NYS Court of Appeals Criminal Decision; June 3, 2021

People v. Schneider

This is a 4 to 2 decision authored by the Chief Judge. Judge Wilson wrote for the dissent, which Judge Rivera joined. The Second Department is affirmed. At issue was whether Supreme Court, sitting in Kings County, had jurisdiction to issue eavesdropping warrants for the defendant's cell phones, which were *not* physically in New York. This was part of a state RICO (enterprise corruption) and gambling investigation. The defendant also argued, among other things, that due process was violated as California (the place where the defendant resided and conducted his activities) did not include gambling as a designated crime for eavesdropping. The court, however, held that the warrants were indeed "executed" in Brooklyn pursuant to CPL 700.05(4), as the communications were intentionally intercepted by law enforcement in that geographical location.

The defendant ran a sports gambling website. Following a two-year gambling investigation, Mr. Schneider and seven co-defendants were indicted in Kings County for conduct which included the concealing of customer payments and the laundering of profits. There were multiple targets, including those physically inside NYS. Aside from the eleven eavesdropping warrants for the defendant's three cell phones, law enforcement conducted physical and video surveillance, and utilized a bugging device in Kings County. The defendant's participation in the purported illegal gambling enterprise was discovered through intercepted telephone conversations. Supreme Court concluded probable cause existed to believe defendant committed the designated gambling crimes within Kings County. *See*, CPL 700.05(8).

After mirroring the verbatim language of the Fourth Amendment in its first paragraph, the second paragraph of article I, § 12 of the NYS Constitution, as amended in 1938, indicates that:

> The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and *ex parte* orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 USC § 2510 *et seq.*, which was enacted in the aftermath of *Katz v. United States*, 389 US 347, 351 (1967) and *Berger v. New York*, 388 US 41, 55 (1967), imposed minimum standards upon the

states for conducting electronic surveillance. CPL article 700 was enacted subsequent to Title III and sets out our state's procedural mechanism for securing an eavesdropping warrant. The enterprise corruption statute, PL § 460.20 (one of the nation's "baby RICO" laws), CPL article 700 and PL article 250 were enacted with the understanding that while organized crime is difficult to prosecute, the right to privacy remains a fundamental right. Strict compliance with article 700 is thus required. Articles 700 and 250 were both amended in 1988 to keep pace with emerging technologies and federal law.

The issuance of an eavesdropping warrant is further limited by the CPL article 20 and NY Const., article I, § 2 geographic jurisdictional requirements. But here, the Supreme Court sitting in Kings County was authorized to issue this warrant and the Kings County DA was authorized to both investigate the activity in question and "execute" the warrant within the territorial limits of Brooklyn. *See*, CPL 700.05(4)/(6); 700.35(1).

While the defendant argued the warrant was not actually "executed" inside Brooklyn, the majority says a warrant is "executed" where law enforcement intentionally overhears or records the telephonic (or electronic) communications, irrespective of the physical location of the target of the investigation. New York law was meant to conform to federal law, *i.e.*, 18 USC § 2518 and the so-called "listening post" rule, which emphasizes the point of interception.

The **dissent** argued the majority is approving of the *nationwide* jurisdiction of courts to compel wireless cell phone carriers to re-route into Kings County telephonic communications having no connection to NYS. The defendant never even set foot in New York. This was an unconstitutional extraterritorial application of NYS law and the Fourth Amendment. The defendant's calls from California were made to numerous states, but not New York. Eavesdropping warrants are indeed limited by CPL article 20's geographical limitations, just as search warrants addressing physical property are limited in their execution to the county of issuance or an adjoining county. *See*, CPL 690.25(2); *see also*, CPL 120.60 (limiting arrests made outside an officer's geographic jurisdiction). The warrant at bar should have been issued in California, not New York. The cell phone carriers are plainly agents of law enforcement in this scenario.

Prior to the advent of cell phones, wiretapping merely required the police to physically splice the telephone wires, having one of them terminate with the location of a law enforcement agency. But temporal proximity between the police and the so-called "wiretap" is no longer physically necessary. The signal (or telephonic conversation between two people outside of NYS) was diverted at bar by a nationwide cellular company upon the command of the warrant. This was the extraterritorial point where the warrant was "executed" in contravention of article 700. *See also*, *Matter of 381 Search Warrants Directed to Facebook*, 29 NY3d 231, 257-259 (2017) (Wilson, J., dissenting) (analyzing second paragraph of NY Const., art. I, § 12, prohibiting the "unreasonable interception of telephone and telegraph communications"); *see also*, *Olmstead v. United States*, 277 US 438, 476 (1928) (Brandeis, J., dissenting) (observing that … [g]eneral warrants are but puny instruments of tyranny oppression when compared with wire tapping"). A NYS court

is not authorized to divert purely out-of-state communications into our state. As articles 250 and 700 are silent regarding the definition of “executed,” they should have been strictly interpreted. Unlike federal law, there is a NYS statutory distinction between telephonic and electronic communications, with the legislature omitting the phrase “intercepted or assessed” regarding telephonic communications. Instead, unlike 18 USC § 2518(4), CPL 700.05(4) and 700.35(1) indicate an “execution” event. The CPL did not adopt the federal “listening post” rule.

The majority’s policy reasons for supporting the legality of this warrant is based on conjecture. Between 2009 and 2019, only 9 out of 36,000 state and federal wiretap applications were denied. None were denied between 2017 and 2019. Moreover, though NYS has only 6 % of the national population, its state courts accounted for no less than 28 % of the 2019 state wiretap applications granted nationwide. In contrast, the federal district courts in NYS accounted for only 5.9 % of the federal wiretap applications granted nationwide. Strict oversight of this process would not be impeded by requiring this warrant to be issued out of California where the target spoke from. In sum, wiretapping is a Penal Law crime. As Justice Brandeis observed, “[i]f the Government becomes a lawbreaker, it breeds contempt for the law…” *Olmstead*, 277 US at 468 (Brandeis, J., dissenting).