

Supreme Court of N.J. Issues Two Significant Search and Seizure Opinions

By Eric R. Breslin

New Jersey's courts have seen an uptick in Fourth Amendment search and seizure and ancillary privacy litigation over the last few years. In April and May of 2015 alone, the state Supreme Court issued two significant opinions that implicate both the Fourth Amendment and the proper admission into evidence of monitored telephone calls: *State of New Jersey v. Ricky Wright* and *State of New Jersey v. Kingkamau Nantambu*. A quick look at the court's docket for next term shows that more decisions are coming.

The Private Search Doctrine

The "private search doctrine" occupies a semi-obscure corner of Fourth Amendment jurisprudence. At its base, the doctrine addresses instances in which a private actor (*i.e.*, not a law enforcement officer) conducts a "search" and discovers some species of contraband or proof of illegal conduct. That person must then proceed to notify law enforcement personnel or present them with the item in question. Law enforcement must then proceed to duplicate the private search without first obtaining a judicial warrant.

Does this happen every day? Probably not. Yet, it happens enough to be the subject of a May decision by the Supreme Court of New Jersey—*State of New Jersey v. Ricky Wright*—which recounts a diverse line of state and federal authority on this very issue.

Although somewhat counterintuitive, the logic of the doctrine is as follows: Since a private person conducts the original search, it is deemed to not implicate the Fourth Amendment. So, if the follow-up police search does not exceed the scope of the private search, the government is held not to have invaded a protected privacy interest and an otherwise proscribed warrantless search can be valid.

Should this doctrine apply to the most sacred of all Fourth Amendment locations—a private home? As always, this is the beating heart of the privacy-based analysis. For as U.S.



Supreme Court Justice Antonin Scalia has observed, "[W]hen it comes to the Fourth Amendment, the home is first among equals 'and stands' at the Amendment's very core." *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013). These protections exist with equal vigor in the New Jersey State Constitution, in Article I, Paragraph 7. This eternal clash between privacy and law enforcement prerogatives brings us to the case of Ricky Wright.

Wright had a girlfriend, a woman named Evangeline James. She lived with her children in an apartment in Asbury Park, New Jersey, where Wright stayed over three-to-four nights a week.

One Sunday evening in March 2009, James called her landlord to report a major water leak in her ceiling. The landlord instructed James to turn off the water main valve and assured her that both he and a plumber would be at the apartment in the morning.

The landlord was true to his word and arrived in the company of a plumber on Monday morning. James, however, was not home and did not answer her telephone. After waiting about 30 minutes, the landlord let himself in—something he had done before, presumably as required for routine maintenance.

The landlord and the plumber observed water and raw sewage leaking from the kitchen ceiling. As they moved through the apartment looking for other leaks, they noticed marijuana on a night stand. In an open drawer inside the night stand, they also found what they believed to be cocaine. They called the police.

Police Officer Christie soon arrived at the scene. Officer Christie walked through the apartment and noticed the drugs. He also found a scale, which neither the landlord nor the plumber had mentioned. He then called for back-up, and a full search (on consent) was carried out. This search yielded other drug contraband, as well as a handgun loaded with illegal hollow-point bullets. James and Wright were arrested.

Both were then indicted for several drug and weapons offenses. At trial, Wright moved to suppress all the evidence seized. Despite a police admission that the need to search was not exigent and that there had been ample time to obtain a warrant, the trial court denied the motion to suppress, finding that the search of the apartment did not violate the Fourth Amendment or state constitutional protections. The trial court relied primarily on the private search doctrine and found that the police search did not exceed in scope that which was done by the plumber and the landlord. The Appellate Division affirmed.

The Supreme Court of New Jersey granted a petition for certification to consider one issue: whether the private search doctrine (also sometimes referred to as the third-party intervention doctrine) can be used to search a residence without a warrant. On May 19, in a unanimous opinion authored by Chief Justice Rabner, this question was resoundingly answered in the negative, as the state Supreme Court reversed the findings of the trial court and the Appellate Division and found the search of James' apartment to be unconstitutional.

The court acknowledged the existence of the private search doctrine as rooted in earlier United States Supreme Court authority and confirmed the general precept that the Fourth Amendment's warrant requirement applies only to searches carried out by government agents, not by private individuals. *Burdeau v. McDowell*, 256 U.S. 465 (1921); *Walter v. United States*, 477 U.S. 649 (1980).

While the doctrine has an almost 100-year-long pedigree, the United States Supreme Court has never extended its reach to the search of a private home. This apparently troubled the Supreme Court of New Jersey, which found such a proposed usage to be a "significant expansion" of the doctrine and something about which it had "serious reservations."

Of interest to New Jersey practitioners is that the opinion was premised on both state and federal law. The absence of a United States Supreme Court opinion on the point weighed heavily here, but the state Supreme Court maintained that its holding rested on the New Jersey State Constitution and New Jersey precedent, as well.

At the end of the day, it seems the fact that the premises searched was a private home was what swung the day in Wright's favor. The court cited federal and state case law, all

confirming the special intimate and personal nature of a private residence and the careful scrutiny that must accompany any state intrusion into that space. "The unique status of the home has been recognized for centuries." See the opinion citing *Miller v. United States*, 357 U.S. 301, 307 (1958).

A warrantless search of a home is "presumptively invalid," wrote Chief Justice Rabner, citing *State of New Jersey v. Lamb*, 218 N.J. 300 (2014); and *Riley v. California*, 134 S. Ct. 2473 (2014). Only a recognized exception to the warrant requirement can justify such an intrusion. The search of the apartment in the *Wright* case did not meet this high standard.

Though his opinion was emphatic, Chief Justice Rabner reviewed the various findings on this issue reached by other states and federal circuit and district courts. New Jersey's view can be argued to be the majority view, but it is not a unanimous view. While the application of the private search doctrine to private residences may be resolved in New Jersey, it is foreseeable that rulings from other courts in other jurisdictions are likely to continue.

An Audio Tape with Gaps in It

Audio tapes and video tapes are a frequent coin of the realm in both federal and state criminal practice. It is increasingly rare to find a major prosecution in which the government's discovery does not now include some form of recording. There are multiple paths of varying effectiveness through which intrepid defense counsel can seek to exclude this evidence. One of the more straightforward ways is if the recording in question can be argued to have been incomplete in some way.

One might assume that a partial recording, even if relevant, would be so inherently suspect as to preclude admission under Rule 403 of the Federal Rules of Evidence or one of its state law counterparts. This would be a perilous assumption. Incomplete or partial tape recordings can be admitted, once authenticated and found to be trustworthy, although litigating for admission can require a challenging and convoluted analysis. One such scenario was addressed in April by the Supreme Court of New Jersey in *State of New Jersey v. Kingkamau Nantambu*.

Nantambu was involved in a domestic dispute with his girlfriend, Crystal Aikens. The police were summoned, and Aikens then alleged that Nantambu had threatened her with an illegally possessed firearm. Such a weapon was, in fact, found on the premises. This resulted in Nantambu's being charged with two gun offenses.

Shortly after his arrest, Aikens also reported to the police that Nantambu had contacted her and had engaged in "witness tampering," attempting to influence her future testimony in exchange for money. Aikens agreed to let two detectives from the Atlantic County Prosecutor's Office place recording equip-

ment on her cellular telephone and listen in while she talked to Nantambu. Two ear pieces were then attached to the telephone and to a digital audio recorder in order to capture the conversation while the detectives stood by.

For a time, all went quite well (from the prosecution's point of view, at least). Aikens reached Nantambu, who soon promised her money in an attempt to script what she would say going forward. He also admitted that he had, in fact, possessed a gun.

Then, things took a turn. According to the detectives, during the call, Aikens shifted her position and moved the cellphone. This, in turn, caused the recording device to fall and the wires to disconnect. By the time the recorder was retrieved and checked and the wires reattached, two minutes had elapsed and the conversation was effectively over. The resulting recording thus had a significant gap.

Nonetheless, the state added bribery and witness tampering charges to Nantambu's already-existing weapons issues. At trial, the state attempted to offer the partial recording as substantive evidence on both sets of charges. This proffer was bolstered by testimony from the detectives to the effect that they had heard portions of the unrecorded slice of the conversation and that nothing material had transpired in the missing part.

The defense objected, citing to *State of New Jersey v. Driver*, 38 N.J. 255 (1962), contending that the gap in the tape made it inadmissible. The trial court agreed, finding that, although the gap was not caused by any intentional conduct by the police, the very existence of a gap precluded the tape's admission. The court was also discomfited that the gap was situated immediately after one particularly damaging statement by Nantambu.

On appeal, the Appellate Division reversed, crediting the testimony by the detectives that nothing material was said in the two-minute gap. The Supreme Court of New Jersey granted certification.

Under *Driver* and New Jersey law, partial tape recordings can come into evidence. But the trial court must first utilize *Driver*'s five-part analysis applicable to all recordings proffered by the state: (i) that the device used could and did, in fact, record; (ii) that its operation was competent; (iii) that the recording is authentic; (iv) that no changes, additions or deletions were made; (v) and that any confessions on the tape were elicited voluntarily.

In the circumstances of a partial recording, it is thus really the fourth *Driver* element that comes to the forefront, as trial court must determine whether admission of a partial tape unduly prejudices the interests of the defendant and what the remedy should be.

Here, the state Supreme Court found that gaps in a tape do not automatically require the exclusion of the entire recording. Instead, the court instructed that an evidentiary hearing must be held on the trial court level in order to determine whether the missing portion renders the entire recording inherently unreliable. The court also left open the possibility that strategic redactions of portions of a tape made unreliable by missing material is an option that may be considered at trial.

Thus, in evaluating a partial recording, the trial court would need to determine two things: first, whether an omission or gap in the tape is unduly prejudicial; and second, if prejudice is found, whether the prejudice renders all or only some of the tape untrustworthy. The trial court should then suppress only the portion deemed untrustworthy.

Since this analysis was not done, the judgment of the Appellate Division was reversed and the matter remanded to the trial court for additional consideration.

What Next Year May Hold

The *Wright and Nantambu* cases are meant to be illustrative only—they do not comprise all of the Fourth Amendment or privacy opinions in the past year—and represent two unique and especially interesting decisions. A look at the state Supreme Court's pending docket for the next term shows that more decisions are coming. Here are some examples.

- *State of New Jersey v. Gary Lunsford*, A-61-14. Should cellular telephone billing records be secured by a grand jury subpoena or a search warrant?
- *State of New Jersey v. Antoine Watts*, A-21-14. Possible suppression of certain drug evidence not found in an initial search of a premises pursuant to warrant, but found while defendant was being transferred to another location.
- *State of New Jersey v. Demetrius Cope*, A-13-14. Was a protective sweep of a suspect's apartment justified?
- *State of New Jersey v. William L. Witt*, A-9-14. Should the automobile exception of the warrant requirement apply in this case?

In sum, next year promises to be an active one for the New Jersey Supreme Court. •

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