

CR 1827-72 (13)
US V GEORGE GORDON LIDDY ETAL

THIS ENVELOPE CONTAINS OPINION
FILED JANUARY 18, 1973, SETTING
FORTH REASONS FOR ALLOWING
CONTENTS OF INTERCEPTED
CONVERSATIONS TO BE ADMITTED.

ORDERED SEALED UNTIL
FURTHER ORDER OF COURT.

opened 5/2/73 per
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7/27/73 - RAB

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA :
v. : Criminal Case No. 1827-72
GEORGE GORDON LIDDY, ET AL., :

O P I N I O N

On January 5, 1973, this Court filed an opinion and order denying the motion of various persons not parties to this case, hereinafter referred to as movants, to suppress the contents of illegally intercepted communications, to quash subpoenas and for other relief. In response to an appeal from this order by the movants, the Court of Appeals for this Circuit, one judge dissenting, entered an order on January 12, 1973, prohibiting this Court from receiving evidence of the contents of any of the allegedly illegally intercepted communications without first holding an in camera hearing concerning the admission of this evidence.

On Wednesday afternoon, January 17, 1973, during the direct examination of the Government witness, Alfred C. Baldwin, he was asked to identify the persons who used the telephone the communications of which were intercepted. Before he could answer, counsel for the movants in open court, interposed an objection to this question being answered on the grounds that identity of the parties to an illegally intercepted communication falls within the definition of "contents" as defined in 18 U.S. Code § 2510(8). Thereupon, the jury, which is sequestered in this case, was excused and an in camera hearing held as prescribed by the Court of Appeal's order of January 12, 1973.

Present at the in camera hearing were counsel for the movants, the defendants and their counsel, and government counsel. Counsel for the government made a proffer of the questions the government planned to ask the witness Baldwin as to contents of intercepted telephone

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JAMES F. DAVEY, Clerk

communications he overheard and the anticipated answers. The Court then heard lengthy argument from all counsel as to the admissibility of this evidence. Counsel for the defendant McCord and counsel for the movants objected to the admissibility of any evidence at all relating to contents. Counsel for the defendant Liddy argued that on cross-examination he could not be bound by some of the conclusory answers expected on the direct examination of Mr. Baldwin but, in protection of the Fifth and Sixth Amendment rights of his client, he would require the latitude of the full and thorough cross-examination permitted in the federal courts. See, e.g., Smith v. Illinois, 390 U.S. 129 (1968); Alford v. United States, 282 U.S. 687 (1931).

The Court has concluded that the evidence set forth in the Government's proffer, reasonably limited in its scope, is relevant and material to the charges in the indictment. This conclusion is based on the Court's familiarity with the entire record to date, including the exhaustive pretrial pleadings, the pretrial conferences, the Government's opening statement, and all the evidence introduced thus far in the trial. As pointed out in its previous opinion, the need for disclosure of the contents of the intercepted communications with respect to at least the first and last counts of the indictment cannot seriously be disputed. In the first count, the defendants are charged with conspiracy to obtain illegally and use information from the offices and headquarters of the Democratic National Committee. Proof that information was obtained by the defendants through the illegal interception of wire communications is clearly highly probative to proof of the conspiracy. In this regard evidence that telephone calls were intercepted does not by itself constitute persuasive evidence that "information" was obtained and used. If the Government is to be permitted to prove the offense charged, proof of contents, if available, is particularly probative as^{to} whether or not information was obtained.

The nature of the information obtained is also potentially highly probative on the issue of motive. Though motive need not be

alleged or proved by the Government in a criminal case, the Court is convinced that the question of motive is ~~likely~~^{likely} to be particularly significant to the jury in this case in assessing the state of mind of the defendants. All the offenses in this indictment require proof of specific intent and all require proof that the defendants acted knowingly and willfully.

At the in camera hearing, the Government argued that proof of the contents would be relevant to establishing that the defendants were attempting to secure political intelligence and that their interest in matters of a private and confidential nature, whether personal or political, was relevant to establish a possible motive of intent to compromise. If the Government has such evidence, it should be made available to the jury.

The necessity for disclosure of contents is equally clear with respect to the eighth count of the indictment which charges the two defendants with illegal interceptions of conversations on a telephone used primarily by Robert Spencer Oliver and Iida M. Wells. Both counsel for the defendant McCord and counsel for the movants argued that Baldwin's testimony that he overheard intercepted communications, without more, is sufficient. This is simply inaccurate. The Government in a criminal trial bears a heavy burden of proof. It is unreasonable, therefore, to limit its proof to the minimum necessary to avoid a judgment of acquittal. This is particularly so since Mr. Baldwin may be considered an accomplice or co-conspirator and the defendant McCord has requested a specific instruction that as an accomplice his testimony is to be considered by the jury with great care and caution. The defendant McCord cannot have it both ways, that is, limit the Government's proof to a mere general ~~assertion~~^{assertion} by Baldwin and then attack this uncorroborated proof as inadequate because that of an accomplice.

The Government has alleged that the testimony of the witnesses Oliver and Wells that they engaged in certain conversations which Baldwin claims he overheard is not only necessary to prove commission of the offense alleged in the eighth count - wiretapping of their conversations - but it also is relevant and material because it corroborates Baldwin on a critical issue in the case - that he overheard specific conversations - and therefore enhances his credibility. The Court agrees. Baldwin's credibility is clearly a significant issue for the jury. The Court has gone to great lengths to afford defense counsel access to material potentially valuable for impeaching Baldwin's credibility. For example, over strenuous objection, it ordered a newspaper publisher to make available to the defense for impeachment purposes a taped conversation with Baldwin despite an alleged promise of confidentiality and claim of First Amendment privilege. Under these circumstances, the Court concludes that the Government is entitled to a corresponding opportunity to corroborate Mr. Baldwin's testimony.

Counsel for movants has urged that no contents of an unlawfully intercepted communication can be disclosed in a criminal case and this extends to the identities of parties to communications. The Court agrees that identity is included in the definition of contents under 18 U.S. Code § 2510(8). If counsel for movants is correct, therefore, the Government cannot prove who used the telephone that was illegally tapped and, as a practical matter, may not be able to prove the offense. Congress could never have intended this bizarre result. The Court can only conclude that Congress intended that, within the traditional limitations of relevancy, materiality, and competency, the contents of illegally intercepted communications can be introduced into evidence to prove that communications were illegally intercepted.

The Court wishes to address itself to another matter related to this proceeding. In its prior opinion, the Court questioned but was willing to assume the standing of movants to intervene in this litigation. Upon further reflection and analysis, however, the Court is persuaded that movants have no standing. Although movants may be "aggrieved persons" as defined in 18 U.S. Code § 2510(11), they do not, in the Court's view, have a right to file a motion to suppress in any way.^{1/} 18 U.S. Code §s2518(10)(a) provides the remedy for aggrieved persons. See S. Rep. No. 1097, 90th Cong., 2d Sess. 106 (1967). It limits those who can file a motion to suppress to aggrieved persons who "are in any trial, hearing or proceeding in or before any court, . . ." Movants are not such persons. In no way involved in this case, they do not fall within the class of persons traditionally permitted to file motions to suppress, and 18 U.S. Code § 2518(10)(a), was not intended to enlarge this class. See S. Rep. No. 1097, 90th Cong., 2d Sess. 96 (1967). Accordingly, the Court finds that movants lack standing in this Court.

In this regard, it should be noted that the unwarranted intervention of movants has had a most unfortunate effect on the conduct of this trial. For the second time in less than a week, the trial of this case has had to be suspended in order to dispose of the motions of movants. The second suspension occurred in the middle of the direct testimony of a key government witness. To preserve the rights of the defendants in this case to a fair trial, the Court has ordered the jury sequestered. Any interruption of the trial is burdensome on these jurors who are performing a public service. The lengthy interruption for an appeal is particularly burdensome and for this reason disturbing to the Court. For the Court is sensitive to the position of the Government that to require it

^{1/} Mr. Oliver and Miss Wells are involved since they have been subpoenaed to testify as witnesses. Their only remedy, however, in this regard, is to move to quash the subpoenas. Their motion to do so was denied by this Court. The only relief available to them is to refuse to testify and then to be found in contempt. *United States v. Anderson*, 464 F.2d 1390 (1972). See also *United States v. Ryan*, 402 U.S. 530 (1971); *Cobbledick v. United States*, 309 U.S. 323 (1939).

to continue with the presentation of its case while an appeal is pending will deprive its proof of coherence, logic, and continuity and will therefore confuse and confound the jurors.

The Court will admit the evidence of the contents of the intercepted communications as proffered by the Government, with respect to the witness Baldwin. The objections of counsel for the defendant McCord and counsel for the movants are overruled. The defendants will be accorded their right of cross-examination, limited only by the traditional standards long accepted in the federal courts: relevance, materiality, and scope of the direct examination. Pursuant to the order of the Court of Appeals, those parties who wish to do so will be granted an opportunity to appeal.



Chief Judge

January 18, 1973