

CASE TRANSLATION: DENMARK

CASE CITATION:
U.2011.2396V

NAME AND LEVEL OF COURT:
High Court of Western Denmark

DATE OF DECISION:
11 May 2011

MEMBERS OF THE COURT:
**Henrik Bjørnager Nielsen, Bjerg Hansen
and Mette Øvre**

LAWYER FOR THE CLAIMANT:
The prosecution

LAWYER FOR THE DEFENDANT:
Hans Kjærgaard

Stolen motor vehicle; SIM card inside the vehicle; powers of the police to require the telephone company to provide an accurate bearing on the location of the SIM card; Denmark

Eastern High Court 2nd Dept. S-0518-11 – Viborg, May 11th 2011

Judges: Henrik Bjørnager Nielsen, Bjerg Hansen and Mette Øvre (kst.)¹

Appeal of order regarding telecommunications surveillance decided by the Court in Århus on 24 February 2011.

In court records of 24 February 2011 from the Court in Århus, it is stated, Case No. 5-1315/2011:

The prosecutor stated his case and informed the court that the police were seeking assistance from Telenor A/S to locate a stolen car.

The car, a ---, with registration number ---, belongs to F ---. The car was stolen from the victim's residence by unknown offenders in the period between --- and ---.

As anti-theft protection, the car was, amongst other things, equipped with two transmitters: a GPS transmitter and a mobile telephone unit (a SIM card). As can be seen from professional thefts of expensive cars,² the offender had mounted a jammer in the car that interferes with the signal from the GPS transmitter. The jammer also disrupts the signal from the SIM card, but a signal can still be picked up from this device, which technically acts as a one-way mobile telephone.

As shown in the attached report, the police obtained

the consent of the victim, F, to obtain information about the location of the mobile telephone (or rather the SIM card and hence the car). Against this background, the police requested and received *mast information* from the telephone company Telenor (i.e. the identity of the telephone mast the mobile telephone in question had been connected to at a given time).

As also shown in the attached report, the mast information did not provide the desired result – the mast information is, in this case, so vague that the police were not able to locate the car. Therefore, the police requested Telenor A/S to make a 'cross bearing' to locate the mobile telephone more accurately.

The prosecutor stated that a trace may be established consisting either of a cross bearing, if more masts are in the area, or, further clarifications as to the direction and distance from the transmitter mast.

The prosecutor explained that it is Telenor's position that such a trace requires a court order and cannot be executed solely on the basis of a consent form.

The prosecution claims:

Primarily: It is the position of the prosecution that a cross bearing of a mobile telephone or a SIM card is, or should be, treated as a telecommunications surveillance, under Administration of Justice Act § 791 a, paragraph 5, and that this can be executed without a court order when the telephone's rightful owner consents to the disclosure of the information.

Alternatively, the prosecution requests, under the Administration of Justice Act § 783, paragraph 1, pursuant to § 791 a paragraph 5, that Telenor A/S be ordered to hand over information regarding the locating of mobile telephone no. ---, belonging to F, CPR number ---, in a case involving the taking of a motor vehicle without consent under aggravating circumstances, pursuant

¹ The 'kst.' means this is a judge who is 'konstitueret', meaning a temporarily appointed judge. It is a trial period for judges lasting nine months, where the performance is evaluated. Their role is the same as any

other judge. This is similar to a Recorder in England and Wales.

² For more information and further references, see Stephen Mason, 'Vehicle remote keyless entry systems and engine immobilisers: do

not believe the insurer that they are perfect', *Computer Law and Security Review*, Volume 28, Issue 2 (April 2012), 195 – 200.

to the Criminal Code § 293 a, second section. In this case, it is requested that the duration mentioned in the Administration of Justice Act § 783, paragraph 3, be fixed to 4 weeks.

Pleas:

It is alleged that telecommunications surveillance can be carried out with the consent of the rightful owner of the mobile telephone.

In the present case, the basis of which is not a question of a coercive measure – but a question of information that the victim in this case – it must be assumed – could themselves ask the telephone company to disclose.

This is the situation in the present case, and the telephone company must therefore provide the information without a court order pursuant to the Administration of Justice Act § 791 a, paragraph 6.

It is noted that there is no hard-and-fast boundary between (1) disclosure of stored mast information, (2) telecommunications information and (3) telecommunications surveillance. These interventions can all be used to locate a mobile telephone. The interventions are, however, regulated by three different sets of rules.

(1) Stored (historical) mast information may be disclosed to the police according to the rules applicable to discovery. Neither the conditions of the Administration of Justice Act § 780 (interception, etc.) nor § 791 a, paragraph 5, (on telecommunications surveillance) are required to be met in this situation. This follows the Supreme Court's judgment of 22 July 2009.

This must mean that the police can demand this information disclosed by the telephone company without a court order if the person entitled to the information consents to it. This is certainly the result in other cases where a third party has information or documents, which the 'owner' consents to being obtained.

(2) In contrast, telecommunications information under § 780, paragraph 1, subparagraph 3, is supplied only by court order. This also applies when the owner of the telephone has consented in accordance with § 786, paragraph 2. It may be assumed that this rule was inserted in the Administration of Justice Act because stored telecommunications data may contain information about third parties whose interests, where appropriate, must be protected by the court.

(3) Regarding telecommunications surveillance, there is no third party interest to consider that may lead

to the equating of the intervention with the retrieval of telecommunications information, so that a rule, equivalent to § 786, paragraph 2, should apply.

An interpretation of the Administration of Justice Act § 791 a, speaks in favour of this result: the procedure is separately regulated in § 791 a, paragraph 5 – not in § 780. Both the indication requirement and criminality requirement are laxer than in cases of interception of communications under § 781.³

It also follows from § 791 a, paragraph 4 that the victim may consent to the police carrying out surveillance in places not freely accessible by the public, according to the provision's paragraphs 1-3. For instance, placing hidden cameras in people's bedrooms can be said to be a very intrusive intervention, which in this situation can take place without judicial review. When this is the case, then a fortiori, the victim can consent to telecommunications surveillance under paragraph 5.

Substantive considerations also speak in favour of this result – there do not seem to be any competing interests that make this legal status subject to concern: the telephone has been stolen. In this situation, there is no requirement to consider the thief's interests.

If the court cannot accept the prosecution's view, then alternatively the conditions for telecommunications surveillance are met in accordance with § 791 a, paragraph 5. The procedure is essential to the investigation, because there are no other alternative means to find the car, and the Criminal Code § 293 a provides adequate statutory authority for punishment.

The appointed lawyer, Hans Kjærgaard, had no comment on that Telenor A/S, pursuant to the Administration of Justice Act § 783, paragraph 1, see § 791, paragraph 5, is ordered to disclose information regarding the location of mobile telephone no ---. However, there is no legal basis for this to happen without a court order on the basis of the consent of the holder of the telephone.

The court ordered

Order:

A cross bearing of a mobile telephone or a SIM card is or should be treated as telecommunications surveillance, see the Administration of Justice Act § 791 a, paragraph 5.

There does not appear to be a legal basis for carrying out such an intervention without a court order – even

³ The indication requirement means that there have to be specific reasons to believe that the search will result in evidence that may be seized.

if the telephone's rightful owner has consented to the disclosure of the information.

The rule on consent in the Administration of Justice Act § 791, paragraph 4, on surveillance of a place not freely accessible by the public, is not to be interpreted broadly so as to apply it to the intervention in the present case.

Obtaining a court order is therefore necessary pursuant to the Administration of Justice Act § 783, paragraph 1.

Since the requirements of the Administration of Justice Act § 791 a, paragraph 5 are met, the court finds for the prosecution as to its alternative claim.

It is held:

East Jutland Police may obtain information from Telenor Denmark A/S regarding the locating of mobile telephone number --- belonging to F.

The time period within which the intervention can be executed shall be fixed to 4 weeks.

Western High Court order.

On 24 February 2011, the District Court, pursuant to the Administration of Justice Act § 791 a, paragraph 5, see § 783, paragraph 1, ruled that East Jutland Police may obtain information from Telenor Denmark A/S regarding the locating of mobile telephone number --- belonging to F.

The time period within which the intervention can be executed shall be fixed to 4 weeks.

The ruling is appealed by East Jutland Police, claiming the District Court's order be changed so that Telenor Denmark A/S is ordered to disclose to the police the aforementioned information without a court order being necessary.

The appointed lawyer, Hans Kjærgaard, primarily claimed the appeal be dismissed; in the alternative the prior order affirmed.

The court hearing was held in the District Court in camera.

The High Court ordered

Order:

The District Court has, in its order, addressed whether a court order is required. This involves a decision in relation to the police. Thus the High Court has no basis on which to dismiss the appeal.

The procedure may under these circumstances be treated as telecommunications surveillance, pursuant to the Administration of Justice Act § 791 a, paragraph 5.

It is accepted on the grounds stated by the District Court, that the intervention pursuant to the Administration of Justice Act § 783, paragraph 1, requires a court order, even if the holder has consented to the disclosure of such information.

The High Court therefore affirms the order.

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