

## SUPREME COURT OF PENNSYLVANIA

# Commonwealth of Pennsylvania v. Rahiem Cardel Fant

Fant · No. 66 MAP 2015 · Decided September 28, 2016

### SUMMARY

Justice Wecht concurs in the Pennsylvania Supreme Court's decision concerning whether inmate “visit conversations” fall within the Pennsylvania Wiretapping and Electronic Surveillance Control Act exception for telephone calls to or from inmates. He agrees with the Majority's interpretation and application of the statutory exception but disagrees with addressing the Commonwealth's alternative argument that no interception occurred, concluding that the argument was not preserved for appellate review.

### CASE DETAILS

|                       |                                                                                                                                                                                                                                                                                                                                                                                         |
|-----------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | Supreme Court of Pennsylvania                                                                                                                                                                                                                                                                                                                                                           |
| WRITING FOR THE COURT | Justice Wecht                                                                                                                                                                                                                                                                                                                                                                           |
| JURISDICTION          | Pennsylvania                                                                                                                                                                                                                                                                                                                                                                            |
| DECIDED               | September 28, 2016                                                                                                                                                                                                                                                                                                                                                                      |
| DOCKET                | 66 MAP 2015                                                                                                                                                                                                                                                                                                                                                                             |
| DISPOSITION           | other                                                                                                                                                                                                                                                                                                                                                                                   |
| PROCEDURAL POSTURE    | The Commonwealth appealed to the Supreme Court of Pennsylvania from the Superior Court's order reversing the Clinton County Court of Common Pleas' suppression order. The concurrence addresses the statutory exception for inmate telephone calls under the Pennsylvania Wiretapping and Electronic Surveillance Control Act and preservation of an alternative interception argument. |
| PRECEDENTIAL VALUE    | Published concurring opinion; the concurrence is not independently controlling, although it joins the majority's resolution of the statutory issue.                                                                                                                                                                                                                                     |
| PARTIES               | Rahiem Cardel Fant v. Commonwealth of Pennsylvania                                                                                                                                                                                                                                                                                                                                      |

### TOPICS

statutory interpretation

suppression of evidence

appellate procedure

preservation of error

criminal procedure

## PRACTICE AREAS

criminal procedure

wiretap and electronic surveillance

appellate procedure

## QUESTIONS PRESENTED

1. Whether the inmate-related “visit conversations” fell within the Pennsylvania Wiretapping and Electronic Surveillance Control Act exception permitting interception of telephone calls from or to an inmate in a facility.
2. Whether the Commonwealth could rely on the right-for-any-reason doctrine to assert, for the first time in the Supreme Court, that there was no interception under the Wiretap Act.
3. Whether the Commonwealth's failure to raise and preserve the interception issue in the Superior Court barred appellate review of that alternative argument.

## HOLDINGS

1. The concurrence joins the majority's resolution that the relevant “visit conversations” fall within the statutory exception for interception of telephone calls from or to an inmate and agrees with the majority's application of that exception to the suppression court's factual findings.
2. The concurrence concludes that the majority should not reach the Commonwealth's alternative argument that no interception occurred because the Commonwealth failed to raise and preserve that issue in the Superior Court while acting as the appellant there.

## KEY QUOTATIONS

*“Because the Wiretap Act does not define “telephone calls,” it is necessary to discern the ordinary meaning of this term.” (at 2)*

*“Having lost in the suppression court, the Commonwealth had the obligation to preserve the issue when it was the appellant in the Superior Court.” (at 4)*

## FACTUAL BACKGROUND

The case involved recorded or monitored conversations associated with an inmate, described by the majority as “visit conversations.” The concurrence states that the suppression court made factual findings and agrees with the majority's application of the Wiretap Act's inmate-telephone-call exception to those facts.

## PROCEDURAL HISTORY

The Clinton County Court of Common Pleas entered an order in a criminal case on February 26, 2014. The Superior Court, at No. 386 MDA 2014, reversed that order on February 9, 2015. The Commonwealth appealed to the Supreme Court of Pennsylvania under No. 66 MAP 2015; the matter was submitted on March 16, 2016, and decided on September 28, 2016.

## DISPOSITION

#### CASES CITED

- Commonwealth v. DiNicola, 866 A.2d 329, 346 n.7 (Pa. 2005)
- E.J. McAleer & Co., Inc. v. Iceland Products Inc., 381 A.2d 441, 443 n.4 (Pa. Super. Ct. 1977)
- Commonwealth v. Katze, 658 A.2d 345, 349 (Pa. Super. Ct. 1995)
- Freed v. Geisinger Med. Ctr., 5 A.3d 212, 222 n.4 (Pa. 2010)
- In re J.M., 726 A.2d 1041, 1051 n.15 (Pa. 1999)
- Vicari v. Spiegel, 989 A.2d 1277, 1287 (Pa. 2010)
- Commonwealth v. Fant, 109 A.3d 777

#### OPINION

#### PER CURIAM.

[J-46-2016] [MO: Donohue, J.] IN THE SUPREME COURT OF PENNSYLVANIA MIDDLE DISTRICT COMMONWEALTH OF PENNSYLVANIA,; No. 66 MAP 2015 Appellee: Appeal from the Order of the Superior: Court at No. 386 MDA 2014 dated: February 9, 2015 Reversing the Order v.: of the Clinton Court of Common Pleas,: Criminal Division, at No. CP-18-CR-: 0000415-2013, dated February 26, RAHIEM CARDEL FANT,; 2014.

Appellant: SUBMITTED: March 16, 2016 CONCURRING OPINION JUSTICE WECHT DECIDED: September 28, 2016 I join the Majority opinion with the exception of footnote 13. Maj. Slip Op. at 19- 21, n.13. The Pennsylvania Wiretapping and Electronic Surveillance Control Act (the “Wiretap Act” or “the Act”), 18 Pa.C.S. §§ 5701-82, establishes a general prohibition barring interception of wire, electronic, or oral communications,<sup>1</sup> subject to several specific exceptions.

The question presented by today’s case is whether certain “visit conversations,” as described by the Majority, fall within the exception in Subsection 5704(14) of the Wiretap Act, 18 Pa.C.S. § 5704(14), which, under certain conditions, permits interception of “telephone calls from or to an inmate in a facility.”<sup>2</sup> Because the 1 See 18 Pa.C.S. § 5703. 2 Section 5704 provides, in relevant part, that “[i]t shall not be unlawful and no prior court approval shall be required under this chapter for” the following: (continuedD) Wiretap Act does not define “telephone calls,” it is necessary to discern the ordinary (Dcontinued) (14) An investigative officer, a law enforcement officer or employees of a county correctional facility to intercept, record, monitor or divulge any telephone calls from or to an inmate in a facility under the following conditions: (i) The county correctional facility shall adhere to the following procedures and restrictions when intercepting, recording, monitoring or divulging any telephone calls from or to an inmate in a county correctional facility as provided for by this paragraph: (A) Before the implementation of this

paragraph, all inmates of the facility shall be notified in writing that, as of the effective date of this paragraph, their telephone conversations may be intercepted, recorded, monitored or divulged.

(B) Unless otherwise provided for in this paragraph, after intercepting or recording a telephone conversation, only the superintendent, warden or a designee of the superintendent or warden or other chief administrative official or his or her designee, or law enforcement officers shall have access to that recording. (C) The contents of an intercepted and recorded telephone conversation shall be divulged only as is necessary to safeguard the orderly operation of the facility, in response to a court order or in the prosecution or investigation of any crime. (ii) So as to safeguard the attorney-client privilege, the county correctional facility shall not intercept, record, monitor or divulge any conversation between an inmate and an attorney. (iii) Persons who are calling into a facility to speak to an inmate shall be notified that the call may be recorded or monitored. (iv) The superintendent, warden or a designee of the superintendent or warden or other chief administrative official of the county correctional system shall promulgate guidelines to implement the provisions of this paragraph for county correctional facilities.

18 Pa.C.S § 5704(14). [J-46-2016] [MO: Donohue, J.] - 2 meaning of this term. I agree with the Majority's resolution of the meaning of "telephone calls" and its application of the statutory exception to the facts found by the suppression court herein.

However, I distance myself from the Majority's consideration of the Commonwealth's alternative argument. The Commonwealth has argued in the alternative that we should affirm the Superior Court's decision because there was no "interception" under the Wiretap Act.

Although this issue was not raised below, the Commonwealth asserts that we can reach it through application of the "right-for-any-reason doctrine."<sup>3</sup> However, the Commonwealth is seeking to uphold the judgment of the intermediate appellate court, rather than that of the fact-finding tribunal.

Although the Majority is correct that we have never resolved whether the doctrine may be invoked to uphold the intermediate appellate court's order, I am inclined to agree with Chief Justice Saylor's narrow understanding of the doctrine's focus in Pennsylvania. See *Commonwealth v. DiNicola*, 866 A.2d 329, 346 n.7 (Pa. 2005) (Saylor, J., concurring) ("Significantly, the focus of the right-for-any-reason doctrine in Pennsylvania is on upholding the judgment of the fact-finding tribunal, not that of the intermediate appellate court." (citing E.J.

*McAleer & Co., Inc. v. Iceland Products Inc.*, 381 A.2d 441, 443 n.4 (Pa. 1977); *Commonwealth v. Katze*, 658 A.2d 345, 349 (Pa. 1995))). <sup>3</sup> As we have explained, "[u]nder the right-for-any-reason doctrine, an order or judgment may be affirmed for any reason appearing as of record." *Freed v. Geisinger Med. Ctr.*, 5 A.3d 212, 222 n.4 (Pa. 2010) (Saylor, J., dissenting); see generally Thomas

G. Saylor, Right for Any Reason: An Unsettled Doctrine at the Supreme Court Level and An Anecdotal Experience with Former Chief Justice Cappy, 47 Duq.

L. Rev. 489, 490 n.2 (2009) (collecting cases). [J-46-2016] [MO: Donohue, J.] - 3 Moreover, under any iteration, application of the right-for-any-reason doctrine is questionable when the appellee before this Court was the appellant in the intermediate appellate court, such as the Commonwealth herein.

Under such circumstances, any matter not raised and preserved in the intermediate appellate court is unavailable for appellate review. See *In re J.M.*, 726 A.2d 1041, 1051 n.15 (Pa. 1999); *Freed v. Geisinger Med. Ctr.*, 5 A.3d 212, 222 n.4 (Pa. 2010) (Saylor, J., dissenting); *Vicari v. Spiegel*, 989 A.2d 1277, 1287 (Pa. 2010) (Castille, C.J., concurring) (“Arguably, as the party prevailing below, appellee is free to raise properly preserved alternative arguments, and the Court is then free to determine which arguments to discuss (or to determine to dismiss the appeal on prudential grounds.”).

Having lost in the suppression court, the Commonwealth had the obligation to preserve the issue when it was the appellant in the Superior Court. See Pa.R.A.P. 302(a). In that court, it did not raise the interception question. *Fant*, 109 A.3d at 777.

Accordingly, there is no basis for the Majority to engage the Commonwealth’s alternative argument, however briefly. Maj. Slip Op. at 19-21, n.13. [J-46-2016] [MO: Donohue, J.] - 4