THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS

SUPERIOR COURT
05-S-1749

STATE OF NEW HAMPSHIRE

V.

ERIC WINDHURST

ORDER ON DEFENDANT'S MOTION TO SUPPRESS

LYNN, C.J.

The defendant, Eric Windhurst, is charged with one count of first degree murder for allegedly shooting Daniel Paquette to death on or about November 9, 1985. The State alleges that the defendant committed this crime while accompanied by Melanie Cooper, Paquette's step-daughter. Presently before the court is the defendant's motion to suppress consensually recorded telephone conversations between Cooper and the defendant which were obtained by the New Hampshire State Police on various dates in July 2004. The court heard argument on the motion on June 23, 2006. I conclude that the motion is lacking in merit and must be denied.

I.

The facts pertinent to the motion are undisputed. At some time after Paquette's death, Cooper moved to Idaho. In July 2004, officers of the New Hampshire State Police ("the police") traveled to Idaho to interview Cooper regarding the shooting. While in Idaho, the police requested and obtained permission from the New Hampshire Attorney General to intercept and record telephone conversations between Cooper and the defendant. Cooper initiated the telephone calls from Idaho and consented to the interception of the calls. At the time of the telephone calls, the defendant was in New

Hampshire. The defendant at no time consented to the interception or recording of his conversations with Cooper. The attorney general described the basis on which she authorized the intercepts in memoranda written within 72 hours of the authorization.

II.

The defendant asserts that the recordings in question constitute "single-party intercepts" which were not authorized under New Hampshire law. Specifically, the defendant argues that, under RSA chapter 570-A (2001 and Supp. 2005), the attorney general's authority to grant permission for such intercepts is confined to the territorial boundaries of the State of New Hampshire. Because the intercepts occurred in Idaho, not New Hampshire, the defendant contends that the New Hampshire officers did not have the requisite authorization to conduct them. While recognizing that, unlike New Hampshire, Idaho is a one-party consent state, the defendant further asserts that the fact the police may have complied with Idaho law in intercepting the telephone calls is irrelevant because persons in New Hampshire have a greater expectation of privacy than those in Idaho. Thus, according to the defendant, because the police could not obtain authority from the attorney general to conduct intercepts in Idaho, and because Idaho law is not controlling, the only manner by which the intercepts in this case could have been lawfully conducted is if the police transported Cooper to New Hampshire and made the calls to the defendant from within the state with proper authorization. The State, on the other hand, takes the position that, while it obtained approval for the intercepts pursuant to New Hampshire law out of an abundance of caution, the intercepts are governed by Idaho law, under which the intercepts were entirely valid.

A.

Under New Hampshire's wiretap statute, "a law enforcement officer in the ordinary course of the officer's duties pertaining to the conducting of investigations" of certain offenses enumerated in RSA 570-A:7, may "intercept a telecommunication or oral communication, when . . . one of the parties to the communication has given prior consent to such interception." N.H. REV. STAT. ANN. § 570-A:2, II(d) (Supp. 2005); see also State v. Kilgus, 128 N.H. 577, 589 (1986) (holding that offenses enumerated in RSA 570-A:7 are incorporated into RSA 570-A:2, II(d)). However, an officer may not make such an interception unless the attorney general or her designee "determines that there exists a reasonable suspicion that evidence of criminal conduct will be derived from such interception." Id. "Oral authorization for the interception may be given and a written memorandum of said determination and its basis shall be made within 72 hours thereafter." Id. The statute also contains an evidence exclusion provision, which states: "Whenever any telecommunication or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial . . . before any court . . . of the state . . . if the disclosure of that information would be in violation of [chapter RSA 570-A]." N.H. REV. STAT. ANN. § 570-A:6 (Supp. 2005). "[R]ecordings made pursuant to RSA 570-A:2, II(d) [are] exempt from RSA 570-A:6's exclusion." State v. Kilgus, 128 N.H. 577, 590 (1986). The New Hampshire Supreme Court has found that RSA 570-A "provides greater protection of individual rights [than does federal law] because it requires authorization from the attorney general prior to conducting [a] one-party intercept." State v. Kepple, 151 N.H. 661, 665 (2005).

By contrast, under Idaho law, "it is lawful . . . for a law enforcement officer or a person acting under the direction of a law enforcement officer to intercept a wire, electronic or oral communication when such person is a party to the communication or one (1) of the parties to the communication has given prior consent to such interception." IDAHO CODE § 18-6702(2)(c) (2005). It also is lawful "for a person to intercept a wire, electronic or oral communication when one (1) of the parties to the communication has given prior consent to such interception." IDAHO CODE § 18-6702(2)(d). Thus, Idaho law is less restrictive than New Hampshire law with regard to the circumstances in which one-party intercepts may be conducted, inasmuch as there is no requirement in Idaho that prior authorization from a governmental official be obtained as a prerequisite to either a law enforcement officer or a private person conducting an intercept where one party to the conversation consents.

Initially, I note that the parties appear to agree that the communications at issue were "intercepted" in Idaho.[1] The New Hampshire Supreme Court has not addressed the precise issue presented in this case. However, courts in other jurisdictions which considered the issue of whether evidence obtained in another state may be admitted in a forum state's prosecution have generally employed two approaches – the exclusionary rule approach and the conflicts of law approach. See 1 WAYNE R. LAFAVE, *Search and Seizure, A Treatise On the Fourth Amendment*, § 1.5(c), at 175-86 (4th ed. 2004) and State v. Schmidt, 712 N.W.2d 530, 535 (Minn. 2006); see also People v. Capolongo, 647 N.E.2d 1286, 1293 (N.Y. 1995).

[1] RSA 570-A:1, III defines "intercept" to mean "the aural or other acquisition of, or the recording of, the contents of any telecommunication or oral communication through the use of any electronic, mechanical, or other device." Inasmuch as the recordings of the conversations at issue were made in Idaho, neither party disputes that Idaho rather than New Hampshire is the place where the "intercepts" occurred.

Under the exclusionary rule approach, the courts "adhere to the Federal view that the overriding purpose of the exclusionary rule is to deter unlawful governmental conduct, and that one State's laws have no deterrent effect on conduct of governmental agents of another jurisdiction." Capolongo, 647 N.E.2d at 1293 (citations omitted). This approach "incorporates the policies underlying each state's exclusionary rules of evidence." Schmidt, 712 N.W.2d at 535 (citing State v. Lucas, 372 N.W.2d 731, 736-37 (Minn. 1985) and LAFAVE, § 1.5(c), at 175-86).

The Washington Supreme Court appears to have taken this approach in determining that, where the California police recorded the defendant's statements without his consent but in accordance with California law, which "if . . . done in Washington, [ ] most probably would be in violation of" Washington's Privacy Act, suppression of the recordings in a Washington trial depended on whether the California officers were acting as "agents" of the Washington police. State v. Brown, 940 P.2d 546, 576 (Wash. 1997); cf State v. Minter, 561 A.2d 570 (N.J. 1989) (holding that wiretap evidence obtained independently by federal officers in accordance with federal standards without the cooperation of state agents is admissible because exclusion would serve no deterrence effect, while evidence obtained by federal officers acting as "agents" of state officers is not admissible as state officers would be deterred from violating New Jersey law). If the California officers were acting as "agents," the recorded statements would be suppressed because "similar action in Washington might have been a violation of [the Washington Privacy Act.]" Brown, 940 P.2d at 578. However, if the California police were merely acting with the "cooperation and assistance" of the Washington police, the statements would be admissible because the

California police "*lawfully and independently* recorded the statements under California law." Id. (emphasis added).[2]

Similarly, in Commonwealth v. Bennett, 369 A.2d 493, 494 (Pa. Super. 1976), the court reversed the trial court's suppression of certain evidence, holding that the use in Pennsylvania "of information secured through a valid, legal, properly authorized wiretap in a foreign jurisdiction is not in contravention of the Pennsylvania anti-wiretapping statutes, and that the evidence seized in Pennsylvania under such a warrant is admissible." In that case, the information used to support a search warrant in Pennsylvania was derived from a wiretap legally authorized by the Superior Court of New Jersey and conducted solely by New Jersey police. In determining that the information from the New Jersey wiretap could support probable cause for the Pennsylvania search warrant, the Bennett Court reasoned that, in the absence of a legislative mandate, public policy favored the exchange of information between law enforcement agencies of Pennsylvania and those of other states in furthering the public interest in detecting and apprehending "those who persist in defying" Pennsylvania laws. 369 A.2d at 494. The Bennett Court explained that an unwarranted extension of the protection afforded by constitutional safeguards on the facts before it would allow "procedure to emerge victorious over justice." Id.

Bennett also examined the legislative history of the Pennsylvania wiretapping statute, finding that the history failed to reveal a specific or implied legislative mandate to declare that evidence obtained in violation of that statute outside of Pennsylvania would also be regarded as illegal. Id. Without such a legislative intent, the Bennett

[2] After examining the facts of the case, the Brown Court concluded that the California police had not acted as agents of the Washington police and, therefore, the statements were admissible.

Court refused to extend or amend the legislation to exclude the evidence in the case before it. Id. In reaching its decision, the court emphasized that:

> No useful purpose whatsoever would be served by denying the Commonwealth the use of this information when applying for a search warrant. *We would not chastise errant law enforcement agencies or officers and we are not dealing with scoundrels who would use this information to the detriment of our citizens. We would not influence future wiretaps in New Jersey. Pennsylvania police officers did not participate in any manner in the securing of this wiretap* or in the resulting New Jersey [sic] surveillance. No law of this Commonwealth was violated, and the rights of our citizens were not infringed.

Id. at 495 (emphasis added).

Other courts view the question as a choice-of-law issue. The Minnesota Supreme Court has recently summarized the conflicts of law approaches used by courts in addressing the issue:

> (1) the "mechanical" approach, that determines admissibility by the law of the forum state; (2) the "significant relationship" or "group of contacts" approach that looks to which state has the greater interest in the process by which the evidence was obtained; [and] (3) the "governmental interest" approach that weighs the interests of the forum state against those of the state in which the evidence was obtained . . . .

Schmidt, 712 N.W.2d at 535 (citing Lucas, 372 N.W.2d at 736-37 and LAFAVE, § 1.5(c), at 175-86).

In State v. Lynch, 969 P.2d 920, 923 (Mont. 1998), the Montana Supreme Court considered "whether wiretap evidence obtained in a sister state by that state's public officials is admissible in a Montana criminal prosecution." In that case, Nevada police, as part of a Nevada investigation of a death believed at the time to have occurred in Nevada, applied for and received judicial authorization from a Nevada court to intercept

the communications at issue. These recordings were subsequently provided to Montana prosecutors when it was determined that the death at issue actually occurred in Montana. The Montana prosecutors sought to introduce the recordings even though, under Montana law, they would be considered illegally obtained. In analyzing whether the recordings could be admitted, the Lynch Court employed a conflicts of law approach. The court determined that the issue involved an application of procedural law, namely a rule of evidence, not substantive law, and therefore, under general conflicts of law principles, the forum state's law applied to preclude admission.

In Commonwealth v. Sanchez, 716 A.2d 1221, 1222 (Pa. 1997), the Pennsylvania Supreme Court also employed a conflicts of law approach in determining "whether Pennsylvania or California law should be used to evaluate the propriety of a canine sniff search conducted in California which provided probable cause for a search warrant in Pennsylvania." In examining the issue, the Sanchez Court noted, as an initial matter, "Information secured through valid and legal means in a foreign jurisdiction may be used to establish probable cause for a search warrant in this Commonwealth." 716 A.2d at 1223. However, according to the Sanchez Court, the determination of which law applied to the *legality* of the canine sniff was best evaluated under the conflict of laws principles normally used in civil cases. The court determined that the issue was substantive, not procedural, and therefore, under Pennsylvania law, it was required to determine which state had the most interest in the outcome. In finding that California had a greater interest in the validity of the canine sniff at issue, the Sanchez Court emphasized that no Pennsylvania officer had been involved in the execution of the sniff. After also finding the reasoning of the Bennett Court, *supra*, to be persuasive, the

Sanchez Court held "that if the courts of a sister state determine that a canine sniff is not a search in that state, the propriety of a sniff initiated by that state's officers and conducted within that state's borders must be evaluated under the laws of that state." Id. at 1224-25.

Upon review of the foregoing authorities and the principles discussed therein, I reject the State's position that the admissibility of the intercepts in this case should be governed by Idaho law. Rather, it appears to me that, under any of the above approaches, New Hampshire law should govern the determination of whether the recordings at issue may be received in evidence at trial. In making this determination, a critical factor is that the interceptions at issue were made by New Hampshire police officers in furtherance of a New Hampshire investigation and potential prosecution in the courts of this state. Under the "exclusionary rule" approach, application of New Hampshire law effectuates the purpose of the New Hampshire wiretap statute by deterring New Hampshire police officers from conducting one-party intercepts in the absence of proper authorization. Otherwise, New Hampshire police officers would be permitted to circumvent New Hampshire law and intercept communications without authorization by simply crossing the border to a state with lesser protections. Cf. Minter, 561 A.2d at 577 ("Certainly we would not permit State investigators to circumvent the law by merely calling the federal agents and asking them to tap the phone"); compare People v. Blair, 602 P.2d 738 (Cal. 1979) (where federal agents in Pennsylvania obtained evidence lawfully under Pennsylvania and federal law, but the seizure violated California law, exclusion of evidence would not serve the deterrence purpose as no California officer participated in the seizure).

New Hampshire law also governs using the "mechanical approach," as New Hampshire is the forum state. Under the "significant relationship" approach, because New Hampshire police, not Idaho police, conducted the wiretaps, and because New Hampshire law provides greater protection to an individual's right to privacy than Idaho law, New Hampshire has a greater interest in the process by which a New Hampshire resident's conversation is recorded for use in a New Hampshire judicial proceeding. Finally, with regard to the "governmental interest" approach, a weighing of the interests of New Hampshire against those of Idaho again yields a result in favor of applying New Hampshire law: the investigation concerned a New Hampshire homicide, not an Idaho crime; New Hampshire police, not Idaho police, conducted the intercept; and the non-consenting party whose privacy interests were at stake, the defendant, was a New Hampshire resident.

Accordingly, I find that the admissibility of the recorded intercepts in this case is governed by New Hampshire law.

B.

The defendant asserts that New Hampshire law was violated because the attorney general had no power to authorize New Hampshire police to conduct intercepts in Idaho. I disagree.

While it is certainly true that no New Hampshire official would have the authority to authorize a New Hampshire police officer to conduct coercive-type[3] law enforcement

[3] By coercive-type law enforcement activity I mean the kind of activity which police officers are uniquely empowered to perform and as to which they have the authority to compel submission, often through use of force where necessary, by the citizenry. Executing search and arrest warrants are the most obvious examples of these activities, but the issuance of a summons that purports to require a person to appear before a New Hampshire court also falls within this category of activity. Undoubtedly, there are other examples.

activity, such as executing an arrest or search warrant or issuing a summons, outside of the state, see State v. Goff, 118 N.H. 724, 727 (1978), nor could a New Hampshire official authorize this state's officers to engage in activities violative of the laws of another state, the conduct at issue here falls into neither of these categories. From all that appears of record, when the New Hampshire officers traveled to Idaho, their only purpose was to conduct a voluntary interview of Ms. Cooper and to request that she telephone the defendant in New Hampshire and consent to having the conversation recorded. Under Idaho law, none of these activities is limited or restricted such that it may be legally performed only by a police officer. There seems to be no reason why such activities could not be undertaken by any private citizen in that state. More importantly, the defendant has failed to point to anything in New Hampshire law generally or RSA chapter 570-A in particular which restricts New Hampshire police officers from conducting the type of investigative activities which occurred in Idaho, including the one-party consent intercepts, outside this state's borders.[4] Indeed, experience suggests that it is a relatively routine matter for New Hampshire police to travel to other states to interview witnesses and seek their cooperation. That New Hampshire police officers would have occasion to conduct certain types of investigative activities outside the state's borders is hardly surprising, given that the criminal code specifically contemplates that jurisdiction may be exercised by this state over criminal offenses even though some portion of the conduct or results comprising the offense may have occurred outside the state. See RSA 625:4, I (1996); State v. Stewart, 142

[4] At the very least, there is no indication in New Hampshire law that extra-territorial investigative activity is precluded when it is conducted with the approval of officials in the foreign jurisdiction. Here, defendant makes no claim that Idaho officials were unaware of or disapproved of the intercepts. On the contrary, the record contains evidence indicating that Cooper placed her calls to the defendant from the offices of the Idaho sheriff in the locale where she resided.

N.H. 610, 612 (1998) (New Hampshire court properly exercised jurisdiction over criminal contempt charge arising from defendant's conduct in Maine which violated a New Hampshire restraining order); State v. Roberts, 136 N.H. 731 (1993) (acts that occurred in Canada in effort to influence witness not to testify in New Hampshire court proceeding properly subject to witness tampering prosecution in New Hampshire).

Construing our wiretap statute to authorize extra-territorial intercepts is fully consistent with the underlying purposes of RSA 570-A. The statute serves to protect an individual's right to privacy by, among other things, prohibiting police from conducting one-party intercepts without proper authorization. See Kepple, 151 N.H. at 665. The authorization process seeks to insure that, prior to an intercept, a legally-trained and at least somewhat detached official has determined that there is reasonable suspicion to believe evidence of criminal conduct will be obtained by the intercept. The privacy interests at stake, e.g. those of the non-consenting party in New Hampshire, remain essentially[5] the same regardless of whether the interception takes place within or without the borders of this state. Certainly the statute cannot reasonably be interpreted as designed to give New Hampshire residents more protection from out of state intercepts than from in-state intercepts. See note 5 supra. Yet this is exactly what would result from adoption of the defendant's construct. Furthermore, to suggest, as the defendant does, that the only lawful way for a one-party consent intercept to be accomplished under New Hampshire law is to transport the consenting party to New Hampshire so that the intercept occurs entirely intrastate would significantly undermine

[5] Arguably, a person who knows that he is speaking with a caller from out of state might be thought to have assumed the risk that the laws of the state where the caller is located offer less protection than New Hampshire law. But the prospect that people actually engage in this kind of analysis before speaking over the telephone appears to be more theoretical than real.

the statute's usefulness as a tool against multi-state criminal activity that impacts New Hampshire. See State v. Warren, 147 N.H. 567, 568 (2002) (recognizing presumption against construing statute in a manner that produces an absurd result).

In sum, I can find no legitimate reason for construing RSA 570-A:2, II(d) so as to preclude the attorney general from granting authorization for New Hampshire law enforcement officers to conduct extra-territorial one-party consent intercepts. I emphasize that such authorization in no way exempts or excuses New Hampshire officers from complying with all legal requirements of the locale where the intercepts occur; rather, the purpose of the authorization is simply to insure compliance with New Hampshire law so that, pursuant to the analysis in subsection A above, the fruits of the intercepts are admissible in evidence at a trial held in this state.

Therefore, I hold that the New Hampshire Attorney General properly authorized all the intercepts at issue in this case.

III.

For the reasons stated above, the defendant's motion to suppress is hereby denied.

BY THE COURT:

July 13, 2006

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ROBERT J. LYNN
Chief Justice