

ORIGINAL

Decision No. 90321 MAY 22 1979

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Charles Kinion, )  
 )  
 Complainant, )  
 )  
 vs. )  
 )  
 Pacific Telephone & Telegraph )  
 Company, )  
 )  
 Defendant. )

Case No. 10723  
(Filed February 28, 1979)

Michael J. Leonard, Attorney at Law,  
 for complainant.  
Gerald H. Genard, Attorney at Law,  
 for defendant.  
Michael Brenner and Kirk Newkirk,  
 Attorneys at Law, for the District  
 Attorney, Los Angeles County, intervenor.

O P I N I O N

Complainant alleges that defendant terminated complainant's service of two telephone numbers on or about February 8, 1979 pursuant to Rule 31, Schedule Cal. P.U.C. No. D & R, based upon Appendix "A" of Decision No. 71797, issued December 30, 1966, which telephone service termination was ordered by defendant after it was served with a court document entitled "Finding of Probable Cause" signed by Eric Younger, judge of the Municipal Court, Los Angeles Judicial District, dated January 3, 1979. The telephone numbers involved are (213) 413-3281 and (213) 413-6194, subscribed to by complainant.

Complainant alleges that said telephone service was terminated without prior knowledge, without prior notice, without prior hearing, and without opportunity to present evidence or any defense in violation of complainant's rights to due process and equal protection of the laws and in violation of the decisional law of California and the United States. Complainant further alleges that, to the extent that summary provision for termination of service was sanctioned in Decision No. 71797 which resulted in the promulgation of tariff Rule 31, said decision and rule are unconstitutional and void. In addition, complainant alleges that he has been denied rights guaranteed by the first amendment to the United States Constitution in that the action taken by defendant constitutes a prior restraint infringing on free speech. Complainant cites numerous cases in his complaint which he believes sustain his position.

Complainant seeks an order directing defendant to forthwith restore telephone service or, in the alternative, order a hearing to commence immediately and, pending said hearing, to grant complainant the interim relief of restoration of full telephone service pending a decision by the Commission as provided in Rule 31.

Rule 31 provides in part as follows:

"LEGAL REQUIREMENTS FOR REFUSAL OR DISCONTINUANCE OF SERVICE

"California Public Utilities Commission's Decision No. 71797 in Case No. 4930, requires that each communications utility, operating under the jurisdiction of the Commission, include the provisions of the rule set forth in Appendix 'A' of that decision as a part of the rules in the utility's tariff schedules. Accordingly, Appendix 'A' of Decision No. 71797, Case No. 4930, is quoted herein:

"APPENDIX 'A' OF DECISION NO. 71797

- "1. Any communications utility operating under the jurisdiction of this Commission shall refuse service to a new applicant, and shall disconnect existing service to a subscriber, upon receipt from any authorized official of law enforcement agency of a writing, signed by a magistrate, as defined by Penal Code Sections 807 and 808, finding that probable cause exists to believe that the use made or to be made of the service is prohibited by law, or that the service is being or is to be used as an instrumentality, directly or indirectly, to violate or to assist in the violation of the law.
- "2. Any person aggrieved by any action taken or threatened to be taken pursuant to this rule shall have the right to file a complaint with the Commission and may include therein a request for interim relief. The remedy provided by this rule shall be exclusive. No other action at law or in equity shall accrue against any communications utility because of, or as a result of, any matter or thing done or threatened to be done pursuant to the provisions of this rule.
- "3. If communications facilities have been physically disconnected by law enforcement officials at the premises where located, without central office disconnection, and if there is not presented to the communications utility the written finding of a magistrate, as specified in paragraph 1 of this rule, then upon written request of the subscriber the communications utility shall promptly restore such service.
- "4. Any concerned law enforcement agency shall have the right to Commission notice of any hearing held by the Commission pursuant to paragraph 2 of this rule, and shall have the right to participate therein, including the right to present evidence and argument and to present and cross-examine witnesses. Such law enforcement agency shall be entitled to receive copies

of all notices and orders issued in such proceeding and shall have both (1) the burden of proving that the use made or to be made of the service is prohibited by law, or that the service is being or is to be used as an instrumentality, directly or indirectly to violate or to assist in the violation of the law, and (2) the burden of persuading the Commission that the service should be refused or should not be restored."

Pursuant to paragraph 4 of Rule 31, John K. Van De Kamp, district attorney of Los Angeles County, and the Los Angeles City Police Department were notified of the filing of the complaint and of the date, time, and place of hearing. Thereafter, John K. Van De Kamp filed a petition for leave to intervene pursuant to Rule 53 of the Commission's Rules of Practice and Procedure and an answer as an intervenor. On March 30, 1979 the petition of John K. Van De Kamp for leave to intervene was granted in a ruling issued by the Administrative Law Judge.

After proper notice, a hearing was held in Los Angeles on April 5, 1979 before Administrative Law Judge William A. Turkish and the matter was submitted upon the filing of letter briefs since received on April 13, 1979.

Exhibit 1, a packet consisting of the Affidavit for Probable Cause, 'RAP' sheet, on William Edward Kahre, Finding of Probable Cause, utility bills addressed to Charles C. Kinion, and arrest record of William Edward Kahre on January 28, 1979; and Exhibit 2, a packet of seven photographs showing the front and interior views of the residence at 1652 Ingraham Street, Los Angeles, were received into evidence. The Commission takes official notice that as of January 30, 1979, the date the Finding of Probable Cause in Exhibit 1 was signed, Eric Younger was a judge of the Municipal Court of the Los Angeles Judicial District and, as such, was a magistrate as defined by Sections 807 and 808 of the Penal Code.

Stephen I. Warren, an officer with the Los Angeles City Police Department, testified on behalf of the intervenor. The witness testified that he has been assigned as a vice officer in the Rampart Division for the past eighteen months. He has been a Los Angeles City police officer for over five years. Counsel for complainant stipulated that the witness was an expert in bookmaking activities. The witness related that he has knowledge of the arrests of a William Edward Kahre in connection with bookmaking activities which, in 1977, led to the termination of Mr. Kahre's telephone service upon a magistrate's issuance of a Finding of Probable Cause. The witness related that in 1978 he received information from a reliable confidential informant that William Edward Kahre had moved to 1652 Ingraham Street and was still engaged in bookmaking. The location was placed under observation for a period of months during which time officers observed lone males enter the location for brief periods of time and then observed them leaving.

The witness stated that surveillance of the Ingraham location was made at various times and that numerous lone males were observed entering and exiting the location. He stated that he and fellow officers went to the location on four or five random occasions to converse with Kahre and saw Kahre seated at a desk containing two telephones and on occasion observed him using the telephone. The witness testified that a buzzer, connected to an electronic lock on the front door, was mounted on the wall behind the desk and Kahre would open the door from the desk by means of the buzzer when the lookout gave Kahre the okay. On the occasions that the police went to the location to make a visual inspection for suspected bookmaking paraphernalia, the witness observed Kahre at the desk hurriedly wiping a glass slate with a rag before opening the door for the police. In the expert opinion of the

witness, based on experience, Kahre was erasing recorded wagers on the glass slate. He testified that the telephones rang during such visits by the police and that on several such visits the witness answered the telephone. After indicating to the male callers asking for "Bill" that "Bill" was sick or unable to answer the telephone, the male callers would immediately hang up. The witness stated that during the police visits several males were observed sleeping in the upstairs bedrooms of the residence with little evidence to indicate they were other than transients. He also testified that Kahre previously had his telephones at a prior location terminated for bookmaking activities under a similar Finding of Probable Cause proceeding. Based on the witness' expertise on bookmaking activities, the reliable confidential informant's tip that Kahre was still engaged in bookmaking and using the Ingraham location as a combination telephone spot/cash room, and the observations made by the witness and his fellow officers during their surveillance and visits to the residence, he concluded that Kahre was engaged in bookmaking and using the telephone for receiving betting wagers and race results. As a result of their investigation, the witness obtained a search warrant and returned to the residence on January 28, 1979. Evidence of bookmaking was recovered and Kahre and the lookout were arrested. He testified that both Kahre and his lookout made admissions of bookmaking activities following their arrest and that while there, the telephone rang and was answered by one of the arresting officers. According to the information contained in the affidavit of the officer, a male caller, thinking he was talking to "Bill", placed several horse race wagers and then hung up.

The witness also testified that although various utility bills (including telephone) found at the Ingraham location showed the subscriber to be one Charles C. Kinion, he never met or ever saw Charles C. Kinion at that location or anywhere else. It was the witness' belief that the person in control of the utility service in question and true subscriber was William C. Kahre, using the name Charles C. Kinion. ✓

Request for Interim Relief

Ordinarily, where there is a request for interim relief pending a final determination on the matter, we have issued interim opinions during protracted proceedings, especially when an individual's basic rights or property were placed in jeopardy and a speedy decision on such basic issues were compelled. However, in this matter, the hearing was completed on the day heard and all issues to be decided can be decided in this final opinion rather than in two separate decisions considering that there will be no added delay in rendering only one final opinion instead of two opinions.

No evidence whatsoever was presented by complainant to show that he is entitled to immediate interim relief as requested. Such interim relief should be granted only if the procedure set forth in Rule 31 is invalid as maintained by complainant, or the basis upon which the magistrate issued the Finding of Probable Cause was insufficient to issue such finding. Intervenor opposes complainant's interim relief request for restoration of telephone service. Complainant's counsel argues that interim relief should be granted because of the interim relief we granted in the Marvin Golden, dba Summerwind v General Tel. Co. case in Decision No. 87170, issued April 5, 1978 in Case No. 10282.

In Decision No. 87170, we acknowledged the Commission's discretion to grant the interim relief as requested, and we granted the interim relief on the basis that the proper forum for complainant to challenge the magistrate's Finding of Probable Cause was in the criminal courts rather than in the Commission's courtroom. In addition, because it had been alleged by complainant that the telephones involved in that case were being utilized in the operation of a legitimate lawful telephone answering service business, we were concerned that long delays before a final determination was rendered, despite an expeditious hearing, could cause complainant possible business hardship.

Complainant argues that certain portions of the affidavit presented to the magistrate should be struck under Section 1538.5 of the Penal Code and that if such illegally seized evidence was eliminated from the affidavit, there would be insufficient grounds upon which a magistrate could issue a Finding of Probable Cause. Specifically, complainant alleges the police officer's act of answering complainant's phone and recording the ensuing conversation in the affidavit was an illegal seizure because it was done without the consent of complainant. Complainant relies on People v Harwood (1977) 74 Cal App 3d 460 in support of his argument. We need not consider this issue.



We held in our interim and final decisions in Decision No. 87170 that we were under no obligation to review the showing made before the magistrate in order to determine whether probable cause for summary termination existed and that the complainant's remedy was in the criminal courts through a motion to suppress evidence under Section 1538.5 of the Penal Code. However, since that time, the matter was taken up before the California Supreme Court in Marvin Goldin v Public Utilities Commission (1979) 23 Cal 3d 638, and a decision in the matter issued on March 15, 1979. The Court pointed out that Section 1538.5 may be invoked only by a "defendant" in a criminal case, and that in a proceeding before the Commission complainant is not a "defendant". Thus, the Court stated applicant is not "entitled to invoke before the Commission the full range of procedures available to a 'defendant' under Section 1538.5 of the Penal Code. (See, e.g., Theodore v Superior Court (1972) 8 Cal 3d 77.) In a civil administrative proceeding of this nature, where the liberty of the subscriber is not at stake, it is sufficient for purposes of the interim protection involved that the Commission limit itself to the face of the affidavits and its assessment of their adequacy to support the magistrate's finding."

The Court also upheld its previous holding in Sokol v Public Utilities Commission (1966) 65 Cal 2d 247 and found that Rule 31 was generally consistent with the requirements of its Sokol decision, supra, and the requirements of applicable principles of state and federal constitutional law. Although the Court suggested two changes to Rule 31 with regard to the magistrate's finding of probable cause and the need for an early hearing for

interim relief following the discontinuance of service, they are not applicable in the instant case since the action herein took place prior to the issuance of the Court's Goldin decision, supra, in accordance with the existing Rule 31.

An examination of the documents contained in Exhibit 1 and the supporting testimony of the witness reveal sufficient facts to fully support a Finding of Probable Cause that the telephone numbers 413-3281 and 413-6194, located at 1652 Ingraham Street, Los Angeles, were being used for purposes of bookmaking, and that William Edward Kahre was the person who had control of the utility service in question. ✓

The location of the two telephones in a single-family residence plus the absence of any allegation or showing by complainant that the telephones were being used in the operation of a lawful business operation tend to dispel any danger that complainant may suffer economic hardship while awaiting a final decision in the matter as was alleged in Case No. 10282.

### Findings of Fact

1. The procedure set forth in defendant's Rule 31 for the termination of telephone service of a subscriber allegedly using the service for illegal purposes requires that the police, in a manner reasonably comparable to the procedure before a magistrate to obtain a search warrant, obtain prior authorization to secure termination of service by satisfying an impartial tribunal that they have reasonable cause to act, and after service is terminated the subscriber is provided by that rule with a prompt opportunity to challenge the allegations of the police and to secure prompt restoration of service.

2. Defendant adopted Rule 31 in its tariff. Rule 31, as adopted by defendant, conforms with the Commission's requirements as ordered in Decision No. 71797 (1966) 66 CPUC 675.

3. A certificate of Finding of Probable Cause was issued by a magistrate on January 30, 1979, in accordance with the provisions of Rule 31, and the certificate was based upon sufficient, proper, and reliable information and data as set forth in Exhibit 1. The magistrate had a sufficient basis to issue the certificate of Finding of Probable Cause and to conclude that there was probable cause to believe that the use made or to be made of the telephone service was prohibited by law; that the service was being used as an instrumentality to violate or assist in the violation of law; and that the telephones served by the said telephone numbers were at that time being utilized for illegal purposes.

4. The requirements of defendant's Rule 31 were properly adhered to when the telephone service consisting of two telephone numbers of complainant, as set forth in the complaint, was terminated by defendant on February 8, 1979.

5. In Goldin, supra, the California Supreme Court held that the provisions of Rule 31 were generally consistent with the requirements set forth by that Court in Sokol, supra, are consistent with the requirements of due process of law, equal protection of the laws, and the right of freedom of speech, as required by the California and United States Constitutions and other laws pertinent thereto, and that Rule 31 is constitutional, legal, and valid.

6. There is reasonable probability that if the relief requested by complainant is granted, the restoration of telephone service to complainant will result in a continuation of such activity, and the telephones will continue to be used as instrumentalities to violate or to assist in the violation of the law and for illegal purposes. ✓

7. In order to expedite this matter as requested by complainant and to prevent delay which may be caused by having this order effective at some time after the date hereof, there is sufficient reason to make this order effective as of the date of the order.

Conclusions of Law

- 1. Rule 31 <sup>has been declared</sup> ~~is~~ constitutional, legal, and valid *by the California Supreme Court.*
- 2. The provisions of Rule 31 were adhered to in terminating the telephone service of complainant.
- 3. The magistrate issued the certificate of Finding of Probable Cause based upon a proper and sufficient basis.
- 4. The relief requested by complainant should be denied. ✓

O R D E R

IT IS ORDERED that the interim and complete relief requested by complainant is denied.

The effective date of this order is the date hereof.

Dated at San Francisco, California, this 22nd day of MAY, 1979.

John E. Bryson  
President

Vernon L. Sturgeon

Robert O. Howell

Robert J. Pugh

James H. ...  
Commissioners