SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 62

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THE PEOPLE OF THE STATE OF NEW YORK

DECISION AND ORDER
IND. # 4404-12

- against -

GORDON FRANCIS,

Defendant.

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Melissa C. Jackson, J.:

The defendant moves to suppress certain telephonic evidence obtained by the People from the New York City Department of Corrections. The People are seeking to introduce prison phone calls at trial, made by defendant from Rikers Island Correctional Facility to an outside third-party. The People argue that during these phone calls, the defendant makes inculpating statements which establish his role in the commission of the murder for which he is charged. The People argue that such evidence would be highly probative of defendant's state of mind and identity as the perpetrator of the crime.

The defendant moves to suppress the phone calls and prevent them from being introduced at trial on the grounds that they were obtained in violation of the defendant's Federal and State Constitutional rights to be free of unreasonable searches and seizures.

After careful review and consideration of the defendant's motion and supplemental filings as well as the People's response and the official court records (including the phone calls in question), the defendant's motion is denied.

Standing to Challenge Subpoena – Fourth Amendment Basis

The Court will first address whether the defendant has standing to challenge the subpoena issued to the NYC Department of Corrections requesting production of the prison phone calls in

question.[1] In order to determine standing, the Court looks to whether there was an intrusion into any area in which defendant had a protected Fourth Amendment interest. The United States Supreme Court has held that "no interest legitimately protected by the Fourth Amendment" is implicated by governmental investigative activities unless there is an intrusion into a zone of privacy, into "the security a man relies upon when he places himself or his property within a constitutionally protected area." See *United States v. Miller*, 425 US 435 [1976] citing to *Hoffa v. United States*, 385 U.S. 293 [1966].

The monitoring of defendant's phone calls made from Rikers Island is indeed a warrantless monitoring of defendant's private conversations with others outside the prison. At first glance, the warrantless monitoring of a person's phone calls by the government or any of its agencies would be the subject of strict Fourth Amendment scrutiny. However, where a person consents to the search or seizure, no warrant is required.

The People argue, and this Court agrees, that the defendant in this case impliedly consented to the monitoring of his phone calls by DOC as a pre-condition to using the institutional prison phones. The defendant was fully informed of his institutional phone rights and warnings through various ways. These ways included: 1) the defendant received an inmate handbook at orientation at Rikers Island. This handbook purportedly informs inmates that their phone calls could be recorded for security purposes; 2) warnings are found posted by the institutional phones indicating that the phone calls can be monitored or recorded; and 3) a pre-recorded audio message warns the inmate, prior to the phone call being made, that such phone call could be recorded. These warnings

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[1] The Court notes that the defendant does not contest his identity as the caller for purposes of establishing standing to contest his privacy interests in the phone calls.

collectively serve to notify the defendant of the institution's intent to record the phone call and the inmate's implicit consent to such recording.

Therefore, the defendant's use of the telephones at Rikers Island correctional facility indicate defendant's implicit consent to interception of his conversations, and thus suppression of recordings of conversations is not warranted on the grounds that this seizure violates defendant's rights under the Fourth Amendment or were made in contravention of state and federal statutes requiring judicial authorization for governmental interception of telephone conversations. See *People v. Ross*, 118 AD3d 1321 [4th Dept. 2014], *appeal denied*, 23 NY3d 1067 [2014]; *People v. Koonce*, 11 AD3d 1277 [4th Dept. 2013], *appeal denied*, 24 NY3d 1085 [2014]; See generally, *People v. Cherry*, 2003 N.Y. Slip Op. 50949(U) [N.Y.Co.Ct. May 21, 2003]; [no violation of Fourth Amendment prohibition against warrantless search of inmate's mail because inmate was made fully aware of institution's policy that inmate mail is inspected]. See *People v. Garofolo*, 46 NY2d 592, 604 [1979].

As previously discussed, the defendant impliedly consents to the monitoring of his prison phone calls and thereby does not hold a legitimate expectation of privacy in those calls or has no interest legitimately protected by the Fourth Amendment. *United States v. Miller*, 425 US 435 [1976]. Accordingly, the defendant has no Fourth Amendment basis which creates standing to challenge the subpoena served upon the Department of Corrections for those phone calls.

Standing to Challenge Subpoena – Possessory or Proprietary Basis

Additionally, the defendant does not have standing to challenge the subpoena to the NYC Department of Corrections because he does not have a possessory or proprietary interest in the recorded phone conversations. In *People v. Di Raffaele*, 55 NY2d 234 [1982], the defendant challenged the validity of subpoenas issued to a telephone company for his phone records, the

Court of Appeals held "[e]ven if it be assumed that the subpoenas in question were indeed null and void, whatever may have been the right of the telephone company to challenge their validity, defendant, having no possessory or proprietary interest in the records, has no standing to do so." *Id. at* 242. In similar cases, the defendant lacked standing to challenge the subpoenas requesting financial information from his bank "as he had no possessory or proprietary interest in the bank's records." *People v. Adeniran*, 116 AD3d 706 [2nd Dept. 2014] citing to *People v. Crispino*, 298 AD2d 220, 221 [1st Dept. 2002]. See also *People v. Doe*, 96 AD2d 1018 [1st Dept. 1983].

Validity of Subpoena

The defendant argues that the subpoena for the Rikers Island phone calls in this case were not properly issued pursuant to CPLR §2307. This statute requires that a subpoena compelling a municipality or one of its departments (in this case, the New York City Department of Corrections) to produce records must be "so-ordered" by a Court. In this case the subpoena was not "so-ordered." The Court finds this to be of no import because the Department of Corrections ultimately complied with the subpoena even though they had no legal obligation to do so under the CPLR. Furthermore, as discussed more fully above, the defendant does not possess the requisite standing to challenge the validity of the subpoena in question.

Implied and Informed Consent – For Security Purposes Only

The defendant argues that his implied consent to be recorded was only for institutional "security purposes" and not for any other purpose (such as turning it over to District Attorney for prosecution). The defendant further argues that he did not (or could not) consent, expressly or impliedly, to having his phone calls recorded for purposes other than institutional security. These arguments are unpersuasive, unsupported by the record and are without merit.

First and foremost, the NYC Department of Corrections does not require (nor should it be expected to obtain) express consent from inmates to record phone calls because conceivably none would ever be given. Again, the nature of the consent derived from the use of institutional prison phones is implicit. This form of consent to telephonic monitoring is widely accepted in our law based on the circumstances surrounding the recording. See *Curley v. Board of Trustees of Village of Suffern*, 213 AD2d 583 [2nd Dept. 1995], *appeal dismissed*, 87 NY2d 860 [1995]. See also, *People v. Ross*, 118 AD3d 1321 [4th Dept. 2014], *appeal denied*, 23 NY3d 1067 [2014]; *People v. Koonce*, 11 AD3d 1277 [4th Dept. 2013], *appeal denied*, 24 NY3d 1085 [2014];

When an inmate at Rikers Island inputs their PIN and inmate number into the phone, they are impliedly consenting to having any of their phone conversations recorded and monitored in return for the license and privilege to use the institutional phone system.

Secondly, what constitutes consent to record for "security purposes" cannot be left to the individual inmate's subjective view of what constitutes security, but must be left to the institution itself to determine. To hold otherwise would lead to a preposterous result.

This Court finds that the capture of an inmate's telephonic admission or complicity in the commission of a crime is quite probative and relevant for institutional security. More specifically, the admission of a defendant to his role or commission in a violent murder is definitely related to the institutional "security" of a prison to the extent this defendant may pose a threat to other inmates or Department of Corrections personnel.

Implied and Informed Consent – Use of Phone Calls by Prosecution

Lastly, the defendant argues that he did not consent to his recordings being turned over to the prosecution and therefore the recordings are illegally obtained and should not be used at trial. This argument is completely without merit. The defendant would have this Court endeavor to

parse out a legal exception to what extent an inmate "consents" when they use institutional phones based on the type of conversation the inmate intends to have and who intends to use the calls later on in the future.

The Court notes again that it would be unrealistic to impose a requirement upon the People to obtain explicit consent from an inmate to use their prison phone calls as evidence in a prosecution against that inmate – simply because no inmate would ever explicitly consent to such an endeavor.

When a defendant uses a phone at Rikers Island they do so with the knowledge that their conversations are subject to being recorded for future scrutiny. Whether those conversations ultimately find themselves in the hands of DOC personnel or prosecutors is of no import in the context of Fourth Amendment search and seizure law. The Fourth Amendment protects against the unlawful search or seizure - the act itself. It does not concern itself with the disposition of the fruits of the search. If the search or seizure of the thing (or conversation) is lawfully done, then the use of that thing as evidence later on at trial concerns a different body of law – the rules of evidence.

Conclusion

For the foregoing reasons, the defendant has no standing to challenge the subpoena issued to the NYC Department of Corrections. However, assuming arguendo that defendant does have standing, the defendant's motion to suppress premised on lack of consent and on other Constitutional grounds is denied.

This Court finds that the defendant did in fact knowingly and voluntarily consent to the monitoring and recording of the phone conversations in question and thus the seizure of those phone calls are legal. Therefore, defendant's motion to preclude the prison phone calls because

they were obtained in violation of the defendant's State and federal Constitutional rights is denied in its entirety.

Whether those phone conversations are in any way admissible at trial is to be determined by this Court. If admissible, the question whether the phone conversations are probative (or not) of the defendant's guilt will be within the purview of the ultimate fact-finder.

The foregoing is the decision and order of the court.

Dated: New York, New York
June 18, 2015

Melissa C. Jackson
Acting Justice Supreme Court