Recent Case Report

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City of Ontario v. Quon

(2010) __ U.S. __ [2010 WL 2400087]

Issues

(1) Did a police officer have a reasonable expectation of privacy in the contents of text messages that he sent and received over a police-issued pager? (2) If so, did his supervisors violate his Fourth Amendment rights when they obtained and reviewed transcripts of his messages?

Facts

To alert its SWAT officers of call-outs, the Ontario Police Department provided them with pagers that were capable of sending and receiving text messages. The department also announced a policy that it "reserves the right to monitor and log all network activity" including text messaging; and that officers "should have no expectation of privacy or confidentiality when using these resources."

One of the officers who received a pager was Jeff Quon. Because he had repeatedly exceeded the allocated number of text messaging characters per month, his supervisor obtained transcripts of his text messages from the wireless service provider to determine if he was using the device for personal matters while on duty. It turned out that during one month he sent or received 456 messages during work hours, but that no more than 57 of them were work related. After he was disciplined for misusing his pager, he sued the department on grounds that his messages were private and, thus, his supervisor violated the Fourth Amendment when he obtained and reviewed his text messages.

Following a jury trial, a federal district court judge ruled that the department did not violate Quon's Fourth Amendment rights. Quon then appealed to the Ninth Circuit which reversed the judgment, ruling that, (1) he had a reasonable expectation of privacy in the text messages, and (2) the search was unreasonable in its scope because there were less intrusive means of determining whether Quon was misusing his pager. The department appealed to the United States Supreme Court.

Discussion

Under established law, a police department or other government agency may lawfully review communications over government-issued devices if, (1) the employee could not reasonably expect that the communications were private, or (2) the employer had a legal right to review them. As for privacy, the Court determined that it need not decide whether Quon reasonably expected privacy in his text messages because, even if he had, the police department had a right to obtain and inspect copies of his communications.

The Court's ruling was based on the well-established principle that a federal, state, or local agency may search places and things in the workplace that are owned by the government but used by employees if the search was, (1) reasonably necessary to

uncover evidence of "work-related misconduct," and (2) not unduly intrusive in light of the nature of the misconduct.[1]

The Court then applied these requirements to the facts of the case and made the following determinations. First, it was apparent that Quon's excessive text messaging provided the department with reasonable suspicion of work-related misconduct. Second, the Ninth Circuit either neglected to address the intrusiveness limitation or misunderstood it. Specifically, it determined that the search was unlawful because the officers did not utilize the least intrusive means of obtaining evidence of Quon's work-related misconduct. But, as the Supreme Court pointed out, it has consistently rejected such a "least intrusive means" requirement. Instead, a search may be invalidated only if officers were negligent in failing to recognize and implement the less-intrusive alternative. Thus, the Supreme Court observed in 1985 that "[t]he question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it."[2] The Court then ruled that, because there was no reason to believe the search of Quon's text messages was excessive in its scope, the Ninth Circuit erred when it ruled the search was unlawful.

Comment

Two things. In the recent case of *U.S.* v. *Struckman* (see the Summer 2010 *Point of View*), the Ninth Circuit also employed the long-disapproved "least intrusive means" test to suppress a gun obtained from a suspected burglar. We can only hope that those members of the court who have continued utilize this nonexistent "test" to justify the suppression of evidence have finally gotten the message.

Second, although the Court's decision was well-reasoned, it was actually a big disappointment. That was because *Quon* was widely expected to be *the* case in which the Court would rule on whether, or to what extent, people can expect privacy in text and email messages (and maybe stored cell phone messages) when, as is usually the case, a copy of the message is also in the hands of an internet or cellular provider. The Court explained that it decided not to rule on this issue because the "judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear." But if the "emerging" character of a government activity were to stand as a barrier to "elaborating" constitutional standards

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[1] See *O'Connor* v. *Ortega* (1987) 480 US 709, 726 ["The search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the nature of the misconduct."]; *Schowengerdt* v. *General Dynamics* (9C 1987) 823 F2 1328, 1335-36 ["Ordinarily, a search of an employee's office by a supervisor will be justified at its inception when there are reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct"].

[2] *United States* v. *Sharpe* (1985) 470 US 675, 687. ALSO SEE *United States* v. *Montoya De Hernandez* (1985) 473 U.S. 531, 542 ["But the fact that the protection of the public might, in the abstract, have been accomplished by 'less intrusive' means does not, in itself, render the search unreasonable."]; *Atwater* v. *City of Lago Vista* (2001) 532 U.S. 318, 350 [the "least-restrictive-alternative limitation" is "generally thought inappropriate in working out Fourth Amendment protection"]; *United States* v. *Sokolow* (1989) 490 U.S. 1, 11 ["The reasonableness of the officer's decision to stop a suspect does not turn on the availability of less intrusive investigatory techniques. Such a rule would unduly hamper the police's ability to make swift, on-the-spot decisions-here, respondent was about to get into a taxicab-and it would require courts to indulge in unrealistic second-guessing."].

for its use, there would never be a ruling on privacy in digital communications because the technology will be emerging for decades, if not centuries.

Taking note of the timorous tone of the Court's opinion, the Eleventh Circuit noted that it "shows a marked lack of clarity in what privacy expectations as to content of electronic communications are reasonable."[3] The Circuit also thought it strange that "[e]ven after the briefs of two parties and 10 amici curiae, the Supreme Court declined to decide whether the plaintiff's asserted privacy expectations were reasonable." POV

[3] *Rehlberg* v. *Paulk* (11th Cir. 2010) __ F.3d __ [2010 WL 2788199].