“THE FEDERAL CORNER”

Raynor-the-Rapist Should Have Worn a Long Sleeve Shirt

Buck Files

On March 2, 2015, the Supreme Court handed down its opinion in *Raynor v. Maryland* __S.Ct.__, 2015 WL275603 (2015): “Petition for writ of certiorari to the Court of Appeals of Maryland denied.”

I am always curious about the facts in those cases that the Justices of the Supreme Court choose not to hear. Sometimes, I look at the earlier opinions in these cases and one of them -- as today -- becomes the subject of this column.

Raynor-the-Rapist had avoided capture for some two years. Then, he became a person of interest and was invited to come to the police station in Bel Air, Maryland, to be interviewed. While at the station, he refused to consent to the officers’ request that he give them a DNA sample. Fortunately for the officers, Raynor had chosen to wear a short sleeve shirt to the interview and had been observed rubbing his bare arms against the armrests of the chair in which he had been seated. The officers took swabs of these armrests and the DNA extracted from the swabs matched DNA samples that had been collected from the scene of the rape.

Raynor was indicted for the offense of first-degree rape and related offenses. His attorney filed a pre-trial motion seeking suppression of the DNA evidence and all evidence derived therefrom. This motion was denied and Raynor was convicted in the Circuit Court of Harford County. He appealed his conviction. The Court of Special Appeals, affirmed his conviction. 201 Md.App. 209 (2011). Raynor then petitioned for a writ of certiorari to the Court of Appeals of Maryland, which granted the petition and, thereafter, affirmed his conviction. 440 Md. 71 (2012). Raynor’s case was argued before Chief Judge Harrell and Judges Barbera (who authored the opinion), Battaglia, Greene, Adkins, McDonald and McAuliffe. Judge Barbera’s opinion reads, in part, as follows:

[In The Trial Court]

> Petitioner… argu[ed] that the warrantless collection and testing of cellular material that he shed during his interview at the police station violated his right under the Fourth Amendment to be free from unreasonable searches and seizures.
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> The suppression court denied the motion, reasoning in pertinent part:

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I don't think DNA is any different in terms of leaving it anywhere than a fingerprint [or] than if he walks out of the [police station] and somebody takes his photograph. He is sitting in there and [the police] ask can we take a picture of you ... to have other people look at it. He says no.... So [he] walks outside the [station], is standing on the sidewalk, and they take his picture. He is in a public place. When he goes in there, does he have any expectation that anything he leaves that he is going to continue to have a privacy right in it? I don't think so. And because I don't think so, because I don't think the Fourth Amendment applies at all, because I don't think he had any reasonable expectation [of privacy] ... that society is prepared to recognize as reasonable, then the same logic applies because the use of [the DNA evidence] to obtain the search warrants also is perfectly legitimate.

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[The Issue Before the Court of Appeals of Maryland]

… the precise question for decision is whether law enforcement's testing of the identifying loci within that DNA material for the purpose of determining whether those loci match that of DNA left at a crime scene constitutes a search under the Fourth Amendment.

[The Fourth Amendment & DNA Testing]

Recently, in Maryland v. King, —— U.S. ——, 133 S.Ct. 1958, 186 L.Ed.2d 1 (2013), the Supreme Court held "that using a buccal swab on the inner tissues of a person's cheek in order to obtain DNA samples is a search" for purposes of the Fourth Amendment, reasoning that "[v]irtually any intrusio[n] into the human body ... will work an invasion of cherished personal security that is subject to constitutional scrutiny." Id. at 1968–69 (quotations and citations omitted). The Court did not decide explicitly whether the testing of the 13 identifying loci the police later extracted from King's DNA sample required a separate Fourth Amendment analysis, and how, if at all, the analysis would have differed had the police obtained King's DNA absent a physical intrusion into his body. [Emphasis added]

[The Issues Not Answered in *King*]

The case at bar implicates those questions left unanswered in *King*. For reasons we shall explain, we hold that law enforcement's analysis of the 13 identifying loci within Petitioner's DNA left behind on the chair at the police station, in order to determine a match with the DNA the police collected from the scene of the rape, was not a search, as that term is employed in Fourth Amendment parlance.

[The *Katz* Test]

It is bedrock constitutional law "that the rights accorded by the Fourth Amendment 'are implicated only if the conduct of the [government] officials at issue ... infringed an expectation of privacy that society is prepared to consider reasonable.'… The test for ascertaining whether a particular form of conduct is a search for purposes of the Fourth Amendment is often referred to as the *Katz* test, so named for *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)... ("[A] Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable.").[7]

The *Katz* test consists of two parts, "each of which must be satisfied in order for the Fourth Amendment to apply: (1) a defendant must 'demonstrate an actual, subjective expectation of privacy in the item or place searched' and (2) 'prove that the expectation is one that society is prepared to recognize as reasonable.' "

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[The Defendant's Argument]

Petitioner relies upon the *Katz* test to argue that the analysis of the identifying loci within his DNA implicated the protections of the Fourth Amendment. He first claims that he demonstrated a subjective expectation of privacy in his DNA when, during the course of his interview with Trooper Wenger and Sergeant DeCourcey, he declined to consent to the taking of a DNA sample, thereby asserting a belief that "his genetic markers would not be inspected." The State accepts as much, and so do we.

Petitioner further claims, as he must for his argument to prevail, that his expectation of privacy in his DNA, under these circumstances, was objectively reasonable. In making that argument, he urges us to "focus ... squarely on the 'treasure map' ... of information capable of being culled from" one's DNA. He claims that… contrary to the conclusion of the Court of Special Appeals individuals have a "much greater" expectation of privacy in their DNA than their fingerprints because DNA contains "a massive amount of deeply personal information," including "medical history, family history, disorders, behavioral characteristics, and ... propensity to ... commit certain behaviors in the future."

[The State's Response]

The State counters that Petitioner did not possess an objectively reasonable expectation of privacy in the information the police analyzed because they tested only 13 junk loci, which, unlike other regions of the DNA strand, do not disclose the intimate genetic information about which Petitioner expresses concern. Instead, those loci reveal only information related to a person's identity. In this regard, the State argues, law enforcement's testing of the DNA evidence in this case is indistinguishable from its testing of fingerprints left unknowingly upon surfaces in public places, which does not implicate the protections of the Fourth Amendment.

[The Court Agrees With The State]

We agree with the State. The Supreme Court has made clear that one's identifying physical characteristics are generally outside the protection of the Fourth Amendment.

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[DNA Testing]

With the advent of DNA testing technology, law enforcement has a highly effective means of identifying an individual as "unique" in the general population and thereby identifying, or excluding, a criminal suspect as the actor in the commission of a crime. *King,* 133 S.Ct. at 1966 …Although highly useful for identification purposes, junk DNA "does not show more far-reaching and complex characteristics like genetic traits." *Id.; accord Williamson,* 413 Md. at 543, 993 A.2d 626 (noting that the 13 junk loci consist of stretches of DNA that "do not presently recognize traits" and "are not associated with any known physical or medical characteristics")

Moreover, as noted by the Supreme Court in *King,* there exists no incentive for the police to unveil more intimate information contained in a suspect's DNA, even if the police had access to the technology to do so.

[DNA & Fingerprints]

Petitioner does not cite, nor has our research revealed, a case holding that law enforcement's analysis of fingerprints left behind by a potential suspect implicates the protections of the Fourth Amendment. In fact, the Supreme Court has given, albeit impliedly, the constitutional "go ahead" for such police practices.

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Petitioner contends that DNA differs from fingerprints because it has the potential to provide more information about a person. Petitioner relies, in part, upon *Skinner v. Railway Labor Executives' Association,* 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989).

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Skinner is of little assistance to Petitioner because here, unlike in *Skinner*, the targeted analysis of the 13 identifying loci did not reveal "physiological data" about Petitioner, but rather, revealed only identifying information.

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Petitioner does not allege that the police in the present case tested any portion of his DNA other than the 13 junk loci, nor does he claim that law enforcement, at present, has the technological capabilities to do so. In short, Petitioner attempts to "evoke images of an oppressive 'Big Brother' cataloguing our most intimate traits," but the reality here is "far less troubling."

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[The Court's Holding]

In the end, we hold that DNA testing of the 13 identifying junk loci within genetic material, not obtained by means of a physical intrusion into the person's body, is no more a search for purposes of the Fourth Amendment, than is the testing of fingerprints, or the observation of any other identifying feature revealed to the public—visage, apparent age, body type, skin color. That Petitioner's DNA could have disclosed more intimate information is of no moment in the present case because there is no allegation that the police tested his DNA sample for that purpose. Because the testing of Petitioner's DNA did not constitute a search for the purposes of the Fourth Amendment, he was not entitled to suppression of the DNA evidence or any fruits derived therefrom. The Court of Special Appeals came to the same conclusion. We therefore affirm the judgment of that Court.

My Thoughts

- If you enter the query TO(110) & "DNA" in WestLaw's Texas database, you will find 1,131 cases, dating back to 1989. For those of us who were admitted to practice well before that year, we can recall those first cases in which DNA evidence helped the State convict our clients.

- It is not surprising that the Supreme Court denied certiorari in *Raynor*. His lawyer, though, should be commended on the legal theory that he raised that had not been addressed by the Supreme Court in *Maryland v. King*.
- With tongue in cheek, I would note that we always visit with our clients about the importance of being properly attired when they go to the courthouse. If Raynor had worn a long sleeved shirt to the police station, he might have avoided prosecution. Bad luck for Raynor-the-Rapist.