[J-98-2013] [MO: Baer, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 516 CAP
	:	
Appellee	:	Appeal from the Judgment of Sentence entered on February 22, 2000, in the Philadelphia County Court of Common Pleas, Criminal Division, at No. CP-51-CR-0812071-1998
v.	:	
	:	
LANCE ARRINGTON,	:	
	:	ARGUED: March 10, 2010
Appellant	:	RE-SUBMITTED: November 4, 2013

CONCURRING OPINION

MR. CHIEF JUSTICE CASTILLE **DECIDED: February 28, 2014**

I join the Majority Opinion, subject to the following qualifications respecting two of the issues raised on appeal. The issues implicate appellant's claims premised upon the Wiretapping and Electronic Surveillance Control Act ("Wiretap Act"), 18 Pa.C.S. §§ 5701-5782, and upon Simmons v. South Carolina, 512 U.S. 154 (1994) (plurality).

Wiretap Act Claim

First, respecting appellant's claim deriving from the Wiretap Act, the Majority does not address the dispute between the parties over whether appellant implicitly consented to the recording of his telephone conversation by the victim, Tondra Dennis. The Majority instead dismisses the claim on harmless error grounds. See Majority Slip Op. at 18-20. I join in the harmless error analysis, but write to address other aspects of

appellant's claim, because, in my view, the decisional law in this area is problematic and because it is not difficult to imagine a situation similar to that before us recurring.

Generally, the Wiretap Act criminalizes the intentional interception, disclosure or use of wire, electronic or oral communications. 18 Pa.C.S. § 5703. Section 5704 lists exceptions to the prohibition of interception and disclosure of communications. 18 Pa.C.S. § 5704. Relevant here, the statute also prohibits evidentiary disclosure of the contents of any wire communication in a court proceeding. 18 Pa.C.S. § 5721.1(a). An "aggrieved person," party to a court proceeding, "may move to exclude" from evidence the contents of a wire communication, on the ground that it was intercepted by law enforcement without prior approval, see 18 Pa.C.S. §§ 5712 - 5713.1, except where a Section 5704 exception applies. 18 Pa.C.S. § 5721.1(b). According to one exception, "[i]t shall not be unlawful and no prior court approval shall be required under [the Wiretap Act] for . . . [a] person, to intercept a wire, electronic or oral communication, where all parties to the communication have given prior consent to such interception." 18 Pa.C.S. § 5704(4). A "person" includes an individual, whether or not affiliated with law enforcement. See 18 Pa.C.S. § 5702.

Appellant's argument proceeds on the assumption that Section 5721.1(b) requires automatic suppression of evidence for a non-governmental violation of the Wiretap Act. Appellant cites as settled law Commonwealth v. DeBlase, 515 A.2d 564 (Pa. Super. 1986), in support of this result. In DeBlase, the Superior Court summarily held that a conversation between a criminal defendant and the victim's wife, recorded by the victim without the consent of the participants, was properly suppressed because the recording violated the Wiretap Act. Id. at 566 (citing 18 Pa.C.S. § 5721 (repealed)); but see Commonwealth v. Louden, 638 A.2d 953 (Pa. 1994) (applying constitutional standard, *i.e.*, reasonable expectation of privacy, to decide whether suppression proper

under repealed Section 5721). The Section 5721 analysis of the Superior Court in DeBlase was brief, conclusory, and, in my view, unpersuasive. Moreover, while the subject matter of Section 5721 was reprised in Section 5721.1, the plain language of the two provisions is not identical. This Court has not yet had an opportunity to interpret Section 5721.1, and does not have the benefit of adversarial presentations in this case concerning this subject in order to decide the issue.

Section 5721.1(b) provides that an aggrieved person "may move to exclude" evidence on specifically enumerated grounds; the provision purports to dictate the exclusive judicial remedy for a non-constitutional violation of the Wiretap Act. See Commonwealth v. Spangler, 809 A.2d 234, 240 (Pa. 2002) (citing 18 Pa.C.S. § 5721.1(b), (e)). The Wiretap Act thereby would provide greater protection than the Fourth Amendment, grounded in Pennsylvania notions of privacy. "Because of this privacy concern, the provisions of the Wiretap Act are strictly construed." Id. at 237. Two obvious questions are implicated: (1) did the General Assembly intend that relevant, probative, accurate, and reliable evidence, secured without governmental conduct, much less governmental misconduct, should be excluded in criminal prosecutions; and (2) if so, is the judicial branch obliged to defer to that evidentiary directive in managing criminal trials? The DeBlase black letter rule may offer ease of application, but it does not adequately address these questions.

Respecting the first question, I would not be too quick to assume a universal and rote exclusionary rule absent proof that this was the clear intent of the General Assembly. Cf. U.S. v. Caceres, 440 U.S. 741, 751 n.13 (1979). Section 5721.1(b), specifically, appears to be concerned primarily, if not exclusively, with governmental interceptions of communications without prior approval, rather than with private interceptions. This statutory construct is logical, because civil actions are available to

vindicate privacy interests affected by purely private action. Non-governmental recordings, such as the victim's here, are only obliquely implicated by the statutory exclusionary rule because of the reference to the exceptions in Section 5704. See 18 Pa.C.S. § 5704(4). The obvious purpose of the reference to Section 5704 in Section 5721.1 is to signal that the statutory exclusionary rule is not authorized if one of the exceptions to the prohibition of interception and disclosure applies. Any intent of the General Assembly to extend the statutory exclusionary rule beyond constitutional requirements to apply to private conduct requires at best circuitous construction by the Court. The intent is certainly not explicit.

The Wiretap Act criminalizes the conduct of private parties. But, simply because the General Assembly imposed sanctions on private persons intercepting communications it is not automatically true that the General Assembly intended to penalize the government, and the people, in criminal prosecutions, if the government afterwards lawfully obtained the private recording. It is also counter-intuitive that suppression would be a rote remedy in cases of non-governmental interceptions, given that such actions are not of constitutional magnitude. Cf. Commonwealth v. Blystone, 549 A.2d 81, 87-88 (Pa. 1988) (warrantless government interceptions of wire communications, with consent of one party, do not violate either Fourth Amendment of U.S. Constitution or Article I, Section 8 of Pennsylvania Constitution) (citing Caceres, supra (failure of IRS agent to follow agency regulations before recording conversations with taxpayer did not require suppression of recordings in prosecution of taxpayer for bribing agent)).

Respecting the second question, in my view, it is not self-evident that the General Assembly can proscribe the admission by statute of evidence otherwise determined relevant and admissible by a court. It is one thing for the General Assembly

to accept and codify a common law evidentiary rule, such as privilege rules. But, it is quite another matter to proscribe a legislative rule of evidence, particularly one which impedes the core truth-finding function of a criminal trial, and without advancing a constitutional value. In short, until the Court passes upon the question, I would caution courts to view DeBlase with skepticism.

Turning to the question disputed by the parties, but not reached by the Majority, in my view, appellant manifested his consent to the recording of his telephone call to the victim, during the course of that call. Section 5704(4) requires the "prior consent" to interception of all parties to the communication but does not specify that the consent must be explicit in response to explicit disclosure that the interception is in progress. See Commonwealth v. Proetto, 771 A.2d 823, 830-31 (Pa. Super. 2001), aff'd 837 A.2d 1163 (Pa. 2003) (person may consent by conduct to recording of message). The totality of circumstances, as evident from the parties' conversation -- which the Majority reproduces in footnote 13 -- shows that appellant was well aware that the victim may have been taping the conversation and, nonetheless, he continued to make statements rather than disconnect the phone call. Appellant assented to the recording by repeatedly disavowing any expectation or interest in keeping the conversation with the victim private and expressing disinterest, in no unclear terms, in whether he was being recorded. In my view, appellant gave implied consent to the interception of his telephone conversation with the victim. The trial court did not err on this basis in admitting the recording of the parties' conversation, containing highly probative, relevant evidence. See Tr. Ct. Op., 8/7/2008, at 13. Indeed, no cognizable value would be forwarded by exclusion of the recording especially where, as here, there was evidence that appellant was the cause of the victim's unavailability, which prevented the victim from relaying to the jury the threats he unquestionably made during that phone call.

Simmons Claim

Second, I join the Majority's analysis and its rejection of appellant's Simmons claim. I agree with the Majority that trial counsel's argument concerning mandatory sentences of life without possibility of parole ("LWOP") more than conveyed the current nature of an LWOP sentence. Counsel's argument was incorrect, however -- and to appellant's benefit -- to the extent that it declared that an LWOP sentence means there is no prospect of release. The fact remains that an LWOP sentence can be commuted; the General Assembly could redefine the punishment to allow for parole; and the U.S. Supreme Court's Eighth Amendment jurisprudence, which is in a dynamic and changing phase favoring criminal defendants, see, e.g., Miller v. Alabama, __ U.S. __, 132 S.Ct. 2455 (2012) (banning imposition of mandatory LWOP on juvenile murderers) and Graham v. Florida, 560 U.S. 48 (2010) (banning imposition of LWOP on juvenile offender who did not commit homicide), could someday "evolve" to dictate that LWOP sentences are unconstitutional for all murderers. See Commonwealth v. Trivigno, 750 A.2d 243, 260-61 (Pa. 2000) (Castille, J., concurring and dissenting).

Mr. Justice Stevens joins this concurring opinion.