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IN THE SUPREME COURT OF APPEAL OF THE STATE OF FLORIDA

FIFTH DISTRICT

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STATE OF FLORIDA,

Appellant,

vs. CASE NO: 93-810; 93-935

CAROL PINHAL,

Appellee.

_____/

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

INITIAL BRIEF OF APPELLEE

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Appellee' Initial Response has been furnished by U.S. Mail delivery to the Office of the Robert R. Butterworth, Attorney General, c/o Belle B. Turner, Assistant Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114 and to Adam Reiss, Esq., 203 E. Hillcrest Street, Orlando, FL 32801, Attorney for Appellants, Wiggins and Blum, this the 22ND day of November. 1994.

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STATEMENT OF THE CASE

The Appellee agrees with the recitation of the Statement of the Case with respect to the first two paragraphs of page one of the Appellant's Statement of the Case and Facts. Paragraph three of the State's Statement of the Case states that "the Authorization for Wiretap Order included all the necessary predicates in compliance with Chapter 934". The State then goes on to indicate that Office McCue's undercover investigation established multiple contacts with the Appellee (R184-243). As pointed out to the Office of the Attorney General upon original receipt of the Brief, the record provided to this Court beginning on page one hundred eighty four (184) is part of an Affidavit and Application for Pen Register and has nothing to do with an Authorization for Wiretap Order. The continued recitation that the garbage search revealed forty-four items of evidentiary value is also part of an Application for Pen Register as shown by (R196-205) per the Statement of the Case provided by the State. Appellee, Pinhal filed her Motion to Suppress on March 5th, 1993. (R114-119). The Motion speaks for itself. The State then indicates that their response to the Motion filed on April 6th, 1993, is to be located at (R177-243), when in fact, per the record provided herein, the State's response is located at (R177-181). The State incorrectly notes that (R178) reflects a response that both the Application and

Authorization for Wiretap named prostitution related felony. In fact, (R178) indicates, at best, that some reliance may have been placed on deriving support from prostitution in the Application for Wiretap. (Paragraph 4, R178) The Appellee agrees with the rest of the recitations in the Appellant's Statement of the Case.

ARGUMENT

Counsel for the Appellee in this case brought to the attention of the Attorney General's Office, the need for a Supplemental Record on Appeal inasmuch as the Brief filed by the Appellant cited to record entries having nothing to do with the Authorization or Application for a Wiretap Order. The references in the Statement of Appellant's Case to factual issues in the Application for a Wiretap Order are actually directed at that portion of the record dealing with an Application for a Pen Register, an application which has absolutely nothing to do with the lower Court's evaluation. Although a supplemental index to the record has now been supplied to counsel for the Appellee, which contains the pertinent Applications and Authorizations for Wiretap, the Appellant's Brief still cites documents in the original record which are irrelevant. This seemingly leaves the task of making some sense out of the facts in the record to the Appellee.

Taking the State's argument chronologically, the argument appears to start with the concept that because AIDS is now a recognized health risk, that legislation which preceded any awareness of the disease by several years should somehow be "grandfathered" into viable existence without regard to the legitimacy of the legislation at the time of its passage. The word "AIDS" had not even been coined until the early 80's, nor had the disease been recognized as sexually transmitted. This logic would promote anticipatory legislation regardless of the proper use of

its police power underpinnings and might generate such contemporary proscriptions as a ban on smoking in manned space stations, none of which presently exist, but probably will in the not too distant future. The Appellee would invite the State's case authority for justifying the existence of legislation which at the time of its inception was not recognized as a valid exercise of police power as protecting public health or welfare.

The second argument advanced by the State is that the Appellee were charged with RICO. This ignores the fact that the Application for a Wiretap Order did not ask for a wiretap in connection with RICO. The charges were simply the net result of the wiretap imposed for prostitution. The State would justify a wiretap order for littering violations because the wiretap uncovered the French Connection.

Finally, the State argues that the Court abused its discretion in adhering to the presumption of validity accorded legislation. This is a limp argument at best and a pallid response to a significant question of law.

The State urges this Court to overrule the lower Court's decision because Appellee Pinhal through counsel had filed a 3.190 C-4 Motion with respect to her involvement in the RICO charge and that it was "likely that the Appellee can and would raise several other basis to dismiss the case or suppress the evidence which would not involve declaring the Statute unconstitutional". Appellee Pinhal, represented by counsel herein was a co-defendant

with Webster and Rivers. This Motion was filed on March 22, 1993, seventeen (17) days after the Motion to Suppress had been filed, related only to Appellee Pinhal with respect to her management activities in the RICO operation, had nothing to do with the validity of the wiretap with respect to other co-defendants or herself. This Motion was later denied by the Court. The reasoning of the State seems to be that the invocation by one defendant in a multiple defendant case of other potential defenses deprives the trial court of the ability to resolve constitutional issues fully unrelated to those defenses and raised by other defendants. This argument is without merit. The State's next argument is that the Court was fundamentally wrong in granting the Motion to Suppress because of the rather incidental existence within Florida Statute 796 of a crime of deriving support from the proceeds of prostitution. Whatever the questionable merits of this argument may be, the crime of deriving support from prostitution was only recently elevated to the status of a felony and was a misdemeanor, as were all prostitution related crimes, at the time of the passage of Florida's wiretap law. The State also argues that it was Defendant Rivers whose telephone was tapped and who was ultimately charged with that felony. It is not a question of whether or not co-defendant Rivers was charged with a felony, it is a question of whether or not there was a legal basis for the wiretapping of the telephone initially.

Without wanting to honor this specious argument with too much protest, Appellee nonetheless would point out that the specific telephone which was to be intercepted pursuant to the Application for Wiretap was a number listed to R. Vester Rivers, 4815 Kathy Jo Terrace, Orlando, Orange County, Florida (Supp. Index P-277). It is in paragraph seven of the Application for Wiretap that co-defendant Rivers is mentioned, not as the proprietor of the telephone, but an individual whom the State alleged was communicating and who would be probably intercepted. This casual approach to the Application for Wiretap would support a finding that because a suspected criminal was using his telephone and talking to another party on their telephone, a party altogether innocent of wrongdoing and exhibiting no probable cause, that the telephone of the second party could be legally intercepted in order to listen to the culpable individual. The State concedes on page seven of their Initial Brief in footnote 1 that there is no issue as to whether wiretaps are permitted for misdemeanor prostitution. This concession is certainly acceptable to the Appellee, although a curious move considering the State's other argument that prostitution is an inherently dangerous crime due to the AIDS issue. The State speaks from both sides of its mouth. If, in fact, the issue of whether or not misdemeanor wiretapping is legitimate has been confessed as error by the State, then the question would

simply be whether or not living off the earnings of prostitution, the felony which they would justify this intercept on, is an inherently dangerous offense. Providing support from prostitution related activities is not the cause of AIDS, it is potentially the sex acts related to prostitution which would be relevant arguably. That, again, would necessitate a legislative finding at the time that the Florida wiretap statute was passed, that prostitution in any form was related to AIDS, a disease unheard of at that time, and that deriving support from prostitution, a misdemeanor at that time, was an inherently dangerous activity based on the same fallacious reasoning. The sexually related diseases of gonorrhea and syphilis were recognized as potentially related to unprotected sexual activity and prostitution and, although they have lost their glamour compared to AIDS, they were, and are, a potential threat to public health and welfare, a potentially valid basis for police interference. This reality was probably not lost by the Court in People v. Shapiro, Ct.App. 431 N.Y.S.2d 422 (1980), also cited by the State in their initial brief. The State, however, carefully avoids the precise reasoning of Shapiro in analyzing the perimeters of permissible State wiretapping. Recognizing that the State's ability to wiretap can be no broader than that allowed by Federal Law, the Court carefully enumerated those crimes considered serious

enough to warrant wiretap investigation. Prostitution is not among those crimes. Shapiro also added emphasis to that portion of the Federal Regulation which allows for the interception of "other crimes dangerous to life, limb, or property, and punishable by imprisonment for more than one year," Shapiro page 431. The Court stated as follows:

> "As is apparent, with 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 Senate Report No. 1907, Page 2187. Further, the ejusdem generis rule dictates that that the general phrase "other crimes dangerous to life or limb" since it follows words of a particular meaning, is to be construed as applying only to crimes of the same kind as those precisely stated".

The Court noted that the allegations of sexual abuse and promotion of prostitution in that particular case, although violative of New York criminal law, did not come within the ambit of the Federal Statute because such crimes could not be said to be dangerous to life or limb. It was important to the Court that these crimes were not reasonably alleged to be related to violence or coercion. The Court stated "in fact these criminal activities involve only consentual conduct, to which, as already indicated, the legislative history tells us the Federal Statute does not extend the reach of permissible wiretapping." It should be noted

that the crimes which the Court addressed in Shapiro involved allegations of prostitution or sexual abuse with minors, crimes inherently more serious than those charged herein, assuming one can get past the exaggerated buzz word, RICO.

The State also acknowledges the authority of State v. Aurilio, 366 So.2d 71 (4th DCA 1979) which determined that a wiretap for gambling should be sustained because it was not only authorized as an offense which could be intercepted under State law, but under Federal law as well. The significance of this case is that gambling was an acceptable subject for wiretapping because of its inclusion under the Federal Statute. This is not the case with prostitution.

SUMMARY OF ARGUMENT

Florida has no legal ability to legislate the wiretapping of prostitution, inasmuch as such would broaden the limits of electronic eavesdropping as set by Federal law. The State would hope to entice this Court to breathe life into a statute by invoking the spectre of AIDS, a concededly lethal disease, but one which was unknown at the time. Further, consentual sex acts are not the stuff of which Federal law contemplated in describing those crimes which could be wiretapped.