IN THE COUNTY COURT OF THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR MARTIN COUNTY, FLORIDA

STATE OF FLORIDA

Case No. 19-445-MM

-VS-

PAUL FRAHM

Defendant(s)

ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS

THIS CAUSE, having come before the court at the Defendant's Motion to Suppress evidence gathered from the Order for Surreptitious Entry and Installation of Surveillance Camera, and the court having reviewed and applied the relevant caselaw, grants the Defendant's Motion to Suppress.

On April 24, 2019, the court heard testimony and arguments of counsel on the Defendants' Motions to Suppress the covert surveillance evidence obtained pursuant to a circuit court order. Counsel for the Defendants and the Assistant State Attorneys also presented memorandums of law and caselaw in support of their positions. This court has had the opportunity to read the memorandums as well as the associated caselaw, and it is clear that great deference is to be given to the approving magistrate's decision to sign the search warrant. *State v. Abbey,* 28 So.3d 208 (Fla. 4th DCA 2010) With that recognition, assuming *arguendo* that all other arguments made by defense counsel were without merit, the motion to suppress must be granted because of the fatal flaw in the execution.

At the outset, this court must address the issue of standing. While the State has asserted in its memorandum that the Defendant did not have standing to challenge the search warrant, the court finds without question that he does. Defense counsel stipulated to the fact that his client was indeed the male seen in the surveillance video, which depicts sexual activity between the defendant and a female. Identity is not a question that this court need decide as that fact has

been stipulated to by the Defendant. The State's memorandum also challenges the Defendant's assertion as to standing, arguing that the Defendant has no reasonable expectation of privacy in a massage room. The State correctly conceded in the closing argument that there was an expectation of privacy in this instance and therefore the question as to whether the Defendant has standing is answered in the affirmative.[1]

In order for the government[2] to covertly monitor by hidden camera potential criminal activity and gather evidence for prosecution, the federal courts have followed the precedents established for other search techniques to balance the instrusive nature of a video surveillance with the government's use of these methods for effective means to keep the citizenry safe from criminal elements. *United States v. Mesa-Rincon* 911 F.2d 1433 (10th Cir.1990)

---

1 The State cannot possibly maintain that a person does not have an expectation of privacy in a massage room because the spa is a business open to the public. A bathroom stall in a restaurant does not become open to surveillance by law enforcement any more than a dressing room in a department store merely because the front doors are unlocked to allow the public to come inside the establishment. While the expectation of privacy may be less than that of the marital bedroom, it does not mean that persons do not have a reason to believe that the activities inside those areas are private and safe from public view. The State's reliance on *State v. Conforti,* 688 So.2d 350 (Fla. 4th D.C.A. 1997) is misplaced. Not only does the *Conforti* case address First Amendment, not Fourth Amendment issues, it also involves an entirely different fact pattern. In *Conforti*, the State, through its undercover agent, was invited into the private room where the criminal act took place in his presence. *Id. at 358.* In this case, however, the State was not invited into the massage rooms, but gained covert access through the use of a search warrant. So while the magistrate determined that the expectation of privacy could be breached by warrant for the probable cause he found within the affidavit, it does not mean that the privacy expectation does not exist.

2 "Government" is being used in this context as the federal government. There is no Florida law or statute that specifically authorizes covert video surveillance and both sides point to federal rules, laws, and caselaw in support of their respective arguments. This court again gives great deference to the signing magistrate as to the authority of the state action and recognizes that video surveillance, when properly performed can be an exceedingly useful investigative tool. However, with no guiding Florida guidance in rule, law, or caselaw, by necessity this court turns to federal authority, which ironically also points out that there is no clear Congressional action as it relates to video surveillance. *United States v. Mesa-Rincon* 911 F.2d 1433 (10th Cir. 1990); *United States v. Koyomejian,* (9th Cir. 1991)

A magistrate shall issue an order permitting video surveillance only when:

(1) there has been a showing that probable cause exists that a particular person is committing, has committed, or is about to commit a crime;

(2) the order particularly describes the place to be searched and the things to be seized in accordance with the fourth amendment;

(3) the order is sufficiently precise so as to minimize the recording of activities not related to the crimes under investigation;

(4) the judge issuing the order finds that normal investigative procedures have been tried and have failed or reasonably appear to succeed if tried or appear to be too dangerous; and

(5) the order does not allow the period of interception to be longer than necessary to achieve the objection of the authorization, or in any event longer than thirty days.

Mesa-Rincon 911 F.2d at 1436.

Both sides argued at great lengths over whether the order satisfied the requirements of the issuance of the warrant; however, the crux of the issue for this court is **how** the order was executed. The order requires that law enforcement minimize the monitoring activities. Law enforcement recognizes this in their Minimization Instructions which were introduced into evidence. The minimization requirements were not met in the execution of the order.

There were a total of four defendants who had similar motions to suppress pending that were addressed at the hearing. The defendants visited one of two businesses that were under surveillance by the Sheriff's Office. During the hearing, they were referred to as either the "Bridge Spa" or the "Therapy Spa" depending on which business and defendant was referenced. Each affidavit, signed order by the magistrate, and Minimization Instruction memo was identical except for the identification and description of the business being referenced, and each of those was introduced into evidence as State's Exhibits without objection by each defendant. The lead detective prepared the affidavit as well as the order with the help of the State Attorney's Office. The detective prepared the probable cause in the affidavit in large part himself, but the paperwork was a coordinated effort between the two agencies. This affidavit contains an assertion that the affiants have strongly considered the parameters and requirements established by the *Mesa-*

Rincon court and assure the magistrate that the guidelines have been met. *See State Exhibit 3, page 26 of 29 of the affidavit.*

With the signed Order for Surreptitious Entry and Installation of Surveillance Camera, law enforcement proceeds to install the surveillance equipment at the Bridge and Therapy Spas. The detective testified that both the Bridge Spa and the Therapy Spa are licensed for the legitimate services provided, that is, massages. The massage rooms themselves are closed door rooms: a client is led to the room, the therapist leaves the client in the room, closes the door behind her, and the client is to get undressed and lay on the massage table. There are drapes to cover the body once on the table. After a time the therapist comes back into the room, shutting the door. There is a camera installed at the front desk where the clients check in and pay for services from the "board" or "menu" that lists legitimate services. There are cameras also installed in each of the closed door massage rooms.

With the cameras installed, law enforcement begins the surveillance of the business. "Surveillance" however might be a stretch. While the defense took issue with whether "monitor" meant "record," the issue becomes the lack of monitoring that was conducted. Once the cameras were installed, they were set to record all of the events on all of the cameras during business hours. Sometimes a member of law enforcement was monitoring the activities in "live" time, but at no point during the investigation were the cameras ever turned off. Indeed, all of the data collected is being housed on a server at the Sheriff's Office. While this did capture the events and activities in which these defendants were involved, it also captured and collected events of the otherwise innocent clients that went in for legitimate services, all unaware that they were being watched. This violates the minimization requirements in two important ways.

First, law enforcement ensured the magistrate in the affidavit for application of the Surveillance Order that the affiants had "strongly considered" the restraints of the *Mesa-Rincon* case. The detective confessed he had not read the case and was relying upon the Assistant State Attorney for guidance. Had he read the case, he would have known that the Mesa-Rincon court established the safeguards to avoid "recording of activity by persons with no connection to the crime under investigation who happen to enter an area covered by a camera." *Mesa-Rincon* 911 F.2d at 1441. Those with "no connection to the crime under investigation" would be the innocent person who had come in for a legitimate service, and because he or she was there during

regular business hours for the two weeks to thirty days that the recordings were made, has had their activities in that massage room, including undressing and being seen either partially or completely unclothed not only recorded, but collected and saved on a server. By the detective's estimation, that would be about 45 people between the two spas. There was no effort made to minimize the monitoring or recording of innocent activity. The detective believed that minimization had been achieved by the Minimization Memo, the placement of the cameras, the time duration of limiting by two weeks from thirty days, and monitor only during business hours. But this ignores completely that activity of innocent parties was recorded from start to finish in a separate room. To be sure, perhaps illicit conduct was occurring in the room next door; but there was no effort made to separate and monitor only the illicit activity. Indeed, the innocent client was treated the same by law enforcement as the criminal element they sought to capture.

Secondly the Minimization Memo, memorialized in State's Exhibits 1 and 2 was not followed. The minimization memo requires that surveillance monitoring will be conducted for a reasonable period until it is determined that no criminal conduct will be conducted. When that determination is made, the surveillance is to be terminated. *State Exhibit 1 and 2, paragraph 3.* To emphasize this requirement, paragraph 4 states that if criminal conduct is being surveilled, it will be monitored and recorded.[3] While it does not appear that the minimization memo was presented to the magistrate, it was prepared as instruction to the conduct of the investigation. It was not followed. At the very least, it would have required that when it was determined that no illegal activity was happening in the massage room, the monitoring or recording was turned off when the client began to dress after the massage was concluded. At no time was any effort made to stop the monitoring or recording **at any point** to protect the innocent person who happened to enter an area covered by a camera.

The detective testified that minimization was achieved by not putting cameras in the "personal areas" that is the living areas or bathrooms and by only recording for two weeks rather than the full thirty days that was allowed by the surveillance order, and only recording during business hours. While these may be factors in the minimization, the blanket storing of all surveillance of all rooms at all times, regardless of the activities occurring within them falls far

3 The Defendant is correct in the assertion that the language of the Order allows for "monitoring" but does not provide for "recording." Oversight, scrivenor's error, or something more insidious is not at issue here as it pertains to "monitor" or "record." Neither were done in accordance with the caselaw nor the Minimization Memo.

short of the minimization requirements required to protect innocent activity of innocent people who happen to come under the camera's eye.

The use of video surveillance and monitoring is an extraordinarily intrusive method of searching for evidence of criminal activity. The difference between surveillance and video surveillance is akin to the difference between pat down search and strip search. *Mesa-Rincon* 911 F.2d at 1442. Because of its highly intrusive nature, the requirements to curtail what can be captured must be scrutinized and high levels of responsibility must be met to avoid the intrusion on the activities of the innocent. These strict standards were simply not met in this case. There was no effort made to avoid capturing innocent activity behind the closed door of a massage room. There is no other remedy but to suppress the evidence gathered.

It is hereby ORDERED AND ADJUDGED

The Defendant's Motion to Suppress is granted. Any evidence gathered as a result of the Order for Surreptitious Entry and Installation of Surveillance Camera is prohibited from use in the prosecution of this cause.

DONE AND ORDERED in Martin County, Stuart, Florida this 1 day of May, 2019.

KATHLEEN H. ROBERTS
COUNTY COURT JUDGE

CC: Office of the State Attorney, SA19eservice@sao19.org
Law Offices of Kibbey and Wagner, counsel for the Defendant