Review of Recent Juvenile Cases (2007)

by
The Honorable Pat Garza
Associate Judge
386th District Court
San Antonio, Texas

Vicarious-consent part of consent exception to Texas wiretap law.[Alameda v. State](07-4-19)

On June 27, 2007, the Texas Court of Criminal Appeals held that a parent may give vicarious-consent to record a child's telephone conversations if the parent has a good-faith basis for believing that recording is in the best interest of the child.

¶ 07-4-19. **Alameda v. State,** No. PD-0231-06, 2007 Tex.Crim.App. Lexis 868, (Tex.Crim.App., 6/27/07).

Background: Appellant was convicted of two counts of aggravated sexual assault of a child under fourteen. The jury assessed punishment at thirty years' confinement for each count, and the trial judge ordered that the sentences be served consecutively. Appellant appealed the stacking order, as well as the trial court's decision to admit an audio tape of his conversations with the victim and a transcription of the audio tape. The court of appeals held that the trial court did not err in stacking Appellant's sentences or in admitting the audio tape and the transcript. *Alameda v. State*, 181 S.W.3d 772 (Tex. App.--Ft. Worth 2005).

Facts: While Appellant was going through a divorce, he moved in with the 12-year-old victim, J.H., and her mother, Deborah, whom Appellant had known for eight or nine years. He lived in an extra bedroom in Deborah's home for close to a year. After Appellant moved out, Deborah became suspicious [1] that Appellant and J.H. were communicating without her knowledge, so she attached to the phone jack in her garage a recording device that would record all incoming and outgoing calls on her home telephone. Over two weeks, Deborah recorded almost twenty hours of conversation between Appellant and J.H., neither of whom knew that they were being recorded. Deborah did not suspect that Appellant and J.H were having a sexual relationship until she heard the recording of their conversations. Deborah took the audiotape to the police, and Appellant was charged with aggravated sexual assault of a child.

> 1 Members of Appellant's family made statements to Deborah which led her to believe that Appellant and J.H. were in frequent contact with each other. Deborah was also aware that Appellant had allowed J.H. to do things that she did not approve of, such as driving even though she was not old enough, and lying about her age in order to join a gym.

Prior to his trial, Appellant filed a motion to suppress the audiotapes. He claimed that it was an offense under Penal Code section [2] 16.02 to intentionally intercept a wire communication without consent, so the audiotape was inadmissable under Code of Criminal Procedure article [3] 38.23. The trial judge found that Deborah could vicariously consent to the recording of J.H.'s phone conversations, so the audiotape was admissible.

> 2 All future references to sections refer to Texas Penal Code, unless otherwise specified.

3 All future references to articles refer to Texas Code of Criminal Procedure unless otherwise specified.

After Appellant was convicted, he appealed the trial court's decision to admit the audiotape and a transcript of the recording. He also appealed the trial court's cumulation of the two 30-year sentences imposed by the jury, arguing that the jury should decide whether the sentences were cumulated rather than the trial judge. Because there are no Texas cases on this issue, the court of appeals looked at other state courts, as well as at how federal courts have interpreted the federal wiretap law, which is similar to the Texas law. The court of appeals considered the factors outlined in *Pollock v. Pollock*, 154 F.3d 601 (6th Cir. 1998), which held that a parent may give vicarious-consent to record a child's telephone conversations if the parent has a good-faith basis for believing that recording is in the best interest of the child. Although vicarious-consent is not listed as an exception to the Texas wiretap law, the court of appeals held that, in order to protect a child, a parent may record her child's telephone conversations if the recording meets the standards in *Pollock*. *Alameda*, 181 S.W.3d at 778. The court of appeals agreed with the trial court's determination that Deborah had a good-faith, objectively reasonable belief that recording the phone conversations was in the best interest of J.H. and therefore upheld the trial court's denial of Appellant's motion to suppress. *Id*. at 780. Because the court held that the audiotape was properly admitted, and Appellant conceded that the transcript was admissible if the audiotape was admissible, the court of appeals did not address the admissibility of the transcript. *Id*. The court of appeals also rejected Appellant's claim regarding the cumulation of his sentences, stating that it was not improper for the trial judge, rather than the jury, to determine whether the sentences would be cumulated. *Id*. at 781. Because the cumulating of the sentences does not exceed the statutory maximum for the offense, the court held that the cumulated sentence does not violate *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). *Alameda*, 181 S.W.3d at 781.

Appellant filed a petition for discretionary review, asking us to consider whether the court of appeals erred in grafting an exception into the relevant statute in order to conclude that the audiotape was properly admitted. Appellant argues that because the court of appeals improperly held that the audiotape was admissible, the court erred in failing to address the merits of his claim that the transcript of the audiotape was improperly admitted. Finally, Appellant asks us to consider whether the court of appeals erred in holding that the trial court's cumulation of his sentences does not violate *Apprendi*.

Held: The court affirmed the appellate court's decision.

Opinion: Article 38.23(a) of the Texas Code of Criminal Procedure states, "No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case." Therefore, because section 16.02(b) [4] states that a person commits an offense if he intentionally intercepts a wire communication, the audiotapes are inadmissible unless the vicarious-consent given by Deborah meets the consent exception to this statute [5] or the interception was legal for some other reason. Appellant argues that the vicarious-consent exception does not apply to the wiretap laws. He bases this argument on *Duffy v. State*, 33 S.W.3d 17, 25 (Tex. App.--El Paso 2000, no pet.), and *Kent v. State*, 809 S.W.2d 664, 668 (Tex. App.--Amarillo 1991, pet. ref'd), in which both courts stated that section 16.02 must be applied in all circumstances that are not specifically excepted. However, as the court of appeals noted, *Duffy* and *Kent* are distinguishable from Appellant's case because those cases addressed whether one spouse can vicariously consent to the recording of the other spouse's conversation, rather than the issue of whether a parent can vicariously consent to the recording of her child's conversations. *Alameda*, 181 S.W.3d at 775 n. 1. The fact that there is no interspousal consent exception to the wiretap statute does not preclude us from recognizing a parent-child vicarious-consent exception.

Texas Penal Code Section 16.02(b) states that a person commits an offense if the person:

(1) intentionally intercepts, endeavors to intercept, or procures another person to intercept or endeavor to intercept a wire, oral, or electronic communication;

(2) intentionally discloses or endeavors to disclose to another person the contents of a wire, oral, or electronic communication if the person knows or has reason to know the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

(3) intentionally uses or endeavors to use the contents of a wire, oral, or electronic communication if the person knows or is reckless about whether the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection.

Under section 16.02(c), it is an affirmative defense to prosecution under Subsection (b) that:

(4) a person not acting under color of law intercepts a wire, oral, or electronic communication, if:

> (A) the person is a party to the communication; or
>
> (B) one of the parties to the communication has given prior consent to the interception, unless the communication is intercepted for the purpose of committing an unlawful act.

Appellant also cites cases related to a minor child's right to seek an abortion or to purchase contraceptives without parental consent for the proposition that a child has the right to privacy, and this general right to privacy should not be taken from the child unless there is a significant state interest. Appellant further argues that, because the Texas Family Code [6] lists the circumstances under which a parent has the right to consent on behalf of a child and does not mention the right to consent to the recording of a child's conversations, we should assume that the legislature intended that no such right exist.

Texas Family Code section 151.001 lists the rights and duties of a parent:

> (a) A parent of a child has the following rights and duties: (6) the right to consent to the child's marriage, enlistment in the armed forces of the United States, medical and dental care, and psychiatric, psychological, and surgical treatment; (7) the right to represent the child in legal action and to make other decisions of substantial legal significance concerning the child;

We disagree. We dealt with both the right to privacy and a mother's ability to consent for her child in *Sorensen v. State*, 478 S.W.2d 532 (Tex. Crim. App. 1972). Even though the child in *Sorensen* was not a minor, we held that a child has no reasonable expectation of privacy in his room when the parent routinely enters the room, and that a parent can vicariously consent to a search of her child's room. *Id*. at 534. Therefore, we reject Appellant's contentions that the vicarious-consent exception unlawfully violates a minor's right to privacy and that a parent has the right to consent only in the circumstances listed in the family code.

Because no Texas cases have addressed a parent's ability to vicariously consent to the recording of a child's telephone conversations, and the federal wiretap statute is substantively the same as the Texas statute, we look to the Sixth Circuit's decision in *Pollock v. Pollock,* 154 F.3d 601 (6th Cir. 1998), which is the leading case regarding the vicarious-consent doctrine in the context of the federal wiretap statute. [7] In *Pollock*, the plaintiff was the child's stepmother and the defendant was the child's mother. The stepmother appealed the trial court's determination that the mother had not violated Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2511 when she recorded conversations between her daughter and the plaintiff. In upholding the trial court's decision, the court of appeals looked to federal and state case law in which the vicarious-

consent doctrine had been applied to both federal and state wiretap statutes. [8] *Pollock,* 154 F.3d at 608-610. The court adopted the rule set out in *Thompson v. Dulaney*, 838 F. Supp. 1535, 1544 (D. Utah 1993), and held that:

> as long as the guardian has a good faith, objectively reasonable basis for believing that it is necessary and in the best interest of the child to consent on behalf of his or her minor child to the taping of telephone conversations, the guardian may vicariously consent on behalf of the child to the recording. *Pollock* 154 F.3d at 608-610.

Unlike adults, minors do not have the legal ability to consent in most situations. As the *Thompson* court noted, the vicarious-consent doctrine was necessary because children lack both "the capacity to consent and the ability to give actual consent." 838 F. Supp. at 1543.

18 U.S.C. § 2511(1)(a) states in relevant part that any person who intentionally intercepts any wire communication shall be punished. The federal analog to the consent exception is in 18 U.S.C. § 2511(2)(d) and states that it is not unlawful for a person not acting under color of law to intercept a wire communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal act.

The court referenced *Campbell v. Price*, 2 F. Supp. 2d 1186 (E.D. Ark. 1998), where the vicarious-consent doctrine was applied to Title III; *Silas v. Silas*, 680 So. 2d 368 (Ala. Civ. App. 1996) and *State v. Diaz*, 308 N.J. Super. 504, 706 A.2d 264 (N.J. Super. Ct. App. 1998), which applied the vicarious-consent doctrine to the respective state's wiretap statutes; and *Williams v. Williams*, 229 Mich. App. 318, 581 N.W.2d 777, 1998 WL 180849 (Mich. Ct. App. 1998) and *West Virginia Dep't of Health & Human Resources v. David L.*, 192 W. Va. 663, 453 S.E.2d 646 (W. Va. 1994), which addressed the vicarious-consent doctrine under both federal and state wiretap statues.

Appellant argues that, in this case, J.H. did have the ability to consent because she was thirteen years old at the time the conversations were recorded, whereas the children in *Thompson* were only three and five years old. However, the vicarious-consent doctrine has also been applied to older children, including a fourteen-year-old in *Pollock*. A minor's actual ability to consent does not preclude her mother's ability to vicariously consent on her behalf. Thus the standard set out in Pollock is that vicarious-consent is acceptable if the parent had an objectively reasonable, good-faith belief that consenting for the child was in the child's best interest.

We agree with the court of appeals that Deborah had an objectively reasonable, good-faith basis for believing that recording the conversations was in J.H.'s best interest. Because the recording of the conversations meets the standards set out in *Pollock*, the vicarious-consent given by Deborah satisfies the exception to the Texas wiretap statute. And, since it is not a violation of Penal Code section 16.02 to intentionally intercept an oral communication if one party consented, no law was broken, and article 38.23 does not render the evidence inadmissible.

Appellant states that this case may illustrate why a vicarious-consent exception should be added to the statute, but he argues that it should be added by the legislature and not the courts. However, by holding that a parent can give vicarious-consent for a child, we are not adding a new exception to the wiretap statute. Rather, we are saying that vicarious-consent, which is a type of consent is recognized in many contexts in the law regarding the parent-child relationship, also applies to the existing consent exception to the wiretap statute.

Admissibility of the Transcript

Appellant concedes that if the audiotape were admissible, his complaint regarding the admissibility of the transcript of the recorded conversations would be moot. Therefore, because the audiotape was properly admitted, the transcript was also admissible, and we do not need to address Appellant's second ground for review. The court of appeals did not err in failing to consider the merits of this claim.

Conclusion: We hold that the doctrine of vicarious-consent applies to the consent exception of the wiretapping statute. Because the victim's mother provided the consent necessary for the affirmative defense to the statute prohibiting wire tapping, it was not a violation of Penal Code section 16.02 to record the conversations. Therefore, the audiotape was legally obtained and was not rendered inadmissible by article 38.23. Since the audiotape was properly admitted, the admissibility of the transcript of the recorded conversations is not at issue, and the court of appeals did not err in failing to consider the merits of this claim. Although the jury imposed the two 30-year sentences, it was within the trial judge's discretion to decide whether to order that the sentences be served consecutively. The court of appeals properly rejected Appellant's arguments regarding the cumulation of his sentences and upheld the trial court's cumulation order. The decision of the court of appeals is affirmed.

CONCUR BY: KELLER

CONCUR

KELLER, P.J., *filed a concurring opinion in which KEASLER, and HERVEY, JJ., joined.*

Three salient facts bear on the admissibility of the tape recording in this case: (1) one of the parties to the recorded conversations was the minor child of a parent conducting the recording, (2) the recording was conducted by the parent as part of caring for the child's welfare, and (3) the recording occurred through a telephone jack located in the parent's home. Because of these three facts, I would hold that the recording did not constitute "interception" under the Texas wiretap statute.

For a crime to occur under the wiretap statute, there must be an *interception* or an intended interception of a wire, oral or electronic communication. [1] The statute provides that "intercept" has the same meaning as defined under Article 18.20 of the Code of Criminal Procedure, governing law-enforcement-related wiretaps. [2] Under Article 18.20, "intercept" means "the aural or other acquisition of the contents of a wire, oral, or electronic communication through the use of an electronic, mechanical, or other device." [3] This definition in turn relies upon the definition of "electronic, mechanical, or other device," which explicitly excludes certain types of instruments or equipment. [4] Among other things, the wiretap statute excludes from its reach "a telephone or telegraph instrument, [or] equipment . . . used for the transmission of electronic communications, . . . if the . . . instrument [or] equipment . . . is . . . furnished to the subscriber or user by a provider of wire or electronic communications service in the ordinary course of the provider's business and *being used by the subscriber or user in the ordinary course of its business*." [5]

1 TEX. PEN. CODE § 16.02(b).

2 § 16.02(a).

3 TEX. CODE CRIM. PROC. Art. 18.20, § 1(3).

4 Art. 18.20, § 1(4).

5 Art. 18.20, § 1(4)(A)(emphasis added).

All of this language is virtually identical to language in the federal wiretap statute. In reviewing the legislative history of the federal counterpart to this provision (what has become known as the "extension phone" exception), the Second Circuit explained that the exception originally contained no "ordinary course of business" limitation. [6] This limitation was added after Professor Herman Schwartz, testifying on behalf of the A.C.L.U., complained that the unqualified language would allow policemen and private intruders to enter others' homes and listen in on extension phones without penalty. [7] But, declining to recommend that the entire exception be deleted, Professor Schwartz commented, "I take it nobody wants to make it a crime for a father to listen in on his teenage daughter or some such related problem." [8]

6 *Anonymous v. Anonymous*, 558 F.2d 677, 679 (2nd Cir. 1977).

7 *Id.*

8 *Id.* (quoting Hearings on the Anti-Crime Program Before Subcomm. No. 5 of the House Judiciary Comm., 90th Cong., 1st Sess. 901 (1967)).

Several federal appeals courts have applied the extension phone exception to in-home recording by a parent of a minor child's conversations because the recording was done within the ordinary course of the parent's business of caring for the child. [9] The Supreme Court of New Hampshire followed suit in interpreting the same language in its own wiretap statute. [10] I would follow these cases and hold that a parent's recording of a minor child's conversations from a telephone jack within the home for the purpose of caring for the child constitutes a use that is exempt from the wiretap statute.

9 *Scheib v. Grant*, 22 F.3d 149, 153-55 (7th Cir. 1994); *Newcomb v. Ingle*, 944 F.2d 1534, 1536 (10th Cir. 1991); *Janecka v. Franklin*, 843 F.2d 110, 111 (2nd Cir. 1988), *affirming and approving district court opinion at* 684 F. Supp. 24 (S.D.N.Y. 1987); *Anonymous*, 558 F.2d at 679. *But see Pollock v. Pollock*, 154 F.3d 601 (6th Cir. 1998)(declining to follow these cases but citing them as some support for its holding exempting parental recording of a minor child's conversations under the "consent" exception to the wiretap statute).

10 *State v. Telles* 139 N.H. 344, 346-47, 653 A.2d 554, 556-57 (1995).

With these comments, I join the opinion of the Court.