



THE SIXTH CIRCUIT UPHOLDS A DISTRICT COURT'S DENIAL OF THE DEFENDANTS' MOTION TO SUPPRESS, FINDING THAT THE WIRETAPS AT ISSUE WERE SUPPORTED BY PROBABLE CAUSE, THAT THE WIRETAPS WERE NECESSARY TO THE INVESTIGATION



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In *United States v. Jenkins*, 659 Fed. Appx. 327 (6th Cir. Sept. 2, 2016), the United States Court of Appeals for the Sixth Circuit was asked to consider whether the evidence obtained by the Government by placing wiretaps on two brothers' phones were supported by probable cause and whether the wiretaps complied with Title III of the Omnibus Crime Control and Safe Streets Act. The District Court concluded that the wiretaps were supported by probable cause, that they were necessary, and that the wiretaps complied with Title III of the Omnibus Crime Control and Safe Streets Act. Therefore, the District Court denied the brothers' motion to suppress. Thereafter, the brothers entered into a conditional plea agreement whereby they agreed to plead guilty to conspiring to distribute cocaine, but they reserved the right to challenge on appeal the District Court's denial of their motion to suppress. The relevant facts are as follows.

In 2009, a federal task force began investigating narcotics trafficking in Chattanooga, Tennessee. Specifically, the task force began investigating Defendant Juanzell Jenkins' involvement in cocaine distribution in Chattanooga. During the investigation, the Government sought and obtained Title III authorization to place wiretaps on several phones connected to Juanzell. Three of these wiretaps—placed on “target telephones” designated TT4, TT5, and TT8—were at issue in the appeal.

The Government first applied for a wiretap on TT4 (Juanzell's cell phone) and sought authorization to intercept Juanzell's communications with three others in May 2012. The wiretap application was based on the affidavit of James Hixson, a member of the Chattanooga Police Department assigned to the task force, who provided evidence that Juanzell and the named interceptees were conspiring to distribute cocaine. This evidence included information from confidential informants, physical surveillance, controlled drug purchases, and analyses of call records from TT4 and other phones. Juanzell's brother, Defendant Joe Jenkins, was not named as an interceptee, but he was discussed and referred to as a subject in Hixson's affidavit given the frequent interactions between the brothers. As required by Title III, Hixson also attested to the need for the wiretap as compared to other investigative methods and asserted that the wiretap was necessary to ascertain the scope of Juanzell's distribution organization in Chattanooga. Lastly, Hixson explained how the Government

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planned to minimize the interception of non-pertinent calls which is another Title III requirement. The District Court authorized a thirty-day wiretap.

In February 2013, the Government applied for a wiretap on TT5. In the supporting affidavit, Hixson explained that Juanzell had stopped using TT4 in favor of TT5 shortly after the TT4 wiretap ended. Although the TT4 wiretap had yielded evidence of a conspiracy, a regional cocaine shortage had prevented investigators from learning the depth of the coconspirators' involvement. Therefore, the application sought authorization to intercept Juanzell's communications with Joe and four others on TT5. According to Hixson's affidavit in support of the TT5 wiretap, Joe was named as an interceptee, in part, because the TT4 wiretap had intercepted 67 calls between the brothers that revealed Joe's active role in Juanzell's operation. Hixson, again, attested to evidence supporting probable cause for the wiretap and asserted that another wiretap was the only available means of identifying the scope of Juanzell's operation, including the identities of their suspected cocaine sources in Atlanta, Georgia. The affidavit also included an explanation of the investigators' planned efforts at minimization. The District Court signed an order authorizing a thirty-day wiretap on TT5.

Lastly, the Government applied for a wiretap on TT8 in April 2013 shortly after the TT5 wiretap authorization had expired. Investigators believed that TT8 was used by Robert North, an associate of Juanzell, and sought authorization to intercept North's communications with Juanzell, and two others, not including Joe. Hixson attested to evidence—from the previous wiretaps, call data, and confidential sources—that North supplied Juanzell with cocaine. Further, Hixson asserted that wiretap interception was necessary because there was still no other technique with a reasonable likelihood of success to identify the entire Chattanooga operation. The District Court signed a wiretap order for TT8.

As noted above, the Jenkins' brothers moved to suppress the evidence that the Government had obtained as a result of the wiretaps. Specifically, the brothers argued that the wiretap applications were not supported by probable cause, that the wiretaps were not necessary to the investigation, and that non-pertinent communications were not properly minimized as required by Title III. The District Court denied the motion to suppress, and this appeal followed.

The Sixth Circuit began its analysis by noting that the basic standards for a wiretap are similar to those for a search warrant and that the question that must be decided in issuing a warrant is whether there is probable cause to believe that evidence of a crime will be uncovered. "Certainty is not required, but rather a fair probability and something more than mere suspicion." *United States v. Poulsen*, 655 F.3d 492, 504 (6th Cir. 2011). The issuing judge's probable-cause determination will not be reversed if the record contains a substantial basis for his probable cause findings.

Upon review, the Sixth Circuit agreed with the District Court that Hixson's affidavits established probable cause to believe that all three wiretaps would lead to evidence that Juanzell and his associates had entered into a conspiracy to distribute narcotics. The Sixth Circuit stated that, under a totality of the circumstances, the controlled buys, the number and frequency of the telephone calls, and the statements made by confidential informants established probable cause sufficient to support Hixson's affidavit and the District Court's issuance of each of the wiretaps at issue on appeal.

Furthermore, the Sixth Circuit agreed with the District Court that the wiretaps were necessary to the Government's investigation of the brothers' drug trafficking activities. Under Title III, the wiretap

application must include “a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous,” and the district court may authorize interception only after a determination that this standard has been met. 18 U.S.C. § 2518(1)(c), 3(c). This requirement protects against the impermissible use of a wiretap as the initial step in a criminal investigation. However, investigators need only give serious consideration to the non-wiretap techniques prior to applying for wiretap authority and explain to the district court the reasons for the investigators’ belief that such non-wiretap techniques have been or will likely be inadequate. The purpose of the necessity requirement is not to foreclose electronic surveillance until every other imaginable method of investigation has been unsuccessfully attempted but simply to inform the issuing judge of the difficulties involved in the use of conventional techniques.

In this case, the Sixth Circuit concluded that Hixson’s affidavits sufficiently described the available methods of investigation and demonstrated that each method, having been duly considered, was either unsuccessful or too risky to attempt. For example, Hixson stated in his affidavit that physical surveillance had been attempted on Juanzell numerous times but that these attempts had been limited by Juanzell’s skill in counter surveillance techniques. In addition, although Hixson and the task force had relied upon confidential informants to obtain some information, the informants had been unsuccessful in obtaining information about the scope of Juanzell’s organization. Finally, Hixson noted that there were no cooperating witnesses who were in a position of trust with Juanzell who could have functioned in an undercover capacity. Accordingly, the Sixth Circuit agreed that the information contained within Hixson’s affidavits satisfied Title III’s requirements and were necessary to the investigation of Defendants drug conspiracy.

Finally, the Sixth Circuit affirmed the District Court’s finding that the Government took steps to minimize the interception of communications not otherwise subject to interception as is required by Title III. The Sixth Circuit noted that “[t]he statute does not forbid the interception of all nonrelevant conversations, but rather instructs the agents to conduct the surveillance in such a manner as to ‘minimize’ the interception of such conversations.” *Scott v. United States*, 436 U.S. 128, 140 (1978). The Sixth Circuit explained that a reviewing court must objectively assess the reasonableness of the monitoring agents’ actions in light of the facts and circumstances confronting them at the time. A criminal defendant challenging a wiretap based upon a failure to minimize non-relevant communications must establish a pattern of interception of innocent conversations which developed over the period of the wiretap. The defendant must demonstrate that the monitoring agents exhibited a high disregard for the defendant’s privacy rights or that they did not do all that they could reasonably do to avoid unnecessary intrusions.

Here, the Sixth Circuit opined that the Government’s minimization efforts were documented in progress reports that they submitted to the District Court at the midpoints and at the conclusions of the wiretap authorization periods. Hixson also testified at the suppression hearing as to the officers’ minimization efforts. Given the large-scale scope of the conspiracy, the Sixth Circuit found that the District Court did not err in concluding that the Government took reasonable steps to minimize the interception of non-relevant communications. Therefore, the Sixth Circuit affirmed the District Court’s denial of the brothers’ motion to suppress and affirmed their convictions and sentences.

Note: *Court holdings can vary significantly between jurisdictions. As such, it is advisable to seek the advice of a local prosecutor or legal adviser regarding questions on specific cases. This article is not intended to constitute legal advice on a specific case.*

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