

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA :  
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 -v- :  
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 RAJAT K. GUPTA, :  
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 Defendant. :  
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11 Cr. 907 (JSR)  
MEMORANDUM ORDER

JED S. RAKOFF, U.S.D.J.

Pending before the Court is defendant Rajat Gupta's motion, made pursuant to 18 U.S.C. §§ 2515, 2518(10) and the Fourth Amendment of the Constitution, to suppress wiretap intercepts and the evidence derived therefrom from being introduced at his criminal trial.

Much the same evidence, obtained from the cellular telephone of Gupta's alleged co-conspirator, Raj Rajaratnam, was similarly challenged in Rajaratnam's criminal trial. See United States v. Rajaratnam, No. 09 Cr. 1184 (RJH), 2010 WL 4867402 (S.D.N.Y. Nov. 24, 2010), appeal docketed, No. 11-4416 (2d Cir. Oct. 25, 2011). Following a four-day evidentiary hearing, Judge Holwell denied Rajaratnam's motion to suppress the wiretaps in a lengthy and detailed opinion, full familiarity with which is here presumed. While Judge Holwell's opinion denying Rajaratnam's motion has no preclusive effect on Gupta, see generally Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found., 402 U.S. 313, 329 (1971), lack of preclusion does not mean lack of persuasion, especially where the wiretaps at issue here are the same wiretaps at issue in the Rajaratnam case. Having reviewed Judge Holwell's

opinion, as well as the parties' briefs submitted in the instant case, this Court finds itself in agreement with Judge Holwell's decision not to suppress the wiretap evidence.

Gupta offers no arguments different from the arguments Judge Holwell considered in the Rajaratnam case. He argues instead that Judge Holwell's conclusions are in error. The Court disagrees.

First, Gupta argues that insider trading is not an offense as to which wiretapping is authorized under Title III. See 18 U.S.C. § 2516. But, as Judge Holwell explained, the wiretap of Rajaratnam's phone also had the "bona fide" purpose of investigating wire fraud, an offense for which Title III does permit wiretapping. Rajaratnam, 2010 WL 4867402, at \*6. So long as the Government acts in good faith with respect to informing the Court of the crimes it is investigating and learning of in connection with the wiretap, as Judge Howell and this Court conclude was done here, the Government is free to use evidence obtained from an authorized wiretap in the prosecution of a crime not listed in § 2516. See 18 U.S.C. § 2517(5); Rajaratnam, 2010 WL 4867402, at \*6 & n.9; Government's Memorandum of Law in Opposition to Defendant Rajat Gupta's Motion to Suppress Wiretaps dated Jan. 19, 2012 ("Gov't Opp. Br.") Ex. 1-B ("Kang Aff.") at 5 & n.2 (listing wire fraud and money laundering as predicate offenses, and also advising of probable cause to suspect

securities fraud); id. Ex. 4 (section 2517(5) order authorizing Government to use Rajaratnam wiretap intercepts to prosecute securities fraud).

Second, Gupta argues that Judge Holwell erred in how he analyzed the Government's failure to inform Judge Lynch (the judge who authorized the initial wiretap) of the parallel SEC investigation, which arguably was relevant to Judge Lynch's determination of the "necessity" for a wiretap. See 18 U.S.C. § 2518(1)(c) (requiring "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous"). Judge Holwell held a "Franks" hearing to determine if 1) "a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit"; and 2) "if the allegedly false statement is necessary to the finding" of necessity. Rajaratnam, 2010 WL 4867402, at \*18 (citing Franks v. Delaware, 438 U.S. 154, 155-56 (1978)). Judge Holwell ultimately concluded that, while the affidavit recklessly omitted mention of the parallel SEC investigation, the fruits of which the Government largely shared, the omission was ultimately not material because a factually corrected affidavit would have still amply supported a finding of necessity. Id. at \*19-24.

As this Court independently concludes in a separate opinion filed today regarding disclosure of "Brady" material obtained in the SEC investigation, the joint acquisition and sharing of information by the SEC and U.S. Attorney's Office in their parallel investigations of Rajaratnam's insider trading triggered certain obligations. One such obligation, as Judge Holwell found, was to disclose the SEC investigation in the wiretap application. But the Court also agrees that, under the doctrine of Franks, the error was harmless.

Here, Gupta, like Rajaratnam, argues that the Franks standard is inappropriate for evaluating Title III's necessity requirement. Instead, Gupta argues, this Court should apply Title III's statutory exclusion rule, which requires suppression of any "communication [that] was unlawfully intercepted." 18 U.S.C. § 2518(10)(a)(i); see United States v. Giordano, 416 U.S. 505, 510 (1974) (excluding wiretap evidence under statutory provision where prosecutors had failed to get approval of Assistant Attorney General, as required by §§ 2516(1) and 2518(1)(a)). Accordingly, Gupta argues, once Judge Holwell concluded that the Government did not provide a "full and complete statement" in the affidavit with respect to necessity, he should have suppressed the wiretap evidence, regardless of the omission's materiality.

Judge Holwell considered and rejected this very argument:

While the Franks analysis discussed above is typically employed to evaluate misstatements and omissions relating to probable cause, the Second Circuit has extended the Franks analysis to other Title III requirements for obtaining a warrant. See United States v. Bianco, 998 F.2d 1112, 1125-26 (2d Cir. 1993) (applying Franks to 18 U.S.C. § 2518(11)(a)(ii), which requires that the government explain why "specification of the place of interception is not practical"). And district courts in this Circuit have done so with respect to the issue of necessity in particular. See United States v. King, 991 F. Supp. 77, 88-90 (E.D.N.Y. 1998); United States v. Sanchez-Flores, No. 94-CR-864, 1995 WL 765562, at \*5 (S.D.N.Y. Dec. 29, 1995). Cf. United States v. Guerra-Marez, 928 F.2d 665, 670-71 (5th Cir. 1991); United States v. Cole, 807 F.2d 262, 267-68 (1st Cir. 1986); [United States v. Ippolito, 774 F.2d [1482, ]1485 [(9th Cir. 1985) ] ("although Franks dealt specifically with probable cause, its reasoning applies [to Title III's necessity requirement] as well").

Rajaratnam, 2010 WL 4867402, at \*18. This Court agrees.

Gupta attempts to distinguish the Second Circuit's holding in Bianco by noting that Bianco addressed a situation where the affidavit contained misleading statements with respect to the necessity for a "roving" wiretap, rather than the ordinary wiretap necessity requirement. See Bianco, 998 F.2d at 1125-26. Compare 18 U.S.C. § 2518(11)(a)(ii) (requiring "full and complete statement" of roving wiretap necessity), with 18 U.S.C. § 2518(1)(c) (requiring "full and complete statement" of wiretap necessity). The Court does not find this distinction meaningful in this context, and agrees with Judge Holwell that the Franks analysis is the appropriate framework through which to evaluate an attack on the truthfulness of a wiretap affidavit with respect to necessity. Bianco makes clear that "[d]espite the existence of

§§ 2515 and 2518(10)(a), . . . Franks analysis [applies] to alleged falsehoods or omissions in wiretap affidavits and applications under Title III." Id. at 1126.

Finally, Gupta argues that, even accepting the Franks framework for analysis, Judge Holwell erred in concluding that the omission of the SEC investigation from the affidavit was ultimately not material to the authorization of the wiretap. This Court, however, completely agrees both with Judge Holwell's statement of the standard for evaluating materiality and with his analysis of why, even if the details of the SEC investigation had been included in the affidavit, traditional investigative techniques would still have been reasonably unlikely to reveal the full scope of the alleged insider trading scheme. See Rajaratnam, 2010 WL 4867402, at \*19-24; see also United States v. Young, 822 F.2d 1234, 1237 (2d Cir. 1987) ("[T]here is no requirement that any particular investigation procedures be exhausted before a wiretap may be authorized."). The simple truth is that, in both this and numerous other cases, insider trading cannot often be detected, let alone successfully prosecuted, without the aid of wiretaps. The Court therefore adopts Judge Holwell's reasoning by reference and agrees with his conclusion that the omissions were immaterial.

Accordingly, defendant Gupta's motion to suppress the wiretaps and the evidence derived from them is hereby denied. The

Clerk of the Court is directed to close document number 18 on the docket sheet of the case.

SO ORDERED.

  
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JED S. RAKOFF, U.S.D.J.

Dated: New York, New York  
March 26, 2012