

United States Supreme Court
SMITH v. MARYLAND, (1979)
No. 78-5374
Argued: March 28, 1979
Decided: June 20, 1979

The telephone company, at police request, installed at its central offices a pen register to record the numbers dialed from the telephone at petitioner's home. Prior to his robbery trial, petitioner moved to suppress "all fruits derived from" the pen register. The Maryland trial court denied this motion, holding that the warrantless installation of the pen register did not violate the Fourth Amendment. Petitioner was convicted, and the Maryland Court of Appeals affirmed.

Held:

The installation and use of the pen register was not a "search" within the meaning of the Fourth Amendment, and hence no warrant was required.

- (a) Application of the Fourth Amendment depends on whether the person invoking its protection can claim a "legitimate expectation of privacy" that has been invaded by government action. This inquiry normally embraces two questions: first, whether the individual has exhibited an actual (subjective) expectation of privacy; and second, whether his expectation is one that society is prepared to recognize as "reasonable." *Katz v. United States*, 389 U.S. 347
- (b) Petitioner in all probability entertained no actual expectation of privacy in the phone numbers he dialed, and even if he did, his expectation was not "legitimate." First, it is doubtful that telephone users in general have any expectation of privacy regarding the numbers they dial, since they typically know that they must convey phone numbers to the telephone company and that the company has facilities for recording this information and does in fact record it for various legitimate business purposes. And petitioner did not demonstrate an expectation of privacy merely by using his home phone rather than some other phone, since his conduct, although perhaps calculated to keep the contents of his conversation private, was not calculated to preserve the privacy of the number he dialed. Second, even if petitioner did harbor some subjective expectation of privacy, this expectation was not one that society is prepared to recognize as "reasonable." When petitioner voluntarily conveyed numerical information to the phone company and "exposed" that information to its equipment in the normal course of business, he assumed the risk that the company would reveal the information [442 U.S. 735, 736] to the police, cf. *United States v. Miller*, 425 U.S. 435.

This case presents the question whether the installation and use of a pen register constitutes a "search" within the meaning of the Fourth Amendment, made applicable to the States through the Fourteenth Amendment.

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On March 5, 1976, in Baltimore, Md., Patricia McDonough was robbed. She gave the police a description of the robber and of a 1975 Monte Carlo automobile she had observed near the scene of the crime. ... By tracing the license plate number, police learned that the car was registered in the name of petitioner, Michael Lee Smith.

The next day, the telephone company, at police request, installed a pen register at its central offices to record the numbers dialed from the telephone at petitioner's home. The police did not get a warrant or court order before having the pen register installed. The register revealed that on March 17 a call was placed from petitioner's home to McDonough's phone. On the basis of this and other evidence, the police obtained a warrant to search petitioner's residence. The search revealed that a page in petitioner's phone book was turned down to the name and number of Patricia McDonough; the phone book was seized. Petitioner was arrested, and a six-man lineup was held on March 19. McDonough identified petitioner as the man who had robbed her.

Petitioner was indicted in the Criminal Court of Baltimore for robbery. By pretrial motion, he sought to suppress "all fruits derived from the pen register" on the ground that the police had failed to secure a warrant prior to its installation. The trial court denied the suppression motion, holding that the warrantless installation of the pen [442 U.S. 735, 738] register did not violate the Fourth Amendment. Petitioner then waived a jury, and the case was submitted to the court on an agreed statement of facts. The pen register tape (evidencing the fact that a phone call had been made from petitioner's phone to McDonough's phone) and the phone book seized in the search of petitioner's residence were admitted into evidence against him. Petitioner was convicted, and was sentenced to six years. He appealed to the Maryland Court of Special Appeals, but the Court of Appeals of Maryland issued a writ of certiorari to the intermediate court in advance of its decision in order to consider whether the pen register evidence had been properly admitted at petitioner's trial.

The Court of Appeals affirmed the judgment of 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." Because there was no "search," the court concluded, no warrant was needed. Three judges dissented, expressing the view that individuals do have a legitimate expectation of privacy regarding the phone numbers they dial from their homes; that the installation of a pen register thus constitutes a "search"; and that, in the absence of exigent circumstances, the failure of police to secure a warrant mandated that the pen register evidence here be excluded. Certiorari was granted in order to resolve indications of conflict in the decided cases as to the restrictions imposed by the Fourth Amendment on the use of pen registers.

II

A

...Consistently with Katz, this Court uniformly has held that the application of the Fourth Amendment depends on whether the person invoking its protection can claim a "justifiable," a "reasonable," or a "legitimate expectation of privacy" that has been invaded by government action. This inquiry, as Mr. Justice Harlan aptly noted in his Katz concurrence, normally embraces two discrete questions. The first is whether the individual, by his conduct, has "exhibited an actual (subjective) expectation of privacy," - whether, in the words of the Katz majority, the individual has shown that "he seeks to preserve [something] as private." The second question is whether the individual's subjective expectation of privacy is "one that society is prepared to recognize as `reasonable,'" - whether, in the words of the Katz majority, the individual's expectation, viewed objectively, is "justifiable" under the circumstances.

B

In applying the Katz analysis to this case, it is important to begin by specifying precisely the nature of the state activity that is challenged. The activity here took the form of installing and using a pen register. Since the pen register was installed on telephone company property at the telephone company's central offices, petitioner obviously cannot claim that his "property" was invaded or that police intruded into a "constitutionally protected area." Petitioner's claim, rather, is that, notwithstanding the absence of a trespass, the State, as did the Government in Katz, infringed a "legitimate expectation of privacy" that petitioner held. Yet a pen register differs significantly from the listening device employed in Katz, for pen registers do not acquire the contents of communications. This Court recently noted:

"Indeed, a law enforcement official could not even determine from the use of a pen register whether a communication existed. These devices do not hear sound. They disclose only the telephone numbers that have been dialed - a means of establishing communication. Neither the purport of any communication between the caller and the recipient of the call, their identities, nor whether the call was even completed is disclosed by pen registers." *United States v. New York Tel. Co.*, 434 U.S. 159, 167 (1977).

Given a pen register's limited capabilities, therefore, petitioner's argument that its installation and use constituted a "search" necessarily rests upon a claim that he had a "legitimate expectation of privacy" regarding the numbers he dialed on his phone.

This claim must be rejected. First, we doubt that people in general entertain any actual expectation of privacy in the numbers they dial. All telephone users realize that they must "convey" phone numbers to the telephone company, since it is through telephone company switching equipment that their calls are completed. All subscribers realize, moreover, that the phone company has facilities for making permanent records of the numbers they dial, for they see a list of their long-distance (toll) calls on their monthly bills. In fact, pen registers and similar devices are routinely used by telephone companies "for the purposes of checking billing

operations, detecting fraud, and preventing violations of law." Electronic equipment is used not only to keep billing records of toll calls, but also "to keep a record of all calls dialed from a telephone which is subject to a special rate structure." *Hodge v. Mountain States Tel. & Tel. Co.*, 555 F.2d 254, 266 (CA9 1977) (concurring opinion). Pen registers are regularly employed "to determine whether a home phone is being used to conduct a business, to check for a defective dial, or to check for overbilling. Although most people may be oblivious to a pen register's esoteric functions, they presumably have some awareness of one common use: to aid in the identification of persons making annoying or obscene calls. Most phone books tell subscribers, on a page entitled "Consumer Information," that the company "can frequently help in identifying to the authorities the origin of unwelcome and troublesome calls." Telephone users, in sum, typically know that they must convey numerical information to the phone company; that the phone company has facilities for recording this information; and that the phone company does in fact record this information for a variety of legitimate business purposes. Although subjective expectations cannot be scientifically gauged, it is too much to believe that telephone subscribers, under these circumstances, harbor any general expectation that the numbers they dial will remain secret.

Petitioner argues, however, that, whatever the expectations of telephone users in general, he demonstrated an expectation of privacy by his own conduct here, since he "us[ed] the telephone in his house to the exclusion of all others." But the site of the call is immaterial for purposes of analysis in this case. Although petitioner's conduct may have been calculated to keep the contents of his conversation private, his conduct was not and could not have been calculated to preserve the privacy of the number he dialed. Regardless of his location, petitioner had to convey that number to the telephone company in precisely the same way if he wished to complete his call. The fact that he dialed the number on his home phone rather than on some other phone could make no conceivable difference, nor could any subscriber rationally think that it would.

Second, even if petitioner did harbor some subjective expectation that the phone numbers he dialed would remain private, this expectation is not "one that society is prepared to recognize as 'reasonable.'" This Court consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties. E. g., *United States v. Miller*, 425 U.S., at 442 -444; *Couch v. United States*, 409 U.S., at 335 -336; *United States v. White*, 401 U.S., at 752 (plurality opinion); *Hoffa v. United States*, 385 U.S. 293, 302 (1966); *Lopez v. United States*, 373 U.S. 427 (1963). In *Miller*, for example, the Court held that a bank depositor has no "legitimate `expectation of privacy'" in financial information "voluntarily conveyed to . . . banks and exposed to their employees in the ordinary course of business." 425 U.S., at 442 . The Court explained:

"The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government. . . . This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government

authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed."

Because the depositor "assumed the risk" of disclosure, the Court held that it would be unreasonable for him to expect his financial records to remain private.

This analysis dictates that petitioner can claim no legitimate expectation of privacy here. When he used his phone, petitioner voluntarily conveyed numerical information to the telephone company and "exposed" that information to its equipment in the ordinary course of business. In so doing, petitioner assumed the risk that the company would reveal to police the numbers he dialed. The switching equipment that processed those numbers is merely the modern counterpart of the operator who, in an earlier day, personally completed calls for the subscriber. Petitioner concedes that if he had placed his calls through an operator, he could claim no legitimate expectation of privacy. We are not inclined to hold that a different constitutional result is required because the telephone company has decided to automate.

Petitioner argues, however, that automatic switching equipment differs from a live operator in one pertinent respect. An operator, in theory at least, is capable of remembering every number that is conveyed to him by callers. Electronic equipment, by contrast, can "remember" only those numbers it is programmed to record, and telephone companies, in view of their present billing practices, usually do not record local calls. Since petitioner, in calling McDonough, was making a local call, his expectation of privacy as to her number, on this theory, would be "legitimate."

This argument does not withstand scrutiny. The fortuity of whether or not the phone company in fact elects to make a quasi-permanent record of a particular number dialed does not, in our view, make any constitutional difference. Regardless of the phone company's election, petitioner voluntarily conveyed to it information that it had facilities for recording and that it was free to record. In these circumstances, petitioner assumed the risk that the information would be divulged to police. Under petitioner's theory, Fourth Amendment protection would exist, or not, depending on how the telephone company chose to define local-dialing zones, and depending on how it chose to bill its customers for local calls. Calls placed across town, or dialed directly, would be protected; calls placed across the river, or dialed with operator assistance, might not be. We are not inclined to make a crazy quilt of the Fourth Amendment, especially in circumstances where (as here) the pattern of protection would be dictated by billing practices of a private corporation.

We therefore conclude that petitioner in all probability entertained no actual expectation of privacy in the phone numbers he dialed, and that, even if he did, his expectation was not "legitimate." The installation and use of a pen register, consequently, was not a "search," and no warrant was required. The judgment of the Maryland Court of Appeals is affirmed.