

WIRETAPPING & ELECTRONIC PRIVACY

A case study of the United States v. Scarfo, Criminal No. 00-404 (D.N.J).

WRITTEN BY:

JOHN THOMPSON

THE UNIVERSITY OF IOWA

INTRODUCTION TO LAW

1/10/04

OVERVIEW

The legality of computer and security issues has become a part of our new culture in the 21st century, and is becoming a more dominating faction of law now that the high tech industry has boomed and is now beginning to be more closely regulated. In May of 1999, US Magistrate Donald Haneke issued an order granting an application for surreptitious entry and installation of a computer program to log password information from Nicodemo S. Scarfo's business computer system. Mr. Scarfo had been under surveillance and investigation for his criminal gambling, loan sharking and other racketeering offenses. The FBI executed the order and discovered passwords which lead to the recovery of encrypted business data that was then used to indict Mr. Scarfo, whose attorney ended up filing a motion to suppress the evidence seized by the government which was obtained through the use of the aforementioned order. On December 26, 2001, the court upheld the legality of the FBI's use of the "key logger system" and denied the defense motion to suppress evidence obtained through the technique.

I intend to present to you the three topics of interest that you requested including what type of law applies, what legal system was involved, and what rules of law there are for wiretapping and electronic privacy.

LEGAL SYSTEM

One of the main decisions an attorney must make is what courts have jurisdiction and of those courts which will be most likely to rule in your favor. There are many factors involved including where the crime took place, where the defendant and plaintiff are from and what laws were broken. This case went to the Federal District court because federal courts have jurisdiction over federal statutes. Scarfo had committed illegal gambling, loansharking and other racketeering offenses which are violations of 18 U.S.C

371 (conspiracy), 892-94 (extortionate credit transactions), 1955 (illegal gambling business) and 1962 (RICO) statutes. This case got into federal court, but it could also have been brought in state court too unless one party had it "removed" to the federal court.

RULES OF LAW

In this case, there are many rules of law that must be taken into account. Some of them deal with procedural issues and some deal with substantive law. Understanding which rules you are dealing with is of utmost importance because if you overlook a law or don't follow the proper procedure, you could make a mistake that could completely ruin your case. In this case, there were several main rules of law that were taken into consideration. The first being the procedure for obtaining a warrant, then dealing with the Bill of Rights in the steps of the criminal process.

One of the first rules of law deals with procedural law regarding the process for obtaining a search warrant. To search a person's property or in this case to plant a keylogger, the police must obtain a warrant from a magistrate that will specify the place to be searched and the items to be seized. If the warrant doesn't detail exactly what the police do when they are at the premise, then the search may be deemed unconstitutional and the recovered evidence may be suppressed. The police must show that there is probable cause that evidence of a crime will be found in the place mentioned. A warrant was issued permitting Special Agents of the FBI to 1) search for and seize key related password information from Scarfo's business computer and 2) to search for and seize business records in whatever form they are kept.

After the warrant was issued, the police then executed the warrant, being careful not to search beyond what was written in the warrant and gathered the evidence they need to present to the magistrate to have arrest warrants issued. The police then are able to find

Scarfo and arrest him. At the time of arrest, the police must read Miranda warnings before taking Scarfo to the police station to be booked.

The evidence is then handed over to the local US prosecutor and the prosecutor presents the evidence to a grand jury made up of citizens, much like a trial jury. They decide whether there is probably cause that the defendant committed the crime, and after they reviewed the evidence, they voted to indict Scarfo. They had found that there was probably cause that he had committed the racketeering, gambling, and loansharking crimes. The defendant is then ordered back to court where the clerk reads the charges and Scarfo entered a not guilty plea.

Next, the process goes into the discovery stage, where the prosecutor and the defense attorney are finding information to build their case or defense. Scarfo's defense attorney filed a motion to suppress arguing that the evidence was gained through a violation of Scarfo's fourth amendment right dealing with wiretapping. The government and Scarfo entered into a plea agreement on February 28, 2002 which results in no trial nor appellate consideration of the issues raised in the case.

APPLICABLE LAWS

In addition to rules regarding the law and law procedures, there are also innumerable laws governing how we live, work, and interact with one another. In the Scarfo case, there were a number of laws that dealt with the crimes he had been accused of. The prosecution had evidence showing that Scarfo had committed illegal gambling, loansharking and other racketeering offenses which are violations of 18 U.S.C 371 (conspiracy), 892-94 (extortionate credit transactions), 1955 (illegal gambling business) and 1962 (RICO). Under RICO, the prosecution must be able to show that 1) the defendant committed 2 or more racketeering acts and 2) that they used those acts to accomplish 3 criminal acts tied to business.

The main issue for court was whether the typing-tap was akin to wiretap regulated by title III or was it a general search authorized by a search warrant? Scarfo's attorney entered a motion to suppress claiming that Scarfo's Fourth Amendment rights were violated. This meant that they felt that the FBI conducted their search and seizure beyond their legal authorization. The judge had to compare this case to precedent in United States v. Acosta, 965 F.2d 1248, 1257 n.9 (3d Cir. 1992) finding that just like searches for incriminating documents in a closet or filing cabinet, it is true that during a search for a passphrase "some innocuous [items] will be at least cursorily perused in order to determine whether they are among those [items] to be seized." United States v. Conley, 4 F.3d 1200, 1208 (3d Cir. 1993).¹

The next part of this issue was whether or not the FBI had engaged in activities that would fall under the wiretap statute and were outside of the scope of a legitimate search. The judge requested that the FBI explain how their password catching software worked. The FED attorney commenced invocation of CIPA (classified information procedures act-1980) because of KLS software's proprietary and classified status. "The principal mystery surrounding this case was whether the KLS intercepted a wire communication in violation of the wiretap statute by recording keystrokes of e-mail or other communications made over a telephone or cable line while the modem operated. These are the only conceivable wire communications which might emanate from Scarfo's computer and potentially fall under the wiretap statute."

Upon a careful and thorough review of the classified information provided to the Court on September 26th and the Murch Affidavit, the Court found that the KLS technique utilized in deciphering the passphrase to Scarfo's encrypted file did not intercept any wire communications and therefore did not violate the wiretap statute according to Title III, 18 U.S.C. § 2510.

CONCLUSION

¹ <http://www.epic.org/crypto/scarfo.html>

In our legal system, we have complex, yet orderly methodologies for ensuring the rights of our citizens while maintaining that there are rules and consequences. We have rules for ensuring that the case is held in the proper venue under the proper judge, many rules for how the law needs to be carried out and finally many laws that came about by statute or by common law that govern the way judges need to respond to future incidents of the same nature.