

2017 WL 5495584

Only the Westlaw citation is currently available.
This case was not selected for publication in West's
Federal Reporter.

United States Court of Appeals, Third Circuit.

UNITED STATES of America

v.

Robert J. **RICE**, Appellant

No. 17-1102

|Submitted Under Third Circuit L.A.R. 34.1(a)

October 13, 2017

|[Opinion filed: November 16, 2017]

On Appeal from the United States District Court for the
Middle District of Pennsylvania (No. 1:14-cr-00119-001),
District Judge: Honorable Christopher C. Conner

Attorneys and Law Firms

[James T. Clancy](#), Esq., Chelsea B. Schinnour, Esq., Office
of United States Attorney, Harrisburg, PA, for Plaintiff-
Appellee

[Peter Goldberger](#), Esq., Ardmore, PA, [Joseph D.
Caraciolo](#), Esq., [Karen L. DeMarco](#), Esq., Foreman &
Caraciolo, Harrisburg, PA, for Defendant-Appellant

Before: [CHAGARES](#), [JORDAN](#), and [FUENTES](#),
Circuit Judges

OPINION*

* This disposition is not an opinion of the full
court and, pursuant to I.O.P. 5.7, does not
constitute binding precedent.

[FUENTES](#), Circuit Judge.

***1** Robert Rice appeals his jury conviction for
knowing possession of child pornography, and
knowing receipt and distribution of child
pornography. For the following reasons, we will
affirm.

I.

Because we write exclusively for the parties, we set
forth only those facts necessary to our disposition.

Rice, who was an officer in the United States Army,
had a laptop computer. Without his knowledge, his
wife, Marilyn Rice-Goldie, installed a spyware
program called “Spector Pro” on the laptop. Spector
Pro—the presence of which was not readily apparent
to computer users—monitored and reported on the
activity of Rice’s entire computer, including
accounts on the laptop that Rice had not authorized
Rice-Goldie to access. Among other things, Spector
Pro logs keystrokes, takes screen shots, captures web
sites visited, and saves the contents of searches,
emails and chats.

After installing Spector Pro, Rice-Goldie reviewed
Spector Pro’s records and discovered child
pornography on the laptop. Rice-Goldie eventually
turned the laptop over to the police. Based on Rice-
Goldie’s reports, the police obtained a search
warrant and found evidence of child pornography on
the laptop.

Rice was charged with one count of knowing
possession of child pornography, in violation of [18
U.S.C. § 2252A\(a\)\(5\)](#), and one count of knowing
receipt and distribution of child pornography, in
violation of [18 U.S.C. § 2252A\(a\)\(2\)](#). Before trial,
Rice moved to suppress the evidence seized under
the above warrants, arguing, *inter alia*, that it was
acquired in violation of the Wiretap Act.¹ The
District Court denied Rice’s motion.

¹ The Wiretap Act, [18 U.S.C. § 2510](#), *et seq.*,
“formally known as the 1968 Omnibus Crime
Control and Safe Streets Act,” was technically
superseded by the Electronic Communications
Privacy Act of 1986. [Fraser v. Nationwide Mut.
Ins. Co.](#), 352 F.3d 107, 110, 113 n.7 (3d Cir.
2003), *as amended* (Jan. 20, 2004). For the sake
of convenience, we refer to the Wiretap Act
throughout.

In May 2016, Rice was tried by jury. On the first day
of trial, Rice-Goldie appeared as a government
witness. During defense counsel’s cross-examination
of Rice-Goldie, the prosecutor erroneously
commented, in the jury’s presence, that defense
counsel’s questioning might elicit information
related to “a separate investigation into a national
security issue.”² Defense counsel immediately
objected and moved for a mistrial. After speaking

with counsel at sidebar, the District Court took a recess to consider the transcript and how to proceed. After the recess, the District Court spoke further with counsel about their respective arguments, but ultimately rejected defense counsel's motion for a mistrial. Rather, after recalling the jury, the District Court delivered a short curative instruction informing the jury that the prosecutor's reference to a national security investigation was in error and instructing them to disregard it. With that, Rice's trial continued and the prosecutor's remark was not mentioned again during the rest of the five-day trial.

² App. 301.

*2 Ultimately, the jury convicted Rice on both counts.³ Rice was then sentenced to 142 months' imprisonment, to run concurrently with the four-year term of imprisonment imposed by the Army following court-martial. This appeal followed.⁴

³ On Rice's motion, the court later dismissed Rice's conviction under 18 U.S.C. § 2252A-(a)(5) pursuant to the Double Jeopardy Clause of the Fifth Amendment because Rice was convicted by court-martial for the "same offense." App. 903.

⁴ The District Court had jurisdiction under 28 U.S.C. § 3231. We have jurisdiction under 28 U.S.C. § 1291.

II.

Rice appeals his conviction on two grounds. First, Rice contends that the District Court erred in denying his pretrial motion to suppress all evidence that the government seized pursuant to warrants based on Rice-Goldie's alleged violation of the Wiretap Act. Second, Rice argues that the District Court abused its discretion by denying his motion for a mistrial and instead giving a curative instruction after the prosecutor erroneously mentioned once in the jury's presence that Rice's case was related to "a separate investigation into a national security issue."⁵ We address these issues in turn.⁶

⁵ App. 301.

⁶ "We review the denial of a suppression motion for clear error as to the underlying facts, but exercise plenary review as to its legality in light of the [D]istrict [C]ourt's properly found facts." *United States v. Jackson*, 849 F.3d 540, 544 (3d Cir. 2017) (quoting *United States v. Coles*, 437 F.3d 361, 365 (3d Cir. 2006)). The District Court's denial of a motion for a mistrial is reviewed for abuse of discretion. *United States v. Liburd*, 607 F.3d 339, 342 (3d Cir. 2010).

A. Suppression Motion

Rice first maintains that the District Court should have suppressed evidence obtained through Rice-Goldie's installation of Spector Pro on his laptop as a wrongful interception of his electronic communications under the Wiretap Act.⁷ This argument fails. "The Wiretap Act does not provide a suppression remedy for electronic communications unlawfully acquired under the Act."⁸ Instead, 18 U.S.C. § 2515—the Wiretap Act's suppression provision—only mandates the exclusion of unlawfully intercepted wire and oral communications.⁹ Indeed, while the legislative history for the USA Patriot Act demonstrates that Congress considered amending § 2515 to extend to electronic communications, no such provision was added.¹⁰

⁷ The Wiretap Act defines "electronic communication" as "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce." 18 U.S.C. § 2510(12).

⁸ *United States v. Steiger*, 318 F.3d 1039, 1052 (11th Cir. 2003); see also *United States v. Meriwether*, 917 F.2d 955, 960 (6th Cir. 1990) ("The [Electronic Communications Privacy Act] does not provide an independent statutory remedy of suppression for interceptions of electronic communications.").

⁹ See 18 U.S.C. § 2515 (“Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court ... if the disclosure of that information would be in violation of this chapter.”) (emphasis added); *United States v. Barajas*, 710 F.3d 1102, 1110 n.5 (10th Cir. 2013) (“In 1986, Congress amended [the Wiretap Act] with the Electronic Communications Privacy Act, and clarified that only wire and oral communications are subject to statutory suppression.”).

¹⁰ See *Steiger*, 318 F.3d at 1050.

*3 Recognizing that § 2515’s exclusion rule does not apply to electronic communications, Rice asserts that 18 U.S.C. § 2517(3) creates, by negative implication, a suppression remedy for electronic communications under the Wiretap Act. We reject this argument. Section 2517(3) does not suggest that unlawfully intercepted electronic communications should be suppressed.¹¹ Rather, § 2517(3) merely describes the limited purposes for which information concerning electronic communications received by authorized means may be disclosed under the Wiretap Act.¹²

¹¹ See *United States v. Jones*, 364 F.Supp.2d 1303, 1308 (D. Utah 2005) (“[I]t is clear from the general context of § 2517(3) that it does not create by implication a suppression remedy for electronic communications.”).

¹² See 18 U.S.C. § 2517(3) (“Any person who has received, by any means authorized by this chapter, any information concerning a wire, oral, or electronic communication ... may disclose the contents of that communication ... while giving testimony under oath or affirmation in any proceeding held under the authority of the United States....”); see also *Jones*, 364 F.Supp.2d at 1308 (“Read in context, § 2517 describes the limited purposes for which

communications received by authorized means may be used or disclosed; its effect has no implication for communications received by unauthorized means.”).

B. Mistrial Motion

Lastly, Rice argues that the District Court abused its discretion in denying his motion for a mistrial based on the prosecutor’s incorrect statement, before the jury, that Rice’s case was related to “a separate investigation into a national security issue.”¹³ We disagree. The prosecutor’s single reference to a national security investigation, which occurred on the first day of trial and was not mentioned again during the rest of the five-day trial, was corrected by the District Court’s prompt and succinct curative instruction, and could not have prejudiced Rice in light of the overwhelming evidence presented regarding Rice’s possession, receipt, and distribution of child pornography.¹⁴

¹³ App. 301.

¹⁴ See *United States v. Rivas*, 493 F.3d 131, 140 (3d Cir. 2007) (“A mistrial is not required where improper remarks were harmless, considering their scope, their relation to the context of the trial, the ameliorative effect of any curative instructions and the strength of the evidence supporting the conviction.”).

III.

For the foregoing reasons, we will affirm Rice’s conviction.

All Citations

--- Fed.Appx. ----, 2017 WL 5495584

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA	:	CRIMINAL NO. 1:14-CR-119
	:	
v.	:	(Chief Judge Conner)
	:	
ROBERT J. RICE,	:	
	:	
Defendant	:	

ORDER

AND NOW, this 19th day of November, 2015, upon consideration of the motions (Docs. 33, 34, 35) to suppress evidence filed by defendant Robert J. Rice (“Rice”), wherein Rice asserts that all evidence seized pursuant to search warrants in the matter *sub judice* concerning possession, receipt, and distribution of child pornography is subject to suppression because (1) the inceptive evidence—screen shots of internet websites, emails, and instant message conversations captured surreptitiously from Rice’s computer and conveyed to the Pennsylvania State Police by Rice’s wife—was obtained in violation of 18 U.S.C. §§ 2510-22 (“Wiretap Act”), which provides for the exclusion of certain unlawfully acquired communications, id. § 2515; (Docs. 33, 39); (2) law enforcement officers omitted material information from the probable cause affidavits underlying the search of Rice’s computer, in violation of the Fourth Amendment, see U.S. CONST. amend. IV; (Docs. 34, 38); and (3) the search warrants were secured based upon illegally obtained evidence, in violation of the Fourth Amendment, see U.S. CONST. amend. IV; (Docs. 35, 37), and further upon consideration of the government’s omnibus brief (Doc. 40) in opposition to the motions, and the court observing that although the Wiretap Act

proscribes the unlawful interception of any “wire, oral, or electronic communication,” 18 U.S.C. § 2511, the Wiretap Act only mandates evidentiary exclusion of unlawfully intercepted wire and oral communications, *excepting* electronic communications, *id.* § 2515; *see United States v. Barajas*, 710 F.3d 1102, 1110 n.5 (10th Cir.) *cert. denied*, 134 S. Ct. 230 (2013); *United States v. Reed*, 575 F.3d 900, 915 (9th Cir. 2009); *United States v. Steiger*, 318 F.3d 1039, 1050-51 (11th Cir. 2003); *United States v. Meriwether*, 917 F.2d 955, 960 (6th Cir. 1990), and it appearing that Rice does not contest that the evidence allegedly obtained by his wife in violation of the Wiretap Act constitutes electronic communication *in toto*, (*see* Doc. 39 at 7-8), and the court concluding that the Wiretap Act’s suppression remedy is inapplicable to the evidence herein, (*see* Docs. 33, 39), and the court observing that the Fourth Amendment protects individuals from unreasonable searches and seizures, *see* U.S. CONST. amend. IV; *Horton v. California*, 496 U.S. 128, 133 (1990), and that generally a search is reasonable only if effectuated with a warrant supported by probable cause, *see City of L.A. v. Patel*, 135 S. Ct. 2443, 2452 (2015), and the court recognizing that probable cause may be established when there exists a fair probability that evidence of a crime will be found in the location sought to be searched based upon the circumstances set forth in the supporting affidavit, *United States v. Vosburgh*, 602 F.3d 512, 526 (3d Cir. 2010), and that a criminal defendant who endeavors to void a warrant and suppress all concomitant evidence “must show . . . that there would have been no probable cause but for the incorrect statement” or material omission, *United States v. Shields*, 458 F.3d 269, 276 (3d Cir. 2006); *see Franks v. Delaware*, 438 U.S. 154, 171, (1978); *United States v.*

Conley, 4 F.3d 1200, 1208 n.7 (3d Cir. 1993), and it appearing that Rice argues that the initial search of his computer conducted by law enforcement officers was unsupported by probable cause because the underlying affidavits omitted the methods employed by Rice's wife in gathering his private electronic communications, (Doc. 38 at 5-8), and the court noting that the Fourth Amendment does not protect against searches effected by private individuals "not acting as . . . agent[s] of the [g]overnment or with the participation or knowledge of any governmental official," United States v. Jacobsen, 466 U.S. 109, 113 (1984)); see Walter v. United States, 447 U.S. 649, 656 (1980), and that "the [g]overnment may retain for use . . . incriminating documents which were stolen by private individuals, without governmental knowledge or complicity, and turned over to the [g]overnment," Wotring v. Stuski, No. 1:14-CV-1843, 2015 WL 4478775, at *3 (M.D. Pa. July 22, 2015) (quoting Meister v. C.I.R., 504 F.2d 505, 508 (3d Cir. 1974)); see Walter, 447 U.S. at 656; United States v. Jarrett, 338 F.3d 339, 344 (4th Cir. 2003), and the court finding that because Rice's wife acted as a private individual when she independently recorded, reviewed, and submitted to law enforcement officials Rice's electronic communications without Rice's knowledge or consent, the omission of her allegedly unlawful conduct from supporting affidavits was immaterial to the issuing magistrate's probable cause determination, see Walter, 447 U.S. at 656; Wotring, 2015 WL 4478775, at *3, and the court concluding that the circumstances set forth in the affidavits—namely, that Rice's wife (1) reported that she had recently discovered images of child pornography and evidence of chat room

conversations regarding same on Rice's computer, and (2) provided factual detail regarding the substance of certain of these images and internet conversations, (Doc. 40-1, Ex. 1)—established a fair probability that evidence of criminal activity would be found on Rice's computer, see United States v. Miknevich, 638 F.3d 178, 182-83 (3d Cir. 2011), and thus supported a finding of probable cause, (see Docs. 34, 38), and it appearing that Rice additionally asserts that reliance of the probable cause affidavits upon illegally obtained information violated his Fourth Amendment rights, (Doc. 37 at 6-9), but the court observing that, as noted *supra*, "private wrongdoing does not deprive the government of the right to use evidence that it has acquired lawfully," Walter, 447 U.S. at 656, and the court concluding that the information proffered by Rice's wife provided sufficient support for a finding of probable cause, (see Docs. 35, 37), it is hereby ORDERED that Rice's motions (Docs. 33, 34, 35) to suppress evidence are DENIED.

/S/ CHRISTOPHER C. CONNER
Christopher C. Conner, Chief Judge
United States District Court
Middle District of Pennsylvania