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Clerk of Supreme Court

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

IN THE MATTER OF SEARCH
WARRANTS REGARDING SEIZURE
OF DOCUMENTS, LAPTOP
COMPUTERS, CELLULAR
TELEPHONES, AND OTHER
DIGITAL STORAGE DEVICES FROM
THE PREMISES OF LAS VEGAS
BISTRO, LLC AND LITTLE
DARLINGS OF LAS VEGAS, LLC

Case No.: 84931-COA

LAS VEGAS BISTRO, LLC D/B/A
LARRY FLYNT'S HUSTLER CLUB;
AND LITTLE DARLINGS OF LAS
VEGAS, LLC,

Appellants,

vs.

LAS VEGAS METROPOLITAN
POLICE DEPARTMENT,

Respondent.

RESPONDENT LAS VEGAS METROPOLITAN POLICE
DEPARTMENT'S ANSWER TO APPELLANTS' PETITION FOR
REHEARING

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

While Appellants characterize its Petition for Rehearing in the context of this Court's order not accurately reflecting the record, the requested relief by the Appellants—modification of the Order to direct LVMPD to return all seized devices immediately—is wholly inappropriate. First and foremost, Appellants did not demonstrate that all property seized contained privileged information. Indeed, only three devices belonging to the Hustler Club were alleged to hold privileged information. Second, as pointed out by LVMPD in its Answering Brief, there is a dispute about ownership regarding the Apple devices that complicates LVMPD's return of the property and requires a factual finding from a lower court.

To the extent this Court believes that its order needs modification, it can modify its holding to reflect Appellants' obligations to create a privilege log in relation to the property in its possession. To be sure, Appellant's have waived any argument as to any property not specifically identified as having privileged information. Indeed, Appellants neglected to address how a Digital Video Recording (DVR) system or a point-of-sale system would contain privileged

information. Moreover, Appellants' concerns about LVMPD's compliance with the District Court's order returning property must be addressed by the lower court before this Court can take any action. At this juncture, there is an ownership dispute as to at least one, if not both of the devices and there is no evidence before this Court regarding whether the other device has been imaged. If this Court were to require LVMPD to turn over an un-imaged device, it would substantially interfere with LVMPD's investigation and potentially result in the spoliation of evidence.

Accordingly, this Court should deny the Petition for Rehearing to the extent Appellants seek modification of the Order to require LVMPD to return all property when Appellants (and the record) failed to demonstrate that all property contains privileged information and only certain property belonging to the Hustler Club contains such information. Should this Court find modification of its order is warranted, it should amend its order to direct Appellants to provide a privilege log in relation to the property in its possession.

II. PROCEDURAL HISTORY AND FACTUAL BACKGROUND

A. APPELLANTS ONLY CLAIMED *CERTAIN* PROPERTY CONTAINED PRIVILEGED INFORMATION.

Appellants claimed that certain property contained privileged material, including attorney-client and work-product privileged material. AA000008-11.

Specifically, Little Darlings failed to identify any specific property that contained privileged material. AA000097-128. And, the Hustler Club only identified an Apple Laptop (retrieved from a separate suite within the Hustler Club, **belonging to Go Best**), an Apple Macbook Laptop owned by Ralph James, and the personal cell-phone of Andrea Woods. *Id.*

B. THE DISTRICT COURT’S ORDER REQUIRING RETURN OF THE PROPERTY.

Search warrants permitted LVMPD, through its Digital Forensic Lab (DFL), to examine, image, and copy the electronic devices as part of its search. AA000077-78; *see also* AA000080-84; 000088-91. At the time of the Appellants’ filing, DFL had imaged the following property from the Hustler Club:

- White Apple Phone with clear case
- Black iPhone w/ black case
- Blue iPhone w/ clear case
- Black iPhone w/ pink case
- iPad S/N GG8WQ3S3JF8J
- iPad S/N DMPRLA6MH1MK

AA000093-96. Absent from this imaged list are the Apple devices identified in Appellants’ declarations. *Id.* Likewise, the following property had been imaged from Little Darlings:

- HP Prop, desktop computer
- Dell OptiPlex 3060 desktop computer
- HP Pro desktop computer
- Black Cell Phone
- Black Apple iPhone

- (3) Lexar 64 GB thumb drives
- (1) SanDisk 32GB thumb drive
- (7) Unknown make thumb drives
- (1) Microsoft thumb drives

Id. While these items had been imaged, DFL was still processing the images. *Id.* DFL articulated that retention of the property was necessary until DFL could confirm that the imaging was successful. *Id.* DFL further explained that the return of the original devices, prior to confirming the successful imaging of the same, could result in a loss of evidence. *Id.*

After the District Court denied Appellants' their requested relief, Appellants sought to stay enforcement of the District Court's order pending this appeal. Respondent's Appendix (RA) 001-6. While the District Court denied the request for a stay, it did order the return of property that LVMPD **had imaged**. This decision was never challenged by Appellants. *See* Notice of Appeal and Docketing Statement on file herein.

C. THIS COURT'S ORDER AFFIRMING, IN PART, AND REMANDING, IN PART.

This Court entered an Order Affirming, in part, and Remanding, part, the District Court's decision. *See* Order filed on April 7, 2023. First, this Court concluded that there was a substantial basis for the District Court to conclude that probable cause existed for the issuance of the warrants and affirmed the lower

court's decision. See Order at 6. Of similar vein, this Court ruled that Appellants did not establish good cause to unseal the warrant applications and affidavits. *Id.* at 7-8.

In addressing Appellants' privilege arguments, this Court determined that the District Court erred in when permitted LVMPD to retain the copies or mirror images of the **electronic devices that may contain certain privileged documents** without determining whether such materials were covered by a privilege. *Id.* at 14. Overall, the Court found that Appellants' would not be able to properly assert a privilege without having access to the seized property with alleged privileged materials. Recognizing that LVMPD retained copies and mirror images of the devices, this Court did not order LVMPD to return copies but encouraged the District Court to put a protective order in place

III. LEGAL ARGUMENT

A. LEGAL STANDARD.

NRAP 40(c)(2) provides, in relevant part, that "the [C]ourt may consider rehearing in the following circumstances: (A) [w]hen the court has overlooked or misapprehended a material fact in the record or a material question of law in the case, or (B) [w]hen the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling dispositive issue

in the case. *See also, e.g., Am. Cas. Co. of Reading, Pa. v. Hotel & Rest. Emps. & Bartenders Int'l Union Welfare Fund*, 113 Nev. 764, 766, 942 P.2d 172, 174 (1997) (rehearing will be granted when the court has overlooked a material matter and when rehearing will promote substantial justice).

B. THIS COURT CANNOT ORDER THE RETURN OF ALL PROPERTY.

Appellants' Petition ignores the fact that it did not claim that all property contained privileged material. This Court's Order limiting reversal and remand to the privilege issue is significant to the specific property that should be returned. Appellants did seek return of all their property. Importantly, however, sought return of all their property on the basis that LVMPD lacked probable cause to obtain the warrant. This Court affirmed the District Court's finding that there was probable cause. Thus, under this theory, return of all property is not appropriate.

Appellants' alternative argument was that, at a minimum, certain property should be returned because it contained privileged information. To be sure, Little Darlings did not provide any declarations in support of its briefing below and made no proffer about devices containing privileged materials. Accordingly, Little Darlings did not assert that any of its property contained privileged material and Appellants are barred from arguing to the contrary. The Hustler Club limited their privilege arguments to three electronic devices, an iPhone and two Apple

computers. The iPhone has been returned. RA 0001-6. The Apple computers (or Apple devices) were not returned. Nevertheless, this Court cannot modify its order to return **all** property, for the purpose of conducting a privilege review, when Appellants failed to demonstrate that all property, including the DVR and the point-of-sale systems contain privileged material. Thus, the sole issue is whether the Court should modify its order to direct LVMPD to return the Apple devices. For the reasons discussed in more detail below, return of the Apple devices is not appropriate at this juncture.

C. THERE IS AN OWNERSHIP DISPUTE AS TO THE APPLE DEVICES BARRING LVMPD FROM RETURNING THE PROPERTY.

Return of the Apple devices, at this time, would cause harm to LVMPD as there is a factual dispute about ownership. At the time of Appellants' filing, it was the only case seeking property seized in executing the Hustler Club search warrant. Subsequently, however, Mohny's other company¹, Go Best, LLC, sought relief from the District Court for access to an Apple computer. *See* Court of Appeals Court Case No. 85082. To date, there remains a significant factual issue that bars this Court from mandating the return of the Apple devices to the Hustler Club.

¹ Mohny is the managing member of both the Hustler Club and Go Best, LLC. AA000117.

In the instant case, on behalf of Hustler Club, Mohny declared:

8. A **Go Best** laptop, annotated on the Return as “**Apple Laptop SN C02VHAAHHTD5** . . . was seized from inside Go Best’s locked office by law enforcement during the April 5, 2022 police raid of the Hustler Club.

AA000117 (emphasis added). And, the laptop contained privileged communications as well information irrelevant to either Go Best and the Hustler Club. *Id.* The General Manager of the Hustler Club then claimed that the other Apple device, annotated as 1X Apple MacBook Laptop belonged to him. AA000123. At the time of these filings, LVMPD did not challenge Go Best’s standing because it construed Go Best to be part and parcel of the Hustler Club. *See* Court of Appeals Case No. 85082.

To circumvent the District Court’s order, Mohny, via Go Best, filed another lawsuit seeking the return of an Apple device. *Id.* Mohny, however, in his declaration in the Go Best matter, did not specify which Apple device. *Id.* LVMPD presumed that Mohny was referring to the same Apple device with the serial number he identified in his declaration for the Hustler Club matter. *Id.* Counsel for Mohny, however, represented that Mohny was asserting ownership of the Apple device notated as 1X Apple MacBook Laptop in the search warrant return. *Id.* This is the same laptop the Hustler Club is claiming belongs to it—not Go Best.

In the Go Best lawsuit, LVMPD argued that Go Best is bound by the District Court's order entered by Judge Weise. *Id.* This issue is currently pending before this Court. *Id.* If this Court concludes that Go Best was not bound by the District Court's order in the Hustler Club case, then, at a minimum, the District Court must make a factual determination as to the ownership of the devices. This is significant as it effects whether the Hustler Club has standing to assert return of property that does not belong to it. Ownership is particularly important if this Court holds that Go Best could initiate a separate return of property proceeding, despite Hustler Club's requested relief on behalf of Go Best.

In sum, an order from this Court directing LVMPD to return the Apple devices without a decision in the Go Best case (Court of Appeals Case No. 85082) or a factual determination as to ownership could create liability on behalf of LVMPD for returning a device that (allegedly) contains privileged information to the wrong party. Thus, this Court should not modify its order to direct LVMPD to return all property, let alone the Apple devices. Alternatively, if the Court believes modification of its order is necessary, it can direct the Court to reach a factual determination as to ownership of the Apple devices.

D. RETURN OF UN-IMAGED DEVICES WOULD PREJUDICE LVMPD'S INVESTIGATION

A blanket order requiring the return of all property, or even just the Apple devices, without the requirement that LVMPD image the copy first would be detrimental to the criminal investigation. At this time, there is nothing in the record that demonstrates the Apple devices have been imaged. If this Court were to order LVMPD to return the Apple device, or any of the property, without first imaging or copying the device, it is significantly likely that information or evidence relevant to LVMPD's investigation would be destroyed—resulting in prejudice to LVMPD's investigation. Imaging or copying the device before returning the Apple devices to Hustler Club squares with this Court's recommendation to the District Court that it issue a protective order until Appellants provide the Court with a privilege log and it reaches a determination as to whether such information is privileged. Therefore, the Court must deny Appellants' Petition for Rehearing because they have not demonstrated that this Court misapprehended a material fact.

IV. CONCLUSION

Based on the foregoing, LVMPD asks that this Court deny Appellants' Petition for Rehearing as they have not established that this Court misapprehended or overlooked a material fact. Alternatively, should the Court believe that

modification of its order is warranted, it cannot order the return of all property, but the order should be modified so that Appellants provide a privilege log related to the materials in their possession.

Dated this 6th day of June, 2023.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this answer complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

2. I further certify that this answer complies with the page- or type-volume limitations of NRAP 40 or 40A because it is either:

☒ proportionally spaced, has a typeface of 14 points or more and contains 2581 words; or

☐ does not exceed _____ pages.

Dated this 6th day of June, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **RESPONDENT LAS VEGAS METROPOLITAN POLICE DEPARTMENT'S ANSWER TO APPELLANTS' PETITION FOR REHEARING** was filed electronically with the Nevada Supreme Court on the 6th day of June, 2023. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, addressed to:

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