APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

OTHER DOCUMENTS

OPINION OF THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA (JULY 22, 2021)

DISTRICT OF COLUMBIA COURT OF APPEALS

MARK A. WITASCHEK,

Appellant,

v.

DISTRICT OF COLUMBIA,

Appellee.

No. 19-CT-165

Appeal from the Superior Court of the District of Columbia (CRT-4321-18) (Hon. Darlene M. Soltys, Trial Judge)

Before: GLICKMAN, THOMPSON, and MCLEESE, Associate Judges.

THOMPSON, Associate Judge:

Appellant Mark A. Witaschek challenges his conviction, after a bench trial, of two counts of attempting to evade or defeat tax (for tax years 2011 and 2012). *See* D.C. Code § 47-4101 (2015 Rept.). For the reasons that follow, we affirm the judgment of conviction.

I.

In the midst of an "acrimonious" divorce, appellant's (then soon-to-be) ex-wife provided tax and financial information about appellant to District of Columbia ("District") officials, resulting in a February 2014 referral to the District's Office of Tax and Revenue ("OTR"). OTR Special Agent James Hessler interviewed appellant's ex-wife, who provided information about appellant's residency from 2009 through 2013. Appellant's ex-wife also provided bank records for bank accounts held either jointly by the couple or solely by appellant. Comparing this information with appellant's tax returns, Agent Hessler questioned appellant's claim on his 2011 and 2012 income tax returns that he was only a part-year resident of the District (a claimed status that resulted in a substantial reduction of his District taxable income).[1] Agent Hessler therefore initiated a criminal tax investigation of appellant for tax years 2009 through 2013.

Agent Hessler arranged to interview appellant in April 2014. On the appointed date, appellant's attorney appeared instead. The attorney explained appellant's part-year residency claim for tax years 2009 2013 by providing a packet of materials entitled "Proper Reporting by Mark Witaschek of 2011-2012 Income Based on Principle [sic] Residence/Domicile," which contained spreadsheets that provided dates and

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[1] When appellant filed his 2011 Form D-40 tax return, he subtracted $326,326 from his $423,020 in total income because he purportedly obtained the former amount during a period of non-residence that he alleged to have spent in New Hampshire. In 2012, appellant again claimed to be a part-year resident on his D-40 form and accordingly deducted $287,755 from his $362,649 total income.

addresses relating to time that appellant allegedly spent outside the District, in New Hampshire. In order to verify the information the attorney provided, and pursuant to D.C. Code § 47-4310(a)(1) (2015 Repl.), Agent Hessler crafted twenty-six summonses to third parties for bank, investment, residential, real estate, employment, school, and other records.

After the inception of this criminal case (in which appellant was charged with two counts of tax fraud/false statements based on tax returns he filed in 2012 and 2013, in addition to the tax-evasion charges on which he was eventually convicted), appellant filed a motion to suppress the documents obtained by the summonses. Analogizing the summonsed documents to the cell phone records at issue in *Carpenter v. United States*, 138 S. Ct. 2206 (2018), appellant argued that the summonses were overbroad and that he had a legitimate expectation of privacy in the records sought. Accordingly, he contended, obtaining the documents without a warrant violated his rights under the Fourth Amendment. The District opposed appellant's motion on the grounds that the documents were relevant and material to its investigation and that appellant did not have a legitimate expectation of privacy in them under the third-party doctrine as articulated in cases such as *United States v. Miller*, 425 U.S. 435 (1976).[2]

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[2] *See id.* at 443 ("This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed."); *see also Smith v. Maryland*, 442 U.S. 735, 744-46 (1979) (holding that telephone company's installation, at police request, of a "pen register" to record the numbers dialed from the telephone at Smith's home

The trial court denied the motion to suppress, concluding that (1) appellant had no reasonable expectation of privacy in any of the records that were produced because the documents were not his personal records, but instead were created, owned, or possessed by third parties, and, alternatively, that (2) even if appellant had a legitimate expectation of privacy in the documents, suppression was not an appropriate remedy because Agent Hessler had relied in good faith on the statute that authorized him to issue the summonses.

The matter proceeded to trial, at which the bulk of the testimony centered around the question of how, during tax years 2011 and 2012, appellant had allocated his time between the District of Columbia and New Hampshire, from which appellant had moved his family in 2009. Agent Hessler testified that he cross-referenced records from the hotel where appellant stayed while in New Hampshire with bank debit card records to calculate the maximum number of days that appellant could have spent in New Hampshire during the years in question. Agent Hessler determined that appellant could have spent a maximum of eighty-nine days in New Hampshire in 2011 and sixty-seven days in that state in 2012.

During his testimony, appellant told the court that he had used TurboTax, a tax preparation software program, to complete his 2011 and 2012 tax returns, and that the program advised him that he was a part-year District resident. Appellant testified that he had

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was not a search for which a warrant was required, because Smith "assumed the risk that the company would reveal to police the numbers he dialed," and had no legitimate expectation of privacy in the numbers dialed, which are used by the telephone company for a variety of purposes).

not known that he was only a part-year District resident before he started the return, but after completing it with TurboTax came to believe that the part-year-resident status entered on his returns was correct. He acknowledged, however, that TurboTax's designation of his status as a part-year resident was dependent upon information he had entered. Appellant also acknowledged that, because New Hampshire has no personal state income tax, he gained a financial benefit by claiming only part-year District residency.

Referencing the definition of "resident" set out in D.C. Code § 47-1801.04(42) (2015 Repl. & 2020 Supp.), the trial court explained that the term "resident" means a person who is domiciled in the District or who maintains a place of abode in the District for 183 days out of the year regardless of domicile, and that temporary absence from the District does not change a person's domicile or place of abode. The court further explained that a person is domiciled in the District if he lives there and has no intent to return to where he was formerly domiciled, and that to establish a change in domicile, a person must show physical presence outside the District, an intent to abandon the domicile in the District, and an intent to remain in the new domicile indefinitely. The trial court found that appellant "was domiciled in New Hampshire until July 16, 2009, when he moved his family to D.C., and that he remained domiciled here until sometime after April 2014 when he moved back to New Hampshire." In so finding, the court emphasized that appellant: (1) canceled his membership at a New Hampshire gym in June 2009, citing the move; (2) signed a lease for a residence in the District in July 2009; (3) in July 2009 moved "everything . . . he had" to the District using three

moving vans; (4) enrolled his children in District of Columbia public schools from 2009 to 2013; (5) obtained a District driver's license in December 2009 and registered vehicles in the District; (6) listed his house on Powder Hill Road in New Hampshire for sale in 2010 and sold it in 2011; (7) leased another residence in the District in February 2011 and extended that lease until 2015; (8) filed for divorce in October 2012 in the Superior Court, which found him to be a bona-fide resident of the District for at least six months before the filing of the petition; and (9) self-identified as living in the District on various forms.

The trial court acknowledged that if appellant "had a good-faith misunderstanding of the law or good-faith belief that he was not violating the law, then such belief would negate [the] willfulness" that is required for conviction of tax evasion. Examining the evidence pertinent to good faith, the court found that the New Hampshire address information supplied to OTR by appellant or his attorney was unsupported and not believable and was "an after-the-fact attempt [by appellant] to justify" his claim of part-year residency on his tax returns. The court also credited the testimony of a Manchester, New Hampshire, hotel employee that appellant told her he was being audited and "offered to pay a fee to use the hotel as his residency" after "his ex-wife had accused him of cheating on [his] taxes." The court deemed this as evidence of another attempt by appellant "to establish domicile after the fact . . . to justify or rationalize what he did [*i.e.*, claim part-year residency] on his 2011, 2012" tax returns. The court discredited appellant's explanation that the non-resident income he deducted for 2011 and 2012 was derived from a business enterprise for which he

paid New Hampshire tax, finding that appellant was employing "fuzzy math" and "accounting magic." The court found that appellant used the entity Nova Cura, LLC to conceal his income. The court also discredited appellant's TurboTax defense, finding that he had an incentive to claim residency in New Hampshire since it has no state income tax, and that appellant's financial background (he worked as a certified financial planner) gave him the wherewithal to consult with tax experts in the event of sincere confusion over his tax liability. Based on all these circumstances, the court concluded that appellant did not have "a good-faith misunderstanding or good-faith belief that [he] w[as] not violating the law when [he] filed [his] part-year residency." Rather, the court explained, the record showed that he "knew exactly what [he] w[as] doing, and these [acts] were willful, affirmative acts done in an attempt to evade or defeat the law[.]"

On appeal, appellant argues that the trial court denied his motion to suppress in contravention of the Supreme Court's decision in *Carpenter* and that the trial court applied the wrong standard in assessing whether he met the willfulness mens rea requirement for tax evasion.[3]

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[3] In reviewing the denial of appellant's motion to suppress, we "must view the evidence in the light most favorable to the prevailing party." *Bennett v. United States*, 26 A.3d 745, 751 (D.C. 2011) (quoting *Barrie v. United States*, 887 A.2d 29, 31 (D.C. 2005)). The scope of our review is limited: we defer to the trial court's factual findings unless they are clearly erroneous, and we review the court's legal conclusions de novo. *Green v. United States*, 231 A.3d 398, 405 (D.C. 2020) (citing *Hooks v. United States*, 208 A.3d 741, 745 (D.C. 2019)). We review de novo appellant's claim that the trial court erred in defining and applying the legal standard for willfulness. *In re L.B.*, 73 A.3d 1015, 1017 (D.C.

II

Carpenter raised the question of whether law enforcement's warrantless harvest of cell-site location information ("CSLI")—yielding 12,898 location points cataloging a defendant's movements over the span of at least 127 days—violated the Fourth Amendment. *Id.* at 2212. The Court emphasized that the CSLI at issue in *Carpenter* created a "detailed chronicle" and "comprehensive dossier of [Mr. Carpenter's] physical movements" and thus implicated privacy concerns "far beyond" those considered in *Smith* and *Miller*. *Carpenter*, 138 S. Ct. at 2220. The Court concluded in its "narrow" holding—which does "not disturb the application of *Smith* and *Miller* or . . . address other business records that might incidentally reveal location information"—that the historical CSLI at issue was governed by the Court's line of decisions that preserved a privacy interest in records that reveal an individual's physical movements over time.[4] *Id.* at 2220-22.

Appellant argues that his records—which he asserts were obtained through summonses that "sought disclosure of [his] personal, familial, political, professional, religious, and sexual associations" without reasonable suspicion and without the check of neutral magistrate—likewise created "a comprehensive chronicle of [his] past movements." *Id.* at 2211. The District argues that the summonsed documents fell squarely within the third-party doctrine as it developed prior

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2013) ("This court reviews de novo any errors of law in a trial court's judgment after a bench trial.").

[4] *See, e.g., United States v. Jones*, 565 U.S. 400, 415, 430 (2012) (five Justices concurring that longer-term GPS monitoring impinges on expectations of privacy).

to the 2018 decision in *Carpenter* (and as it continues to exist post-*Carpenter*).[5]

We conclude that we need not definitively decide whether, under *Carpenter*, all or some portion of the summonsed documents implicated a privacy interest in appellant's location information, because it is enough that, under the law in place at the time the summonses were issued to third parties in 2014, OTR could reasonably believe that issuance of the summonses pursuant to statute did not violate the Fourth Amendment. Thus, the records were admissible under the so-called good-faith exception to the exclusionary rule. *See United States v. Leon*, 468 U.S. 897, 919-26 (1984) (holding that "the extreme sanction of exclusion is inappropriate" where government agents relied on an objectively reasonable understanding that a search was lawful); *Jones v. United States*, 168 A.3d 703, 720 (D.C. 2017) (explaining that the good-faith exception "applies when the police conduct a search in objectively reasonable reliance on binding judicial precedent") (internal quotation marks omitted).[6]

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[5] *See Carpenter*, 138 S.Ct. at 2216-17 ("[W]hile the third-party doctrine applies to telephone numbers and bank records, . . . an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI.").

[6] *See, also, e.g., United States v. Castro-Aguirre*, 983 F.3d 927, 935 (7th Cir. 2020) (holding that defendants were not entitled to suppression of CSLI because the use of a court order to collect CSLI was issued prior to the decision in *Carpenter* requiring a warrant therefor, and thus the good-faith exception to the warrant requirement applied); *United States v. Carpenter*, 926 F.3d 313, 318 (6th Cir. 2019) (noting that while "[t]he Government's acquisition of Carpenter's CSLI violated the Fourth Amendment[,]" suppression was inapposite because "the FBI

Prior to *Carpenter*, the Supreme Court and this court repeatedly applied the third-party doctrine to the types of records at issue here. *See, e.g., Couch v. United States*, 409 U.S. 322, 324, 336 (1973) (holding that the petitioner lacked a reasonable expectation of privacy in bank statements, payroll records, and reports of sales shared with an accountant and subsequently sought by IRS summons in connection with a criminal tax investigation); *Donaldson v. United States*, 400 U.S. 517, 519-22 (1971) (noting that there was "no constitutional issue" as to whether employment records, 1099s, W-2 forms, and other documents pertaining to an employee taxpayer are the employer's records and obtainable by an IRS subpoena), *superseded by statute on other grounds; In re Richardson*, 759 A.2d 649, 654 (D.C. 2000) (rejecting the argument that "the disclosure of [respondent's] bank records pursuant to a

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agents relied in good faith on the [statute] when they obtained the data"), *on reh'g*, 788 F. App'x 364, 365 (6th Cir. 2019) ("[W]e reject as meritless Carpenter's renewed argument that the district court should have granted his motion to suppress."); *United States v. Chavez*, 894 F.3d 593, 608 (4th Cir. 2018) (observing that "[w]hile *Carpenter* is obviously controlling going forward, it can have no effect on Chavez's case" because "investigators in this case reasonably relied on court orders and the Stored Communications Act in obtaining the cell site records"); *accord United States v. Curtis*, 901 F.3d 846, 848-49 (7th Cir. 2018); *United States v. Joyner*, 899 F.3d 1199, 1204-05 (11th Cir. 2018); *United States v. Leyva*, No. 16-cr-20723, 2018 U.S. Dist. LEXIS 199327, at *7-8 (E.D. Mich. Nov. 26, 2018) ("[A]pplying *Carpenter* retroactively leads the Court to conclude that Leyva's Fourth Amendment rights were violated, but there is no remedy for her because of the good-faith exception."); *see also Davis v. United States*, 564 U.S. 229, 249-50 (2011) (holding that where the police conducted a search of Davis's vehicle pursuant to then-binding precedent that was later overruled, the exclusionary rule did not bar admission of the fruits of the search).

subpoena violated his Fourth Amendment right to be free from unreasonable searches and seizures"). Further, it was well-established under *pre-Carpenter case* law that the third-party doctrine applies to credit card records. *See, e.g., United States v. Graham*, 824 F.3d 421, 430 n.9 (4th Cir. 2016) (noting that while a credit card user "may not pause to consider that he is also 'conveying' to his credit card company the date and time of his purchase or the store's street address . . . he would hardly be able to use that as an excuse to claim an expectation of privacy if those pieces of information appear in the credit card company's resulting records of the transaction") (citation omitted), *abrogated on other grounds by Carpenter*, 138 S. Ct. 2206; *United States v. Phibbs*, 999 F.2d 1053, 1077-78 (6th Cir. 1993) (observing that defendant "did not have both an actual and a justifiable privacy interest in . . . his credit card statements"); *United States v. Wilson*, No. 1:11-CR-53-TCB-ECS-3, 2013 U.S. Dist. LEXIS 37783, at *18 (N.D. Ga. Feb. 20, 2013) ("[N]umerous courts have extended the [business records/third party] doctrine well beyond bank records and telephone numbers to, *inter alia*, credit card statements, electric utility records, motel registration records, and employment records[.]") (citation omitted).[7]

While there appears to be a dearth of *pre-Carpenter case* law specifically involving debit card (rather than credit card) records, no reason appears

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[7] *Cf. United States v. Schaefer*, No. 3:17-cr-00400-HZ, 2019 U.S. Dist. LEXIS 8505, at *10-13 (D. Or. Jan. 17, 2019) (declining to apply *Carpenter* to a string of online commercial transactions because defendant voluntarily conveyed his purchasing information to the company and thus assumed the risk that the company would share his purchases with law enforcement).

why OTR could not reasonably have regarded them as falling squarely within the third-party doctrine.[8] We therefore hold that the trial court did not err in reasoning that Agent Hessler and OTR acted in objectively reasonable good-faith in reliance on then-existing law in issuing the summonses, and in ruling that the documents need not be suppressed.

III.

The mens rea standard that is applicable in criminal tax cases requires proof "that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty." *Cheek v. United States*, 498 U.S. 192, 200-01 (1991); *see also Stedman v. District of Columbia*, 12 A.3d 1156, 1157 n.1 (D.C. 2011) (noting that "[a]lthough the District's tax code does not define 'willful,' a breach of the federal tax laws is 'willful' under the *Cheek* standard, and that the tax laws have been revised to "align them more closely with federal penalty provisions") (cleaned up). The defendant's knowledge of the duty can be negated if the factfinder credits a defendant's good-faith belief that he was not violating the law, even if that belief is objectively unreasonable. *Cheek*, 498 U.S. at 202. But the factfinder

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[8] *United States v. Frei*, No. 3:17-cr-00032, 2019 U.S. Dist. LEXIS 6436, *3-8 (M.D. Tenn. Jan. 14, 2019) (rejecting *Carpenter* claim and reasoning that "the only location-revealing data available in bank records is information identifying the vendor and the city where the defendant used his bank card," while "[i]n contrast, CSLI provides an 'all-encompassing record of the holder's whereabouts' that allows law enforcement to 'achieve[] near perfect surveillance, as if [there was] an ankle monitor [on] the phone's user') (quoting *Carpenter*, 138 S. Ct. at 2217-18).

can consider other objective evidence, such as form instructions, tax rulings, or other evidence showing the defendant's awareness of the relevant tax provisions, in determining whether the defendant's asserted belief was genuinely held. *Id.* "[The more unreasonable the asserted beliefs or misunderstandings are, the more likely the [factfinder] will consider them to be nothing more than simple disagreement with known legal duties imposed by the tax laws and will find that the Government has carried its burden of proving knowledge." *Id.* at 203-04.

In this case, the trial court's finding of willfulness was amply supported by the evidence, which the court found amounted to "overwhelming" proof that appellant was domiciled in the District during the periods in question. But appellant zeroes in on the following sentence in the trial court's twenty-seven-page ruling to argue that the court contravened *Cheek* and failed to apply the correct legal standard for willfulness:

> [I]f I discredit his claim of a good-faith misunderstanding or a good-faith belief, or if I find it to be unreasonable, and I consider it to be nothing more than simple disagreement with [known] legal duties, then I could find that the Government has carried its burden by proving knowledge and willfulness.

November 5, 2018, Transcript at 17 (emphasis added). Appellant asks us to read the italicized clause as evincing that the trial court thought, erroneously, that appellant's belief that he was only a part-year resident of the District had to be reasonable to be held in good faith.

We conclude that even if the court erroneously thought that appellant's belief needed to be reasonable to be held in good faith, the error was assuredly harmless. The court cited many reasons why it found that appellant did not believe in good faith that he was only a part-year resident of the District. The court's finding on the issue could not have been clearer: "So therefore, Mr. Witaschek, I do not credit your testimony. I do not find that you had a good-faith misunderstanding or a good-faith belief that you were not violating the law when you filed your part-year residency." Thus, whether any such belief might have been unreasonable was not a factor that affected the verdicts.[9]

For the foregoing reasons, the judgment of the trial court is

Affirmed.

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[9] *Cf. Douglas v. United States*, 859 A.2d 641, 642 (D.C. 2004) (reasoning that "it [wa]s plain enough that [the trial judge] credited the testimony of the complainant that Douglas was the aggressor"; that "[h]ad the judge 'instructed herself' correctly on the law of self-defense . . . her determination as fact-finder that Douglas's account was not credible would have led her to the same conclusion-that Douglas did not act in self-defense" and thus Douglas "suffered no prejudice from the judge's putative legal error").

JUDGMENT AND SENTENCE OF THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA (FEBRUARY 22, 2019)

SUPERIOR COURT OF
THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

v.

MARK WITASCHEK,
DOB: 12/16/1960

Case No. 2018 CRT 004321

Before: Darlene M. SOLTYS, Judge.

THE DEFENDANT HAVING BEEN FOUND GUILTY ON THE FOLLOWING COUNT(S) AS INDICATED BELOW:

Count	Court Filing	Charge
1	Trial By Court Guilty	Tax Fraud Willful Attempt to Evade or Defeat Tax
2	Trial By Court Guilty	Tax Fraud Willful Attempt to Evade or Defeat Tax

SENTENCE OF THE COURT

COUNT 1 FAX FRAUD WILLFUL ATTEMPT TO EVADE OR DEFEAT TAX. Sentenced to 180 days incarceration, execution of sentence suspended as to all but 8 day(s), *Unsupervised Probation for 5 years. $134.885.00 Restitution. $50.00 VVCA. VVCA Due Date 04/22/2019

COUNT 2 TAX FRAUD WILLFUL ATTEMPT TO EVADE OR DEFEAT TAX. Sentenced to 180 day(s) incarceration. execution of sentence suspended as to all but 8 day(s), *Unsupervised Probation for 5 year(s). $134,885.00 Restitution. $50.00 VVCA. VVCA Due Date 04/22/2019

INSTRUCTIONS FOR PAYING VVCA: Payable to Superior Court of the District of Columbia, 500 Indiana Ave., NW, Finance Office in room 4003 on the 4th Floor

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* Imprisonment to be served as follows: Defendant is to report to D.C. Jail at 1901 D Street S.E. with photo I.D. and a copy of this order on Saturday, March 23, 2019 no later than 6:00 PM and to be released Saturday, March 30, 2019 by 12:00pm.

The defendant is hereby committed to the custody of the Attorney General to be incarcerated for a total term of 8 DAYS. MANDATORY MINIMUM term of _____ applies.

The Court makes the following recommendations to the Bureau of Prisons Department of Corrections:

Defendant is hereby ordered placed on probation– *See* Page 2 of this order for Conditions of Probation *upon release from either the courtroom or incarceration. Defendant must report to 633 Indiana Avenue, N.W, 8th Floor, Washington. DC. By the next business day after release from jail or prison.*

Total costs in the aggregate amount of $100.00 have been assessed under the Victims of Violent Crime Compensation Act of 1996. And have not been paid.

In addition to any condition of probation, restitution in made part of the sentence and judgment pursuant to D.C. Code § 16-711.

/s/ Darlene M. Soltys
Judge

2/22/2019
Date

Entered by clerk pursuant to criminal Rule 32(1)

E. Thompson
Deputy Clerk

2/22/2019
Date

The Defendant is hereby placed on *Unsupervised Probation for a term of 5 year(s)

GENERAL CONDITIONS OF PROBATION

1. Obey all laws. ordinances, and regulations.

2. Report to CSOSA today and then for all appointments scheduled by your Community Supervision Officer (CSO).

3. Permit your CSO to visit your place of residence.

4. Notify your CSO within one business day of (A) an arrest or questioning by a law enforcement officer. (B) a change in your residence. or (C) a change in your employment.

5. Obtain the permission of your CSO before you relocate from the District of Columbia.

6. Do not illegally possess or use a controlled substance or any paraphernalia related to such substances (you may take law fully prescribed medication). You must not frequent a place where you know a controlled substance is illegally used or distributed.

7. You must drug test at the discretion of CSOSA. in the event of illicit drug use or other violation of conditions of probation, participate as directed by your CSO in a program of graduated sanctions that may include periods of residential placement or services.

8. Participate in and complete CSOSA's employment/academic program, if directed by your CSO.

9. Participate in and complete other CSOSA's programs as identified through CSOSA's risk and needs assessment.

10. Satisfy all court imposed financial obligation(s) (fines, restitution. Victim of Violent Crime Act assessments, etc.) to which you are subject. You must provide financial information relevant to the payment of such a financial obligation that is requested by your CSO. A payment plan will be established by your CSO so that you will be in a position to pay your court imposed financial obligation(s) within 90 days prior to the termination of your probation.

SPECIAL CONDITIONS OF PROBATION

1. Cooperate in seeking and accepting medical, psychological or psychiatric treatment in accordance with written notice from your CSO.

2. Restitution of $134,885.00 in monthly installments of $2,250.00 beginning April 1, 2019

The Court will distribute monies to: DC Office of Tax and Revenue: Attn. Angela Coleman PO BOX 75520 Washington, D.C. 20013

- Payments are to be paid monthly over a period of 60 months. The 60th month requires a double payment to be made, so that the balance is satisfied.

TRANSCRIPT OF SENTENCING
(FEBRUARY 22, 2019)

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, CRIMINAL DIVISION

DISTRICT OF COLUMBIA,

v.

MARK WITASCHEK,

Defendant.

Docket Number: 2018 CRT 004321

Before: Hon. Darlene M. SOLTYS, Associate Judge.

[February 22, 2019 Transcript, p. 2]

Proceedings

(This transcript contains the ruling portion of the hearing only.)

Findings of the Court

So the defendant is before the Court for sentencing on two counts of attempt to evade or defeat taxes for the tax year 2011 and 2012. The defendant was found guilty by this Court on November the 5th of 2018 of the two counts, and he was acquitted of two counts pertaining to making a false and fraudulent statement for those same two tax years.

Before today's sentencing I reviewed my notes, and my explanation as to why I found the defendant not guilty on two counts, and guilty on two counts, and the evidence to the Court demonstrated beyond a reasonable doubt that as to the tax years 2011 and 2012 the defendant acted affirmatively in an attempt to evade or defeat a tax or payment thereof. An outstanding tax deficiency is due, and owing, and the defendant acted willfully.

I did not credit the defendant's testimony, and I did not find that he had a good faith misunderstanding, or a good faith belief that he was not violating the law when he filed part-year resident.

So the factors that the Court has to consider before imposing a sentence include, number one, the nature and circumstances of the offense. Here there was an attempt to evade or defeat a tax, and the Court determines to be pretty egregious, that he claimed 77 percent one year, and 80 percent the next year of his income to be attributed to New Hampshire residency, when, in fact, he was staying at the Hilton, and he was claiming falsely to be staying in New Hampshire at other locations.

And, so, frankly, society is harmed when people do not pay their fair share of their taxes. Tax cheats hurt all of us. Society benefits from taxes in the form of schools, and court systems, court employees, law enforcement, national defense, entitlements. There's an endless list of benefits that we as a society reap when people pay the appropriate amount of taxes.

Number two, I considered the history and the characteristics of the defendant. The defendant is

a 57-year-old man who has no prior criminal history. He has a wife and children to support, he has a business to run, but as a financial planner, I found that he should have known better.

So, I think that some jail time is warranted, but not so much that it would interfere with Mr. Witaschek's livelihood, and Mr. Witaschek's ability to remain the breadwinner in his family, and a gainfully employed productive member of society.

The Court considers a need for a sentence to reflect the seriousness of the offense to promote respect for the law, to provide a just punishment, to afford adequate deterrence, to protect the public, and to provide the defendant with vocational educational training, the latter to be non-existent here.

And, so, I've tried to determine what I thought would be an appropriate sentence. The Government asks for a sentence that the Court finds to be not warranted, and, so, the Court thinks that a sentence in which Mr. Witaschek spends seven nights in jail would be the appropriate sentence in this case. That would mean an eight-day sentence.

I am prepared to allow Mr. Witaschek to self-report at a time when he can make arrangements to serve the time in jail.

I turn next to the amount of restitution that the defendant has to pay. I am not going to impose a fine because I find that the amount of restitution is adequate to impose the appropriate sentence in this case.

The amount of restitution that the defendant has to pay is $134,885, and I will explain to everyone how I came up with this. This is not the amount that the Government proposes, and it is not the amount that Mr. Witaschek proposes.

So I looked at very carefully Mr. Egonjobie's (phonetic sp.) form both—all three of them that were submitted in this case.

So I understand that what Mr. Egonjobie did on his form he took the 47,000—I'm sorry he took the $46,736, he added to that the $325,326 that was the 77 percent of the $423,020 that Mr. Witaschek claimed was his part-time resident income in the State of New Hampshire.

Mr. Egonjobie then added the $3,950 as under-reported commission; added in the $4,188, which was the prorated five exemptions, and then subtracted the $8,375 for the five exemptions that he had, and Mr. Egonjobie came up with a revised taxable income in the amount of $372,825, with a revised tax liability of $31,725, resulting in a tax deficiency of $28,953.

So then Mr. Egonjobie took the revised tax liability of the $31,725 and gave him credit for the child-care expenses of $1,236 to come up with a balance due of $30,489 from which Mr. Egonjobie calculated the 75 percent. Fraud, penalty, and the ten percent interest compounded daily.

Mr. Witaschek on the other hand provided the Court with a revised 2011 D-40 in which Mr. Witaschek reported his wages to be $229,107; business income in the amount of $1,694, and

capital gains in the amount of $192,219, which totals $423,020.

Mr. Witaschek then took the federal adjusted gross income from line 37 of his 1040, which reduced his income by an amount equal to the alimony payment that he claimed that he made, plus $23 of self-employment tax, and put that on line 15 as his D.C. adjusted gross income to be $322,997. From there he itemized his deductions of $85,770, plus the five-family-member exemptions of $8,375, which totaled $94,145, subtracted from the D.C. adjusted gross income on line 15, equals $228,852. His tax in Mr. Witaschek's paperwork ends up being the $16,469.

Now, I do not credit Mr. Egonjobie's calculations because Mr. Egonjobie did not take into account the first adjustment of the alimony, and the second, the effect of the itemized deductions.

Mr. Witaschek only took half of the amount of the itemized deductions from his federal form to reduce his D.C. tax income to the $46,736, and the point is that Mr. Egonjobie's addition of that 77 percent, or, rather, the $326,326, was unfair because it did not-was not reduced by the remaining 50 percent of the itemized deductions.

So, therefore, by the Court's calculation the 2011 tax owed was the correct amount that Mr. Witaschek provided, which was $16,469. The penalty on that, 75 percent penalty, which the Court finds to be fair, and reasonable, and not excessive under the Eighth Amendment, is $12,351. Ten percent interest compounded daily from October the 15th, 2012, which was the date

that he filed his taxes through March the 16th, 2018, which is the date that the complaint was filed, totals $11,844.

So when I add $16,469, $12,351, and $11,844, I come up with a total payment owed as restitution for the 2011 tax year is $40,664.

All right. Moving on to 2012, I do not credit Mr. Egonjobie's chart for the same reason; that is, the revised taxable income of $578,673 did not take into account the itemized deductions that Mr. Witaschek took on his federal 1040.

And, also, because Mr. Egonjobie disallowed $42,500 from the Schedule C for the very first time, the Court does not consider it to be fair that after the Court considered—asked the Government to recalculate the interest and penalty so that it ended when the complaint was filed, that Mr. Egonjobie would for the first time disallow a deduction on a federal form, and recalculate it making a higher tax liability. That could have been part of the Government's case, and it's not appropriate to do it after we've already had one sentencing hearing.

However, I also do not credit Mr. Witaschek's recalculated 2012 D-40 because under his analysis he only listed $69,626 as capital gains, and the evidence in the trial clearly showed that for that year Mr. Witaschek received as income the amount of $262,381 as shown by the second 1099 miscellaneous form; therefore, I recalculated his tax liability in the following manner.

The wages according to the W-2 were listed at $337,797. There was business loss in the amount

of $44,774, and there was a capital gain of $262,381, making a federal adjusted gross income for that year to be $554,404. That became his D.C. adjusted gross income, which would be on line 15 of the D-40.

For that year, according to the Schedule—for the itemized deductions for 2012 attached to his 1040 that are listed on the Schedule A, his itemized deductions totaled $33,600.

So I used that as his itemized deductions, noting that there were no D.C. taxes that were withheld, which, therefore, did not need to be put back in, plus the exemptions five times 1,675 equals 8,375, added together makes his—and then subtracted from line 15 makes the D.C. taxable income for 2012 to be $513,429. His taxes for that year then are calculated to be $43,177.

I had to recalculate his taxes for that year using the Schedule I that's listed in the 2012 tax booklet, in which the formula is, I believe, the first 350,000 is $28,500, and the remaining over his—multiplied by 8.75, but I can't find my paperwork as to how I came up with the tax of $43,177.

Giving him the credit for the childcare expenses, as Mr. Egonjobie did in the amount of $1,060, also giving him a credit for the $2,620 paid to New Hampshire, makes for a total payment to be $39,497.

75 percent of that is $29,622. Ten percent interest compounded daily from April the 15th, 2013, which is when he filed this tax form until March the 16th, 2018, which is when the complaint was filed is $25,102.

So when I add $39,497, plus $29,622, plus $25,102, I come up with $94,221. When I add $94,221 from 2012 to $40,664 from 2011, I come up with $134,885. That's the amount of restitution that I'm ordering in this case.

All right. Mr. Witaschek, when would you like to report?

(This concludes the requested portion of the hearing. Other matters were reported, but are not transcribed herein.)

VERDICT DELIVERED BY JUDGE SOLTYS FOLLOWING BENCH TRIAL (NOVEMBER 5, 2018)

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, CRIMINAL DIVISION

DISTRICT OF COLUMBIA,

v.

MARK WITASCHEK,

Defendant.

Criminal Action Number: 2018-CRT-004321

Before: Hon. Darlene M. SOLTYS, Associate Judge.

[November 5, 2018 Transcript, p. 3]

THE DEPUTY CLERK: Calling on Your Honor's calendar, the United States versus Mark Witaschek, 2018-CRT-4321.

Parties, please step forward and identify yourselves for the record.

MS. LEIGHTON: Good afternoon Your Honor, Bayly Leighton on behalf of the District.

THE COURT: Good afternoon.

MR. HESSLER: Good afternoon, Your Honor, Special Agent James Hessler.

THE COURT: Good afternoon.

MR. MCEACHERN: Good afternoon, may it please the Court, Your Honor, Howard McEachern on behalf of Mark Witaschek here before the Court.

THE COURT: Good afternoon to the two of you.

Are there any preliminary matters before I deliver a verdict?

MS. LEIGHTON: Not for the Government, Your Honor.

MR. MCEACHERN: No, Your Honor.

THE COURT: All right.

The Court has had an opportunity to evaluate all the evidence and testimony that was presented over three days last week, and I will now explain my findings and my reasoning behind my verdicts. I will address count three, the fraud and false statements first.

The elements of the offense of fraud and false statements, each of which the Government must prove beyond a reasonable doubt are that Mr. Witaschek willfully made and subscribed, delivered or disclosed a D.C. tax return required under the D.C. tax code for a particular year.

The tax return made and subscribed, delivered or disclosed by Mr. Witaschek was false as to a particular matter or matters in the return, and Mr. Witaschek did not believe the matter or matters were true or correct. This requires a finding of willfulness.

The definition of willfulness is as follows: To prove that a defendant acted willfully, the Government must prove beyond a reasonable doubt that he acted knowingly, intentionally and deliberately.

The Government must prove that a defendant acted consciously or voluntarily, not inadvertently or accidently. A good-faith misunderstanding of the law or a good-faith belief that one is not violating the law is not willfulness.

That last statement comes from the Supreme Court case of Cheek (phonetic.) Cheek is important because it explains in the context of tax laws, due to the proliferation of tax statutes and codes, it can sometimes be difficult for the average citizen to know and comprehend the extent of their duties and obligations.

Exhibit number 9, and Special Agent Hessler's testimony explains that the amount of the underreported income for 2011 is $81,000.00. And that is broken down into the $50,000.00 alimony payment from his ex-wife; the $12,527.00, which was part of the settlement from his separation from the Harber Group (phonetic), and the $18,473.00 in commissions from the sale of insurance policies.

I find Mr. Witaschek's explanation for the $50,000.00 to be reasonable. That is, Mr. Witaschek paid his ex-wife alimony and not the other way around. This was a repayment for a loan, as he testified, and I accept the explanation. I accept that explanation.

I also accept the explanation that the $12,527.00 was reported in 2010 on his federal 1040 because he received a W-2 and a 1099 for the full amount of the settlement in that year. That testimony was not rebutted by the Government.

I understand that it was income that was never reported to the District of Columbia. But the District of Columbia did not charge Mr. Witaschek with evading and defeating for the 2010 tax year. As to the $18,473.00 in commissions, he reported $14,523.00 on his federal, schedule C, and both Government's exhibit number 9 and number 40 explained that the underreported income is $3,950.00

His explanation Is that he gave the commissions back to Lorraine and Rob as bonuses, although his schedule C for that year only reports the $4,624.00 as their bonus. There are no 1099s for Lorraine and Rob in 2011 as there are for 2012.

When I consider that explanation, that is, that they were bonuses paid to them, and that the amount is only $3,950.00, which was the underreporting, I cannot find that omission to be willful because maybe it was or maybe it wasn't a good-faith mistake. And if that's the case, then that means that I have a reasonable doubt.

Then in closing arguments, the Government expanded its argument to include that the amount listed on line 7 of the D 40 for the 2011 tax year, which is $326,326.00, which is what he claimed as income received during the period of non-residency, to also be a false statement.

I am not going to entertain that argument because it was clear from the presentation of evidence and Government's Exhibit number 9 and number 40, that the underreported amount was the $81,000 .00. Therefore, I find the defendant not guilty on count three.

As to count four, which is the fraud and false statement, the amount in question is $195,941.00, which is the difference of $262,381.00 minus $69,626.00, plus $3,186.00, there were two 1099s issued by McLean Asset Management (phonetic) in 2012 for Mr. Witaschek, Defendant number 5, exhibit number 5 in the amount of $69,625.00 and Defendant's number 6 and Government's number 28, in the amount of $262,381.00.

Mr. Witaschek claimed that he did not know about the greater amount 1099 until 2014. He did report the lesser amount, the $69,625.00 on both the 1040 and the D 40, and it is clear that that $69,000.00 amount was part of the $262,381.00, and not in addition to. So it does seem to the Court that the lesser amount 1099 was issued in error.

Should Mr. Witaschek have realized that and self-reported to McLean Asset Management that they issued an incorrect 1099 because he should have realized he had an extra $193,000.00 in his bank accounts than what had been reported to him on his yearend earning statements, that's not an insignificant amount that people are likely to overlook.

On the other hand, the lesser amount 1099 does not appear to be a fake or a forgery. And there was no evidence from the Government to rebut Mr. Witaschek's testimony that he only received the lesser amount 1099 in 2012, which I have already said he did report on his 1040 and D 40. So could this have been a good-faith mistake, perhaps.

Then as to the amount of the $3,186.00, which is the amount not reported on the schedule C, I noticed that the schedule C for 2012 claimed a net loss in the amount of $44,774.00, on gross receipts of $18,778.00.

There were two 1099s offered by the defense for Rob and for Lorraine showing that they received $17,870.00 as bonuses. So the question then is was it a good-faith mistake to not account for the $3,186.00 on the schedule C, especially in this case where the losses outnumber the gross receipts. I cannot find that that behavior was willful.

As I said before, I'm not entertaining the Government's amended argument that I should consider the amount of line 7, which is $287,755.00 listed as income received during the period of non-residency for the same reason I gave before.

So therefore I have a doubt as to whether the amount of the underreporting of the $195,941.00 was a good-faith mistake. Therefore, I cannot find it to be willful, and therefore, I must find the defendant not guilty on count four.

I'll address counts one and two, which are the attempt to evade and defeat together. It is the same underlying affirmative act for 2011 and 2012. The elements are as follows:

That Mr. Witaschek acted affirmatively in an attempt to evade or defeat a tax or payment thereof; an outstanding tax deficiency is due and owing, the defendant, Mr. Witaschek acted willfully, same definition of willfulness applies.

There are some other definitions which I have considered. The definition of a resident every resident in the District of Columbia who is required to file a federal income tax must also file a tax return in the District of Columbia.

"Resident" means an individual domiciled in the District at anytime during the tax year and every other individual who maintains a place of abode within the District for an aggregate of 183 days or more during a tax year, whether or not the individual is domiciled in the District.

Residency and abandonment of residency. In determining whether an individual is a resident, an individual's absence from the District for temporary or transport purposes shall not be regarded as changes in his domicile or place of abode.

A person is domiciled in the District if he lives in the District and has no fixed or indefinite intent to return to and make his home where he was formally domiciled.

To establish a change of domicile, a person must demonstrate both one, physical presence, and two, an intent to abandon the former domicile and remain in the new one for an indefinite period of time. Bartholomew explains that the burden of proving these two elements is on the person claiming a change in domicile at page 318.

And finally, the definition of "domicile". A person is domiciled in the District if he lives in the District and has no fixed or definite intent to return to and make his home where he was formerly domiciled.

So the Government's theory here, for both, is that Mr. Witaschek was not a part-year resident of New Hampshire. Therefore, not only was he ineligible to so claim, but doing so was a willful affirmative act on his part. So I make the following findings of fact:

On July 16th, 2009, Mr. Witaschek and his then-fiancee moved to the District of Columbia where they signed a two-year lease for property on University Terrace, a lease that would have run between July 15th, 2009 and July 31st, 2011.

On October the 25th, 2009, Mr. Golo (phonetic) worked on an empty house in Bedford, New Hampshire. On December 16th, 2009, Mr. Witaschek obtained his D.C. driver's license. On March the 5th, 2010, the real estate agent 1sted that empty house in Bedford, New Hampshire, where Mr. Witaschek and his family had previously resided.

On July 2nd, 2010, Mr. Witaschek changed the vehicle title. On November 16th, 2010, Mr. Witaschek and his fiancee married in the District of Columbia.

On February the 1st, 2011, Mr. Witaschek signed two year-lease for property at 3114 Q Street, a lease that would have run between February the 1st, 2011 and January the 31st, 2013.

On or about February the 2nd, 2011, Mr. Witaschek and his three kids moved out of that rental property on University Terrace.

On May 6th, 2011, the Bedford New Hampshire home was sold. On February the 1st, 2012, Mr. Witaschek amended the lease at 3114 Q Street for

a lease that would have run between January 31st, 2013, and January 31st, 2015.

On October the 2nd, 2012, Mr. Witaschek filed for divorce here in the District of Columbia at the Superior Court.

Thirteen days later on October the 15th, 2012, Mr. Witaschek filed his 2011 taxes claiming part-time residency in New Hampshire and submitting a W-2 with the New Hampshire address, that was his office address.

On March the 2nd 2013, Mr. Witaschek moved out of 3114 Q Street. On April the 15th, 2013, Mr. Witaschek filed his 2012 taxes, again, claiming that he was a part-time resident in New Hampshire and proffering a W-2 with the New Hampshire address, that is his work address.

On October 10th, 2013, the divorce was final and findings were made, including the fact that Mr. Witaschek was a bona fide District of Columbia resident.

Starting in January 2014 and again, in April 29, of 2014, Mr. Witaschek asked whether he could use the Hilton as his address in New Hampshire.

So I find that Mr. Witaschek was domiciled in New Hampshire until July 16th, 2009, when he moved his family to DC, and that he remained domiciled here until sometime after April 2014 when he moved back to New Hampshire.

The following evidence, which I credit, supports that he was domiciled here, and that he did not change his domicile or his residency back to New Hampshire at anytime during 2011/2012.

There is the letter to the gym, Government's Exhibit number 38; there is the lease for University Terrace, number 11; there is the school application for Natasha, Government's 44; there is the DMV driver's license application, Government's Exhibit 34.

DMV vehicle title and registrations, Government's 36 and 37; the lease for Q Street, Government's 16; the extension lease for Q Street, Government's 18, testimony from Mr. Golo that Mr. Witaschek moved from New Hampshire to the District of Columbia with everything that he had in three moving vans and another vehicle.

The divorce decree, Government's Number 12, which includes findings on page two that Mr. Witaschek is a bona fide resident of the District of Columbia, residing in the District of Columbia and has been a resident of the District of Columbia for more than six months preceding the filing of his complaint.

Testimony from Ms. Viz (phonetic) that he listed his house on Powder Hill and that she sold it, Government's 15; testimony that he sent his kids to D.C. Public Schools from Ms. Becker from 2009 at least through 2013.

I note that he claimed expenses for business use of the home in DC for both the 2011, 2012 tax years on federal 1040s. I saw numerous checks with DC addresses listed on them. There is an EFT authorization form with a DC address, Government's 33.

Either one or the other of the DC addresses are listed all over the paperwork, including a W-4

that Mr. Witaschek submitted on October 31st, 2009, Government's 36.

So if I believe that he had a good-faith misunderstanding of the law or a good-faith belief that he was not violating the law, then such belief would negate willfulness, and I would have to find him not guilty.

So the evidence that he proffered from which the Court considers whether or not there was a good-faith misunderstanding or a good-faith belief are:

That Turbo Tax recommended that he file, as he did, that's Defendant's Exhibits numbers 2 and 3. That he had ties to New Hampshire, that is, he was a longtime resident and he had been domiciled there for years.

That he maintained an office in New Hampshire to serve his clients. That the majority of his clients were based in or around New Hampshire. That he believed that his income was generated in New Hampshire.

That he maintained two family homes, although one of those was sold, and that he made frequent and confirmed travel to New Hampshire, including 44 nights at the Hilton in 2011, 23 nights at the Hilton in 2012.

And Government's number 5, which he prepared and created, a memorandum, and he endorsed it with his first attorney to try to persuade the Office of Tax and Revenues that his filings were correct.

On the other hand, if I discredit his claim of a good-faith misunderstanding or a good-faith belief,

or if I find it to be unreasonable, and I consider it to be nothing more than simple disagreement with no legal duties, then I could find that the Government has carried its burden by proving knowledge and willfulness.

So the facts on this side are as follows: He was incentivized to try to reduce his tax burden by claiming that he was a part-time resident of New Hampshire because New Hampshire has no personal income tax.

His career as a certified financial planner includes continuing education classes in both ethics and tax. I know that he claimed approximately $98,000 .00 in attorneys and accounting fees. From that, I gather that he should have known how to consult with a tax expert if he had tax questions.

On the schedule C for 2012, he listed legal and professional expenses in the amount of $42,500.00. On his schedule A when he itemized for 2011, he listed attorney and accounting fees in the amount of $56,312.00.

There is overwhelming evidence that he was domiciled here; moving his family here; taking advantage of his residency status by sending his kids to D.C. Public Schools; obtaining D.C. driver's license; vehicle registration; utilizing the court system by filing an October the 2nd, 2012 for a divorce in which he asserted that he lived here for more than six months.

I considered what the D 40 actually says, from what month to what month were you part year. And it is clear from the form that they are asking

when did a person move in and when did a person move out of the District of Columbia.

I consider this that Mr. Witaschek was not an independent certified planner. That he was a W-2 employee with McLean Asset Management, which is in Virginia-based corporation where he had an office.

Then I consider whether or not there is a basis to discredit or to credit his testimony that he relied in good faith on the Turbo Tax recommendation.

And here I find that there is a strong basis to discredit his testimony that he relied in good faith on the Turbo Tax recommendation. And here I make the following observations:

In Government's Exhibit number 5, Mr. Witaschek claimed to be staying at his home that had been on the market. He claimed between January and May 2011 that he stayed there four times for a total of 63 days.

I considered the pictures of the house, the empty house, the testimony of Ms. Viz and Mr. Gola that they didn't see Mr. Witaschek, and I also looked at the financial records.

What I saw persuaded me that Mr. Witaschek did not stay at that Powder Hill Road address for the 63 days that he claimed that he did.

Notably, I saw that on January the 20th, 2011 and February the 17th, 2011, his debit card made a withdrawal at the Manchester airport ATM between concourse A and concourse B on days that Mr. Witaschek checked out of the Hilton.

I know that there was an ATM that was closer to Mr. Witaschek's office because I saw that he made a withdrawal from that, which was in the 100 block of his office. And the fact that there were these two withdrawals on these two dates persuade me that he was flying back to the District of Columbia where his home was.

These coincide, the days thereafter, are the days that he said that he was staying in New Hampshire. Then I looked at those four time periods where he said he was staying in New Hampshire, and I saw numerous debit charges here in the District of Columbia and the surrounding areas.

Including, ski weekend at Snowshoe in West Virginia over President's Day weekend, and a purchase from a store in McLean. And then I looked to see whether or not there were any charges in New Hampshire during the time period that he said he was staying in New Hampshire, and I didn't see any.

So I don't credit his assertion that he was living or staying or residing or living part time at the Powder Hill property. But then when this property was sold in May of 2011, Mr. Witaschek had to present to the Government, another address.

Here, I credit the testimony of Special Agent Hessler that Mr. Witaschek first claimed that he was staying at 1555 River Road, but that turned out not to be supported by his former client.

So then Mr. Witaschek blamed his first attorney for getting the address incorrect and claimed that

it was actually 55 River Road. That just doesn't sound believable.

But I considered the financial records. Are those stays that he presents on Government's Exhibit number 5 at 55 River Road corroborated or disproved by the financial records.

I looked at the seven dates that he claimed that he was staying at 55 River Road for a total of 39 nights, similarly, on one occasion, July the 27th, 2011, I found that his debit card—

I saw that his debit card withdrew money at the Manchester airport ATM on the date when he checked out of the Hilton, that persuades me that he was returning back to the District of Columbia.

On the seven occasions that he claimed to be staying at 55 River Road, the financial records show the same thing as before. One, there was no information. For the other six, the debit card was shown to have been used—

I should say, multiple debit cards, were used in this area, including, there were three of those time periods where there was ATM withdrawals at an ATM on Wisconsin Avenue and another time in which there was an $11,000.00 transfer made at an ATM in Georgetown.

There was activity in North Beach, Maryland. At the same time, there just weren't charges in New Hampshire. So I do not credit Mr. Witaschek's assertion that he was staying at 55 River Road once the 50 Powder Hill property was sold.

And then I see on Government's number 5 that Mr. Witaschek claimed 304 Beam Road (phonetic)

from May 2011 through the end of 2012 as his principle residence, slash domicile. And that is just unreasonable under any stretch. That property was rented out.

So I do not credit what I believe to be an after-the-fact attempt to justify his actions that were proffered in Government's Exhibit's number 5.

I also considered the testimony of Ms. Shelley (phonetic) at the hotel. January 2014, Mr. Witaschek first asked if he could use the hotel as his address at a time that he did not yet know that he was under investigation.

But in April, he did find out that he was under investigation by OTR, and he did renew his request. And I do credit her testimony that Mr. Witaschek did tell her that his ex-wife had accused him of cheating on taxes and that he was being audited, and that he offered to pay a fee to use the hotel as his residency.

That suggests that he was trying to establish domicile after the fact to use to show the Office of Tax and Revenue to justify or rationalize what he did on his 2011, 2012, D 40.

I also consider the testimony of Tim Riley, and I credit his testimony that Mr. Witaschek asked to be paid by a 1099 into a trust for privacy as an independent contractor. And the law firm had said that they could not do this. This tells me that Mr. Witaschek was trying to shield his assets.

That is consistent with the representations that Mr. Witaschek made on Government's Exhibit number 30 to support the lease application at

University Terrace, that is, that he had an interest in Harber Group in the amount of 1.5 million that would be coming to him, as well as deferred income from the Harber Group, which would flow through his corporation, NOVO Cura (phonetic), which was owned by Gabriella—which he said was owned by Gabriella.

This also shows me that he was trying to conceal his income.

(Pause in the proceedings.)

THE COURT: I also saw that Mr. Witaschek attached a schedue U to his D 40 in 2011, in which he ran his W-2 income through NOVA Cura, and in 2012, he ran his W-2 income through his own name when he filed the New Hampshire business enterprise tax.

That was not enterprise income, and I find that, I believe that Mr. Witaschek did it to create a tax assessment, that is to show that he paid some tax when in fact, that was a tax of less than one percent. I also do not consider Defendant's Exhibit number 9, in which he claims that there was a cost-basis analysis that was presented to OTR to justify his filings.

I find that that doesn't make logical sense that there was not a cost basis to deduct from the gains that were reported on the 1099 and that he did not have a capital gain overreport.

I find that this was just some fuzzy math and some accounting magic. I also considered that on Government's Exhibit Number 26, on the W-4, he

put his work address on the form, the New Hampshire address so that McLean Asset Management would not deduct any state income taxes, and that he did so on April 15th, 2011.

And finally, I look at Government's Exhibit number 1 on line 7, in which he claimed $326,326.00 as income that was received during the period of nonresidency or 77 percent. And on Government's Number 2, where he claimed $287,755.00 as income received during a period of nonresidency or 80 percent.

But the D 40 asks, when are you a part-year resident, from what year to what year. There is nothing about being a part-time resident. You can make Turbo Tax say whatever you want it to say according to the information that you provided to it.

And here, these last findings that I have made, in which I discredit exhibit number 5, which I find that it was created after-the-fact and is not credible, as well as everything else that I have listed:

About why he would have been incentivized to use New Hampshire; his career training; the $98,000 .00 in attorneys fees, which shows me that he should have known how to consult with tax experts if he really had a legitimate question; the overwhelming evidence that he was domiciled here, all of that persuades me that he was trying to conceal and protect his earnings from legitimate D.C. personal income tax obligations.

So therefore, Mr. Witaschek, I do not credit your testimony. I do not find that you had a good-faith

misunderstanding or a good-faith belief that you were not violating the law when you filed your part-year residency.

I don't find the Turbo Tax defense to be reasonable at all. I find that you knew exactly what you were doing, and these were willful, affirmative acts done in an attempt to evade or defeat the law, the tax law or payment thereof, and that there are outstanding tax deficiencies which you are due in owing for both 2011, 2012, and therefore, I find you guilty of counts one and two.

So shall we set a sentencing date?

MS. LEIGHTON: Yes, please.

THE COURT: How much time would you like?

MR. MCEACHERN: I'd just like to ask, what type of timeframe are you thinking, Your Honor, given that Thanksgiving is in about two weeks, are we thinking December?

THE COURT: Whatever the parties want. If there are motions that you need to file, however much time you'd like, that is fine.

(Pause in the proceedings.)

MR. MCEACHERN: The other thing we would ask for after consultation with Ms. Leighton, that first full week in the new year, I believe that's—January 7th is that first full week of January—

THE COURT: That's fine.

MR. MCEACHERN: So in that week, I was going to ask for the 9th or 10th—8th, 9th or 10th, I'd prefer to ask for the 9th, but I'm flexible any of those dates

that the Government and the Court can accommodate.

THE COURT: Ms. Leighton.

MS. LEIGHTON: Let me just make sure that this agent is available.

(Pause in the proceedings.)

MS. LEIGHTON: At the Court's pleasure.

THE COURT: All right. We'll set it for January the 9th then. And we'll set it for 10:00 a.m. or 12:00 p.m.

Do you have a preference?

MR. MCEACHERN: Court's brief indulgence.

Actually, noon will be better for me, Your Honor.

THE COURT: All right. Then we'll set it for noon. The sentencing will take place in courtroom JM-14.

MR. MCEACHERN: Very well. Thank you.

THE COURT: Thank you all. Good luck to everyone.

MS. LEIGHTON: Thank you. Your Honor, may I just leave the binder with Ms. Kornegay.

THE COURT: Yes, and I'll give Ms. Kornegay the defendant's exhibits that I have, and then she'll give everything back once it's all scanned and put under seal.

MR. MCEACHERN: I explained to Mr. Witaschek that there was an e-mail that was sent, I believe it was Ms. Kornegay, that indicate that these could be done under seal—

THE COURT: I filed it—I've signed an order to that effect that everything will be under seal.

MR. MCEACHERN: Thank you.

THE COURT: I find that the sealing is necessary because there are numerous bank account numbers as well as social security numbers for many individuals that are contained in these documents.

MR. MCEACHERN: May we be excused, Your Honor?

THE COURT: You may. Thank you.

(Whereupon, the proceedings were concluded.)

ORDER OF THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA DENYING MOTION TO SUPPRESS (OCTOBER 25, 2018)

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA TAX DIVISION

DISTRICT OF COLUMBIA

v.

MARK WITASCHEK,

Defendant.

2018 CRT 004321
Trial Date: 10/29/2018

Before: Darlene M. SOLTYS, Judge.

This matter is before the Court upon consideration of *Defendant's Motion to Suppress Evidence Obtained by Administrative Summonses in Violation of the Fourth Amendment* filed by Defendant, through counsel, on October 19, 2018, and the *Opposition* filed by the Government on October 23, 2018. For the reasons explained herein, the Motion is DENIED.

FACTUAL BACKGROUND

On March 16, 2018, Defendant Mark A. Witaschek was charged with two counts of attempts to evade or defeat tax in violation of D.C. Code § 47-4101(b) (2005

Supp.) for the tax years 2011 and 2012, and two counts of fraud and false statements in violation of D.C. Code § 47-4106(c) (2005 Supp.) for the tax years 2011 and 2012. Defendant seeks to suppress information obtained pursuant to twenty-six administrative summonses which were issued by the District of Columbia Office of Tax and Revenue ("OTR") pursuant to D.C. Code § 47-4310(a)(1) ("[T]he Mayor may summon any person to appear and produce all books, records, or other data which may be relevant or material to an inquiry" regarding "the correctness of the return, making a return where none has been made, determining the liability of a person for a tax imposed under this title, collecting tax," or for other reasons.). Defendant claims that the OTR summonses were issued without probable cause or reasonable suspicion and that the Supreme Court's recent decision in *Carpenter v. United States*, 138 S. Ct. 2206, 2221-23 (2018), requiring the Government to obtain a warrant in order to obtain cell site location information which reveals a person's physical location and movements, for which that person has a reasonable expectation of privacy-rather than an 18 U.S.C. § 2703(d) court order supported only by reasonable grounds as to relevancy and materiality, compels the suppression and exclusion of this evidence at his upcoming criminal trial. The OTR summonses demanded records and other information in an investigation as to whether Defendant was a resident of the District of Columbia who failed to pay D.C. personal income taxes for several tax years between 2009 and 2014.

According to the instant Motion, OTR issued the following twenty-six summonses in the course of its investigation:

(1) a summons issued on March 31, 2014 to University Terrace LLC for the period of January 1, 2009 through March 31, 2014 for all records relating to Defendant and the property located at 2806 University Terrace, NW, Washington, D.C., for the period of January 1, 2009 through December 11, 2011, including rental lease agreements; rent payment ledgers or statements; notifications and correspondence to and from Defendant or Gabriella Landinez (Defendant's ex-wife); and records relating to the eviction of Defendant or Landinez and the subsequent lawsuit;

(2) a summons issued on June 18, 2015 to The Harbor Group, Inc. for the period of January 1, 2009 through June 18, 2015 for all records relating to Defendant, including ten samples each of client agreements in which Defendant was the financial advisor, and client termination letters in which Defendant was the financial advisor;

(3) a summons issued on April 21, 2014 to The Harbor Group, Inc. for the period of January 1, 2009 through April 21, 2014 for all records relating to Defendant, including IRS Forms W-4, W-2, 1099 MISC; earnings statements or records of earnings, wages and commissions; termination agreement or settlement agreement; records concerning clients of Defendant and The Harbor Group; records of visits by Defendant to The Harbor Group, or clients in New Hampshire; and records relating to Defendant's move to the Washington, D.C. area;

(4) a summons issued on April 7, 2014 to TD Banknorth, N.A. for the period of January 1, 2009 through March 28, 2014 for all records relating to Defendant or his company Novo Cura, LLC, including applications for accounts; signature cards; statements of accounts; deposit tickets; deposited items; Forms 1099, 1098, or back-up withholding documents; IRS disclosures or tax notifications; and fraud investigation reports, SARs, CTRs, or other Bank Secrecy Act filings;

(5) a summons issued on April 7, 2014 to TD Bank for the period of January 1, 2009 through March 28, 2014 for all records relating to Defendant or his company, Novo Cura, LLC, for the period January 1, 2009 through April 7, 2014, including applications for accounts; signature cards; statements of accounts; deposit tickets; deposited items; Forms 1099, 1098, or back-up withholding documents; IRS disclosures/Tax notifications; and fraud investigation reports, SARs, CTRs, or other Bank Secrecy Act filings for the period January 1, 2009 through April 7, 2014;

(6) a summons issued on March 27, 2014 to St. John's College High School for the period of January 1, 2009 through March 27, 2014 for all records relating to Defendant's son, Nathaniel Witaschek, for the period from January 1, 2009 through December 31, 2013, including student registration, applications and attendance;

(7) a summons issued on May 20, 2015 to Sentry Management Corporation for the period of

January 1, 2009 through January 1, 2014 for all records relating to Defendant or Gabriella Landinez and all units located at 55 River Road, Manchester, New Hampshire, including rental lease agreements rent payment ledgers or statements; notices and correspondence to and from Defendant or Gabriella Landinez relating to rental units, or residency of either in a unit located in the Hampshire Towers at 55 River Road, Manchester, New Hampshire; settlement statements; deeds; deeds of trust; mortgages; satisfaction of mortgages; appraisals, agreements; and notes and correspondence of Defendant or Gabriella Landinez relating to the sale or purchase of any unit in the Hampshire Towers at 55 River Road, Manchester, New Hampshire; and all records contained in the settlement file;

(8) a summons issued on April 9, 2014 to RBS Citizens N.A. for the period of January 1, 2009 through April 9, 2014 for all records relating to Defendant or his company Novo Cura, LLC, including applications for accounts; signature cards; statements of accounts; deposit tickets; deposited items; Forms 1099, 1098, or back-up withholding documents; IRS disclosures/Tax notifications; and fraud investigation reports, SARs, CTRs, or other Bank Secrecy Act filings;

(9) a summons issued on April 1, 2014 to McLean Asset Management Corporation for the period of January 1, 2009 through March 27, 2014 for all records relating to Defendant, including

partnership agreements; employment contracts; employment application and resume; IRS Forms W-4, W-2, and 1099 MISC; earnings statements or records of earnings, wages and commissions; Defendant's clients reflecting client addresses, phone numbers, visits by Defendant, and client investments; visits to New Hampshire by Defendant to New Hampshire office or clients; expenses and reimbursements of Defendant's travels;

(10) a summons issued on May 19, 2014 to RE/MAX, LLC for the period of January 1, 2009 through May 19, 2014 for all records relating to Defendant and the properties located at 50 Powder Hill Road, Bedford New Hampshire, and 304 Bean Road, Warner, New Hampshire, including MRIS or other listings of the referenced properties; agreements, contracts, or other documents authorizing the listing; marketing and sale of the referenced properties; pictures of the referenced properties; and letters, emails or correspondence to and from Defendant and Gabriella Landinez;

(11) a summons issued on April 9, 2014 to LegalZoom.com for the period of January 1, 2009 through April 8, 2014 for all records relating to Defendant or Gabriella Landinez, including LLC applications; online applications on LegalZoom.com; Articles of Incorporation for all LLCs; related documents regarding the filings of all LLCs by Defendant or Landinez; and invoices reflecting payments to LegalZoom.com;

(12) a summons issued on May 29, 2014 to John Gola for the period of January 1, 2009 through May 28, 2014 for all records relating to Defendant, including invoices, receipts, or documents for repairs, moving, or other services rendered; and all correspondence to and from Defendant;

(13) a summons issued on March 26, 2014 to Hilton Garden Inn for the period of January 1, 2009 through March 26, 2014 for all records relating to Defendant, including folios;

(14) a summons issued on May 22, 2014 to Hilton Garden Inn for the period of January 1, 2009 through May 22, 2014 for notes and correspondence to and from Defendant;

(15) a summons issued on March 31, 2014 to Hardy Middle School for the period of January 1, 2009 through March 31, 2014 for all records relating to Defendant's daughter, Natasha Witaschek, for the period from January 1, 2009 through December 31, 2013, including student registration, applications, and attendance at Francis Scott Key Elementary School and Hardy Middle School;

(16) a summons issued on April 7, 2014 to Francis Scott Key Elementary School for the period of January 1, 2009 through December 31, 2013 for all records relating to Defendant's daughter, Natasha Witaschek, including student registration, applications, and attendance at Francis Scott Key Elementary School and Hardy Middle School;

(17) a summons issued on March 31, 2014 to Deal Middle School for the period of January 1, 2009 through December 31, 2013 for all records relating to Defendant's daughter, Natasha Witaschek, including student registration, applications, and attendance for Josephine Witaschek and Natasha Witaschek;[1]

(18) a summons issued on May 21, 2015 to JP Morgan Chase Bank, N.A. for all records of loan application; statements of account; payment history; credit reports; and correspondence relating to an auto loan by Defendant for the purchase of a 2010 Audi SUV;

(19) a summons issued on January 13, 2015 to the Catholic Order of Foresters for the period of January 1, 2009 through December 31, 2014 for all records relating to Defendant and Defendant's company, Novo Cura, LLC, including contracts; agreements; payments; commissions; fees paid; commission statements; and IRS Form 1099 or other forms ("company records");

(20) a summons issued on April 8, 2014 to The Charles Schwab Corporation for the period of January 1, 2009 through April 8, 2014 for all records relating to Defendant and Defendant's company, Novo Cura, LLC, including

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[1] The Government's *Opposition* includes a summons issued on March 27, 2014 to Horace Mann Elementary School for the period of January 1, 2009 through December 31, 2013 for Josephine Witaschek's student registration, application, and attendance. Opp'n 4.

applications and statements for accounts; IRAs and other investments; IRS Forms 5498, 1099, and IRS disclosures/Tax notifications; and fraud investigation reports, SARs, CTRs, or Bank Secrecy Act filings;

(21) a summons issued on December 22, 2014 to the Catholic Order of Foresters for the period of January 1, 2009 through December 19, 2014 for all records relating to Defendant, including contracts; agreements; payments; commissions; fees paid; commission statements; and Forms 1099 and other IRS forms;

(22) a summons issued on April 30, 2015 to Brady Sullivan Properties for the period of January 1, 2009 through December 31, 2011 for all records relating to Defendant and all units located at 55 River Road, Manchester, New Hampshire, including rental lease agreements, rent payment ledgers or statements; notices and correspondence to and from Defendant or Gabriella Landinez relating to rental units, or residency of either in a unit located in the Hampshire Towers at 55 River Road, Manchester, New Hampshire; settlement statements; deeds; deeds of trust; mortgages; satisfaction of mortgages; appraisals, agreements; and notes and correspondence of Defendant or Gabriella Landinez relating to the sale or purchase of any unit in the Hampshire Towers at 55 River Road, Manchester, New Hampshire; and all records contained in the settlement file;

(23) a summons issued on December 19, 2014 to Banner Life Insurance Company for the

period of January 1, 2009 through December 19, 2014 for all records relating to Defendant, including insurance policies; statements of accounts; requests for loans; terminations; "pay-out;" "surrenders" of insurance policies; commission statements; and Form 1099 and other IRS forms;

(24) a summons issued on July 21, 2014 to Brown Family Realty for the period of January 1, 2009 through July 21, 2014 for all records relating to Defendant or Defendant's Family Trust, including property management agreements and contracts; all mails and written correspondence to and from Defendant; lease agreements, applications, and contracts; schedules and records of rent payments from renters; and schedules and records of repairs and expenses;

(25) a summons issued on April 14, 2014 to Bowie-Sevier Estate for the period of January 1, 2011 through December 31, 2013 for all records relating to Defendant and the property located at 3114 Q Street, N.W., Washington, DC 20007, including copies of rent payment checks or other financial instruments employed to pay rent; rent payment statements and ledgers; and all correspondence to and from Defendant; and

(26) a summons issued on April 7, 2014 to Executive Housing Consultants, Inc. for the period of January 1, 2011 through December 31, 2013 for all records relating to Defendant and the property located at 3114 Q Street, N.W., Washington, DC 20007, including copies

> or rent payment checks or other financial instruments employed to pay rent; rent payment statements and ledgers; and all correspondence to and from Defendant.

Mot. 2-8.

ARGUMENT

In the instant Motion, Defendant argues the collective summonses sought information that was impermissibly broad both quantitatively and qualitatively. *Id.* at 9. Defendant argues that the summonses required the production of information from 2009, 2010, 2013, 2014, and 2015 which is beyond the tax years at issue in the charges, 2011 and 2012. *Id.* Defendant also protests that the summonses produced personal information regarding:

> . . . divorce and child custody issues, the public and private schools [Defendant's] children attended, doctors and clinics he utilized, medications he purchased, life insurance applications and the attached medical and financial information on all life insurance held, retirement benefits, college savings and planning, colleges applied to for his children, attorneys he paid and hired for various legal matters, clothing, food, entertainment, vacations, children's sports and activities, cars he purchased and repaired, family members he supported through gifts, gifts for birthdays and holidays, churches and charities he supported and was a member or parishioner of, sports and health clubs he was a member of, and utilities he paid for, including mobile and landline telephone, gas and electric, water and sewer, and more.

> In summary, the summonses yielded every personal expense Defendant made over nearly seven years.

Id. at 9-10. Likewise, Defendant objects to information disclosed regarding his political and professional affiliations, and his online dating history. *Id.* at 10. Defendant asserts that of the "more than 4000 documents" produced in response to the subpoenas, "at least 95 percent" were "so unrelated" and vastly overbroad relative to the investigation of the personal income tax evasion charges so as "to violate the Fourth Amendment's requirement of reasonableness." *Id.* Defendant argues that the evidence obtained in response to these subpoenas must be suppressed under *Carpenter* as impermissibly intrusive into his personal and private matters. *Id.* at 13-14.

The Government responds that there is no Fourth Amendment violation where OTR issued summonses to various public, corporate, business and financial entities, as these are third parties and the requested documents are records belonging to the third parties. The third-party principle provides that when an individual shares information with a third-party, he forfeits any privacy interest he may have in that information, relying on *United States v. Miller*, 425 U.S. 435 (1976), which, as *Carpenter* makes clear, the Government posits, is still good law.

ANALYSIS

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Its basic purpose "is to safeguard the privacy and security of individuals against arbitrary

invasions by government officials." *Camara v. Mun. Court of City and Cty of S.F.*, 387 U.S. 523, 528 (1967). Pre-*Carpenter*, Fourth Amendment jurisprudence was divided into two worlds—on one side, the myriad of "things" that people kept to themselves, preserving as private, for which people retained an expectation of privacy that society recognized as reasonable, including, in the whole of a person's physical location and physical movements, *United States v. Jones*, 565 U.S. 400, 414-15 (2012) (according to concurring justices); and on the other side, "information he voluntarily turns over to third parties," *Smith v. Maryland*, 442 U.S. 735, 743-44 (1979), in which he has no legitimate (or has a reduced) expectation of privacy. A warrant is required to search and seize those items in which a person retains a reasonable expectation of privacy.[2]

For the latter, the third-party principle has been understood to permit the Government to engage in the warrantless collection of corporate and business records including, an individual's personal banking activity, including canceled checks, deposit slips and monthly statements, *Miller*, 425 U.S. at 438 (obtained through grand jury subpoenas in an investigation of tax evasion on whiskey sales); a compilation of outgoing phone numbers dialed on a landline telephone, *Smith*, 442 U.S. at 742 (obtained by pen register installed by telephone company at police request); wage, payroll and sales records, *Donovan v. Lone Steer, Inc.*, 464 US

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[2] Our Court of Appeals has similarly held that the use of a cell site simulator to locate a person through his cell phone, absent a warrant, invades the individual's actual, legitimate, and reasonable expectation of privacy in his location information, and is a search, implicating the warrant clause. *(Prince) Jones v. United States*, 168 A.3d 703, 717 (D.C. 2017).

408, 411 (1984) (obtained by administrative subpoena in an investigation of labor laws); bank statements, payroll records, report of sales provided by restaurateur to private accountant, *Couch v. United States*, 409 U.S. 322, 324 (1973) (obtained by federal taxing authority subpoena in an investigation of tax evasion); company records of taxpayer's employer, *Donaldson v. United States*, 400 U.S. 517, 519 (1971) (obtained by federal taxing authority subpoena in an investigation of tax evasion); records, correspondence and memorandum of an organization, *McPhaul v. United States*, 364 U.S. 372, 374 (1960) (subpoena issued by the House of Representatives); special reports corporations were required to file showing compliance with a court decree, *United States v. Morton Salt Co.*, 338 US 632, 634 (1950); and corporate records, papers, and payroll records, *Okla. Press Publ'g Co. v. Walling*, 327 U.S. 186, 189 (1946) (sought by administrative subpoena in an investigation into labor laws).

At first glance, *Carpenter* appeared to upend the presumption that a person forfeits his expectation of privacy in materials he voluntarily discloses to a third-party, by requiring law enforcement to obtain a search and seizure warrant supported by probable cause to seek device cell site location information, even though such data was in the hands of a third-party (in this case, the wireless-service provider). The reasoning, however, was compelled by the understanding that cell site location records reveal intimate and extensive physical location and physical movement information of the user of the device, and one's physical movements (at least for more than a six-day period) is something over which the user retains a reasonable expectation of privacy. Challenging the majority, Justice

Alito and Justice Kennedy queried in their respective dissenting opinions whether the third-party principle and the subpoena doctrine survived. In response, the *Carpenter* majority went to great lengths to assure us that its holding "is a narrow one," that is, the vitality of the third-party principle was preserved, noting, "[w]e do not disturb the application of *Smith* or *Miller*," and confirming the continued use of subpoenas in almost all instances:

> [T]his is certainly not to say that all orders compelling the production of documents will require a showing of probable cause. The Government will be able to use subpoenas to acquire records in the overwhelming majority of investigations. We hold only that a warrant is required in the rare cases where the suspect has a legitimate expectation of privacy in records held by a third party.

Carpenter, 138 S. Ct. at 2220-22.[3]

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[3] Indeed, on the same day that *Carpenter* was handed down, the Supreme Court resolved several related cases it was holding, including *Ulbricht v. United States*, No. 17-950, 2018 U.S. LEXIS 4043 at *1 (U.S. June 28, 2018) (denying certiorari to a Fourth Amendment challenge regarding defendant's internet traffic information obtained without a warrant); *Zanders v. Indiana*, No. 17-166, 2018 U.S. LEXIS 4076 at *1 (U.S. June 28, 2018) (vacating conviction and remanding a Fourth Amendment challenge regarding the accumulation and use of historical cell cite information obtained without a warrant); and *Caira v. United States*, 138 S. Ct. 2700, 2701 (U.S. 2018) (denying certiorari to a Fourth Amendment challenge regarding defendant's Internet Protocol "IP" login history and subsequent customer information, which led to the location of the computer user, such information having been obtained by administrative subpoenas). Presumably *Caira* would have been reversed and remanded, like *Zanders*, had a

Here, the materials obtained by the Government can be divided into several categories: (1) information pertaining to whether real property owned by Defendant in New Hampshire was leased to others, and managed by property managers; (2) information pertaining to whether real property owned by Defendant in New Hampshire was sold by a real estate agent; (3) information pertaining to whether real property located within the District of Columbia was leased by Defendant as a residence, including whether payments for leased local property came from a family trust; (4) information pertaining to whether his children attended District of Columbia private secondary and public primary and secondary schools; (5) information pertaining to his stays at a hotel in New Hampshire; (6) information pertaining to a car loan application for a leased vehicle; (7) information pertaining to personal income received from life insurance policy payouts or loans; (8) information pertaining to his employment history and records showing personal income, earning statements, a transfer move to the District of Columbia, payroll, client agreements, and work visits to New Hampshire, among other records; (9) bank record information pertaining to his company's expenses and what his financial purchases reveal about his domicile and place of residency; (10)

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majority of the justices concluded that a warrant was required to obtain computer user identification and user's location, which had been discovered through records kept by the service provider. This Court reads the denials of certiorari to mean that a person does not have a reasonable expectation of privacy in their IP login history, customer information, and non-content internet traffic information, which are types of data routinely requested pursuant to administrative subpoenas issued by law enforcement agencies.

investment information pertaining to his company potentially revealing his personal income; (11) information pertaining to the legal documents acquired from an on-line service; (12) information pertaining to home improvement work done by a contractor on out-of-state property; and (13) information pertaining to personal income derived from a religious charitable organization. The summonses covered not only Defendant, and a company he apparently controlled, but also records including activities of his ex-wife and his two minor children, and the period of time from 2009 through 2014.[4]

At the outset, it is undisputed that all of this information was legitimately in the possession of the third party entities and that none of the material triggered his privacy interest in his physical location per *Carpenter*. In addition, the Government proffers that the records were sought to determine where Defendant was a bona fide resident and the amount of his personal income; both areas constitute relevant and material evidence in a tax evasion case. Still, Defendant objects to the exhaustive list of information incidentally collected from third parties by the Government pursuant to its investigation for evidence of tax evasion.

For one, Defendant complains that his debit card history contains purchases which reveal "familial, political, professional, religious, and sexual associations," *Carpenter*, 138 S. Ct. at 2217, information he would rather keep private. The reasonableness of

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[4] The Government represented at a hearing that the statute of limitations precluded the filing of charges for years preceding 2011.

Defendant's privacy claims turn on whether he voluntarily exposed the intimate details of his personal life, through debit charges, to the third parties in a way that is more like *Carpenter*, or more like *Miller*. In *Carpenter*, the defendant did not intend to share where he was going with anyone else; he only carried a device that created a data trail which the Government mined for a different purpose; namely, to reconstruct his physical movements. In *Miller*, on the other hand, the defendant knowingly communicated to his bank what purchases he made and how he managed his money. The Court found in *Miller* that the defendant assumed the risk that by revealing his affairs to a third party, he could have this information shared with still others. The defendant's records provided to the Government were not manipulated, but shared in their original state. Thus, the privacy claim in *Miller* failed because the Court concluded that defendant's banking records were not his confidential communications, but instead belonged to the bank.[5] And *Miller* is still good law in this jurisdiction. *In re Richardson*, 759 A.2d 649, 654 (D.C. 2000) (rejecting an argument that disclosure of respondent's bank records pursuant to a subpoena violated his Fourth Amendment right to be free from unreasonable searches and seizures). "[A] depositor has no expectation of privacy and thus no 'protectable Fourth Amendment interest' in copies of checks and deposit slips retained by his bank." *Id.* (quoting *United States v. Payner*, 447 U.S. 727, 732

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[5] "All of the documents obtained, including financial statements and deposit slips, contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business." *Miller,* 425 U.S at 435.

(1980) (quoting *Miller*, 425 U.S. at 437)). Here, Defendant's debit card usage is factually indistinguishable from *Miller*'s check writing. Defendant's claim that he had a reasonable expectation of privacy in his debit card purchases and financial statements must fail.

The summonses also included records of Defendant's business dealings with property managers, real estate agents, home improvement contractors, and a hotel. When one does business with an entity, one reasonably expects that the entity will create business records for its own purposes. Records that document the third parties' business transactions with Defendant belong to the entity with which Defendant conducted the business. They do not become the Defendant's private papers. It follows that records from property managers, real estate agents, home improvement contractors and the hotel fit into this category. Defendant engaged in business transactions by contracting with others to rent, lease, sell or make improvements on real properties located in two jurisdictions. When Defendant stayed at a hotel, the records of his stay were created for the use of and belong to, the hotel. He cannot claim a reasonable expectation of privacy in business records created by those business entities with which he engaged in business.

In addition, Defendant protests the collection of his children's school records. In order to enroll his children in schools, presumably he and his family completed applications and submitted those applications to District of Columbia Public Schools ("DCPS") (for which in-bounds residency is a requirement for admission) and a private school (any application would ask for the prospective student's permanent address). Because school registration records reveal where a

child is reported to live, they were summoned by OTR as relevant to the tax evasion investigation. Once the applications were submitted, Defendant relinquished any further proprietary interest over the forms, as these became school records possessed and owned by the private school or DCPS administration. Therefore, Defendant does not have a reasonable expectation of privacy in school records.

Lastly, the Government sought Defendant's employment history, payroll records, personal income earning statements and investment income from Defendant's employers, financial institutions, a religious charitable organization, an insurance company, and an on-line legal service to investigate Defendant's personal income and his reported place of residence, both relevant in an investigation into determining appropriate tax liability. Bank records and investment income records pertaining to his own company would similarly reveal his actual income and his place of residence. *Donaldson* explains that the production of employment records, 1099's, W-2 forms, etc., pertaining to the employee taxpayer, are the employer's records, not the records of the taxpayer, and thus obtainable by the Internal Revenue Service with a summons issued pursuant to 26 U.S.C. § 7602 (similar to D.C. § 47-4310, used by the Government here). 400 U.S. at 519-20. *Couch* explains that the tax payer "cannot reasonably claim, either for Fourth or Fifth Amendment purposes, an expectation of protected privacy or confidentiality" in documents pertaining to the tax payer's tax liability in the hands of the tax payer's accountant. 409 U.S. at 336. Likewise, the Court concludes here that Defendant lacks a legitimate (or even a diminished) expectation of privacy in the employment records held

by Defendant's employers or income earning statements held by other source of income entities.

Finally, the Court observes that none of the information obtained here falls into the category of personal information involving cloud storage. It is clear that the Government would be required to obtain a search warrant to acquire an individual's electronically stored media located in or beyond the security of one's person, home, physical storage facility, vehicle, cellular phone, etc., *see Riley v. California*, 134 S. Ct. 2473, 2492 (2014) (warrantless search and seizure of a cellular device is unconstitutional, noting problems presented by cloud computing in which data is stored on a remote server and not the device itself); *In Re Search of Info. Assoc. with Facebook accounts DisruptJ20, lacymacauley, and legaba.carrefour*, 2017 D.C. Super. Lexis 16, *7-10 (D.C. Super. Ct. Nov. 9, 2017) (setting forth protocols to limit government's search and seizure of electronically stored information contained in user's Facebook accounts which can contain artistic, political, personal media created by the user and be blocked from public view).

Simply put, none of the records sought here are Defendant's personal records, because the records were created by, owned by, used by, possessed by, controlled by or belong to the various entities. The use of federal taxing authority subpoenas, which have been used to gather similar types of materials as sought here, have repeatedly been upheld against the same challenge lodged here.[6] *See Miller*, 425 U.S. at 443;

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[6] The summons authority under D.C. Code § 47-4310 is similar to the administrative summons authority cited by the IRS in 26

Couch, 409 U.S. at 326-27; *Donaldson*, 400 U.S. at 523 ("taxpayer has no proprietary interest of any kind, which are owned by the third person, which are in his hands, and which relate to the third person's business transactions with the taxpayer.").[7] Nothing in *Carpenter* changes this body of law.[8] The Court does not find that Defendant has expectations of privacy in any of the records which were produced in response to the summonses that would implicate the warrant clause.

Furthermore, even if there was a successful challenge to the compulsory process used here, suppression would not be appropriate because the exclusionary rule is a remedy to deter future Fourth Amendment violations. For exclusion to be appropriate, the deterrence benefits must outweigh the rule's heavy costs. Reliance on a statute valid at the time does not trigger application of the exclusionary rule and the good faith exception outlined by the Supreme Court in *Illinois v. Krull*, 480 U.S. 340, 348-50 (1987), would apply here

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U.S.C. § 7602, and further used in *Donaldson* and *Couch*. D.C. Council, Report on Bill 13-586 at 13 (Sept. 28, 2000).

[7] Nor would Defendant have a Fifth Amendment privilege to challenge the production of the materials sought here because there was no personal compulsion against Defendant. *Couch*, 409 U.S. at 329 (no Fifth Amendment privilege in bank statements, payroll records, report of sales provided by restaurateur to private accountant); *Fisher v. United States*, 425 U.S. 391, 396 (1976) (no Fifth Amendment privilege in documents relating to the preparation by the accountants of targets' tax returns).

[8] This Court is mindful of the admonition that "if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower courts] should follow the case which directly controls, leaving this Court the prerogative of overruling its own decisions. *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (citations omitted).

if D.C. Code § 47-4310(a)(1) were subsequently rejected as a means to obtain the types of materials sought here. This is because the exclusionary rule does not apply where the challenged evidence was obtained by an officer acting in objectively reasonable reliance on a statue even if that statute was later determined to be unconstitutional. *Id.* (search of wreckage yard and inspection of yard's records pursuant to Illinois statute later found unconstitutional but suppression not warranted).

CONCLUSION

Upon review of the information sought, the Court concludes that the Defendant has no reasonable expectation of privacy in the documents obtained by the OTR summonses, because (1) the records were created for use by the third party public/business/corporate/banking entity with which (2) Defendant voluntarily engaged, (3) the records remain property of those entities and are not Defendant's personal papers, and (4) the records cannot be classified as his personal papers which he has chosen to store elsewhere.

Accordingly, it is hereby this 25th day of October, 2018,

ORDERED that *Defendant's Motion to Suppress Evidence Obtained by Administrative Summonses in Violation of the Fourth Amendment* is DENIED.

/s/ Darlene M. Soltys
Judge

Service List:

Bayly Leighton, AAG (E-serve)
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ORDER OF THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA TAX DIVISION DENYING DEFENDANT'S MOTION TO RECONSIDER ORDER DENYING MOTION TO SUPPRESS (DECEMBER 21, 2018)

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA TAX DIVISION

DISTRICT OF COLUMBIA

v.

MARK WITASCHEK,

Defendant.

2018 CRT 004321

Before: Darlene M. SOLTYS, Judge.

ORDER

This matter is before the Court upon consideration of *Defendant's Motion to Reconsider Order Denying Motion to Suppress Evidence,* filed December 12, 2018. The Defendant argues that "[t]he whole point of *Carpenter*[1] was to jettison the wooden third-party doctrine that exalts form over substance instead of focusing on real life expectations of privacy." Mot. 3. Defendant asserts that the 4000 documents produced

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1 *Carpenter v. United States,*138 S. Ct. 2206, 2221-23 (2018).

in response to the subpoenas, of which he believes 95 percent were irrelevant to the investigation of the personal income tax evasion charges, violated the Fourth Amendment's requirement of reasonableness.[2]

> Our Court of Appeals has explained that
>
> > [T]he touchstone of Fourth Amendment right-to-privacy analysis "is whether a person has a 'constitutionally protected reasonable expectation of privacy.'" *California v. Ciraolo*, 476 U.S. 207, 211, 106 S. Ct. 1809, 90 L.Ed.2d 210 (1986) (quoting *Katz v. United States*, 389 U.S. 347, 360, 88 S. Ct. 507, 19 L.Ed.2d 576 (1967)). Central to the analysis is whether the person invoking the Fourth Amendment's protection "can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action." *Smith v. Maryland*, 442 U.S. 735, 740, 99 S. Ct. 2577, 61 L.Ed.2d 220 (1979) (citations omitted). To establish a Fourth Amendment violation, "there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

Napper v. United States, 22 A.3d 758, 767 (2011) (suspect making cell phone call inside police interview room

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[2] The Court analyzed the Defendant's reasonable expectation of privacy for each type of summons throughout the Order. The Order explicitly states the Court did not find Defendant had any expectation of privacy in the records produced in response to the summonses. Order 15, Oct. 25, 2018.

had neither a subjective nor an objectively reasonable expectation of privacy).

As noted in the Order denying the Motion to Suppress, the *Carpenter* majority went to great lengths to assure us that its holding "is a narrow one;" the vitality of the third-party principle was preserved, noting, "[w]e do not disturb the application of *Smith* or *Miller,*" and confirming the continued use of subpoenas in almost all instances:

> [T]his is certainly not to say that all orders compelling the production of documents will require a showing of probable cause. The Government will be able to use subpoenas to acquire records in the overwhelming majority of investigations. We hold only that a warrant is required in the rare cases where the suspect has a legitimate expectation of privacy in records held by a third party.

Carpenter, 138 S. Ct. at 2220-22.

The third-party principle, as explained in *United States v. Miller,* 425 U.S. 435, 443 (1976) (permitting warrantless collection of monthly bank statements and banking records obtained through grand jury subpoena in tax evasion case), is still alive and well in this jurisdiction. *See e.g., In re Richardson*, 759 A.2d 649, 654 (D.C. 2000) (rejecting an argument that disclosure of respondent's bank records pursuant to a subpoena violated his Fourth Amendment right to be free from unreasonable searches and seizures); *Holt v. United States*, 675 A.2d 474, 480 (1996) (defendant had no legitimate expectation of privacy in the outward appearance of his clothing when he admitted himself to the hospital emergency room). Likewise,

Smith (permitting warrantless collection of dialed phone numbers) is still good law in this jurisdiction. *See Prince Jones v. United States*, 168 A.3d 703, 716 (D.C. 2017) quoting *Smith*, 442 U.S. at 741 n.5 ("[W]here an individual's subjective expectations ha[ve] been 'conditioned' by influences alien to well-recognized Fourth Amendment freedoms, those subjective expectations obviously could play no meaningful role in ascertaining what the scope of Fourth Amendment protection [is]."); *Napper*, 22 A.3d at 767 (no subjective nor objective reasonable expectation of privacy in interview room when making phone call); *Brown v. United States*, 627 A.2d 499, 503 (1993) (no legitimate expectation of privacy in stairwell where defendant was arrested).

Consequently, Defendant here did not have a subjective, reasonable expectation of privacy in the records he disclosed to, or those which were created and held by third party entities, nor did he have an objective, reasonable expectation of privacy in any of those records.

Accordingly, it is hereby this 21st day of December, 2018,

ORDERED that *Defendant's Motion to Reconsider Order Denying Motion to Suppress Evidence* is DENIED.

/s/ Darlene M. Soltys
Judge

AFFIDAVIT OF MARK A. WITASCHEK (OCTOBER 17, 2018)

I, Mark A. Witaschek, being sworn, hereby say and depose based on personal knowledge:

1. I am over the age of twenty-one years and of sound mind.

2. I make this Affidavit of my own personal knowledge.

3. I reside in Hillsborough County, New Hampshire.

4. I have carefully reviewed the twenty-six (26) summonses issued by the Washington, D.C. Office of Tax and Revenue (DCOTR) in its criminal investigation of me for District of Columbia income tax evasion for the calendar years 2011 and 2012.

5. Copies of the summonses are attached as Exhibit I to this affidavit.

6. The DCOTR summonses yielded more than four thousand (4,000) pages of documents.

7. At least ninety-five percent (95%) of those four thousand (4,000) pages of documents were unrelated and immaterial to District of Columbia income tax matters under investigation.

8. Among other things, the twenty-six (23) summonses required disclosure of sensitive and personal information about me and my family, including, my Minor children and former spouse. The information related to:

a. divorce and child custody issues;

b. the public arid private schools my children attended;

c. the medical doctors and clinics my family utilized;

d. the medications we purchased;

e. my family's life insurance applications and the attached medical and financial information relating to all life insurance policies held;

f. my retirement benefits;

g. college savings and planning;

h. the colleges my children applied to attend;

i. the attorneys I paid and hired for various legal matters;

j. information relating to clothing, food, entertainment and vacation purchases;

k. children's sports and activities;

l. the cars I purchased, maintained and repaired;

m. the family members I supported through gifts;

n. gifts for family birthdays and holidays;

o. the churches and charities I supported and of which I was a member or parishioner;

p. the exercise, gyms, sports and health clubs of which I was a member; and,

q. utilities I paid for, including mobile and landline telephone, gas and electric, water and sewer, and more.

In summary, the summonses required disclosure of every personal expense I made for a time period of nearly seven years.

9. The twenty-six (23) summonses also sought highly personal information about my political associations, including party contributions, candidates I supported and political groups I was a member of and contributed to.

10. My professional associations or affiliations were disclosed by summonses directed to employers, insurance companies, brokerage firms, real estate agencies, marketing companies, subcontractors who worked for me, banks, and more.

11. Because the summonses demanded my contracts and agreements with many of the companies with whom I do business, notice was given notice to these firms that I was under criminal investigation, thereby unfairly prejudicing me and jeopardizing my business and professional relationships by placing me in a position of weakness in contract negotiations or otherwise.

12. The twenty-six (23) summonses further compelled disclosure of highly personal, sensitive and potentially prurient information relating to my sexual associations through salacious demands for information relating to my dating club memberships and locations where I entertained partners whom I dated and had romantic interests, and more.

FURTHER AFFIANT SAYETH NAUGHT.

Dated this 17th day of October 2018.

/s/ Mark A. Witaschek

State of New Hampshire
County of Hillsborough

This instrument was acknowledged before me this 17th of Oct (date) by Mark A. Witaschek.

/s/ Lorraine Malo
(Signature of notarial officer)

Print Name: Lorraine Malo
My commission expires
9-13-22 (date)