APL-2020-00010

Court of Appeals

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

JOSEPH SCHNEIDER,

Defendant-Appellant.

BRIEF FOR THE DISTRICT ATTORNEYS ASSOCIATION OF THE STATE OF NEW YORK AS *AMICUS CURIAE*

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BRIEF FOR AMICUS CURIAE DISTRICT ATTORNEYS ASSOCIATION OF THE STATE OF NEW YORK

PRELIMINARY STATEMENT

The District Attorneys Association of the State of New York ("DAASNY") submits this brief as amicus curiae in the above-captioned appeal. By permission of the Honorable Eugene M. Fahey, Joseph Schneider appeals from an order of the Appellate Division, Second Department, entered on October 16, 2019. That order affirmed a judgment of the Supreme Court of the State of New York, Kings County (Chun, J.), rendered on May 30, 2018, convicting defendant, upon his plea of guilty, of seventeen counts of Promoting Gambling in the First Degree, and one count each of Enterprise Corruption, Possession of Gambling Records in the First Degree and Conspiracy in the Fifth Degree. Defendant was sentenced to concurrent prison terms

of one to three years for each of the felony charges and one year for the misdemeanor conspiracy count.

Defendant's conviction arose from his participation, between 2014 and 2016, in the Mitchnick Enterprise, a nationwide gambling organization based in Costa Rica. Defendant, who was in California, paid for monthly access to internet sports betting sites that were maintained on servers operated by Mitchnick. In turn, betting agents would pay defendant to grant their clients access to those sites to place bets. Some of those clients were in Kings County. The Kings County District Attorney applied for and received authorization for a number of eavesdropping warrants, including for defendant's cellphone. Defendant was intercepted in discussions with his co-conspirators about the daily operations of the Enterprise. He and seventeen co-defendants were arrested and indicted for gambling related crimes.

During the criminal proceedings, defendant moved to suppress the wiretap evidence. He claimed that the issuing justice did not have jurisdiction to issue those warrants because defendant lived in California and never traveled to New York. He insisted that both New York and federal law prohibited prosecutors from eavesdropping on out-of-state residents. In opposing that motion, the Brooklyn prosecutors argued that the issuing justice had acted properly because the phone calls were actually heard at a listening plant located in Kings County.

The trial judge denied defendant's motion. The court ruled that New York's wiretap statutes granted jurisdiction to the justice presiding in the district where the

eavesdropping warrant was executed, which included the place where the intercepting team was listening. Because the agents listening to the conversations occurring over defendant's phone were in Brooklyn, a Brooklyn justice could properly issue the warrants. The Appellate Division, Second Department agreed. The intermediate appellate court found that, even though defendant had been in California at the time he made or received the relevant calls and the party to whom he was speaking was not in New York, the issuing justice had jurisdiction to issue the eavesdropping warrant because the warrant was executed in Brooklyn. *People v. Schneider*, 176 A.D.3d 979, 980-81 (2d Dept. 2019). We address the propriety of that ruling and ask this Court to affirm it.

STATEMENT OF AMICUS CURIAE

The District Attorneys Association of the State of New York (DAASNY) is a state-wide organization composed of elected District Attorneys from throughout New York State, the Special Narcotics Prosecutor of the City of New York, and their nearly 2900 assistants. Members of the Association are responsible for the investigation and prosecution of financial crimes such as Promoting Gambling and Possessing Gambling records. Members of the Association are also responsible for investigating and prosecuting other crimes -- such as those involving large-scale narcotics trafficking, identity theft and enterprise corruption -- in which it is not unusual for some of the conspirators to be outside of New York state. DAASNY's experience on issues relating to the criminal law and criminal procedure applicable to the prosecution of such crimes

therefore places it in a position to assist the Court's resolution of the specific issue of statewide concern raised by this appeal: whether New York's eavesdropping statutes authorize a New York justice to issue a warrant in connection with an investigation over which the justice has jurisdiction when it is likely that certain telephone calls will take place between people who are not in New York state.

POINT

NEW YORK'S PENAL AND CRIMINAL PROCEDURE LAWS PERMIT COURTS TO ISSUE EAVESDROPPING WARRANTS EVEN WHEN CERTAIN INTERCEPTED CONVERSATIONS WILL BE BETWEEN CELL PHONE USERS WHO ARE NOT IN NEW YORK STATE, SO LONG AS THE ISSUING COURT HAS JURISDICTION OVER THE INVESTIGATION AND THE LISTENING POST IS WITHIN THAT JURISDICTION.

A review of the relevant statutes makes clear that the Appellate Division, Second Department applied them in a straightforward and common-sense manner and arrived at the correct result. Those statutes are found in Criminal Procedure Law Article 700 and Penal Law Article 250. Article 700, which is entitled "Eavesdropping and Video Surveillance Warrants," lists the requirements that applicants must meet in applying for eavesdropping warrants, and also denotes the responsibilities of the judges who issue the warrants. Penal Law Article 250, "Offenses Against the Right Of Privacy," criminalizes unauthorized interceptions and provides definitions of significant terms, which CPL Section 700.05(1) adopts for use in Article 700.

Pursuant to CPL Section 700.10(1), "a justice may issue an eavesdropping warrant . . . upon ex parte application of an applicant who is authorized by law to investigate, prosecute or participate in the prosecution of" certain designated offenses. Section 700.05(4) defines "justice" as:

> any justice of an appellate division of the judicial department in which the eavesdropping warrant is to be executed, or any justice of the supreme court of the judicial district in which the eavesdropping warrant is to be executed, or any county court judge of the county in which the eavesdropping warrant is to be executed. When the eavesdropping warrant is to authorize the interception of oral communications occurring in a vehicle or wire communications occurring over a telephone located in a vehicle, 'justice' means any justice of the supreme court of the judicial department or any county court judge of the county in which the eavesdropping device is to be installed or connected or of any judicial department or county in which communications are expected to be intercepted. When such a justice issues such an eavesdropping warrant, such warrant may be executed and such oral or wire communications may be intercepted anywhere in the state.

While the statute was enacted before the emergence of cell phones, the language concerning phones in cars shows that the legislators were well aware that devices could be mobile. However, the legislators did not prohibit continued interception when the target car was in another state, making clear that interception in New York State of conversations over mobile phones located outside of New York is permissible. Indeed, as the statute's phrasing establishes, as long as the "interception" or execution occurs

"anywhere in the state," it does not matter where the "oral or wire communications" originate or terminate.[1]

The Legislature did not expressly define the terms "executed" and "intercepted." However, Penal Law Section 250.00 contains several definitions that shed additional light on the legislative intent concerning the interception of conversations between people located outside New York. To begin, subsection 1 defines "wiretapping" as "the intentional overhearing *or* recording of a telephonic or telegraphic communication" by a person other than one of the participants and without the consent of one of those participants. Subsection 2 similarly defines "mechanical hearing of a conversation" as the "intentional overhearing *or* recording of a conversation," again by a nonparticipant and without the consent of a participant. Lastly, subsection 6 defines the "[i]ntercepting or accessing of an electronic communication" as the "intentional acquiring, receiving, collecting, overhearing *or* recording of an electronic communication, without the consent of sender or receiver. . ." (emphasis in all statutes supplied). The use of "or" in all three definitions provides options for defining where the interception of telephone conversations and electronic communications occurs. In connection with the interception of phone calls, interception occurs either where the conversation is overheard or where it is recorded. For electronic communications, again, interception

[1] Contrary to defendant's claim (DB: 21-22), nothing in the language expanding the definition of "justices" authorized to issue warrants for car phones bars a justice sitting in a jurisdiction in which a communication is actually intercepted from issuing a warrant merely because those participating in the call are outside of New York State.

occurs either where the communication is acquired/collected or where it is recorded. In all three sections, the Legislators gave significance not just to where the communications occurred, but also to where the government ultimately listened to them.

None of these sections specifically defines the term "execution." It is nevertheless a matter of common sense that the execution of an eavesdropping warrant occurs where the authorized interceptions take place. Indeed, the last sentence of Section 700.05(4) specifically links interception with execution, by stating that the warrant may be "executed *and* such . . . communications may be intercepted" anywhere in the state (emphasis added). Here, then, under the plain language of the relevant New York statutes, as the conversations were both overhead and recorded at a listening post in Brooklyn, both interception of the conversations and execution of the eavesdropping warrant occurred within New York State, and more particularly in Brooklyn.

While this is a case of first impression in this Court, a number of federal and state courts have addressed this same issue. Starting with *United States v. Rodriguez*, 968 F.2d 130 (2d Cir. 1992), the Second Circuit upheld a Southern District judge's issuance of eavesdropping warrants for landline phones that were located in New Jersey. The Court of Appeals rejected the defendant's argument that the issuing court did not have jurisdiction over the wiretap because the target phone was located in another geographic jurisdiction.

In arriving at this ruling, the Second Circuit initially examined the jurisdictional grant in 18 U.S.C. § 2518, which states that a "judge may enter an ex parte order . . . authorizing or approving interception of wire, oral, or electronic communications within the territorial jurisdiction of the court in which the judge is sitting," and noted that the statute did not specify where an interception occurred. *Rodriguez,* 968 F.2d at 135-36. The Court concluded that, as a matter of common sense, an interception occurred where the contents of the communication were captured and redirected to where the wire monitors would be located. As the phone under consideration was a landline, interception occurred at the site of the phone. *Id.* at 136.

However, the Court went on to examine 18 U.S.C. § 2518(3), which defines interception as "the aural" acquisition of the contents of the communication. As the term "aural" referred to hearing, the Court found that Congress had intended that interception also occurs at "the place where the contents of a wire communication [were] first to be heard and understood by human ears, other than those of the parties to the conversation." *Id.* The Court called the place where the agents heard the communication the "listening post." As it was located within the Southern District of New York, a court in that district did indeed have jurisdiction to authorize the wiretap. *Id.*

In support of its interpretation, the Second Circuit noted that one of the key goals in enacting a wiretap statute is to protect the privacy interests of users of communication devices from abuse by law enforcement. Thus, both federal and state

laws mandated that an eavesdropping warrant could not continue longer than necessary to achieve the goals of the investigation. If multiple judges in each out-of-state jurisdiction where the phone would be used had to issue eavesdropping warrants, they might not be aware when the goals of the investigation had been achieved and might permit eavesdropping to continue longer than was necessary. *Rodriguez*, 968 F.2d at 136-37.

The phones in *Rodriguez* were landline telephones and the opinion did not discuss specifically whether the New Jersey phones had been used to place calls to other non-New York phones. Subsequently, though, other federal courts have endorsed "listening post" jurisdiction in upholding the interception of conversations where both cell phones were outside the geographic jurisdiction of the issuing court. *See e.g., United States v. Jackson*, 849 F.3d 540 (3d Cir. 2017); *United States v. Vega*, 826 F.3d 514 (DC Cir. 2016); *United States v. Cano-Flores*, 796 F.3d 83 (DC Cir. 2015); *United States v. Henley*, 766 F.3d 893, 931-12 (8th Cir. 2014); *United States v. Luong*, 471 F.3d 1107 (9th Cir. 2006); *United States v. Jackson*, 207 F.3d 910 (7th Cir. 2000), *vacated on other grounds*, 531 U.S. 953 (2000); *United States v. Denman*, 100 F.3d 399, 402-04 (5th Cir. 1996); *see also United States v. Sidoo*, 2020 U.S. Dist. LEXIS 111244 (D.Mass 2020); *United States v. Milleri*, 2020 U.S. Dist. LEXIS 63842 (S.D. Mississippi 2020); *United States v. Brock*, 2020 U.S. Dist. LEXIS 7320 (W.D. La. 2020).

Additionally, several state courts have interpreted their eavesdropping statutes in accordance with the listening post basis of jurisdiction adopted by the federal courts.

See, e.g., State v. Nettles, slip op. No. 2020-Ohio-768 (Ohio S.Ct. 2020); *State v. Brye,* 304 Neb. 498 (Neb.S.Ct. 2019); *State v. Brinkley*, 132 A.3d 839 (Del. Sup. Ct. 2016); *State v. Ates*, 86 A.3d 710 (N.J. S.Ct. 2014); *Davis v. State*, 43 A.3d 1044, 1045-46 (Md. Ct. App. 2012); *State v. McCormick,* 719 So.2d 1220 (Fla.Fifth Dist. 1998); *see also United States v. Hudson*, 2018 U.S. Dist. LEXIS 5660 (WD OK 2018) (finding that the Oklahoma counterpart to Title III provides that jurisdiction is where the phones are located *and* where law enforcement puts its listening post).[2]

Rodriguez was decided in 1992, well before cell phones became, as the United States Supreme Court remarked, ubiquitous and essentially tethered to their users. *See Carpenter v. United States*, 138 S.Ct. 2206 (2019), and *Riley v. California*, 573 U.S. 373 (2014). Those apt descriptions show that the ways phones are used by New York's citizens are now different from 1992. Landline telephones were stationary devices that

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[2] *Dahda v. United States*, __ U.S. __, 138 S.Ct. 1491 (2018), bears mention. There, the government submitted a request for a wiretap to a federal judge in Kansas in connection with a drug ring based in Kansas. The order that the court signed included a sentence stating that, if the target cellphones were taken out of the jurisdiction, interception could occur anywhere in the United States. For the most part, the government listened to conversations from a listening post in Kansas. In one instance, however, they listened to a conversation that took place in California from a listening post in Missouri. Although that conversation was not introduced at trial, the defendants argued to the Supreme Court that it tainted the entire wiretap and asked that all conversations be suppressed. *Id.* at 1496.

In rejecting the defendant's request, the Court noted that both parties had agreed that a federal judge could issue an eavesdropping warrant that permitted interception of phones that were physically outside the court's jurisdiction, so long as the listening post was in that court's jurisdiction. *Id.* While this was *dictum*, the fact that the Court accepted that interpretation so readily certainly suggests that that Court saw no problem with listening post jurisdiction.

were located in a home or place of business, thereby tethering the phone user to a physical location. Now, phone users can use their phones anywhere so long as they are within range of a cell tower.[3]

This Court's statement in *People v. Capolongo*, 85 N.Y.2d 151 (1995), that state and even country boundaries are dissolving in this "era of electronic and satellite communications[]," *id.* at 151, was certainly prescient, as cell phones have clearly made criminal enterprises more mobile. Co-conspirators in enterprises such as the one in which this defendant participated are no longer tethered to a phone jack. They can move within a state or leave the state altogether, without compromising their ability to reach their cohorts, who similarly carry cell phones. Heads of organizations can travel to oversee the out-of-state arms of their conspiracies and yet still maintain instantaneous contact with the conspirators who stayed behind to continue the criminal operations there.

Given the changes that cell phone technology has brought, listening post jurisdiction is critical for the government to be able to investigate these large scale conspiracies efficaciously and thoroughly. The multiple plant alternative is simply not

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[3] The new technology has also changed how law enforcement conducts a wiretap. Previously, in order to intercept conversations occurring over landlines, the government agents conducting the eavesdropping needed to install a physical device onto a phone line near the phone's location. They would then set up their listening plant near this phone line. Now, agents can set themselves up anywhere and have the cell phone user's service provider funnel the electronic signals that convey the contents of cell phone calls to that "plant." *See Nettles, supra*, slip op. 2020-Ohio-768.

feasible. First, prosecutors may not know, in advance, where their targets are going. They also may not know how long their targets will remain in these foreign states, and it is certainly possible that those stays will be exceedingly brief. A target can make calls from a car or train and so can be carrying on conversations as he moves from state to state. Under those circumstances, prosecutors will not have any realistic opportunity to arrange with a foreign prosecutor to apply for and oversee the necessary wiretap.

Even in those instances in which prosecutors could predict the jurisdictions in which criminal conversations would take place, it would nonetheless be unduly burdensome for the government to obtain warrants in each jurisdiction. In order even to obtain court authorization for interception, the prosecutor would have to make arrangements with a prosecutor in that foreign jurisdiction to apply for the warrants. Moreover, wiretap investigations are time-consuming and expensive, and there would be no guarantee that a prosecutor's office in a different state would be willing to commit or even have the resources necessary to conduct court-authorized eavesdropping.

Furthermore, New York prosecutors would be disadvantaged by being forced to rely on foreign personnel to further their investigations. Agents and monitors from different states would not be as familiar with the investigation as the New York investigators and wire monitors. For instance, as monitors listen to intercepted conversations, they come to learn the voices of the various phone users. For each new foreign warrant, new monitors from those jurisdictions would have to listen long enough to recognize voices. The time that it would take them to do so and also to

recognize the significance of certain codes that the co-conspirators were utilizing could have negative consequences for the investigation, as crucial evidence could be missed.

Finally, requiring law enforcement to obtain eavesdropping warrants from foreign jurisdictions would present significant procedural hurdles for the prosecutors once defendants had been arrested. Prosecutors would have to obtain all the wiretap applications from all of the foreign jurisdictions within a short period of time to satisfy New York's disclosure requirements. *See* CPL Section 700.70 (requiring disclosure of the relevant eavesdropping warrants and affidavits within fifteen days of arraignment). Prosecutors would also have to arrange for the out-of-state agents who listened to the conversations and/or took certain steps in the field in furtherance of the wire to come to New York to testify before the grand jury and any ensuing trial. The greater number of foreign jurisdictions involved, the more logistically difficult that would be.

It is also sensible that the judge issuing the warrant and supervising the wiretap be from the jurisdiction in which the defendant-targets are to be prosecuted. That judge is better equipped to determine whether it is appropriate for the government to utilize eavesdropping as a tool for that investigation. The judge will certainly have other cases and investigations against which to compare the investigation at issue, in order to ensure that this invasive tool is used only where necessary. Moreover, to the extent that a probable cause determination turns on knowledge of the elements of New York crimes, New York judges are better positioned to determine whether the probable cause standard has been met.

While listening post jurisdiction is crucial for prosecutors, it is, in some respects, beneficial for the targets of the wiretaps as well. Where there are multiple plants in multiple jurisdictions, there will be multiple prosecutors, judges, and wire monitors listening to the conversations. In other words, more people will learn of the accusations against the targets and will be listening to their conversations. Furthermore, and related to the concern raised in *Rodriguez* that interception could proceed over some out-of-state phones even after the investigative objectives had been realized, authorizing multiple state court judges to oversee the executions of the warrants in his/her state, would diffuse general supervision over the eavesdropping warrant. Such diffusion could deprive the target of the protection that results from centralized judicial supervision. *See People v. Perez,* 18 Misc.3d 582 (Bx. Co. 2007) (where a district attorney is required to obtain warrants from judges in two or more jurisdictions "[s]uch a result would undesirably divide supervision of the execution of the warrants between or among the issuing judges, and could thereby prejudice the defendant"); *see also Brinkley,* 132 A.3d at 846-47 ("by diffusing oversight responsibilities [of Delaware's wiretap statute], it might weaken the courts' ability to protect citizens' privacy by monitoring the wiretap process").

It is worth noting that extending the prosecutorial reach to targets whose telephone calls take place wholly outside of the state is consistent with a legislative and judicial endorsement of prosecutions in New York State of criminal defendants whose criminal conduct takes place outside of the state. As this Court explained in *People v.*

Fea, 47 N.Y.2d 70 (1979), while at common law, the sovereign's power to prosecute was limited to acts within its territory, certain exceptions emerged, such as where conduct outside the state was committed with the intent to obstruct the government affairs of the sovereign. Thus, the Legislature created statutory exceptions to strict principles of territorial geographic jurisdiction. *Id.* at 75-76. Under CPL Section 20.20(1), a criminal defendant may be convicted in the courts of New York for an offense defined by the laws of this state if the relevant conduct occurs in New York state and that conduct is committed by him *or "by the conduct of another for which he is legally accountable"* (emphasis supplied). CPL Section 20.20(2) lists four circumstances under which a person may be tried and convicted in a New York court "[e]ven though none of the conduct constituting [the] offense may have occurred within the state."

Consistent with this Legislative grant of extra-territorial jurisdictional, this Court has upheld prosecutions in New York courts for New York crimes where the defendant's conduct occurred outside of New York state. *See, e.g., People v. Kassebaum*, 95 N.Y.2d 611 (2001) (New York had jurisdiction over defendant for attempting to purchase drugs in Boston based on his accomplice's conduct in New York); *see also People ex rel. Burroughs v. Warden, O.B.C.C. Facility,* 132 A.D.3d 469 (1st Dept. 2015). At the risk of stating the obvious, a defendant who is arrested for acts committed outside of the state suffers as much, if not more, of an intrusion into his privacy as a person whose conversations are intercepted pursuant to an eavesdropping warrant. And, he

certainly suffers a greater deprivation of liberty. Nonetheless, this Court has upheld the legality of such prosecutions.

In an effort to sound the alarm of government overreach, the defendant in the case at bar warns that listening post jurisdiction "gives a New York State judge unbounded jurisdiction anywhere in the nation" (DB: 22). That is simply not true. Pursuant to CPL Section 700.10(1), the applicant for the eavesdropping warrant must be someone who is "authorized by law to investigate, prosecute or participate in the prosecution of the designated offense which is the subject of an application." Furthermore, CPL Section 700.20(1)(a) requires that the applicant explain in the application his/her authority to make the application. In other words, the district attorney's office seeking use of eavesdropping warrants must still have jurisdiction to investigate the underlying criminal conduct. The effect of that requirement is to ensure that judges will only issue eavesdropping warrants that are sought in furtherance of investigations of the commission of New York crimes. *See State v. Ates,* 86 A.3d at 712 (because a judge must find that the state has territorial jurisdiction to prosecute the underlying crimes, the Wiretap Act does not unconstitutionally permit the interception of communications with no connection to New Jersey). Indeed, here, as the defendant does not contest, the Brooklyn District Attorney's Office had jurisdiction over the investigation into the gambling crimes for which they utilized wiretapping.

One more comment bears mention. It should be stressed that listening post jurisdiction does not excuse either the statutory or constitutional requirements that

must be met for the warrant to issue. The prosecutors must still establish probable cause to believe that the phone is being used to further the crimes under investigation and also show that evidence of those crimes will be intercepted over that phone. CPL §§ 700.15, 700.20. And, in accordance with Fourth Amendment requirements, the application must be reviewed by a neutral and detached magistrate.

In sum, the Appellate Division correctly interpreted New York's eavesdropping statute to authorize the issuing justice to sign the warrant. The signing justice had jurisdiction over the crimes and the listening post was in the court's jurisdiction. The fact that some of the intercepted conversations occurred wholly outside of New York state did not deprive the issuing court of its jurisdiction and did not warrant suppression of the fruits of the wiretaps.

CONCLUSION

The order appealed from should be affirmed.

Respectfully submitted,

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