

SUPERIOR COURT - STATE OF CALIFORNIA
COUNTY OF RIVERSIDE

PEOPLE OF THE STATE OF CALIFORNIA,)
)
Plaintiff,)
)
vs.) Case No. RIF1600646
)
CHRISTIAN AGRAZ,)
)
Defendant.)
_____)

REPORTER'S TRANSCRIPT OF MOTION TO SUPPRESS EVIDENCE

BEFORE THE HONORABLE JOHN D. MOLLOY

October 14, 2016

APPEARANCES:

For the Plaintiff:

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TRINA N. FEHLMAN, CSR, RPR, CRR

1 anticipatory harmless error.

2 THE COURT: I like that. All right. Very good.

3 Give me just one second. I'm looking for a cite in one
4 of the cases that you-all cited me to. And the problem is I got
5 too happy with my highlighter. So it's hard for me to find it.
6 But it had to do with statutory interpretation and the rules for
7 it.

8 (Pause.)

9 MR. VALENCIA: Is it *Lange versus the United States*?

10 THE COURT: No. It may be a cite to *Lange*. Hold on.

11 All right. We're going to take a ten-minute recess,
12 and I'll come out and rule at that time.

13 (Recess.)

14 THE COURT: Let's go back on the record in *People*
15 *versus Agraz*. All parties are present, represented as before.

16 I finally found my citation. First, I am going to, as
17 a matter of first impression, interpret 629.50. Specifically,
18 with respect to the delegation clause that the district attorney
19 may make.

20 I am mindful that statutory interpretation or
21 construction requires the following: "The objective of statutory
22 construction is to determine the intent of the enacting body so
23 that the law may receive the interpretation that best effectuates
24 that intent." That is a cite from *People versus Roberts*, which
25 can be found at 184 Cal.App.4th 1149, specifically at page -- I
26 believe it's 1179. Let me make sure. Yes.

27 And there's an internal cite to *Fitch*. Which is *Fitch*
28 *versus Select Products Company*, a 2005 case, found at 36 Cal.4th

1 812. "The words of the statute should be given their ordinary
2 and usual meaning and should be construed in their statutory
3 context. If the plain common-sense meaning of a statute's words
4 is unambiguous, the plain meaning controls. We may not, under
5 the guise of construction, rewrite the law or give the words in
6 effect different from the plain and direct import of the terms
7 used." Once again, from the same page in *Roberts*, citing both to
8 *Fitch* as well as *California Federal Savings and Loan Association*
9 *versus the City of Los Angeles*, a 1995 case, found at 11 Cal.4th
10 342.

11 When turning to the statute, it reads as follows. And
12 I will recite the entirety of 629.50, subdivision (a): "Each
13 application for an order authorizing the interception of a wire
14 or electronic communication shall be made in writing upon the
15 personal or affirmation of the attorney general, chief deputy
16 attorney general, or chief assistant attorney general, criminal
17 law division, or of a district attorney, or the person designated
18 to act as district attorney in a district attorney's absence, to
19 the presiding judge of the superior court or one other judge
20 designated by the presiding judge. An ordered list of additional
21 judges may be authorized by the presiding judge to sign an order
22 authorizing an interception. One of these judges may hear an
23 application and sign an order only if that judge makes a
24 determination that the presiding judge, the first -- the first
25 designated judge, and those judges higher on the list are
26 unavailable. Each application shall include all of the following
27 information."

28 So when I look at the statute, I am mindful of two

1 things. First, in the designation clause that is used for the
2 district attorney, the legislature chose not to use, only if
3 the -- the phrase "only if he is absent."

4 In the designation clause used for the superior court,
5 the legislature did two things. One, they used the presiding
6 judge. Actually, they used first a single designation, one other
7 judge designated by the presiding judge. And only then did they
8 discuss what happens if neither of those two people are
9 available. And that is the use of an ordered list. And anyone
10 on the ordered list can only act if, in that judge's view of the
11 facts, not only is the presiding judge missing, the designee of
12 the presiding judge is missing, and any person who appears on the
13 hierarchical list above that particular judge is missing.

14 To the extent that the legislature specifically used
15 words to deal with an actual absence in the delegation of judges
16 and they did not use that, I find the word "absence" in the
17 designation clause for the district attorney to have a different
18 meaning than is suggested by the defense.

19 Specifically -- and now turning to the legislative
20 history, the Court is mindful of, number one, that the first
21 versions of the bill actually had, as under the designation
22 clause, the chief deputy district attorney -- or yes, it was the
23 chief deputy district attorney.

24 The Court is also mindful that not only across the
25 state do the different district attorneys' offices have different
26 titles for the second in command, but the District of Riverside
27 DA's Office, there have been at least two different designations
28 for who is the second in command. The Court finds -- this Court

1 finds that the designation clause or the person designated to act
2 as district attorney in the district attorney's absence is a
3 functional title. It, in all respects, says "or second in
4 command," the person who takes the reigns if I am not here.

5 The notion that there cannot be a designation flies in
6 the face of the federal enabling statute. It flies in the face
7 of how the federal law has developed. It flies in the face of
8 how the state law has developed and changed over time. Just
9 looking at the top of this list, originally back in the 1960s
10 when wiretaps were authorized by the enabling statute, it was
11 only one or two local prosecutors. But just the state statute
12 now has the attorney general, the chief deputy attorney general,
13 or the chief assistant attorney general. And then one other
14 person, who I'm not sure I quite understand, just says "criminal
15 law division." Both the history of wiretap statutes and the
16 Court's analysis, even going so far back as *Giordano*, support
17 that there can be more than one person other than the chief
18 prosecutorial officer who can approve -- who can approve wiretap
19 applications.

20 That being the case, I believe that the most
21 appropriate interpretation of California's Penal Code 629.50 is
22 that it is merely a designation. It is identifying the person
23 who is the other person besides the district attorney, him or
24 herself, who gets to apply for wiretaps.

25 The Court makes no comment on the wisdom of whether any
26 elected official should completely delegate that authority as
27 allowed by the statute. The Court makes no comment. The Court's
28 only concern here is does the law allow it. And the Court finds

1 that California law does allow that form of wholesale delegation.

2 As a practical matter, in terms of factual findings, I
3 do find that in this county, from 2011 to the end of 2014, it
4 appears, to this Court's satisfaction, that Mr. Zellerbach had
5 made such a delegation. And it was, for all practical purposes,
6 a complete delegation to his second in command, to review and
7 apply for wiretap application -- well, apply for wiretaps.

8 Having said those things, I said I was going to rule
9 alternatively. I am mindful of *People versus Jackson*. *People*
10 *versus Jackson* turns out not to be the six-day requirement. It
11 was -- they didn't -- they didn't list the target. They didn't
12 list the name of the targets that they were trying to intercept,
13 and they ended up intercepting a number of different individuals.
14 In fact, it was a wiretap on a jail pay phone without any
15 designation of who the specific target was. And the Court,
16 there, simply adopted another Court's analysis for how you should
17 view a violation of the wiretap statute.

18 The Court did not find, in *Jackson*, that the wiretap
19 statute had been set -- had been complied with. It was *Roberts*
20 who applied it. *Roberts* -- and that's *People versus Roberts*,
21 found at 184 Cal.App.4th 1149. In that particular case, it was a
22 harmless error case, Counsel. And it was the reporting
23 requirements that required six-day reports to the monitoring
24 judge to make sure that there was still a purpose for the
25 wiretap, that it hadn't gone stale or that they weren't
26 intercepting more than they should be intercepting.

27 And the Court found, there, that -- that because of a
28 number of confessions that were made in the case, it was harmless

1 error. That the wiretap information added little, if anything.
2 But they did find it to be a violation.

3 So if I were analyzing our statute without the benefit
4 of *Giordano* and I were to walk through the three-step analysis
5 of, I'll call it, *Jackson* and *Roberts*, that three-step analysis
6 would be as follows:

7 Has the defendant established a violation of Fourth
8 Amendment or a provision of the act? If not, the motion should
9 be denied.

10 As I said, I'm ruling in the alternative. So assuming
11 that I am wrong about the interpretation of the delegation clause
12 available to the district attorney in 629.50, then I would have
13 to find, yes, there was a violation of the act.

14 Does the violated provision play a central role in the
15 act? Going to *Giordano*, I don't know how I escape that. I don't
16 know how I escape that. Because *Giordano*, at page -- at the end
17 of their analysis for why only two people should be allowed to
18 apply for the wiretap, they say, "We are competent that the
19 provision for preapplication approval was intended to play a
20 central role in the statutory scheme and that suppression must
21 follow when it is shown that the statutory requirement has been
22 ignored." And that's 14 -- 416 U.S. 505, specifically at page
23 527. So I would have to find that, yes, it had.

24 Then turning to the third prong, was the purpose of the
25 provision achieved despite the error? If the purpose of the
26 provision is as *Giordano* suggests -- if the purpose of the
27 provision was to restrict the approval of these applications to
28 only the most seasoned attorneys who were closest to the, I'll

1 call it, the voting process -- because in the federal statute,
2 they're closest to the legislature, specifically the Senate. And
3 with respect to the State, in the case of the district attorney,
4 closest to the voters -- then I would say, yes, it has.

5 But I am not riding on clean cloth just given *Jackson*.
6 I still have to look at *Giordano*. And I don't know how I could
7 square saying that the third prong, was the purpose achieved
8 despite this error, given what *Giordano* did at the end of the
9 day. Which was Congress said these two people, period, someone
10 else did it.

11 Here, if -- if I am wrong about what role absence plays
12 in the delegation clause, then it is clear they wanted the
13 elected official to make the decision unless they were absent.

14 That takes us to another point, doesn't it? If I were
15 to find that he was -- well, this morning as I prepared for this
16 case, I thought where I was headed was to say that it would have
17 to be suppressed under *Jackson* because of *Giordano*. The problem
18 I have with doing that, quite frankly, is the proof that was put
19 on that Mr. Zellerbach, in -- was absent. He was absent from the
20 office. And that the definition of absence that I would choose
21 is just a functional one. It's just a functional one.

22 And geographic distance makes no difference to me. He
23 could be across the street engaged in a high-profile meeting. He
24 could be in Sacramento engaged in a high-profile meeting. The
25 fact that Sacramento is farther away makes no difference. There
26 is zero functional difference. A hundred years ago there might
27 have been. But with the advent of cell phones, he is just as
28 reachable across the street as he would be in Sacramento. Absent

1 means gone.

2 And it appears that he was indeed absent. That is a
3 bit troubling to this Court. And the reason I say it's a bit
4 troubling is it's clear to this Court that it wouldn't have
5 mattered whether he was in the office or not. Mr. Van Wagenen is
6 the person who would have been reviewing the wiretap application.
7 But in terms of what the statute calls for, by providence
8 alone -- by providence alone, he appears that he was indeed
9 absent within the meaning of 629.50 (a).

10 So what I've really done is just thought out loud with
11 respect to my alternative ruling. It's denied under both --
12 under both analyses. As an initial statutory interpretation with
13 belief that absence doesn't mean anything, it's denied again.
14 Because it appears that the overwhelming evidence is that
15 Mr. Zellerbach was indeed absent on May 13th, 2014, when this
16 particular application was signed.

17 And oddly, that is consistent with *Chavez*. *Chavez* was
18 companion case to *Giordano*. And in *Chavez*, what they said was, a
19 mere ministerial error does not require suppression. And in
20 *Chavez*, what happened was the appropriate official had reviewed
21 the wiretap application, had okayed it. But someone else who
22 wasn't supposed to signed it. Actually, it was a designee who
23 could sign it did sign it but hadn't actually reviewed it. And
24 the Court, there, found that it was fine. It was fine because
25 the -- the legislative intent was completely satisfied by the
26 fact that the -- one of the people who was supposed to review it
27 actually did review it.

28 Having said those things, the motion to suppress for a

1 violation of 629.50 and the Fourth Amendment is denied at this
2 time.

3 Anything further that we need to do at this time,
4 Counsel?

5 MR. RONIS: Set dates.

6 THE COURT: Set some dates.

7 Are we here for TSC? Are we post-prelim or no?

8 MR. RONIS: We are post-prelim, yes.

9 MR. KIEL: Yes, your Honor, we're set here for TRC
10 today.

11 THE COURT: All right. So when can you be ready for
12 trial?

13 MR. RONIS: Well, what I propose is that we -- we can
14 set a trial date today and set it for a status in a couple of
15 weeks.

16 THE COURT: Oh, we certainly could. We could set a
17 trial date out any time you want and we can set it for a status
18 in a couple of weeks, sure.

19 MR. RONIS: That would be fine.

20 THE COURT: What's convenient for you in terms of trial
21 dates?

22 MR. RONIS: Look at my calendar.

23 THE COURT: Those exhibits will all be -- are all going
24 to stay in evidence. And the exhibits need to be retained by the
25 Court.

26 MR. RONIS: Yes, your Honor. In fact, belatedly, if we
27 could move for the introduction --

28 THE COURT: 1 through 4 were received in evidence.

1 MR. RONIS: Well, I think 3 is not going in; is that
2 correct?

3 THE COURT: 1 through 4 were all published, all
4 discussed by the witnesses.

5 MR. RONIS: Very well.

6 THE COURT: It's up to you.

7 MR. RONIS: That's fine. We have no objection. 1 and
8 2 were actually marked with the official clerk's sealed approval.
9 And 3 and 4 will need to be so marked as well.

10 THE COURT: Do you want 1 through 4, or do you -- tell
11 me what you want.

12 MR. RONIS: That's fine, your Honor. 1 through 4.

13 THE COURT: Okay. 1 through 4 received in evidence.
14 And they do need to be preserved. So they'll be retained by the
15 Court.

16 Anything else?

17 MR. RONIS: No. With respect to the dates, your Honor,
18 if we could set it for a status conference, felony readiness
19 conference, on the 27th of October.

20 THE COURT: 27th of October would be -- I'd set it for
21 a TSC -- well, a TRC, which is trial readiness conference.

22 MR. RONIS: Right.

23 THE COURT: When do you want your trial set?

24 MR. KIEL: Your Honor, the only thing I would imagine
25 is going back to Department 42 at this point. And drug
26 calendar's only there on Mondays, Wednesdays, or Fridays.

27 MR. RONIS: The 28th would be fine, your Honor.

28 THE COURT: All right. The 28th, then.

1 There is a countywide meeting, though, so you wouldn't
2 have your normal judge that day. Would you rather have it on the
3 26th?

4 MR. RONIS: Well, that's ironic, but that's okay. I
5 don't care who the judge is.

6 THE COURT: And that's fine, the 28th will be fine.
7 There'll be somebody there.

8 All right. And when do you want a trial?

9 MR. RONIS: Your Honor, if we could set a trial perhaps
10 the 14th of November.

11 THE COURT: Okay. I -- what is our current time
12 waiver? I know we took one last time.

13 MR. RONIS: I think it's always been on today's date
14 with 30 days remaining.

15 THE COURT: So I'd have to take another --

16 MR. RONIS: Right.

17 THE COURT: So what was it? November what?

18 MR. RONIS: I suggested the 14th or 15th, your Honor.

19 THE COURT: Counsel?

20 MR. KIEL: I'm agreeable with the Court. The 14th or
21 15th -- as long as it's a Monday, Wednesday, or Friday. And
22 there appears that the 14th is a Monday, so if that's agreeable
23 with you.

24 THE COURT: All right. November 14th, 8:30 a.m.,
25 Department?

26 MR. KIEL: 42.

27 THE COURT: Department 42. The TRC was -- what was the
28 date we set again? 28th? October 28th, 8:30 a.m., Department

1 42.

2 Mr. Agraz, you have a right to have your trial commence
3 within 60 calendar --

4 Was it 60 calendar days of his arraignment in superior
5 court?

6 MR. KIEL: Yes, your Honor.

7 THE COURT: Within 60 calendar days of your arraignment
8 in superior court. You previously waived that right. Do you
9 agree that your trial will be timely if held -- what type of time
10 waiver, Counsel, are we talking about?

11 MR. KIEL: Plus ten.

12 THE COURT: Ten court days from the trial date?

13 MR. KIEL: Yes, your Honor.

14 THE COURT: Do you agree that your trial will be timely
15 if it occurred on November 14th or within ten court days of that
16 date?

17 THE DEFENDANT: Yes.

18 THE COURT: All right. Matter is set for jury trial
19 November 14th, 8:30 a.m., Department 42.

20 MS. FITZPATRICK: May I clarify something?

21 THE COURT: Yes.

22 MS. FITZPATRICK: Your Honor, may I clarify your ruling
23 just for the appellate record, because I have a feeling this will
24 surely go up.

25 THE COURT: Sure.

26 MS. FITZPATRICK: Okay. So the Court found no
27 violation in this instance, based on it's a statutory
28 interpretation that there does not need to be absence by the

1 district attorney.

2 THE COURT: Correct.

3 MS. FITZPATRICK: Okay. So it's a --

4 THE COURT: Here, I'll clarify it. I found that
5 absence is not -- is not a condition precedent to the delegation.
6 That the person is identified once the delegation has happened.
7 And that that delegation happened as early as January of 2011.
8 It certainly had happened in January of 2014 when the interoffice
9 memo was authored that indicated that Jeff Van Wagenen was the
10 person to act in the DA's absence for all purposes.

11 And I find that he was the person that is identified by
12 the, I'll call it, delegation clause. That once that delegation
13 has been made, it is -- that is the DA's election to choose a
14 person specific who can also apply for wiretaps.

15 Alternatively, I find that if absence is a condition
16 precedent, the overwhelming proof is that he was indeed
17 functionally absent from the office on May 13th, the date when
18 the application was made. And so for that reason, there is no
19 reason to do the *Jackson* analysis because I can't find a
20 violation of the statute.

21 MS. FITZPATRICK: Okay. Thank you.

22 THE COURT: There you go.

23 MR. VALENCIA: Can I have one clarifying point?

24 THE COURT: Sure.

25 MR. VALENCIA: And the reason that he wasn't absent is
26 because he was speaking at a conference in Riverside.

27 THE COURT: Correct.

28 MR. VALENCIA: Okay.

1 THE COURT: He was not physically present -- no, he was
2 absent from the office within the meaning of the statute. He was
3 absent. Which means not physically present there. He was
4 otherwise engaged.

5 (Proceedings concluded.)
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