No. 78-5374
SMITH
v.
MARYLAND

Cert to Md CtApps
(Murphy, Smith, Levine, Orth;
Digges, Eldridge, Cole dissenting)

TABLE OF CONTENTS

Summary	i
I. Facts	1
II. Decision Below	2
III. Contentions	6
A. Petr's Contentions	6
(1) Actual Expectation of Privacy	6
(2) Reasonable Expectation of Privacy	6
B. Resps' Contentions	7
(1) Actual Expectation of Privacy	8
(2) Reasonable Expectation of Privacy	9
IV. Discussion	11
A. Actual Expectation of Privacy	11
B. Reasonable Expectation of Privacy	12
V. Conclusion	14
Questions	15
Pool memo	App

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SUMMARY

This little case presents one question: whether the installation of a pen register constitutes a "search" for purposes of the 4th Amendment, such that a warrant for its installation is required. Everyone seems to agree that Katz governs the case, and that Justice Harlan's two-pronged inquiry is appropriate: first, did petr have an actual (subjective) expectation of privacy; and second, if he did, is society prepared to recognize that expectation (objectively) as reasonable? The parties disagree only as to how these questions should be answered as to pen registers.

The case seems quite easy to me. I conclude that telephone users in general probably do not entertain any expectation of privacy as to the numbers they dial into the national telephone network; and that, even if users do have some expectation of privacy, this expectation is not "reasonable." Hence, the installation of a pen register is not a "search" and no warrant is required.

I. FACTS

The facts, which were stipulated, are as follows. Ms McDonough was robbed. She gave police a description of the robber and of a 1975 Monte Carlo she had observed near her home just before the robbery. After the robbery, she began getting threatening phone calls from a man identifying himself as the robber. Police saw a man who met McDonough's description driving a 1975 Monte Carlo in McDonough's neighborhood. By tracing the license plate number, police learned that the car was registered in petr's name.

Ten days after the robbery, the telephone company (Telco), at police request, installed a pen register at its central offices to record the phone numbers of all calls made from the telephone at petr's residence. (A pen register records only the numbers dialed; it does not reveal the contents of the call, or whether the call was completed.) Police did not get a warrant or court order before having the pen register installed. The register subsequently revealed that a call was made from petr's residence to McDonough's phone. The police then got a warrant to search petr's house; that search turned up a notation of McDonough's name and number alongside petr's phone. Petr was arrested and McDonough identified him in a line-up as the robber.

At a pre-trial suppression hearing, petr contended that the installation of a pen register, absent a court order or warrant, was an illegal search and seizure in violation of the 4th Amendment. On petr's theory, the evidence gained from the pen register (i.e., the fact that petr had called McDonough), and the evidence gained pursuant to the search warrant issued in part on the basis of the pen register data, had to be suppressed. The trial judge denied petr's suppression motion and petr was convicted. The Md CtApps granted cert directly to the trial court.

II. DECISION BELOW

The CtApps noted that this Court had reserved decision on the applicability of the 4th Amendment to pen registers. US v Giordano, 416 US 505, 553-54 & n.4 (1974) (LFP dissenting); US v NY Tel Co, 434 US 159, 165 n.7 (1977). The question whether installation of a register was a "search" subject to the warrant requirement, therefore, had to be answered by resort to basic 4th Amendment principles, as enunciated in Katz v US, 389 US 347 (1967). Under Katz, the answer depended on whether a telephone subscriber has a constitutionally protected expectation that the numbers he dials will remain private. In seeking this answer, the CtApps adopted the two-fold test articulated by Justice Harlan in his Katz concurrence: "first, a person [must] have exhibited an actual (subjective) expectation of privacy, and second, that expectation [must be one that society is prepared to recognize as 'reasonable.'" 389 US at 361.

The CtApps then applied this two-fold test to the facts of this case. As to actual expectations of privacy, the court noted that an expectation of privacy normally extends to the content of a conversation, rather than to the fact that a conversation took place or that a particular number was dialed. Most phone subscribers, moreover, are aware that the Telco routinely makes records of phone calls. It is true, of course, that the Telco usually maintains tool-call records only of long-distance calls, not of local ones. Yet most subscribers, the court suggested, are unaware of the precise boundaries of their local dialing zones, especially when those zones don't coincide with geographical boundaries. Further, the Telco often keeps records of all calls from phones subject to a special rate structure. Hodge v Mountain States Tel Co, 555 F2d 254, 266 (CA 9 1977) (Hufstedler, J, concurring). Although it was difficult to know exactly how much privacy the average

subscriber expected with respect to the numbers he dialed, the CtApps thought subscribers generally possessed a general understanding that calls are placed through electronic equipment and that some record of those calls was made.

Secondly, even if subscribers were vaguely aware that the Telco did not keep records of local calls, and if they consequently entertained some expectation of privacy regarding local numbers dialed, this did not necessarily mean that society was prepared to recognize that expectation as "reasonable." All subscribers utilize equipment owned by the Telco: in order to complete a call, the subscriber must "convey" the number to the Telco's switching equipment. Under these circumstances, it would be unreasonable for the subscriber to assume that the fact of his call's passing through the network will remain a total secret to the Telco. Once it is conceded that subscribers have no legitimate expectation of privacy respecting long-distance calls, moreover, it would be bizarre to make the existence of a constitutionally-protected privacy interest depend on how the Telco defined its "local call zone" or how it organized its billing policy. If the Telco decided to drop the flat monthly charge, for example, and to record all calls (local and otherwise) for billing purposes, the Telco would effectively extinguish subscribers' privacy interest in the numbers dialed. Once it is conceded that subscribers have no privacy interest in toll-billing records, and that the Telco is free to keep whatever billing records it chooses, it would be anomalous to say that subscribers have a "legitimate expectation of privacy" in locally-dialed numbers simply because the Telco does not currently choose to keep records of them.

For these reasons, the CtApps concluded that subscribers have no "legitimate expectation of privacy" with respect to any numbers they dial. The court derived support for this conclusion from three analogous

lines of cases. The first line consisted of cases like US v White, 401 US 745 (1971) (person has no legitimate expectation of privacy in statements made to informant "wired for sound") and US v Miller, 425 US 435 (1976) (bank depositor has no legitimate expectation of privacy in checks and deposit slips in bank's possession). Just as the speaker in White and the depositor in Miller "took the risk" that the third party would turn the information over to the Govt, so a subscriber, realizing that the numbers he dials must necessarily be conveyed to the Telco, "takes the risk" that it will in turn hand the information over to the police. The second line of cases involved mail covers, which the CAs generally have approved. In a mail cover, the Govt views information on the outside of a sealed envelope travelling through the mails; the Govt may learn the origin and destination of the envelope, but not the contents of the letter itself. A pen register was quite similar: the Govt learns numerical data indicating the destination of the call, but nothing whatsoever about the contents of the communication. The third line of cases involved beepers, which the CAs again have generally upheld. Just as a person has no legitimate expectation of privacy as to his location when he is travelling about in public, so a subscriber has no legitimate expectation of privacy in the numbers he dials into the national telephone network.

For these reasons, the CtApps concluded that, even if subscribers do have some expectation of privacy in the numbers they dial, this expectation is not one that society is prepared to recognize as "reasonable." Congress, in exempting pen registers from Title III of the Omnibus Act, obviously expressed the judgment that such devices do not pose a threat to privacy of the same dimension as the interception of oral communications. As this Court said in NY Tel Co, pen registers are regularly used by the Telco, without court order, "for purposes of

checking billing operations, detecting fraud, and preventing violations of law." Under these circumstances, any expectation of privacy as to numbers dialed over the phone network would be unreasonable.

Three judges dissented. They believed that subscribers do have an expectation of privacy in their local calls, and that this expectation was objectively "reasonable." First of all, routine Telco activities do not include the monitoring of local calls, since most customers pay for the basic use of Telco equipment at a flat rate. The overwhelming number of calls, moreover, are local calls. The majority's assertion that customers are unaware of the boundaries of local-call zones was, in the dissent's view, mere speculation: in Md, at any rate, callers had to dial the prefix "1" in order to get out of their local area. Secondly, subscribers' expectation of privacy was "reasonable." True, subscribers necessarily entrust the numbers they dial to Telco electronic equipment, but it cannot be deduced from this that subscribers voluntarily intend to transfer information to the Telco. Subscribers, "by the simple act of dialing local numbers, do not reasonably intend to reveal information; they merely make use of machinery in particular ways which, without police intrusion, would have remained fully private."

The dissent rejected the "analogies" the majority sought to draw from other lines of cases. White and Miller, in the dissent's view, were inapposite: in those cases, the defendant made a knowing and voluntary communication to the third party, and thus truly "assumed a risk." The subscriber, by contrast, does not knowingly and voluntarily reveal information to the Telco. The mail cover and beeper cases were likewise irrelevant: in those cases, the defendant subjected his letters or his person to full public inspection; the subscriber, on the other hand, dial phone numbers in the privacy of his home, and "reveals" them only to the inanimate switching equipment of the phone company.

III. CONTENTIONS

A. Petr.

Petr agrees with the court below that the outcome here is governed Katz, and likewise agrees that Justice Harlan's two-pronged inquiry is to be applied. Petr simply disagrees with the CtApps as to how the two questions are to be answered.

(1) Did Petr Exhibit an Actual Expectation of Privacy? Petr contends that he did: by placing his call to McDonough in the privacy of his home, petr evinced an intent to shut out the "uninvited eye or ear" just as Katz did by shutting the door to his public phone booth. Of course, despite petr's attempt to secure privacy, he necessarily revealed the number he was dialing to the Telco's switching equipment. As the dissent below said, however, petr did not thereby betray any subjective intent to transfer information to the phone company; indeed, since this was a local call, the Telco made no record of it at all. By making his call in the privacy of his home, petr took reasonable steps to protect the number he dialed from curious members of the public at large; by so doing, he manifested a subjective expectation of privacy. The fact that the number he dialed was recognized as a pattern of beeps or pulses by Telco switching machinery does not suggest that petr's subjective expectation of privacy was any less.

(2) Is Society Prepared to Recognize Petr's Subjective Expectation as "Reasonable"? Petr suggests that the answer to this question depends on a balancing of "privacy interests" against "effective law enforcement interests." On the one hand, the burden on law enforcement should a warrant requirement for pen registers be imposed would be slight. Obviously, it takes some time to get a warrant, but it takes time to get any kind of search or arrest warrant; judging from the number of pen register cases (e.g., NY Tel Co) in which the FBI or police did get a court order prior to installation, petr suggests that the t

burden posed by getting one is probably slight. On the other hand, the protection that a warrant requirement would offer privacy interests is substantial. Petr notes that pen registers can be abused: they may easily be converted into wiretaps by attaching earphones. See Note, 1977 Duke L J 751, 759. Petr cites congressional testimony about abuses of wiretaps, and suggests that pen registers can be similarly abused. In order to prevent "slippery slope" problems, petr says, a warrant should simply be required for a pen register at the outset. To the CtApps' argument that subscribers have no "reasonable expectation of privacy" because they entrust the numbers they dial to the Telco, petr replies that this reasoning only enhances the expectation of privacy. If people had a choice as to whose apparatus they used when communicating with others, the choice of the Telco's equipment might suggest a voluntary decision to transfer information to a third party. But consumers in actuality have no choice--the Telco has a monopoly--and thus a person's "decision" to reveal a number to the Telco cannot be said to evidence a voluntary conveyance of information.

For these reasons, petr concludes that he had an actual expectation of privacy, that this expectation was objectively "reasonable," and that the logging of the numbers he dialed thus constituted a "search." Since the search fell within none of the recognized exceptions to the warrant requirement, it was presumptively "unreasonable" and hence violative of the 4th Amendment.

B. Resp.

Resp begins by emphasizing that a pen register does not intercept the content of any communication. As LFP noted in his Giordano dissent, a pen register

> is a mechanical device attached to a given telephone line and usually installed at a central telephone facility. It records on a paper tape all numbers dialed from that line.

> It does not identify the telephone numbers from which incoming calls originated, nor does it reveal whether any call, either incoming or outgoing, was completed. Its use does not involve any monitoring of telephone conversations.

416 US at 549 n.1. As this Court said in NY Tel Co, moreover,

> 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. Furthermore, pen registers do not accomplish the "aural acquisition" of anything. They decode outgoing telephone numbers by responding to changes in electrical voltage caused by the turning of the telephone dial (or pressing of buttons on push button phones) and present the information in a form to be interpreted by sight rather than by hearing.

434 US at 167. The only question in this case, therefore, is whether the mere recordation of telephone numbers dialed by a subscriber constitutes a "search and seizure" for 4th Amendment purposes. In answering this question, resp agrees with petr and the CtApps that the two-pronged test from Justice Harlan's Katz concurrence should be applied.

(1) Did Petr Exhibit an Actual Expectation of Privacy? Resp argues that telephone users in general entertain no real expectation of privacy in the numbers they dial: as several CAs have said, people normally expect privacy as to the contents of their calls, not as to the fact that they have placed a call to a certain number. People realize that the number they dial is necessarily communicated to the Telco, not only for the purpose of completing the call, but also for billing and other business purposes. People likewise realize that records of phone calls are kept, for they see lists of the long-distance numbers they've called on their monthly bills. The fact that the Telco does not usually keep records of all calls, resp argues, is of no constitutional significance. The facts that all numbers dialed are imparted to the Telco, and that all numbers dialed are capable of being recorded by it, are enough to negate any reasonable expectation of privacy in the information thus divulged. The constitutional irrelevance of any "long distance"/"local"

distinction is underscored when one considers that the signals going out from a local call are transported by the same equipment that handles long-distance calls. This equipment is the necessary conduit of all phone calls, and the "intrusion" effected by a pen register on the dialer's privacy is identical regardless of what city he is calling. Under these circumstances, it would bizarre to hold that the dialer's constitutional rights depended on what the Telco's zone-definition practices happened to be. Resp, following the CtApps, relies on White, Hoffa, and Miller, emphasizing that the intrusion here is less than in those cases, since in those cases the content of the communication was at stake. Pen registers, by contrast, do not intercept content at all.

(2) Is Society Prepared to Recognize Petr's Subjective Expectation (If He Had One) as "Reasonable"? Resp notes that pen registers are routinely used for a variety of purposes. The Telco uses them, for example, to find out whether a home phone is being used to conduct a business; to check for defective dials; to ascertain billing errors; and to record all calls from phones subject to special rate structures. Most importantly, pen registers are routinely used by the Telco to investigate customer complaints about obscene or harassing calls. Forty-nine States now have statutes making abusive phone calls a criminal offense, and society has recognized that pen registers may legitimately be used as devices for detecting the persons responsible for such calls. Numerous courts have approved the use of pen registers by the Telco, as against "invasion of privacy" challenges, for the purpose of ferreting out violators of the law. Society's recognition that the Telco will employ pen registers to investigate customer complaints--and that, when the evidence is gathered, Telco will divulge it to the police--indicates that an expectation of privacy in the numbers one dials is unreasonable. In this case, of course, the Telco did not install a pen register on petr's phone sua sponte, but was requested to do so by police. Yet this differ-

since, while it would obviously be significant for purposes of "state action" analysis, is really insignificant for purposes of "expectation of privacy" analysis. Once it is accepted that Telco will record numbers to detect misuse of the phone system, it is irrelevant to the dialer whether Telco is acting on its own or at the Govt's instance. Society has recognized that Telco's logging of one's numbers is permissible for any number of legitimate purposes--billing, correcting errors, preventing abuse. Law enforcement is simply one more such legitimate purpose. Given this pervasive pattern of permissible recordation, a telephone user cannot reasonably expect that any particular number he dials will remain totally private.

After concluding its Katz analysis, resp replies to petr's suggested "balancing process." Resp argues in limine that the premise of petr's argument here is erroneous. This Court has used a "balancing test" to ascertain what sort of 4th Amendment protection (a warrant, for example, or something less) is appropriate in a given case. The "balancing test," in other words, assumes that the 4th Amendment is applicable, whereas the question here is whether pen registers effect a "search or seizure" such that the 4th Amendment comes into play at all. Even assuming that some sort of balancing is proper here, moreover, it would not, on resp's view, suggest a different result. On the one hand, the burden on law enforcement imposed by a warrant requirement would be substantial: the time necessary to secure a warrant may be considerable, and the usefulness of pen registers will be eliminated entirely in cases where reasonable suspicion, but no probable cause, exists. On the other hand, the privacy interests to be protected are slight, since pen registers leave the contents of communications inviolate. Nor is there any real possibility that pen registers will be abused, e.g., by being converted into more insidious devices like wiretaps. Law enforcement officers and phone companies alike know the limits of their authori-

cy under Title III, and no "slippery slope" from permissible pen registers to impermissible wiretaps need be feared. In any event, this Court must presume that law enforcement officers will obey the law. It could just as plausibly be argued that a warrant to search "X" for "Y" could be abused by police desirous of converting it into a "general warrant." Yet this possibility is obviously no reason for refusing to issue the search warrant in the first place.

In sum, resp concludes that the installation of a pen register effects no "search or seizure" within the meaning of Katz, and that the 4th Amendment's warrant requirement is thus inapplicable. This conclusion, on resp's view, is mandated, not only on analysis of people's realistic "expectations of privacy" in the numbers they dial, but also on policy grounds.

IV. DISCUSSION.

For me, this is a very simple case. I believe that the installation of a pen register does not constitute a "search or seizure" and that the decision below should be affirmed.

A. Actual Expectation of Privacy. The average phone user, I would suspect, does not harbour any significant expectation of privacy regarding the fact that he has dialed a particular number on his phone. All phone users are aware from their monthly bills that the Telco records long-distance dialings. Some users may infer--from the fact that local calls are generally governed by a flat rate, rather than a per-call rate-that the Telco does not usually record local dialings. Yet I wonder how many subscribers consciously draw this inference: the Telco could have any number of reasons for keeping track of local calls too--to gauge the volume of calls over particular circuits, for example, or to get some idea of what a fair monthly charge would be. Phone users, in other words know for a fact that the Telco records some calls, know for a fact that

the Telco has the facilities for recording all calls, and might well suspect, if forced to think about it, that the Telco may have reasons (unrelated to billing, perhaps) for recording local dialings in particular. On a common-sense level, it seems hard to imagine that people would seriously think that the numbers they dial into a computerized phone network will remain a secret from the phone company.

The fact that petr dialed McDonough's number from his own home does not, to my mind, call for any different conclusion. Contrary to petr's argument, Katz is quite different from this case. Katz wanted to keep the contents of his phone call private, and he reasonably took steps toward this end by shutting the doors to his phone booth. Yet petr, by the mere act of dialing from home, could not keep the number he was dialing "secret" from the phone company--regardless of where petr called from, he would have to reveal that number to the phone company in precisely the same way. Petr, by calling from home, may well have evinced a desire to keep the obscene contents of his calls secret; the numbers he dialed are something else again.

B. "Reasonable" Expectation of Privacy. Even if petr here had some expectation that the number he dialed would remain private, I doubt that society is prepared to recognize this expectation as reasonable. Everyone concedes that a person can have no legitimate expectation of privacy in the long-distance numbers he dials. The Telco keeps routine business records of these numbers, and this Court's cases establish that a person has no legitimate expectation of privacy in business records furnished to a third party. Everyone concedes, moreover, that the Telco in some circumstances does record all dialings from a particular residence--to check billing errors, to monitor equipment malfunctions, to trace harassment calls--and that the Telco could record all dialings if it chose to. Given this, to make the existence of a constitutionally-protected privacy interest contingent on the fortuity of a private

company's billing practices would be most bizarre. It is, after all, a Constitution that we are interpreting. When a person dials a number--any number--he takes the risk that the Telco will record that number for a variety of legitimate business purposes. Having taken that risk, the dialer can claim no reasonable expectation that the number should remain his little secret.

I think this result is consistent with the trend of this Court's cases. Viewing the matter broadly, one may suggest that there are two types of "surveillance" cases. One group consists of cases involving mail covers, visual surveillance (through binoculars if necessary), beepers, and the like. These various "devices" are similar in that they take in what might be called the "externals" of people's activity--their physical location in space, their name and address, the destination of their movements and correspondence. These devices, in other words, keep track only of that which one must necessarily reveal to others in conducting one's affairs. The other group consists of cases involving wiretaps of phone calls or opening of letters. Here, where surveillance necessitates taking in the contents of people's communications, the 4th Amendment applies and a warrant is necessary. Pen registers, in my view, belong quite firmly in the former group. Pen registers, like mail covers, beepers, and visual surveillance, take in no content: they take in only the facts that the dialer must necessarily reveal to others (here, the phone company) in going about his business. Pen registers reach only the "externals" of communication--the bare fact that a number has been dialed. Just as one must "reveal" the outside of an envelope in order to get it delivered, so one must reveal the number one dials in order to get the call completed. To the extent that one necessarily discloses certain data for the purpose of using modern methods of communication, one pro tanto surrenders any "expectation of privacy" as to the data necessarily disclosed.

Finally, to hold that installation of a pen register is a "search," and thus to hold that such installations are subject to a warrant requirement, would, in my view, impose a serious burden on law enforcement. It is my understanding that pen registers are customarily used in the investigative phase of criminal proceedings: pen registers, that is, are used to help get evidence sufficient to make out probable cause to arrest or search. This was the pattern in this case: the police had a suspicion of petr, but perhaps not probable cause; they installed a pen register, and that produced a key fact--that petr had called McDonough. On the strength of that fact (plus earlier evidence) the police got a search warrant; that search turned up yet more incriminating evidence, and the police then had probable cause to arrest. As the investigation in this case reveals, therefore, the police often may not have probable cause at the time they need to install a pen register; if a warrant is required for all installations, therefore, pen registers will be useless at the early stages of investigations where the police have nothing but a strong suspicion.

V. CONCLUSION

I conclude that the installation of a pen register is not a search for 4th Amendment purposes, and hence that no warrant is required prior to such installations. Accordingly, the decision of the Md CtApps should be aff'd.

QUESTIONS

For petr:

You have argued that telephone users have an "expectation of privacy" as to the local numbers they dial because the telephone company does not normally keep records of local calls. Does not your argument mean that the existence vel non of a constitutionally-protected privacy interest will depend on the fortuity of a private corporation's billing policies at any point in time? Does this mode of reasoning strike you as odd?