FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D2023-0506

STATE OF FLORIDA,

Appellant,

v.

DELMETRICE ROGERS,

Appellee.

On appeal from the Circuit Court for Leon County.
Joshua M. Hawkes, Judge.

July 24, 2024

LEWIS, J.

The sole issue in this appeal is whether the trial court erred in suppressing the evidence against Appellee, Delmetrice Rogers, based upon its determination that Florida's Statewide Prosecutor, Nicholas Cox, is not a "principal prosecuting attorney of any political subdivision" as that term is used in the Federal Wiretap Act and, thus, could not authorize the application for the wiretap at issue. For the following reasons, we affirm. In doing so, we offer no opinion on whether the Statewide Prosecutor is the "principal prosecuting attorney of any State" under the Act because that issue is not properly before us.

Factual Background

In February 2021, Florida's Statewide Prosecutor authorized an application to the Circuit Court for Leon County for an order approving a wiretap for a phone number associated with Appellee. He did so under the authority of section 934.07, Florida Statutes, which grants "[t]he Governor, the Attorney General, the statewide prosecutor, or any state attorney" the power to authorize an application to a state court of competent jurisdiction for an order approving the interception of wire, oral, or electronic communications. The State filed for a search warrant of Appellee's residence based on what it learned through the wiretap. Thereafter, the State charged Appellee with various drug offenses.

Appellee moved to suppress all evidence derived from what he claimed was an illegally approved wiretap. Appellee relied upon 18 U.S.C. § 2516(2), a provision in the Federal Wiretap Act, which authorizes two categories of individuals to apply to state courts for orders authorizing wiretaps: (1) the "principal prosecuting attorney of any State" or (2) the "principal prosecuting attorney of any political subdivision thereof." Appellee asserted that section 934.07's grant of power to the Statewide Prosecutor to authorize applications to state courts for wiretaps violated federal law because that position does not fit into either federally permissible category. Appellee contended that the only two people authorized to apply for an order authorizing a wiretap in Leon County are Attorney General Ashley Moody and State Attorney Jack Campbell.

In its response to the motion to suppress, the State argued that the Statewide Prosecutor is authorized to make wiretap applications to state courts under the Federal Wiretap Act because he is the principal prosecuting attorney of a political subdivision. During the suppression hearing, the State similarly argued that the Statewide Prosecutor is "in his own political subdivision," and it contended in its response to Appellee's post-hearing memorandum of law that "the only issue before this Court is whether the Statewide Prosecutor is a principal prosecuting attorney 'of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge.'"

In the Order on Motion to Suppress, the trial court rejected the State's political subdivision argument, setting forth in pertinent part as follows:

> [T]he federal scheme sets forth the following requirements: (1) there has to be a state statute authorizing wiretap applications (Florida's statute is § 934.07); (2) the state has to designate certain "principal prosecuting attorney[s]" to authorize applications; (3) the applications have to be approved by court order; (4) there has to be an enumerated offense being investigated (with a few catchall provisions); and (5) that offense also has to be designated in the state statute (hereinafter referred to as Elements (1)-(5)).
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> Florida case law has found that the federal Wiretap Act "preempts the field of wiretapping and electronic surveillance and limits a state's authority to legislate in this area." . . .
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> Specifically at issue is the authority of the Statewide Prosecutor to authorize wiretap applications. In order to address that issue, more background on the Statewide Prosecutor is necessary. Florida Statutes address the Statewide Prosecutor in section 16.56. Pertinent provisions include: the office is housed in the Department of Legal Affairs (§ (1)); the office has jurisdiction when an enumerated offense occurs in two or more judicial circuits (§ (1)(a)); the statewide prosecutor is appointed by the Attorney General on nomination from the judicial nominating commission of the Florida Supreme Court and is removable by the Attorney General (§ (2)); if removed the office should be filled within 60 days and the Attorney General assumes the office's duties in the interim (§ (2)).
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> The crux of the Defendant's argument is that federal law only allows state wiretap applications to be authorized under two categories, *i.e.*, (I) the "principal prosecuting attorney of any State, or (II) the principal

prosecuting attorney of any political subdivision thereof." The Defendant argues that the Statewide Prosecutor fits under neither category. The State agrees as to Category I, arguing instead, that the Statewide Prosecutor is permitted to authorize wiretap applications under Category II.

. . . .

The State argues the Defendant's exact argument has already been raised and dismissed, citing to *Bell v. Sec'y, Dep't of Corr.*, Case No. 17-250, 2018 WL 10425948 (M.D. Fla. Feb. 12, 2018). *Bell* has no precedential value for this issue. For one, it is a federal habeas opinion, under a "mandatory and difficult to meet" burden with respect to a claim adjudicated on the merits in state court. *Id.* at 2. *Bell* found that the petitioner had not met that burden because the state court's determination was not "contrary to, or involv[ing] an unreasonable application of, clearly established federal law." *Id.* at *4. That is, *Bell* was looking for a clear case in federal law that said Florida's Statewide Prosecutor is not permitted to authorize wiretap applications: obviously, no such case exists. Second, *Bell* notes that the state trial court's determination was per curiam affirmed, a result with no precedential value. . . . Finally, the basis of the trial court's ruling in *Bell* was that the Statewide Prosecutor is "a political subdivision of the Attorney General's office." *Bell*, *4. The Court disagrees with that finding as set forth below.

As noted, the State proceeds under the theory that the Statewide Prosecutor is a permissible applicant under the Wiretap Act as the principal prosecuting authority of any political subdivision. The Court agrees with the Defendant's position on that issue. Florida's 20 judicial circuits are political subdivisions, each consisting of one or more counties. §§ 26.021 Fla. Stat. ("The state is divided into 20 judicial circuits"); 27.01, Fla. Stat. (creating one state attorney for every judicial circuit); 27.50, Fla. Stat. (same as to public defenders); *see also*

POLITICAL SUBDIVISION, Black's Law Dictionary (11th ed. 2019) ("A division of a state that exists primarily to discharge some function of local government."). Thus, the relevant political subdivision is a judicial circuit, created by Florida Statute, consisting of one or more counties, and is responsible for the local government function of implementing Florida's criminal justice system.

The definition of a political subdivision in Florida Statutes comports with this commonsense understanding: "The words 'public body,' 'body politic,' or 'political subdivision' include counties, cities, towns, villages, special tax school districts, special road and bridge districts. bridge districts, and all other districts in this state." § 1.01(8), Fla. Stat. The Court does not view "political" in the Wiretap Act's use of "political subdivision" as requiring an election (prosecuting attorneys could be appointed), but it refers to the body politic, or in other words, a group of people formed together for purposes of the governmental function of criminal justice. Other states may utilize counties for this purpose, Florida uses judicial circuits.

But the Statewide Prosecutor is not a political subdivision either geographically or bureaucratically. Geographically, the Statewide Prosecutor's jurisdiction shifts with each case, it requires two or more judicial circuits, they do not even have to be contiguous, they could in fact. be the entire state. The boundaries are determined by the scope of the criminal enterprise, not a specific Florida statute creating a district. Bureaucratically, the Statewide Prosecutor is housed within the Department of Legal Affairs, *i.e.*, within and under the auspices of the Attorney General. The Statewide Prosecutor is not a political subdivision of the Attorney General just as the Court is not a political subdivision of the Second Judicial Circuit. If departmental divisions satisfy the Wiretap Act's use of political subdivisions, the state attorney for the Second Judicial Circuit could then claim each of his four division

chiefs in Leon County are the principal prosecuting authorities of their respective "political subdivisions," and they could then authorize wiretap applications. The phrase in the Wiretap Act does not allow such an expansive reading.

Even if the phrase were stretched beyond its ordinary meaning to include the Statewide Prosecutor, the other half of the requirement, "principal" also shows how the State's position must fail. The Statewide Prosecutor has, at best, concurrent jurisdiction. Art. IV, § 4(b), Fla. Const.; *see also Spaulding v. State*, 965 So. 2d 350, 351 (Fla. 4th DCA 2007) ("statewide prosecutor [does not have] exclusive jurisdiction to prosecute continuing offenses that span multiple counties"). Assume then that the Statewide Prosecutor is investigating a case that takes place in the First and Second Judicial Circuits. Each of those state attorneys would have as much, or arguably more, authority to bring the case in their respective circuits. *See* § 910.05 (case can be brought in any county where part of crime committed).

Further, the Statewide Prosecutor can only pursue certain crimes while the state attorneys are virtually unlimited in scope. *Compare* § 16.56(a), Fla. Stat. *with* § 27.02(1). One thing clear from Florida's structure is that the Statewide Prosecutor is not in a position principal to the elected state attorneys. In the final analysis, the Statewide Prosecutor does not have a political subdivision in Florida. All he has is jurisdiction, sometimes.

To support its argument, the State spends a great deal of effort emphasizing federal courts' deference to different state statutory schemes designed to comply with the Wiretap Act. *See, e.g., United States v. Lanza*, 341 F. Supp. 405, 410 (M.D. Fla. 1972) ("The section [§ 2516(2)] must be construed so as to permit each state to fit its scheme into the framework of the federal statute even though the distribution of power or the names of the officers may differ from state to state."). That point does

not apply to the issue in this case. Federal courts' willingness to defer to Florida's statute does not advance the statutory interpretation question.

The State also expends much effort trying to argue that Florida's designation of the Statewide Prosecutor fits the intent of the Wiretap Act because it ensures that authorizations are made at the "highest practicable policy-making levels." While plenty of courts have divined this policy intent of the Wiretap Act, it is not actually stated in the act. Instead, it comes from a passé reliance on legislative history, *See, e.g., Lanza*, 341 F. Supp. at 408 (citing Senate Report No. 1097). *Lanza* is a good example of this ends-justifies-the-means approach to statutory interpretation. *Lanza* found the Governor was a permissible authorizer under the Wiretap Act because the defendants received "more protection, rather than less, than the federal statute requires." *Lanza*, 341 F. Supp. at 410. The order does not interpret the statute so much as consider what the statute should do and ask whether what happened was close enough.

Notably, the State cites ANTONIN SCALIA & BRYAN A. GARNER, READING LAW (2012) throughout its written submissions, but neglects those portions that eschew the intent-driven type of interpretation it is advocating. *See, e.g.*, § 58 "The false notion that the spirit of a statute should prevail over its letter." § 66 "The false notion that committee reports and floor speeches are worthwhile aids in statutory construction." That latter myth that the authors seek to dispel is the largest section in the book.

Moreover, the federal side of the statute clearly abandoned the political accountability rationale as seemingly every prosecuting attorney at the federal level can authorize wiretap applications. 18 U.S.C. § 2516(3) ("Any attorney for the Government (as such term is defined for the purposes of the Federal Rules of Criminal Procedure) may authorize an application to a Federal judge"). That sweeping provision was added later;

initially, the federal government was limited to the attorney general and certain deputies. 18 U.S.C. § 2516(1); *see also* Pub. L. No. 99–508, § 105 (HR 4952), 100 Stat. 1848 (1986) (adding 18 U.S.C. § 2516(3)). Thus, to the extent the Senate Report had any interpretative utility, it has since been undermined by revisions to the statute.

Finally, the supposed intent proves too much. The Wiretap Act allows state officials to be the principal prosecuting authority of any political subdivision. Many states exercise this at the county level. The Court does not see how, for example, Virginia's 120 commonwealth attorneys, all enforcing their own policy preferences regarding wiretaps, adds any political accountability. Centralized authority and policymaking do not inform the statutory interpretation.

The State argues that reading the statute the way the Defendant does would lead to an absurd result, noting it would basically brush aside almost 40 years of practice. There was no testimony regarding how long the Statewide Prosecutor has been authorizing wiretaps, but the Court cannot see how it would matter. Interpreting a federal law clearly designed to preempt state laws, having been held to preempt state laws, and having been applied to override portions of Florida's law to again override the state law is not an absurd result. Instead, the State is simply arguing that a result contrary to its view is absurd.

Thus, the Court finds that the Statewide Prosecutor does not fall within the Wiretap Act's allowance for the principal prosecuting authority of any political subdivision. The more interesting issue is whether the Statewide Prosecutor is the "principal prosecuting attorney" for Florida, *i.e.*, the Statewide Prosecutor is allowed to authorize wiretap applications under the Wiretap Act and not the Attorney General.

However, the State presented and argued the issue that the Statewide Prosecutor falls under the political

> subdivision category of the Wiretap Act. *See* State's Resp. to Mtn at 6 (filed Dec. 29, 2022) ("[T]he Statewide Prosecutor is a 'principal prosecuting attorney of any political subdivision' as recognized by state law."); State's Resp. to Memo (filed Feb. 15, 2023) ("Therefore, the only issue before this Court is whether the Statewide Prosecutor is a principal prosecuting attorney 'of any political subdivision thereof ...'. As a result, this Court's analysis hinges on the interpretation of 'political subdivision.'"). *See also* State's Oral Argument.
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> This Court will not brief and argue the issue for the State. *See, e.g., Polyglycoat Corp. v. Hirsch Distributors, Inc.*, 442 So. 2d 958, 960 (Fla. 4th DCA 1983) ("This Court will not depart from its dispassionate role and become an advocate by second guessing counsel and advancing for him theories and defenses which counsel either intentionally or unintentionally has chosen not to mention.").

Based upon the foregoing, the trial court granted Appellee's motion and ordered that "[t]he evidence derived from the wiretap of the Defendant's phone and the subsequent search warrant are suppressed."

In its motion for rehearing, the State argued for the first time that the Statewide Prosecutor is Florida's principal prosecuting attorney. Appellee filed a response, and the trial court denied the motion without comment. This appeal followed.

Analysis

A trial court's ruling on a motion to suppress is presumed correct, and an appellate court must interpret the evidence and reasonable inferences derived therefrom in a manner most favorable to sustaining the trial court's ruling. *Channell v. State*, 257 So. 3d 1228, 1232 (Fla. 1st DCA 2018). An appellate court defers to the trial court's findings of fact if supported by competent, substantial evidence, but reviews de novo the application of the law to those facts. *Id.* This case involves statutory construction, which is a question of law. *Therrien v. State*, 914 So. 2d 942, 945

(Fla. 2005). To ascertain legislative intent, we look first to the plain and obvious meaning of the statute's text, which a court may discern from a dictionary. *Rollins v. Pizzarelli*, 761 So. 2d 294, 297–98 (Fla. 2000). If that language is clear and unambiguous and conveys a clear and definite meaning, we will apply that unequivocal meaning and not resort to the rules of statutory interpretation. *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984). If an ambiguity exists, the rules of statutory construction should be used to help determine the meaning of the text. *W. Fla. Reg'l Med. Ctr., Inc. v. See*, 79 So. 3d 1, 9 (Fla. 2012).

On appeal, the State's primary argument is that the Statewide Prosecutor is Florida's principal prosecuting attorney for purposes of the Federal Wiretap Act. However, as the trial court observed below, the State did not make this argument at any point prior to or during the suppression hearing. Nor did it make the argument in its response to Appellee's post-hearing legal memorandum. Although it did raise the argument in its motion for rehearing, Florida Rule of Criminal Procedure 3.192 specifically precludes the State from raising a new argument in such a motion. The rule provides that a "motion for rehearing shall state with particularity the points of law or fact that, in the opinion of the state, the court has overlooked or misapprehended in its decision, and *shall not present issues not previously raised in the proceeding*." Fla. R. Crim. P. 3.192 (emphasis added). While the trial court certainly could have exercised its inherent authority to reconsider its ruling, there is no indication in the record that the trial court addressed the State's new argument on the merits. The court simply denied the motion for rehearing without comment. As such, the State's argument that the Statewide Prosecutor is Florida's principal prosecuting attorney is not properly before us in this appeal. *See McGurn v. Scott*, 596 So. 2d 1042, 1045 n.2 (Fla. 1992) (declining to address an issue that was not ruled on by the trial court); *Glendale Fed. Sav. & Loan Ass'n v. State, Dep't of Ins.*, 485 So. 2d 1321, 1325 (Fla. 1st DCA 1986) ("It is a familiar concept of appellate review that appellate courts are loath to rule upon issues not directly ruled upon by the trial court.").

The only issue properly before us is whether the trial court erred in determining that the Statewide Prosecutor is not a principal prosecuting attorney of a political subdivision. According

to the State, the Statewide Prosecutor's political subdivision is the combination of two or more judicial circuits implicated by multi-circuit crimes falling within his investigatory and prosecutorial jurisdiction. However, for the reasons set forth in the trial court's well-reasoned order, we reject the State's political subdivision argument and affirm the order granting Appellee's motion to suppress.

AFFIRMED.

ROWE and M.K. THOMAS, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

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