



Supreme Court of Georgia

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CASES DUE FOR ORAL ARGUMENT

Summaries of Facts and Issues

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Tuesday, January 31, 2017

**Special Session
Emory University School of Law
Atlanta, Georgia**

10:00 A.M. Session

IHEARTMEDIA, INC. V. SHERIDAN ET AL. (S17Q0345)

In a case involving the streaming of music over the internet, a federal court is asking the state Supreme Court to determine whether internet radio services are exempt from a Georgia statute that makes it illegal to transfer sound recordings without the owner's consent.

FACTS: iHeartRadio, owned by iHeartMedia, Inc., a Delaware corporation, offers internet radio services in the form of customizable music "stations" that stream music over the internet to users based on their individual preferences. iHeart also owns hundreds of traditional AM and FM radio stations and streams their broadcasts online. iHeart offers its internet radio services on a variety of internet platforms, including computers, digital media devices, tablets and smartphones. Streaming music and other programming over the internet involves the transfer of a series of digital "packets" to the temporary random access memory of the listener's internet-connected device.

In the 1950s and 1960s, Arthur Sheridan owned several recording companies that recorded and sold doo-wop, jazz, and rhythm and blues music. Today he owns several master recordings of the music that was made prior to 1972, including jazz, blues and doo-wop songs. Barbara Sheridan owns the pre-1972 master sound recording of “Golden Teardrops” by The Flamingos. Arthur and Barbara, who live in Illinois, also own the intellectual property and contract rights associated with the recordings.

iHeart has regularly streamed the Sheridans’ pre-1972 recordings to Georgia customers. However, iHeart has no license, authority or consent from the Sheridans to use and transfer the sounds of the pre-1972 master recordings. Furthermore, iHeart has never compensated the Sheridans for the use and transfer of their pre-1972 master recordings.

Generally, federal law governs sound recordings made after 1972, while sound recordings made before 1972 are generally governed by state law. In 1972, Congress granted federal copyright protection to sound recordings but left the states free to continue regulating sound recordings made before the law went into effect. In Georgia, Georgia Code § 16-8-60 gives owners of master sound recordings the sole right to transfer the sounds of those recordings under the law entitled, “Criminal Reproduction and Sale of Recorded Material.” Specifically, § 16-8-60 makes it illegal to transfer “any sounds...recorded...onto any other...disc, wire, tape...without the consent of the person who owns the master phonograph record, master disc, master tape...” The statute includes an exemption that states that § 16-8-60 “shall not apply to any person who transfers or causes to be transferred any such sounds or visual images [i]ntended for or in connection with *radio or television broadcast transmission or related uses.*”

At issue in this case is whether iHeart’s internet radio services qualify as “radio broadcast transmission” or “related uses.”

On Sept. 29, 2015, the Sheridans filed a one count class action lawsuit in the U.S. District Court for the Middle District of Georgia against iHeart, alleging violations of the Georgia Racketeer Influenced and Corrupt Organizations (RICO) Act on behalf of themselves and others like them who owned pre-1972 master recordings. The Sheridans allege that iHeart repeatedly violated Georgia Code § 16-8-60 in a form of racketeering by the ongoing transfer of songs without the consent of the owners of the master recordings. In response, iHeart filed a motion to dismiss the case, claiming the exemption applies to its streaming over the internet. Because the Georgia courts have not clearly ruled on the matter, the U.S. District Court has certified the following question to the state Supreme Court: “Whether the exemption to Georgia Code § 16-8-60...applies such that internet radio services are exempt from application of § 16-8-60.” The federal court meanwhile has stayed resolution of this case and iHeart’s motion to dismiss pending the state Supreme Court’s response to the question.

ARGUMENTS: Attorneys for iHeart Media argue the answer to the question is yes, calling it a “startling premise” that “iHeart Media, the country’s largest radio broadcaster is a criminal enterprise under Georgia law.” The Sheridans suggest that digitally streaming music to listeners on their phones or devices at the same time the music is broadcast to the rest of the public over the airwaves somehow violates the “criminal record piracy statute” of § 16-8-60. “And this supposedly felonious practice allegedly makes iHeart Media a *racketeering enterprise* subject to civil liability via the Georgia RICO law,” the attorneys argue in briefs. The state Supreme Court should rule that § 16-8-60 does not criminalize internet radio for two reasons: First, the statute by its terms does “not apply...in connection with radio or television broadcast

transmission or related uses.” Under “well-settled rules of statutory construction, the radio broadcast exemption of § 16-8-60 (c) (1) includes iHeart Media’s ‘internet radio service,’” they argue. “This exemption alone precludes all of the liability asserted in this action...” There is no reason why an internet radio service is not a radio broadcast transmission within the meaning of the statute, let alone a “related use.” Notably, the language of the statute does not distinguish between broadcast transmissions over the airwaves and those made using other technologies, such as the internet, analog cable networks or digital satellite streams. Second, even without the exemption, iHeart Media would not be guilty of record piracy “because the conduct alleged in the complaint does not constitute that crime at all or remotely resemble it,” the attorneys argue. “Record piracy is the unauthorized physical copying of records, tapes, CDs and the like, to sell them in competition with the authorized versions.” It has nothing to do with streaming music over the internet. The Georgia piracy law criminalizes the “transfer” of sounds from one physical object to another, e.g. copying the music from one CD to another CD. “Streaming songs as part of an internet radio broadcast does not, within the meaning of that statute, ‘transfer’ any sounds at all.” As the state Supreme Court recognized in its 2006 decision in *Briggs v. State*, the purpose of § 16-8-60 is “to protect the public and entertainment industry from piracy and bootlegging.” This Court should thus hold that § 16-8-60 does not extend to – and make felons of – popular internet radio service providers like iHeart Media.” Among other arguments, “radio broadcast transmission” also is not a term of art, iHeart’s attorneys argue.

The Sheridans are not seeking to criminalize digital transmission of music, their attorneys argue. “The only act that is criminal is the unauthorized transfer of songs – nothing more, nothing less. As long as a transferor has consent from the master owner, there is no liability under § 16-8-60, regardless of whether the transfer is digital or otherwise, raising no constitutional issues.” The Sheridans brought this case to be compensated for iHeart’s unauthorized streaming of their master recordings, a service iHeart offers to the public and makes money from, but for which the Sheridans receive no royalties. “The case is brought under Georgia RICO based on violations of § 16-8-60, which prohibits unauthorized transfers of music. The harm caused to the Sheridans by iHeart is no different than the harm caused by a prototypical bootlegger, i.e. the shady character on the street corner illegally copying CDs, and then selling them out of their van on the cheap – profiting from creative works without compensation.” With the change in technology, “piracy takes on a digital form, and is far more damaging because music can be transferred to literally millions of people in seconds, and with just the touch of a button.” Through its streaming service, iHeart Radio’s unauthorized transfers of the Sheridans’ recordings and the master recordings owned by other members of the class, earn iHeart millions of dollars in advertising fees,” the attorneys argue. “This is modern day corporate piracy.” iHeart’s arguments that the exemption under § 16-8-60 should include its streaming services are wrong for three reasons: First, “iHeart ignores that the complaint alleges that the unauthorized transfers were done as part of iHeart Radio’s ‘streaming,’ which is a distinct technology from ‘radio broadcast transmission.’” Second, “radio broadcast transmission” is a “term of art” related to copyright law which is defined to include only over-the-air broadcast of AM/FM radio. “Therefore, iHeart cannot simply resort to the ordinary dictionary definitions of ‘broadcast’ and ‘transmission’ in an effort to claim this exemption,” the attorneys argue. Third, iHeart attempts to add an additional “certified question” by arguing that a temporary copy in the course of streaming is not a “transfer” under § 16-8-60. iHeart Radio simply is not covered

by the exemption of § 16-8-60 (c) (1), the Sheridans' attorneys argue. Also, while iHeart argues that its streaming of AM/FM radio programming is "related" to its radio broadcast transmission because they both play the exact same programming, iHeart's argument misinterprets what needs to be related – "which is the *use*, not the content," the attorneys argue.

Attorneys for Appellant (iHeart): Gregory Garre, Jonathan Ellis, Daniel Griffin, Michael Kohler, James Lynch, Andrew Gass

Attorneys for Appellees (Sheridans): Matthew Galin, Joseph Durham, Jr.

KIMBROUGH ET AL. V. THE STATE (S16G1313)

Two women, who have been charged with racketeering for illegally getting oxycodone by lying to doctors, are appealing a Georgia Court of Appeals decision that upholds the charge. In this pre-trial appeal, the women argue the formal indictment charging them did not contain the information they needed to defend themselves.

FACTS: In July 2013, Heather Kimbrough and Melissa Ann Mayfield, along with two others, were indicted by a **Gwinnett County** grand jury with one count of violating the Georgia Racketeer Influenced and Corrupt Organizations (RICO) Act and numerous counts of illegally possessing oxycodone and hydrocodone, which are prescription pain medications. Specifically, count one of the indictment, which is at issue in this appeal, stated that the defendants "being associated with an enterprise, to wit: Executive Wellness and Rehabilitation, did participate in, directly and indirectly, such enterprise through a pattern of racketeering activity, as more particularly described in this count and this indictment, which counts are incorporated herein...." The same count says the "pattern of racketeering activity consisted of the following: between the 20th day of January 2012 and the 12th day of July 2012 in Gwinnett County, Georgia, the accused did commit the offense of Violation of the Georgia Controlled Substances Act: Unauthorized Distribution (Georgia Code § 16-13-43) in that the said accused unlawfully obtained possession of oxycodone, a Schedule II Controlled Substance, by withholding information from various practitioners...." The additional counts of the indictment alleged that Kimbrough and Mayfield violated § 16-13-43 in two ways. First, the indictment alleged that each obtained oxycodone "by subterfuge, in that the accused did conceal the fact that she had previously obtained a prescription for the same or similar controlled substance...." Second, the indictment alleged they had obtained oxycodone "by withholding information from a practitioner...that the accused had obtained a controlled substance of a similar therapeutic use in a concurrent time period from another practitioner...." Kimbrough and Mayfield filed a "special demurrer" to the RICO count of the indictment, arguing that count one failed to inform them of the manner in which they allegedly participated in the enterprise; the enterprise's relationship to the alleged racketeering activity; and which counts in the indictment constituted the "predicate acts." Under RICO, predicate acts are related acts of racketeering that are necessary to establish a pattern. In the indictment, all four of the defendants were charged in count one, which alleged they had violated RICO. Each was then charged separately with the predicate acts in the following 21 counts in the indictment. While both women were charged with illegally obtaining oxycodone, two counts against only Mayfield alleged that she also illegally obtained hydrocodone, a separate controlled substance under the Georgia Code. In February 2015, following a hearing, the trial court denied Kimbrough's and Mayfield's special demurrer. The women appealed, and in March 2016, the Court of Appeals upheld the trial court's ruling. "We reject the defendants' arguments that the

indictment does not sufficiently allege the manner in which they participated in the enterprise and the enterprise's relationship to the alleged racketeering activity," the appellate court's opinion says. The women now appeal to the Georgia Supreme Court, which agreed to review the case to determine whether the Court of Appeals was correct in upholding the trial court's denial of the women's special demurrer.

ARGUMENTS: Attorneys for Kimbrough and Mayfield argue the Court of Appeals was wrong in concluding that the indictment is sufficient to apprise the women of the manner in which the State alleges they violated the RICO Act. The appellate court ruled that the indictment alleges they participated in the enterprise by committing the predicate acts, and the indictment alleges a "nexus" – or a connection – between the predicate acts and the enterprise by use of the proposition, "through." But the Court of Appeals used the wrong analysis, the attorneys argue. Kimbrough and Mayfield are entitled to know how they "participated" in the enterprise. "Nowhere in the indictment does it explain how the defendants violated Georgia's RICO law by obtaining these prescription drugs, or how they participated in the enterprise by obtaining the prescriptions," the women's attorneys argue in briefs. "It does not allege that they sold the prescriptions at Executive Wellness, or that they sold the prescriptions at all, or that the doctors named in the indictment worked at Executive Wellness. The indictment provides no information as to how the State thinks Mayfield and Kimbrough participated in Executive Wellness through this alleged pattern of racketeering activity." Because the indictment fails to sufficiently apprise Kimbrough and Mayfield of the allegations against which they must be prepared to defend themselves, the Georgia Supreme Court should reverse the ruling by the Court of Appeals, the women's attorneys argue.

The Gwinnett District Attorney's office, representing the State, argues the Court of Appeals correctly determined that the trial court did not err when it denied the women's challenge of count one of the indictment. The trial court did not use the wrong test. "The rule for a defendant who has timely filed a special demurrer is that he or she 'is entitled to an indictment perfect in form and substance,'" the State argues in briefs. "The true test of whether an indictment can withstand a special demurrer is 'whether [the indictment] contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet....'" The language in count one of the indictment "includes the elements of the crime alleged and indicates that the method by which those elements are satisfied are through particular violations of statute and that those violations are further outlined and incorporated in later counts of the indictment," the State argues. "The predicate acts, as outlined in counts two through twenty-two as they apply to appellants [i.e. Kimbrough and Mayfield], include the applicable date, the name of the physician involved, the type of controlled substance, and the method of unlawfully obtaining the controlled substance. This specific information, when incorporated into count one, add the necessary details to enable the appellants to prepare a defense as well as fend off any additional prosecutions for the same conduct." The indictment also "sufficiently outlines 'how' the appellants are alleged to have participated in a pattern of racketeering activity to withstand a special demurrer," the State contends. "An indictment does not have to allege every detail of a crime, and generally, tracking the language of the statute and including particular facts to allow a defendant to be able to prepare a defense will be sufficient." Here, the Court of Appeals found that the RICO count of the indictment "largely tracks the language of the statute." While the women claim the indictment failed to allege how they

“participated in the enterprise,” count one makes it clear that they did so “by obtaining controlled substances either by withholding information from practitioners or by subterfuge.” They participated in the enterprise, Executive Wellness, “through a pattern of racketeering activity, and that racketeering activity is described in counts two through twenty-two,” the State argues.

Attorneys for Appellants (Kimbrough): Janice Singer-Capek, Amanda Palmer

Attorneys for Appellee (State): Daniel Porter, District Attorney, Jon Setzer, Asst. D.A.