

[J-30-2001]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 82 MAP 2000
	:	
Appellant	:	Appeal from the Order of the Superior
	:	Court dated December 20, 1999, at 416
	:	EDA 1999, affirming the Order of the
v.	:	Chester County Common Pleas Court
	:	dated January 4, 1999, at 2869-98
	:	
YURI SPANGLER,	:	
	:	
Appellee	:	ARGUED: January 31, 2001

DISSENTING OPINION

MR. CHIEF JUSTICE ZAPPALA

DECIDED: July 17, 2002

Because I believe the lower courts properly suppressed the tape recordings as violative of the Wiretapping and Electronic Surveillance Control Act, I dissent. The majority improperly focuses on the apparent need to engraft an additional element (a specific time requirement for transfer of recorded evidence) to the provision of the Wiretap Act dealing with one-party consensual interceptions, 18 Pa.C.S. § 5704(2)(ii). To the contrary, one need not alter the statutory language to find an illegal interception here. The lower courts recognized that Section 5704(2)(ii) provides that the Attorney General or District Attorney (or its designee), who authorizes the interception, shall act as the custodian of the recorded evidence obtained therefrom. As such requirement was not satisfied here, the lower courts correctly ruled that the tape recordings were inadmissible at trial.

The record establishes that, pursuant to Section 5704(2)(ii), the District Attorney of Chester County designated an Assistant District Attorney to authorize interceptions relating

to illegal drug transactions occurring on three occasions: February 11 or 12, 1998, March 12, 1998, and May 27, 1998. None of the tapes were placed into the District Attorney's custody within a reasonable time after interception. The tape of February 11 or 12, 1998, was returned nearly two weeks later on February 24, 1998. The tape of March 12, 1998, was returned over two weeks later on March 31, 1998. Finally, the tape of May 27, 1998, was returned over six weeks later on July 13, 1998. In suppressing the evidence as violative of the custodial requirement, the trial court found that it was the policy of the District Attorney's Office to have any tape recordings returned "as soon as practicable." Trial court opinion at 2. The court further found that the police headquarters and the District Attorney's Office are located only 6 blocks away from each other. Id. at 3. After concluding that there was no good reason why the tape recordings were detained by the police detective, rather than promptly returned to the District Attorney's Office, the trial court found a clear violation of Section 5704(2)(ii).

The majority looks past this provision and instead examines the section dealing with *non-consensual* interceptions, which provides that, upon the expiration of the order authorizing the interception, the recordings are to be immediately transferred to the judge who issued the order and sealed under his direction. 18 Pa.C.S. § 5714(b). This provision deals with a different type of interception than the one at issue in this case and provides for a different procedure to be employed. It is simply irrelevant to the analysis here. The fact that Section 5704(2)(ii) does not include the word "immediately" or some other time designation prior to the custodial language is of no moment. In order for the District Attorney's Office to act as the custodian of the tape recordings, it must possess and control the recordings within a reasonable time after interception. It did not do so here. The majority's proposition that the Legislature in some way intended to permit police detectives to retain tape recordings after one-party consensual interceptions is belied by the plain

statutory language requiring the District Attorney's Office to act as custodian of the evidence in these cases.

Finally, the majority relies on Section 5721.1(e), which states that the remedies described in that subchapter are the "only judicial remedies and sanctions" for nonconstitutional violations of the statute. The trial court, however, relied on Section 5721(a)(3), which provided that any party may move to exclude the contents of any wire, electronic or oral communication on the ground that the requirements of Section 5704 have not been met.¹ As the custodial requirement of Section 5704 was not satisfied here, the trial court properly suppressed the tape recordings.

Accordingly, I dissent.

Mr. Justice Nigro joins this dissenting opinion.

¹ As the majority notes on pages 6-7, Section 5721(a)(3) was repealed on February 18, 1998. Section 5721.1(b)(1) was enacted, effective on February 18, 1998, to replace Section 5721(a)(3). The only relevant statutory change is the substitution of the phrase "Unless intercepted pursuant to an exception set forth in section 5704 . . ." for the phrase "The interception unless made in accordance with section 5704"