Case No. 2019-0078

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Plaintiff-Appellee,

v.

KEITH NETTLES

Defendant-Appellant.

On Appeal from the Court of Appeals
Sixth Appellate District, Sandusky County, Ohio
Case No. S-17-053

REPLY BRIEF OF APPELLANT KEITH NETTLES

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APPELLANT'S RESPONSE TO THE STATE'S ARGUMENT

Proposition of Law No. 1

> **An interception warrant must be issued by a judge of the common pleas court located in the county "in which an interception is to take place or in which an interception device is to be installed" per the plain and unambiguous language of R.C. § 2933.53. An "interception" occurs at the listening point.**

A. The State's argument that an interception takes place at both the location of the targeted phone and the location of the listening post requires a very involved, contrived exercise in statutory interpretation that leads to a result contrary to the plain text of the statute.

Both parties are in agreement on two things: (1) "this case turns on the meaning of the phrase 'county in which the interception is to take place.' R.C. § 2933.53(A)." and (2) this is a case of first impression. *See* State of Ohio's Brief, pp.11, 22. However, the State and Appellant have vastly different views as to how this phrase is to be interpreted. The State argues that the statute should be interpreted in a way so as to provide the broadest meaning of the phrase, thereby allowing a law enforcement officer to obtain a warrant in any county where a suspect/target could conceivably carry his or her cell phone. This argument fails because it defies the axiom that criminal statutes are to be liberally construed against the State and in favor of the accused. *State v. Stevens*, 139 Ohio St.3d 247, 2014-Ohio-1932, 11 N.E.3d 252. Here, there are two separate interpretations that have been posited. Based upon this well established precedent of liberal construction in favor of the accused, the more expansive interpretation advocated by the State should not be adopted by this Court, but rather the interpretation that requires the warrant to be signed by a judge of the common pleas court in the county where the communication is actually heard, which in this case was the county where the DEA listening post was located, or Lucas County.

Here, the warrant was signed by a judge in Sandusky county because the Defendant/Appellant resided in Fremont, Ohio and his cell phone was determined to be in that county at times. However, there is no evidence in the record in this case to show that all of Appellant's phone calls either originated in Sandusky County, or were made by him while out of state to someone else located within the County. The interpretation of the statute argued for by the State would allow a law enforcement officer to apply for a county wherever a cell phone is believed to be, even if the actual cell phone communications are made outside of the county. Therefore, as a matter of sound policy and to avoid the possibility of a judge from an unrelated county issuing an interception warrant, the best interpretation of the statute would be to consider the phrase, "the county in which the interception is to take place," to mean the county where the listening post is located and where the communications are actually heard by law enforcement.

The State asks the question: what does the statute mean by the phrase, "in which the interception is to take place." Appellant respectfully asserts that, although the State of Ohio has set forth a rather complex and carefully constructed argument, its answer to this question ignores the plain text of the statute and is, therefore, wrong. In other words, there in no need to go to the great lengths that the State's argument requires because the plain meaning of the phrase, "in which the interception is to take place," is clear and unambiguous and, therefore, should be given its ordinary meaning. *State v. Lowe*, 112 Ohio St.3d 507, 2007-Ohio-606, 861 N.E.2d 512. It means the location where the communication is actually heard.

To arrive at its conclusion that an interception takes place at both the location of the targeted phone and the location of the listening post, the State takes a few liberties

with the meaning of certain statutorily defined terms. For instance, the State argues at multiple pointes throughout its Brief that the phrase "aural or *other* acquisition" means that an interception occurs both when the communication occurs and when the government gains access to the communication via "other acquisition." Following the State's reasoning, the term "other acquisition" refers to the point at which the State first gains access to the communication. While this somewhat unique interpretation of the phrase "aural or other acquisition" does indeed bolster the State's position, it does not appear to be supported by any facts in way of the legislative record, Ohio case precedent, or even a common sense understanding of grammar and syntax.

The idea that there are two types of acquisitions, aural and "other," does not lead to the conclusion that "other acquisition" merely means the point where the contents of a communication are first accessed. Given that wire and electronic communications are often transmitted in a manner that is non-aural, i.e., via text messaging, instant messaging, and e-mail, it is more logical that the word "other" when modifying the word "acquisition" would refer to these other, non-aural forms of communications that cannot be heard. There is no reason to find that the term "other acquisition" leads to the illogical result that there are two interception points.

To support its position of "dual-location" acquisition and, therefore, a very broad understanding of the locus of an interception (and by doing so creating multiple loci for a singular event), the State posits the analogy of a canal used to redirect the Ohio River's water a few miles inland. *See* States Brief, p. 14. The State argues that the interception occurs when the water entered the canal and not just when the water has reached the reservoir. Id. The State's analogy is flawed for a few reasons. First, it is

flawed because a phone call may enter the "network" but is never reviewed by any one acting on behalf of the State. In that instance the process of being intercepted would not have been completed. (If a tree falls in the woods and no one is there to hear it, does it make a sound?). Second, an interception, by definition, is an event that happens at single location and in a single point of time. It is a fiction to say an interception occurs at two separate points in time.

Next, a sports analogy is perhaps better suited to explain when the point of interception occurs. In the sport of football, the term interception is used to indicate when a player on the offensive team, usually the quarterback, throws a pass intended for one of his receivers, but instead is caught in the air by the opposing team's player.[1] In this analogy, the quarterback represents the accused, the defensive back represents the DEA agent, and the football represents the cell phone communication. Not until the defensive back actually receives and possesses the football is an interception said to have occurred. The point of the interception is considered to have happened on the yard line where the defensive back gained possession of the football, not where the quarterback is deemed to have thrown the ball. Similarly, not until the DEA agent actually hears and reviews the cell phone communication should the process of intercepting the communication be deemed completed. An interception is a singular act that occurs in one location -- the listening post. Everything else is an incompletion.

While the State presents an elaborate argument to support an impossible position, i.e., defining a singular event as occurring in two places at one time, Appellant has presented a clear and concise argument that is to the point and follows the common

[1] The undersigned counsel, being life-long Cleveland Browns fans are, unfortunately, all too familiar with this interception analogy.

sense meaning of the word, "interception." The State suggests that the brevity of Appellant's argument somehow discredits the Appellant's position on the issue altogether. Appellant can just as easily argue the converse: the complexity of the State's argument shows that the State's position requires a strained, unnatural reading of the statute in order to reach the result it wants. That Appellant's argument is short and to the point does not make it any less persuasive, but rather just the opposite is true. The fact that Appellant's argument can be stated without the same tortuous, machinations required by the State's argument illustrates its strength. Again, because the statute's terms are plain and unambiguous, an exercise in determining legislative intent and reviewing persuasive case law from other jurisdictions in unnecessary. This Court can rely fully upon the plain and clear language in the statute and, in doing so, determine that an interception of a communication occurs in one spot, and that is where the communication is heard. Having made that determination, this Court should further determine that the interception warrant issued in this case is contrary to the dictates of the statute and, therefore, invalid, requiring suppression of the fruits of the warrant (in this case the audio recordings of Appellant's cell phone conversations.)

Additionally, this Court's discussion on "new federalism" in *State v. Mole*, 149 Ohio St. 3d 215, 2016-Ohio-5124, 74 N.E.3d 368, is also applicable in this context where the State relies heavily upon the federal statutory framework and interpretative case law to support its argument. This Court recently noted:

> We once again reaffirm that this court, the ultimate arbiter of the meaning of the Ohio Constitution, can and will interpret our Constitution to afford greater rights to our citizens when we believe that such an interpretation is both prudent and not inconsistent with the intent of the framers. We also reaffirm that we are not confined by the federal courts' interpretations of similar provisions in the federal Constitution any more than we are confined

> by other states' high courts' interpretations of similar provisions in their states' constitutions…..Federal opinions do not control our independent analyses in interpreting the Ohio Constitution, even when we look to federal precedent for guidance.

(citations omitted.) *State v. Mole*, 149 Ohio St. 3d 215, 2016-Ohio-5124, ¶21. Here, just as this Court is the ultimate arbiter of the meaning of the Ohio Constitution, it is also the ultimate arbiter of the meaning of Ohio statutes. In this case, the Ohio statute governing interception of wireless communications, R.C. § 2933.53, should be assigned a meaning to provide greater protection to Ohio citizens relative to their expectation of privacy in cell phone communications.

B. If the Court finds that the warrant is defective because it was issued in the wrong county, it should not remand for further consideration of whether that make the warrant facially invalid.

The State's argues that "if the Court finds any territorial defect, it should remand for further consideration of whether that make the warrant facially invalid." This argument should not be persuasive in light of Ohio's statute, R.C. § 2933.63, entitled Suppression of Contents of Intercepted Communications. This statute mandates suppression of the communications acquired under these circumstances. R.C. § 2933.63 provides in pertinent part:

> (A) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of this state or of a political subdivision of this state, other than a grand jury, may request the involved court, department, officer, agency, body, or authority, by motion, to suppress the contents, or evidence derived from the contents, of a wire, oral, or electronic communication intercepted pursuant to sections 2933.51 to 2933.66 of the Revised Code for any of the following reasons:
>
> (1) The communication was unlawfully intercepted.
>
> (2) The interception warrant under which the communication was intercepted is insufficient on its face.

> (3) The interception was not made in conformity with the interception warrant or an oral order for an interception granted under section 2933.57 of the Revised Code.
>
> (4) The communications are of a privileged character and a special need for their interception is not shown or is inadequate as shown.
>
> (B) Any motion filed pursuant to division (A) of this section shall be made before the trial, hearing, or proceeding at which the contents, or evidence derived from the contents, is to be used, unless there was no opportunity to make the motion or the aggrieved person was not aware of the intercepted communications or the grounds of the motion. Upon the filing of the motion by the aggrieved person, the judge or other officer conducting the trial, hearing, or proceeding may make available to the aggrieved person or the person's counsel for inspection any portions of the intercepted communication or evidence derived from the intercepted communication as the judge or other officer determines to be in the interest of justice. If the judge or other officer grants the motion to suppress evidence pursuant to this section, the contents, or the evidence derived from the contents, of the intercepted wire, oral, or electronic communications shall be treated as having been obtained in violation of the law, and the contents and evidence derived from the contents shall not be received in evidence in any trial, hearing, or proceeding.

R.C. § 2933.63. Here, the interception warrant should be deemed insufficient on its face per subsection (b) and, therefore, a remand for the limited purpose of determining whether it is facially invalid would be futile because the outcome is mandated by the statute. Suppression is required.

CONCLUSION

Appellant Keith Nettles respectfully urges this Honorable Court to reverse the decision of the Sixth District Court of Appeals in this case, finding that the Sandusky County Common Pleas court judge lacked jurisdiction to issue an interception warrant for communications to be heard at the DEA listening post in Toledo, Lucas County, Ohio and further finding that any evidence derived from the unlawful warrant must be suppressed in accordance with R.C. § 2933.63.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief of Appellant Keith Nettles was served this 9th day of September, 2019 upon the following via electronic mail at:

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