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Admissibility of Voiceprints Not Limited to "Corroborative Purposes" Unted States v. Franks

R. Brent Chapman

CRIMINAL LAW

Admissibility of Voiceprints Not Limited to "Corroborative Purposes"

United States v. Franks, 511 F.2d 25 (6th Cir. 1975)

ON FEBRUARY 12, 1975, the United States Court of Appeals for the Sixth Circuit decided *United States v. Franks*,[1] affirming a district court ruling, which permitted the use of voiceprints[2] for purposes of identification and marking the first occasion in which a circuit court had held such evidence admissible.

Defendants Franks and Britton were convicted in the United States District Court for the Western District of Tennessee of obstructing commerce in violation of the Hobbs Act,[3] and of 18 U.S.C. Section 2 (1970).[4] The jury found the pair guilty of procuring others to bomb two Memphis businesses, namely Jett Hair Care Center and Tri-State Beauty Supply, whose operations affected interstate commerce. In addition, Franks and Britton were convicted of aiding and abetting the malicious damaging of, and the attempt to destroy the establishments by means of an explosive,

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[1] 511 F.2d 25 (6th Cir. 1975).

[2] Voiceprints are photographic representations of sound waves produced by a device called a spectograph. The voiceprint technique is based on the theory that no two human voices are exactly alike, thus resulting in identification by comparing the voiceprint of an unidentified person with that of an identified one. If the two prints should match, the unidentified speaker has been determined. Although seemingly akin to fingerprint identification, voiceprint analysis is often likened to the lie detection technique in that the reliability depends significantly on the expertise of the examiner. Detractors of voiceprints dispute the uniqueness of a person's voice, and alternatively question the effects of the passing of time or impersonation in relation to the spectrogram produced. Opponents characterize the necessary subjective spectrographic analysis as an increased chance for error of an already questionable method of identification. *See* Kamine, *Voiceprint Technique: The Structure and Reliability*, 6 SAN DIEGO L. REV. 213 (1969); *Kersta, Speaker Recognition and Identification by Voiceprints*, 40 CONN. BAR J. 586 (1966).

[3] 18 U.S.C. § 1951(a) (1970), which reads:

> Whoever in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

[4] That section reads as follows:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

in violation of 18 U.S.C. Section 844(a) (1970).[5] A third defendant, Mitchell, was tried along with Franks and Britton, and found guilty of knowingly causing blasting caps to be transported in interstate commerce without a license in violation of 18 U.S.C. Section 842(a)(3)(A) (1970).[6] Prior to trial, defendants Britton and Mitchell were compelled by court order to submit voice exemplars which were subsequently compared to recorded telephone conversations involving the alleged illegal acts. The results of the spectographic analysis were introduced into evidence during the course of the trial.

The trio combined in asserting 25 claims on appeal, but the appellate court found no reversible error.[7] This note is primarily concerned with the ramifications of two of the claims lodged by Britton and Mitchell: (1) voiceprint analysis is too inaccurate to be admitted into evidence;[8] and, (2) the court order compelling them to give voice exemplars violated their constitutional right against unreasonable search and seizure and their constitutional privilege against self-incrimination.[9]

In support of the first contention, the appellants relied on the sole federal circuit decision speaking to the admissibility of voiceprints, *United States v. Addison,*[10] which held voiceprints inadmissible. The *Addison* opinion was itself based on *Frye v. United States,*[11] long recognized as the leading case in determining what scientific evidence should be admissible. The *Frye* standard maintains:

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized and expert testimony deduced from well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have general acceptance in the particular field in which it belongs.[12]

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[5] That section reads, in pertinent part, as follows:

> Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not more than ten years or fined not more than $10,000, or both. . . .

[6] "It shall be unlawful for any person . . . other than a licensee or permittee knowingly . . . to transport, ship, cause to be transported, or receive in interstate or foreign commerce any explosive materials. . . ."

[7] 511 F.2d at 28.

[8] *Id.* at 33.

[9] *Id.* at 32.

[10] 498 F.2d 741 (D.C. Cir. 1974), *aff'g,* 337 F. Supp. 641 (D.D.C. 1972) (involving the spectographic identification of defendant Raymond as the maker of a telephone call to which a police officer was responding when shot).

[11] 293 F. 1013 (D.C. Cir. 1923).

[12] *Id.* at 1014.

This test reflects an understanding that scientific proof may assume a mystic infallibility in the eyes of a jury and tries to assure that a minimal reserve of experts exists to actually exercise a "scientific determination." Thus, the *Frye* approach limits the factfinding process by excluding scientific evidence of only marginal reliability,[13] seeking to eliminate those tests which might be deemed accurate by the trier of fact solely because the particular expert on the witness stand so testifies.

The *Addison* court, taking note of the substantial number of experts critical of voiceprint reliability, found the scientific community too much in conflict to sustain spectogram comparison.[14] The *Franks* opinion acknowledged the variance of federal and scientific opinion relating to the use of voiceprints, but opted to base its decision on the considerable area of discretion which a trial judge enjoys in admitting or refusing evidence based on scientific processes.[15] In particular the court noted *United States v. Stifel*:[16] "[N]either newness nor lack of absolute certainty in a test suffices to render it inadmissible in court. Every useful new development must have its first day in court. And court records are full of the conflicting opinions of doctors, engineers, and accountants. . . ."[17]

The *Franks* court admitted that the *Stifel* decision applied the *Frye* standard, but deemed "general acceptance in the particular field in which it belongs" as being nearly synonymous with reliability.[18] To buttress the reliability concession, the court pointed out the trend in other jurisdictions to admit voiceprint evidence[19] and the fact that neither defendant, although airing their criticism of the technique via cross-examination, produced a witness rebutting the government's claim of accuracy.[20]

It would appear that the *Franks* court could well have rested its decision on the aspect of the trial judge's discretion, amplified by a stipulation that it was up to the trier of fact to decide what, if any, weight was to be given to the expert testimony.[21] By interjecting "reliability" as synonymous with "general acceptance," the court left the door open to the many detractors who insist that voiceprint analysis is far from a generally accepted technique in any discipline, let alone the acoustical field.[22] Moreover, the court retreated even further with

[13] C. MCCORMICK, LAW OF EVIDENCE § 203 n. 32 (2d. ed. 1972).
[14] 498 F.2d at 745.
[15] 511 F.2d at 32.
[16] 433 F.2d 431 (6th Cir. 1970), *cert. denied*, 401 U.S. 994 (1971) (permitting the admission of neutron activation analysis to identify the source of certain package fragments remaining after an explosion).
[17] *Id.* at 437.
[18] 511 F.2d at 34.
[19] *Id.* at 33.
[20] *Id.*
[21] *E.g.*, Jaster v. Arkansas Natural Gas Corp., 321 U.S. 620 (1944).
[22] *See* Jones, *Evidence vel non—The Non Sense of Voiceprint Identification*, 62 KY. L. REV. 301 (1973-74).

the intimation that had Britton and Mitchell produced experts opposed to voiceprint analysis, the court might have found voiceprints to be unreliable.

Having done little in the way of clarifying the reliability problem, and having retreated from what started out to be a marked departure from the *Frye* standard and its outgrowths,[23] the *Franks* decision does add a significant element which expands upon the admissibility of voiceprint evidence as expounded in prior case law.

Of the few appellate courts passing on voiceprint admissibility, several have expressly limited their decisions to the corroborative aspect of voiceprint identification. In 1971, the Minnesota supreme court in *State ex. rel. Trimble v. Hedman,*[24] sanctioned voiceprint identification evidence to the extent of satisfying the sufficiency of proof necessary to establish probable cause and to corroborate aural voice comparisons.[25] The *Trimble* decision was followed by the Florida appellate decision in *Worley v. State,*[26] in which evidence was already ample to sustain the conviction, the court specifically holding that it was proper to admit voiceprints to corroborate defendant identification by other means[27] and reserving judgment as to whether spectograms were limited to corroboration.[28] The most recent federal decision dealing with spectographic analysis, prior to *Franks,* was the Pennsylvania district court case of *United States v. Sample.*[29] The court permitted voiceprints to be introduced into evidence, but left little doubt that such admissibility was only for the purpose of corroborating the state's testimony in a proceeding for the revocation of probation.

The very first appellate court to approve voiceprint identification, and perhaps the most favorable decision toward admissibility prior to *Franks* was the military case of *United States v. Wright.*[30] The case involved obscene phone calls, and focused on strong identity testimony from witnesses who had heard the obscene conversations. Noting the tape recordings which were entered as evidence, the court stated that it was for the trier of fact to determine for

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[23] Of the numerous courts which have relied on the Frye standard, few have shed light on what "general acceptance" connotes other than to employ "general" in an everyday context of "extensive but not universal." *See* United States v. Zeiger, 350 F. Supp. 685 (D.D.C. 1972). A slight twist to the Frye test was introduced by People v. Williams, 169 Cal. App. 2d 858, 860-61, 331 P.2d 251 (1958), which held in admitting the results of a nalline blood test that general acceptance should be measured by those who would be expected to be familiar with its use.

[24] 291 Minn. 442, 192 N.W.2d 432 (1971).

[25] *Id.* at 457, 192 N.W.2d at 441.

[26] 263 So. 2d 613 (Fla. App. 1972).

[27] *Id.* at 614.

[28] *Id.* at 614-15.

[29] 378 F. Supp. 44 (E.D. Pa. 1974).

[30] 17 U.S.C.M.A. 183, 37 C.M.R. 447 (1967).

himself the margin of expert error in connection with the voiceprints.[31] With the emphasis placed on the strong identity testimony and existing taped conversations, the opinion implies that voiceprints were to be used only for corroborative purposes. Soon after the *Worley* decision came *Alea v. State,*[32] a case in which once again the evidence was already ample for conviction and in which two witnesses had already made positive identification with the aid of spectograms.[33] The *Alea* court frequently referred to the *Worley* rationale, thus limiting voiceprints for corroboration purposes only.

A pair of 1973 decisions, the California appellate opinion of *Hodo v. Superior Court,*[34] and the District of Columbia Superior Court judgment of *United States v. Brown,*[35] found spectograms admissible in criminal cases, but dealt primarily with the test to be applied in determining reliability rather than the situations in which it would be held admissible.

Other courts have not been disposed to admit voiceprint evidence for any purpose. In 1967 and 1968 respectively, the New Jersey supreme court in *State v. Cary*[36] and a California appellate court in *People v. King*[37] rejected voiceprints as lacking in the requisite reliability. Following these decisions the trend toward acceptability pressed ever forward, but an obstacle fell suddenly in the road with the 1973 opinion of *People v. Chapter,*[38] which flatly rejected the reliability of voiceprints for any purpose.

The *Franks* court, unlike the bulk of other courts which have admitted spectographic analysis, does not limit the voiceprint to corroborative purposes, at least not expressly. Obviously the voiceprint evidence was used in conjunction with the testimony of the government informants, but the *Franks* opinion fails to tie the knot between them. This fact, coupled with the court's emphasis on the *Stifel* test, brings the *Franks* decision at least arguably closer than any prior opinion to breaking the bond of using voiceprints merely for the corroboration of other evidence.

Appellants' second contention, that the court order compelling them to

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[31] *Id.* at 191, 37 C.M.R. at 453.
[32] 265 So. 2d 96 (Fla. App. 1971).
[33] *Id.* at 98.
[34] 30 Cal. App. 3d 778, 106 Cal. Rptr. 547 (1973).
[35] 13 Crim. L. Rep. 2203 (D.C. Super. Ct. 1973).
[36] 49 N.J. 343, 230 A.2d 384 (1967), *on remand,* 99 N.J. Super. 323, 239 A.2d 680 (Law Div. 1968), *remanded again,* 53 N.J. 256, 250 A.2d 15 (1969), *aff'd,* 56 N.J. 16, 264 A.2d 209 (1970) (the opinion viewing the reliability of voiceprints as a collateral question which would divert attention from the important issues).
[37] 266 Cal. App. 2d 437, 72 Cal. Rptr. 478 (1968) (the court observed that a high standard for admissibility would protect the integrity of the factfinding process).
[38] 13 Crim. L. Rep. 2479 (Cal. Super Ct. Marin Cty. 1973) (the decision calling for substantial additional research before general acceptance in the scientific community, let alone the legal).

give voice exemplars violated their constitutional right against unreasonable search and seizure and their constitutional privilege against self-incrimination, was summarily dismissed by the *Franks* court's reliance upon *United States v. Dionisio.*[39] The *Dionisio* case dealt with both issues in a voice exemplar situation, but realistically was a compilation of previous decisions rendered by the Court and discussed below. In an attempt to define the scope of the self-incrimination privilege, the *Dionisio* Court noted *Schmerber v. California:*[40]

> Both federal and state courts have usually held that [the privilege] offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture. The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling "communications" or "testimony" but that compulsion which makes a suspect or accused the source of "real or physical evidence" does not violate it.[41]

This rule was followed by the court in *United States v. Wade,*[42] where a defendant, accused of bank robbery, was compelled to utter in a lineup the words allegedly spoken by the robber. The *Wade* Court stated that the accused was "required to use his voice as an identifying physical characteristic, not to speak his guilt."[43] Since a voiceprint identification is but a form of real evidence, requiring a person to produce a voice exemplar would not seem to constitute self-incrimination.

As the Court pointed out in *Schmerber,* the obtaining of physical evidence from a person produces a potential fourth amendment violation at two junctures, namely the seizure of the person to bring him into contact with the authorities and the subsequent search.[44] Had Britton and Mitchell been illegally detained the subsequently compelled voice exemplars may well have constituted a violation, but such an illegal detention was simply not in evidence.

In the case of voice exemplars, the second time interval brings into play the facets of the self-incrimination argument and an accompanying right to privacy. However, in *Katz v. United States,*[45] the Supreme Court seriously limited the right of privacy in this context by stating that the fourth amendment provided no protection for what "a person knowingly exposes to the public, even in his home or office. . . ."[46] Applying *Katz,* the *Dionisio*

[39] 410 U.S. 1 (1973) (involving compelled voice exemplars for the grand jury of transcripts taken directly from tape recordings of conversations relating to interstate gambling).
[40] 384 U.S. 757 (1966).
[41] *Id.* at 764.
[42] 388 U.S. 218 (1967).
[43] *Id.* at 222-23.
[44] 384 U.S. 767 (1966).
[45] 389 U.S. 347 (1967).
[46] 389 U.S. at 351.

decision alluded to the fact that a person's voice, in opposition to the content of a specific conversation, is repeatedly produced in public for others to hear and that a person had no more reasonable expectation that others would not know the sound of it than he could reasonably expect that others would not know his face.[47]

What then is to come of the *Franks* decision? The answer might well be forthcoming from the United States Supreme Court, which has noted probable jurisdiction.[48] Standing alone, the *Franks* opinion can in no way be interpreted as settling any and all of the constitutional questions relating to voiceprints. If voiceprints continue to be admitted into evidence it is only logical that more questions will be raised concerning constitutional rights. Complaints of violations of fourth and fifth amendment rights will no longer be a mere addenda to the question of admissibility, but will rather form the crux of the argument before the court and conceivably force alterations in the present judicial outlook. It might be contended that the nature of voiceprint technique entitles a person to have counsel present at the taking of a voice exemplar. Even if such is not the case, the voiceprint might be taken prejudicially, this subject to exclusion on due process grounds. Such prejudice could arise in a number of ways, for instance: (1) the examiner might be aware of other evidence thus affecting the outcome of his analysis; (2) the examiner could be biased initially, or, (3) the accused might be forced to submit several voice exemplars, thus affording a better opportunity for producing a match.

Undeniably the *Franks* decision is significant in that it is the highest federal ruling to admit voiceprint evidence. The real significance, however, may revolve around the initial broad test that the court evinced concerning the admissibility of evidence and its omission of the words "corroborative purposes." It remains highly unlikely that any court in the near future will adopt the liberal view of the *Franks* outlook on admissibility, which at least inferentially bears resemblance to the test applied by *State v. Cerciello*[49] in admitting fingerprint evidence for the first time in New Jersey:

> The law in its effort to enforce justice by demonstrating a fact in issue, will allow evidence of those scientific processes which are the work of educated and skillful men in their various departments and apply them to the demonstration of fact, leaving the weight and effect to be given to the effort and its results entirely to the consideration of the jury.[50]

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[47] 410 U.S. at 14.
[48] 419 U.S. 828 (1975).
[49] 86 N.J.L. 309, 90 A. 1112 (Ct. Err. & App. 1914).
[50] *Id.* at 314, 90 A. at 1114.