

IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA,

Appellant,

v.

Case No. _____
5D02-503

JAMES OTTE

Appellee.

_____ /

ON APPEAL FROM THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT
AND THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND FACTS

Appellee James Otte, with others not part of this appeal¹, was charged in an information containing 93 counts, filed October 16, 2000, with racketeering, conspiracy to commit racketeering, both first degree felonies, and 35 counts of the third degree felony of deriving support from prostitution, as well as several prostitution related misdemeanors. (V1 p. 117-191). The information alleged that between January 1, 1999 and September 26, 2000, the defendants were employed by or associated with the business operating under the name of Elegant Encounters, which was an enterprise under the racketeering statute. Specific predicate acts were alleged, including over 90 predicate offenses in furtherance of the organized criminal activity. The information was amended on January 18, 2002, to add two felony counts, including a charge of procuring a minor for prostitution. (V6 p. 1012-1074).

On December 15, 2000, the Application and Affidavit for An Order Authorizing the Interception of Wire, Oral and Electronic Communications was filed. (V2-3 p. 258-395) This affidavit detailed the structure of the racketeering activity,

¹Otte's wife, Diane Fratello, was initially a party below, but presented no appearance in the appeal. The appeal became moot as to Fratello when she "entered a plea in the underlying criminal prosecution and was sentenced accordingly." State v. Otte, 28 Fla. L. Weekly D134, n. 1 (Dec. 27, 2002).

and specifically alleged violations of Chapter 895. It alleged that cocaine and other controlled substances were provided to customers upon request.

The affidavit repeatedly alleged that Cheryl England and Diane Fratello Otte were managing a common pool of prostitutes. (e.g., R 818) The telephone records indicate that these women called each other frequently. (R 323) During one four month period from March 25 to July 25, 2000, there were 4,145 calls to the cellular phone owned by Fratello, and more calls on the private home line listed in the name of her husband, Appellee James Otte. (R 304-306, 317) Of these 4,145 calls, 2,565 calls were incoming calls. (R 317) Assuming this four month time period is customary traffic for the escort business, and assuming that only one half of these incoming calls were to arrange prostitution services, the resulting average is more than ten customers per day. At the rate of \$150 per customer, the gross annual income is in excess of \$500,000 a year, with half of that amount going directly to Appellee and his wife. Another attempt to estimate the annual income to Elegant Encounters, based upon one prostitute's estimation of three "dates" a day, resulted in an annual income of \$162,000, with half of that amount being paid to Appellee and his wife. (R 363-365) Sixteen prostitutes who

worked for Appellee were identified by name as a result of the investigation; several more were unidentified or only known by nicknames. The affidavit alleged that they were escort services managers, arranging liaisons, providing money laundering, hiring surveillance from private investigators, recruiting prostitute/employees, and other services necessary to maintain the business operation.

The order authorizing the wiretap was rendered December 15, 2000, and specifically found probable cause to believe that the defendants were committing violations of the Florida racketeering and money laundering statutes. (V3 p. 396-409) The district court's decision acknowledged and accepted this factual finding. "Upon review, the trial court granted the State's application, finding that probable cause existed to believe Otte was violating Florida's RICO statute by virtue of his actions which included the management and direction of prostitutes and the clients of prostitutes." State v. Otte, 28 Fla. L. Weekly D134 (Fla. 5th DCA Dec. 27, 2002).

On July 2, 2001, the defendant filed a motion to find the oral intercepts facially invalid. (V6 p. 931-934; V12 p. 2134-2138) This motion alleged that the wiretap in this case was invalid because the federal statute delegating the power to wiretap for certain offenses did not include RICO, and RICO

based on prostitution-related offenses was not dangerous to life, limb or property. The State filed a response in opposition, and a supporting memorandum of law. (V6 p. 1075-1096)

The trial court entertained argument on the defense motion on January 23, 2002, and reserved ruling. (V1 p. 60-84) The order granting the motion was rendered February 14, 2002. (V11 p. 2043-2049) In this order, the trial court acknowledged that the August 21, 2000, order authorizing the interception of wire, oral and electronic communications specifically found probable cause to believe that the Defendants had committed the offenses of racketeering under chapter 895 and money laundering under chapter 896. (V11 p. 2043) The trial court determined that based upon State v. Rivers, 660 So.2d 1360 (Fla. 1995), wiretaps were not permissible for prostitution related offenses, even when the felony prostitution counts are alleged as part of a racketeering enterprise. "As such, this Court finds that the interception of communications based on racketeering offenses with predicates of non-violent prostitution-related acts contravenes 18 U.S.C. §2516(2)." (V11 p. 2048) Nor was the fact that money laundering counts were alleged as predicate offenses for the RICO satisfy the statute. "(T)his Court also

finds that an alleged money laundering violation, where non-violent prostitution-related offenses are the source of the money laundering, may not be permitted to bootstrap prostitution-related conduct into the category of crimes dangerous to life, limb or property in order to authorize a wiretap." (V11 p. 2048)

The State sought timely review in the district court. "Concluding that the trial court properly determined that the wiretap intercepts were unauthorized under federal or state law, we affirm." State v. Otte, 28 Fla. L. Weekly D134 (Fla. 5th DCA Dec. 27, 2002). The decision acknowledged that the wiretap statute specifically authorized electronic interception based upon probable cause for "any violation of chapter 895 (RICO)," or any violation of the money laundering statute. § 934.07, Fla. Stat. (1999). Nevertheless, the decision below determined that

Here, no allegation was made that Otte's prostitution-related offenses involved any violence or the threat of violence and thus, in granting Otte's motion to suppress, the trial court ruled that the interception of communications based on racketeering offenses with predicates of nonviolent prostitution-related acts contravenes federal law. The State challenges this ruling, arguing that the wiretap was permitted

under federal law because racketeering is a felony which, by its nature, is necessarily dangerous to life, limb, or property because it involves claims of organized criminal activity and therefore falls within the "dangerous to life" general category of the federal statute. We disagree.

State v. Otte, 28 Fla. L. Weekly D134 (Fla. 5th DCA Dec. 27, 2002)

The State timely filed a motion pursuant to rule 9.330, which was denied by order entered January 28, 2003. This timely filed appeal follows.

SUMMARY OF ARGUMENT

This Court has appellate jurisdiction in this case because the district court's decision declared invalid the portion of the wiretap statute that permits electronic interception where, as here, there is probable cause to believe that "any" violation of chapter 895 has occurred, without regard to the "dangerousness" of the underlying predicate offense for the RICO charge. §934.07, Fla. Stat. (1999); see also, State v. Rivers, 660 So.2d 1360 (Fla. 1995). Fla.R.App.P. 9.030(a)(1)(A)(ii). Instead, the district court's decision requires an ad hoc determination of whether the validly charged RICO offenses include predicate crimes that are intrinsically "dangerous to life, limb or property." This ruling is presumptively incorrect and subject to de novo review.

Racketeering and money laundering are separate crimes from the objects of the criminal enterprise which generates illegal money. The fact that criminals organize with an identifiable, continuous structure to commit criminal offenses is dangerous to life, limb, or property. The Legislature made this specific factual finding when enacting the RICO statute. Where there is a finding of probable cause in the wiretap order that violations of chapters 895 and 896 are occurring,

the wiretap is permitted by Florida statute. The statutory authorization does not exceed the authority delegated by Congress because racketeering and money laundering are first degree felonies that are dangerous to life, limb, or property.

The lower courts' overreading of the Rivers decision is presumptively incorrect because it invalidates the wiretap statute to the extent that it permits wiretaps for racketeering based on "non-violent" predicate offenses. This Court should reverse the lower courts' orders because organized crime is by definition dangerous to life, limb, or property, regardless of the source of income from the illegal criminal enterprise. This criminal organization was related in the application for a wiretap, and the issuing magistrate found probable cause for RICO and money laundering operations, which squarely fall within the wiretap statute. The Rivers case implicitly acknowledged that organized crime with prostitution related predicate offenses was within the ambit of the wiretap statute. The State seeks reversal of this incorrect ruling that improperly expands the holding of Rivers to include RICO and money laundering offenses where even part of the enterprise involves prostitution related offenses.

POINT ON APPEAL

RACKETEERING IS A DANGEROUS CRIME, NO
MATTER WHAT PREDICATE OFFENSES ARE ALLEGED,
SUCH THAT WIRETAPS ARE AUTHORIZED TO
INVESTIGATE RACKETEERING.

This Court has appellate jurisdiction in this case because the district court's decision declared invalid the portion of the wiretap statute that permits electronic interception where there is probable cause to believe that "any" violation of chapter 895 has occurred, without regard to the "dangerousness" of the underlying predicate offense for the RICO charge. §934.07, Fla. Stat. (1999); see also, State v. Rivers, 660 So.2d 1360 (Fla. 1995). Fla.R.App.P. 9.030(a)(1)(A)(ii).

The issue involved in this case is one of statutory construction, which is reviewed by this court de novo. Stephens v. State, 748 So.2d 1028 (Fla. 1999). Since the lower courts determined that the statute was an invalid exercise of the authority delegated by Congress insofar as it relates to wiretapping for RICO predicated on "non-violent" predicate offenses, there is no presumption of correctness, but rather, the trial court's order is presumed to be incorrect. See, State v. Slaughter, 574 So.2d 218 (Fla. 1st DCA 1991).

The lower courts erred in their interpretation of State

v. Rivers, 660 So.2d 1360 (Fla. 1995), by failing to recognize that organized crime is dangerous, whether prostitution-related offenses are all or part of the object of the criminal organization. Where, as here, a judge determines that there is probable cause to believe that criminal violations of RICO and money laundering are taking place, chapter 934 authorizes a wiretap to investigate those dangerous offenses.

Section 18 U.S.C. §2516(2) authorizes state prosecutors to intercept wire, oral or electronic communications upon an order finding "...evidence of the commission of the offense of murder, kidnaping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year..." (V12 p. 2160-2161) Pursuant to this delegated authority, the Florida Legislature permits wiretaps "when such interception may provide...evidence of the commission of...any violation of chapter 893;...any violation of chapter 895; (or) any violation of chapter 896." §934.07, Fla. Stat. (1999).

In this case, the order authorizing the wiretap specifically found probable cause to believe that violations of chapter 895 (RICO) and chapter 896 (money laundering) were occurring. The affidavit also alleged that as part of the

prostitution services, the escorts provided controlled substances to customers, which is a violation of chapter 893.

In State v. Rivers, 660 So.2d 1360 (Fla. 1995) this Court held that section 934.07, Florida Statutes (1991), was invalid to the extent that it permitted wiretaps to investigate prostitution. Although prostitution was dangerous to life, limb, or property, it was a misdemeanor, not punishable by more than one year. Prostitution related felonies, including deriving proceeds from prostitution, satisfied the second prong, but were not dangerous to life, limb or property. The fact that racketeering had been subsequently charged did not save the wiretap in Rivers, because the only evidence to support the RICO charge was developed as a result of the invalid wiretap. Florida's statute exceeded the authority delegated by Congress to the extent that it permitted wiretaps for prostitution.

The lower courts erred in relying on Rivers to invalidate the wiretap in this case. Racketeering and money laundering was alleged at the outset, and the trial judge issuing the wiretap order specifically found probable cause to believe that RICO and illegal financial offenses were occurring. Racketeering and conspiracy to commit racketeering are crimes

which are dangerous to life, limb, or property. It does not matter whether the predicate offenses for the criminal organization include prostitution related offenses.

The threat created by organized criminal activity renders racketeering dangerous to life, limb, or property. From the outset, the legislature has recognized that "organized crime...uses vast amounts of money, power and all the techniques of violence, intimidation and other forms of unlawful conduct to accomplish its goals." Ch. 77-334, Laws of Fla. p. 1400. The fact that the criminal enterprise generates large sums of illegally obtained money "harms innocent investors...and thereby constitutes a substantial danger to the economic and general welfare of the State of Florida." Id. These legislative findings demonstrate that RICO and money laundering present a danger over and above the crimes that generate the illegal income.

The requirement that racketeering prosecutions be focused upon ongoing organizations which function as a continuing unit insures that all RICO charges by definition create a danger to life, limb or property. See, Gross v. State, 765 So.2d 29 (Fla. 2000); State v. Berjerano, 760 So.2d 218 (Fla. 5th DCA 2000). The trial court erred in determining that organized criminal activity encompassed under racketeering laws is not a

valid subject of wiretapping. Indeed, the wiretapping statute itself makes the legislative finding that organized criminal activity is a proper subject of wiretaps. "Organized criminals make extensive use of wire and oral communications in their criminal activities. The interception of such communications to obtain evidence of the commission of crimes or to prevent their commission is an indispensable aid to law enforcement and the administration of justice." §934.01(3), Fla. Stat. (2001).

Appellee would have this Court ignore the specific legislative finding that organized crime is dangerous, instead opting for an ad hoc evaluation of which portions of criminal enterprises are dangerous to life, limb or property so as to fall within the ambit of the wiretap statute. The lower courts implicitly found that prostitution is not dangerous, even where it is conducted as part of a large scale RICO operation. As with conspiracy, Appellant contends that the danger arises from the combination of dozens of persons to generate hundreds of thousands of dollars. It is the organization of criminals that creates the danger, not simply the underlying objects of the criminal enterprise. The decision below ignores the plain language of the wiretap statute which permits intercepts for any violation of Chapter

895.

The State contends that organized crime is by definition dangerous to life, limb or property, regardless of the specific predicate offenses alleged. This argument was specifically presented below. "The State challenges this ruling, arguing that the wiretap was permitted under federal law because racketeering is a felony which, by its nature, is necessarily dangerous to life, limb, or property because it involves claims of organized criminal activity and therefore falls within the 'dangerous to life' general category of the federal statute. We disagree." State v. Otte, 28 Fla. L. Weekly D134 (Fla. 5th DCA Dec. 27, 2002).

The decision below rejected this argument based in part on a discredited federal case for the proposition that RICO offenses based upon prostitution related offenses are not the proper subject of wiretaps. United States v. Millstone, 684 F.Supp. 867 (W.D. PA. 1988). This case was reversed by the United States Court of Appeal on other grounds, but the appellate court expressly declined to endorse the lower court's ruling that the wiretap was unauthorized. United States v. Millstone, 864 F.2d 21, 24 (3rd Cir. 1988). When the case returned to state court, Pennsylvania courts repeatedly upheld the convictions for racketeering, and rejected the

contention that the wiretap was impermissible under federal law. Commonwealth v. Birdseye, 637 A.2d 1036 (Pa. 1994); Commonwealth v. Birdseye, 670 A.2d 1124 (Pa. 1996), cert. denied, Birdseye v. Pennsylvania, 518 U.S. 1019 (1996).

The Millstone holding was further discredited when it was rejected by another federal district court in United States v. Marcy, 777 F.Supp 1400 , 1402 (N.D.Ill. 1991). That court accepted the State's argument advanced herein, namely, that the allegation of violations of the racketeering statute permitted the wiretap, regardless of the fact that the predicate offenses were not within the ambit of the wiretap statute.

It is clear that successful racketeering prosecutions can be based on criminal enterprises involving prostitution in both state and federal court. See, e.g., United States v. McLaurin, 557 F.2d 1064 (5th Cir. 1977); Vaughn v. State, 711 So.2d 64 (Fla. 1st DCA 1998); Golden v. State, 578 So.2d 480 (Fla. 2d DCA 1991); Cantrell v. State, 403 So.2d 977 (Fla. 1981). All of these cases affirm convictions for racketeering where the predicate offenses are prostitution related. It is equally clear that the racketeering crimes are separate from the underlying predicate offenses; a defendant can be convicted both of racketeering and the offenses alleged to be

predicates of the RICO as separate counts. Carroll v. State, 459 So.2d 368 (Fla. 5th DCA 1984). Therefore, the lower courts erred by failing to consider that the racketeering offenses were dangerous to life, limb, or property separate and apart from the offenses alleged to be the object of the organized crime scheme.

CONCLUSION

Based upon the argument and authority presented, the decision affirming the order granting the motion to suppress evidence must be reversed and this case remanded for further proceedings.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail to Gerald F. Keating, Counsel for James Otte, at 318 Silver Beach Avenue, Daytona Beach, FL 32118, this day of February, 2003.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,
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COUNSELS FOR APPELLANT

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