

104

5/3/5

Response requested & rec'd. The State concedes that the question whether a warrant is req'd for installation of a pen register is open in this Court, and that "there appears to be a split of authority on the subject." However, resp says that the decision below was right. The 4th Am protects the content of conversations, not the fact that conversations transpired. Telephone users have no expectation of privacy in the numbers they dial since (1) they realize that records of toll calls are kept and have no clear awareness of the line between toll and local calls, nor of the phone co's actual record-keeping practices; (2) they realize that the numbers called must be revealed to the phone co, since it is through the phone co's switching equipment that the calls are completed. Indeed, people have even less expectation of privacy as to the numbers dialed than as to bank records or conversations with wiretappers, since in the former case there is absolutely no content conveyed. Since there is no 4th Am protection in the latter cases, the absence of protection in the former is a fortiori. I agree with resp, but in view of the fairly strong conflict I would grant. The Court may, however,

PRELIMINARY MEMORANDUM

want to wait til the conflict becomes more firmly cemented.

Dec 1, 1978, L2, 52  
~~October 27, 1978 Conference~~  
~~List 4, Sheet 3~~

11/25/78 AGL

No. 78-5374 CSY

4-3

SMITH (robber)

Cert to Md. Ct. App.  
(Murphy, Smith, Levine, Orth;  
Digges, Eldridge, Cole, dissenting)

v.

MARYLAND

State/Criminal

Timely

1. SUMMARY: Does the installation of a pen register constitute a search within the meaning of the Fourth Amendment?
2. FACTS: Ms. McDonough was robbed. She gave police a description of the robber and of a 1975 Monte Carlo that she had observed in her neighborhood shortly before the robbery. After the robbery, she began receiving threatening and obscene phone calls from a man who identified

himself as the person who robbed her. Police spotted a man who met the description of the robber driving a 1975 Monte Carlo. By tracing the license number of the vehicle, police learned that the car was registered in petr's name. At the request of the police, the telephone company installed a pen register at its central offices to record the phone numbers of all calls from the telephone at petr's residence. Police / <sup>did not</sup> obtain a warrant or court order before installing the pen register. Thereafter, the pen register showed that a call was made to McDonough's home. Armed with a search warrant, police searched petr's home and found a notation of McDonough's telephone number next to petr's phone. McDonough identified petr as the robber at a line-up. At a pretrial suppression hearing, petr argued that evidence resulting from the installation of the pen register should be suppressed because absent a court order or search warrant, the use of a pen register constituted an illegal search and seizure in violation of the Fourth Amendment. The trial judge denied the motion, petr was found guilty of robbery and sentenced to 10 years imprisonment. The Maryland Court of Appeals affirmed.

3. DECISION BELOW: The majority stated that under Katz v. United States, 389 U.S. 347 (1967), the question whether installation of a pen register requires compliance with the Fourth Amendment depends on "whether a telephone subscriber has a constitutionally protected expectation that the numbers which he dials will remain private." The court held that a subscriber does not have a constitutionally protected ex-

pectation of privacy with respect to the numbers dialed for two reasons

✓ First, every subscriber realizes that the phone company keeps records of toll calls and there seems no valid distinction between the expectations associated with local calls and toll calls because most subscribers probably have no "real knowledge" of the geographic boundaries on their "local call" zone. Second, all telephone subscribers use equipment owned by a third party and therefore it is unreasonable to ✓ assume that the fact of one's call passing through the system will remain a total secret from the phone company. While the Fourth Amendment protects the content of conversations, pen registers do not reveal that content and they are regularly used by the phone company without a court order "for the purposes of checking billing operations, detecting fraud and preventing violations of the law." United States v. New York Tel., 434 U.S. 159, 174-75 (1977). The court found support for its conclusions in cases dealing with the attachment of transmitters to informants, inspection of bank deposit slips turned over to the bank, use of beepers, and reading of mail covers, all of which either this Court or other courts have held do not violate the Fourth Amendment. The majority cited several cases in which courts have held that telephone subscribers have no reasonable expectation that records of their calls will not be made. See, e.g., Hodge v. Mountain States Tel. & Tel., 555 F.2d 254 (9th Cir. 1977); United States v. Clegg, 509 F.2d 605 (5th Cir. 1975).

The dissenters / <sup>believe</sup> that the installation of a pen register constitute a search within the meaning of the Fourth Amendment. While a subscriber

at III  
the last

may expect that completed long distance calls will be recorded, the subscriber does not expect that the phone company will monitor the telephone numbers of local calls. Contrary to the majority's view, subscribers are aware of their "local call" zone because, at least in Maryland, they must dial the prefix "1" before they can make a call beyond that zone. "The defendant, by the simple act of dialing local numbers, did not reasonably intend to reveal information; he merely made use of machinery in particular ways which, without the police intrusion, would have remained fully private." They found the analogy to the transmitter-on-informer and bank deposit slip cases unpersuasive because the phone company is not a "party" to telephone conversations in parties to the conversations or bank transactions, the same sense as the informer and bank are! Mail cover cases also are distinguishable since anything written on the outside of an envelope is placed in the plain view of the public. Finally, the dissenters noted that several courts have held that the installation of pen registers is subject to Fourth Amendment requirements. See, e.g., Southwestern Bell Tel. v. United States, 546 F.2d 243 (8th Cir. 1976), cert. denied, \_\_\_ U.S. \_\_\_ (1978); New York Tel. v. United States, 538 F.2d 956 (2d Cir. 1976), <sup>revid</sup> cert. denied, 434 U.S. 149 (1977); United States v. Illinois Bell Tel., 531 F.2d 809 (7th Cir. 1976); United States v. John, 508 F.2d 1134 (8th Cir.), cert. denied, 421 U.S. 962 (1975).

How about beepers?

4. CONTENTIONS: Petr simply repeats the arguments of the dissenter: He claims that there is a split among the lower courts on this question as evidenced by the cases relied on by the majority and dissenters and

that the Court should grant cert in this case to resolve the conflict. Finally, he argues that the following statement by Mr. Justice Powell, concurring and dissenting, in United States v. Giordano, 416 U.S. 505, 553-54 (1974) "should be dispositive of this issue":

*this has been trouble!*

"Because a pen register is not subject to the provisions of Title III, the permissibility of its use by law enforcement authorities depends entirely on compliance with the constitutional requirements of the Fourth Amendment."

5. DISCUSSION: This Court has not yet determined whether pen register surveillance is subject to the requirements of the Fourth Amendment. The question was specifically reserved in United States v. New Tel., 434 U.S. 159, 165 n. 7 (1977). And in a footnote following the above-quoted statement by Mr. Justice Powell in Giordano, he stated that he did not have to address the question whether the use of a pen register constitutes a search because, assuming the applicability of the Fourth Amendment, its requirements were satisfied in that case. 416 U.S. at 554 n. 4. The claimed split in the circuits on this question may be more apparent than real. The court in John specifically declined to decide whether the use of pen registers constitutes a search. None of the other cases really addressed the question whether use of the device is a search; instead, they simply quoted the statement from Mr. Justice Powell relied on by petr and assumed that the Fourth Amendment governs installation of pen registers, apparently without recognizing that Mr. Justice Powell declined to decide that question. In any event, in all of the cases relied on by the dissenters, the Government had secured a

