Jean v. Massachusetts State Police and the Right to

Digital Media and Data Privacy Law Blog

on 04.25.2011
Posted in Wiretapping

In an earlier post, we began analyzing whether there is a recognized "right to record the police." We looked at judicial decisions in Maryland and in Illinois involving each state's wiretapping statute. In this post, we examine a decision issued in 2007 by the First Circuit Court of Appeals in *Jean v. Massachusetts State Police*.

Jean presents a slightly different twist on wiretapping prosecution cases than those we examined earlier. In *Jean*, a political activist posted a videotape on the Internet of a warrantless search of a private residence by the state police. The videotape, taken by the home owner's "nanny-cam," was assumed by the court to have been taken illegally, in violation of the Massachusetts state wiretapping statute, Mass. Gen. Laws ch. 272 § 99(B)(4)—both audio and video were recorded without the knowledge or consent of the police, and the state wiretapping statute required the consent of all parties in order to record conversations.

Following publication of the video on Jean's website, the state police wrote to Jean and told her to remove the audio portion of the material because it was in violation of the wiretapping statute or face action by legal authorities. Jean then sought a temporary restraining order and preliminary and permanent injunction against the state police's threatened prosecution under the wiretap statute, citing her right to free speech under the First Amendment.

The trial court granted the plaintiff's request for preliminary injunction, citing the U.S. Supreme Court's decision in *Bartnicki v. Vopper*, 532 U.S. 514 (2001). *Bartnicki* involved the application of the federal wiretapping statute, 18 U.S.C. § 2511, to the news media's reporting on an illegally recorded conversation that was legally obtained by the media. Ultimately, after balancing the interests of the government and the news media at stake, the Supreme Court held in *Bartnicki* that state officials may not constitutionally punish publication of truthful information that was lawfully obtained, "absent a need . . . of the highest order."

The First Circuit affirmed the trial court's application of *Bartnicki* to the facts of *Jean*. The state wiretapping statute was deemed content neutral, so, to determine the outcome of the case, the court balanced the interests of the state police in criminalizing the plaintiff's conduct, and the interests of Jean and the public in the "publication of truthful information of public concern." The state advanced the interest of the government in protecting the privacy of citizens and encouraging the uninhibited exchange of ideas and information among private parties. The court

found this interest "virtually irrelevant" as the intercepted communication at issue involved a search by police officers of a private citizen's home in front of that individual, his family, and several other officers. The second asserted government interest in punishing a subsequent publisher of intercepted information because interceptors were rarely known and could not generally be prosecuted was likewise discounted as the identity of the interceptor (the home owner) was already known.

On the public interest side, the government did not dispute that the videotape involved a matter of public concern. The only way to distinguish the case from *Bartnicki*, according to the First Circuit, was if the plaintiff obtained the videotape illegally. The court assumed that she did but still held that *Bartnicki* compelled the conclusion that the plaintiff's publication on her website of an illegally recorded conversation and search by the police was protected by the First Amendment.

The outcome in *Jean* is important in particular for those who post videotapes of police altercations filmed by others. *Bartnicki* stands for the proposition that, absent the highest government interest, the First Amendment bars the government from criminalizing the publication of truthful information about a matter of public concern that is lawfully obtained. *Jean* appears to go one step further and holds that the First Amendment bars criminalizing the publication of truthful information about a matter of public concern, absent the highest government interest, even if that information was unlawfully obtained—for example, obtained in violation of the wiretapping statute. Either scenario could potentially apply to a citizen or journalist who videotapes (or posts videotape online) of the police in the course of carrying out their official duties.

Of course, unlike the cases we discussed in our earlier post, *Jean* also involves political speech and express criticism of the government. Jean was an activist and had posted the "nanny-cam" video of the warrantless police search on her website—a website dedicated to criticism of a former district attorney. This kind of government criticism falls into the category of "core" political speech, where First Amendment protection is generally at its highest.

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We have now examined several cases involving the conflict between recording police activity and state wiretapping statutes. In a post to follow, we will examine Section 1983 claims asserting First Amendment violations following wiretapping arrests for recording the police. In a final post, we will also explore whether citizens or journalists may run afoul of state obstruction statutes when they record police activity.