Palmer District Court

Docket#: 201143RO 000079

Peter Frei)
Plaintiff)
v.)
Brian Johnson)
Defendant)

Memorandum

I, Peter K Frei, the victim of assault and battery By Brian Johnson, Highway Surveyor for the Town of Holland, and a group of his friends and employees, and also the victim of criminal harassment by Brian Johnson and at least one of his employees, Alexander Haney, recorded audio during the incident which occurred on February 19, 2011.

During a hearing on victim's request for a Criminal Harassment prevention Order against Brian Johnson, Tani Sapirstein, attorney of Brian Johnson, objected to said audio recording and requested the recording to be suppressed based on the fact that the recording was in her opinion in violation of the Massachusetts wiretap statute, G.L. c.272, s.99.

This memorandum will address seriatim the following questions:

1. Are audio recordings recorded without consent of all parties per se inadmissible as evidence as defendant's attorney claims?

2. Was the victim's recording of the assault and battery an illegal act pursuant G.L. c.272, s.99?

3. Since s.99 forbids both, the recording and the dissemination of speech, is the victim's posting of the audio on the Internet (The Holland Blog) illegal pursuant G.L. c.272, s.99?

1. Are audio recordings recorded without consent of all parties per se inadmissible as evidence as defendant's attorney claims?

Virtually all of the eavesdropping laws, starting with the federal (one party consent) law and the more protective law of the Commonwealth (two party consent) were all a direct response to the Supreme Court's 1967 rulings in *Katz* and *Berger*, which held that government eavesdropping without probable cause violated the Forth Amendment's prohibition on eavesdropping on members of the public without a warrant.

The US Supreme Court, the SJC and Appeals Court of the Commonwealth consistently answered the question whether audio recordings should be suppressed or not, based on who actually was involved in making the recording.

Only evidence tainted by government misconduct requires to be suppressed at trial. Suppression is necessary as deterrent to protect the public's

constitutional rights under the Fourth Amendment. Admitting tainted evidence at trial excuses and encourages police misconduct.

The fact that the Forth Amendment only protects the public's privacy from illegal intrusion by the government and not from intrusion by other members of the public was spelled out by the Supreme Court in *Jacobsen* (infra):

> The first Clause of the Fourth Amendment provides that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated …" This text protects two types of expectations, one involving "searches," the other "seizures." A "search" occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. 4 A "seizure" of property occurs when there is some meaningful interference with an individual's possessory interests in that property. 5 This Court has also consistently construed this protection as proscribing only governmental action; it is wholly inapplicable "to a search or seizure, even un unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official."

United States v. Jacobsen, 466 U.S. 109, 113 (1984); citing *Walter v. United States*, 447 U. S. 649, 662 (1980).

CASES:

In ***Com. v. Rivera***, 445 Mass. 119 (2005), the Appeals Court found that a Judge properly denied the defendant's

motion to suppress audio portion of a videotape recorded without the consent of the defendant. The videotape was a recording showing the killing of a store clerk by the defendant.

Again, the Appeals Court voiced their concern about “legitimate privacy interests of individuals”, and the “deterrent purpose” of section 99 on government actions, and that, “[t]he statute delegates to the courts the task of striking the proper balance [whether to suppress audio evidence] in each individual case.”

In *Rivera* (supra), the Appeals court referred to *Santoro* where an incriminating telephone conversation was allowed into evidence because the police had no part in recording the telephone conversation.

The Appeals court opined:

> [2] In Santoro, this court confronted the question whether recordings of incriminating telephone conversations of a defendant made by a third party without the defendant's knowledge or consent, and thereafter obtained by the police, should have been suppressed. This court concluded that where the police had no part in recording the telephone conversations, suppression was not required because it would serve no deterrent purpose. Id. at 423. *Santoro* recognizes that the Massachusetts wiretap statute is carefully nuanced and strikes a balance between the legitimate privacy interests of individuals in speech they wish to keep private and the need to equip law enforcement officials with the means to combat increasingly sophisticated organized

> criminal activities. Id. at 423-424. See *Commonwealth v. Gordon*, 422 Mass. 816, 833 (1996) ("It is apparent from the preamble [to the statute] that the legislative focus was on the protection of privacy rights and the deterrence of interference therewith by law enforcement officers' surreptitious eavesdropping as an investigative tool"). [Note 6] The statute delegates to the courts the task of striking the proper balance in each individual case. *Santoro*, *supra* at 423, 548 N.E.2d 862. See G. L. c. 272, § 99 P (suppression of evidence).
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> [Note 6] The preamble to the wiretap statute, G. L. c. 272, § 99 A, states that "the increasing activities of organized crime constitute a grave danger to the public welfare and safety," that "[n]ormal investigative procedures are not effective in the investigation of illegal acts committed by organized crime," and that "[t]herefore, law enforcement officials must be permitted to use modern methods of electronic surveillance, under strict judicial supervision, when investigating these organized criminal activities." The preamble then states: "The general court further finds that the uncontrolled development and unrestricted use of modern electronic surveillance devices pose grave dangers to the privacy of all citizens of the commonwealth. Therefore . . . [t]he use of such devices by law enforcement officials must be conducted under strict judicial supervision and should be limited to the investigation of organized crime."
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> *Com. v. Rivera* supra at 123.

In affirming the denial of the motion to suppress the audio, the Appeals Court put emphasis in the fact that "the police had no part in making" the recording, and that, "[e]vidence discovered and seized by private parties is

admissible without regard to the methods used, unless State officials have instigated or participated in the search."

The Appeals Court further opined:

> Here, following *Santoro*, two factors compel denial of the motion to suppress. First, the police had no part in making, inducing, soliciting, or otherwise encouraging or abetting the making of the surveillance tape. The tape, evidence of a grave crime, fell into their hands. See *Santoro*, supra at 423. See also *Commonwealth v. Brandwein*, 435 Mass. 623 , 630-632 (2002), and cases cited ("Nothing in our law" prevents police from acting on confidential information disclosed to them); *Commonwealth v. Leone*, 386 Mass. 329 , 333 (1982), and cases

Com. v. Rivera supra, at 124. The Appeals Court could not have been clearer, "[e]vidence discovered and seized by private parties is admissible without regard to the methods used." The method in question here is clearly referring to the recording of audio which is illegal under certain circumstances pursuant to section 99.

But it does not end there, the Appeals Court explicitly and unambiguously made clear that the exclusionary rule of the wiretap statute is not intended "to discourage citizens from aiding to the utmost of their ability the apprehension of criminals' "), the Appeals Court opined:

Absent an explicit statement from the Legislature to the contrary, we will not read the "use" provisions of the wiretap statute as forcing police and prosecutors to avert their eyes from information procured by private individuals, without any encouragement from the State. [Note 7] Id. at 632-633, quoting Coolidge v. New Hampshire, 403 U.S. 443, 488 (1971) ("the 'target' of the exclusionary rule 'is official misconduct,' and the rule is not intended "to discourage citizens from aiding to the utmost of their ability the apprehension of criminals' "). [Note 8]

[Note 7] The defendant interprets the statute to mandate the suppression of all information garnered by means of any unlawful interception of oral communications by a private individual in violation of the wiretap statute, regardless whether the government was involved in the unlawful surveillance. If the defendant were correct, there would be no need to include a statutory provision giving a defendant the opportunity to file a motion to suppress in terms that permitted a judge to exercise discretion to allow or deny the motion. See *Santoro*, supra at 423. See also *Commonwealth v. Crowley*, 43 Mass.App.Ct. 919, 919 (1997) (Massachusetts wiretap statute "does not mandate that all unlawfully intercepted communications should be suppressed. It merely gives a defendant in a criminal case standing to seek suppression of evidence obtained in violation of § 99").

[Note 8] The report of the commission responsible for drafting the Massachusetts wiretap statute, G. L. c. 272, § 99, lends strong support to the result we reach today, and to the *Santoro* decision. The commission stressed its intention to create a statutory framework that, while staying within the limits set by then recent United States Supreme Court cases requiring warrants for police wiretapping, generally would facilitate the use of constitutionally obtained wiretap evidence in prosecutions. Their report evidences no suggestion that the police be barred from using wiretap evidence where, as here, its

> creation did not give rise to constitutional difficulties. See, e.g., Report of the Special Commission on Electronic Eavesdropping, 1968 Senate Doc. No. 1132, at 5-6, 8 ("The statute proposed by the Commission has revised the Massachusetts law to require strict compliance with the probable cause provisions of the Fourth Amendment [to the United States Constitution]").
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> *Com. v. Rivera* supra, at 125.

Com. v. Montgomery, 78 Mass.App.Ct. 1101 (2010), 2010 WL 3835052, (Unpublished Disposition). Trial court erred in excluding a voice mail recording of a defendant talking to a police officer after an altercation with the alleged victim. When the police arrived at the scene of the altercation, defendant appeared agitated, was crying and asked to call her mother. Her mother did not answer; the phone went to voice mail and recorded a portion of the defendant's conversation with the police officer. At trial the police officer testified that the defendant did not tell him that the alleged victim had assaulted her. The defendant attempted to offer the recording as evidence to impeach the officer's testimony. The trial court excluded the evidence as an interception in violation of the Massachusetts wiretap statute. However, there was no evidence that the defendant intended to intercept the message. M.G.L.A. c. 272, § 99.

The Appeals Court:

> [W]e turn to whether the trial judge erred in excluding the voice mail. We conclude there was error. The voice mail was material to the defendant's claim of self-defense, may have added to her credibility concerning what she said to the officers, and may have deducted from the officer's credibility concerning what was said by the defendant close to the events at hand.
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> *Montgomery* supra, at 1101.

Com v. Gonzales, 68 Mass.App.Ct. 620 (2007). Recording of telephone conversation by witness during which murder confessed shooting the victim was allowed to go into evidence because the police was not involved in the recording:

> [9] 4. *Admission of the telephone conversation recorded by Penniman.* Prior to trial, the defendant moved to suppress the tape recording of his conversation with George Penniman, detailed *supra.* After an evidentiary hearing, the motion judge issued findings of fact and conclusions of law and denied the motion. The defendant argues that the motion judge should have granted his motion to suppress the recording Penniman made of the defendant's telephone call to him because it violated the wiretap act. The motion judge found that the recording was not made at the direction of the police and, in any event, was not made secretly. Therefore, the judge concluded that the exclusionary rule should not apply. We accept the judge's findings of fact absent clear error, and we review the judge's conclusion of law de novo.
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> There appears to be ample support in the record for the judge's factual findings. In addition, we

> agree with the judge's legal conclusion that the exclusionary rule ought not to be applied. See *Commonwealth v. Santoro,* 406 Mass. 421, 423, 548 N.E.2d 862 (1990); *Commonwealth v. Barboza,* 54 Mass.App.Ct. 99, 104-105, 763 N.E.2d 547, cert. denied, 537 U.S. 887, 123 S.Ct. 131, 154 L.Ed.2d 147 (2002).
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> *Com v. Gonzales*, 68 Mass.App.Ct. 620, 629 (2007).

Com. v. Santoro 406 Mass. 421 (1990). After defendant's motion to suppress evidence was denied by the District Court, defendant was convicted by the District Court of being present where betting apparatus was found. Defendant appealed as tapes of illegal telephone conversation were illegally seized by police in a neighboring residence. The Supreme Court affirmed as, (1) defendant did not have standing to challenge search of third party's residence, and (2) illegal interception of defendant's telephone conversation by private party was not subject to suppression. The Supreme Court opined:

> [3] Exclusionary rules generally are intended to deter future police conduct in violation of constitutional or statutory rights. However, no police or governmental conduct was involved in the recording of these telephone conversations. A private individual, apparently engaged in unlawful activity himself, recorded the defendant's conversations in violation of § 99. No deterrent purpose would be served by suppressing the intercepted conversations. The exclusionary rule was not designed to protect

> persons from the consequences of the unlawful seizure of evidence by their associates in crime. See § 99 A (preamble). Indeed, a contrary result would aid criminals by assuring that, in many instances, telephone calls [***424]** they might unlawfully record could not be used as incriminating evidence.
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> *Com. v. Santoro* (supra) at 423.

Com. v. Barboza, 54 Mass.App.Ct. 99 (2002). A father, fearing that his fifteen year old son was having a sexual relationship with the fifty-seven year old defendant, placed a tape recording device on the family telephone. He thereby intercepted and recorded four telephone conversations between the defendant and his 15 year old son without their knowledge. Two of the conversations were recorded before the father informed the police that he was recording the conversations, and two recordings were made after he had informed the police of his activities. The recorded telephone conversations confirmed the existence of an ongoing sexual relationship between the defendant and Tom. In his ruling on the defendant's motion to suppress the tapes of the four telephone conversations, the motion judge allowed the use of the two earlier calls in evidence and suppressed those recordings made after the police were informed of the secret taping.

The Appeals Court, as part of their opinion, published the following analysis:

> [1][2][3] II. *Analysis of the suppression issues.* A. *Massachusetts wiretap statute.* We begin our analysis by interpreting the Massachusetts wiretap statute. Unlike many of its counterparts in other States, or the Federal wiretap statute, the Massachusetts wiretap statute, G.L. c. 272, § 99, requires both parties to consent to the recording of telephone calls for the recording to be legal. *Commonwealth v. Hyde,* 434 Mass. 594, 599, 750 N.E.2d 963 (2001). With exceptions not applicable here, (See G.L. c. 272, § 99 D 1 a-f)., the Massachusetts wiretap statute, therefore, "strictly prohibits the secret electronic recording by a private individual of any oral communication...." *Commonwealth v. Hyde,* 434 Mass. at 595, 750 N.E.2d 963. Nevertheless, the statute does not "mandate that all unlawfully intercepted communications should be suppressed." *Commonwealth v. Crowley,* 43 Mass.App.Ct. 919, 919, 684 N.E.2d 5 (1997). See *Commonwealth v. Hyde,* 434 Mass. at 601, 750 N.E.2d 963 (drawing distinction between "the admissibility of a secret recording as evidence" and "whether a violation of the statute had occurred"). Rather, it has been held that although "[a]ny person who is a defendant in a criminal trial ... may move to suppress the contents of any intercepted wire or oral communication or evidence derived there from ... [if] [t]hat ... communication was unlawfully intercepted," G.L. c. 272, § 99 P, the "Legislature has left it to the courts to decide whether unlawfully intercepted communications must be suppressed." *Commonwealth v. Santoro,* 406 Mass. 421, 423, 548 N.E.2d 862 (1990).
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> *Com. v. Barboza* (supra) at 103.

Com. v. Crowley, 43 Mass.App.Ct. 919 (1997).

Defendants facing charges in connection with beating of

their daughter moved to suppress evidence. The Superior Court, Elizabeth B. Donovan, J., granted motion, and Commonwealth appealed. The Appeals Court held that applicable statute did not require suppression of tapes made by private citizen without state action. Assuming that tapes made by boarder in private home, using equipment owned by him in space under his control, purporting to record sounds made elsewhere in house as parents beat their child, constituted “illegal interception of oral communication” within meaning of applicable statute, statute did not require suppression of such tapes at parents' trial; statute did not create remedy of suppression with respect to communications recorded without state action, nor did it mandate that all unlawfully intercepted communications should be suppressed, but rather gave parents standing to seek suppression. G.L., c. 272, § 99, subds. B, par. 4, C, P.

The Appeals Court opined:

> The judge nevertheless did conclude, and the Commonwealth concedes, that the tapes were made in violation of G.L. c. 272, § 99(B)(4) [FN2] and (C). We are not bound by the Commonwealth's concession and do not decide today whether a tape recording of the audible outcries of a child being beaten is proscribed by § 99(C) under the specific facts of this case and when no telephonic device that would implicate the

> commerce clause was used. The judge then ruled that § 99(P) required suppression of the tapes. The Commonwealth argues that that ruling was erroneous, and we agree.
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> *Com. v. Crowley*, (supra) at 919.

2. <u>Was the victim's recording of the assault and battery an illegal act pursuant G.L. c.272, s.99?</u>

Back on February 19, 2011, the victim was going to stop the defendant and his gang from trespassing and at the same time was going to get his mail from his mailbox and put his trash out on the curb. To protect himself, the victim recorded audio. The victim had no intention to get involved in a dialog or to "surreptitiously" record any speech of anyone.

The victim recorded with a microphone in plain sight, a microphone which is part of every apple i-phone, a phone which is so popular that over 60 millions sold. The white microphone was very visible on his chest as the victim was wearing a black ski-overall.

Victim's recording was an act of self-defense in that the victim recorded the criminal assault and battery. The victim had a reasonable assumption that defendant Brian Johnson and his gang would assault him, and/or that defendant and his gang would not only deny their own

criminal actions, but instead, accuse the victim of criminal conduct. The defendant has done it before. The defendant accused the victim before of criminal conduct and victim was able to prove the allegations to be wrong based on digital pictures and time stamps on said pictures.

Back then, the defendant Brian Johnson had, as in this incident, a close friend, Alexander Haney, lying for him. Haney is also his neighbor and an employee of the Holland HWD. That previous incident occurred on September 30, 2009, (Exhibit 3).

The assault of February 19, 2011, took place just nine days before the hearing during which this Court issued a criminal harassment prevention order against the defendant’s friend Haney, docket #1143 RO 022.

On February 19, the victim had no intention to engage defendant in a conversation. Instead, victim’s actual recording is evidence of criminal conduct by the defendant and his gang, (assault and battery, making false statements to a police officer, obstruction of justice), and also evidence that an alleged crime did not happen (defendant’s allegation that victim threatened to kill defendant).

Informing Brian Johnson and his gang that they were videotaped during the assault and battery saved me; self defense worked. In that sense, the recording is like a surveillance audio to my protection and not a surreptitious recording to intercept private speech.

In Com. v. Damiano, 444 Mass. 444 (2005), the Supreme Judicial Court had the following to say in connection with intercepting communication:

> In 1986, Congress amended 18 U.S.C. § 2511, to change the requisite state of mind from "willful" to "intentional." Insight into what Congress meant when it used the term "intentional" can be found in the amendment's legislative history:
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> "As used in the Electronic Communications Privacy Act, the term 'intentional' is narrower than the dictionary definition of 'intentional.' 'Intentional' means more than that one voluntarily engaged in conduct or caused a result. Such conduct or the causing of the result must have been the person's conscious objective. An 'intentional' state of mind means that one's state of mind is intentional as to one's conduct or the result of one's conduct if such conduct or result is one's conscious objective. The intentional state of mind is applicable only to conduct and results. Since one has no control over the existence of circumstances, one cannot 'intend' them."

CASES:

Com v. Manzelli, 68 Mass.App.Ct. 691 (2007). A defendant speaking in a loud voice asking questions in an

“odd manner” with microphone tucked into the zippered front of his jacket” found guilty of violating section 99;

3. Since s.99 forbids both, the recording and the dissemination of speech, is the victim’s posting of the audio on the Internet (The Holland Blog) illegal pursuant G.L. c.272, s.99?

In the days after February 19, there were rumors in town that it was not Brian Johnson and his gang who harassed the victim; instead that the victim allegedly harassed Brian Johnson and his gang.

It was after victim obtained the official police report about Brian Johnson’s February 19, 2011 assault, when victim decide to post the audio on the Holland Blog.

According to the incident report by officer Forcier, Brian Johnson falsely accused victim of having made a threat to commit murder. Victim thereafter posted the audio on the Holland Blog in “self-defense.”

As the victim, another political activist, Mary T Jean of Worcester MA, maintained a website displaying articles and other information critical of certain officials.

In October 2005, Paul Pechonis contacted Jean through her website. They had never met previously. Pechonis explained that, on September 29, eight armed State Police troopers arrested him in his home on a misdemeanor charge.

He met the officers at the front door and allowed them to handcuff him. The officers then conducted a warrantless search of his entire house. The arrest was both audiotaped and videotaped by a “nanny-cam,” a motion-activated camera used by parents to monitor children's activities within the home. After the arrest, the arrestee gave the tape to Jean, who then posted the video on her website.

Shortly thereafter, the police wrote to Jean to demand that the footage be taken down on grounds that it was illegal and threatened Ms. Jean with prosecution if she failed to comply. The police later “clarified” their demand and requested only the removal of the audio portion of the recording.

Ms. Jean sought and obtained a temporary restraining order in Federal Court, and later, a temporary injunction against the police and attorney general.

The United States District Court for the District of Massachusetts, F. Dennis Saylor, IV, J., granted preliminary injunction, and the State Police appealed.

On appeal, the First Circuit relied on the precedent established by the Supreme Court in *Bartnicki v. Vopper*, 532 U.S. 514 (2001), (which involved the replaying of an unlawfully intercepted cell phone conversation concerning a matter of public interest), and held:

> That court concluded that the statutes were invalid as applied because they deterred significantly more speech than was necessary to protect the privacy interests at stake […].
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> *Jean,* (supra), at 28.

Instead of ordering the audio to be removed from the website, the First Cir. Recognized and attested Jean's audio the superseding protection of the First Amendment:

> We conclude that the government interests in preserving privacy and deterring illegal interceptions are less compelling in this case than in *Bartnicki*, and Jean's circumstances are otherwise materially indistinguishable from those of the defendants in *Bartnicki*, whose publication of an illegally intercepted tape was protected by the First Amendment. Jean's publication of the recording on her website is thus entitled to the same First Amendment protection. Consequently, we agree with the district court that Jean has a reasonable likelihood of success on the merits of her suit for a permanent injunction. The district court's decision to grant Jean's request for a preliminary injunction is *affirmed.*
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> *Jean v. Mass State Police*, 492 F.3d 24, at 33 (2007).

Jean is distinguishable from the situation here at bar. In *Jean,* Pechonis claimed that the recording was accidental and was made by a "nanny-cam."

However, the 1.Cir. opined, "the parties contest whether the recording was accidental; this fact is immaterial to the outcome of the case." *Jean,* supra, at 25.

In *Bartnicki*, the Supreme Court found:

> It would be quite remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party.
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> *Bartnicki* supra at 516.

Considering the fact that in the situation here at bar, the recording does not only reveal an assault and battery, but also exposes a conspiracy to frame the victim by falsely accusing victim of having made a threat to commit murder, the Supreme Court would probably find an even stronger expression then “quite remarkable” for any attempt to suppress victim’s recording.

To suppress the victim’s audio recording would be inconsistent with the law and prejudice to the victim.

Holland, May 11, 2011

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