October Term

No. 19-7605

IN THE SUPREME COURT OF THE UNITED STATES

VINCENT KANE,
Petitioner
V.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

On Petition for Writ of Certiorari to the
Supreme Court of Pennsylvania

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Dated: March 9, 2020

QUESTION PRESENTED

Petitioner knowingly, intentionally, and voluntarily abandoned his cell phone, which was turned on and recording in a public bathroom, in the commission of the crime of invasion of privacy. Under such circumstances, did petitioner have an objective expectation of privacy in his cell phone which society would recognize? [1]

(Suggested answer: No)

[1] The Commonwealth has combined petitioner's two questions.

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I. COUNTER-STATEMENT OF THE CASE

A female student at Villanova University discovered an abandoned cell phone in a unisex dormitory bathroom that was recording people as they used the bathroom. Tr., 4/20/17, p. 8[2]; RR. 351. She brought the phone to Villanova campus security, who transported the phone to the Delaware County District Attorney's Office's Criminal Investigative Division ("CID"). *Id.*at 9; R.R. 352.

CID officers confirmed with a Deputy District Attorney that the phone was legally abandoned when found and thus did not require a warrant to search. *Id.* They subsequently searched the phone and discovered defendant to be the owner, found bathroom videos, and located images of child pornography and upskirt videos of women on computer equipment possessed by defendant.

Following this search, officers sat down with defendant at an optional interview on the Villanova University campus. *Id.* at 12-18, R.R. 355-61. During the interview, defendant admitted to recording "bathroom videos", upskirt videos, and to possessing child pornography. *Id.* at. 16; RR 360. He also consented to a search of his laptop and desktop computer at home, where he volunteered more images would be found. *Id.* at 17-18; R.R. 360-61. CID consensually conducted a search of defendant's computer, and subsequently obtained two separate search warrants to search the external hard-drive of the computer. They discovered additional images of child pornography and upskirt videos, as well as bathroom videos and images of young girls in gym shorts at a local high school. After the

[2] All citations are to the suppression hearing Transcript.

discovery of the images and videos, the CID officers obtained an arrest warrant and arrested defendant.

At the suppression hearing, the search and seizure of petitioner's cell phone was litigated. Based on the trial court's well supported findings of fact, the Superior Court "discern[ed] no error of law in the trial court's conclusion that when Appellant intentionally and voluntarily left his cell phone in a public bathroom he did **not** have a reasonable expectation of privacy in his cell phone." *Commonwealth v. Kane*, A.3d 324, 331 (Pa.Super. 2019) (emphasis supplied).

> Once Appellant voluntarily abandoned his cell phone in a public bathroom, he abandoned any legitimate expectation of privacy in its contents, likewise, he abandoned standing to complain of a search or seizure of that cell phone . . . Accordingly, under the facts and circumstances of this case, the trial court did not err when it concluded that Appellant did not have a reasonable expectation of privacy and denied Appellant's Motion to Suppress the warrantless search of his cell phone . . .

Id., citations omitted.

Petitioner's submission to this Court is replete with references to his cell phone being password protected and the files on the cell phone being password protected. In his Summary of Argument, he goes so far as saying that in the…"last reasoned opinion of the Pennsylvania courts, "[*Kane*, 201 A.3d 324 (Pa.Super. 2019)]…"[t]he Opinion does not touch the fact that the cell phone itself was password protected, and the files within the cell phone also were protected by separate passwords." *Petition for writ of certiorari, p. 10.* The state court in fact, did not address this point because petitioner failed to develop the record in any way to demonstrate this claim. It was not until Kane's discretionary petition for allowance of appeal to the Pennsylvania Supreme Court that such a contention was even raised.

Petitioner creates his own facts rather than using those found by the trial court and properly relied upon by the Superior Court, Pennsylvania's intermediate appellate forum. Given the circumstances of the female co-ed finding the cell phone that was surreptitiously set up to video record persons going to the bathroom, there is no suggestion that this was a lost, misplaced, or stolen phone. Moreover, the record is devoid of any evidence that the phone was locked or employed other security measures such as being password protected while it was intentionally and carefully placed in a public bathroom in the commission of a criminal offense.

Because it suits petitioner's purposes, however, he repeatedly dwells on the password protection issue. In his petition for allowance of appeal to the Pennsylvania Supreme Court, he asserted for the first time "[i]t would seem that the phone was password protected but that's not in the record." Petition for Allowance of Appeal, p. 12.

Petitioner misrepresents the significance of the contents of Appendix Exhibit E (Excerpts from forensic analysis), which shows that petitioner had social media accounts on his cell phone which were password protected, but which had nothing to do with the prosecution of this case. What the exhibit does not show is whether petitioner's actual cell phone was password protected. In fact, it was not, and when it was found by a third party in a public bathroom, it was powered on and in the process of invading unsuspecting restroom patrons of their own personal privacy. Nonetheless, petitioner clings to the fact that sometime later the cell phone was powered off because it lost its charge. Contrary to petitioner's representation, the Cellbrite analyzer did not have to break into any account. Pet. for Cert, p. 6.

II. REASONS FOR DENYING THE WRIT

A. It is well settled law that a person does not have a reasonable expectation of privacy in abandoned property, and therefore *Riley*'s holding concerning an individual's heightened privacy interest in his or her cellphone does not apply to an abandoned cellphone under the circumstances at bar.

A warrantless search is per se unreasonable under the Fourth Amendment, unless an exception to the warrant requirement applies. *Arizona v. Gant*, 556 U.S. 332, 338 (2009). When such an exception applies, as in the case of a search incident to lawful arrest, courts will then engage in the requisite weighing process between a citizen's reasonable expectation of privacy and a legitimate government interest. *Riley v. California*, 573 U.S. 373, 385-86 (2014). In *Riley*, this Court held that, in general, law enforcement must obtain a warrant to search a cell phone incident to arrest. *Id.* at 401. While *Riley* specifically elaborated on the availability of the exigent circumstances exception, *Riley* in no way suggested that it is per se unconstitutional to conduct a warrantless search of a cell phone. *Id.* at 401-02. Rather, this Court indicated that other "exceptions" may be available. *Id.* at 401.

It is well settled that a person relinquishes Fourth Amendment protection in abandoned property because he or she no longer has a reasonable expectation of privacy. *See United States v. Basinski*, 226 F.3d 829, 836 (7th Cir. 2000) ("No person can have a reasonable expectation of privacy in an item that has been abandoned."); *United States v. Cofield*, 272 F.3d 1303, 1306 (11th Cir. 2001) (explaining that defendant does not have standing to bring Fourth Amendment claim if defendant "voluntarily discarded, left

behind, or otherwise relinquished [his] interest" in his property). Indeed, numerous Federal Courts of Appeals have held that a defendant has no expectation of privacy in a vehicle or its contents when the defendant abandons the vehicle to flee from police. *See United States v. Smith*, 648 F.3d 654, 660 (8th Cir. 2011) (defendant relinquished any legitimate expectation of privacy in his vehicle and its contents when he left the car open and running in a public area and ran from police); *United States v. Vasquez*, 635 F.3d 889, 892, 894 (7th Cir. 2011) (defendant had no expectation of privacy in his vehicle after fleeing from police and leaving it in a Walmart parking lot); *United States v. Edwards*, 441 F.2d 749, 751 (5th Cir. 1971) ("Defendant's right to Fourth Amendment protection came to an end when he abandoned his car to the police, on a public highway, with engine running, keys in the ignition, lights on, and fled on foot. At that point defendant could have no reasonable expectation of privacy with respect to his automobile.") Lower courts have applied the abandonment defense to *all* property without regard to the nature of the abandoned item and have recently applied it to advanced technologies, such as computers. *See State v. Gould*, 963 N.E.2d 136 (Ohio 2012) (warrantless search of computer hard drive and its contents did not violate Fourth Amendment when defendant left hard drive in his apartment and never inquired about it), *cert denied*, 133 S.Ct. 444 (2012); *Gerbert v. State*, 793 S.E.2d 131, 145 (Ga. Ct. App. 2016) (counsel not ineffective for failing to file motion to suppress images recovered from computer because defendant abandoned computer when he left it with a coworker and never attempted to recover it and motion would not have been successful); *Commonwealth v. Sodomsky*, 939 A.2d 363, 369 (Pa. Super. Ct. 2007) (holding that defendant abandoned his privacy interest in the child

pornography stored on his hard drive when he submitted his computer to technician for repair), *review denied*, 929 A.2d 1196 (2008), *cert. denied*, 556 U.S. 1282 (2009).

Petitioner contends that *Riley* establishes a categorical ban on all warrantless searches of cell phones and eliminates the longstanding abandonment defense. Pet. Cert. at 13. Although *Riley* discusses in detail the ubiquitous nature of today's cell phones and their capacity to hold enormous amounts of information about a person's daily life, that observation was made in the context of evaluating a person's privacy interest in his or her cell phone *when they have a privacy interest*. *Riley*, 573 U.S. at 391-398. Precedent establishes that Petitioner does not have a privacy interest in his abandoned property. Consequently, the assessment undertaken to balance privacy interests with governmental interests in *Riley* and its implications for cellphones does not apply here.

Petitioner extrapolates the *Riley* "search incident to arrest" holding and the Pennsylvania Supreme Court's application of *Riley* in *Commonwealth v. Fulton*, 179 A.3d 475 (Pa. 2018) into abolishing the well-established warrant exception of abandonment. Petitioner further muddies the waters by continually clinging to the subjective expectation of privacy a person may have in the contents of his cell phone and by referencing the lay person's concept of abandonment rather than abandonment in its legal sense. Petitioner's subjective expectation of privacy in his cell phone was never the issue. Rather, it was whether based on the totality of the circumstances, by virtue of voluntarily leaving behind his cell phone in a public bathroom and actually utilizing it as an instrument of crime to violate the privacy interests of other unsuspecting persons, that there was no objective, reasonable expectation of privacy retained.

B. Petitioner's conclusion that *Riley v. California* extends to all warrantless searches of cell phones conflicts with other state and federal court decisions.

Petitioner's interpretation of *Riley* is inconsistent with courts across the country that apply the abandonment doctrine to cell phones. State and federal courts have not altered their Fourth Amendment analysis regarding abandoned property simply because the abandoned property is a cell phone. Federal courts have refused to extend *Riley* and prevent warrantless searches of abandoned cellphones and its data. *See United States v. Sparks*, 806 F.3d 1323 (11th Cir. 2015) (affirming the refusal of a district court to suppress evidence of child pornography seized from a phone the defendant left at Wal-Mart and did not reclaim), *cert denied*, 136 S. Ct. 2009 (2016); *United States v. Quashie*, 162 F. Supp. 3d. 135, 141-142 (E.D.N.Y. 2016) ("[*Riley*] outlines the standard to be applied to a search of a cellphone incident to arrest. It has nothing to do with an abandoned cellphone or even a stolen cellphone. Although *Riley* includes language about the vast amount of information contained on cellphone and how the expectations of privacy in the contents have shifted, any objective expectation of privacy in a cellphone must go hand-in-hand with an individual's demonstration of a subjective expectation of privacy").

State courts have also refused to interpret *Riley* as the end of the abandonment doctrine's application to cell phones. *See Edwards v. State*, 497 S.W.3d 147, 161 (Tex. App. 2016) (defendant had no reasonable expectation of privacy in cell phone that was abandoned and left on top of vehicle from which defendant fled); *State v. Samalia*, 375 P.3d 1082, 1087 (Wash. 2016) (cell phone was voluntarily abandoned when defendant left phone in unattended vehicle and fled on foot); *State v. Brown*, 776 S.E.2d 917, 923-24 (S.C. Ct. App. 2015) (denying the suppression of evidence from a password protected cellphone

found at the scene of a burglary); *Royson v. State*, No. 14-13-00920-CR, 2015 WL 3799698, at *3 (Tex. App. June 18, 2015) (ruling that defendant abandoned his cell phone when he hid it on the floor of a women's dressing room to record women trying on clothes at a department store).

One state court applied *Riley* to prohibit the warrantless search of a password-protected, abandoned cellphone but it is not an opinion of a state court of last resort and should not serve as a basis for granting this writ of certiorari. *State v. K.C.*, 207 So.3d 951 (Fla. App. 4 Dist. 2016), *cert. denied*, 137 S.Ct. 2269 (2017). Further, *State v. K.C.* mistakenly considers officers' danger, a policy justification for the search incident to arrest exception, when considering the proper application of the abandonment doctrine and should not be followed as a matter of law. *Id.* at 955 (holding that the abandonment exception does not apply to cell phones because "there is no danger to individuals, property or the need to immediately capture a criminal suspect where the cell phone is out of the custody of the suspect for substantial amounts of time"). The Pennsylvania Superior Court, like most state and federal courts, correctly applied *Riley* and limited its holding to searches incident to arrest. *Commonwealth v. Kane*, 210 A.3d 324 (Pa. Super. Ct. 2019). This Court should deny Petitioner's writ of certiorari accordingly.

III. CONCLUSION

For all the aforementioned reasons, this Honorable Court should deny the petition seeking a *writ of certiorari*. Contrary to petitioner's assertions, the Pennsylvania intermediate appellate court's decision in no way contradicts this Court's precedent.

Respectfully submitted,

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CERTIFICATION OF WORD COUNT

Pursuant to the Rules of the United States Supreme Court,

I, A. Sheldon Kovach, hereby certify that the foregoing brief:

1. complies with the requirements set forth in the Rules of the United States Court Rule 33.1(h) as the brief consists of 1 pages and 2,921 words and;

2. complies with the typeface requirements of the Rules of the United States Supreme Court Rule 33.1(b) using a proportionally spaced typeface of Century Schoolbook 12.

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PROOF OF SERVICE

A. SHELDON KOVACH, Senior Deputy District Attorney, hereby certifies that on March 9, 2020, he served the persons in the manner indicated below, which service satisfies the requirements of the Rules of the United States Supreme Court Rule No. 29.

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