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Warrants for Videotape Surveillance Issuable Despite Lack of Statutory Authority

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Cona, however, held that a motion to dismiss for insufficient evi-
dence did not preserve for the Court the issue of whether the con-
viction was based upon uncorroborated accomplice testimony.

Also noteworthy is Salla v. County of Monroe, wherein the
Court found that the privileges and immunities clause of the
United States Constitution prohibits New York State from statu-
torily mandating contract terms requiring the employment of its
residents on public works projects. In the area of criminal proce-
dure, the Court's decision in People v. Conyers held that the credi-
bility of a defendant's exculpatory trial testimony may not be im-
peached by proof of his silence at the time of his arrest, despite the
absence of Miranda warnings.

People v. Teicher, an important lower court decision com-
mented upon in The Survey, concerns the admissibility of evi-
dence gathered by means of videotape surveillance. In Teicher, the
Appellate Division, First Department, held that despite the ab-
sence of express statutory authority, a court is empowered to issue
a warrant for visual electronic surveillance. Through The Survey's
discussion of these and other refinements in New York law, it is
our intention to be of continuing assistance to the practicing
attorney.

Criminal Procedure Law

Warrants for videotape surveillance issuable despite lack of stat-
utory authority

The New York State Constitution¹ and article 700 of the CPL²

¹ N.Y. Const. art. 1, § 12. The state constitutional prohibition against warrantless tele-
   graphic and telephonic interceptions provides:

   The right of the people to be secure against unreasonable interception of tele-
   phone and telegraph communications shall not be violated, and ex parte orders or
   warrants shall issue only upon oath or affirmation that there is reasonable ground
   to believe that evidence of crime may be thus obtained . . . .

² N.Y. Const. art. 1, § 12; see Comment, Electronic Eavesdropping Under the Fourth

² CPL § 700.15 provides:

An eavesdropping warrant may issue only:
1. Upon an appropriate application made in conformity with this article; and
2. Upon probable cause to believe that a particularly described person is com-
   mitting, has committed, or is about to commit a particular designated offense; and
3. Upon probable cause to believe that particular communications concerning
   such offense will be obtained through eavesdropping; and
4. Upon a showing that normal investigative procedures have been tried and
   have failed, or reasonably appear to be unlikely to succeed if tried, or to be too
permit electronic eavesdropping by wiretaps or mechanical listening devices—pursuant to a special search warrant. No constitutional or statutory authority exists, however, for the issuance of warrants permitting videotape surveillance. Recently, in People v. Teicher, the Appellate Division, First Department, held that despite the absence of express statutory authority, videotape surveillance pursuant to a warrant issued upon a showing of probable cause was permissible under the fourth amendment.
In Teicher, the defendant, a dentist, was accused of sexually abusing several female patients while they were under anesthesia during the course of treatment. In conjunction with their investigation of these complaints, the police installed videotape equipment in the defendant's office pursuant to a court-ordered warrant. A policewoman, posing as a patient, voluntarily submitted to anesthesia while undergoing dental treatment. During the resuscitation procedure, the policewoman was allegedly subjected to non-consensual sexual contact. Prompted by the video transmission, a policeman entered the office, witnessed the conduct, and arrested the defendant. At his subsequent trial on charges of sexual abuse in the first degree, the Supreme Court, New York County, denied the defendant's motion to suppress the videotape evidence, holding that the lack of express statutory authority for videotape warrants did not preclude their issuance since a court has the inherent power to issue such warrants provided the search complies with the fourth amendment.

On appeal, the Appellate Division, First Department, affirmed, finding that the videotape was admissible into evidence. Justice Kupferman, writing for the majority, initially noted that a state

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Id. at 137, 425 N.Y.S.2d at 316.

Id. at 138, 425 N.Y.S.2d at 317. The criminal conduct occurred largely out of the camera's view.

N.Y. PENAL LAW § 130.65(2) (McKinney 1975). Teicher was convicted by the trial court of two counts of sexual abuse.

90 Misc. 2d at 643-44, 395 N.Y.S.2d at 592-93. The trial court recognized that CPL article 700 alone could not serve as the predicate for the issuance of the warrant since it deals exclusively with aural communication. The court determined, however, that visual observation fell within the definition of "property" subject to seizure in CPL article 690. Id. at 643, 395 N.Y.S.2d at 592. Thus, the court concluded that by reading CPL articles 690 and 700 together, the issuance of a videotape warrant was authorized. Id. at 644, 395 N.Y.S.2d at 593. In addition, the court found that, "in any event," courts have an inherent power to issue videotape search warrants under the fourth amendment. Id.

73 App. Div. 2d at 139, 425 N.Y.S.2d at 318. The defendant appealed his conviction of counts I and III. As to count I, the majority rejected the defendant's contention that his actions did not meet the "sexual contact" requirement of N.Y. PENAL LAW § 130.65 (McKinney 1975). Count III involved the legality of the videotape surveillance.

Presiding Justice Murphy concurred in a separate opinion. Justice Fein concurred in the opinion of Justice Murphy as to count I and the opinions of Justice Murphy and Justice Kupferman on count III. Justice Markewich concurred in a separate opinion with respect to
may afford a criminal defendant greater rights than those guaranteed by the Federal Constitution. The majority asserted, however, that those rights must be balanced against the need for effective law enforcement. Under this balancing test, Justice Kupferman concluded that no justification existed for suppressing the videotape evidence. Finally, the majority reasoned that the use of electronic devices has been sustained by the Supreme Court, and other jurisdictions have admitted videotape evidence in criminal trials even in the absence of a specific legislative sanction.

In a dissenting opinion, Justice Birns argued that the issuance of a videotape warrant without express constitutional or statutory authority was a judicial usurpation of legislative power. More-
over, the dissent contended that videotape surveillance violated an individual’s reasonable expectation of privacy, since the eavesdropping statute defines the permissible limits of intrusion into the area of personal privacy. Justice Birns concluded, therefore, that only through the imposition of statutory guidelines can the necessary balance between privacy and investigative interests be achieved.

It is submitted that the Teicher court’s affirmance of a court’s inherent power to issue warrants for videotape surveillance is supported by legal precedent. State courts have historically enjoyed broad power to assist in criminal investigations by issuing search warrants. Furthermore, prior to the enactment of eavesdropping statutes, the legality of electronic eavesdropping warrants was determined solely on fourth amendment grounds. It appears sound, therefore, to apply the standards of the fourth amendment to warrants for videotape surveillance in the absence of legislation expressly addressing their legality. It seems, moreover, that a videotape search warrant complying with the guidelines of CPL article 700 would survive fourth amendment scrutiny. Consequently,

(1979), as support for the proposition that a court is not empowered to authorize videotape surveillance without specific statutory authorization. 73 App. Div. 2d at 140-44, 425 N.Y.S.2d at 319-21 (Birns, J., dissenting). It is interesting to note, however, that Justice Stevens specifically restricted his analysis in Dalia to a federal context and excluded state courts from his discussion. 441 U.S. at 264-65 n.6 (Stevens, J., dissenting).


34 Id. at 144, 425 N.Y.S.2d at 321 (Birns, J., dissenting).

35 Id. (Birns, J., dissenting).


38 CPL § 700.15 (1971) enumerates the requirements for acquiring eavesdropping search warrants. There must be a showing of probable cause to a neutral magistrate that: (1)
there should be no constitutional objection to the issuance of videotape warrants under the *Teicher* test, even without explicit statutory authorization.\(^2\)

It is suggested, however, that because of the intrusive nature of videotape surveillance, the legislature should adopt strict guidelines governing videotape warrants.\(^3\) Where conventional means of obtaining evidence have proved ineffective, as in *Teicher*, the individual's expectation of privacy should yield.\(^3\) If less intrusive means of evidence-gathering exist, however, a balancing of the individual's rights and the need for effective law enforcement should result in a denial of a videotape warrant.\(^3\) These limitations would

\(^a\) a particular person has, is, or is about to commit an offense; (2) a particular communication relating to the crime will be intercepted; and (3) the place where the eavesdropping will take place is commonly used or associated with the suspect. *Id.* In addition, the police must show that normal investigative techniques would not succeed or are too dangerous. *Id.* The particularity required by this statute and the fact that warrants will be issued only as a "last resort," would seemingly serve to make videotape surveillance under CPL article 700 guidelines constitutional. See United States v. Cirillo, 499 F.2d 872, 878 (2d Cir.), *cert. denied*, 419 U.S. 1056 (1974); note 6 *supra*. In addition, the propriety of the decision to issue a warrant is always appealable. See Dalia v. United States, 441 U.S. 238, 258 (1979).

\(^9\) But see Note, *Electronic Visual Surveillance and the Fourth Amendment: The Arrivial of Big Brother?*, 3 Hastings Const. L.Q. 261, 294-99 (1976) [hereinafter cited as *Electronic Visual Surveillance*], in which the author suggests that a videotape intrusion constitutes an unreasonable search and seizure, since conventional methods of investigation and authorized eavesdropping procedures were sufficient to aid effective law enforcement. *Id.* at 284-99.

\(^{29}\) See generally *Electronic Visual Surveillance, supra* note 29, at 264-66. A shortening of the effective period of a videotape warrant, for example, may be the most logical way to minimize the privacy invasion. Article 700 states that the warrant is valid only for the lesser of 30 days or the time needed to produce the desired evidence. CPL § 700.10(2) (1971). It is suggested, however, that a 10-day time limit would discourage investigators from seeking videotape warrants except where there is the greatest likelihood of success and would ensure a new probable cause showing at more frequent junctures. Cf. CPL §§ 700.15, 700.40 (1971) (new showing of probable cause necessary to renew the eavesdropping warrant after expiration of 30-day period). It is also suggested that the police be required to show that normal investigative techniques, including eavesdropping, have in fact failed, rather than showing that they would not have succeeded, see CPL § 700.15 (1971). This would guarantee that videotape warrants were issued only as a last resort.

\(^{31}\) In *Teicher*, the police had unsuccessfully attempted to gather evidence by normal investigative techniques and by eavesdropping. 90 Misc. 2d at 649, 395 N.Y.S.2d at 596. Moreover, the patients were unable to satisfactorily relate the extent of the sexual contact because they were sedated at the time of its occurrence. *Id.* Additionally, there was a reasonable basis for believing that the dentist would commit the same offense in the presence of the undercover policewoman, *id.* at 648, 395 N.Y.S.2d at 596, and that the alleged criminal activity would be intercepted by focusing the camera on the dental chair, the scene of the three reported sexual incidents. *Id.* at 647, 395 N.Y.S.2d at 595.

\(^{22}\) Cf. United States v. Tortorello, 480 F.2d 764, 784 (2d Cir.), *cert. denied*, 414 U.S. 866 (1973) (unnecessary intrusion upon privacy must be avoided); CPL § 700.15 (1971) (normal
serve the dual purpose of decreasing the probability of unreasonable intrusions while maintaining the effectiveness of investigative procedures.

Kerry B. Conners

**EDUCATION LAW**

*Voluntary preemployment waiver of tenure rights held not to violate public policy*

In order to insure the employment of quality personnel in the public education system, the Education Law provides teachers with certain tenure rights guaranteeing job security. Historically, investigative techniques would fail.


As a precondition to eligibility for receiving tenure, appointment to a probationary period not exceeding three years is required. N.Y. Educ. Law §§ 3012(1), 3014(1) (McKinney Supp. 1971-1979). Probationary appointment is made by majority vote of the BOCES or school board upon the recommendation of the district superintendent. Id. To attain the position of a tenured teacher, the district superintendent must, on or before the expiration of the probationary period, recommend that the board grant tenure to those probationary teachers who have been found to be "competent, efficient and satisfactory." Id. (2), 3014(2). It is then within the board's discretion to grant or deny tenure. Bergstein v. Board of Educ., 34 N.Y.2d 318, 322, 313 N.E.2d 767, 769, 357 N.Y.S.2d 465, 468 (1974). Probationary teachers who are not recommended for tenure must be notified in writing by the district superintendent no later than sixty days prior to the expiration of the probationary period. Pavilion Cent. School Dist. v. Pavilion Faculty Ass'n, 51 App. Div. 2d 119, 380 N.Y.S.2d 387 (4th Dep't 1976); N.Y. Educ. Law §§ 3012(2), 3014(2) (McKinney Supp. 1971-1979). Failure to give notice to the teacher as required may result in tenure by estoppel and acquiescence. See Ricca v. Board of Educ., 47 N.Y.2d 385, 392, 391 N.E.2d 1322, 1326, 418 N.Y.S.2d 345, 349 (1979); Baer v. Nyquist, 34 N.Y.2d 291, 313 N.E.2d 751, 357 N.Y.S.2d 442 (1974); Matthews v. Nyquist, 67 App. Div. 2d 790, 412 N.Y.S.2d 501 (3rd Dep't 1979).

Once granted tenure, a teacher can only be removed by a school board acting in strict compliance with the Education Law. See N.Y. Educ. Law §§ 3012, 3014, 3020-a (McKinney Supp. 1971-1979). Indeed, a tenured teacher has been held to enjoy a constitutionally protected property interest in his compensation and employment which cannot be deprived without due process. Abramovich v. Board of Educ., 91 Misc. 2d 481, 485, 398 N.Y.S.2d 311, 315 (Sup. Ct. Suffolk County 1977), rev'd on other grounds, 62 App. Div. 2d 252, 403 N.Y.S.2d 919 (2d Dep't 1978), aff'd, 46 N.Y.2d 450, 386 N.E.2d 1077, 414 N.Y.S.2d 109, cert.