

**First Place
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I. FACTS

Deborah received a phone call from her boyfriend Jake. Deborah's mother first answered the phone and then relayed the call to Deborah. Deborah began her conversation without knowing that her mother was listening in on another connecting speakerphone. Jake proceeded to confess a crime. Deborah's mother then notified the local sheriff's department. Jake was arrested within an hour. The defense attorney is now moving to suppress the mother's testimony on the grounds that it violated the State of New Mexico's statute on interference with communications, (NMSA § 30-12-1 and § 30-12-8).

With what we can glean from the given facts, Deborah is still a minor who lives in her mother's home and who does not own the telephone line involved in this case.

II. CONSTITUTIONAL QUESTIONS

a. History and Purpose of the Fourth Amendment

The Fourth Amendment to the United States Constitution originated from British values perhaps expressed best by the maxim, "Everyman's house is his castle." Although the United States Supreme Court has also looked to the penumbra of the First, Third, Fifth, Ninth and Fourteenth Amendments to identify privacy as a right protected by the Constitution, it is the Fourth that most directly applies to this case.

The Fourth Amendment states that Americans are protected against "unreasonable searches and seizures" unless a warrant is issued with "probable cause." The framers intended with this amendment to limit how the government can exercise its police powers to protect individual rights. The government must have probable cause or a justifiable reason to search or seize any private property, either tangible or intangible. Clearly, the conversation Deborah had with her boyfriend is constitutionally protected. The government cannot use that conversation in a court of law unless interception was authorized by a valid warrant. To understand how law has evolved as society has progressed we must analyze the history of privacy rights.

In the first part of the 1900's as new technology pushed the limits of police power, important constitutional questions about how far the government was allowed to penetrate personal space to fight crime needed to be answered. At first the court ruled in *Olmstead v. United States*, 277 U.S. 438 (1928) that the Fourth Amendment only applied to physical trespassing and only to tangible things. Then the Federal Communications Act of 1934 signaled that Congress was catching up with cutting edge technology, for the Act applied Fourth Amendment protection to all communication, including telephones.

The Warren Court years saw an expansion of constitutional rights including a rethinking of the scope of the Fourth Amendment. Under *Katz v. United States*, 389 U.S. 347 (1967) and *Berger v. New York*, 388 U.S. 41 (1967) the Court finally overruled *Olmstead* and declared that eavesdropping and wiretapping are to be regarded as searches and intercepted communications as seizures under the Fourth and the Fourteenth Amendments. By ruling that *Olmstead* was no longer controlling, the court established that the Fourth Amendment protects people rather than places. The court recognized that without an updated opinion, the new technologies would only add to the government's level of intrusiveness into individual rights. There was a need for a balance between a citizen's level of expectation of privacy and a government's level of intrusiveness. Justice Stewart in the majority opinion of *Katz* wrote that "the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements." Surely, with new advancements in technology and science, what constitutes private property will have to be redefined. When this occurs, the court will undoubtedly find it necessary to weigh and balance the interests of both the government and the individual.

b. Exclusionary Rule

The courts have adopted a mechanism to prevent law enforcement officers from conducting illegal searches and seizures. *Mapp v. Ohio*, 81 S.Ct. 1684 (1961) applied the exclusionary rule to the states and said that evidence states illegally obtain cannot be used in a court of law. In *Burdeau v. McDowell*, 41 S.Ct. 574 (1921) the Supreme Court established that the exclusionary rule does not apply to purely private individuals. In *United States v. Price*, 86 S.Ct. 1152 (1965) the Court then decided that the exclusionary rule does apply to individuals acting under “color of law”. This means that ordinary civilians are subject to Fourth Amendment search and seizure restrictions only if they are collaborating with law enforcement officials. This rule is what the defense attorney is considering when moving to suppress Deborah’s mother’s testimony.

c. Why the Fourth Amendment Does Not Apply to This Case

The Constitution does not protect our privacy from other individuals who are not acting in concert with law enforcement officials. This does not prevent states from creating additional privacy rights and protections through statutory law. Because it is not the state or federal government encroaching upon Deborah’s privacy, the Fourth Amendment does not apply. One cannot justify that the mother was acting under “color of law” because the facts do not state that she was collaborating with law enforcement officials. This means that it was not unconstitutional under these grounds for the mother to listen in on Deborah’s conversation. Therefore, a motion to suppress her testimony cannot rest on these grounds. So now the motion to suppress, if it is to be granted, must rest on a violation of statutory law.

III. STATUTORY ANALYSIS

The sections of New Mexico State Law that are applicable in this case are NMSA § 30-12-1 and § 30-12-8. These two sections deal specifically with interference with communications and motions to suppress, respectively. In NMSA § 30-12-1, Subsection B and Subsection C are the parts of the statute that need to be specifically addressed. We must determine if Deborah was “in the lawful possession or control of” the phone and if Deborah gave her mother any “prior consent” to listen in on her phone calls.

Under NMSA § 30-12-8, the legislature has embedded its own exclusionary rule into the statute. If “the communication was unlawfully intercepted,” then it “shall not be received as evidence.” This section of the statute only comes into effect if any part of NMSA § 30-12-1 has been violated.

IV. CASE LAW ANALYSIS

First, we must consider the legal relationship between a child and a parent. The majority opinion in *New Mexico State Department of Human Services v. Minjares*, 98 NM 198 (1982) states that a “parent’s rights are among the most basic rights of our society and go to the very heart of our social structure.” The court then recognized under this case “the fundamental liberty interest of natural parents in the care, custody and management of their child.”

If we interpret the care, custody and management of a child to mean keeping a child safe, then it only follows that Deborah’s mother should have been allowed to listen in on her minor child’s telephone conversations. We must also consider that according to the National Center for Missing and Exploited Children, one in five children are sexually solicited online. If parents have the right to greatly censor, prohibit and monitor what their children do and see on the internet, it only seems applicable for the parent to do the same with their children’s phone calls.

It is not only New Mexico cases that rule in favor of parent’s rights. The Supreme Court ruled in *Wisconsin v. Yoder*, 406 U.S. 205 (1972) that the state cannot impose its will and method of rearing children on its citizens for it violates the Free Exercise Clause of the First Amendment. Raising their children in a manner they see fit is a due process right under the Fourteenth Amendment that all American parents are afforded.

Therefore the relationship between a child and a parent is special and one that must be taken under consideration. Parents must be allowed to control what their children experience and be permitted to keep them safe. This means that parents not only have the right to protect their children from predators and unseemly characters, but also from questionable boyfriends. Accordingly, Deborah's mother was only exercising her constitutionally protected right to raise her child. Her intent to further a constitutionally protected parental interest outweighs her nonexistent intent to further a state interest. We cannot apply these statutes in a way that will prevent parents from managing and protecting their children.

Because Deborah is a minor living in her mother's home, an argument can be made that Deborah impliedly consented to her mother listening in on her telephone conversations. Not only is it valid that Deborah's mother has the right to keep her daughter safe, but according to previous rulings by other courts, the person who owns the phone line also is entitled to broader rights in the use of that phone. Under *Britton v. Britton*, 223 F.Supp 2d 276 (2002), legal ownership of the phone line entitles the owner to listen in on any conversations had on that line. Although the facts of this inter-spousal dispute are different, the fundamental findings can be applied to the present case. Because Deborah's mother presumably owns the line, then she has the right to listen in on conversations.

In the New Mexico case of *State v. Coyazo*, 123 NM 200 (1997), a prisoner was warned that the phone calls he made could be tapped before he placed a call. Because he was warned, his expectation of privacy was limited because he, as a party to the conversation, consented to a third party listening in. Therefore the court could not lawfully grant a motion to suppress evidence collected from that phone call because it was not illegally obtained.

Using this reasoning, it is possible that Deborah gave legally implied prior consent to her mother in the instant case. Although the consent may not have been as obvious as it was with the prisoner, it may still be legally viable. Additionally, Deborah's expectation of privacy may already have been limited as she was a minor talking on her mother's phone.

Second, we must consider the merits of the motion to suppress Deborah's mother's testimony. In Maine, where *Britton v. Britton* was heard, and in New Mexico where *State v. Coyazo* was considered, statutes provide that only the consent of one party to the conversation is required for interception. New Mexico is one of 39 states that either requires only one party to consent or the statute is silent on this point. The remaining eleven require all parties to consent before an intercepted communication is admissible.

As pointed out by the court in *State of Washington v. Oliver C. Christensen* (2004), "The federal wiretap statute, which makes interception of communications legal where one party consents, has been interpreted to permit parents acting to protect the welfare of a child, to consent vicariously for their child to the recording of their child's conversations." Because the State of Washington does not have a specific parental exception to its sweeping "all-parties" consent requirement, the author of this opinion, Justice Tom Chambers, saw it unnecessary to overlay this federal standard on this state case. Because the State of New Mexico does not have many precedent cases, it might be wise for us to consider this decision from the State of Washington. However, considering New Mexico's commitment to a parent's rights, it might be wise to apply the federal approach to this case. The State of Washington chose to go beyond existing federal statutes and national norms and deny a parental exception. Because the New Mexico statute allows for only one party to consent, we should create a parental exception that is consistent with the federal statute's judicially created exception.

Early on, the Supreme Court of the United States held in *Rathbun v. US*, 355 U.S. 107 (1957) that one of the parties to a conversation can constitutionally allow a third party to listen in. Consequently, each party to the conversation takes the risk of a third party intercepting the phone call. Since this interception has been authorized, it is legal. Applying this principal to the current case, the defendant, Jake, knew the risks of the phone call being intercepted. According to the Supreme Court ruling, Jake may have impliedly consented to the interception as well.

Many recent state cases echo what *Rathbun* held. *Mitchell v. State*, 235 SE 2d 509 (1977) in Georgia also held that eavesdropping only occurs when a third party is listening in. New Mexico's *Robinson v. Katz*, 94 NM 314 (1980) states, "the consent of one of the parties to a third person listening to the conversation is all that is necessary to remove the activity from the purview of the statute (30-12-1)".

V. CONCLUSIONS

1. Deborah's mother's interception of her phone call does not have protection under the Fourth Amendment's search and seizure restrictions because she was not acting "color of law." The Exclusionary rule is therefore inapplicable because the phone call was not unlawfully intercepted.
2. The management and protection of children by their parents is a fundamental right guaranteed in New Mexico. The state has no constitutional right to mandate how parents should raise their children. Consequently, Deborah's mother was legally allowed to listen in on Deborah's conversation under the grounds that she was keeping her daughter out of harm's way.
3. Because Deborah's mother owns the telephone and because Deborah is a minor, Deborah did provide legally recognized implied consent to her mother to listen in on her conversations.
4. Under NMSA § 30-12-1, the consent of one party is sufficient for a legal interception of electronic communication. Since there was implied consent between Deborah and her mother, there is no violation of the statute.
5. Additionally, based on the precedent set by previous US Supreme Court cases, the defendant, Jake, also provided implied consent because the risks of interception by Deborah's mother were previously known. It is reasonable under *Rathbun* to expect all parties to be aware that their conversations could be intercepted in these circumstances.

In deciding this case we must effectively balance the mother's parental rights and the state's interest in prosecuting a crime against the expectations of privacy of the minor in a conversation with a boyfriend on her mother's phone.

According to the facts of the case and already established legal precedent and standards, the court must rule in favor of the prosecution. The exclusionary rule does not take effect and the intercepted phone call should be entered into evidence. The motion to suppress should be denied.