STATE OF NEW JERSEY v. PATRICK J. BUCHANAN.

A-96-3211-T4

Superior Court, Appellate Division

Submitted July 12, 1996 -- Decided August 7, 1996.

Before Judges GRIM, REAPER and MERCY.

William Clinton, Public Defender of New Jersey, attorney for defendant (*William Clinton*, of counsel and on the brief).

Robert Dole, Essex County Prosecutor, attorneys for the State of New Jersey (*Robert Dole*, of counsel and on the brief).

REAPER, J.A.D., joined in part by GRIM, J.A.D., and in part by MERCY, J.A.D.

We hold that N.J.S. 2C:43-2.2 as applied to a person charged with aggravated sexual assault is constitutional, and that statements made by a defendant to an individual who sought to represent him as a lawyer can not be introduced at defendant's trial.

The Facts

This case involves a vicious sexual attack upon a 10-year-old handicapped girl, C.H.,[1] as she slept in her own home. The facts are particularly grim. On the evening of October 20, 1995, the child's parents had left their home in Newark's Ironbound section and gone next door to help neighbors with a construction project, leaving the child sleeping alone in her own bed. The little girl is mute and has physical handicaps that make it hard for her to walk. The parents left the doors to the house open so that they could respond at once if the child needed them. Unfortunately, those open doors led to tragedy.

Shortly after the parents left, an intruder made his way through the open doors into the house with the aim of burglary. During the course of the crime (expensive jewelry was taken), the burglar came upon C.H.l as she slept. He forced her to perform fellatio on him and raped her anally. When he was through, he told her he would kill her parents if she told anyone about the attack. He left her covered up from head to toe in her bed.

1. Because of the age of the victim and the nature of the offense, the full name of the child will not be disclosed.

When the parents returned, they checked on the child but saw that she was still in her bed with the covers pulled up and assumed all was well. They had no reason to check on the jewelry and so did not realize a crime had occurred until the next morning. Since it was a Saturday, the child usually slept in and the parents were unaware of any problem until they realized that the little girl was much later than usual in getting up. At that point, they went in to check on C.H., pulled down the bedclothes and found her nude from the waist down and blood on the bedclothes.

Police and emergency medical personnel responding to the scene were able to reconstruct the above facts but there were few real clues as to the identity of the perpetrator. Both the child's bedroom and the parents' bedroom where the jewelry had been kept were wiped completely clean of all fingerprints. Enough time had gone by that whatever evidence there might have been of seminal fluids and the like had been dissipated. However, police did find a distinctive sneaker print just outside the rear door of the house. The girl is able to communicate in only a limited fashion and the only thing she communicated clearly was that the attack had involved the mouth.

Months went by without further developments in the case. The parents became more and more hysterical with fear that their child had been assaulted by someone who could transmit the AIDS syndrome to the child and the entire family required and continues to require therapy.

Then, on April 17, 1996, C.H. was riding with her father in the family car on Broad Street in Newark when suddenly she became very agitated. She pointed to a young man on a bench several yards away and appeared to be extremely frightened of him. The father immediately called the police, who responded to the scene, and identified the young man as the defendant, 18-year-old Patrick J. Buchanan. Buchanan agreed to come to the police station for questioning. At the police station, he was taken into an interview room off the main squad room. The interview room and the men's room used by detectives are the only rooms down a small hallway off the squad room and anyone leaving the interview room would have to cross the squad room to exit the building.

Detectives George Pataki and Christy Whitman administered proper Miranda warnings and first ascertained that Buchanan had no fixed address, had not lived with his family in Belleville for more than a year and had no known means of support. There was no record that he had ever held a job or collected any form of public assistance. His family told police by phone that he did not live at home, they did not know where he lived and did not provide him with financial support.

As the detectives were proceeding beyond these basics to Buchanan's whereabouts on October 20th, an attorney named Jack Kemp came to the station and demanded to be present at any interrogation of Buchanan. He was escorted to the interview room where he identified himself as Buchanan's lawyer to the detectives. Buchanan said Kemp was not his lawyer but only represented his father. Kemp said he had been called by the father but was there to represent Buchanan. Buchanan, however, said he did not need Kemp to represent him. Det. Pataki asked him if he wanted Kemp to stay; Buchanan said he did not care but reiterated that Kemp was not his lawyer. The detectives allowed Kemp to remain.

At one point during the questioning thereafter, the two detectives were able to get a good look at the soles of Buchanan's sneakers. They then told him that his shoes matched the shoes of a person who had assaulted a little girl and they were going to get a warrant

to seize them. Buchanan said they could have them. Kemp objected and Buchanan said again that Kemp was not his lawyer and could not tell him what to do. Whitman gave the shoes to another officer for comparison and she and Pataki continued the questioning.

Shortly thereafter, Buchanan yawned broadly and Whitman saw that he had a distinctive tongue stud. It occurred to her then that the little girl's communication about the attack involving the mouth might have referred to the assailant's mouth and not only to her own. She excused herself, called the girl's parents and got them to ask C.H. if she meant her mouth or his mouth. The parents consulted with the child and then told Whitman the girl was very excited and had drawn a picture. They described the picture, and Whitman concluded it was intended to be a picture of the tongue stud. She then asked them to bring the child to the police station for a line-up. As she headed back towards the interview room, another detective told her the sneakers matched the print left at the scene.

Whitman went back into the interview room and told Buchanan his shoes matched those of the assault, the little girl would be able to identify him and he would go to jail for the rest of his life for the assault. Buchanan was silent for a moment and then said he wanted a break to go to the bathroom. The detectives told him he was not free to leave the police station. He agreed to stay in the interview room or the adjacent bathroom. As the detectives stepped away from the interview room, they heard Buchanan say, "Who knows? Maybe I should talk to you. And maybe not." Nothing more was said while the detectives were within earshot. Buchanan was allowed to use the adjacent men's room. He went back into the interview room with Kemp. The door to the interview room was left ajar. Pataki and Whitman were 20 feet or more away from the door, well out of earshot, but could see who entered or left the room. They were consulting with each other about the line-up.

Meanwhile, Detective Albert Gore, who knew the facts of the case, went to the men's room next to the interview room. As he left the men's room, through the open door to the interview room, he overheard Buchanan tell Kemp, "They can't prove it was me. They'll never find my fingerprints in those rooms." Rather than keep walking out of hearing range, Gore stopped out of Buchanan's or Kemp's view and listened. Key among the statements he overheard Buchanan make were: "The girl can't testify. She's a dummy. All she says is 'ah, ah, ah'"; and "she's an ugly thing, with that scar on her butt." Gore reported what he had overheard to Dets. Pataki and Whitman. Both of them knew that the only sound the child makes is "ah" and that she has a surgical scar at the base of her spine at the coccyx.

As a result of the foregoing, Buchanan was arrested on the spot and now stands accused of aggravated sexual assault in violation of N.J.S. 2C:14-2(a)(1). He was indicted on April 22, 1996. Pretrial motions were filed by both prosecution and defense on May 15, 1996. Judge Ross Perot of the Law Division held an evidentiary hearing on June 7, 1996. It is the trial court's disposition of those motions on June 14, 1996 that concerns us here.

The Compulsory Testing Motion

First, the State moved on behalf of the child victim to compel defendant to submit to serological testing to determine whether or not he has the HIV virus and thus is at risk of having transmitted the virus to the child. At the hearing, the State presented the testimony of Dr. Nobel as its expert. Highly credentialed AIDS expert Dr. Nobel testified that:

sufficient time has passed since the assault for the results of an HIV test on the alleged perpetrator to be reliable with the requisite degree of medical certainty;

it is prudent medically to err on the side of caution because of the fatality rate of AIDS and its predecessor HIV virus; a child has a weaker autoimmune system than an adult and this is more at-risk of infection;

this particular child has had multiple medical and psychological problems since birth and C.H. is therefore at higher risk even as compared to other children;

the risk of virus transmission is higher through anal intercourse than through vaginal intercourse; prudent medical treatment for an at-risk child could well include prophylactic treatment with AZT or other newer and more experimental drugs;

a prudent physician treating an at-risk child needs the results of the alleged perpetrator to make an informed recommendation as to whether the risks of the prophylactic drug treatments outweigh the risks of HIV infection for the child;

the child and her parents will be greatly benefited psychologically from knowing whether or not defendant is HIV positive and all of their counsellors and psychologists agree that anything that may help assuage the parents' severe fear and their communication of that fear to the child is worth doing.

The defense did not leave this testimony uncontradicted. also produced an expert with equally impressive credentials as an AIDS expert. In his presentation, Dr. Laureate testified that:

the window during which test results must be regarded as inconclusive is up to one year since there are reported cases in which the antibodies have not been detectable for up to one year;

a positive test result only means the individual is HIV positive now and cannot determine whether he was HIV positive a month ago, six months ago or a year ago;

testing an alleged assailant is nowhere near as useful for treatment or counseling purposes as testing the victim;

there is no medically accepted treatment known to reduce the chances of developing the HIV virus after an incident in which the victim may have been in contact with an infected person;

prophylactic AZT treatment is contraindicated because of high risk of side effects including anemia, nausea and toxicity;

the decision as to whether or not to engage in prophylactic treatment does not relate medically to the HIV status of the alleged perpetrator;

it does not aid in the psychological healing process for a victim to know the HIV test status of her alleged assailant and may in fact be counterproductive since it may well be misused by the victim (a false negative can create a false sense of security while a positive test may result in hysterical fear of death even though such a result does not mean that the child will contract the virus or AIDS).

Following this testimony, the trial court held that the special needs of society in this case outweigh the privacy interests of the defendant and he ordered the test to go forward. He stayed his order pending an emergent appeal to this court. We agree that mandatory HIV testing under N.J.S. 2C:43-2.2 is constitutional. There is a clear special need for this sort of testing given the facts presented to the trial court, and we adopt the special needs test for reviewing the constitutionality of the trial court's order of testing. *Skinner v. Railway Labor Exec. Ass'n*, 489 U.S. 602 (1980). We find support for our conclusion in the holdings of other courts who have confronted this issue. *See e.g. Johnetta v. San Francisco Sheriff's Dept.*, 218 Cal. App. 3d 1255 (1990); *Fosman v. Florida*, 664 So.2d 1163 (Fla. App. 1995).

The Motion to Suppress

The defendant also filed a pretrial motion, to suppress as evidence the statements he made to attorney Kemp that were overheard by Det. Gore at the police station on April 17, 1996. The facts set out above were testified to at the pretrial hearing by Det. Gore and attorney Kemp. The trial court concluded that no attorney-client relationship has been established at the time of the communications and, in any event, it was through mere inadvertence and not deliberate intrusion that the statements were overheard. Thus, it held, they are admissible. We disagree.

We conclude that defendant's statements made to attorney Jack Kemp and overheard through the open door by Detective Albert Gore are inadmissible at defendant's trial. We do not and will never countenance the intentional eavesdropping by police on privileged communications. While this case is not an egregious as that of *State v. Sugar*, 84 N.J. 1 (1980), a comment made there by the Supreme Court applies with equal force here and bears repeating: "The necessity of full and open disclosure by a defendant imbues that disclosure with an intimacy equal to that of the confessional, and under current law greater than that of the marital bedroom." Id. at 12.

AFFIRMED IN PART, REVERSED IN PART.

GRIM, J.A.D., concurring in part, dissenting in part:

I agree with my colleague Judge Reaper that the application of the compulsory HIV testing provisions of N.J.S. 2C:43-2.2 to this defendant is constitutional. I disagree, however, with my brethren on the issue of the admissibility of defendant's statements. Like the trial court, I am, to begin with, utterly unconvinced that an attorney-client relationship had been established between defendant and attorney Kemp at the time the statement was made. *See United Jersey Bank v. Wolosoff*, 196 N.J. Super. 553, 563 (App. Div. 1984). Moreover, since Detective Gore who overheard the comments did not set out initially to deliberately eavesdrop on a protected conversation, I cannot find the government's intrusion here into such attorney-client relationship as may have existed to be of a nature so as to compel suppression. *See State v. Santiago*, 267 N.J. Super. 432 (Law Div. 1993).

For these reasons, I must respectfully dissent in part.

MERCY, J.A.D., concurring in part, dissenting in part:

I join with my colleague Judge Reaper in concluding that the defendant's statements, overheard by a police officer in contravention of defendant's right to private consultation with counsel, must be suppressed. I part company with my colleagues on the issue of the constitutionality of that portion of N.J.S. 2C:43-2.2 that permits, indeed requires, a court to order serological testing of individuals who, like this defendant, have merely been charged with and not convicted of sexual assault.The vast majority of cases that have addressed HIV testing of sex offenders have not involved compulsory HIV testing of a person who is innocent or, if charged with a crime, presumed to be innocent, *see e.g. In the Matter of Juveniles A, B, C, D, E*,121 Wash. 80, 97 n.9 (1993), and it is a case of first impression in New Jersey. *See State in Interest of J.G*., 289 N.J. Super. 575, 593 (App. Div. 1996).

In my view, there can be no constitutional application of the HIV testing statute to individuals who have not, in fact, been convicted of a sexual offense. I reject the notion of "special needs" as a justification for such testing and would require probable cause to be shown in every instance where testing is sought to be compelled by the State. Such a showing must include both probable cause to believe that the person to be tested committed a sexual assault which, in and of itself, is capable medically of causing transmission of the HIV virus and probable cause to believe that the person to be tested in fact has the HIV virus at all.

In this case, I accept the indictment as probable cause as to the commission of the assault, but find nothing in the facts to establish probable cause as to the existence of the condition the defendant is to be tested for.

Without such a showing, I find compulsory testing repugnant to New Jersey law. I conclude that paragraphs 1 and 7 of Article I of the New Jersey Constitution alone or in combination require us to find this statute unconstitutional in its application to those who have not been convicted of a crime.

IN THE SUPREME COURT
OF THE STATE OF NEW JERSEY

A-96-522

STATE OF NEW JERSEY	:	
vs.	:	ORDER
PATRICK J. BUCHANAN,	:	
Defendant	:	

The cross-appeals of this matter by the Defendant and the State of New Jersey are on this 30th day of August, 1996, docketed as to all issues. Simultaneous briefing is directed and both defendant and the State are to file briefs with this Court on or before December 7, 1996.

STEPHEN W. TOWNSEND, Clerk
For the Court