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Supreme Court Decisions: Pen Register Not A "Search"

T. Scott Basik

more than mere preservation of public highway safety, had to be present to allow the police to conduct these arbitrary spot checks. Privacy must be preserved. Individuals in a democratic society should not have to live in constant fear of capricious police searches.

The holding in this case, however, does not preclude other avenues of police investigation. Checkpoint stops utilizing roadblocks for the investigation of suspicious automobiles, roving patrols for policing borders and other methods of surveillance are now being used to stop the flow of illegal drugs, cigarettes, liquor, and aliens. Speaking for the dissent, Justice Rehnquist indicated spot checks are useful tools; productive mechanisms that promote legitimate state interests, e.g., traffic safety and public welfare. Rehnquist felt that individual privacy was counterbalanced by the need to stop the flow of illicit traffic.

While keeping the requirement of probable cause, *Prouse, supra,* has not disallowed all unwarranted vehicle searches. It has merely addressed one alternative, discretionary spot checks, and left the door open for alternative, perhaps more insidious methods of surveillance. As Justice White wrote, "this holding does not preclude the state of Delaware or other States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion . . . we hold *only* that persons in automobiles on public roadways may not for that reason alone have their travel and privacy interfered with at the unbridled discretion of police officers." *Id at 1401.* (Emphasis added)

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Pen Register Not A "Search"

by T. Scott Basik

On June 20, 1979, in *Smith v. Maryland,* 99 S. Ct. 2577 (1979), the Supreme Court held that the installation and use of a pen register is not a "search" within the meaning of the Fourth Amendment. A pen register is a mechanical device, usually installed at a central telephone facility, that records the numbers dialed on a telephone—it does not register the content of oral communication or even indicate whether the calls made are completed. Although the Court has consistently held that the interception of conversations (via wiretaps, bugs, etc.) is a "search and seizure," it concluded that Fourth Amendment protection should not be extended to the numbers dialed on a telephone. This holding was the result of the following facts: Particia McDonough was robbed on March 5, 1976, in Baltimore. She gave the police a description of the robber and of a Monte Carlo automobile she had observed near the scene of the crime. After the robbery, McDonough began receiving threatening and obscene phone calls from a man identifying himself as the robber. On March 16, police spotted a man who fit the description of the robber driving a Monte Carlo in McDonough's neighborhood. By tracing the license plate number the police were able to determine that the car was registered in the name of petitioner, Michael Smith.

The next day, at the request of the police, the telephone company installed a pen register at its central offices for the purpose of recording the phone numbers dialed from Smith telephone. The police failed to obtain a warrant before having the device installed. The pen register revealed that a call was placed from petitioner's home to McDonough's home. The police then obtained a warrant to search the home of Smith. The search revealed that a page in Smith's phone book was turned down to the name and number of Patricia McDonough. Smith was arrested and McDonough identified him in a six-man line-up.

The Criminal Court of Baltimore City refused to suppress the evidence obtained as a result of the use of the pen register. The petitioner was convicted, and sentenced to six years imprisonment.

After appealing to the Maryland Court of Special Appeals, a writ of certiorari was issued by the Court of Appeals of Maryland in advance of the intermediate court's decision in order to consider whether the pen register evidence had been properly admitted at petitioner's trial. *Smith v. State* 283 Md. 156, 389 A.2d 858 (1978).

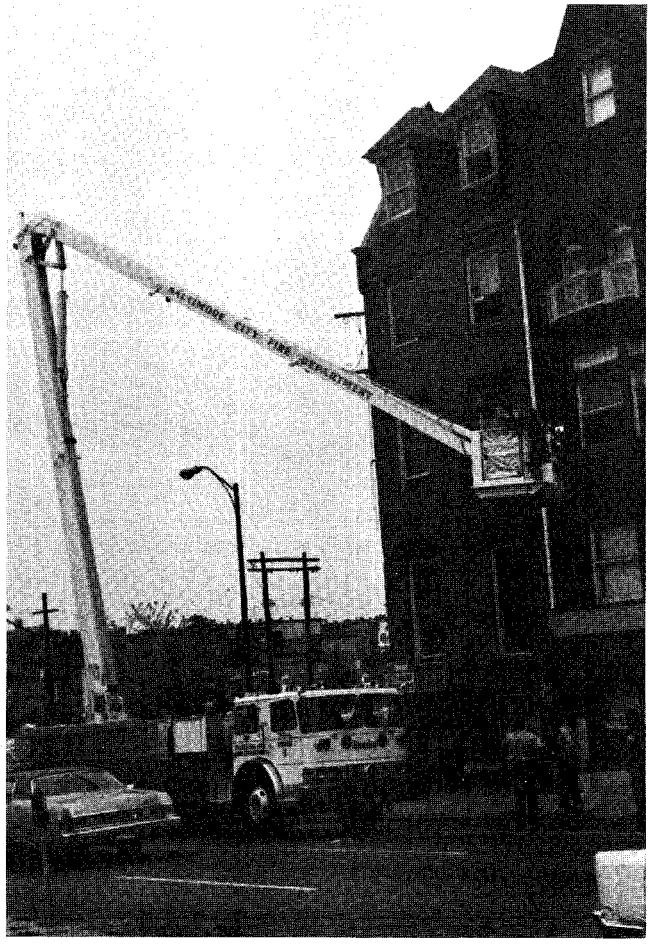
The Court of Appeals (Murphy, C.J.) affirmed the conviction, holding that "there is no constitutionally protected reasonable expectation of privacy in the numbers dialed into a telephone system and hence no search within the Fourth Amendment is implicated by the use of a pen register installed at the central offices of the telephone company." *Id.* at 173, 389 A.2d. at 867. Because there was no "search," the Court of Appeals concluded that no warrant was needed to install the pen register. Three judges dissented, expressing the view that individuals do have a legitimate expectation of privacy in the numbers they dial from their home phones; that the use of a pen register thus constitutes a "search"; and that the failure of police to secure a warrant mandated that the evidence obtained as a result of the use of the pen register be excluded.

The petitioner appealed to the Supreme Court, which affirmed the conviction in an opinion written by Justice Blackmun. The Supreme Court noted at the outset that the controlling case in determining whether a particular form of government initiated electronic survillance is a "search" within the meaning of the Fourth Amendment is *Katz v. United States,* 389 U.S. 347 (1967). In *Katz,* FBI agents intercepted telephone conversations by attaching an electronic listening device to the outside of a public phone booth. The Court found that a physical intrusion was not a prerequisite to a "search," noting that the Fourth Amendment protects people, not places. It held that the interception of Katz's conversations violated the privacy on which he justifiably relied while using the phone booth, and thus constituted a "search and seizure." The standard that has developed since Katz is whether the person invoking protection can claim a justifiable, reasonable or legitimate expectation of privacy that has been invaded by governmental action. *Terry v. Ohio,* 392 U.S. 1 (1968).

The Court in *Smith* held that individuals have no legitimate or reasonable expectation of privacy regarding the phone numbers they dial. Justice Blackmun reasoned that all telephone users have both active and constructive notice that the numbers they dial will not necessarily remain private. This is evidenced through the telephone company's use of switching equipment to complete calls and by the permanent records kept by the phone company of long-distance (toll) calls dialed. Further, pen registers are routinely used by the phone company for checking billing operations, detecting fraud, and to aid in the identification of persons making annoying or obscene calls. "It is too much to believe that telephone subscribers, under these circumstances, harbor any general expectation of privacy that numbers they dial will remain secret." *Smith, supra,* at 2581.

Smith contended that, notwithstanding any general expectations of telephone users, he demonstrated an expectation of privacy in using his home phone. The Court rejected that argument by stating that the site of the call is immaterial. It reasoned that petitioner's conduct may have been calculated to keep his conversation private, but could not have been calculated to maintain privacy as to the numbers dialed. The Court found further that even if petitioner did expect that the numbers he dialed would remain private, that expectation would not be "reasonable." Citing *United States v. Miller,* 425 U.S. 435 (1976), Justice Blackmun noted that a person has no legitimate expectation of privacy in information he voluntarily relinquishes to a third party. In *Miller* the Court held that a bank customer had no legitimate expectation of privacy in financial information he voluntarily conveyed to his bank. The Court explained further that a bank depositor assumes the risk, by being a patron of the bank, that his financial information could be given to the government by the bank.

Applying the *Miller* analysis to *Smith*, Justice Blackmun analogized that when Smith voluntarily conveyed the numbers he dialed to the phone company he "assumed the risk" that the company would reveal that information to the police.



In a further attempt to convince the Court that he maintained a reasonable expectation of privacy, Smith argued that the phone company ordinarily does not record local calls. He contended that since he was making a local call to McDonough, his expectation of privacy, as to her number, was "legitimate." The majority discarded that contention, noting that whether a call is local or long distance is not the basis for a constitutional distinction. Regardless of what numbers the phone company ordinarily records, the risk was assumed that numerical information would be divulged to the police.

The Court concluded that Smith had no reasonable expectation of privacy in the numbers he dialed, and that, even if he did, his expectation was not "legitimate." Because the petitioner failed to meet the test mandated by *Katz,* the Court held that the use of a pen register was not a "search." It further held that since there was no "search" the failure of the police to obtain a warrant did not constitute reversible error and that the Court of Appeals of Maryland had properly affirmed the ruling of the Criminal Court of Baltimore City in its holding that pen register evidence should not be suppressed.

Justice Stewart, with whom Justice Brennan joined, filed a dissenting opinion. Although he also found *Katz* to be controlling, Justice Stewart was of the opinion that a telephone subscriber has a legitimate expectation of privacy in the numbers he dials. He reasoned that the information obtained by a pen register emanates from private conduct within a person's home or office—places that are entitled to Fourth Amendment protection—and that the numbers dialed are *not* without "content."

Justice Marshall, with whom Justice Brennan joined, also filed a dissenting opinion. Justice Marshall noted that telephone users may not know that the phone company records calls for internal reasons, and therefore users do not expect that the numbers they dial will be made available to the government.

Individuals may reveal certain information to third parties for a limited business purpose without expecting that the information will be released to others for other purposes. Justice Marshall also rejected the majority's rationale that petitioner "assumed the risk" that the numbers he dialed would be revealed to the police. He felt that this argument was misplaced because implicit in the concept of assumption of risk is the notion of free choice. Since the telephone has become a personal and business necessity, individuals have no realistic alternative. Agreeing with the dissenting opinions filed in the Court of Appeals of Maryland, Justice Marshall concluded that the use of pen registers is an extensive intrusion, and that evidence obtained as a result of their use should be suppressed unless the police secure a prior warrant.

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Right To Counsel May Be Implicitly Waived

by Mark D. Woodard

In *North Carolina v. Butler,* ___ U.S. ___, 99 S. Ct. 1755 (1979), the Supreme Court ruled that a criminal defendant under custodial interrogation need not waive his right to a lawyer orally or in writing: a waiver can be inferred from the facts and circumstances of each case. By so holding, the Supreme Court continues to narrow the scope of the so-called "Warren" court's emphasis on the rights of the accused.

Shortly after Butler's arrest, FBI agents took him to their office for questioning. Martinez testified to the following: after determining (method not stated) that Butler had an 11th grade education and was literate, he was given the Bureau's "Advice of Rights" form which he read and stated he understood. However, he refused to sign the form. At trial, Butler stated he was told that although he was not required to speak or sign the form, he was "requested" to answer questions. The defendant replied, "I will talk to you but I am not signing any form." *Id. at 1756.* He then proceeded to make inculpatory statements. FBI agent Martinez stated that Butler said nothing when advised of his right to a lawyer and at no time asked for one.

At the conclusion of the agent's testimony, the defense moved to suppress the evidence of Butler's incriminating statements on the ground that he had not waived his right to the assistance of counsel at the time the statements were made.

The trial court denied the motion reasoning that Butler effectively waived his rights, including the right to have an attorney present, by his willingness to answer questions after reading the "Advice of Rights" form. The defendant's incriminating statements were admitted into evidence and the jury convicted him of all charges (kidnapping, armed robbery and felonious assault).

The North Carolina Supreme Court reversed the conviction and remanded for a new trial, holding that the trial court erred in admitting the defendant's inculpatory statements. *North Carolina v. Butler,* 295 N.C. 250, 244 S.E.2d 410 (1978). In its view, the defendant never waived (in writing or orally) his right to an attorney during custodial interrogation. *Miranda v. Arizona,* 384 U.S. 436 (1966). The court interpreted *Miranda* as "providing in plain language that waiver of the right to counsel during interrogation will not be recognized unless such waiver is 'specifically made' after the *Miranda* warnings have been given." *244 S.E.2d at 413.* See also, *State v. Blackman,* 280 N.C. 42, 49-50, 185 S.E.2d 123, 127-128; *State v. Thackes,* 251 N.C. 447, 453-454, 189 S.E.2d 145, 149-150 (1972). The defendant must expressly waive his