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APPENDIX A

Decision of Minnesota Supreme Court

905 N.W.2d 870
Supreme Court of Minnesota.

STATE of Minnesota, Respondent,
v.
Matthew Vaughn DIAMOND, Appellant.

A15-2075
|
Filed: January 17, 2018

Synopsis

Background: Defendant was convicted in the District Court, Carver County, of second-degree burglary, misdemeanor theft, and fourth-degree criminal damage to property. Defendant appealed. The Court of Appeals, 890 N.W.2d 143, affirmed. Defendant petitioned for review.

[Holding:] As matter of first impression, the Supreme Court, Chutich, J., held that ordering defendant to provide his fingerprint to unlock his cellphone did not violate his privilege against self-incrimination.

Affirmed.

***871** Court of Appeals

Attorneys and Law Firms

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Cathryn Middlebrook, Chief Appellate Public Defender, Steven P. Russett, Assistant State Public Defender, Office of the Appellate Public Defender, Saint Paul, Minnesota, for appellant.

Cort C. Holten, Jeffrey D. Bores, Gary K. Luloff, Chestnut Cambronne PA, Minneapolis, Minnesota, for amicus curiae Minnesota Police and Peace Officers Association Legal Defense Fund.

Syllabus by the Court

Ordering appellant to provide a fingerprint to unlock a seized cellphone did not violate his Fifth Amendment privilege against self-incrimination because the compelled act was not a testimonial communication.

Opinion

OPINION

CHUTICH, Justice.

This case presents an issue of first impression: whether the Fifth Amendment privilege against self-incrimination protects a person from being ordered to provide a fingerprint to unlock a seized cellphone. Neither the Supreme Court of the United States nor any state supreme court has addressed this issue.

The police lawfully seized a cellphone from appellant Matthew Diamond, a burglary suspect, and attempted to execute a valid warrant to search the cellphone. The cellphone's fingerprint-scanner security lock, however, prevented the search, and Diamond refused to unlock the cellphone with his fingerprint, asserting his Fifth Amendment privilege against self-incrimination. ***872** The district court found no Fifth Amendment violation and ordered Diamond to provide his fingerprint to unlock the cellphone so that the police could search its contents. After the court of appeals affirmed, we granted Diamond's petition for review. Because the compelled act here—providing a fingerprint—elicited only physical evidence from Diamond's body and did not reveal the contents of his mind, no violation of the Fifth Amendment privilege occurred. Accordingly, we affirm.

FACTS

A homeowner in Chaska returned home to find that someone had kicked open her attached garage's side-entry door, entered her home, and taken jewelry, electronics, and a safe. When police officers arrived to investigate the burglary, they discovered two key pieces of evidence: shoe tread prints on the side-entry door, and, on the driveway, an envelope with the name "S.W." written on it. A Chaska investigator determined that S.W. had sold jewelry to a pawnshop on the same day as the burglary, and the investigator obtained the license plate number of

a car registered in S.W.'s name. Officers then located and stopped S.W.'s car; Diamond was driving the car, and S.W. was a passenger. Police officers arrested Diamond on outstanding warrants and took him to jail, where jail personnel collected and stored his shoes and a Samsung Galaxy 5 cellphone that he was carrying when arrested.

Police officers obtained and executed warrants to seize Diamond's shoes and cellphone. In addition, they obtained a warrant to search the contents of the cellphone. But they could not search its contents because the cellphone required a fingerprint to unlock it.[1] The State then moved to compel Diamond to unlock the seized cellphone with his fingerprint. Diamond objected, asserting his Fifth Amendment privilege against self-incrimination.

The district court concluded that compelling Diamond's fingerprint would not violate his Fifth Amendment privilege because "[c]ompelling the production of [Diamond's] fingerprint or thumbprint would not call upon the use of [his] mind. It is more akin to providing a key to a lockbox." Accordingly, it ordered Diamond to "provide a fingerprint or thumbprint as deemed necessary by the Chaska Police Department to unlock his seized cell phone."

Diamond continued to object to providing the necessary fingerprint for unlocking the phone. Nevertheless, he finally unlocked the cellphone with his fingerprint in court after being held in civil contempt and warned of the possibility and consequences of criminal contempt. Police officers used forensic analysis software to search and to extract the cellphone's data, including call records and messages sent and received from the cellphone. The data showed frequent communication between S.W. and Diamond on the day of the burglary.

During the jury trial, the district court admitted the messages and call logs from the search of the cellphone, but to avoid Fifth Amendment concerns, it prohibited the parties from introducing evidence that Diamond had unlocked the phone with his fingerprint. The court also admitted inculpatory evidence unrelated to the contents of the cellphone, which showed that Diamond *873 had committed the burglary. This evidence included an analysis of Diamond's shoes, which matched the shoeprints found at the scene of the crime; cellphone tower records that placed him in the area of the burglary at the relevant time; pawnshop records; and testimony from S.W. The jury found Diamond guilty of second-degree burglary, Minn. Stat. § 609.582, subd. 2(a)(1) (2016), and other offenses.

The court of appeals affirmed, concluding that providing a fingerprint was not privileged under the Fifth Amendment because it was "no more testimonial than furnishing a blood sample, providing handwriting or voice exemplars, standing in a lineup, or wearing particular clothing." *State v. Diamond*, 890 N.W.2d 143, 151 (Minn. App. 2017).

We granted Diamond's petition for review.

ANALYSIS

[1] The question this case poses arises under the Fifth Amendment to the United States Constitution. We review this constitutional question de novo.[2] *See State v. Borg*, 806 N.W.2d 535, 541 (Minn. 2011) (reviewing de novo whether the Fifth Amendment privilege prohibits eliciting certain testimony during the State's case in chief).

[2] [3] [4] The Fifth Amendment, applicable to the states through the Fourteenth Amendment, *Malloy v. Hogan*, 378 U.S. 1, 8, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964), provides that "no person ... shall be compelled in any criminal case to be a witness against himself," U.S. Const. amend. V; *see also* Minn. Const. art. I, § 7.[3] The "constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens." *Schmerber v. California*, 384 U.S. 757, 762, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). To maintain a "fair state-individual balance," the privilege ensures that the government "shoulder[s] the entire load" in building a criminal case. *Miranda v. Arizona*, 384 U.S. 436, 460, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). "[O]ur accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from [the defendant's] own mouth." *Id.*

[5] The privilege against self-incrimination bars the state from (1) compelling a defendant (2) to make a testimonial communication to the state (3) that is incriminating. *See Fisher v. United States*, 425 U.S. 391, 408, 96 S.Ct. 1569,

48 L.Ed.2d 39 (1976). Because we conclude that the act of *874 providing a fingerprint to the police to unlock a cellphone is not a testimonial communication, we need not consider the other two requirements.

[6] [7] [8] The Fifth Amendment bars a state from compelling oral and physical testimonial communications from a defendant. *Schmerber*, 384 U.S. at 763–64, 86 S.Ct. 1826 ("It is clear that the protection of the privilege reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers."). A physical act is *testimonial* when the act is a communication that "itself, explicitly or implicitly, relate[s] a factual assertion or disclose[s] information." *Doe v. United States (Doe II)*, 487 U.S. 201, 209–10, 108 S.Ct. 2341, 101 L.Ed.2d 184 (1988). For example, complying with a subpoena to produce documents "may implicitly communicate 'statements of fact' " because complying with a court order may communicate the existence of evidence, the possession or control of evidence, or authenticate evidence.[4] *United States v. Hubbell*, 530 U.S. 27, 36, 120 S.Ct. 2037, 147 L.Ed.2d 24 (2000) (subpoena for documents); *Doe II*, 487 U.S. at 203–04, 108 S.Ct. 2341 (order compelling a signature to access bank record); *State v. Alexander*, 281 N.W.2d 349, 352 (Minn. 1979) (order to produce films).

[9] [10] But an act is *not* testimonial when the act provides "real or physical evidence" that is "used solely to measure ... physical properties," *United States v. Dionisio*, 410 U.S. 1, 7, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973), or to "exhibit ... physical characteristics," *United States v. Wade*, 388 U.S. 218, 222, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967). The government can compel a defendant to act when the act presents the "body as evidence when it may be material." *Schmerber*, 384 U.S. at 763, 86 S.Ct. 1826 (quoting *Holt v. United States*, 218 U.S. 245, 252–53, 31 S.Ct. 2, 54 L.Ed. 1021 (1910)). In other words, the government may compel a defendant to "exhibit himself" and present his "features" so that the police or a jury may "compare his features" with other evidence of the defendant's guilt. *Holt*, 218 U.S. at 253, 31 S.Ct. 2; *State v. Williams*, 307 Minn. 191, 239 N.W.2d 222, 225–26 (1976) (holding that an order to "put on a hat found at the scene of the crime" was *not* testimonial because the police compelled the physical act for "the sole purpose of attempting to prove [the defendant's] ownership of [an] incriminating article").

The Supreme Court of the United States has therefore drawn a distinction between the *testimonial* act of producing documents as evidence and the *nontestimonial* act of producing the body as evidence. The Court first held that the compelled exhibition of the body's characteristics was not testimonial under the Fifth Amendment in *Holt*, 218 U.S. at 252, 31 S.Ct. 2. The Court explained that it would be an "extravagant extension of the 5th Amendment" to prevent a jury from hearing a witness testify that a prisoner, who was compelled to put on clothes, did so and that the clothes fit him. *Id.* It reasoned that barring the testimony would, in essence, "forbid a jury" from looking "at a prisoner and compar[ing] his features with a photograph in proof." *875 *Id.* at 253, 31 S.Ct. 2; *see also State ex rel. Ford v. Tahash*, 278 Minn. 358, 154 N.W.2d 689, 691 (1967) ("[T]here is a distinction between bodily view and requiring the accused to testify against himself."); *State v. Garrity*, 277 Minn. 111, 151 N.W.2d 773, 776 (1967) ("The Constitution confers no right on an accused to be immune from the eyes of his accusers. The privilege is against testimonial compulsion, whereas exposure to view, like fingerprinting and photographing, is not proscribed.").

In *Schmerber*, the Supreme Court relied on *Holt* to hold that providing a blood sample to the police for an alcohol-content analysis was a nontestimonial act. 384 U.S. at 765, 86 S.Ct. 1826. The Court reasoned that neither the extraction of the blood sample nor the later chemical analysis of the blood sample showed "even a shadow of testimonial compulsion" or "communication by the accused." *Id.* It emphasized that the defendant's "testimonial capacities" were not involved and "his participation, except as a donor, was irrelevant to the results of the test, which depend[ed] on [the] chemical analysis and on that alone." *Id.* Accordingly, the Court adopted the reasoning of the federal and state courts that distinguished between compelled acts that make a "suspect or an accused the source of real or physical evidence" and compelled acts that elicit testimonial responses. *Id.* at 764, 86 S.Ct. 1826 (internal quotation marks omitted). Courts applying this distinction, it noted, had held that the Fifth Amendment "offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a

stance, to walk, or to make a particular gesture." *Id.* at 764, 86 S.Ct. 1826.

[11] Although the Supreme Court's distinction between the *testimonial* act of producing documents as evidence and the *nontestimonial* act of producing the body as evidence is helpful to our analysis, the act here—providing the police a fingerprint to unlock a cellphone—does not fit neatly into either category. Unlike the acts of standing in a lineup or providing a blood, voice, or handwriting sample, providing a fingerprint to unlock a cellphone both exhibits the body (the fingerprint) *and* produces documents (the contents of the cellphone). Providing a fingerprint gives the government *access* to the phone's contents that it did not already have, and the act of unlocking the cellphone communicates some degree of possession, control, and authentication of the cellphone's contents. *See Hubbell*, 530 U.S. at 36, 120 S.Ct. 2037. But producing a fingerprint to unlock a phone, unlike the act of producing documents, is a display of the physical characteristics of the *body*, not of the mind, to the police. *See Schmerber*, 384 U.S. at 763, 86 S.Ct. 1826.

Because we conclude that producing a fingerprint is more like exhibiting the body than producing documents, we hold that providing a fingerprint to unlock a cellphone is *not* a testimonial communication under the Fifth Amendment. The police compelled Diamond's fingerprint for the fingerprint's physical characteristics and not for any implicit testimony from the act of providing the fingerprint. *See Dionisio*, 410 U.S. at 7, 93 S.Ct. 764. Moreover, the fingerprint was physical evidence from Diamond's body, not evidence of his mind's thought processes. *See Hubbell*, 530 U.S. at 43, 120 S.Ct. 2037. We reach this conclusion for two reasons.

First, the State compelled Diamond to provide his fingerprint only for the physical, identifying characteristics of Diamond's fingerprint, not any communicative testimony inherent in providing the fingerprint. The State's use of Diamond's fingerprint was therefore like a "test" to gather ***876** physical characteristics, akin to a blood sample, a voice exemplar, trying on clothing, or standing in a lineup, in an effort to unlock the cellphone. *See Wade*, 388 U.S. at 222–23, 87 S.Ct. 1926 (testing whether participation in a lineup would lead to a witness identifying the suspect); *Schmerber*, 384 U.S. at 765, 86 S.Ct. 1826 (testing whether a blood sample contained alcohol and in what amount); *Holt*, 218 U.S. at 252, 31 S.Ct. 2 (testing whether a piece of clothing fit a suspect).

The characterization of the act throughout this case's proceedings supports this conclusion. The district court's order compelled Diamond to "provide a fingerprint or thumbprint as deemed necessary by the Chaska Police Department"—a part of his body—to the police so that the police could unlock the cellphone. At the contempt hearing, the district court instructed the State to "take whatever *samples* it needed" to unlock the cellphone. Moreover, the State did not present evidence at trial that Diamond unlocked the cellphone with his fingerprint.

Second, Diamond's act of providing a fingerprint to the police was not testimonial because the act did not reveal the contents of Diamond's mind. *See* 3 Wayne R. LaFave et al., *Criminal Procedure* § 8.12(d) (4th ed. 2016) ("*Schmerber* limited any 'private inner sanctum' protected by the privilege to that of the contents of the mind, which a compelled communication forces the individual to reveal."); *see also Hubbell*, 530 U.S. at 42–43, 120 S.Ct. 2037 (citing *Curcio v. United States*, 354 U.S. 118, 128, 77 S.Ct. 1145, 1 L.Ed.2d 1225 (1957)) (holding that the act of producing documents in response to a subpoena was testimonial because the act required the accused to take "the mental and physical steps necessary to provide the prosecutor with an accurate inventory of the many sources of potentially incriminating evidence sought by the subpoena"); *Doe II*, 487 U.S. at 213, 108 S.Ct. 2341 (stating that the Fifth Amendment is intended "to spare the accused from having to reveal, directly or indirectly, his knowledge of facts relating him to the offense or from having to share his thoughts and beliefs with the Government").

Although the Supreme Court has not considered whether compelling a defendant to provide a fingerprint—or a password[5]—to unlock a cellphone elicits a testimonial communication, other courts considering the question have focused on whether the act revealed the contents of the mind.[6] *See Sec. & Exch. Comm'n v. Huang*, No. 15-269, 2015 WL 5611644, at *2 (E.D. Penn. Sept. 23, 2015) (concluding that the privilege protected the production of a password because the government sought the "Defendants' personal thought processes" and intruded "into the knowledge" of the defendants); ***877** *Commonwealth v. Baust*, 89 Va. Cir. 267, 2014 WL 10355635, at *4 (Va. Cir. Ct. Oct. 28, 2014) (holding

that providing a passcode was testimonial, but providing a fingerprint was not, because "[u]nlike the production of physical characteristic evidence, such as a fingerprint, the production of a password force[d] the Defendant to disclose the contents of his own mind" (internal quotation marks omitted)). *But see In re Application for a Search Warrant*, 236 F.Supp.3d 1066, 1073–74 (N.D. Ill. 2017) (concluding that the privilege barred the compelled production of a fingerprint to unlock a phone because the act *produced* the contents of the phone).

Here, Diamond merely provided his fingerprint so that the police could use the physical characteristics of the fingerprint to unlock the cellphone. The compelled act did not require Diamond to "submit to testing in which an effort [was] made to determine his guilt or innocence on the basis of physiological responses, whether willed or not."[7] *See Schmerber*, 384 U.S. at 764, 86 S.Ct. 1826. To the extent that providing a fingerprint to unlock a cellphone might require a mental process to unlock the phone,[8] the police did not need to rely on that mental process here. *See Hubbell*, 530 U.S. at 43, 120 S.Ct. 2037. Diamond did not need to self-select the finger that unlocked the phone. He did not even need to be conscious. Diamond could have provided all of his fingerprints to the police by making his hands available to them, and the police could have used each finger to try to unlock the cellphone.

Like in *Schmerber*, Diamond's participation in providing his fingerprint to the government "was irrelevant" to whether Diamond's fingerprint actually unlocked the cellphone. *See* 384 U.S. at 765, 86 S.Ct. 1826 (concluding that the results of the blood sample depended on the chemical analysis of the blood, not the act of providing the blood sample). Whether Diamond's fingerprint actually unlocked the phone depended on whether the cellphone's fingerprint-scanner ***878** analyzed the physical characteristics of Diamond's fingerprint and matched the characteristics of the fingerprint programmed to unlock the cellphone.

Because the compelled act merely demonstrated Diamond's physical characteristics and did not communicate assertions of fact from Diamond's mind, we hold that Diamond's act of providing a fingerprint to the police to unlock a cellphone was not a testimonial communication protected by the Fifth Amendment.

CONCLUSION

For the foregoing reasons, we affirm the decision of the court of appeals.

Affirmed.

All Citations

905 N.W.2d 870

Footnotes

1 The cellphone contained an electronic lock that could be opened using only fingerprint recognition, rather than a password or pin number. To use the fingerprint-recognition feature, a cellphone user can train a cellphone to recognize a specific fingerprint's physical patterns by placing a finger on the phone enough times to "build" the phone's memory of the fingerprint. Once the cellphone recognizes the fingerprint, the user can unlock the cellphone by placing the specific finger on the phone itself.

2 In *United States v. Doe* (*Doe I*), the Supreme Court used a different, deferential, standard of review in addressing a question under the Fifth Amendment, but that standard does not apply here. 465 U.S. 605, 613–14, 104 S.Ct. 1237, 79 L.Ed.2d 552 (1984) (holding that it would "not overturn" the district court's explicit finding that an act of producing documents "would involve testimonial self-incrimination" "unless it ha[d] no support in the record"). Critically, *Doe I* focused on whether the act of producing documents was *actually* testimonial in that particular case, which depended on "the facts and circumstances," not whether the act *may* be testimonial in general. *Id.* at 613, 104 S.Ct. 1237 (quoting *Fisher v. United States*, 425 U.S. 391, 410, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976)); *see also id.* at 613 nn. 11–12, 104 S.Ct. 1237 (describing the factual findings of the district court and the court of appeals' review of the findings). In contrast to the factual question presented in *Doe I*, the question here—whether the act of producing a fingerprint to unlock a cellphone is testimonial or nontestimonial—is a question of *law*, which we review de novo.

3 Diamond's claim is brought under the U.S. Constitution, not the Minnesota Constitution.

4 In *Fisher*, the Supreme Court noted that the "prevailing justification for the Fifth Amendment's application to documentary subpoenas" is the "implicit authentication" rationale. 425 U.S. at 412 n.12, 96 S.Ct. 1569. In other words, a subpoena demanding that an accused present his own records is the same as requiring the accused to take the stand and admit the documents' authenticity and the same as acknowledging that the documents produced are in fact the documents described in the subpoena. *Id.*

5 We do not decide whether providing a password is a testimonial communication.

6 These cases often cite authorities analyzing whether a court may compel a defendant to decrypt a computer to unlock it for the government. *See In re Grand Jury Subpoena Duces Tecum Dated March 25, 2011*, 670 F.3d 1335, 1346 (11th Cir. 2012) (holding that compelled decryption of a computer hard drive's contents was testimonial because using a decryption password demands "the use of the contents of the mind"); *United States v. Kirschner*, 823 F.Supp.2d 665, 668–69 (E.D. Mich. 2010) (holding that compelling the suspect to provide passwords associated with the suspect's computer was testimonial because the act revealed the contents of the suspect's mind); *Commonwealth v. Gelfgatt*, 468 Mass. 512, 11 N.E.3d 605, 615–16 (2014) (concluding that the act of computer decryption was testimonial because a defendant cannot be compelled to reveal the contents of his mind, but holding that the testimony was not protected because the testimony was a "foregone conclusion").

7 In *Doe II*, the Court clarified that in *Schmerber* it had "distinguished between the suspect's being *compelled himself to serve as evidence* and the suspect's being *compelled to disclose or communicate information* or facts that might serve as or lead to incriminating evidence." 487 U.S. at 211 n.10, 108 S.Ct. 2341 (emphasis added). In *Schmerber*, the Court explained that when the government compels a defendant to act in a manner in which the defendant's physiological responses reveal the contents of the defendant's mind, then the act *is* testimonial even though the government is only looking at physical characteristics. *See* 384 U.S. at 764, 86 S.Ct. 1826 ("[Compelling a] person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment."). Relying on the example of the lie detector test, the *Schmerber* Court explained that "lie detector tests measuring changes in body function during interrogation[ ] may actually be directed to eliciting responses which are essentially testimonial." *Id.* The *Schmerber* Court, therefore, distinguished between a lie detector test, which could reveal the contents of a suspect's mind, and the exhibition of the defendant's bodily blood sample. *See id.*

8 Even if providing a fingerprint *did* reveal the contents of the mind, because the act of providing evidence of physical characteristics has no testimonial significance, as discussed above, Diamond's act would still be nontestimonial. The *Doe II* Court clarified that the focus of the inquiry is not only whether the content comes from the mind, but also whether the content from the mind has "testimonial significance." 487 U.S. at 211 n.10, 108 S.Ct. 2341 (stating that "it is not enough that the compelled communication is sought for its content. The content itself must have testimonial significance" (citing *Fisher*, 425 U.S. at 408, 96 S.Ct. 1569; *Gilbert v. California*, 388 U.S. 263, 267, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967); *Wade*, 388 U.S. at 222, 87 S.Ct. 1926)).

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APPENDIX B

Decision of Minnesota Court of Appeals

890 N.W.2d 143
Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,
v.
Matthew Vaughn DIAMOND, Appellant.

A15-2075
|
Filed January 17, 2017
|
Review Granted March 28, 2017

Synopsis

Background: Defendant was convicted in the District Court, Carver County, of second-degree burglary, misdemeanor theft, and fourth-degree criminal damage to property. Defendant appealed.

Holdings: The Court of Appeals, Tracy M. Smith, J., held that:

[1] the exigent circumstances exception to the search warrant requirement justified police detective's order to jail staff not to release defendant's property while she sought a search warrant;

[2] detective's act of viewing defendant's property at the jail prior to obtaining a search warrant did not constitute a search under the Fourth Amendment;

[3] as a matter of first impression, defendant's Fifth Amendment privilege against compelled self-incrimination was not violated when the trial court ordered him to provide a fingerprint to unlock the defendant's cellular telephone; and

[4] circumstantial evidence was sufficient to support defendant's convictions for second-degree burglary, misdemeanor theft, and fourth-degree criminal damage to property.

Affirmed.

*145 Carver County District Court, File No. 10-CR-14-1286

Attorneys and Law Firms

Lori Swanson, Attorney General, St. Paul, Minnesota; and Mark Metz, Carver County Attorney, Eric E. Doolittle, Assistant County Attorney, Chaska, Minnesota (for respondent).

Cathryn Middlebrook, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant).

Considered and decided by Johnson, Presiding Judge; Reyes, Judge; and Smith, Tracy M., Judge.

Syllabus by the Court

A district court order compelling a criminal defendant to provide a fingerprint to unlock the defendant's cellphone does not violate the Fifth Amendment privilege against compelled self-incrimination.

Opinion

OPINION

SMITH, TRACY M., Judge

Appellant Matthew Vaughn Diamond appeals his convictions of second-degree burglary, misdemeanor theft, and fourth-degree criminal damage to property following a jury trial. On appeal, Diamond argues his convictions must be reversed because: (1) police seized his property in violation of the Fourth Amendment; (2) the district court violated his Fifth Amendment privilege against compelled self-incrimination by ordering him to provide his fingerprint so police could search his cellphone; and (3) the state's circumstantial evidence was insufficient. We affirm.

FACTS

On October 30, 2014, M.H. left her Chaska home between 10:30 and 10:45 a.m. to run errands. M.H. returned home around noon and noticed that the attached garage's side-entry door appeared to have been kicked in from the outside. M.H. called the police after discovering that a safe, a laptop, and several items of jewelry were missing

from her home. While waiting for police to arrive, M.H. found an envelope in her driveway that had the name of S.W. written on it. Police took photographs and measurements of the shoeprints left on the garage's side-entry door.

Detective Nelson of the Chaska Police Department used state databases to determine S.W.'s car model and license plate number and that S.W. had pawned several pieces of jewelry at a Shakopee pawn shop on October 30. M.H. later verified that the pawned jewelry was stolen from her home. On November 4, police located S.W.'s car, which Diamond was driving at the time. Diamond was arrested on an outstanding warrant unrelated to this case. He was booked at the Scott County jail, where ***146** staff collected and stored his property, including his shoes and cellphone.

The following day, Detective Nelson went to the jail and viewed the property that was taken from Diamond. Detective Nelson observed similarities between the tread of Diamond's shoes and the shoeprints left on the garage's side-entry door. Detective Nelson informed the jail staff that she was going to seek a warrant to seize Diamond's property and gave instructions not to release the property to anyone. Later that day, S.W. attempted to collect Diamond's property but was told that it could not be released.

On November 6, Detective Nelson obtained and executed a warrant to search for, and seize, Diamond's shoes and cellphone. On November 12, Detective Nelson obtained an additional warrant to search the contents of Diamond's cellphone. Detective Nelson was unable to unlock the cellphone. She returned the warrant on November 21.

In December, the state filed a motion to compel Diamond to provide his fingerprint on the cellphone to unlock the phone. The motion was deferred to the contested omnibus hearing. Following that hearing, the district court issued an order, filed February 11, 2015, concluding that the warrant to search Diamond's cellphone was supported by probable cause and that compelling Diamond to provide his fingerprint to unlock the cellphone does not violate his Fifth Amendment privilege against compelled self-incrimination. The district court granted the state's motion to compel and ordered Diamond to provide a fingerprint or thumbprint to unlock his cellphone. Diamond refused to comply. On April 3, the district court found Diamond in civil contempt and informed him that compliance with the order would remedy the civil contempt. Diamond provided his fingerprint, and police immediately searched his cellphone.

At a second omnibus hearing Diamond challenged the refusal to release his cellphone and shoes to S.W., arguing that it constituted a warrantless seizure not justified by any exception to the warrant requirement. The district court's April 3 order concluded that the seizure was justified by exigent circumstances and was tailored to protect against the destruction of evidence while a warrant was sought and obtained. Diamond thereafter brought a pro se motion to suppress all evidence derived from his cellphone and shoes, which the district court denied, relying on the previous orders from February 11 and April 3.

At Diamond's jury trial, S.W. testified that: (1) she believed she was working the day of the burglary; (2) the envelope found in M.H.'s driveway belonged to S.W., and it was in her car the last time she saw it; (3) S.W. sometimes let Diamond use her car when she was working; and (4) on the day of the burglary, Diamond gave her M.H.'s stolen jewelry, and the two of them traveled to the Shakopee pawn shop, where she sold the jewelry. In addition, the state also introduced evidence that: (1) Diamond's wallet and identification card were found in S.W.'s car; (2) Diamond and S.W. exchanged phone calls and text messages throughout the day of the burglary; (3) Diamond's cellphone pinged off cell towers near M.H.'s residence on the day of the burglary; (4) the tread pattern on Diamond's shoes was similar to the shoeprints on the garage's side-entry door; and (5) while in jail, Diamond told S.W. "the only thing that [the state is] going to be able to charge me with is receiving stolen property" and that his attorney said the case would be dismissed if S.W. did not testify or recanted her statement.

***147** The jury found Diamond guilty of second-degree burglary, misdemeanor theft, and fourth-degree criminal damage to property. The district court sentenced Diamond to 51 months in prison for the second-degree burglary and to 90 days in jail for the fourth-degree criminal damage to property.

Diamond appeals.

ISSUES

I. Did the district court err by not suppressing evidence obtained following the temporary seizure of Diamond's property?

II. Did the district court err by ordering Diamond to provide his fingerprint so police could search his cellphone?

III. Does the record contain sufficient evidence to support the jury's conclusion that Diamond committed second-degree burglary, misdemeanor theft, and fourth-degree criminal damage to property?

ANALYSIS

I. The temporary seizure of Diamond's property did not violate the Fourth Amendment.

Diamond argues that the district court erred in denying his suppression motion because Detective Nelson's directions to jail staff not to release Diamond's property while she sought a warrant constituted an unreasonable seizure in violation of the Fourth Amendment. The district court concluded that the exigency exception to the warrant requirement applied. Diamond argues that the exigency exception is inapplicable because Detective Nelson "searched" Diamond's property at the jail before providing instructions to jail staff.

[1] [2] [3] In evaluating a pretrial order on a motion to suppress, we review factual findings for clear error and legal conclusions de novo. *State v. Milton*, 821 N.W.2d 789, 798 (Minn. 2012). When reviewing the applicability of the exigency exception, we look at the totality of the circumstances. *State v. Horst*, 880 N.W.2d 24, 33 (Minn. 2016). The state has the burden of showing that exigent circumstances justified the seizure. *Id.*

[4] [5] The Fourth Amendment protects the right of the people to be free from "unreasonable searches and seizures" of their "persons, houses, papers, and effects" by the government. U.S. Const. amend. IV; *see Mapp v. Ohio*, 367 U.S. 643, 655–56, 81 S.Ct. 1684, 1691–92, 6 L.Ed.2d 1081 (1961) (incorporating the Fourth Amendment and the consequences for violating it into the Due Process Clause of the Fourteenth Amendment). A "seizure" of property within the meaning of the Fourth Amendment occurs when a government official meaningfully interferes with a person's possessory interest in the property. *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S.Ct. 1652, 1656, 80 L.Ed.2d 85 (1984). "In general, warrantless searches and seizures are unreasonable in the absence of a legally recognized exception to the warrant requirement." *Horst*, 880 N.W.2d at 33.

[6] A temporary seizure may be permissible under the Fourth Amendment "when needed to preserve evidence until police are able to obtain a warrant." *State v. Holland*, 865 N.W.2d 666, 670 n.3 (Minn. 2015). The United States Supreme Court has approved the temporary seizure of an individual to prevent him from destroying drugs before police could obtain and execute a warrant. *Illinois v. McArthur*, 531 U.S. 326, 331–32, 121 S.Ct. 946, 950, 148 L.Ed.2d 838 (2001). The Minnesota Supreme Court has observed that, "when ***148** law-enforcement officers 'have probable cause to believe that a container holds contraband or evidence of a crime, but have not secured a warrant,' the officers may seize the property, 'pending issuance of a warrant to examine its contents, if the exigencies of the circumstances demand it.' " *Horst*, 880 N.W.2d at 33–34 (quoting *United States v. Place*, 462 U.S. 696, 701, 103 S.Ct. 2637, 2641, 77 L.Ed.2d 110 (1983)).

[7] Here, Detective Nelson instructed jail staff not to release Diamond's property while she sought a warrant. Detective Nelson's instructions to jail staff were meant to ensure that Diamond's shoes and cellphone, which Detective Nelson considered potential evidence, were not lost or destroyed. The following day, Detective Nelson obtained and executed a warrant to seize Diamond's shoes and cellphone.

In *Horst*, the Minnesota Supreme Court deemed a similar warrantless seizure lasting only one day to be justified. *Id.* at 34–35. There, police had seized the defendant's cellphone when she was interviewed at the police station prior to her arrest, and police obtained a warrant the following day. *Id.* The supreme court concluded that the seizure was justified by exigent circumstances because, as the United States Supreme Court had recently observed, "the owner of a cellphone ... can quickly and easily destroy the data contained on such a device." *Id.* at 35 (citing *Riley v. California*, — U.S. ——, 134 S.Ct. 2473, 2486, 189 L.Ed.2d 430 (2014)). Thus, the temporary seizure of Diamond's cellphone at the jail was justified by exigent

circumstances. The need to protect physical evidence from loss or destruction similarly justified the temporary seizure of Diamond's shoes. *See McArthur*, 531 U.S. at 331–32, 121 S.Ct. at 950.

[8] **[9]** Diamond argues that the exigent-circumstances exception does not apply because Detective Nelson "searched" Diamond's property at the jail prior to the seizure. As an initial matter, we observe that Diamond did not argue to the district court that the evidence should be suppressed because Detective Nelson's act of viewing his property at the jail constituted a "search" rendering the exigency exception for the seizure inapplicable. An appellate court generally will not consider matters not argued to and considered by the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). This rule applies to constitutional questions. *See In re Welfare of C.L.L.*, 310 N.W.2d 555, 557 (Minn. 1981) (declining to address a constitutional issue raised for the first time on appeal from a termination of parental rights).

[10] But even if Diamond's district court argument could be read expansively so as to encompass this argument, we still find it unpersuasive. Diamond does not provide any support for his conclusory assertion that Detective Nelson's act of viewing his property at the jail prior to obtaining a search warrant constituted a "search" under the Fourth Amendment. *See State v. Johnson*, 831 N.W.2d 917, 922 (Minn. App. 2013) ("A 'search' within the meaning of the Fourth Amendment occurs upon an official's invasion of a person's reasonable expectation of privacy." (citing *Jacobsen*, 466 U.S. at 114, 104 S.Ct. at 1656)), *review denied* (Minn. Sept. 17, 2013). Nor does he argue that such action was unreasonable.

As articulated in *McArthur*, we must determine whether "police made reasonable efforts to reconcile their law enforcement needs with the demands of personal privacy." 531 U.S. at 332, 121 S.Ct. at 950. In *McArthur*, the United States Supreme Court determined that the proper balance between law-enforcement needs and personal privacy permitted police to seize the defendant while they sought a warrant to search his trailer. ***149** *Id.* at 332, 121 S.Ct. at 950–51. Here, Detective Nelson properly balanced law-enforcement needs with Diamond's personal privacy. Diamond concedes that his property was lawfully seized and inventoried when he was booked into jail on November 4. The following day, Detective Nelson viewed Diamond's property and observed similarities between the tread of Diamond's shoes and the shoeprints left on M.H.'s garage's side-entry door. Recognizing the possibility that these items could be lost or destroyed, Detective Nelson instructed jail staff to maintain custody of the property and immediately sought a warrant. On November 6, Detective Nelson executed the warrant, seizing the cellphone and shoes. Before attempting to access the cellphone's contents, which plainly constitutes a search within the meaning of the Fourth Amendment, Detective Nelson obtained the November 12 search warrant. *See Riley*, 134 S.Ct. at 2495.

We conclude that the temporary seizure of Diamond's property was justified by exigent circumstances and that the district court did not err in denying Diamond's suppression motion.

II. Diamond's Fifth Amendment privilege was not violated when the district court ordered him to provide his fingerprint so police could search his cellphone.

[11] Diamond argues that the district court's order to provide his fingerprint to unlock his cellphone violated his Fifth Amendment privilege against compelled self-incrimination.[1] This is an issue of first impression for Minnesota appellate courts. Whether the district court violated Diamond's Fifth Amendment privilege against self-incrimination is a question of law, which this court reviews de novo. *State v. Kaquatosh*, 600 N.W.2d 153, 156 (Minn. App. 1999), *review denied* (Minn. Dec. 14, 1999).

[12] The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V; *see Malloy v. Hogan*, 378 U.S. 1, 8, 84 S.Ct. 1489, 1493–94, 12 L.Ed.2d 653 (1964) (incorporating Fifth Amendment protections into the Due Process Clause of the Fourteenth Amendment). "The essence of this basic constitutional principle is the requirement that the [s]tate which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips." *Estelle v. Smith*, 451 U.S. 454, 462, 101 S.Ct. 1866, 1872, 68 L.Ed.2d 359 (1981) (quotation and emphasis omitted). The Supreme Court has explained that "the privilege protects a person only against being incriminated by his own compelled testimonial communications." ***150** *Fisher v. United States*, 425 U.S. 391, 409, 96 S.Ct. 1569, 1580, 48 L.Ed.2d 39 (1976). Here, the record establishes

that Diamond was compelled to produce his fingerprint to unlock the cellphone. The record also reflects that police obtained incriminating evidence once the cellphone was unlocked. Therefore, the question before this court is whether the act of providing a fingerprint to unlock a cellphone is a "testimonial communication."

[13] In examining its application of Fifth Amendment principles, the Supreme Court has established that, "in order to be testimonial, [a criminal defendant's] communication must itself, explicitly or implicitly, relate a factual assertion or disclose information. Only then is a person compelled to be a 'witness' against himself." *Doe v. United States*, 487 U.S. 201, 210, 108 S.Ct. 2341, 2347–48, 101 L.Ed.2d 184 (1988). The Supreme Court has further noted that

> [t]his understanding is perhaps most clearly revealed in those cases in which the Court has held that certain acts, though incriminating, are not within the privilege. Thus, a suspect may be compelled to furnish a blood sample; to provide a handwriting exemplar, or a voice exemplar; to stand in a lineup; and to wear particular clothing.

Id. at 210, 108 S. Ct. at 2347 (citing *United States v. Dionisio*, 410 U.S. 1, 7, 93 S.Ct. 764, 768, 35 L.Ed.2d 67 (1973) (voice exemplar); *Gilbert v. California*, 388 U.S. 263, 266–67, 87 S.Ct. 1951, 1953, 18 L.Ed.2d 1178 (1967) (handwriting exemplar); *United States v. Wade*, 388 U.S. 218, 221–22, 87 S.Ct. 1926, 1929, 18 L.Ed.2d 1149 (1967) (lineup); *Schmerber v. California*, 384 U.S. 757, 765, 86 S.Ct. 1826, 1832–33, 16 L.Ed.2d 908 (1966) (blood sample); *Holt v. United States*, 218 U.S. 245, 252–53, 31 S.Ct. 2, 6, 54 L.Ed. 1021 (1910) (clothing)). In addition, the Supreme Court has recognized that "both federal and state courts have usually held that [the Fifth Amendment] offers no protection against compulsion to submit to fingerprinting." *Schmerber*, 384 U.S. at 764, 86 S.Ct. at 1832; *see Doe*, 487 U.S. at 219, 108 S.Ct. at 2352 (Stevens, J., dissenting) ("Fingerprints, blood samples, voice exemplars, handwriting specimens, or other items of physical evidence may be extracted from a defendant against his will."); *State v. Breeden*, 374 N.W.2d 560, 562 (Minn. App. 1985) ("The gathering of real evidence such as blood samples, fingerprints, or photographs does not violate a defendant's [F]ifth [A]mendment rights.").

Diamond relies on *In re Grand Jury Subpoena Duces Tecum*, 670 F.3d 1335 (11th Cir. 2012), to support his argument that supplying his fingerprint was testimonial. In *In re Grand Jury*, the court reasoned that requiring the defendant to decrypt and produce the contents of a computer's hard drive, when it was unknown whether any documents were even on the encrypted drive, "would be tantamount to testimony by [the defendant] of his knowledge of the existence and location of potentially incriminating files; of his possession, control, and access to the encrypted portions of the drives; and of his capability to decrypt the files." *Id.* at 1346. The court concluded that such a requirement is analogous to requiring production of a combination and that such a production involves implied factual statements that could potentially incriminate. *Id.*

By being ordered to produce his fingerprint, however, Diamond was not required to disclose any knowledge he might have or to speak his guilt. *See Doe*, 487 U.S. at 211, 108 S.Ct. at 2348. The district court's order is therefore distinguishable from requiring a defendant to decrypt a hard drive or produce a combination. *See, e.g., In re Grand Jury*, 670 F.3d at 1346; ***151** *United States v. Kirschner*, 823 F.Supp.2d 665, 669 (E.D. Mich. 2010) (holding that requiring a defendant to provide computer password violates the Fifth Amendment). Those requirements involve a level of knowledge and mental capacity that is not present in ordering Diamond to place his fingerprint on his cellphone. Instead, the task that Diamond was compelled to perform—to provide his fingerprint—is no more testimonial than furnishing a blood sample, providing handwriting or voice exemplars, standing in a lineup, or wearing particular clothing. *See Doe*, 487 U.S. at 210, 108 S.Ct. at 2347–48.

Diamond argues, however, that the district court's order effectively required him to communicate "that he had exclusive use of the phone containing incriminating information." This does not overcome the fact that such a requirement is not testimonial. In addition, Diamond provides no support for the assertion that only his fingerprint would unlock the cellphone or that his provision of a fingerprint would communicate his exclusive use of the cellphone.

Diamond also argues that he "was required to identify for the police which of his fingerprints would open

the phone" and that this requirement compelled a testimonial communication. This argument, however, mischaracterizes the district court's order. The district court's February 11 order compelled Diamond to "provide a fingerprint or thumbprint as deemed necessary by the Chaska Police Department to unlock his seized cell phone." At the April 3 contempt hearing, the district court referred to Diamond providing his "thumbprint." The prosecutor noted that they were "not sure if it's an index finger or a thumb." The district court answered, "Take whatever samples you need." Diamond then asked the detectives which finger they wanted, and they answered, "The one that unlocks it."

It is clear that the district court permitted the state to take samples of all of Diamond's fingerprints and thumbprints. The district court did not ask Diamond whether his prints would unlock the cellphone or which print would unlock it, nor did the district court compel Diamond to disclose that information. There is no indication that Diamond would have been asked to do more had none of his fingerprints unlocked the cellphone. Diamond himself asked which finger the detectives wanted when he was ready to comply with the order, and the detectives answered his question. Diamond did not object then, nor did he bring an additional motion to suppress the evidence based on the exchange that he initiated.

In sum, because the order compelling Diamond to produce his fingerprint to unlock the cellphone did not require a testimonial communication, we hold that the order did not violate Diamond's Fifth Amendment privilege against compelled self-incrimination. [2]

III. The record contains sufficient evidence to support Diamond's convictions.

[14] **[15]** Diamond argues that his convictions must be reversed because the state's circumstantial evidence does not exclude the rational hypothesis that Diamond merely committed the crime of transferring stolen property. When evaluating the sufficiency of circumstantial evidence, the reviewing court uses a two-step analysis. *State v. Silvernail*, 831 N.W.2d 594, 598 (Minn. 2013). "The first step is to identify the circumstances proved." *Id.* "In identifying ***152** the circumstances proved, we defer to the jury's acceptance of the proof of these circumstances and rejection of evidence in the record that conflicted with the circumstances proved by the [s]tate." *Id.* at 598–99 (quotation omitted). The reviewing court "construe[s] conflicting evidence in the light most favorable to the verdict and assume[s] that the jury believed the [s]tate's witnesses and disbelieved the defense witnesses." *Id.* at 599 (quotation omitted). "The second step is to determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt." *Id.* (quotation omitted).

Here, Diamond was convicted of second-degree burglary, misdemeanor theft, and fourth-degree criminal damage to property. A person is guilty of second-degree burglary if the person enters a dwelling without consent and with the intent to commit a crime. Minn. Stat. § 609.582, subd. 2(a) (2014). A person is guilty of theft if the person "intentionally and without claim of right takes ... movable property of another without the other's consent and with intent to deprive the owner permanently of possession of the property." Minn. Stat. § 609.52, subd. 2(a)(1) (2014). A person is guilty of fourth-degree criminal damage to property if the person intentionally causes damage to another's physical property without the other person's consent. Minn. Stat. § 609.595, subd. 3 (2014).

The circumstances proved support the jury's conclusion that Diamond committed these crimes. On October 30, 2014, M.H. returned home after running errands and discovered that someone had kicked in her garage's side-entry door and had stolen jewelry and a number of other items. Police recovered an envelope in M.H.'s driveway that had S.W.'s name written on it. S.W. testified that this envelope was in her car the last time she saw it. S.W. also testified that she believed she was working on the day of the burglary, and that she sometimes let Diamond use her car when she was working. Diamond's cellphone pinged off cell towers near M.H.'s residence on the day of the burglary. S.W. also testified that, on the day of the burglary, Diamond gave her M.H.'s stolen jewelry, and the two of them traveled to the Shakopee pawn shop, where she sold the jewelry. Finally, Detective Nelson testified regarding consistencies between the tread of Diamond's shoes and the shoeprints on M.H.'s garage's side-entry door.

Diamond argues that certain circumstances do not exclude the possibility that he did not commit the crimes at issue. This argument is unconvincing. Diamond considers the individual circumstances proved in isolation. But the evidence as a whole firmly supports the jury's conclusion

that Diamond kicked down M.H.'s garage's side-entry door, entered her dwelling without consent and with the intent to commit a crime, and stole M.H.'s property. Together, the circumstances proved are inconsistent with any other rational hypothesis. Therefore, we conclude that the record contained sufficient evidence to support the jury's conclusion that Diamond committed the offenses of second-degree burglary, misdemeanor theft, and fourth-degree criminal damage to property.

DECISION

The district court did not err in denying Diamond's suppression motion because the temporary seizure of his property was justified by exigent circumstances and, therefore, did not violate the Fourth Amendment. The district court did not violate Diamond's Fifth Amendment privilege against self-incrimination by ordering him to provide his fingerprint so police could search his cellphone because such an order ***153** does not require a testimonial communication. Finally, the record contains sufficient evidence to support the jury's conclusion that Diamond committed second-degree burglary, misdemeanor theft, and fourth-degree criminal damage to property.

Affirmed.

All Citations

890 N.W.2d 143

Footnotes

1 Diamond also argues that the search of his cellphone violated the Fourth Amendment because, he asserts, the police did not have a valid warrant at the time his cellphone was searched in April 2015. Diamond maintains that "no search warrant existed" in April because Detective Nelson had previously returned the November 12 search warrant on November 21 after unsuccessfully attempting to access the contents of the cellphone. However, Diamond did not make this argument at the contested omnibus hearing, where he challenged the probable cause supporting the November 12 warrant and opposed the state's motion for an order compelling him to provide his fingerprint. Instead, Diamond waited until two days before trial to present this argument to the district court, asserting it for the first time during oral argument on his pro se motion to suppress evidence. Because Diamond did not raise this argument at the omnibus hearing, the argument was not timely raised and is not reviewable on appeal. *See State v. Brunes*, 373 N.W.2d 381, 386 (Minn. App. 1985), *review denied* (Minn. Oct. 11, 1985).

2 We express no opinion regarding whether, in a given case, a defendant may be compelled to produce a cellphone password, consistent with the Fifth Amendment.

APPENDIX C

District Court's Order

STATE OF MINNESOTA

COUNTY OF CARVER

DISTRICT COURT

FIRST JUDICIAL DISTRICT

Court File No. 10-CR-14-1286

State of Minnesota,
Plaintiff,

vs.

Matthew Vaughn Diamond,
Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER AND MEMORANDUM

The above-entitled matter came on for a Contested Omnibus Hearing before the Honorable Kevin W. Eide, Judge of First Judicial District Court, on January 21, 20145, at the Carver County Courthouse, Chaska, Minnesota.

Mary Shimshak, Assistant Carver County Attorney, appeared for the State.

Michael W. McDonald, Esq., appeared with and on behalf of Defendant Matthew Vaughn Diamond.

The sole issues identified by Mr. McDonald for the Court's consideration are whether probable cause existed for the search warrant and whether Defendant should be compelled to provide a thumbprint or fingerprint to unlock a Samsung cellular telephone included in the warrant. The parties agreed to submit the matter to the Court based upon their written arguments and the Court's receipt of Exhibit 1, the relevant Search Warrant, Application for Search Warrant and Supporting Affidavit, and two Receipt, Inventory and Return notes.

Based on the files, records, and arguments of counsel, the Court makes the following:

FINDINGS OF FACT

1. On November 12, 2014, Detective Rachel Nelson submitted an Application for Search Warrant and Supporting Affidavit to the Court requesting a warrant to search a Samsung cellular telephone (hereafter "cell phone") seized from the jail property of Defendant Matthew Diamond (hereafter "Defendant").
2. Detective Nelson's Affidavit states that she is a licensed peace officer in the State of Minnesota with 14 years of experience and is presently assigned to the Chaska Police Department. Her Affidavit further stated that she was investigating a report of a burglary at an unoccupied Chaska residence where the door was forced open and jewelry,

electronics and a safe were stolen.

3. Detective Nelson's Affidavit states that the following facts established grounds for the issuance of a search warrant:

    a. On October 30, 2014, officers responded to a report of a burglary at 3711 Bavaria Road in Chaska, Minnesota. The homeowner, Marie Heine, had gone out for approximately two hours, and when she returned she found her garage service door kicked in and some of her property strewn about. Ms. Heine reported that a significant amount of property was missing, including a number of rings and other jewelry.

    b. Carver County Sheriff's deputies assisted at the scene and photographed five shoe prints on the garage service door, presumably left by the intruder as s/he kicked the door in.

    c. Ms. Heine also showed the responding officers an envelope lying in the driveway which she said had not been there when she left. The envelope had the names Savanna Worley, Romeo, Pierre and Jaylyn written on the surface.

    d. Detective Nelson found that Chaska police had contact with a woman named Savanna Lynn Whaley-Worley, DOB 03/28/1993, for lock-out service in 2013 on a 2003 Ford Expedition with Minnesota registration QUENB.

    e. Detective Nelson searched Savanna Whaley-Worley's name through the Automated Property System on October 31, 2014 and learned that Ms. Whaley-Worley pawned at least five items of jewelry at the Pawn Exchange in Shakopee at approximately 6:21 p.m. on October 30, 2014. Detective Nelson went to Pawn Exchange and spoke with staff members who told her that before Ms. Whaley-Worley accepted a price for the jewelry, she went out to her vehicle and spoke with an unseen person. Detective Nelson photographed the jewelry Ms. Whaley-Worley brought to Pawn Exchange and showed the photograph to Ms. Heine. Ms. Heine identified all of the jewelry as items that were stolen from her home.

    f. Detective Nelson searched Savanna Whaley-Worley's name through the Automated Property System again on November 3, 2014 and learned that Ms. Whaley-Worley pawned additional property at Pawn America in Burnsville on October 31, 2014, including two rings that were identified as belonging to Ms.

Heine.

g. On November 4, 2014, at Detective Nelson's request, Shakopee police conducted a traffic stop of a 2003 Ford Expedition with Minnesota registration QUENB. When Detective Nelson arrived at the scene of the stop, she learned that the driver of the vehicle was Defendant herein. Defendant was arrested on two outstanding warrants, including a Department of Corrections warrant for violations of probation after a burglary conviction. Ms. Whaley-Worley was also present and placed under arrest.

h. In a post-Miranda statement, Ms. Whaley-Worley told Detective Nelson that she had pawned jewelry and other property given to her by Defendant (her boyfriend) and turned over all of the cash received to him. She also told Detective Nelson that Defendant regularly used her vehicle while she was at work, but that she did not know what he did with it or where he went, nor did she know where he got the items he asked her to pawn.

i. Detective Nelson showed Ms. Whaley-Worley the envelope that had been found on Ms. Heine's driveway. Ms. Whaley-Worley told Detective Nelson that the envelope was hers, and that she had last seen it on the floor of her car.

j. On November 5, 2014, Detective Nelson went to the Scott County jail where Defendant was being held. She viewed the property Defendant had on him at the time of his arrest, which included a pair of Nike shoes with a sole pattern similar to the prints left on Ms. Heine's garage service door. In addition, Detective Nelson saw Defendant had been carrying a Samsung Galaxy cell phone. On November 6, 2014, Detective Nelson received a warrant to seize the shoes and cell phone and took them into her custody.

k. Detective Nelson spoke with Scott County Sheriff's Deputy Matt Carns who told her he was investigating a burglary occurring on October 27, 2014, where the intruder kicked in a garage service door, stole jewelry and electronics, and some of the jewelry was later pawned by Ms. Whaley-Worley. When Deputy Carns saw photographs of the shoe prints taken from the Heine's residence, he stated he believed the prints were similar to those left at the home of the burglary he was investigating.

l. Deputy Carns also told Detective Nelson that he had investigated Defendant for burglaries in 2011, where he found Defendant had been using his vehicle's GPS system to navigate to burglary locations.

m. In a post-Miranda statement, Defendant denied doing any burglaries and said he was at work on October 27th, 29th, and 30th, 2014. Detective Nelson contacted Defendant's alleged employer who told her Defendant had not been to work on those days, and hadn't worked for him for at least two weeks.

n. Detective Nelson stated that modern cell phones have GPS logs, text and internet based messaging, call logs, contact lists and internet activity data which would assist in confirming or denying information provided by the parties involved in this matter and may lead to recovery of additional stolen property and evidence.

4. Based upon Detective Nelson's Affidavit, a Search Warrant was issued for Defendant's cell phone on November 12, 2014. Deputies were unable to search the cell phone, however, because they were unable to bypass the password protection without Defendant's thumb or fingerprint.

5. The State has filed a motion for an order requiring Defendant to provide his finger and/or thumbprint to unlock the cell phone. Defendant opposes the State's motion, and challenges probable cause for the warrant.

CONCLUSIONS OF LAW

1. Probable cause existed for the issuance of the warrant to search Defendant's cell phone.
2. Compelling Defendant to provide his fingerprint or thumbprint to unlock his cell phone does not violate his Fifth Amendment rights against self-incrimination.

ORDER

1. Defendants' motion to suppress any evidence seized through the execution of the search warrant is respectfully DENIED.
2. Defendant shall provide a fingerprint or thumbprint as deemed necessary by the Chaska Police Department to unlock his seized cell phone.
3. The attached memorandum is incorporated herein by reference.

BY THE COURT:

Dated: February 10, 2015

Kevin W. Eide
Judge of District Court

MEMORANDUM OF LAW

I. Probable Cause for Search Warrant

The Fourth Amendment to the United States Constitution and Article I, § 10 of the Minnesota Constitution provide that "no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." Probable cause is measured by the "totality of the circumstances." *State v. Wiley*, 366 N.W.2d 265, 268 (Minn. 1985), *citing* Illinois v. Gates, 462 U.S. 213, 238 (1983). The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him/her, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Id.*

Defendant argues that there was insufficient probable cause to support the search warrant and that any evidence obtained as a result of the search of his cell phone should be suppressed. The State maintains that sufficient probable cause was established for the issuance of the search warrant.

The Affidavit for Search Warrant contains information about two burglaries and Defendant's girlfriend's pawning of items stolen during those burglaries. The soles of Defendant's shoes resemble shoe prints left on the garage service doors at the sites of the two burglaries. Defendant's girlfriend admitted to pawning jewelry and other items from those burglaries for Defendant, but not knowing at the time where they came from. Defendant also has a history of using GPS programs to navigate to properties he intended to burglarize. Based on the totality of the circumstances in the warrant affidavit, there was a fair probability that evidence relating to the burglaries may be found within Defendant's cell phone; therefore probable cause existed for the issuance of the search warrant. Defendant's motion to suppress any evidence seized from his cell phone as a result of the Search Warrant is respectfully DENIED.

II. Production of Defendant's Fingerprint

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. Amend. V. In order for an individual to fall within this protection of the Fifth Amendment, they must establish the following three elements: (1) compulsion, (2) a testimonial communication or act, and (3) incrimination. *U.S. v. Authement*, 607 F.2d 1129, 2231 (5th Cir. 1979).

In *In re Grand Jury Subpoena Duces Tecum Dated March 25, 2011,* 670 F.3d 1335 (11th Cir. 2012), the State sought the contents of the defendant's laptop and five external hard drives which were protected by an encryption program. The Court upheld the defendant's Fifth Amendment claim, finding that the act of decrypting the laptop and hard drives would be testimonial. *Id.* In reaching this conclusion, the Court considered whether the act of production may have some testimonial quality sufficient to trigger Fifth Amendment protection when the production explicitly or implicitly conveys some statement of fact. *Id.* at 1342. The court determined that an act of production can be testimonial when that act conveys some explicit or implicit statement of fact that certain materials exist, are in the subpoenaed individual's possession or control, or are authentic. *Id.* at 1345. The touchstone of whether an act of production is testimonial is whether the government compels the individual to use "the contents of his own mind" to explicitly or implicitly communicate some statement of fact. *Id.* The Court then went on to describe two ways in which an act of production is not testimonial. First, the Fifth Amendment privilege is not triggered where the Government merely compels some physical act, i.e. where the individual is not called upon to make use of the contents of his or her mind. *Id.* (emphasis added). The most famous example is the key to the lock of a strongbox containing documents. *Id.* (citations omitted). Second, under the "foregone conclusion" doctrine, an act of production is not testimonial—even if the act conveys a fact regarding the existence or location, possession, or authenticity of the subpoenaed materials—if the Government can show with "reasonable particularity" that, at the time it sought to compel the act of production, it already knew of the materials, thereby making any testimonial aspect a "foregone conclusion." *Id.*

Unlike *In re Grand Jury Subpoena Duces Tecum Dated March 25, 2011,* and other cases cited by Defendant which sought passwords for or decryption of computers, the case presently

before the Court seeks only production of Defendant's fingerprint or thumbprint. Compelling the production of Defendant's fingerprint or thumbprint would not call upon the use of Defendant's mind. It is more akin to providing a key to a lockbox. For these reasons, the Court must determine that the act of Defendant providing his fingerprint or thumbprint to unlock his cell phone would not be testimonial, and therefore would not violate his Fifth Amendment rights against self-incrimination.

Conclusion

Based on the totality of the circumstances in the warrant affidavit, there is a fair probability that evidence relating to the burglaries may be found within Defendant's cellular telephone. As a result, probable cause existed for the issuance of the search warrant. Furthermore, because provision of Defendant's thumbprint or fingerprint to unlock the cell phone would not be testimonial, compelling him to unlock the cell phone via his fingerprint or thumbprint would not violate his Fifth Amendment rights against self-incrimination. Defendant's motion to suppress any evidence seized as a result of the warrant is therefore DENIED, and the State's motion to compel Defendant to provide a fingerprint or thumbprint to unlock the cell phone is GRANTED.

K.W.E.

APPENDIX D

Transcript of Contempt Hearing

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF CARVER FIRST JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

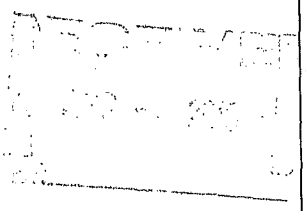
vs.

Matthew Vaughn Diamond,

Defendant.

File No. 10-CR-14-1286

MOTION HEARING



The above-entitled matter came on for hearing before the Honorable Michael D. Wentzell, Judge of the above-named Court, on April 3, 2015, at the Carver County Courthouse, in the City of Chaska, County of Carver, State of Minnesota.

APPEARANCES

MR. PETER A.C. IVY, Esq., Assistant Carver County Attorney, Chaska, Minnesota, appeared for and on behalf of the State of Minnesota.

MR. MICHAEL MCDONALD, Esq., Assistant Public Defender, Chaska, Minnesota, appeared with and on behalf of the Defendant.

The Defendant was personally present.

WHEREUPON, the following proceedings were duly heard:

PROCEEDINGS:

THE COURT: We'll go on the record now. This is State of Minnesota versus Matthew Diamond. Good morning, Mr. Diamond.

THE DEFENDANT: Good morning, sir.

THE COURT: Counsel, will you note your appearances, please?

MR. IVY: Good morning. Peter Ivy on behalf of the State. Also in the courtroom is Detective Bill Hughes from the sheriff's office, and Detective Rachel Nelson from the Chaska Police Department.

MR. MCDONALD: I'm Mike McDonald. I'm here with my client Mr. Diamond.

THE COURT: We're here today pursuant to a motion filed by the State in this case. By way of background, an order was issued by the Honorable Kevin W. Eide on February 11, 2015, which was directing Mr. Diamond to provide his thumb or the thumbprint on a phone to provide access. And Judge Eide ordered that Mr. Diamond comply with that process by putting his thumb on the phone so that the code could be unlocked. My understanding is that to date Mr. Diamond has been requested to comply with this order and has refused to comply with this order. The county attorney's office has filed a motion to follow through with this and if

he refuses to comply, to find Mr. Diamond in contempt of court and then discuss further remedies. The second motion that the State filed is to continue the trial based upon good cause.

Mr. Ivy, did I accurately recite the motions before the Court?

MR. IVY: Actually, Your Honor, I have three motions before the Court. The first motion is for a finding of civil contempt, one happening outside the presence of Your Honor based on Judge Eide's order, and my memorandum contains a sworn affidavit from Detective Nelson establishing the foundation for that. She is in court today, too, and certainly is willing to go under oath to answer any further questions. It does not appear that Mr. Diamond is willing to purge himself of this if there is a finding of civil contempt. It's very, very easy to do. This is not a difficult thing to purge himself of.

My second motion, then, is for the Court to order on the record in open court that Mr. Diamond now gives his thumbprint. And that's why Detective Hughes is here. He has retrieved the phone from evidence. It can be readily done. Even if the thumbprint is given today, that gives us less than seven working days before the trial date and it's going to take some

time to do the forensic examination, and based on the affidavit provided by Detective Nelson where we had cell -- allegedly cell phone pings from a tower very close to the time and place of the burglary, and based on the cell phone records we believe there will be further evidence on that phone. We need to provide that to Mr. McDonald, he obviously needs some time to review that and prepare for trial as that would be important incriminatory evidence should that prove to be true. Based on that we then are asking for a continuance of one month. And as noted in my memorandum, Your Honor, I mean, this is the approximate cause for this continuance. It's purely the defendant's refusal to abide by lawful order. And indeed Judge Cain ordered this search and the seizure of the phone, Judge Wilton ordered the forensic exam, Judge Eide ordered the thumbprint. These orders could not be more clear and could be not more clear that the defendant is obstinately refusing to comply with lawful court order.

The State did nothing in terms of causing this continuance and the State's entitled to that forensic exam as demonstrated by the prior court orders, no less than three judges weighing in on the potential evidentiary value of this phone.

MR. MCDONALD: Your Honor, may I have a minute?

THE COURT: Take your time.

(WHEREUPON, a brief recess was taken.)

MR. MCDONALD: Your Honor, may I?

THE COURT: Go ahead. We're back on the record.

MR. MCDONALD: It's our position that the government does not have a right to look into this cell phone in the first place, that the government improperly seized the cell phone as well as the tennis shoes at the Scott County Jail, that any warrants issued are improper, and my client is insistent that he has not violated or been in contempt of court. He believes that the government is seeking things that violate his constitutional rights. He's opposed to it. He's also opposed to a continuance of this case. He has demanded a speedy trial and is prepared and wants to go to trial next week on the 14th -- well, not next week, but it would be the 14th.

THE COURT: And while I understand your disagreement on behalf of your client, Mr. Diamond, these issues have been litigated and orders have been issued, and the appropriate review that you're seeking is to appellate review and that can't be accomplished

at this time. The orders are in place. You are ordered to submit your thumbprint to this phone to unlock it. I've reviewed Judge Eide's order, I've reviewed the limited case law that's available with respect to this issue, and I believe that Judge Eide's opinion and interpretation is correct. And so based on your past refusal -- upon reviewing the affidavits that have been submitted, based upon the past refusal, I find that you are in civil contempt of court for previously failing to provide your thumbprint pursuant to Judge Eide's order issued February 11, 2015. You can purge yourself of this contempt by simply complying with the order.

MR. MCDONALD: And, Your Honor, to be fair to my client, we were -- just found out about the Court's ruling concerning the taking or the holding of the shoes and the cell phone this morning and I haven't even been able to review that order myself much less provide a copy to Matthew.

THE COURT: And I'll certainly give you whatever time you need to review that and discuss it. I don't think that's a germane issue to the issue that we have today. There has been a subsequent order that I filed this morning, as you indicated, determining that the holding of the cell phone was appropriate and

so I believe we're appropriately here today. The detectives are here and ready to proceed.

Mr. Diamond, at this time I'm ordering you to comply with Judge Eide's order of February 11, 2015. Detective Hughes is here, Detective Nelson is here with the cell phone, and I'm ordering that you put your thumb on that. If you refuse to do so, that refusal will constitute criminal contempt of court. If you refuse to do so and I find you in criminal contempt of court, there's going to be two remedies that we talk about. The first will be an order that I issue that indicates that detention staff and law enforcement can take necessary steps to obtain your thumbprint on this phone. Depending on your cooperation in that process, we'll discuss what the criminal contempt sanctions are. Now this is a separate criminal proceeding. You can face up to an additional six months in jail based upon your refusal. They're going to take this thumbprint one way or the other, whether it's through your voluntary cooperation today or whether it's through detention staff taking the necessary steps to do that. If you refuse to do so, you're in criminal contempt of court and there will be a sanction. And as I indicated, that sanction will depend on your subsequent cooperation. So, Mr.

Diamond, I'll give you a moment to talk with your attorney and ask how you would like to proceed.

(WHEREUPON, a brief recess was taken.)

MR. MCDONALD: Your Honor, my client generally objects to this proceeding, but he's not going to get into a fight with law enforcement, a physical confrontation with law enforcement, and although he strenuously objects to the procedure in the court's order, he's not going to be physically opposing the imprint of his thumb on the cell phone. He doesn't think it's right. He doesn't think it's fair. He thinks it's violating his constitutional rights as an American citizen.

THE COURT: I'll note your objection, Mr. Diamond, to this and I think the record reflects the manner in which you're agreeing, and I'll -- I use that term in quotation marks because I understand you're not agreeing to it, you are simply following an order. You do have a right at the conclusion of this case to appeal this decision.

THE DEFENDANT: Sir, if I may, I mean, I just -- this doesn't make any sense to me of somebody that's supposed to be upholding the law on both sides of the fact, and I feel like I'm being railroaded right now into doing something that obviously you can

see is not retaining my constitutional rights as a human being and as a United States citizen. And with the information that was put into court the last time, all these charges that are being brought upon me are feloniously charges or -- and therefore should be void because of evidential stuff that was put in the court and the way the evidence was seized upon. Therefore, you guys are charging me or trying to charge me with things that shouldn't even be upheld right now and I don't see that as a good factor in this case at all because me being a United States citizen there is constitutional rights that should be upheld on both sides, and I just feel like I'm being railroaded by you telling me that the stuff we put into the court the last time isn't going to be looked at as a factor.

THE COURT: Your objections are noted and everything has been placed in the record. I respectfully disagree with your assessment of the constitutional rights and whether they're being vindicated in this case, but I will note, of course, your objection. The benefit to your willingness to comply here is that you will not be found in criminal contempt of court, and once you've provided that, the civil contempt will be purged. So that's the benefit of doing this.

So at this time, detective, based on Mr. Diamond's acquiescence to the order, if you wish to bring the phone up, we'll keep the record open at this time as he complies with the lawful order.

MR. IVY: Your Honor, we're not sure if it's an index finger or a thumb.

THE COURT: Take whatever samples you need.

(WHEREUPON, a brief recess was taken.)

THE DEFENDANT: What finger do you want?

DETECTIVE NELSON: The one that unlocks it.

DETECTIVE HUGHES: The one that unlocks it.

THE COURT: We're off the record at this point.

(WHEREUPON, a brief recess was taken.)

THE COURT: We're back on the record.

Mr. Ivy, did you verify that the officers have what they need with respect to the thumbprint?

MR. IVY: I believe so. Detective Hughes is going to go down and use a Cellebrite program immediately. I don't know exactly the results of that. He's going to get busy immediately.

THE COURT: Well, I will find, at least for today's purposes, you have purged yourself of the civil contempt of court. I'm not holding you in criminal contempt of court based upon your compliance

with the order.

With respect to the issue of the continuance of the trial, I will take that matter under advisement and issue an order in this case.

Mr. McDonald?

MR. MCDONALD: May I have a minute, Your Honor?

THE COURT: Take your time.

(WHEREUPON, a brief recess was taken.)

MR. MCDONALD: We do oppose a continuance, Your Honor.

THE COURT: Any other comments that you wish to make in that regard?

MR. MCDONALD: No, I already previously addressed it, Your Honor. Thank you.

THE COURT: And you did, I just wanted to make sure you had a full opportunity if there was other ideas that you wished to put on the record.

MR. MCDONALD: Thank you, no.

THE COURT: So that issue will be put -- will be taken under advisement and I'll issue an order in due course on that. Conditions of release remain as previously set.

Mr. Ivy, anything else today?

MR. IVY: It's my understanding there may be

a warrant out of Scott County just for the Court and the defense' information.

THE COURT: Thank you, Mr. Diamond. We'll see you back at the next hearing, then.

MR. IVY: Thank you, Your Honor.

THE COURT: Thank you.

(PROCEEDINGS CONCLUDED AT 9:51 a.m.)

STATE OF MINNESOTA)

REPORTER'S CERTIFICATE

COUNTY OF SCOTT)

I, Lisa M. Anderson, Court Reporter, Notary Public, State of Minnesota, do hereby certify that I have carefully compared the foregoing transcript of the above-entitled matter with the original stenographic notes taken by me, and that the foregoing pages 1 - 12 inclusive are a true and correct transcript of my stenotype notes.

Dated on this 13th day of February, 2016.

/s/
Lisa M. Anderson
Official Court Reporter
My Commission expires: 1/31/20