SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 41

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

SERGEY ALEYNIKOV,

Defendant.

Indictment Number 4447/12

Decision & Order

ZWEIBEL, J.:

The People move for an order granting renewal of this Court's June 20, 2014 ruling, suppressing devices recovered from defendant at Newark Airport at the time of his original arrest on federal charges in 2009, based upon the recent decision of the United States Supreme Court in Heien v. North Carolina, _ U.S._, 135 S.Ct. 530 (2014), and issue an order allowing the admission at trial of testimony about that evidence. Defendant opposes the People's motion. On March 17, 2015 this Court heard oral argument and on March 20, 2015, this Court denied the People's motion on the record. The following is this Court's written decision with respect to its decision to deny the People's motion, made almost three months after Heien was decided.

By way of background, on July 3, 2009, the defendant was arrested by the FBI for violating the National Stolen Property Act ("NSPA") by stealing intangible source code relating to Goldman, Sachs & Co. ("Goldman"). high-frequency trading ("HFT")

platform.[1] At the time of defendant's warrantless arrest, FBI agents recovered a laptop computer and a flash drive from defendant. The FBI then created forensic images of those digital devices, which both contained source code belonging to Goldman. After consulting with the Office of the United States Attorney for the Southern District of New York, a charge of violating the Economic Espionage Act ("EEA") was added although the arresting agent admitted that he was unfamiliar with that act and did not initially arrest defendant for a violation of it.

Defendant was subsequently tried and convicted of violating the EEA and the NSPA, and sentenced to incarceration. However, after serving a year of his sentence, the United States Court of Appeals for the Second Circuit, overturned his conviction and entered an Order of Acquittal in defendant's favor, finding that defendant could not have committed the crimes charged based on the language of the applicable statutes as a matter of law (United States v. Aleynikov, 676 F.3d 71[2d Cir.2012]). The Second Circuit Court of Appeals held that defendant could not have violated the EEA because Goldman's HFT system was not a product produced for or placed in interstate commerce as required

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[1]For a full statement of the facts found by this Court with respect to the suppression of the property recovered from defendant at the time of his arrest, the Court relies on its original June 20, 2014 decision.

under the EEA, and he could not have violated the NSPA because the code defendant was alleged to have misappropriated was not "tangible" property as required by the NSPA (id.). Defendant was released pursuant to that decision. Thereafter, defendant requested the return of his property from the United States Attorney.

Sometime between defendant's federal conviction being overturned and defendant requesting the return of the defendant's property, the New York County District Attorney's Office began the instant prosecution of defendant. As part of the prosecution, on May 21 and 22, 2013, this Court received testimony as part of the Mapp/Dunaway/Huntley hearing. Following extensive motion practice, the Court issued a decision on June 20, 2014 granting, *inter alia*, defendant's motion to suppress the two devices recovered from him at Newark Airport by the FBI. This Court reasoned that FBI Agent Michael McSwain made an unreasonable mistake of law when he arrested defendant for a violation of the NSPA because the property allegedly misappropriated was intangible although case law made it clear that the NSPA required the stolen property to be tangible. Based on that unreasonable mistake, the Court ruled that the seizure of the property violated the defendant's Fourth Amendment rights.

Thereafter, both the People and defendant submitted motions

to reargue. However, the Court's ruling remained unchanged by the time it rendered its final decision on December 10, 2014.

Apparently, five days after this Court rendered its last decision, the United States Supreme Court decided Heien v. North Carolina, _ U.S._, 135 S.Ct. 530 (2014)("Heien"). On March 3, 2015, the People filed the instant motion to renew based on Heien. According to the People, knowing the case was set to go to trial on April 1, 2015, they waited more than two and a half months to file the instant motion because the assigned assistant "do[es not] read every slip opinion from the United States on a daily basis. [He] read[s] them periodically. As soon as [he] read them, [he] formulated [the instant] motion and gave it to the Court" (March 17, 2015 Minutes:7-8).

The People now essentially move, pursuant to CPLR 2221(e)(2), which states that a motion for leave to renew, in relevant part, "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination." Whether or not to grant a motion for leave to renew on this ground is of course "left to the sound discretion of the trial court" [Washington Apts., L.P. v. Oetiker, Inc., 43 Misc.3d 265, 268 [Sup. Ct. Erie Co. 2013]; see United Medical Associates, PLLC v. Seneca Insurance Co.,

Inc., 125 AD3d 959 [2d Dept. 2015]; Eddine v. Federated Dept. Stores, Inc., 72 AD3d 487 [1st Dept. 2010]; Caryl S. v. Child & Adolescent Treatment Services, Inc., 238 A.D.2d 953, 661 N.Y.S.2d 168 [4th Dept.1997]).

A clarification of decisional law may be a sufficient change in the law to support a motion to renew under CPLR 2221 [see CPLR 2221(e)(2); Washington Apts., L.P. v. Oetiker, Inc., 43 Misc.3d, at 268; Roundabout Theatre Co. v. Tishman Realty & Constr. Co., 302 A.D.2d 272 [1st Dept.2003]). However, a development in the case law of another jurisdiction's decisional law that is merely persuasive and not binding, may constitute, under certain circumstances, a sufficient "change in the law" for purposes of a motion to renew (Washington Apts., L.P. v. Oetiker, Inc., 43 Misc.3d, at 268). Clearly, the Supreme Court's decision in Heien is a development in the case law of another jurisdiction's decisional law, and whether or not it is binding on this Court, it certainly constitutes a sufficient "change in the law" for purposes of a motion to renew (id.).

In Heien, the Court held that where an officer makes a seizure based on a reasonable mistake of law, there is no violation of the Fourth Amendment, observing that "the ultimate touchstone of the Fourth Amendment is reasonableness" (id. [internal quotations and citations omitted]). According to the

Supreme Court, a reasonable mistake of law may in certain, very limited circumstances, support the individualized suspicion necessary to justify a seizure under the Fourth Amendment. In Heien, the Supreme Court found the officer had made a reasonable mistake of law where the statute he was interpreting was ambiguous and there was no state court precedent interpreting it.

However, as defendant points out, Heien does not apply to this case as this Court, in its June 20, 2014 decision, has already ruled that Agent McSwain's mistake of law was not reasonable (see June 20, 2014 Decision:37; Marino March 10, 2015 letter). Specifically, this Court stated:

> With respect to the NSPA, Agent McSwain could not have had a reasonable belief that defendant had violated this act because what defendant is alleged to have stolen, namely 32 megabytes of data including source code, is intangible property and the NSPA only refers to tangible property" (June 20, 2014 Decision: 37).

As the People concede, it has been clear for years that the NSPA does not apply to intangible property such as the source code that defendant is alleged to have stolen (Minutes of March 17, 2015: 8). Indeed, the most cursory research would have revealed that according to the federal courts that intangible property was not among the types of property covered by the NSPA (see e.g. United States v. Bottone, 365 F.2d 389 [2d Cir.], cert. denied

385 U.S. 974 [1966]; Dowling v. United States, 473 U.S. 207 [1985]). Therefore, as the People acknowledge, it was by no means reasonable for Agent McSwain to believe that the intangible property defendant was alleged to have stolen was property subject to the NSPA (Minutes of March 17, 2015: 8). As the Supreme Court's decision in Heien makes clear, its decision "does not discourage officers from learning the law;" that "[t]he Fourth Amendment tolerates only reasonable mistakes;" that "those mistakes . . . must be *objectively* reasonable;" that "the inquiry is not as forgiving as the one employed in the distinct context of deciding whether an officer is entitled to qualified immunity for a constitutional or statutory violation;" and, most importantly, that "an officer can gain no Fourth Amendment advantage through a sloppy study of the laws he is duty-bound to enforce," (Heien, 135 S.Ct, at 539-40). Accordingly, it is apparent, as even the People have conceded, that Agent McSwain's mistaken belief that the NSPA applied to intangible property is not, as this Court previously found, a reasonable mistake of law (Minutes of March 17, 2015: 8).

Recognizing this fact, the People argue that defendant was also arrested for violating the EEA, and that his arrest was supported by probable cause because Agent McSwain's mistake of law regarding the EEA was reasonable under Heien as the EEA had

not been interpreted and was so ambiguous that the United States Congress felt compelled to clarify it in light of the Second Circuit's opinion in defendant's case (Minutes of March 17, 2015: 8). The problem with the People's argument, as defendant points out, is that this Court has already found that defendant was not arrested for violating the EEA, but rather, after he was arrested for violating the NSPA, Agent McSwain, who was unfamiliar with the EEA, added a count of violating the EEA based on his consultation with the United States Attorney's Office for the Southern District of New York (June 20, 2014 Decision:34; Marino March 10, 2015 letter; Minutes of March 17, 2015:9-10). As this Court previously explained, even if probable cause existed to arrest defendant for a violation of the EEA, it would not salvage his arrest for violating the NSPA or the seizure of his property at the time of that arrest, because "any search, to be reasonable, had to be related to the crime that the property was seized for rather than for some future crime not considered at that point in time"(June 20, 2014 Decision). Accordingly, since Agent McSwain only arrested defendant for violating the NSPA, and did not even consider whether or not defendant had also violated the EEA until after defendant's arrest and the seizure of his property for allegedly violating the NSPA, the Court does not find that the Heien Court's holding, that a reasonable mistake of

law can sometimes validate an arrest, applies to Agent McSwaion's unreasonable mistake of law in this case.

Accordingly, the motion for leave to renew is granted and upon renewal, the motion is denied. The Court is adhering to its original June 20, 2014 decision as it does not believe that Heien applies based on the specific facts of defendant's case nor requires that the Court alter its original decision in any way.

This constitutes the decision and order of this Court.

ENTER:

Hon. Ronald A. Zweibel, JSC

Dated: April 1, 2015