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NJ Supreme Court: Wiretap Order Required for Prospective Online Communications



The Supreme Court of New Jersey unanimously held that a wiretap order, rather than a search warrant, is required to seek "prospective electronically stored information" from Meta Platforms, Inc., the provider of the Facebook and Instagram services. *Facebook, Inc. v. State*, 254 N.J. 329, 341 (2023).

The court reasoned that "the nearly contemporaneous acquisition of electronic communications ... is the functional equivalent of wiretap surveillance and is therefore entitled to greater constitutional protection." Wiretap orders are subject to heightened privacy protections, providing greater protections for users.

This case came to the court on appeal from the court's appellate division, which affirmed two superior courts' orders quashing two communications data warrants (CDWs) for prospective communications information, but did so on problematic grounds. CDWs are the equivalent of search warrants and can be issued on a showing of probable cause. The two CDWs at issue requested that the contents of electronic communications for 30 days in the future be delivered to law enforcement every 15 minutes. Meta explained, and the state did not dispute, that the 15-minute delay is necessary for technical reasons and that Meta must briefly store the communications before it can forward them to others.

The state argued that while the communications it had requested were as close to real-time communications as they were able to achieve, a wiretap order is unnecessary, since by the time Facebook collected and transmitted them to the state, they would have already been transmitted and in electronic storage. Meta disagreed and moved to quash the CDWs.

The trial courts ruled that a CDW was insufficient, and that the state's request constituted a wiretap. The appellate division consolidated the two cases and held that the state could obtain prospective information from providers through a CDW. They reasoned that the state wiretap statute applied to contemporaneous interception of the electronic communication, but not to attempts to gain access to the communications when they are in storage. 471 N.J. Super. 430, 455-56, 459 (App. Div. 2022). Additionally, the appellate division imposed a 10-

day upper limit on the duration of CDWs, imported from Rule 3:5-5(a), which sets a time limit for the execution of search warrants.

In reversing the appellate division's ruling, the supreme court reasoned that the state's argument was unsupported by any federal or state laws. The court first considered whether the communications sought by the state are covered by New Jersey's equivalent of the Stored Communications Act (SCA). The federal SCA and New Jersey's analogue statute are nearly identical except that the state statute does not mention "electronic storage" and neither the state nor federal statute provide protections for communications in electronic storage. In considering whether protections are available for future communications, the court reasoned that neither the state nor federal SCA protected future communications.

Next, the court held that the communications sought by the state are covered by New Jersey's wiretap statute. The court reasoned that if a strict contemporaneity requirement were applied to prospective communications like those sought by the state, law enforcement would have no need to seek a wiretap order for any prospective communications. Adopting the state's argument would mean that law enforcement could obtain prospective information through the use of CDWs by simply asking Facebook to wait a few minutes while the communications are stored before forwarding them to law enforcement on an ongoing basis. This, the court reasoned, would undermine the intent of both the federal and state wiretap statutes.

Perkins Coie represented Meta in the trial courts and advised on the appeals.

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