



Legal Update

No Automatic Reasonable Expectation of Privacy in Snapchat Videos

Commonwealth v. Averyk Carrasquillo, SJC–13122 (February 7, 2022)

Relevant facts

In April 2017 a Boston Police officer, using a random name and a default profile picture assigned by Snapchat, sent a friend request to a Snapchat account identified as “Frio Fresh.” Frio Fresh accepted that request and the officer began viewing video stories posted to that account. It was later learned that the “Frio Fresh” Snapchat account belonged to the defendant. Frio Fresh was set as a private account so content could only be viewed by “friends” of Frio Fresh, not by the general public.

On May 10, 2017, the officer saw a story on the Snapchat account showing someone from the waist down wearing distinctive clothing displaying a silver revolver. Half an hour later another story was posted showing the defendant inside a weightlifting gym. The officer recognized the gym and established surveillance nearby. Shortly thereafter, officers saw the defendant wearing the same distinctive clothing that was seen in the video. The defendant was stopped by police and a revolver was recovered from his pants pocket.

The defendant moved to suppress the videos and all other evidence as fruit of the poisonous tree arguing that he had a reasonable expectation of privacy in the videos he posted to Snapchat.

Discussion

There are two types of privacy that are implicated when there is government surveillance of social media: conversational privacy and associational privacy. “Conversational privacy protects private conversations from unreasonable government surveillance.” “[A]ssociational privacy protects the ability to develop and maintain personal relationships.”

For specific guidance on the application of these cases or any law, please consult your supervisor or your department’s legal advisor or prosecutor.

The court recognized that more and more personal relationships are being developed via technology as opposed to face-to-face interactions.

“For better or worse, the momentous joys, profound sorrows, and minutiae of everyday life that previously would have been discussed with friends in the privacy of each others’ homes now generally are shared electronically using social media connections. Government surveillance of this activity therefore risks chilling the conversational and associational privacy rights that the Fourth Amendment and art. 14 seek to protect.”

Because of the evolving nature of technology, the court would not provide a bright line rule as to whether someone has a reasonable expectation of privacy in what is posted on social media. The court explained that a rule created today might not make sense when applied to future technology. Instead, each case must be analyzed using the same framework applied in other search and seizure cases: a defendant must prove that they had a subjective expectation of privacy in the content they posted and that their expectation of privacy is one that society would accept as reasonable.

Based upon the facts of this case the court did not find that the defendant had a subjective expectation of privacy. While it is true that the defendant’s Snapchat account was set to private; the court found it significant that the defendant was unaware of the privacy settings of his account. The court noted that other courts have inferred a subjective expectation of privacy in cases in which an individual purposefully took steps to ensure privacy, but the defendant did not take such steps in this case.

The court went on to find that Snapchat has features that would favor a finding that an expectation of privacy in the content posted to its platform was objectively reasonable. For instance, posted content is only visible for a limited time (pictures are deleted after 10 seconds; video stories are deleted after 24 hours) and a friend that wants to record the content must utilize technology outside of the Snapchat App to do so. There are also facts in this case that would favor a finding of an objectively reasonable expectation of privacy: the account was private, the username was a pseudonym which was not a nickname the defendant used, and friends had to be added deliberately by the user of the account.

The court ultimately did not find that there was an objective expectation of privacy in the content that the defendant shared on Snapchat in this case. The court relied heavily on the fact that the governmental intrusion in this case was made with the defendant’s permission. The content of the account was controlled by the defendant and was accessible to the officer only after the officer’s friend request was accepted by the defendant. In a footnote the court cautioned that the result may have been different if the officer had posted as a close friend or family member when making the friend request.

Because the defendant had no reasonable expectation of privacy in Snapchat videos he shared with an undercover officer, no search in the constitutional sense occurred. The motion was properly denied.

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