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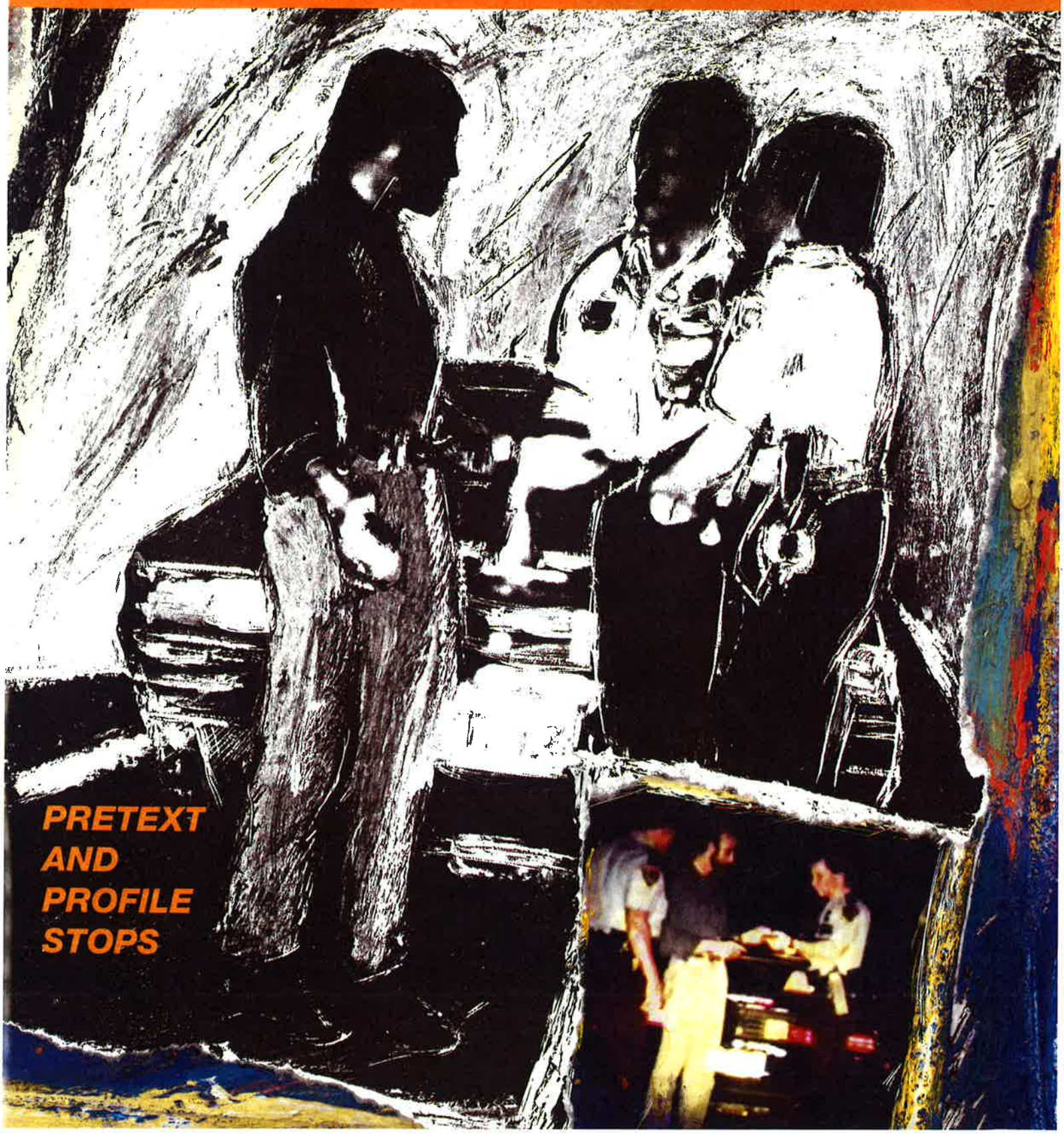
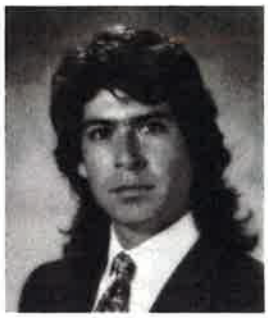


PRETEXT AND PROFILE STOPS



FOURTH AMENDMENT FORUM

No Strings Attached: Are Cordless Telephone Communications Private?

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In *Katz v. United States,* 389 U.S. 347 (1967), the Supreme Court held that the Fourth Amendment protects communications carried by land-based telephone lines. The Court reasoned that an individual has a subjective expectation of privacy in a telephone conversation, and such an expectation is one which society recognizes as reasonable. The Court did not expressly limit its holding to land-based telephone lines, perhaps because it could not predict the future. The Court was apparently motivated, however, by the extent to which law enforcement personnel must go to intercept a conversation transmitted via a land-based line.

Plainly, an individual does not expect law enforcement to intercept a routine telephone conversation by attaching an electronic device to the telephone or a listening device to the phone booth. By direct contrast, where an individual engages in a personal conversation that he knows will likely be overheard by the public, the expectation of privacy cannot be viewed as reasonable. *See Matter of John Doe Trader Number One,* 894 F.2d 240, 246 (7th Cir.1990); *United States v. Burns,* 624 F.2d 95 (10th Cir.), *cert. denied.* 101 S. Ct. 361 (1980) (holding that there was no reasonable expectation of privacy for a loud conversation in a hotel room that could be heard in an adjoining room).

As technology has evolved, courts have strained to glean guidance from earlier cases that clearly did not anticipate the most recent technological developments. One such development, the cordless telephone, has sparked interpretations of the Fourth Amendment which do not square well with the holding in *Katz.* In particular, in *United States v. Smith,* 978 F.2d 171 (5th Cir. 1992), the Fifth Circuit addressed the question of whether the Fourth Amendment mandates the suppression of evidence derived from the warrantless interception of a cordless telephone conversation, which is transmitted by a combination of radio waves and land lines; by radio waves from the handset to the telephone base, and then over traditional land-based lines.

Defendant David Smith was engaging in a conversation on a cordless telephone. His next-door-neighbor, suspicious of ongoing criminal activity, eavesdropped on Smith's calls by using a Bearcat scanner, a radio receiver device designed to monitor radio frequencies. The neighbor overheard conversations regarding drug transactions, so he promptly contacted law enforcement authorities, who instructed him to tape record the conversations. On at least one occasion, law enforcement authorities "were present and assisted in intercepting and recording Smith's phone calls." *Smith,* 978 F.2d at 173. After the district court denied Smith's motion to suppress the conversations, a jury convicted him of various drug offenses, including the use of a telephone to cause or facilitate a drug felony.

On appeal from the denial of his motion to suppress, Smith challenged the district court's ruling on Fourth Amendment grounds as well as under Title III of the Omnibus Crime and Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2521. The Fifth Circuit rejected the statutory claim, concluding that the conversation was neither a "wire," "oral," or "electronic" communication within the meaning of the statute. Title III specifically prohibits nonconsensual interception of such communications. Because Title III, by its terms, excludes cordless telephone transmissions from the definitions of "wire" and "electronic" communications, the court considered whether a cordless telephone transmission was an "oral" communication. It declined to classify a cordless transmission as "oral," reasoning that Congress intended to include in the definition of "oral" only those communications carried by sound waves, not radio waves. *Id.* at 175.

In addressing Smith's Fourth Amendment challenge, the Fifth Circuit stated that "the key inquiry is whether the interception of

Smith's phone calls constituted a search within the meaning of the Fourth Amendment." *Id.* at 176.

The court examined the few cases that have confronted this issue. The cases, *State v. Howard,* 679 P.2d 197 (Kan. 1984), and *State v. Delaurier,* 488 A.2d 688 (R.I.1985), involved cordless phone communications that could be easily overheard by anyone listening on an ordinary radio receiver. Based on that factor, and the other particular characteristics of the cordless phones in question, those cases held that there could have been no reasonable expectation of privacy in the cordless phone transmissions. The courts reasoned that the defendants had "knowingly exposed" the communication to the public by using a technology that could be so easily intercepted. *Smith,* 978 F.2d at 179.

The Fifth Circuit, discussing the more general question, expressed that a telephone communication does not lose its Fourth Amendment protection simply because it is not transmitted by wire. The panel noted that cordless technology has continued to evolve, and therefore, a blanket rule is not appropriate. Cordless technology has improved so much that even radio scanners cannot intercept communications over certain models. Indeed, it is now as difficult to intercept certain cordless communications as it is to intercept a traditional land-based conversation. Based on this analysis, the court stated that "application of the Fourth Amendment in a given case will depend largely upon the specific technology used, and a trial court must be prepared to consider that technology in a hearing on a motion to suppress." *Smith,* 978 F.2d at 180. In that regard, the Fifth Circuit concluded that the trial court incorrectly assumed that there could never be a reasonable expectation of privacy for a cordless communication.

Applying Fourth Amendment principles to the facts at hand, however, the Fifth Circuit held that Smith failed to introduce any evidence, at the motion to suppress, that would tend to show that his subjective expectation of privacy was reasonable. Smith did not present any evidence about the cordless phone's frequency or range. Thus, the Fifth Circuit affirmed the district court's holding on the limited ground that Smith failed to carry his burden on the motion to suppress.

Bear-Katz Scanners

In our view, it was not objectively reasonable for the government to intercept Smith's phone calls with a Bearcat scanner, without court authorization. Stated another way, it was objectively reasonable for Smith to expect that when he used his cordless phone, the government would not be listening to his calls with a Bearcat scanner. The Fifth Circuit failed to identify a meaningful distinction between the Bearcat scanner used in *Smith* and the device used in *Katz.* Had Smith used the land-line telephone used by Katz, his expectation of privacy would have surely been objectively reasonable. Smith would not have had the burden of introducing evidence about the specific characteristics of his land-based phone. His conversation would have been presumptively protected under *Katz.*

Yet, for some unexplainable reason, Smith's expectation of privacy in a cordless phone was somehow less objectively reasonable than Katz's expectation of privacy in his land-line conversation. Ironically, the equipment used by the government to intercept Smith's cordless conversation was more sophisticated than the device used to monitor Katz's conversation from the public phone booth or than the typical wiretape device. *Smith,* 978 F.2d at 179 n.10 ("The equipment needed to tap a regular telephone line can be purchased for less than $25 at Radio Shack (considerably less than the cost of a Bearcat scanner)").

Plainly, the significant difference between the ease with which a land-line conversation and cordless conversation can be intercepted is a matter of degree. Under *Katz,* the expectation of privacy in a land-line phone conversation is always objectively reasonable, even though a land-line conversation is often more easily intercepted than a cordless conversation. By holding that cordless communications are not entitled to a presumption of objective reasonableness and Fourth Amendment protection, the Fifth Circuit drew an artificial line between cordless and land-line telephones, relying on the history of cordless technology which, at its inception, utilized a commercial radio frequency to communicate with the base unit. Any standard AM/FM radio could pick up conversations from the phone.

Understandably, courts were reluctant to protect those communications since they could be innocently intercepted on a transistor radio, a "Plain Hear" exception, if you will. By contrast, Title III—and presumably the Fourth Amendment—protect *cellular* telephone communications because cellular phones do not use AM/FM radio frequencies and, thus, are not ordinarily intercepted by accident. *See* Electronic Communications Privacy Act of 1986: House Report 99-647 at 20, 31, 32; Senate Report 99-541 at 9, 11.

Smith is instructive in one major respect. Whereas communications made on traditional land-based phone lines carry with them the presumption of Fourth Amendment protection and do not require a particularized showing of their characteristics, conversations on cordless phones are not entitled to such a presumption. Thus, when litigating a motion to suppress, a movant must be prepared to introduce evidence about the technological capabilities of the cordless phone to demonstrate that the individual's expectation of privacy was objectively reasonable.

Tele-Strategies

One point defense counsel should certainly make: A cordless phone has a finite range (75 feet in older models, 750 feet in newer ones). Ironically, the shorter the range, the more privacy one can expect: It is less likely that the radio waves can be intercepted if the phone only transmits a short distance because the intercepting device must be placed even closer to the phone. Of course, as a consumer, we prefer a phone with a longer range. Fortunately, phones with a longer range are generally more technologically advanced, and, thus, are better equipped to thwart interception. So be sure that as defense counsel (and as a phone shopper) you consider both the phone's range and the sophistication of its technology.

Another critical point: cordless phones are used predominantly in the home, a fact that should speak loudly of the intrusiveness of the government's surveillance efforts.

Also make note of the problems that a case-by case approach fosters.

Smith does not categorically prohibit law enforcement from intercepting cordless communications; it only prohibits the interception of conversations on phones employing sophisticated technology. In other words, Smith rewards the use of more sophisticated technology by holding that a cordless conversation will only be protected if the individual demonstrates that he took great measures, at great expense, to safeguard his conversation from the uninvited ear. Thus, the reasonableness of the expectation will necessarily vary from cordless model to cordless model and there will be a body of case law on each model.

In developing a coherent Fourth

Amendment principle, it simply makes more sense for courts to focus on the one constant factor—the fact that the government purposefully (rather than innocently) uses a device (Bearcat scanner) which serves no purpose other than to intercept a radio communication. The average conversant does not anticipate that government agents will be expending resources intercepting radio waves between the hand-held unit and the base, especially since the range of cordless phones is quite limited. Buyer beware, however. An FCC regulation requires cordless phone manufacturers to advise consumers that cordless phones do not insure the privacy of their conversations. To the extent that a federal regulation defines the scope of society's privacy expectations—surely a point of contention—the government may take the position that conversants assume the risk of surveillance anytime they pick up a cordless phone. But that leads to a second problem.

Smith makes it difficult for courts to deal with the inevitable situation where one phone conversant is on a cordless phone and the other on a traditional land line. With the flood of cordless phones, even one using a traditional land line should anticipate that a cordless phone will be used on the other end of the line. In light of *Smith,* an individual using a land line perhaps must make an inquiry whether the person on the other end is using a cordless phone; and if so, what model, its range, frequency, etc. Otherwise, his expectation of privacy might not be viewed as objectively reasonable, even though "persons using a standard telephone to speak to a cordless telephone user are generally thought to be protected, because such a person has no reason to know his or her words are being broadcast from the cordless phone user's base unit to a hand set." *Tyler v. Berodt,* 877 F.2d 705, 706-07 n.2 (8th Cir.1989) (citing cases).

Under the Fifth Circuit's rationale in *Smith,* however, the advent of cordless phones makes it less objectively reasonable for a person using a land line to expect privacy in his conversation. The increasing ease with which law enforcement can intercept phone conversations leaves citizens with less reason to believe that their conversations are safe from Listening Toms. Of course, we deal with cordless telephones today; tomorrow it will be microphone devices ("parabolic microphones) that can intercept verbal communications not otherwise audible to the naked ear. Perhaps a private face-to-face conversation will not be subject to Fourth Amendment protections. Yet, as Professor Tribe has observed:

> [O]ne can hardly be said to have assumed a risk of surveillance in a context where, as a practical matter, one had no choice. Only the most committed—and perhaps civilly committable—hermit can live without a telephone, without a bank account, without mail. To say that one must take the bitter with the sweet when one licks a stamp is to exact a high constitutional price indeed for living in contemporary society. Under so reductive and coercive a concept of assumed surveillance, to be modern is to be exposed.

Tribe, *American Constitutional Law* at 1392 (2d ed. 1987).

Our expectation of privacy should not be at the mercy of the technological breakthroughs of tomorrow. The standard should be one to which some courts have alluded, *see Matter of John Doe Trader Number One,* 894 F.2d 240, 246 (7th Cir. 1990): If the surveillance device is one that intercepts either sounds not audible to the naked ear, or radio waves, microwaves, etc., not broadcast for public consumption, then the government has invaded the privacy of the conversant when it deliberately intercepts the communication. Any other standard threatens to antiquate *Katz* and the Fourth Amendment into obsolescence. ■