the SCA and for the majority's overemphasis on disclosure within the narrow context of a criminal proceeding, asserting that the majority

> fails to account for the realities of a technological world of open access and constantly shifting boundaries of personal privacy. The SCA balances the interests of government and service providers so as to avoid disclosure to law enforcement of highly sensitive and personal information, made easily accessible with a keystroke … . There is simply no basis to hold fast to a paradigm that encourages disclosure without addressing the unique circumstances presented when government demands the cache of information stored by service providers.

Matter of 381 Search Warrants Directed to Facebook, 2017 NY LEXIS 767 at 25.

The Dissent

In a lengthy dissent, Justice Rowan Wilson attempts to defend basic Fourth Amendment principles and individual privacy rights versus government intrusions, and specifically cites the

New York State Constitution's provisions against unreasonable search and seizure, which were passed in 1938, already at a time when telecommunications technology was beginning to flourish.

The dissent states that the statute at issue, 18 U.S.C. §2703(d), itself provides to Facebook by its own plain terms a right to quash a subpoena and also provides Facebook its own standing to start an independent cause of action. The dissent also asserts that the statute's reference to orders encompasses all orders referred to in §2703 so that the distinction between warrants and subpoenas found to be so crucial by the majority is irrelevant.

On these issues the concurrence appears to have gotten it right that the failure of Facebook to assert its rights pursuant to §2703(d) left the majority with no options for its ruling.

Conclusion

It is hard to avoid a nagging thought that the majority punted the substantial issues implicated in the case. Their reticence to engage in ostensible judicial activism and step into the province of the Legislature is certainly laudable. Moreover, it appears that the majority was left in a difficult position by the fact that neither Facebook nor its friends of the court asserted the available statutory grounds pursuant to 18 U.S.C. §2703(d) that the district attorney's requests were "unusually voluminous" and that compliance with them would have been "an undue burden," thus preventing the majority from using the statute's own terms, rather than New York criminal procedure law, to address the substantive privacy issues raised by the facts of the case. Nor, as the majority noted, did any of the parties make any explicit argument about federal preemption. Nonetheless, it seems that the Court of Appeals could have been a bit more creative in attempting to address the substantial issues which the court itself recognized were implicated in the case and, it seems, the court could have made some comment in support of those issues in its ruling.

It is also puzzling to consider what strategic considerations led Facebook's attorneys (and their friends) not to argue that §2703(d)'s provisions applied, nor to argue that this was a case where a federal statute preempted state law so that the substantive issues may have received a hearing rather than being hemmed in by New York criminal procedural rules. It will be interesting to see, what, if any, further legal actions Facebook will pursue.

Endnotes:

1. Officially titled the Stored Wire and Electronic Communications and Transactional Records Access Act 18 U.S.C. §2703.

2. 18 U.S.C. §2703(d) provides in relevant part: "A court issuing an order pursuant to this section, on a motion made promptly by the service provider, may quash or modify such order, if the information or records requested are unusually voluminous in nature or compliance with such order otherwise would cause an undue burden on such provider."

3. 18 U.S.C. §2703(a) provides in relevant part that "A government entity may require the disclosure by a provider of electronic communication service of the contents of a wire or electronic communication, that is in electronic storage in an electronic communications system for 180 days or less, only pursuant to a warrant issued using the procedures described in the Federal Rules of Criminal Procedure (or, in the case of a State court, issued using State warrant procedures) by a court of competent jurisdiction."