SUPREME COURT OF NEW JERSEY
DOCKET NO. 084564

	:	CRIMINAL ACTION
STATE OF NEW JERSEY,	:	On Leave Granted to Appeal
	:	From an Interlocutory Order
Plaintiff-Appellant,	:	of the Superior Court of
	:	New Jersey, Appellate Division
v.	:	
	:	App. Div. Docket Nos.
RASHEEM W. McQUEEN and	:	A-4391-18T1, A-4910-18T1
MYSHIRA T. ALLEN-BREWER	:	
	:	Indictment No. 19-02-0302
Defendants-Respondents.	:	
	:	Sat Below:
		Hon. Carmen H. Alvarez, P.J.A.D.
		Hon. Karen L. Suter, J.A.D.
		Hon. Patrick DeAlmeida, J.A.D.

SUPPLEMENTAL BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

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[1] Although Rule 2:6-1(a)(2) generally prohibits the inclusion of briefs submitted to the trial court in an appellant's appendix, the State submits that defendant's letter-brief is properly included here to show that defendant adopted the facts stated in certain police reports for purposes of the motion to suppress.

TABLE OF AUTHORITIES

Cases Cited

[2] The State's brief before the trial court is appended pursuant to Rule 2:6-1(a)(2) because it "is relevant to the question of whether an issue was raised in the trial court," which "is germane to the appeal." Also pursuant to Rule 2:6-1(a)(2), "only the material pertinent to that issue" is included.

Statutes Cited

PRELIMINARY STATEMENT

This case presents the Court with a simple question: Is society prepared to accept as reasonable an expectation of privacy in a telephone call where (1) the call was placed from a landline in a nonpublic room of a police station, (2) the caller was under arrest, charged with crimes, and awaiting transfer to a correctional facility when he made the call, and (3) the caller told the person he called he was "locked up"? The majority of the Appellate Division panel below concluded that, absent an explicit warning that the call would be recorded, the defendants here had a reasonable expectation of privacy in their phone conversation under those circumstances.

The dissenting judge, on the other hand, recognized that the totality of the circumstances here, which included (1) the caller's status as a criminal defendant in custody, (2) the caller's use of a police phone in a police station, and (3) the routine and widely known police practice of recording all calls to and from a police station, gave defendants implicit notice that their call was not private and made any expectation of privacy in the call unreasonable.

For the reasons expressed by the dissenting judge, this Court should reverse the decision of the majority below to the extent that it suppressed the recording of the phone call placed from the police station. As the dissenting judge recognized,

society is not prepared to accept as reasonable the privacy right asserted by the defendants and accepted by the majority below in this case.

STATEMENT OF PROCEDURAL HISTORY

Middlesex County Indictment No. 19-02-00302, a superseding indictment filed February 8, 2019, charged defendant Rasheem McQueen with second-degree eluding under N.J.S.A. 2C:29-2(b) (Count One); second-degree unlawful possession of a handgun under N.J.S.A. 2C:39-5(b)(1) (Count Two); fourth-degree possession of a defaced firearm under N.J.S.A. 2C:39-3(d) (Count Three); fourth-degree possession of handgun ammunition without a carry or purchase permit under N.J.S.A. 2C:58.3(b) (Count Four); three counts of third-degree hindering under N.J.S.A. 2C:29-3(b)(1) (Counts Five, Six, and Seven); fourth-degree false reports to law enforcement authorities under N.J.S.A. 2C:28-4(b)(1) (Count Eight); third-degree possession of a controlled dangerous substance (CDS), oxycodone, under N.J.S.A. 2C:35-10(a)(1) (Count Nine); second-degree conspiracy to unlawfully possess a handgun under N.J.S.A. 2C:5-2 and N.J.S.A. 2C:39-5 (Count Ten); and third-degree attempted hindering under N.J.S.A. 2C:5-1 and N.J.S.A. 2C:29-3(b)(1) (Count Eleven). (Pa1-4).[3] The indictment also charged codefendant Myshira Allen-Brewer with

[3] References to the record are made as follows:
Pa = State's appendix.
1T = Transcript of grand jury proceeding, Oct. 30, 2018.
2T = Transcript of grand jury proceeding, Feb. 8, 2019.
3T = Transcript of motion to suppress, Feb. 25, 2019.
4T = Transcript of motion to suppress, Mar. 25, 2019.
5T = Transcript of motion to suppress, May 3, 2019.
6T = Transcript of motion, June 3, 2019.

third-degree attempted hindering under N.J.S.A. 2C:5-1 and N.J.S.A. 2C:29-3(a)(3) (Count Twelve); and third-degree attempted obstruction under N.J.S.A. 2C:5-1 and N.J.S.A. 2C:29-1(a) (Count Thirteen). (Pa4). The indictment further charged Allen-Brewer as a codefendant in Count Ten. (Pa3).

Defendants moved jointly to suppress evidence, specifically, recordings of telephone calls made by Rasheem McQueen while under arrest at the Piscataway police headquarters and while incarcerated at the Middlesex County Adult Correctional Center (MCACC). (5T8-17 to 9-21; Pa5). A hearing on the motion was held before the Honorable Pedro J. Jimenez, Jr., J.S.C., on May 3, 2019. (5T8-17 to 9-21). After hearing argument on that date, Judge Jimenez (the trial court) granted the motion to suppress and issued an order to that effect. (5T19-11 to 13; Pa23). The court issued an amended order on May 16, 2019, clarifying that the ruling on the motion to suppress applied to both defendants, McQueen and Allen-Brewer, and stating that the motion was being granted "for the reasons stated in the written opinion on the same issue in the matter of State v. Mark Jackson, Indictment No. 18-04-0555."[4] (Pa24).

[4] At the time of the trial court's ruling, the Appellate Division had granted the State's motion for leave to appeal in State v. Jackson. (Pa25). The Appellate Division issued its decision reversing the trial court's ruling in that case on July 19, 2019. State v. Jackson, 460 N.J. Super. 258 (App. Div. 2019).

On May 23, 2019, the State moved for leave to appeal from the May 16, 2019 order suppressing evidence. (Pa128).

On June 3, 2019, while the State's motion for leave to appeal was pending before the Appellate Division, Allen-Brewer made an oral application to be dismissed from the indictment. (6T5-21 to 6-4; Pa129). The trial court granted the application and issued an order to that effect the same day. (6T6-5 to 19; Pa129).

On June 12, 2019, the Appellate Division granted the State's motion for leave to appeal from the trial court's May 16, 2019 order suppressing evidence. (Pa128).

On June 19, 2019, the State moved for leave to appeal from Judge Jimenez's order granting defendant Allen-Brewer's motion to dismiss the indictment with respect to her. (Pa130). The State also moved on that date to consolidate its appeal from the order suppressing evidence with its appeal from the order dismissing Allen-Brewer from the indictment. (Pa131). The Appellate Division granted both of the State's June 19, 2019 motions by orders dated July 12, 2019. (Pa130-31).

On May 19, 2020, the Appellate Division issued an opinion in which the majority reversed the suppression of "the calls from the Correctional Center" and reinstated the "counts of the

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On April 1, 2020, this Court affirmed the Appellate Division's decision in State v. Jackson, 241 N.J. 547 (2020).

indictment applicable to Allen-Brewer" but affirmed "the suppression of the recording made at the police station." State v. McQueen, Nos. A-4391-18, A-4910-18 (App. Div. May 19, 2020) (slip op. at 8, 14). (Pa132-45). In a dissenting opinion, the Honorable Patrick DeAlmeida, J.A.D., agreed with the majority's opinion to the extent that it reversed the suppression of the Correctional Center calls and reinstated the indictment with respect to Allen-Brewer. McQueen, Nos. A-4391-18, A-4910-18 (DeAlmeida, J., dissenting in part) (slip op. at 1). (Pa146). However, the dissenting judge explained that he "would reverse the trial court order to the extent it suppresses the recording of defendants' telephone conversation on the police station telephone." Id. (slip op. at 11). (Pa156).

The State moved for leave to appeal based on Judge DeAlmeida's dissenting opinion, and this Court granted the State's motion on September 22, 2020. (Pa163).

STATEMENT OF FACTS

The following facts are derived from the October 30, 2018 and February 8, 2019 grand jury testimony of Detective Joseph Reilly, Detective Carlos Alameda, and Detective Sergeant Michael Coffey of the Piscataway Township Police Department and from incident reports submitted by the parties for the trial court's consideration of the motion to suppress.[5]

On August 27, 2018, Detectives Reilly and Alameda and Detective Sergeant Coffey were on patrol in an unmarked police vehicle when they observed a car driven by defendant McQueen, which was traveling at a high rate of speed, make several turns without signaling, then accelerate and turn left onto Florence Avenue. (1T6-17 to 8-16). The detectives activated their vehicle's overhead lights and siren. (1T8-17 to 24). McQueen then turned right onto Quincy Street without stopping at a stop sign and eventually came to a stop in front of a residence located on Quincy Street ("the Quincy residence"). (1T8-25 to 9-8).

Coffey and Alameda approached the car driven by McQueen, whom Alameda recognized from previous interactions. (1T9-9 to 19). As Alameda got close to the driver's window, McQueen put the car into gear and drove away. (1T9-25 to 10-17). The

[5] Defendants relied on the facts as stated in the incident reports appended at Pa7-18 for purposes of the motion. (Pa5).

detectives did not immediately pursue the vehicle. (1T10-18 to 19).

At approximately 11:04 p.m., McQueen's grandfather called the Piscataway Police emergency line and reported that McQueen's car had been stolen. (1T11-2 to 21; 1T15-20 to 22). During the call, defendant McQueen also told the police dispatcher his car had been stolen. (1T11-22 to 12-1). A short time later, the detectives observed McQueen at his residence, placed him under arrest, and transported him to the Piscataway police headquarters. (1T12-2 to 13-2).

At the station, McQueen gave a statement in which he admitted to police that he fled from the detectives in his car, then parked the car, ran home, changed his clothes, and then reported the car stolen. (1T13-3 to 24). Officers later searched the car and found in it a quantity of oxycodone. (1T18-13 to 10).

After giving his statement, while in police custody, and after being informed that he would be "going to jail," McQueen insisted on making a telephone call before being transferred to the MCACC. (1T14-9 to 22; 1T28-13 to 16; Pa8). Using a recorded telephone line, "a landline," in the Piscataway police station's "report writing room," defendant called codefendant Allen-Brewer at telephone number (908) 644-5909, told her he was "locked up," instructed her to go to Quincy Street to recover a

firearm he had discarded, and gave her directions for where to find the firearm. (1T22-7 to 23-1; 2T8-14 to 9-19; Pa8; Pa160). Detective Reilly testified before the grand jury that all telephone lines at the Piscataway police headquarters are recorded. (1T27-6 to 9).

On August 28, 2018, at approximately 1:57 p.m., Piscataway police received a call from a homeowner on Quincy Street stating that her landscaper had found a handgun in her yard. (1T20-22 to 21-3; Pa8). Detective Reilly responded to the residence and secured the handgun, which was loaded and had its serial number scratched off. (1T21-16 to 22-6; Pa8).

Detective Reilly recognized the Quincy residence as the same one from the previous night and recalled McQueen's insistence about making a phone call the night before. (1T28-13 to 16; Pa8). Suspecting McQueen may have discussed the handgun in his telephone call, Reilly listened to the recording of McQueen's telephone call and learned that the handgun belonged to McQueen. (1T28-16 to 23; Pa8). McQueen was subsequently charged with unlawful possession of a firearm and other offenses. (Pa8-9).

Grand jury subpoenas for recordings of McQueen's telephone calls placed from the MCACC were later authorized by the Middlesex County Prosecutor's Office and served upon the MCACC. (Pa11-12, 16-18, 19-22). Grand jury subpoenas for subscriber

information corresponding to telephone numbers called by McQueen were likewise authorized by the Prosecutor's Office and served upon various cell phone service providers, specifically for telephone number (609) 644-5909. (Pa11-12). That telephone number was found to be registered to a Shakirah Brewer, defendant Allen-Brewer's mother. (Pa16).

In a recorded MCACC call placed on August 28, 2018, Allen-Brewer told McQueen she was unable to find his handgun. (2T8-14 to 10-9; Pa17). McQueen stated he threw the handgun and that it was in the yard of a house with a white fence. (Pa17). In another MCACC call placed on August 29, 2018, McQueen asked Allen-Brewer whether she found the item he had sent her to retrieve. (Pa16). Allen-Brewer said she checked the street but was unable to find it. (2T10-10 to 11-9; Pa16). Defendant McQueen described his flight from the police during this call. (Pa16). In another telephone call later the same day, McQueen told Allen-Brewer the police had found his handgun. (Pa16).

Summaries of the recorded telephone calls are included in the incident reports submitted by the parties for the motion to suppress. (Pa16-18). It is undisputed that in the telephone calls recorded at the MCACC, the parties were advised at the beginning of each call that the call was being recorded and monitored. (5T11-5 to 16; 5T15-21 to 16-2). Additionally, a pamphlet entitled "Correction Center Inmate Guidelines," which

is provided to inmates at the MCACC and which the State submitted for the trial court's consideration, also states, "Telephone calls may be monitored and recorded except calls to the Internal Affairs Unit and legal telephone calls." (Pa94; Pa100). The Guidelines also warn, "Any abuse of the telephone . . . will result in disciplinary action, and can lead to prosecution." (Pa100).

As a result of the investigation by Piscataway police, both defendants were charged in connection with their attempt to prevent the discovery of McQueen's unlawful handgun. (Pa1-4).

LEGAL ARGUMENT

POINT I

THE DECISION BELOW SHOULD BE REVERSED TO THE EXTENT THAT IT SUPPRESSED THE RECORDING OF DEFENDANT'S POLICE STATION TELEPHONE CALL; THE APPELLATE DIVISION'S DISSENTING OPINION CORRECTLY RECOGNIZED THAT NO REASONABLE EXPECTATION OF PRIVACY EXISTS IN A CALL MADE BY A DEFENDANT IN CUSTODY USING A POLICE STATION'S TELEPHONE.

The holding of the majority below, to the extent that it affirmed the suppression of defendants' recorded call on a police station phone line, is erroneous and should be reversed. As the dissenting judge recognized, defendants suffered no constitutional violation based on the recording of the call McQueen made to Allen-Brewer while in custody at the police station because defendants had no reasonable expectation of privacy in that call under the circumstances.

According to the majority's opinion below, "the Prosecutor's seizure of the station house recording without a warrant violated defendants' right to be free of unreasonable searches and seizures." McQueen, Nos. A-4391-18, A-4910-18 (slip op. at 8). (Pa139). The majority reasoned that defendants had a reasonable expectation of privacy in the call McQueen made to Allen-Brewer on a police station phone line while in custody after being charged because the parties to the call were not explicitly warned that the call would be recorded.

Ibid. The majority opined, "McQueen was under arrest in a police station, but in the absence of notice, he had no reason to doubt his call was as private and secure as if he was using a phone in a friend's apartment." Id. (slip op. at 12). (Pa143). The majority further reasoned that "Allen-Brewer, at the other end of the line," despite having been told by McQueen that he was "locked up," "was similarly situated and she had every reason to assume her conversation was private and secure." Ibid.

As the dissenting judge correctly observed, however, "a person who decides to use a police station's telephone must reasonably expect that they have altered the privacy protection equation and voluntarily subjected their call to potential routine surveillance." McQueen, Nos. A-4391-18, A-4910-18 (DeAlmeida, J., dissenting in part) (slip op. at 4-5). (Pa150-51). Judge DeAlmeida also correctly noted that

> McQueen was not a member of the public who happened to be in the police station and in need of a telephone to make a personal call and should not necessarily be treated as if he were. He was under arrest for crimes to which he confessed, about to be transported to the county jail, and in a non-public room to which detectives had ready assess or were present. . . . He used the police department's telephone to call an alleged co-conspirator to urge her to remove evidence of his criminal acts.
>
> [Id. (slip op. at 5). (Pa150).]

Accordingly, Judge DeAlmeida reached the sound conclusion that "society is not prepared to accept McQueen's professed expectation that this call was private, even in the absence of oral or written notice that the police station telephones were routinely recorded." Ibid.

The dissenting judge reached the similarly sound conclusion that "Allen-Brewer also had no reasonable expectation of privacy in the police station telephone call," noting that "[d]uring the call, McQueen informed Allen-Brewer he was 'locked up'" and that "the unequivocal import of that statement is that McQueen was in the custody of law enforcement personnel, either at a police station or county jail." Id. (slip op. at 7). (Pa154). Thus, Judge DeAlmeida reasoned, "Allen-Brewer could not reasonably have expected that her conversation with McQueen in such circumstances would be private." Ibid. Even if Allen-Brewer claims she believed her phone call with McQueen was private, she should have known it was not private, and "[t]here is no constitutional protection for misplaced confidence or bad judgment when committing a crime." State v. Evers, 175 N.J. 355, 370 (2003). As Judge DeAlmeida further explained, "even if Allen-Brewer was not aware McQueen was in police custody, his voluntary use of the police station phone based on his unreasonable expectation of privacy negated any privacy interest she may have had in their conversation." Ibid. Thus, the

dissenting judge concluded that there was no violation of either defendant's privacy rights that justified the suppression of the police station phone call. Id. (slip op. at 11). (Pa156).

The conclusion reached by the dissenting judge regarding the police station call is the conclusion that should have been reached by the majority. As Judge DeAlmeida understood, the police officers in this case were not required to obtain a warrant before recording or listening to the call McQueen made using the police station's telephone because, given the totality of the circumstances, McQueen had no reasonable expectation of privacy in that call. The call was not made to an attorney or otherwise privileged, and it was made after the defendant had been advised of his Miranda[6] rights, had been interviewed by police, had been charged criminally, and was in police custody waiting to be transferred to a correctional facility. (1T14-9 to 22; 1T28-13 to 16; 5T10-20 to 11-25; Pa8). Most significantly, the call was made at a police station using a police telephone line in a nonpublic area. (Pa8).

The Fourth Amendment of the federal constitution and Article I, Paragraph 7, of the New Jersey Constitution are implicated only when police intrude into an area where a person has a reasonable expectation of privacy. See State v. Hinton, 216 N.J. 211, 236 (2013). Addressing the privacy rights

[6] Miranda v. Arizona, 384 U.S. 436 (1966).

asserted by the defendants in Jackson regarding telephone calls they made from jail, the Appellate Division held and this Court affirmed that neither pretrial detainees nor post-conviction inmates have a reasonable expectation of privacy in those calls, primarily because of the nature of correctional facilities and the security concerns involved. Jackson, 460 N.J. Super. at 276. The Appellate Division explained,

> Correctional facilities . . . have a legitimate security interest in preventing inmates from planning or participating in crimes that will take place outside the facilities' walls. Protecting public safety and preventing obstruction of justice are among the recognized purposes of pretrial detention and post-conviction incarceration.
>
> In the balance, the correctional facilities' interest in maintaining institutional security and public safety outweighs the right to privacy asserted here.
>
> [Ibid.]

This reasoning is consistent with the long-standing principle that determining whether an unreasonable search has occurred in a custodial setting entails "[b]alancing the significant and legitimate security interests of the institution against the privacy interests of the inmates." Bell v. Wolfish, 441 U.S. 520, 560 (1979).

Although the Appellate Division also noted that the defendants in Jackson had been notified explicitly that their

telephone calls may be monitored or recorded, that fact was not necessary to support the court's conclusion. As the court observed in Jackson, "[i]n a prison setting, there is a reasonable expectation that law enforcement will hear the calls. Whether about crimes having an immediate impact on prison security or otherwise, no reasonable expectation of privacy existed." Id. at 277.

Here, the majority of the appellate panel acknowledged the reduced expectation of privacy in a jail but nevertheless opined that

> [a] police station is a different institutional environment than a prison or correctional center. It is not an agency such as a jail or prison, whose sole purpose is to house those either awaiting disposition of criminal charges, or who have already been convicted, and are awaiting or serving sentences.
>
> [McQueen, Nos. A-4391-18, A-4910-18 (slip op. at 11). (Pa142).]

Contrary to the majority's opinion, a police station's "interest in maintaining institutional security and public safety," Jackson, 460 N.J. Super. at 276, is at least as great as that of a correctional facility, in part because it houses pretrial detainees. See Bell, 441 U.S. at 547 ("There is no basis for concluding that pretrial detainees pose any lesser security risk than convicted inmates. Indeed, it may be that in

certain circumstances they present a greater risk to jail security and order.").

Thus, for the same reasons the Appellate Division held that "no reasonable expectation of privacy existed" in phone calls made by inmates from jail, id. at 277, McQueen had no reasonable expectation of privacy in the call he made while in custody using the police station's telephone. As Judge DeAlmeida explained,

> considering the totality of the circumstances, . . . McQueen, under arrest, having recently confessed to criminal activity, and aware he was about to be transported to the county jail, could not reasonably have expected his call to an alleged co-conspirator on a police department telephone with a detective present in the room would be private.
>
> [McQueen, Nos. A-4391-18, A-4910-18 (DeAlmeida, J., dissenting in part) (slip op. at 1-2). (Pa146-47).]

At the time McQueen made the call in question to Allen-Brewer from a police station phone line, he was under arrest, charged with crimes, and waiting to be transferred to the MCACC. McQueen thus was a defendant eligible for pretrial detention when he made that call. Given that one of the stated goals of the Criminal Justice Reform Act is to ensure "that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process," N.J.S.A. 2A:162-15, and given that the goal of McQueen's call was to effectuate the concealment of evidence of

his crimes, society is not prepared to accept that defendants had a reasonable expectation of privacy in their call under the circumstances presented here.

Research reveals no case published in this jurisdiction that directly addresses whether a defendant in custody has a reasonable expectation of privacy in a telephone call made from a police station using a line that is routinely recorded. However, substantial federal and state caselaw supports the conclusion that a defendant has no reasonable expectation of privacy in such situations. See, e.g., Siripongs v. Calderon, 35 F.3d 1308, 1319 (9th Cir. 1994) (no reasonable expectation of privacy where police surreptitiously recorded defendant as he made a telephone call while in custody at police station); United States v. Van Poyck, 77 F.3d 285, 290-91 (9th Cir. 1996) (pretrial detainee did not have reasonable expectation of privacy in his telephone calls from jail); United States v. Correa, 154 F. Supp. 2d 117, 123 (D. Mass. 2001) ("The defendant had no reasonable expectation of privacy in the phone call he made from the police station, while under the visible watch of a police officer."); Scott v. Romero, 153 F. App'x 495, 497 (10th Cir. 2005) (concluding it was "not an unreasonable application of federal law" for district court to find defendant "had no reasonable expectation of privacy in a phone call made from the police station, especially where his comments indicated his

awareness that the police were listening"); State v. Strohl, 587 N.W.2d 675, 682 (Neb. 1999) ("The greater weight of authority . . . has consistently followed Lanza [v. New York, 370 U.S. 139 (1962),] and upheld the admission of monitored conversations in police stations, jail visiting rooms, or jail cells").

Moreover, a suspect in custody has no reasonable expectation of privacy in a call made using a police station's telephone, regardless of whether he or she is explicitly notified that calls may be monitored or recorded. As Judge Posner observed in Amati v. City of Woodstock, 176 F.3d 952, 955 (7th Cir. 1999), "what is ordinary is apt to be known; it imports implicit notice." The court continued,

> To record all calls to and from a police department is . . . a routine police practice. If 'ordinary course' of law enforcement includes anything, it includes that. The sparsity of case law on the question suggests not that the principle is dubious but that it is too obvious to have incited many challenges.
>
> [Id. at 955-56 (citations omitted).]

The dissenting judge in this case agreed with Judge Posner's observation and reached the eminently logical conclusion that, "[g]iven the general knowledge that police department telephones are recorded, notice is implied." McQueen, Nos. A-4391-18, A-4910-18 (DeAlmeida, J., dissenting in part) (slip op. at 3-4). (Pa148-49).

As Judge DeAlmeida's dissenting opinion reflects, it is fairly considered common knowledge that any telephone line at a police station may be a recorded line. See Adams v. City of Battle Creek, 250 F.3d 980, 984 (6th Cir. 2001) (noting that the practice of "routinely and indiscriminately record[ing] all phone activity in and out of the police department" is "well known in the industry and in the general public"). Accordingly, an expectation of privacy in a call made from a police station's telephone is not "one that society is prepared to recognize as reasonable." Evers, 175 N.J. at 369 (quoting Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)). Thus, neither defendant in this case had a reasonable expectation of privacy in the call McQueen made using a recorded line at the Piscataway police headquarters, even absent explicit notice that the line was being recorded. Detective Reilly testified that all lines at the Piscataway police headquarters are recorded (1T27-6 to 9), which is consistent with "routine police practice," and thus defendants had "implicit notice" of the recording. See Amati, 176 F.3d at 955.

A useful analogy can be made between a person's expectation of privacy on a police phone line in a nonpublic room at a police station and his or her expectation of privacy in a police vehicle. Caselaw interpreting the federal Wiretap Act is instructive in this regard because the Act's legislative history

indicates that the definition of "oral communication" in the Act "was intended to parallel the 'reasonable expectation of privacy' test created by the Supreme Court in Katz v. United States.'" Matter of John Doe Trader No. One, 894 F.2d 240, 242 (7th Cir. 1990). See also Hornberger v. Am. Broad. Cos., Inc., 351 N.J. Super. 577, 619 (App. Div. 2002) (alterations in original) ("Courts interpreting [the definition of 'oral communication' in the federal and New Jersey Acts] have opined that the 'expectation of privacy' language in the statute was intended to parallel the language and standard of Katz . . . ."). Thus, although phone conversations are wire communications, not oral communications, for purposes of the Wiretap Act, caselaw addressing whether a person has a reasonable expectation of privacy in a particular area is relevant here.

"[F]ederal and state courts" have held "with apparent unanimity that a person has no objectively reasonable expectation of privacy while seated in a marked patrol car." United States v. Paxton, 848 F.3d 803, 808 (7th Cir. 2017) (collecting cases). Thus, "the interception and recording of [defendants'] conversations" in a police vehicle "d[oes] not constitute a search for purposes of their Fourth Amendment rights . . . ." Id. at 813. Courts have reached that conclusion in large part because "[a] marked police car is owned

and operated by the state for the express purpose of ferreting out crime." United States v. Clark, 22 F.3d 799, 801 (8th Cir. 1994). As the Clark court observed, a marked police car "is essentially the trooper's office, and is frequently used as a temporary jail for housing and transporting arrestees and suspects." Id. at 801-02; accord Paxton, 848 F.3d at 809 ("[T]he patrol car is an official, crime-fighting vehicle that serves both as a police officer's workplace and also as a mobile jail.").

The Clark court explained the significance of the patrol car's function for purposes of an expectation-of-privacy analysis as follows:

> The general public has no reason to frequent the back seat of a patrol car, or to believe that it is a sanctuary for private discussions. A police car is not the kind of public place, like a phone booth (e.g., Katz v. United States, 389 U.S. 347, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967)), where a person should be able to reasonably expect that his conversation will not be monitored. In other words, allowing police to record statements made by individuals seated inside a patrol car does not intrude upon privacy and freedom to such an extent that it could be regarded as inconsistent with the aims of a free and open society.
>
> [Clark, 22 F.3d at 801-02.]

What the Clark court observed about the back seat of a patrol car is also true of the phone that McQueen used to make the call at issue in this case and the room in which that phone

was located. McQueen used a phone connected to "a landline" in the "report writing room" of a police station, an area not open to the general public. (1T14-9 to 22). Like a patrol car, the room served not only as "a police officer's workplace," Paxton, 848 F.3d at 809, but also "a temporary jail," Clark, 22 F.3d at 802, in that McQueen was under arrest, charged criminally, and awaiting transfer to a county jail when he placed a telephone call from that room. Even if McQueen was not given explicit notice that his call would not be private, his surroundings and the totality of circumstances gave him implicit notice. As the Paxton court observed in the police vehicle context,

> given the increasing presence of unobtrusive, if not invisible, audio and video surveillance in all manner of places, public and private, one wonders how much of a reminder a detainee needs that he might be under surveillance--particularly in a marked police vehicle --or that this might be so regardless of whether he can see any obvious signs of surveillance devices.
>
> [Paxton, 848 F.3d at 812.]

Moreover, although courts finding no reasonable expectation of privacy in a police car "have deemed it immaterial whether the individual has been arrested, temporarily detained, or simply invited to sit in the car while the police conduct an investigation," Paxton, 848 F.3d at 809; accord United States v. Zuniga-Perez, 69 F. App'x 906, 911 (10th Cir. 2003), the court

noted in Paxton that the defendants' arrest "resulted in a diminished expectation of privacy on the part of the defendants, and as detainees they could not reasonably have perceived the (marked) police van as a sanctuary for private conversation." Id. at 811 (internal citation omitted). Thus, the fact that McQueen was in custody further supports the conclusion that he had no reasonable expectation of privacy in his phone call from the police station.

Under other circumstances, a person can reasonably presume privacy in a telephone call. Under the circumstances presented here, however, and given that the routine police practice of recording all police station telephone lines is common knowledge among the general public, see Adams, 250 F.3d at 984, any expectation of privacy in McQueen's call was unreasonable, even without express notice of the recording. The Appellate Division majority erred in concluding McQueen "had no reason to doubt his call was as private and secure as if he was using a phone in a friend's apartment." McQueen, Nos. A-4391-18, A-4910-18 (slip op. at 12). (Pa143).

Again, the Seventh Circuit's expectation-of-privacy analysis regarding defendants in a police van is instructive:

> [T]he material point, in terms of the defendants' expectation of privacy, is that the government has legitimate reasons, wholly consistent with the public interest, for monitoring individuals it has taken into

> its custody and placed into a transport vehicle. Regardless of the agents' actual motivations for monitoring the defendants during transport, these legitimate interests reinforce our conclusion that society is not prepared to recognize as reasonable whatever subjective expectations of privacy the defendants may have harbored in their conversations within the van.
>
> [Paxton, 848 F.3d at 813.]

The phone used by McQueen was not his own phone, it was not a business's phone, and it was not another civilian's phone; it was a police phone in a police station. There are "legitimate reasons, wholly consistent with the public interest," ibid., for recording all calls made or received on such a phone. Just as "the correctional facilities' interest in maintaining institutional security and public safety outweigh[ed] the right to privacy asserted" in Jackson, 460 N.J. Super. at 276, the police department's interest in maintaining institutional security and public safety outweighs the defendants' asserted right to privacy on the police department's phone line. Society is not prepared to accept as reasonable the privacy right asserted here.

Nor did the police officers create a reasonable expectation of privacy in the phone call that otherwise would not have existed. Although the record is unclear as to where the police officers were standing when McQueen made his call, there is no indication in the record that the officers led McQueen to

believe his conversation would be private. Detective Reilly testified before the grand jury that McQueen "was in Detective Alameda's presence" when "making that call." (1T27-16 to 17). The State's brief before the trial court indicates that during the call, Alameda and Sergeant Coffey "stepped out of the room . . . and watched defendant speak on the phone through a large glass window directly next to the threshold of the report room door" and that "Coffey eventually re-entered the room during defendant's conversation . . . ." (Pa159). There is no indication in the record that McQueen was given any false assurances that his conversation would be private.

Regarding whether Allen-Brewer knew McQueen was calling from a police station, Judge DeAlmeida soundly reasoned that "even if Allen-Brewer was not aware McQueen was in police custody, his voluntary use of the police station phone based on his unreasonable expectation of privacy negated any privacy interest she may have had in their conversation." McQueen, Nos. A-4391-18, A-4910-18 (DeAlmeida, J., dissenting in part) (slip op. at 7). (Pa152). As the Seventh Circuit has observed, "it is difficult to imagine that the considerations that justify monitoring and recording of a prisoner's utterances could somehow not apply at the other end of the telephone. The rights of free persons may well at times be implicated and stand or fall with the rights of prisoners." United States v. Sababu,

891 F.2d 1308, 1329-30 (7th Cir. 1989) (quoting United States v. Vasta, 649 F. Supp. 974, 991 (S.D.N.Y. 1986)).

Even accepting the majority's opinion that Allen-Brewer's "understanding of the circumstances of the call can only be guessed at," McQueen, Nos. A-4391-18, A-4910-18 (slip op. at 13); (Pa144), despite McQueen's telling her he was "locked up," the police officers were authorized to listen to McQueen's call to Allen-Brewer for the reasons previously stated, regardless of whether Allen-Brewer knew McQueen had called her from a police station. Therefore, any statements made by Allen-Brewer in her conversation with McQueen are admissible under the "plain hearing" exception to the warrant requirement, which applies the principles of the "plain view" doctrine to evidence that is heard, rather than viewed.

Research reveals only one case published in this jurisdiction where the doctrine was applied, State v. Constantino, 254 N.J. Super. 259 (Law Div. 1991), where a Law Division court observed that

> [e]avesdropping from a place where an officer has a right to be is a long-accepted technique of crime detection, not outlawed by the Fourth Amendment. If defendant speaks loudly enough to be overheard his expectation of privacy vanishes. There is nothing wrong in law with police officers listening in on a conversation and then acting on what they hear.
>
> [Id. at 265 (citations omitted).]

However, the "plain hearing" doctrine has broad support in federal caselaw and specifically in the context of telephone conversations under surveillance by police. See United States v. Carey, 836 F.3d 1092, 1093-94 (9th Cir. 2016) (holding "that the police may use evidence obtained in 'plain hearing' when they overhear speakers unrelated to the target conspiracy while listening to a valid wiretap, without having complied with the Wiretap Act requirements of probable cause and necessity as to those specific speakers"); United States v. Ramirez, 112 F.3d 849, 851 (7th Cir. 1997) (citations omitted) ("It is true that if government agents execute a valid wiretap order and in the course of executing it discover that it was procured by a mistake and at the same time overhear incriminating conversations, the record of the conversations is admissible in evidence. It is just the 'plain view' doctrine translated from the visual to the oral dimension."); United States v. Baranek, 903 F.2d 1068, 1071 (6th Cir. 1990) (recognizing the "plain hearing" doctrine and observing further that "[w]hen one calls another on the telephone, it is with the explicit knowledge that the other party could allow someone to listen to the call or even record it").

Under New Jersey law, "the plain view doctrine allows seizures without a warrant so long as an officer is 'lawfully .

. . in the area where he observed and seized the incriminating item or contraband, and it [is] immediately apparent that the seized item is evidence of a crime.'" State v. Hamlett, 449 N.J. Super. 159, 175 (App. Div. 2017) (alteration in original) (quoting State v. Gonzales, 227 N.J. 77, 101 (2016)). Applying those principles to the phone call at issue in this case, the police were lawfully in the area where they observed – aurally rather than visually – the statements made by Allen-Brewer because the officers were lawfully listening to phone calls made by McQueen for the reasons previously stated. In addition, it was immediately apparent to the officers that those statements were evidence of Allen-Brewer's involvement in hindering the investigation into McQueen's criminal activity. (Pa8). Thus, under the principles of the "plain view" doctrine, the officers were authorized to "seize" the statements made by Allen-Brewer as evidence of a crime in "plain hearing."

In sum, considering all of the circumstances, the absence of any assurances of privacy in defendants' phone conversation while McQueen was in custody at the police station, and the institutional security and public safety interests involved, defendants had no reasonable expectation of privacy in the conversation. Defendants therefore suffered no constitutional violation as a result of the recording of that conversation on the police station's phone line. See Hornberger, 351 N.J.

Super. at 621 (adopting "majority expectation-of-privacy standard" and rejecting minority "expectation-of-non-interception standard" for purposes of oral communications under the New Jersey Wiretapping and Electronic Surveillance Act, N.J.S.A. 2A:156A-1 to -34).

The Appellate Division majority therefore erred in suppressing the recording of McQueen's call to Allen-Brewer, which McQueen made using a police station phone line, because neither defendant had a reasonable expectation of privacy in the call. Judge DeAlmeida, in dissent, correctly concluded that the privacy right claimed by defendants is not one that society is prepared to accept as reasonable, and thus, no unconstitutional search occurred as a result of the recording of that call.

For the same reason, the police did not conduct a "seizure" for constitutional purposes when they subsequently listened to that call, which was made on a routinely recorded police phone line. Because the opinion of the majority below is based on its finding a reasonable expectation of privacy where none exists, this Court should reverse the suppression of the recording made at the police station.

CONCLUSION

For the foregoing reasons and those stated in the dissenting opinion of the Honorable Patrick DeAlmeida, J.A.D., the State urges this Court to reverse the decision of the Appellate Division to the extent that the majority affirmed the suppression of the recording made at the police station.

Respectfully submitted,

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