

**[J-127A/B-1997]**  
**IN THE SUPREME COURT OF PENNSYLVANIA**  
**WESTERN DISTRICT**

COMMONWEALTH OF PENNSYLVANIA, : No. 0002 W.D. Appeal Docket 1997  
: :  
Appellee : Appeal from the Order of the Superior  
: Court entered March 19, 1996, at No.  
: 522PGH93, affirming the Judgment of  
v. : Sentence of the Court of Common Pleas  
: of Allegheny County, Criminal Division,  
: entered February 26, 1993, at No.  
TONY ARDESTANI, : CC9210333  
: :  
Appellant : SUBMITTED: September 15, 1997

COMMONWEALTH OF PENNSYLVANIA, : No. 0036 W.D. Appeal Docket 1996  
: :  
Appellee : Appeal from the Order of the Superior  
: Court entered December 6, 1995, at No.  
: 442PGH95, affirming the Judgment of  
v. : Sentence of the Court of Common Pleas  
: of Fayette County, Criminal Division,  
: entered January 14, 1994, at Nos. 769,  
JOSEPH H. METTS, : 769 2/6, 769 3/6, 769 4/6 of 1992 entered  
: January 14, 1994  
: :  
Appellant : 669 A.2d 346 (Pa. Super. 1995)  
: :  
: ARGUED: September 15, 1997

**OPINION ANNOUNCING THE JUDGMENT OF THE COURT**

**MR. JUSTICE ZAPPALA**

**DECIDED: JUNE 29, 1999**

On December 30, 1994, our Court held in Commonwealth v. Brion, 539 Pa. 256, 652 A.2d 287 (1994), that Article I, Section 8 of the Pennsylvania Constitution precludes

the police from sending an informant into the home of an individual to electronically record his conversations absent a prior determination of probable cause by a neutral, judicial authority. Allocatur was granted in the instant consolidated cases to determine the applicability of our decision in Brion. We hold that because the appellants raised and properly preserved the same issue decided in Brion at all stages of the adjudication, and their cases were pending on direct appeal at the time Brion was decided, they are entitled to the benefit of the decision. Accordingly, we reverse the orders of the Superior Court which affirmed the appellants' convictions.

The record establishes that Appellant Tony Ardestani solicited individuals to murder his wife. Following an acrimonious separation in June of 1991, Ardestani approached Richard Vecchiola and inquired whether he knew anyone who would kill his wife for \$10,000. Approximately one year later, Vecchiola suggested that Ardestani meet Otis Winstead. While en route to Ardestani's home on July 2, 1992, Winstead saw Detective Elizabeth Hoover and informed her of Ardestani's plan to have his wife killed. Hoover accompanied Winstead to Ardestani's residence, but he was not home. Winstead thereafter met with Ardestani to discuss the murder. Later that month, Winstead again met with Ardestani and portrayed Hoover as his partner. At that meeting, payment arrangements and specific plans to carry out the killing were discussed.

On July 22, 1992, with authorization from a Deputy Assistant District Attorney, Hoover was fitted with a body wire and accompanied Winstead to Ardestani's apartment. Winstead asked Ardestani whether he wanted his wife killed that weekend, and he replied, "Yeah, I guess." He then gave Hoover and Winstead a description of the victim and directions to her home. As Ardestani and Hoover passed each other in a narrow doorway, Ardestani placed his hand on Hoover's waist and felt the body wire. Hoover then placed Ardestani under arrest.

Ardestani filed a motion to suppress the recordings, alleging that the warrantless wiretap interceptions of his conversations violated Article I, Section 8 of the Pennsylvania Constitution. The trial court denied the motion and a recording of the taped conversation was played for the jury at trial. Ardestani was thereafter convicted of criminal solicitation. The common pleas court denied post-trial motions challenging the constitutionality of the intercepted conversations and sentenced Ardestani to three to ten years imprisonment.

The Superior Court affirmed the judgment of sentence, holding, *inter alia*, that the warrantless wire interception in Ardestani's home did not violate Article I, Section 8. While Ardestani's Petition for Allowance of Appeal was pending before our Court, we decided Brion. On March 2, 1995, we granted allocatur and remanded the case to Superior Court for reconsideration in light of Brion. On remand, Superior Court again affirmed the judgment of sentence, concluding that Brion was not to be retroactively applied based on its *en banc* decision in Commonwealth v. Metts, 669 A.2d 346 (Pa. Super. 1995), appeal granted, 675 A.2d 1238 (1996). Our Court again granted allocatur and directed that this case be consolidated with Metts.

Appellant Joseph Metts was charged with the first degree murder of Piper Newland, a corrections officer at the Fayette County Prison. In the early morning hours on January 5, 1992, Metts awakened his sister, Wendy Sue Kulenovic, and confessed to shooting a guard at the jail.<sup>1</sup> Kulenovic observed a gun and a purse containing the victim's pay stubs on her kitchen table. She recognized the gun as belonging to Paul Kuba, a friend of Metts. Metts then removed a fifty-dollar bill from the purse and stated, "I shot her for a lousy fifty dollars." Metts later told Kuba that he had shot Newland for the money.

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<sup>1</sup> Kulenovic's husband Dwayne was also charged with the murder and was Metts's co-defendant at trial.

On January 27, 1992, and February 6, 1992, with authorization from the Fayette County District Attorney, Kuba wore an electronic transmitter while questioning Metts about his involvement in the murder. During one of the recorded conversations, Metts confessed to shooting the victim for fifty dollars. The conversations were recorded in the home of Wendy Kulenovic, where Metts had been staying for several days prior to the murder.

Metts filed a motion to suppress the recordings on the ground that they violated Article I, Section 8 of the Pennsylvania Constitution. The common pleas court denied suppression and the tapes were played for the jury.<sup>2</sup> Metts was subsequently convicted of first degree murder, robbery and related theft offenses. He received a life sentence on the murder charge and a consecutive sentence of ten to twenty years for his robbery conviction.

While Metts's appeal to the Superior Court was pending, our Court decided Brion. The Superior Court affirmed Metts's convictions, holding that Brion was inapplicable to intercepted conversations that occurred prior to December 30, 1994, the date Brion was decided. Our Court subsequently granted allocatur, limited to the question of whether Brion is applicable to Metts's case, and ordered that the appeal be held pending our disposition of a similarly situated case, Commonwealth v. Selby, 547 Pa. 31, 688 A.2d 699 (1997).

The issue of whether Brion applies to the instant cases is controlled by our decision in Commonwealth v. Cabeza, 503 Pa. 228, 469 A.2d 146 (1983). In Cabeza, the defendant's appeal was pending in Superior Court at the time we decided Commonwealth v. Scott, 496 Pa. 188, 436 A.2d 607 (1981), where we abandoned the rule permitting prosecutors to introduce prior arrests of the accused on cross-examination of character

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<sup>2</sup> At trial, the court reporter indicated that the tape was inaudible. The trial court agreed and a court-commissioned reporter prepared a transcript that was admitted into evidence. According to the transcript, Metts stated, "I shot her for the cash" and "I got fifty bucks off her."

witnesses. As the prosecutor in Cabeza had introduced the defendant's prior arrests to impeach his character witnesses, the Superior Court relied upon Scott and reversed the judgment of sentence.

The Commonwealth appealed, contending that Scott should not be applied because the law in effect at the time of trial sanctioned the prosecutor's line of questioning and the evidentiary rule established in Scott was not of constitutional dimension. We rejected the Commonwealth's argument, and stated:

The only noteworthy difference between Scott and [Cabeza] is that Scott was argued and decided first. The instant case may well have been the case which overruled prior law if Scott had not been decided while [Cabeza's] appeal to the Superior Court was pending. The question whether to apply an enlightened rule in favor of a discredited one should not be determined by the fortuity of who first has his case decided by an appellate court.

Therefore, we hold that where an appellate decision overrules prior law and announces a new principle, unless the decision specifically declares the rule to be prospective only, the new rule is to be applied retroactively to cases where the issue in question is properly preserved at all stages of adjudication up to and including any direct appeal.

503 Pa. at 232-233, 469 A.2d at 148.

Here, Brion overruled prior law which sanctioned the warrantless wire interception of an accused's conversation in his home. Our decision in Brion did not specifically declare that the new rule was to be prospective only. Accordingly, the Brion rule applies to all cases on direct appeal where the issue in question was properly preserved at all stages of the adjudication. See Commonwealth v. Brown, 494 Pa. 380, 431 A.2d 905 (1981) (fairness demands that relief be granted not only in case which successfully contests a rule of law, but also in cases on direct appeal which suffer same infirmity); McHugh v. Litvin, 525 Pa. 1, 574 A.2d 1040 (1990) (changes in the law are applied to cases in the system at the time the change is announced).

We reached the same conclusion in Commonwealth v. Selby, 547 Pa. 31, 688 A.2d 698 (1997), which also involved the application of Brion.<sup>3</sup> We granted allocatur in Selby, but held disposition of the case pending Brion. In rejecting the Commonwealth's contention that Brion should not be applied, we noted that the fact that we held the case pending the outcome of Brion indicated that we expected the case to be controlled by Brion. We stated:

Considered in the light of the Cabeza rule, the illogic of holding this case pending Brion and then reaching the opposite result in an analytically indistinguishable situation defies explanation.

547 Pa. at 34, 688 A.2d at 700.

Having determined that Brion applies, we must next examine whether the application of that decision to the instant cases warrants suppression of the intercepted conversations.<sup>4</sup> In Brion, we held that "an individual can reasonably expect that his right to privacy will not be violated in his home through the use of any electronic surveillance." Id. at 261, 652 A.2d at 289. We concluded that because the conversations were intercepted in the defendant's home and there was no probable cause determination by a neutral judicial authority, the recordings violated Article I, Section 8 of the Pennsylvania Constitution and must be suppressed. The facts of Appellant Ardestani's case are virtually indistinguishable. The conversations in which Ardestani implicated himself in the criminal solicitation were recorded in his home without a determination of probable cause by a neutral judicial authority. Accordingly, the tapes should have been suppressed.

In Appellant Metts's case, the conversations were not recorded in Metts's home, but rather were intercepted in the home of his sister, Wendy Kulenovic. Notwithstanding this

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<sup>3</sup> We recognize that Selby was a plurality opinion. Although not controlling, it is instructive regarding the applicability of Brion to the instant cases.

<sup>4</sup> As noted, both appellants raised and properly preserved the issue challenging the admissibility of the intercepted conversations pursuant to Article I, Section 8 of the Pennsylvania Constitution.

fact, we find that our decision in Brion controls. We have held that an individual need not possess a property right in the place invaded to invoke constitutional protections; rather he must only possess a legitimate expectation of privacy in the area searched. Commonwealth v. Brundidge, 533 Pa. 167, 173, 620 A.2d 1115, 1118 (1993). An expectation of privacy is present when the individual's conduct exhibits an actual expectation of privacy which is recognized by society as reasonable. Id.

The record establishes that Metts did not maintain a permanent residence and had been staying at Kulenovic's home with her permission for several days prior to the murder.<sup>5</sup> These facts establish that Metts possessed a reasonable expectation of privacy in his sister's home which society would recognize as reasonable. See Commonwealth v. Rowe, 43 Pa. 14, 249 A.2d 911 (1969) (defendant had reasonable expectation of privacy in home of co-defendant's father); Commonwealth Evans, 488 Pa. 38, 43, 410 A.2d 1213, 1215 (1979) (overnight guest had legitimate expectation of privacy when staying at residence with the host's permission); Commonwealth v. Brundidge, 533 Pa. at 173, 620 A.2d at 1118 (guest in motel room has legitimate expectation of privacy in room during period of time it is rented). Commonwealth v. Rodriguez, 451 Pa. Super. 474, 679 A.2d 1320 (1996), *alloc. denied*, 550 Pa. 681, 704 A.2d 637 (1996) (defendant had legitimate expectation of privacy in sister's home).

Accordingly, Metts is entitled to the protections of Article I, Section 8 as espoused in Brion. Because there was no prior determination of probable cause by a neutral judicial authority, the recordings of Metts's conversations in his sister's home should have been suppressed.

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<sup>5</sup> Kulenovic testified that she asked Metts to leave her apartment on the day following the murder because she did not want his girlfriend, a runaway, to stay with him. Metts left the apartment on the day after the murder, but returned to spend the night at his sister's apartment several times prior to his arrest.

Finally, we address the Commonwealth's contentions that even if Brion applies, the admission of the tape-recorded conversations amounts to harmless error. It is well established that an error is harmless only if the appellate court is convinced beyond a reasonable doubt that there is no reasonable possibility that the error could have contributed to the verdict. Commonwealth v. Story, 476 Pa. 391, 383 A.2d 155 (1978). The Commonwealth bears the burden of establishing the harmlessness of the error. Id. This burden is satisfied when the Commonwealth is able to show: (1) the error did not prejudice the defendant or the prejudice was *de minimis*; or (2) the erroneously admitted evidence was merely cumulative of other untainted evidence which was substantially similar to the erroneously admitted evidence; or (3) the properly admitted and uncontradicted evidence of guilt was so overwhelming and the prejudicial affect of the error so insignificant by comparison that the error could not have contributed to the verdict. Commonwealth v. Mayhue, 536 Pa. 271, 296, 639 A.2d 421, 433 (1994); Commonwealth v. Williams, 524 Pa. 404, 409, 573 A.2d 536, 538-39 (1990). The Commonwealth has failed to meet this burden in each of the instant cases.

In Appellant Ardestani's case, the Commonwealth relies on the third type of harmless error and contends that because Ardestani voiced his desire to have his wife killed to numerous witnesses, there was overwhelming evidence of his guilt absent the taped conversation. This argument fails, as the evidence in support of conviction was not uncontradicted. Ardestani testified at trial that he never encouraged or requested Detective Hoover or Otis Winstead to kill his wife and that he never expressed a desire to have her killed.<sup>6</sup>

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<sup>6</sup> Likewise, Metts testified that although he could not remember the time surrounding the shooting, he denied shooting the victim for her money or for any other reason.

In Appellant Metts's case, the Commonwealth contends that the admission of the taped confession was harmless because the tape was merely cumulative of other properly admitted, substantially similar evidence. We disagree. As the United States Supreme Court eloquently stated in Arizona v. Fulminante, 499 U.S. 279, 111 S. Ct. 1246 (1991):

A confession is like no other evidence. Indeed, the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him . . . . The admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so

Id. at 296, 111 S. Ct. at 1257 (citations omitted).

The Court emphasized that reviewing courts should exercise extreme caution before determining that the admission of the confession at trial was harmless. Id. With this in mind, we hold that it is virtually impossible to conclude beyond a reasonable doubt that the jury would have reached the same conclusion absent the erroneous introduction of the appellants' taped incriminating statements. The prejudice arising from the jury hearing the most inculpatory declarations from the mouth of the defendant himself cannot be described as insignificant or *de minimis*.<sup>7</sup> In fact, it may be the linchpin securing the jury's ultimate verdict. Thus, the admission of the recordings cannot be deemed harmless error. See Commonwealth v. Bullard, 465 Pa. 341, 349-50, 350 A.2d 797, 801 (1976) (because confession is most damning of all evidence, erroneous admission of confession not harmless error); Commonwealth v. Katz, 540 Pa. 416, 658 A.2d 345 (1995) (Zappala, J., Opinion in Support of Reversal) (violation of Wiretap Act cannot constitute harmless error).

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<sup>7</sup> We recognize that the taped confession in Metts was virtually inaudible. This does not however, eliminate the prejudice arising from the translation of the tape by the court commissioned reporter.

Accordingly we reverse the orders entered by the Superior Court in both Ardestani and Metts and remand for new trials.<sup>8</sup>

Mr. Justice Saylor did not participate in the consideration or decision of Commonwealth v. Ardestani, No. 2 W.D. Appeal Docket 1997.

Mr. Justice Nigro files a concurring opinion.

Mr. Justice Castille files a dissenting opinion in which Madame Justice Newman joins.

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<sup>8</sup> Both the concurring and dissenting opinions entertain a lengthy analysis regarding the appropriate factors to consider in determining whether to apply Brion to the instant cases. I find such analysis unnecessary as our holding in Cabeza has never been overruled and continues to be the most prudent approach to follow in the criminal arena.