

**[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.
	:	336PGH95, reversing the Order of the
v.	:	Allegheny County Common Pleas Court,
	:	Criminal Division, entered January 25,
	:	1995, at No. CC9210525.
KIRK REKASIE,	:	
	:	
Appellant	:	ARGUED: March 8, 2000

**DISSENTING OPINION**

**MR. JUSTICE ZAPPALA**

**DECIDED: AUGUST 20, 2001**

Today the majority holds that the Pennsylvania Constitution affords no protection against the government listening to, recording and reporting the details of our private telephone conversations. By holding that we have no expectation of privacy in the confidential messages and conversations transmitted from our telephones, it has placed the freedom of every citizen into the hands of law enforcement authorities. As I believe this decision flies in the face of constitutional liberties and intrudes upon the sanctity of one's home and the privacy of one's communications, I most vigorously dissent and join the dissent authored by Mr. Justice Nigro.

The majority has authorized the government to seize our words as spoken to another on a telephone in our own homes, requiring nothing more than a willing participant to place the call. This conclusion rests on the majority's finding that an expectation of privacy in a telephone conversation is not one that society is prepared to recognize as

objectively reasonable. The practical effect of this decision, however, goes even farther. For when it is determined that no expectation of privacy exists, there remains nothing of constitutional significance to protect. In other words, if one does not have an expectation of privacy in a telephone conversation engaged in at home, then such a conversation is completely unprotected from government intrusion of *any* nature. The scant protection afforded by the statute, i.e., the requirement of one-party consent, is rendered superfluous when viewing the right to privacy in this context. Following the majority's analysis to its logical conclusion, there is no constitutional precept preventing the government from tapping any individual's telephone line for any reason. Such a conclusion is preposterous given the clear pronouncements of this Court as to the degree of protection afforded an individual's right to privacy under Article I, Section 8 of the Pennsylvania Constitution.

In Commonwealth v. Brion, 652 A.2d 287 (Pa. 1994), our Court expressly held that society recognizes a reasonable expectation of privacy in one's home and that therefore a warrant is required prior to interception of oral communications spoken there. In Brion, the police sent a confidential informant wearing a consensual body wire into the home of the defendant in order to electronically record his conversations and transmit them to law enforcement officers. We ruled that although section 5704(2)(ii) of the Wire Tap Act allows for the interception of communications where one party has consented, when applied to the interception of oral communications occurring within one's home, this provision could only pass constitutional muster if a neutral judicial authority makes a prior determination of probable cause. We stated:

If nowhere else, an individual must feel secure in his ability to hold a private conversation within the four walls of his home. For the right to privacy to mean anything, it must guarantee privacy to an individual in his own home. As then-Justice Roberts stated in Commonwealth v. Shaw, 476 Pa. 543, 550, 383 A.2d 496, 499 (1978): Upon closing the door of one's home to the outside world, a person may legitimately expect the highest degree of privacy known to our society." (Citations omitted.)

652 A.2d at 289 (footnotes omitted).

Because there was no prior determination of probable cause by a neutral judicial authority, we held that the consensual body wire violated Article I, Section 8, and the recording of the conversation in the defendant's home should have been suppressed. The majority erroneously concludes that this heightened expectation of privacy does not apply in the instant case. The controlling factor in Brion was that the intercepted communications were uttered in the sanctity of the defendant's private residence, where he possessed a recognized expectation of privacy and noninterception. The decision was not based upon the manner of interception, i.e., the body wire worn by the informant to transmit the defendant's conversations. Our Court expressly stated that "an individual can reasonably expect that his right to privacy will not be violated in his home through the use of *any* electronic surveillance." 652 A.2d at 289 (emphasis added). Thus, the salient fact is that Appellant's words were uttered in the privacy of his home and were intercepted by the government without a showing of probable cause.

The majority also misinterprets case law addressing the expectation of privacy one has in his telephone conversations. In Commonwealth v. Beauford, 475 A.2d 783 (Pa. Super. 1984), the Superior Court examined whether the utilization by law enforcement agencies of pen registers or dialed number recorders (DNR) requires a judicial order based upon probable cause.<sup>1</sup> The Act provided that it was not unlawful for "[a]ny investigative or law enforcement officer . . . to use a pen register." 18 Pa.C.S. § 5704(5).

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<sup>1</sup> At the time, the Act defined "pen register" as a mechanical or electronic device which attaches to a particular telephone line, and which records outgoing numbers dialed by a particular telephone, but does not monitor the contents of any communication or record the origin of an incoming communication. 18 Pa.C.S. § 5702. The DNR utilized in Beauford had the additional capability of monitoring the length of time the targeted phone was off the hook during outgoing and incoming calls.

Notwithstanding this statutory language, the Superior Court ruled that because the order authorizing the DNRs was not based on probable cause, the evidence gathered through use of the DNRs should be suppressed. It held that a Pennsylvania citizen's expectation of privacy in the telephone numbers he calls is reasonable, legitimate and therefore constitutionally protected against government surveillance without probable cause.

In rejecting a contrary analysis employed by the United States Supreme Court in Smith v. Maryland, 442 U.S. 735 (1979),<sup>2</sup> the court stated:

[W]e are convinced that a person picking up his telephone in his home or office fully expects that the number he is about to dial will remain as private as the contents of the communication he is about to have. That number provides a strong, sometimes conclusive inference as to whom is being called, unquestionably a private matter. The caller certainly evidences no intention to shed his veil of privacy merely because he chooses to use the telephone to make private contacts. In modern-day America, the telephone call is a nearly indispensable tool used to conduct the widest range of business, government, political, social, and personal affairs. Certainly the vast majority of calls are unrelated to criminal enterprise, and yet the vast majority of callers would not think of allowing the destination of their every call to be recorded by the police. . . . In any case we do not hesitate to say that a caller and the person he calls expect and are entitled to as much privacy in the fact they are talking to one another as in what they say to each other.

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<sup>2</sup> In Smith, the United States Supreme Court held that the use of a pen register was not a search under the Fourth and Fourteenth Amendments to the United States Constitution. It reasoned that a telephone caller could entertain no legitimate expectation of privacy in the numbers he dialed because the telephone company had access to the information, much like a bank has access to one's bank records. See United States v. Miller, 425 U.S. 435 (1976) (one does not have a legitimate expectation of privacy in his bank records because they are readily accessible to bank and bank employees). *But cf.* Commonwealth v. DeJohn, 403 A.2d 1283 (Pa. 1979) (Article I, Section 8 of the Pennsylvania Constitution requires a warrant based on probable cause in order for police to gain access to bank records).

475 A.2d at 789. The court asserted that its decision drew independent support from Pennsylvania's long history of affording special protection to the privacy interest inherent in a telephone call.

Our Court adopted the Beauford court's analysis in Commonwealth v. Melilli, 555 A.2d 1254 (Pa. 1989), where we found that "Beauford represents the marked trend of our state law to bring intrusions into telephone communications within the confines of an expectation of privacy under the State Constitution and thereby be subject to the requirements demonstrating probable cause." Id. at 1258. The majority's attempts to cloud this clear pronouncement of the law are unavailing. It is simply beyond cavil that one's expectation of privacy in the *contents* of a conversation is greater than any expectation of privacy in the telephone numbers one dials. I therefore cannot agree that the citizens of this Commonwealth reasonably expect the government to intercept telephone conversations that occur in their homes merely because speaker phones and extension lines have facilitated the means of doing so. Our right to privacy does not rise and fall with technology, but rather is grounded in our state constitution, which has afforded the right to privacy the utmost protection. The future holds more subtle and effective means of invading privacy than we have ever imagined. Rather than relinquish our privacy rights in the face of modern innovation, we should fiercely protect them.

Accordingly, consistent with Brion and Melilli, the citizens of this Commonwealth have a reasonable expectation of privacy in telephone conversations they engage in at home and therefore a determination of probable cause by a detached judicial authority is required prior to interception. Such a requirement does not create too onerous a burden on the Commonwealth when considering the fundamental rights at stake. As no prior judicial approval was obtained in the instant case, the recording of the telephone conversation Appellant engaged in from his residence should have been suppressed.

Mr. Chief Justice Flaherty joins this dissenting opinion.