[J-52-2000]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 86 W.D. Appeal Docket 1999
	:	
Appellee,	:	Appeal from the Order of the Superior
	:	Court entered December 3, 1996, at No.
	:	336PGH1995, reversing the order of the
v.	:	Court of Common Pleas of Allegheny
	:	County, Criminal Division, entered
	:	January 25, 1995, at No. CC9210525.
KIRK REKASIE,	:	
	:	
Appellant	:	
	:	ARGUED: March 8, 2000
	:	
	:	
	:	

CONCURRING OPINION

MR. JUSTICE CASTILLE **DECIDED: AUGUST 20, 2001**

I join the majority opinion, subject to one essential qualification. It is clear to me that there is nothing in Article I, § 8 of the Pennsylvania Constitution that requires the Commonwealth to obtain a determination of probable cause by a neutral, judicial authority before an agent of the Commonwealth may make a simple phone call to an individual's home telephone number and police may record the ensuing conversation.

My point of qualification concerns *dicta* in the majority opinion concerning whether and when a person may retain a reasonable expectation of privacy in the information itself that he discloses to others. Majority Slip Op. at 8-11. With respect to this discussion, it is essential to recognize what is and is not at issue in this case. This Court does not face a claim that the **substance** of appellant's telephone conversation with Tubridy was subject

to suppression; *i.e.*, there is no claim that Tubridy should be constitutionally precluded from repeating in court the specific words that he recalled appellant saying to him telephonically. Instead, here, as in Commonwealth v. Brion, 652 A.2d 287 (Pa. 1994), Commonwealth v. Blystone, 549 A.2d 81 (Pa. 1988), *aff'd on other grounds*, Blystone v. Pennsylvania, 494 U.S. 299, 110 S.Ct. 1078 (1990), and Commonwealth v. Alexander, 708 A.2d 1251 (Pa. 1998), the claim is that a **tape recording** of that conversation, made with Tubridy's express consent, should be excluded from evidence.

The distinction is significant. In my view, the teaching in Commonwealth v. Blystone, respecting the nature of oral communications, remains controlling as to the expectation of privacy one may have in what one says to another. Citing with approval to authority from the United States Supreme Court in that Article I, § 8 case, Blystone noted that, "a thing remains secret until it is told to other ears, after which one cannot command its keeping. What was private is now on other lips and can no longer belong to the teller. What one chooses to do with another's secrets may differ from the expectation of the teller, but it is no longer his secret." 549 A.2d at 87. Implicit in this observation about the very nature of privacy expectations in oral communications was the recognition that one's listeners can, and often do, repeat the content of a conversation to anyone they choose. That reality, in turn, suggests that, at least in the absence of some recognized privilege, the speaker cannot be said to possess any reasonable expectation that the contents of the conversation itself will remain private once the words are related to another.

However, where, as here, there is more than mere passive listening involved by the government agent -- *i.e.,* the government actually records or seizes the words or "disclosures" at issue, and the defendant seeks to have excluded from evidence the separate fruits of **that** seizure -- the matter has proven to be more complicated. As the majority accurately notes, this Court's precedents -- the correctness of which are not at issue in this case -- have disapproved of certain of those seizures, even though the seizure

was of information arguably "disclosed" by the defendant. Although I understand the reason for the majority's attempt to synthesize the various precedents, the attempted synthesis is not necessary to resolve this appeal. It is enough that, unlike Commonwealth v. Melilli, 555 A.2d 1254 (Pa. 1989) and Commonwealth v. DeJohn, 403 A.2d 1283 (Pa. 1979), this case involves oral statements the defendant made to another and, unlike Brion, the recording/seizure of the oral statements did not result from the physical entry of a government agent into the defendant's home, the place where a person "may legitimately expect the highest degree of privacy known to our society." Brion, 652 A.2d at 289, *quoting* Commonwealth v. Shaw, 383 A.2d 496, 499 (Pa. 1978).

Here, as the majority recognizes, appellant knowingly engaged in a conversation that was not confined to the four walls of his home. Even if it is assumed that appellant was standing within the four walls of his home as he spoke into the phone - - this point can only be assumed because, given modern telephone technology, we do not even know if appellant was actually in the home, as opposed to, for example, being on a cordless phone outside his "sanctuary" - - he knowingly and voluntarily related his words to Mr. Tubridy, his drug dealing confederate, who was somewhere outside that sanctuary. The police did not violate the "sanctity" of appellant's home in order to seize his words - - appellant freely chose to transmit his words to another outside his home where, within the confines of a police station, they were "seized" by a tape recorder. Whatever expectations of privacy may be found to exist in other circumstances, I agree with the majority that there was no reasonable expectation of non-interception as to this conversation.

Subject to the qualification explained above, I join the majority opinion.

This concurring opinion is joined by Justice Saylor, who also joins the majority opinion.