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IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA,

Appellant,

v.

Case No: 84,610

CYNTHIA MARIE RIVERS, et al.,

Appellees.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL,
FIFTH DISTRICT AND THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEES

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PRELIMINARY STATEMENT

The record in this case consists of three volumes including the transcript of Motion to Suppress Proceedings, which were held on March 17, 1993, the Court file, as well as a supplemental transcript of record totaling 334 pages. All references to the record will be designated by the letter "R" followed by the appropriate page number. All references to the Motion to Suppress Transcript will be designated by the letter "T" followed by the appropriate page number.

The State will be referred to in this brief as the Appellant and Defendants, Bloom and Wiggins will be referred to as the Appellees.

STATEMENT OF THE CASE AND FACTS

Appellees, Bloom and Wiggins, accept the facts presented by the Appellant, in their initial brief, as being a correct general statement of the facts of the case, however, Appellees do not stipulate that the authorization for Wiretap Order included all the necessary predicates in compliance with chapter 934 of Florida Statutes.

SUMMARY OF ARGUMENT

The Trial Court did not abuse its discretion in holding that the Florida Wiretap Statute was unconstitutional. The State exceeded the scope permitted by the applicable statute because Prostitution is not a crime dangerous to life, limb, or property. Based upon the applicable State and Federal Statutes, the Federal Code does not authorize wiretap for prostitution unless it involves interstate or foreign commerce. In the case at bar there was no evidence of any interstate activity. Further, when considering the three classifications of generic criminal activity subject to wiretap; i.e. National Security, Intrinsically Dangerous Activities, or Activities Characteristic to Organized Crime, the Trial Court was correct in granting the Motion to Suppress.

Although, Count One of the charging document, i.e. the RICO charge, is punishable by a possible penalty of greater than one year, the crime must also fit within the crimes enumerated in title 18 U.S.C. 2516(2), i.e., said crimes are not adherently "dangerous to life, limb, and property" as defined in said section. Further, RICO was charged due to the illegally obtained evidence.

ARGUMENT

THE TRIAL COURT AND DISTRICT COURT OF APPEAL PROPERLY RULED THAT THE FLORIDA WIRE TAP STATUTE WAS UNCONSTITUTIONAL AS EXCEEDING THE AUTHORIZATION CONFERRED BY THE FEDERAL OMNIBUS CRIME CONTROL AND SAFE STREETS ACT.

The authorization for application for wire tap in the case at bar was issued pursuant to the State Attorney requesting that Agent McHue be allowed to intercept wire communications relative to acts allegedly in violation of Chapter 796 of the Florida Statutes. This chapter generally prohibits prostitution related activities. Appellees contend that the State's wire tap law exceeds the authority conferred by the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. 2516. It is well established that the State is not authorized to exceed parameters of permissible State Regulation set out under this title without running afoul of the supremacy clause, U.S. Const. Art. IV, Cl. 2 see State v. McGillicuddy, 342 So.2d 567(Fla. 2 DCA 1977). The State has exceeded the parameters of permissible State regulation set out under Title 18 U.S.C. 2516(2), running afoul of the supremacy clause for the following reasons:

1. Title 18 U.S.C. 2516(2) enumerates the types of charges in which the State may obtain surveillance orders i.e., murder, kidnapping, gambling, robbery, bribery, extortion, narcotic drugs, marijuana, dangerous drugs, or other crimes dangerous to life,

limb, or property, and punishable by imprisonment for more than one year(emphasis added).

2. Title 18 U.S.C. 1952, entitled "interstate and foreign travel or transportation in aid of racketeering enterprises" provides: (a) whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce with the intent (1) to distribute the proceeds of any unlawful activity; or (2) commit any crime of violence to further any unlawful activity; or (3) otherwise promote... any unlawful activity.... Section (b) defines "unlawful activity" as used in this section as (1) any business enterprise involving gambling, liquor..., narcotics..., or prostitution offenses in violation of the laws of the states in which they are committed or of the United States...."

3. 18 U.S.C. 1961, 1962, and 1963 define "racketeering activity" and refer to prohibited activities which affect interstate or foreign commerce.

It is apparent, in the case at bar, that there is absolutely no evidence of interstate activity and considering the three classifications of generic criminal activity subject to wire tap i.e., National Security, Intrinsically Dangerous Activities, or Activities Characteristic of Organized Crime, the Court was correct in finding no basis to establish the lawful interception of wire or oral electronic communications. Further, there is nothing in the authorization for application for interception of wire, oral, and electrical communications, the application for pen register and trap and trace device authorization, nor the Order authorizing the

interception of wire, oral, and electronic communication which alludes to this prostitution ring being dangerous or that it is characteristic of "organized crime" as a term generally interpreted.

Appellees, Bloom and Wiggins, are solely charged in Count I of the charging document with RICO, and three counts of prostitution (R 76-96). Accordingly, the RICO count solely relies upon misdemeanor charges which do not carry a possible penalty of greater than one year and further more are not within the gambit of the crimes enumerated in Title 18 U.S.C. 2516(2). Further, the State has asserted that the RICO violation makes the wiretap valid. The request for the wiretap order was not based on RICO. Rather, the State specifically sought permission to intercept wire communications relative to acts allegedly in violation of Chapter 796 of the Florida Statutes, entitled "Prostitution." The RICO charges materialized after the State obtained evidence through the interception of communications pursuant to the wiretap order. The test is the sufficiency of the allegations contained in the request for the wiretap authorization and not the evidence of other crimes discovered as a result of the interception.

The Appellant, in the case at bar, stresses the increased threat of contracting HIV, or AIDS with the increase of sexual partners in this prostitution business. The Appellant's concern for public safety is well appreciated, but improperly applied. Although HIV, or AIDS, is dangerous to life, allowing the interception of wire, or oral communications because of same contravenes the Supremacy Clause and opens the door to the

interception of wire, oral communication in a myriad of other inappropriate situations.

In the case of People v. Shapiro, 431 N.Y.S.2d 422 (1980), a case factually comparable to the instant case, the New York Court of Appeals held that, although the wire tap would be valid under state law, same was invalid due to the fact that it exceeded Federal Statutory Authority. In the Shapiro case, the Defendant was charged in a 64 count information involving a course of homosexual sodomitic acts on various occasions over 17 months with eight different boys under 17 years of age whom he paid for sex. The Defendant was also charged with promoting such activity in two other cases with two other young boys. The Shapiro Court, making frequent references to Senate Report 1097 stated, at page 433, the following:

The provisions of title 3 do more than codify bare constitutional requisites; they manifest a Congressional design to protect the privacy of wire and oral communications by confining State authorization for eavesdropping by wiretap to what in Congress' view are appropriate and compelling circumstances... (T)he crimes considered serious enough to warrant investigation by wiretap, namely "murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marijuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses"

. . .

The list was to represent a class of major offenses that were either "intrinsically serious or *(were) characteristic of the operations of organized crime"...(W)ith the

exception of gambling and bribery, the designated crimes all involve harm or the substantial threat of harm to the person, a "limitation (expressly) intended to exclude such offenses as fornication and adultery" from the permissible scope of electronic surveillance... These criminal activities involved only consensual conduct, to which, as already indicated, the legislative history tells us the Federal statute does not extend the reach of permissible wiretapping.

The Court further stated, at page 432, that:

while it is possible for such crimes to involve the use of forcible compulsion, the State wiretapping statute is not framed with this particularity, and there was no indication from which the police could have reasonably suspected that Shapiro's alleged criminality partook in any measure of either violence or coercion.

Although wiretaps are authorized in Florida by Chapter 934, Florida Statutes (1992), the statute contains detailed provisions relating to the contents of applications for wiretaps, standards for issuance of wiretap authorizations, conduct of the taps, use of evidence derived from the taps, and grounds for suppression. The Florida Supreme Court, in re: Grand Jury Investigation, 287 So.2d 43(Fla.1973) held that the statute is an exception to the Federal and State Constitutional right to privacy and must be strictly construed and narrowly limited in it's application by the specific provisions set out by legislature.(Emphasis added). It must be noted that Federal law has preempted the field of wiretaps and any State law regulating the interception of same must provide safe guards that are at least as stringent as those set out in the Federal Statute, State v. McGillicuddy, 342 So.2d 567(Fla. 2 DCA 1977)Supra. In State v. Aurilio, 366 So.2d 71(4 DCA 1978), a case involving gambling, the significant portion of the decision stated

that a warrant could issue to intercept and investigate suspected gambling offenses, as designated by section 934.07 and as authorized by the Federal Statute.

CONCLUSION

The case at bar is not within the authorization of the Federal Statute and accordingly, the Trial Court properly suppressed the evidence declaring that the wiretaps used in the case were invalid and the evidence gleaned from them suppressed. It is respectfully requested that the Trial Court's Order suppressing evidence and the decision of the District Court be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing answer brief has been furnished this 18th day of November, 1994, by U.S. Mail to the Assistant Attorney General, 210 N. Palmetto Ave., Suite 447, Daytona Beach, Florida 32114, and Ed Leinster, 1302 E. Robinson Street, Orlando, Florida 32801.

Respectfully submitted,



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