



SUPERIOR COURT OF NEW JERSEY

VICINAGE 1

Bernard E. DeLury, Jr.
Presiding Judge

Criminal Division
Criminal Court Complex
4997 Unami Boulevard
Mays Landing, N.J. 08330
609-402-0100 ext. 47360

Not for Publication Without Approval of the Committee on Opinions

May 22, 2025

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Re: **State v. Marty Small and La'Quetta Small: Defendants' Motion to Suppress Evidence Pursuant to the Wiretap Act, State v Marty and La'Quetta Small, Indictment No. 24-09-2951**

Dear Counsellors:

The Court has received and reviewed your submissions in response to the Court's Order of April 15, 2025, requiring proposed findings of fact and conclusions of law with respect to the admissibility of the alleged recorded interceptions by [REDACTED] and/or [REDACTED]. Based on these very thorough and helpful submissions, the Court has determined the following:

1. The State bears both the burden of proof and the burden of persuasion with regard to the proposed admissibility of the twelve extracted audio and video clips detailed in the State's letter brief of May 19, 2025, pp 4-6 ("the Clips").

2. The State shall be held to its burdens by a preponderance of the credible evidence to show that the Clips were obtained lawfully as an exception to the general prohibitions set forth in the Wiretap Act.
3. The Clips, at this juncture, appear to have been obtained by [REDACTED] while not "acting under color of law." The Clips further appear to be intercepts of electronic communications transmitted from [REDACTED]'s device to [REDACTED]'s device by use of cellular or similar connection. Interceptions, such as the intercepts defined under N.J.S.A. 2A:156A-4d, "do not represent the same intrusions [as unauthorized wiretaps by law enforcement] into constitutionally protected privacy." State v. Toth, 354 N.J. Super. 13, 22 (App. Div. 2002) (citing State v. McDermott, 167 N.J. Super. 271, 278 (App. Div. 1979)).
4. The Defendants have countered with reference to the contents of the Clips. Namely, the Clips appear to be the result of [REDACTED]'s device maintaining an open connection with [REDACTED] and that [REDACTED] used his electronic device to record the communications between [REDACTED], the Defendants and [REDACTED]'s grandmother. Such a showing warrants a testimonial hearing pursuant to N.J.R.E. 104 and R. 3:5-7 in order to establish whether the Clips were interceptions covered under the Wiretap Act and whether they were obtained with [REDACTED]'s prior consent. A consensual intercept by a third party (no state involvement) simply means that the person recording the conversation is a party to the conversation or that the persons who are being recorded have given their lawful consent to have the conversation recorded. This consent can be implied. See George v. Carusone, 849 F. Supp. 159, 164 (D. Conn. 1994) ("A court can infer implied consent when the circumstances indicate that the party knowingly agreed to the surveillance." In that case, the court observed that police officers who were aware that police telephone lines were taped impliedly consented to recording of their conversations).
5. Further, the Court is of the opinion that an evidentiary and testimonial hearing is required to ensure that the strictures of the Wiretap Control Act have been scrupulously observed. The Defendants are entitled to test that the appropriate guardrails were in place protect the Defendants' rights of privacy.

State v. Minter, 116 N.J. 269 (1989) reaffirmed the principles set forth in State v. Worthy, 141 N.J. 368, 379 (1995) "that legislative concern demands the strict interpretation and application of the Wiretap Control Act." The Worthy Court held:

That legislative concern demands the strict interpretation and application of the Wiretap Control Act. See, e.g., State v. Catania, 85 N.J. 418, 437 (1981) ("[T]his Court has strictly construed the Wiretap Act so as to afford maximum safeguards for individual privacy"); State v. Cerbo, 78 N.J. 595, 604 (1979) ("[T]he Wiretap Act constitutes an intrusion into 'individual rights of privacy' and should be strictly interpreted and meticulously enforced") (citation omitted); In re Wire Communication, 76 N.J. 255, 260 (1978) ("Wiretap statutes implicating as they do an intrusion into individual rights of

privacy, constitutionally and legislatively recognized, should generally be strictly construed").

Id. 141 N.J. at 380.

6. In order to gain admissibility of the Clips, the State must show that [REDACTED] provided prior consent to the interception of communications between her and her family members by [REDACTED]. The State has provided the Court with a recorded interview of [REDACTED]. The interview was conducted by Detective Sergeant Ryan Ripley ("R.R.") and Assistant Prosecutor Elizabeth Fischer ("E.F.") on May 1, 2025, at the Atlantic City High School. The Court has reviewed the audio recording. The recording provides:

00:00:04

R.R.: So today's date is Thursday, May 1, 2025. Time is approximately 11:10 AM. Currently located at the Atlantic City High School, located in the conference room. Currently in the room is [REDACTED], also myself Detective Sergeant Ryan Ripley of Atlantic County Prosecutor's Office as well as Assistant Prosecutor Liz Fischer. The following will be a recorded statement of [REDACTED] in reference to ACPO 240192 which is an active criminal investigation. [REDACTED] do you see the recording in front of you?

00:00:37

[REDACTED]: mhm

00:00:39

R.R.: Do we have permission to record our statement?

00:00:41

[REDACTED]: mhm

00:00:42

R.R.: If you could just for the record, it can you just say yes or no for me I'm sorry?

00:00:46

[REDACTED]: Yes.

00:00:47

R.R.: OK thank you. So [REDACTED], as a county detective, I'm empowered to administer an oath. Could you please raise your right hand for me? Do you swear affirm to tell the truth the whole truth nothing but truth?

00:01:00

[REDACTED]: Mhm

R.R.: Is that yes?

00:01:01

[REDACTED]: Yes.

00:01:07

R.R.: OK thank you. now [REDACTED] is it true that we spoke off the record prior to going on the record?
[REDACTED]: Yeah.

00:01:09 R.R.: OK and that conversation we had talked about was an introduction of AP Liz Fisher moving forward with the court proceedings. Is that accurate?
[REDACTED]: Yes.

00:01:22 R.R.: OK. Now during our discussion we had talked about, uhm. you had mentioned consent regarding the iPad recordings. Is that correct?

00:01:33 [REDACTED]: Mhm.
R.R.: Is that a yes?
[REDACTED]: Yes.
R.R.: OK so regarding the iPad recordings that are contained on the iPad. Who was on that recording during those incidents?

00:01:54 [REDACTED]: My dad, me, my mom.

00:01:55 R.R.: OK and then, during those incidents, was there someone else who was listening as well?

00:02:01 [REDACTED]: Yeah.
R.R.: OK and who was that?

00:02:03 [REDACTED]: My boyfriend.

00:02:04 R.R.: And what's his name?

00:02:06 [REDACTED]: [identifies boyfriend as [REDACTED]]
R.R.: What's his last name?
[REDACTED]: [identifies boyfriend as [REDACTED]]

00:02:07 R.R.: OK. Now during those recordings that are on the iPad, did you want [REDACTED] to listen to that?

00:02:17 [REDACTED]: Yes.

00:02:18

00:02:22 R.R.: OK and why did you why did you give consent for [REDACTED] to listen?
[REDACTED]: He was just on the phone.

00:02:24 R.R.: OK. Now how did you provide consent to [REDACTED] to listen?
00:02:37 [REDACTED]: What do you mean how did I provide consent?
00:02:38 R.R.: How did, did you, tell him to listen did you?
00:02:42 [REDACTED]: He was just on the phone. Like he was on the phone like I didn't know stuff was going to happen. He was just on the phone.

00:02:49 R.R.: You were just on the phone and that's when stuff happened.
00:02:51 [REDACTED]: Yeah.

00:02:52 R.R.: OK. Did you want him to listen?
00:02:56 [REDACTED]: Yes.
R.R.: OK and is there a reason specific reason as to why you wanted him to listen.
[REDACTED]: [inaudible]

00:03:03 R.R.: No reason?
00:03:06 R.R.: Uhm. Ok. And to clarify the recordings that we're speaking about are the altercations that you have between your parents. Is that correct?
00:03:17 [REDACTED]: Yes.

00:03:19 R.R.: OK.
E.F.: And that was, those recordings you remember they were sometime in January of 2024?
00:03:24 [REDACTED]: mhm.
E.F.: OK.
R.R.: Is that yes?
00:03:26

[REDACTED]: Yes
 E.F.: And you didn't hang up with [REDACTED], right? Like you knew he was on the other line. Could you have hung up if you had wanted to with the call?
 00:03:35
 [REDACTED]: I mean I didn't want to get caught with the phone.
 00:03:36
 E.F.: Right OK and you didn't hang up with him on the other line listening, right?
 00:03:45
 R.R.: Yeah OK do you have anything else you'd like to add? OK.
 00:03:50
 R.R.: Time is approximately 11:14 AM on May 1, 2025, that I conclude this statement.

Id. State's Exhibit 32.¹

Under N.J. Ct. R. 3:5-7(c), "[i]f material facts are disputed, testimony thereon shall be taken in open court." The motion judge must conduct an N.J.R.E. 104 evidentiary hearing to provide the parties the opportunity to probe the veracity of testimony. State v. Parker, 459 N.J. Super, 26 (App. Div. 2019). The Appellate Division in Parker held:

Here, the parties made clear in their respective written submissions that they had diametrically irreconcilable accounts about what the [d]etective claimed occurred when he approached defendant. Under R. 3:5-7(c), the motion judge *must* conduct an N.J.R.E. 104 evidentiary hearing to provide the parties the opportunity to probe the veracity of [the detective's] testimony. The motion judge thereafter must make factual findings that will be substantially influenced by an opportunity to hear and see the witnesses. State v. Gamble, 218 N.J. 412, 424-25, (2014).

Id. at 30.

In the present matter, the parties made clear in their respective written submissions and during the April 15, 2025 oral argument that that they have "diametrically irreconcilable" accounts about [REDACTED]'s consent, or lack thereof, to [REDACTED] prior to the intercept. While the May 1, 2025, interview of [REDACTED] may assist the Court in assessing the issue of consent pursuant to N.J.S.A. 2A:156A-4d, the Court finds an evidentiary hearing appropriate to determine the disputed material facts. Exhibit 32, which purports to record [REDACTED]'s sworn statement to law enforcement on

¹ The Court has prepared and attached a transcript of the Interview of [REDACTED] - 05.01.25 (iPad Consent) (1).wma (State's Exhibit 32) for identification only.

the issue of her consent to the intercepts by [REDACTED] appears to be the one-sided product of a law-enforcement interview consisting of a series of leading and suggestive questions that elicited at times inaudible, non-verbal and ambiguous responses. It is axiomatic that credibility determinations are best made when the fact finder has the opportunity to see and hear the witness and the testimony that has been offered in the appropriate judicial setting when such testimony has been assessed in the crucible of cross-examination.

7. The nature and extent of such testimony or other evidence adduced by the State should address, at a minimum, the issue of [REDACTED]'s consent to the alleged interceptions.

Accordingly, the Court will schedule a testimonial hearing on June 16, 2025, to address the foregoing. The Court has entered and enclosed an Order.

Further determinations by the Court concerning whether [REDACTED] had the legal capacity to provide consent as a minor or whether the Clips would be otherwise admissible because no "interceptions" occurred as that term is understood under N.J.S.A. 2A:156A-2(a) will abide the outcome of the evidentiary hearing.

Very truly yours,


Bernard E. DeLury, Jr., P.J.Gr.

BED/ep
Encl.

PREPARED BY THE COURT
Superior Court of New Jersey
Criminal Courts Complex
4997 Unami Boulevard
Mays Landing, NJ 08330

FOR IDENTIFICATION ONLY

Interview of [J.S.] - 05.01.25 (iPad Consent) (1).wma

Transcript

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■ My boyfriend.

00:02:04

R.R.: And what's his name?

00:02:06

■: [identifies boyfriend as ■]

R.R.: What's his last name?

■: [identifies boyfriend as ■]

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