

[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 Court of Common
	:	Pleas, Criminal Division, entered January
	:	25, 1995, at No. CC9210525.
KIRK REKASIE,	:	
	:	
Appellant	:	ARGUED: March 8, 2000
	:	
	:	

DISSENTING OPINION

MR. JUSTICE NIGRO

DECIDED: AUGUST 20, 2001

In holding that the citizens of this Commonwealth have no expectation of privacy in their telephone conversations, the majority has unwittingly cast aside the Constitution of this Commonwealth as well as controlling precedent of this Court. Because I believe that the majority has compromised our settled jurisprudence merely to reach a desired end result, I emphatically dissent.

I am mystified by the fact that while an individual has a reasonable expectation of privacy in a dialed telephone number, see Commonwealth v. Melilli, 555 A.2d 1254 (Pa. 1989), that person, according to the majority, has absolutely no privacy expectation in the content of his conversation. The majority's attempt to distinguish Melilli by noting that the question of privacy in "all telephone activities" was not the issue before the Melilli court ignores the illogic of protecting a dialed telephone number but not the content of the

conversation.¹ The majority's analysis is a prime example of failing to see the forest for the trees.

The majority's decision effectively renders this Court's decision in Commonwealth v. Brion, 652 A.2d 287 (Pa. 1994), moot. Now that the Commonwealth may record an individual's statements made in his home over a telephone line without any prior judicial determination of probable cause, why would the Commonwealth ever bother sending an informant into the home in order to intercept conversations? By way of a simple telephone call, the Commonwealth can now record any conversation at its discretion without having to obtain the judicial approval needed to record a face-to-face conversation.

The majority alleges that Brion is distinguishable because an individual has less control over who may intrude upon a telephone conversation, as opposed to a face-to-face conversation. I simply cannot agree, however, that it is unreasonable for a person who receives a telephone call to conclude that others are not listening in on the conversation. Moreover, as Mr. Justice Zappala notes in his dissent, the majority's analysis ignores Brion's holding 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." Brion, 652 A.2d at 289 (emphasis added). Thus, Brion is clear that whether the intercepted conversation occurs face-to-face or over the telephone is irrelevant if a person is in the privacy of his home.

According to the majority, the existence of extension telephones and speakerphones make it unreasonable for citizens to assume that their telephone conversations are private. Given the ever-increasing technological means for eavesdropping into private affairs, it

¹ The majority claims that Melilli's recognition of a privacy right in all telephone activities was merely an "untested assumption." Slip Op. at 14. However, Melilli clearly stated that "[t]elephone activities are largely of one piece, and efforts to create distinctions between numbers and conversational content are constitutionally untenable in our view." Melilli, 555 A.2d at 1259.

appears, under the majority's rationale, that it is only a matter of time before there is no privacy anywhere or in anything. In my view, the constantly expanding ways in which the Commonwealth is able to intrude upon our private affairs calls for heightened, rather than diminished, protection of our constitutional rights. Requiring the Commonwealth to obtain a judicial determination of probable cause prior to interception of an individual's telephone conversation is not so heavy a burden as to outweigh a citizen's fundamental constitutional right to be free from such intrusion. I respectfully dissent.

Mr. Chief Justice Flaherty and Mr. Justice Zappala join in the dissenting opinion.