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## Search and Seizure

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## COURT OF APPEALS

### People v. Martello<sup>1</sup> (decided July 6, 1999)

Defendant, John Martello, was convicted of one count of attempted coercion in the first degree and one count of criminal mischief in the second degree and was sentenced to two concurrent terms of one and one-half to four and one-half years imprisonment.<sup>2</sup> Defendant appealed and claimed that the government's acquisition of evidence through electronic wiretapping<sup>3</sup> violated the requirements of the Fourth Amendment of the United States Constitution<sup>4</sup> and was contrary to the subsequent decision reached by the Court of Appeals of New York in *People v. Bialostok*.<sup>5</sup> The Court of Appeals affirmed the decisions of both the Supreme Court of New York and its Appellate Division holding that the court's own decision in *Bialostok* must be applied prospectively only, thus making it inapplicable to pen register<sup>6</sup> surveillance conducted by New York law enforcement prior to the issuance of the *Bialostok* ruling.<sup>7</sup>

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<sup>1</sup> 1999 WL 452195 (N.Y. July 6, 1999).

<sup>2</sup> *Id.*

<sup>3</sup> N.Y. PENAL LAW § 250.05 (McKinney 1999). This statute provides in pertinent part: "Wiretapping is defined, in relevant part, as intentional overhearing or recording of a telephonic or telegraphic communication."

<sup>4</sup> U.S.C.A. CONST. amend. IV: The Fourth Amendment provides in pertinent part:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

*Id.*

<sup>5</sup> *People v. Bialostok*, 80 N.Y.2d 738, 742, 610 N.E.2d 374, 376, N.Y.S.2d 701, 703 (1993); The court held that a pen register device capable of being adapted to monitor telephone conversations should be treated as an eavesdropping device subject to a probable cause requirements of CPL 700.

<sup>6</sup> N.Y. CRIM. PROC. LAW § 705.00(1) (McKinney 1999), This statute provides in pertinent part: "pen register is defined to mean: a device which records or decodes electronic or other impulses which identify the numbers dialed or

In October 1993, Paul Martello, an officer of Plumber's Labor Union No. 2, along with nine other individuals, was charged with enterprise corruption and related crimes in a 183-count indictment.<sup>8</sup> The charges arose out of a government investigation into alleged labor racketeering and other illegal activities involving the plumbing industry.<sup>9</sup> Throughout the investigation, orders were granted authorizing the installation of pen registers, and ultimately eavesdropping devices, on the personal telephones of the individuals indicted.<sup>10</sup> The evidence against defendant at trial was derived from the government's electronic telephonic eavesdropping.<sup>11</sup> The government's numerous applications for the eavesdropping warrants were supported by information gained from the government's prior pen register surveillance.<sup>12</sup> That surveillance was authorized by warrants issued pursuant to CPL 705.10.<sup>13</sup> The surveillance was concluded before *Bialostok* was decided.<sup>14</sup>

On appeal, the defendant, relying on *Bialostok*, argued that because the pen register devices used in his case were undisputedly capable of monitoring the contents of telephone conversations, they must be treated as eavesdropping devices, thus, making them subject to the probable cause requirement of CPL 700.15.<sup>15</sup> Furthermore, since the warrants were issued upon the "reasonable

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otherwise transmitted on the telephone line to which such device is attached . . ." *Id.*

<sup>7</sup> *Martello*, 1999 WL 452195.

<sup>8</sup> *Id.*

<sup>9</sup> *People v. Salzarulo*, 168 Misc.2d 408, 409, 639 N.Y.S.2d 885, 886 (Sup. Ct. New York County 1996).

<sup>10</sup> *Id.*

<sup>11</sup> *Martello*, 1999 WL 452195.

<sup>12</sup> *Id.*

<sup>13</sup> N.Y. CRIM. PROC. LAW § 705.10 (McKinney 1999). This section requires a judicial order based upon a showing of reasonable suspicion to install a pen register. *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> N.Y. CRIM. PROC. LAW § 700.15(2) (McKinney 1999). The statute provides in pertinent part: "an eavesdropping warrant may be issued only upon probable cause to believe that a particularly described person is committing, has committed, or is about to commit a particular designated offense . . ." *Id.*

suspicion” requirement of CPL 705.10, the evidence should be suppressed.<sup>16</sup>

Proper analysis of the case at bar requires a discussion of *Bialostok*, upon which the appellant’s contentions rest.<sup>17</sup> In *Bialostok*, the defendant was convicted of gambling and conspiracy based, in part, on evidence derived from electronic monitoring of two telephone lines used to transmit bets.<sup>18</sup> Under the law at the time, a warrant based on probable cause was required for an eavesdropping device, but none was needed to install a pen register.<sup>19</sup> Subsequent to *Bialostok*’s operative facts, on December 22, 1988, CPL article 705 became effective,<sup>20</sup> thus requiring a judicial order based upon a showing of reasonable suspicion to install a pen register.<sup>21</sup> The Court of Appeals distinguished the pen registers used in *Bialostok* from traditional pen registers<sup>22</sup> by acknowledging that the former have the additional capacity to record conversations.<sup>23</sup> Relying on this determination, the court held that a pen register device capable of being adapted to monitor telephone conversations should be treated as an eavesdropping device subject to the probable cause requirement of CPL article 700.10.<sup>24</sup>

The court’s analysis of the case began with a discussion of the difference between the federal and state rules regarding retroactivity.<sup>25</sup> In *Griffith v. Kentucky*<sup>26</sup>, the Supreme Court of the United States held that where a new constitutional rule is formed, it

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<sup>16</sup> *Martello*, 1999 WL 452195.

<sup>17</sup> *Id.*

<sup>18</sup> *Bialostok* at 743, 610 N.E.2d at 375, 594 N.Y.S.2d at 702.

<sup>19</sup> *Id.*

<sup>20</sup> *Martello*, 1999 WL 452195.

<sup>21</sup> *Id.*

<sup>22</sup> *Bialostok* at 744, 610 N.E.2d at 376, 594 N.Y.S.2d at 703. (“... a pen register was incapable of intruding on a legitimate expectation of privacy because it recorded only phone numbers dialed and disclosed nothing more than what phone users voluntarily conveyed to the telephone company in the ordinary course of business”).

<sup>23</sup> *Id.* at 744.

<sup>24</sup> *Id.* at 743.

<sup>25</sup> *Martello*, 1999 WL 452195.

<sup>26</sup> 479 U.S. 314.

is to be applied retroactively to all cases pending on direct review.<sup>27</sup> Alternatively, in *American Trucking Association v. Smith*<sup>28</sup>, the Supreme Court recognized that when questions of state law are at issue, state courts have the authority to determine the retroactivity of their own decisions.<sup>29</sup> New York implements a more flexible approach to retroactivity, in which it applies the Pepper-Mitchell tripartite test.<sup>30</sup>

The court first determined whether the present case raised a federal or state issue of retroactivity. In making their determination, the court noted that in interpreting CPL article 700, it was required to be sensitive “to the constitutional guarantees against search and seizure that the statute seeks to protect.”<sup>31</sup> Moreover, the court’s analysis of the issue was limited to the privacy protection then afforded pursuant to the provisions of article 700 of the CPL.<sup>32</sup> The court concluded that the issue in the present case emanates from the court’s interpretation of CPL article 700, albeit inspired by federal constitutional principles to some extent,<sup>33</sup> and thus constitutes a New York State rule of law therefore requiring application of this State’s Pepper-Mitchell factors.<sup>34</sup>

In applying the Pepper-Mitchell factors, the threshold question under this analysis is whether the *Bialostok* case itself established a new rule of law in this State, or merely “applied previously established principles in a new factual setting or settle[d] a

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<sup>27</sup> *Id.* at 328.

<sup>28</sup> 496 U.S. 167.

<sup>29</sup> *Id.* at 177.

<sup>30</sup> *People v. Pepper*, 53 N.Y.2d 213, 220, 423 N.E.2d 366, 383, 440 N.Y.S.2d 889, 996 (1981). Whether a new rule of New York State Law is to be given retroactive effect requires an evaluation of three factors: (1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, (3) the effect on the administration of justice of retroactive application. See *People v. Mitchell*, 80 N.Y.2d 519, 525-26, 606 N.E.2d 1381, 1384, 591 N.Y.S.2d 990, 993 (1992).

<sup>31</sup> *Bialostok* at 745, 610 N.E.2d at 376, 594 N.Y.S.2d at 703 (noting that “[o]ur interpretation of article 700 must be sensitive to the constitutional guarantees against search and seizure that the statute seeks to protect”).

<sup>32</sup> *Martello*, 1999 WL 452195.

<sup>33</sup> *People v. Martello*, 251 A.D.2d 187, 188, 675 N.Y.S.2d 33 (1<sup>st</sup> Dept. 1998).

<sup>34</sup> *Martello*, 1999 WL 452195.

question in a manner that was clearly foreshadowed.”<sup>35</sup> In *People v. Favor*,<sup>36</sup> the Court of Appeals recognized that the determination that a new rule was established is warranted where a recent holding “represented a dramatic shift away from customary and established procedure.”<sup>37</sup> In the case at bar, the court found that the decision in *Bialostok* for the first time placed pen registers having audio capabilities under article 700 of the New York Criminal Procedure Law, which had previously dealt exclusively with eavesdropping surveillance.<sup>38</sup> By holding audio-capable pen registers subject to the probable cause requirements of CPL article 700, the *Bialostok* ruling did in fact represent a dramatic shift away from customary and established procedure thus warranting the determination that *Bialostok* established a new rule of law in New York State.<sup>39</sup>

Following its determination that *Bialostok* established a new state rule of law, the court applied the Pepper-Mitchell factors.<sup>40</sup> The court determined that “the purpose of the rule is unrelated to the fact-finding process and, in that respect, in no way affects the determination of guilt and innocence.”<sup>41</sup> In other words, the rule does not relate to the substance of the information procured, but simply the procedures the government uses in obtaining the information. Moreover, the rule is intended as a deterrent to the government’s ability to engage in unauthorized electronic eavesdropping.<sup>42</sup> Additionally, the court found that the law enforcement authorities relied extensively on CPL 705 which required simply a “reasonable suspicion” to procure a pen register warrant.<sup>43</sup> Finally, the court held that in light of law enforcement’s reliance on the *pre-Bialostok* rule, retroactive application of the law would work a substantial burden on the administration of

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<sup>35</sup> *Id.*

<sup>36</sup> 82 N.Y.2d 254, 624 N.E.2d 631, 604 N.Y.S.2d 494 (1993).

<sup>37</sup> *Id.* at 263, 624 N.E.2d at 635, 604 N.Y.S.2d at 498.

<sup>38</sup> *Martello*, 1999 WL 452195.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Martello*, 1999 WL 452195.

<sup>43</sup> *Id.*

justice and could affect a large number of cases still bending.<sup>44</sup> In light of this, the court held that *Bialostok* should be applied prospectively only.

Additionally, the court recognized that *Bialostok* was not controlling upon the facts and circumstances of *Martello* because article 705 of the CPL went into effect subsequent to *Bialostok*'s operative facts.<sup>45</sup> The court reasoned that it did not refer to CPL article 700 in its analysis of *Bialostok* because of its subsequent effective date.<sup>46</sup> Thus, in the case at bar, the court addressed for the first time whether the *Bialostok* ruling should be applied in a case where law enforcement strictly complied with the prescriptions of CPL article 705.<sup>47</sup>

In summation, the court discussed the status of pen registers in the statutory scheme of the CPL. In *People v. Kramer*,<sup>48</sup> the court "forewarned that [it's] opinion in *Bialostok* had not created a per se rule that all pen registers with audio capability were equivalent to eavesdropping devices.<sup>49</sup> As evidence, the court points to CPL article 705's definition of "pen register"<sup>50</sup> in combination with CPL article 700's definition of "eavesdropping."<sup>51</sup> The definition of "pen register" under CPL article 705 provides no exclusion for pen registers with eavesdropping capabilities but not used in that

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> 92 N.Y.2d 529, 706 N.E.2d 731, 683 N.Y.S.2d 743 (1998).

<sup>49</sup> *Id.* at 541, 706 N.E.2d at 743, 683 N.Y.S.2d at 755.

<sup>50</sup> N.Y. CRIM. PROC. LAW § 705.00 (McKinney 1999) (defining "pen register" as:

A device which records or decodes electronic or other impulses which identify the numbers dialed or otherwise transmitted on the telephone line to which such device is attached, but such term does not include any device used by a provider or customer of a wire or electronic communication service for billing, or recording as an incident to billing, for communications services provided by such provider or any device used by a provider or customer of a wire communication service for cost accounting or other like purposes in the ordinary course of its business.)

<sup>51</sup> *Id.*

capacity.<sup>52</sup> Additionally, the definition of “eavesdropping” in CPL article 700 explicitly excludes “the use of a pen register or trap and trace device when authorized pursuant to [Criminal Procedural Law] article 705.”<sup>53</sup> In light of this, the court found that CPL article 705’s definition of “pen register” along with the express exclusion of pen registers from CPL article 700’s definition of “eavesdropping,” supports its determination that the legislature intended to view all pen registers, including those capable of recording conversations, as pen registers and not, as *Bialostok* held, as eavesdropping devices.<sup>54</sup>

Thus, the court held that the ruling in *Bialostok* emanated from its interpretation of the New York State statutory law, did not raise constitutional concerns, and, therefore, was subject only to the New York State rules on retroactivity. Moreover, the Pepper-Mitchell factors applied begged the conclusion that *Bialostok* should be applied prospectively only. Furthermore, the court concluded that *Bialostok* was not controlling upon the case at bar because of the subsequent effective date of CPL 705. Thus, the *Bialostok* ruling was inapplicable to the case at bar. Upon further discussion, the court held that in reference to the CPL, all “pen registers” are not to be viewed inherently as “eavesdropping devices.”

*Scott Sorel*

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*