



COMMENTARY

BY RICHARD Q. HARK
Special to the Law Weekly

CRIMINAL PRACTICE

RICHARD.HARK@PENNCRIMINALDEFENSE.COM

Senate Amendments May Only Create More Questions About the Wiretap Act

The Wiretap Act is a legislative scheme permitting very limited state law enforcement interception and recording of oral, electronic and wire communications. Interception is currently legal only after judicial approval, conducted only by law enforcement, on specific devices, under specific circumstances, at designated locations with extensive record-keeping responsibilities.

In May, the state House of Representatives passed HB 2400, amendments to Pennsylvania's Wiretap Act, 18 Pa C.S. §5701. The goal was to update the 1988 law to match current civilian communication capabilities.

Over the summer, representatives from the Pennsylvania Association of Criminal Defense Lawyers, Pennsylvania District Attorneys' Association, ACLU and other stakeholders met with staff for state Senator Stewart J. Greenleaf, R-Montgomery, chairman of the Judiciary Committee in the upper house, to discuss and jointly propose amendments to the bill. These amendments are contained in Senate Amendment 13132.

On September 25, the Senate Judiciary Committee, on a unanimous roll call vote, referred HB 2400 as amended to the Senate Appropriations Committee for budgetary review and then consideration by the full Senate. If the Senate amendments pass the full Senate, the bill will be sent to the House for an anticipated concurrence vote and then Governor Tom Corbett's signature. This article discusses Senate amendment 13132 in relation to the original House version of the bill.

HB 2400 sought to expand the definition of "oral communication" by eliminating a reasonable expectation of privacy in any oral communication. This amendment effectively permitted any party to record any

oral communication and it be admissible in legal proceeding. For example, any public or private school, school bus operators or business could legally conduct video and audio surveillance in any location. Any recording of any person discussing any criminal conduct, if turned over to law enforcement, would be admissible in any court for any purpose. Senate amendment 13132 deletes this clause from the oral communication definition, thereby precluding public recording surveillance of the breadth and scope HB 2400 authorized.

Senate amendment 13132 would change the meaning of the term "intercept," which HB 2400 did not alter. "Intercept" is currently defined as aural or other law enforcement acquisition of the contents of any communication that can be acquired and recorded through any medium by any device. The Senate amendment would authorize law enforcement contemporaneous surveillance and recording of any communication, without judicial approval, while posing as the intended recipient. Such interception of communication could only occur after the recording officer receives written approval to intercept from the recipient and a county district attorney or deputy attorney general and that law enforcement designee is "satisfied that the communication involves suspected criminal activities."

This personal satisfaction standard of a nonjudicial, biased party is a departure from established Wiretap Act jurisprudence. There is extensive precedent in Pennsylvania discussing the constitutional necessity of a judicially approved warrant based upon probable cause prior to contemporaneous interception of and participation in oral, wire or electronic communication.

Even though the act defines "suspected criminal activity," satisfaction of "involvement in" is subject to broad investigatory interpretation. To what subjective standard authorities will apply this rule will become a focal point of suppression litigation. Documenting how law enforcement complies with this perfunctory threshold determination

should be set forth in a statewide, nonsubjective, nondiscretionary manner, subject to formal discovery and judicial review.

This definition amendment also seeks to reverse the holding in *Commonwealth v. Cruttenings*, 976 A.2d 1176 (Pa. Super. 2009), appeal granted, 21 A.3d 680 (Pa. 2011). There, the Superior Court held that interception of contemporaneously written text messages constitute an electronic communication that requires judicial approval based upon a probable cause standard, not a law enforcement designee's personal satisfaction of criminal involvement. In *Commonwealth v. Brachbill*, 520 Pa. 533, 555 A.2d 82 (1989), the court even held that police contemporaneously recording a telephone call, consensually secured from an extension of a home telephone line, without a warrant was properly suppressed. These are but two examples of many cases addressing the necessity of judicial supervision and enforcement of a probable cause standard relative to the admissibility of the contents of intercepted real-time communications.

Section 5703 of the act prohibits interception, disclosure or use of any wire, electronic or oral communication. Section 5704 provides exceptions to this general rule. HB 2400 sought to amend Sections 5704(2)(i), (ii), and (17) to eliminate most of §5703's prohibitions.

The Section 5704(i) amendment allowed law enforcement to supplant themselves for a layperson and intercept and participate in any contemporaneous communication. The Senate amendment removes this proposed section and replaces it with the amended definition of the term intercept.

House amendment §5704(2)(ii) authorizes law enforcement interception of, and the surreptitious participation in, any contemporaneous wire, electronic and oral communication where one of the parties consents to the interception. Neither a warrant nor reasonable suspicion of criminal activity is required. A designee of the attorney general or county district attorney where the interception is to be initiated must confirm

Richard Q. Hark is a partner of Hark & Hark, a regional law firm specializing in all aspects of federal and state criminal defense.

pre-interception written consent from the device's recipient, and become the custodian of the recorded evidence obtained therefrom. The Senate version retains this amendment because it is consistent in purpose with the definition of interception. Section §5704(2)(ii) and the modified definition of intercept, together, remove all pre-interception judicial oversight and approval of telephone, email, text, Skype, AIM, Facebook, Myspace and/or Instagram intercepts by police posing as recipients of criminal contact.

HB 2400 §5704(17) allowed for the warrantless interception by a person not employed in law enforcement of any communication "if that person is under reasonable suspicion that the intercepted party is committing or has committed a crime of violence or a felony of the first degree." The Senate version authorizes only a victim, witness or licensed private detective to conduct the interception if a "crime of violence" is anticipated.

Senate limits on authorized §5704(17) interceptors would be a significant step away from the House proposal. Senate amendment 13132 would still require a victim or witness to be knowledgeable about the Pennsylvania Crimes Code and sentencing schemes, in order for that person to conclude that the intercepted party is about to commit a "crime of violence." Evidentiary hearings would abound, seeking suppression of recorded statements or conversations that civilians have intercepted while purporting to comply with this provision. Inevitably, the discovery and independent source rules will be tested.

The Senate amendments would remove §5717(a.2) from the House bill. That section provided immunity for civilian disclosure of intercepted communications. The Senate amendments would maintain consistency in allowing legal disclosure to only those persons identified in the modified §5704(17) and all law enforcement personnel. The Senate amendments would permit a defendant, who claims to be a victim or witness in a case, to disclose intercepted communications if such may (not will) exculpate him or her in an open or closed criminal case.

An evidentiary "two-way street" increases fairness to all parties involved. The Senate version added §5717(c), rendering admissible in a Pennsylvania court the contents of a nonconsensual law enforcement interception from outside the jurisdiction if a court upon a showing of probable cause authorized the interception.

In the current §5721.1, the act provides a statutory exclusionary rule that authorizes judicial suppression of interceptions not conducted in compliance with §5704. The House amendment added §5721.1(a)(4), seeking to expand law enforcement disclosure and evidentiary use of layperson-derived information in any proceeding (grand jury, preliminary hearing or trial) in Pennsylvania. The Senate version appropriately eliminates

§5721.1(a)(4), maintaining judicial authority to limit admissible interceptions.

The Senate amendments would not alter HB §5712.1, which allows for target-specific search warrant applications supported by probable cause. Law enforcement officials must verify that people involved in the crime are known but that their telephone numbers are unknown and electronic communication service providers have kept changing.

The Senate amendments would also leave untouched §5712.1(b). This provision authorizes application for supplemental court orders under §5712.1(a) upon satisfying a reduced showing of reasonable suspicion of a target's continued criminal activity.

Allowing a defendant to utilize an intercepted communication as exculpatory evidence maintains an even playing field for all involved parties.

The Senate amendments did not alter the recording and disclosure of historical and prospective cell site location information the House provided for in §§5772 and 5773 and modifications to the definition of "mobile communications tracking information." This is cellphone GPS triangulation evidence, not GPS device evidence, which pinpoints historical and real-time subscriber location within 50 feet of where a cellphone call was made or received or smartphone Internet usage triggered.

HB 2400, §5761, regarding placement of GPS mobile tracking devices, is untouched and authorizes tracking devices only if the criminal conduct occurs in the jurisdiction of the county court issuing the warrant. Complying with the U.S. Supreme Court decision in *United States v. Jones*, the House and Senate require §5761(c)(4) warrant applications be supported by probable cause that relevant information to a criminal investigation will be produced. The Senate left these provisions intact.

The Senate amendments to HB 2400 are significant. I thought HB 2400 appropriately balanced the needs for updated criminal investigative techniques with proper judicial

oversight of law enforcement. The amendments contained in Senate version 13132 strive even further to eliminate inappropriate interception of any communications by non-law enforcement. Civil penalties for such conduct remain. However, allowing a defendant to utilize an intercepted communication as exculpatory evidence maintains an even playing field for all involved parties.

Maintaining a probable cause standard of review and not conceding to a lower burden of proof with regard to GPS information is significant and will not inhibit police investigations. Target-specific warrants address the multi-cellphone user. Allowing for admissibility of previously-illegal, surreptitiously-recorded telephone conversations involving felonious criminal conduct, unfortunately, is a necessity in today's high-tech criminal environment.

It is surprising that a new burden of proof, a law enforcement official's personal satisfaction standard of "involved in" criminal activity, has been codified. The removal of the courts, a neutral party, from ensuring constitutional protection during law enforcement's investigatory privacy violation because they are surreptitiously participating in emails, texts or telephone conversations is remarkable. Police will now secure cellphones of low-level drug users, set up drug deals and schedule deliveries. Allegations of entrapment will abound. Who initiates the communications, the tone of demand for the illegal activity, and who decides on when and where delivery shall take place will become important questions for the court.

Defense counsel must review the written permissions secured by law enforcement as an evidentiary predicate of the electronic evidence. All surreptitiously recorded conversations must be separately documented and the participants identified in discovery. Motions to identify a confidential source will give way to motions to identify the confidential police officer who was posing as the narcotics buyer. The final version of House Bill 2400 will raise many evidentiary procedural and substantive legal changes. The lack of judicial oversight, while a legislative prerogative, will become subject to constitutional challenge. •