

771 A.2d 823

Superior Court of Pennsylvania.

COMMONWEALTH of Pennsylvania,

Appellee,

v.

Robert D. PROETTO, Appellant.

Filed March 28, 2001.

Before DEL SOLE, JOHNSON and BECK,
JJ.

DEL SOLE, J.:

¶ 1 Appellant, Robert Proetto, was convicted of criminal solicitation, obscene and other sexual materials and performances, and corruption of minors. After his sentencing, Appellant filed this appeal. After reviewing the record and briefs, and the applicable statutory and constitutional law, we affirm.

¶ 2 Appellant, while a police officer, was arrested for criminal solicitation, dissemination of obscene materials and corruption of minors. These charges stemmed from his communications with a 15-year-old girl over the Internet.

¶ 3 The 15-year-old complainant, "E.E.," was connected to the Internet and while on the Internet was using the screen name "Ellynn." She was in a public chat room when she began receiving private chat messages from Appellant, who was using the screen name "CR907." While in this public chat room, E.E. was invited to enter a private chat room and converse "real time" with the person using the name "CR907." Appellant informed E.E. that he was a police officer working for the Colonial Regional Police Department and e-mailed her a picture of

him in police uniform, telling her 907 was his badge number. E.E. informed Appellant that she was 15 years of age. Logs, printed hard copies of their on-line conversations, reflect that Appellant asked E.E. to videotape herself in the nude masturbating with her legs spread. Appellant also expressed interest in performing numerous sexual acts with her. While making these comments, Appellant stated that he had to be careful because E.E. was only 15 years old. Subsequently, Appellant transmitted to E.E. via e-mail a file containing a photograph of his erect penis.

¶ 4 During the next week, E.E. and Appellant chatted several more times. During these chats, Appellant made explicit remarks and repeatedly expressed his desire to talk on the telephone, meet, and engage in sexual acts with this 15-year-old girl. After each chat with CR907, E.E. logged, or saved, the Internet chat messages.

¶ 5 Shortly thereafter, E.E. reported these incidents to the Bristol Borough Police Department. Detective Randy Morris was assigned to investigate the charges. E.E. gave Detective Morris a diskette containing logs of the chat dialogues, e-mail messages and the two photographs Appellant had e-mailed to her. Detective Morris instructed E.E. to cease all communication with Appellant, but to page him the next time that Appellant was observed on-line.

¶ 6 A few days later, E.E. contacted Detective Morris when she saw CR907 in another public chat room. Detective Morris entered the chat room using the screen name "Kelly15F" and initiated conversation with Appellant. During that chat, Appellant wrote to Kelly15F that he would not mind kissing a 15-year-old as long as she would not tell anybody. He also suggested she make a nude videotape of herself in exchange for his sending her nude photographs of himself.

Detective Morris made a log of the chat. The next day the matter was referred to the Bucks County District Attorney's Office and Appellant was subsequently arrested.

¶ 7 Appellant was charged with committing Criminal Solicitation, Obscene and Other Sexual Materials and Performances, and Corruption of Minors.

¶ 8 Appellant filed an omnibus pre-trial motion requesting various pre-trial relief, including the suppression of evidence and statements. Appellant sought to suppress the communications and pictures sent to E.E. and Kelly15F via e-mail and chat rooms. Appellant asserted that the e-mail and chat messages were intercepted in violation of the Pennsylvania Wiretap Act, Article I Section 8 of the Constitution of the Commonwealth of Pennsylvania, the Fourth Amendment of the United States Constitution and the Pennsylvania Rules of Criminal Procedure. A pre-trial hearing was held and the trial court denied Appellant's motions to suppress. After a non-jury trial, Appellant was sentenced to a term of six months to twenty-three months, and placed on intermediate punishment with the first six months to be served on house arrest. This appeal was timely filed.

¶ 9 On appeal, Appellant presents the following questions:

- I. Did the lower court err, when it admitted evidence seized by the Commonwealth without prior court approval consisting of private Internet chat communications?
- II. Did the lower court err, when it failed to impose constitutional protection to communication conducted on a computer connected to the Internet through telephone lines?

III. Did the lower court err, in failing to rule that,[sic] interceptions of private computer chat communications violate the Pennsylvania Wiretap Act, when done without prior authorization?

IV. Did the lower court err, in failing to suppress the alleged statements of the Appellant?

[...]

Appellant's Brief at 3

Whether the trial court erred in failing to suppress the electronically transmitted communications sent by Appellant.

¶ 10 The first four questions presented by Appellant involve the same substantive issue. The sum of the issues is whether the trial court erred in failing to suppress the electronically transmitted communications of Appellant, on grounds that such statements were obtained by means violative of the Pennsylvania Wiretap Act and/or Appellant's constitutional rights. These issues present a case of first impression in this jurisdiction. These issues will be addressed simultaneously.

[...]

¶ 12 There are two distinct categories of electronic communications involved in this case. First are those received by E .E. from Appellant and then forwarded to Detective Morris by E.E. Second are those statements received by Detective Morris directly from Appellant, while Detective Morris was using the moniker "Kelly15F." We will address each category separately.

1. Communications received by E.E. and subsequently forwarded to Detective Morris.

¶ 13 With regard to the first set of communications, the Pennsylvania Wiretapping and Electronic Surveillance

Control Act is not applicable. . . . ¶ 16 The communications at issue in this case were not intercepted. . . . The acquisition of the communications was not contemporaneous with their transmission. . . . Rather, E.E. received the communication and later disclosed that communication to Detective Morris. Accordingly, there was no “interception” and these communications do not fall within the purview of the Pennsylvania Wiretapping and Electronic Surveillance Act.

[...]

¶ 23 Furthermore, the forwarding of the communications by E.E. to Detective Morris did not violate Appellant’s rights under either the Pennsylvania Constitution or the United States Constitution. In order to invoke the protections of the Pennsylvania Constitution, the individual must possess a legitimate expectation of privacy in the area searched. An expectation of privacy is present when the individual’s conduct exhibits an actual expectation of privacy which is recognized by society as reasonable. The protection of the Fourth Amendment does not depend on a property right in the invaded place but does depend on whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place. An expectation of privacy is present when the individual, by his conduct, “exhibits an actual (subjective) expectation of privacy” and that the subjective expectation “is one that society is prepared to recognize as ‘reasonable.’” The constitutional legitimacy of an expectation of privacy is not dependent on the subjective intent of the individual asserting the right but on whether the expectation is reasonable in light of all the surrounding circumstances.

¶ 24 One of the courts that has addressed the situation involving e-mail and Internet communications has held that:

... [a] Defendant possessed a limited reasonable expectation of privacy in the e-mail messages he sent and/or received on AOL.... E-mail is almost equivalent to sending a letter via the mails. When an individual sends or mails letters, messages, or other information on the computer, that ... expectation of privacy diminishes incrementally ... Furthermore, the openness of the “chat room” diminishes Defendant’s reasonable expectation of privacy.

United States v. Charbonneau, 979 F.Supp. 1177, 1184 (S.D. Ohio 1997).

¶ 25 In this case, Appellant had a limited expectation of privacy in his e-mails and chat-room communications. After receiving the electronic communications, E.E. forwarded the communications to the police. As another court addressing this issue noted:

E-mail transmissions are not unlike other forms of modern communication.... For example, if a sender of first-class mail seals an envelope and addresses it to another person, the sender can reasonably expect the contents to remain private and free from the eyes of the police absent a search warrant founded upon probable cause. However, once the letter is received and opened, the destiny of the letter then lies in the control of the recipient of the letter, not the sender, absent some legal privilege.... Thus an e-mail message, like a letter, cannot be afforded a

reasonable expectation of privacy once that message is received.

Id. at 1184.

¶ 26 Because E.E. received the e-mail messages and could forward them to anyone, Appellant had no reasonable expectation of privacy in them. Accordingly, there was no violation of his constitutional rights.

¶ 27 Moreover, Appellant could not have a reasonable expectation of privacy in his chat-room communications. When Appellant engaged in chat-room conversations, he did not know to whom he was speaking. Oftentimes individuals engaging in chat-room conversations pretend to be someone other than who they are. Appellant could not have a reasonable expectation of privacy in engaging in chat-room conversations.

¶ 28 Accordingly, the court did not err in failing to suppress the electronic communications first received by E.E. on the grounds that they were obtained in violation of Appellant's constitutional rights.

2. Communications received directly by Detective Morris

¶ 29 Next, we will address those communications received directly by Detective Morris while using the moniker "Kelly15F" in the chatroom. First, we find that the Pennsylvania Wiretapping and Electronic Surveillance Act is not applicable to these communications. There was no "interception" in this case. Detective Morris, as "Kelly15F" was the intended recipient of these communications. This Court has held that where a party receives information from a communication as a result of being a direct party to the communication, there is no interception. . . .

[...]

¶ 32 Furthermore, we hold that there was no violation of Appellant's constitutional rights. Appellant had no reasonable expectation of privacy in his e-mails or chat-room communications. Courts that have addressed this issue have found that an individual possesses a limited reasonable expectation of privacy in e-mail messages. See *United States v. Charbonneau*, 979 F.Supp. 1177 (S.D. Ohio 1997). The District Court for Southern Ohio has held: "When an individual sends or mails letters, messages, or other information on the computer, that Fourth Amendment expectation of privacy diminishes incrementally." *Charbonneau*, at 1184. The Court went further in stating: "Furthermore, the openness of the "chat room" diminishes Defendant's reasonable expectation of privacy." *Id.*

¶ 33 We agree with this reasoning. When Appellant engaged in chat-room conversations, he had no way of verifying to whom he was speaking. When Appellant engaged in chat room conversations, he ran the risk of speaking to an undercover agent. See *United States v. Charbonneau*, at 1185. Appellant does not have a reasonable expectation of privacy in the chat rooms. Accordingly, there was no violation of the Appellant's state or federal constitutional rights in allowing these communications to be admitted as evidence.

[...]

¶ 47 Judgment of sentence affirmed.