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Search and Seizure: People v. Bialostok

SEARCH & SEIZURE

N.Y. CONST. art. I, § 12:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

COURT OF APPEALS

People v. Bialostok[2198]
(decided February 25, 1993)

Criminal defendants, Milton Bialostok and Lawrence Scocco, appealed their convictions for conspiracy and promoting gambling which were partially based on evidence secured through a warrantless pen register search.[2199] Defendants claimed that their state constitutional rights were violated[2200] and such

2198. 80 N.Y.2d 738, 610 N.E.2d 374, 594 N.Y.S.2d 701 (1993).

2199. *Id.* at 742, 610 N.E.2d at 375-76, 594 N.Y.S.2d at 702-03. A pen register is used to "identify the numbers dialed or otherwise transmitted on the telephone line to which such device is attached." N.Y. CRIM. PROC. LAW § 705.00(1) (McKinney 1984 & Supp. 1994).

2200. *Bialostok*, 80 N.Y.2d at 743, 610 N.E.2d at 376, 594 N.Y.S.2d at 703. *See* N.Y. CONST. art. I, § 12 ("The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated . . . .").

evidence should have been suppressed because the pen register's audio capacity required a warrant which was neither sought nor issued.[2201] The New York Court of Appeals held that pen registers enhanced with audio capacity do require a warrant regardless of whether such audio capacity is, in fact, utilized.[2202] In light of other incriminating evidence, however, the *Bialostok* court held that failure to obtain a warrant was harmless.[2203]

In the course of investigating the defendants and others, authorities placed pen registers on two telephone lines which were suspected of being used by the defendants to take illegal bets.[2204] No warrant was needed to use a pen register and, therefore, none was obtained.[2205] Because of the telephone numbers dialed, a warrant was eventually obtained to allow an eavesdropping device to be installed on the two lines.[2206] The pen register which had already been installed had the dual capacity of both identifying telephone numbers dialed as well as

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2201. *See Bialostok*, 80 N.Y.2d at 743, 610 N.E.2d at 376, 594 N.Y.S.2d at 703. As the court explained, New York law required a warrant for the use of electronic eavesdropping devices however, a standard pen register was not considered an eavesdropping device and thus required no warrant. *Id.* Defendant Scocco further claimed that the electronic eavesdropping evidence against him should have been suppressed because authorities did not notify him of the wiretap within ninety days of its termination as required by New York law. *Id.* at 742, 610 N.E.2d at 376, 594 N.Y.S.2d at 703; *see also* N.Y. CRIM. PROC. LAW § 700.50(3) (McKinney 1984). The statute states in pertinent part:

> Within a reasonable time, but in no case later than ninety days after termination of an eavesdropping warrant, . . . written notice of the fact and date of the issuance of the eavesdropping warrant, and of the period of authorized eavesdropping, and of the fact that during such period communications were or were not intercepted, must be personally served upon the person named in the warrant . . . .

Id. The *Bialostok* court held that the defendant did have "adequate informal notice" and therefore the evidence did not have to be suppressed. *Bialostok*, 80 N.Y.2d at 742, 610 N.E.2d at 376, 594 N.Y.S.2d at 703.

2202. *Id.* at 745, 610 N.E.2d at 378, 594 N.Y.S.2d at 705.

2203. *Id.* at 745-46, 610 N.E.2d at 378, 594 N.Y.S.2d at 705.

2204. *Id.* at 742, 610 N.E.2d at 375, 594 N.Y.S.2d at 702.

2205. *Id.* at 743, 610 N.E.2d at 376, 594 N.Y.S.2d at 703.

2206. *Id.*

monitoring the audio content of the telephone transmissions.[2207] Therefore, all that needed to be done was to attach an audio cable to the installed pen register.[2208] This allowed the content of the phone conversations to be heard.[2209]

Defendants claimed the eavesdropping evidence should have been suppressed at trial because the pen register was actually an "eavesdropping device."[2210] Defendants contended that because of its ability to switch to being an eavesdropping device, it should have required a warrant before installation, even for use as a pen register.[2211] No evidence was introduced that the pen register was improperly used as an eavesdropping device before the warrant was obtained.[2212]

The court of appeals decided that the dual purpose pen register required a warrant.[2213] The court emphasized that the purpose of requiring a warrant for audio listening devices "is to interpose a neutral and detached Magistrate between citizens and the police to protect individuals from having to rely on the good conduct of the officer in the field for the protection of their right to be free of unreasonable searches."[2214] The court explained:

2207. *Id.* As revealed at trial, however, the audio capacity of the pen register was at first disabled. *Id.* The installer testified that the audio portion of the device was connected once an eavesdropping warrant was obtained. *Id.* The warrant was issued, and the telephone conversations were monitored for ten days ending on December 22, 1986. *Id.* However, the warrant itself contained a December 26th expiration date. *Id.* at 746, 610 N.E.2d at 378, 594 N.Y.S.2d at 705. The ninety day post termination notice was served ninety days after the original expiration date but ninety-four days after the eavesdropping actually terminated. *Id.*

2208. *Id.* at 743, 610 N.E.2d at 376, 594 N.Y.S.2d at 703.

2209. *Id.*

2210. *Id. See also* N.Y. CRIM. PROC. LAW § 700.05(1) (McKinney 1984). The statute states in pertinent part: "'Eavesdropping' means 'wiretapping' or 'mechanical overhearing of conversation,' as those terms are defined in section 250.00 of the penal law." *Id.*

2211. *Bialostok*, 80 N.Y.2d at 743, 610 N.E.2d at 376, 594 N.Y.S.2d at 703.

2212. *Id.*

2213. *Bialostok*, 80 N.Y.2d at 742, 610 N.E.2d at 376, 594 N.Y.S.2d at 703.

2214. *Id.* at 745, 610 N.E.2d at 377, 594 N.Y.S.2d at 704.

> This is a technology that has the capacity, through willful use or otherwise, to intrude on legitimately held privacy, and it is the warrant requirement, interposing the Magistrate's oversight, that provides to citizens appropriate protection against unlawful intrusion. Thus, we hold the devices employed here were subject to the warrant requirement and installation of them without one was unlawful.[2215]

In *People v. Guerra*,[2216] the court of appeals ruled that there is no constitutional violation by the use of traditional pen registers which are able to "provide a list of all numbers dialed, both local and long distance or toll calls . . . ."[2217] The court reasoned that a warrant is not necessary because defendants have "no legitimate expectation of privacy in the records maintained by the telephone company."[2218]

However, in *People v. Gallina*[2219] the court of appeals refused to allow authorities to merely deactivate an eavesdropping device which was still present where it was installed, during a time when the warrant was ineffective regardless of whether such authorities were engaged in unauthorized eavesdropping "because it is the potential for abuse that is the focus of analysis."[2220] The court stated that "[t]he danger of inadequate inactivation is, of course, that an unauthorized eavesdropping will result."[2221] Therefore, in New York, a device with the capacity to intrude upon the "legitimately held privacy" involved in telephone conversations requires a warrant.[2222]

2215. *Id.* at 745, 610 N.E.2d at 378, 594 N.Y.S.2d at 705.

2216. 65 N.Y.2d 60, 478 N.E.2d 1319, 489 N.Y.S.2d 718 (1985).

2217. *Id.* at 64, 478 N.E.2d at 1321, 489 N.Y.S.2d at 720.

2218. *Id.* (quoting People v. Di Raffaele, 55 N.Y.2d 234, 241-42, 433 N.E.2d 513, 516, 448 N.Y.S.2d 448, 451 (1982)).

2219. 66 N.Y.2d 52, 485 N.E.2d 216, 495 N.Y.S.2d 9 (1985).

2220. *Id.* at 58, 485 N.E.2d at 219, 495 N.Y.S.2d at 12 (citations omitted).

2221. *Id.* at 57 485 N.E.2d at 219, 495 N.Y.S.2d at 12.

2222. *Bialostok*, 80 N.Y.2d at 745, 610 N.E.2d at 378, 594 N.Y.S.2d at 705.

On the federal level, the Supreme Court recognized, in *Katz v. United States*,[2223] that citizens can reasonably expect the contents of their telephone conversations to remain private.[2224] However, in *Smith v. Maryland*,[2225] the Court distinguished the use of pen registers and stated that there is no reasonable expectation of privacy for telephone numbers dialed.[2226] The Court reasoned that because the telephone company has access to all phone numbers dialed, it is unreasonable to expect that the numbers dialed are private.[2227] The Court's rationale was that "[t]hese devices do not hear sound. They disclose only the telephone numbers that have been dialed . . . . Neither the purport of any communication . . . nor whether the call was even completed is disclosed by pen registers."[2228]

To date there has been no distinction drawn between traditional and dual purpose pen registers by the United States Supreme Court.[2229] Following *Smith*, there is no constitutional violation to using a pen register without a warrant. Since the court in *Bialostok* made the distinction between traditional pen registers and advanced dual purpose pen registers, New York affords defendants greater constitutional protection in this area.

2223. 389 U.S. 347, 352 (1967). The United States Supreme Court stated that "a person in a telephone booth may rely upon the protection of the Fourth Amendment." *Id.*

2224. *Id.* at 352.

2225. 442 U.S. 735 (1979).

2226. *Id.* at 741-42.

2227. *Id.* at 742-43.

2228. *Id.* at 741 (quoting United States v. New York Tel. Co., 434 U.S. 159, 167 (1977)).

2229. Several state courts have declined to follow *Smith v. Maryland* and *Katz v. United States*. *See, e.g.*, State v. Hempele, 576 A.2d 793 (N.J. 1990) (rejecting the 2-pronged test for searches and seizures and adopting a 1-pronged test of whether society is prepared to recognize and expectation as 'reasonable'); State v. Campbell, 759 P.2d 1040 (Or. 1988) (rejecting the *Katz* "reasonable expectation of privacy" test and adopting the test of whether one has a right to privacy); Commonwealth v. Melilli, 555 A.2d 1254 (Pa. 1989) (holding that for use of a pen register probable cause is required, contrary to *Smith*); Richardson v. State, 865 S.W.2d 944 (Tex. Crim. App. 1993) (holding that a person has a reasonable expectation of privacy in the numbers she dials even though the telephone company may have access to those numbers).