University of Baltimore Law Forum

Volume 45
Number 2 *Spring 2015*

Article 7

2015

Recent Development: Raynor v. State: Non-intrusive DNA Testing for the Sole Purpose of Identification is Not a Search Under the Fourth Amendment

Bradley T. Bald

RECENT DEVELOPMENT

RAYNOR V. STATE: NON-INTRUSIVE DNA TESTING FOR THE SOLE PURPOSE OF IDENTIFICATION IS NOT A SEARCH UNDER THE FOURTH AMENDMENT.

By: Bradley T. Bald

The Court of Appeals of Maryland held that DNA testing of thirteen junk loci unknowingly exposed to the public for purposes of identification, not obtained by physical intrusion, was not a search under the Fourth Amendment. *Raynor v. State*, 440 Md. 71, 96, 99 A.3d 753, 768 (2014).

On April 2, 2006, a perpetrator broke into the victim's bedroom, raped her repeatedly, and then fled the scene. *Raynor*, 440 Md. at 75, 99 A.3d at 755. The victim was unable to view the attacker's face, but noticed that he exuded a "metallic scent." *Id.* A crime scene technician processed the scene for evidence, including blood from her pillow and around the door; the victim also underwent a rape examination at the hospital. *Id.* at 75-76, 99 A.3d at 755. Approximately two years later, the victim contacted an investigator with suspicion that Glenn Joseph Raynor ("Raynor") was the perpetrator. *Id.* at 76, 99 A.3d at 755.

The police contacted Raynor who agreed to go to the station for an interview. *Id.* During the interview, officers noticed that Raynor exhibited a metallic odor similar to that described by the victim. *Id.* at 76, 99 A.3d at 755-56. Police also recognized that Raynor continually rubbed his arms against the chair throughout the interview. *Id.* The officers then asked Raynor for his consent to provide a DNA sample, which he conditionally agreed to. *Id.* at 76, 99 A.3d at 756. However, Raynor then refused because the police could not guarantee that the sample would be destroyed upon completion of the investigation. *Id.* Once the interview concluded, an officer swabbed the armrests of Raynor's chair for DNA analysis. *Id.* at 77, 99 A.3d at 756. The DNA analysis revealed the DNA swabbed from Raynor's chair matched the DNA collected from the crime scene. *Id.* Police then secured a warrant to obtain Raynor's DNA; this DNA also matched the DNA from the crime scene. *Id.*

Raynor filed a pre-trial motion to suppress the DNA evidence obtained from the chair and all further evidence obtained therefrom, which the circuit court denied. *Id.* at 77-79, 99 A.3d at 756-57. Raynor was convicted by a jury in the Circuit Court for Harford County of two counts of rape and related crimes. *Id.* at 77, 99 A.3d at 756. Raynor appealed to the Court of Special Appeals, which affirmed, reasoning the Fourth Amendment did not apply to the analysis of Raynor's DNA. *Id.* Raynor filed a petition for a writ of certiorari to the Court of Appeals, which the court granted. *Id.* at 80, 99 A.3d at 758.

The Court of Appeals began its analysis by clarifying what was at issue before the court. *Raynor*, 440 Md. At 81, 99 A.3d at 758. Raynor, through

counsel, conceded at oral argument that the DNA was lawfully obtained. *Id.* at 81, 99 A.3d at 759. Therefore, the court clarified that the sole issue for discussion was the legality of the testing of Raynor's DNA. *Id.* at 82, 99 A.3d at 759. The court then proceeded to outline the framework of the Fourth Amendment. *Id.* at 82-83, 99 A.3d at 759. The Fourth Amendment protects individuals against unreasonable searches and seizures. *Raynor*, 440 Md. at 82, 99 A.3d at 759. Fourth Amendment concerns are only implicated through government actors. *Id.* at 82-83, 99 A.3d at 759 (citing *Walker v. State*, 432 Md. 587, 605, 69 A.3d 1066 (2013)).

The two-prong *Katz* test is widely recognized as the sound test in determining whether government conduct should be deemed a search under the Fourth Amendment. *Raynor*, 440 Md. at 82-83, 99 A.3d at 759-60 (citing *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)). First, a defendant must demonstrate a subjective expectation of privacy in the item or place to be searched. *Id.* at 83, 99 A.3d at 760 (citing *Walker*, 432 Md. at 605, 69. A.3d 1066 (2013)). Second, the defendant must prove that his or her expectation of privacy is objectively reasonable. *Id.* (citing *Walker*, 432 Md. at 605, 69 A.3d 1066).

The court then evaluated whether Raynor had demonstrated a subjective expectation of privacy when he did not consent to a DNA test at the police station. *Raynor*, 440 Md. at 83, 99 A.3d at 760. An individual demonstrates a subjective expectation of privacy by showing that he or she "sought 'to preserve something as private.'" *Id.* 83-84, 99 A.3d at 760 (citing *Williamson v. State*, 413 Md. 521, 535, 993 A.2d 626 (2010) (quoting *McFarlin v. State*, 409 Md. 391, 404, 975 A.2d 862 (2009)). The court found Raynor demonstrated the requisite subjective expectation of privacy through his refusal to provide a DNA sample during his interview with the police. *Id.* at 84, 99 A.3d at 760.

As to the second prong, the court began with the premise that an individual's identifying physical characteristics are generally outside Fourth Amendment protections. *Raynor*, 440 Md. At 85, 99 A.3d at 761 (citing *United States v. Dionisio*, 410 U.S. 1 (1973)). Here, the court reasoned the testing of the junk loci fell outside Fourth Amendment protections because such testing merely revealed identifying physical characteristics. *Id.* at 85, 99 A.3d at 761. A "junk DNA" analysis does not reveal any overreaching or complex personal characteristics, as would a genetic trait analysis. *Id.* (citing *Maryland v. King*, 569 U.S. 1955, 1966 (2013)). The thirteen junk loci would not allow someone to "discern any socially stigmatizing conditions." *Id.* at 88, 99 A.3d at 763 (quoting *State v. Raines*, 383 Md. 1, 45, 857 A.2d 19, 45 (2004) (Raker, J., concurring)). Even if junk DNA analyses *could* reveal personal information, police are only concerned with generating identifying numbers for potential matches. *Id.* at 87, 99 A.3d at 762 (citing *King*, 133 S. Ct. at 1979)).

Next, the court looked to the analogy drawn between fingerprinting and junk DNA analysis. *Raynor*, 440 Md. at 88, 99 A.3d at 762. Raynor

contended that DNA differs from fingerprints because of DNA's potential for revealing personal information. *Id.* at 89, 99 A.3d at 763. The court rejected Raynor's argument recognizing that both fingerprinting and DNA analysis does not reveal any physiological data, which is necessary to implicate the Fourth Amendment. *Id.* at 90, 99 A.3d at 764. Here, the targeted analysis only revealed information relating to identification, and did not reveal physiological data about Raynor as it did in *Skinner*. *Id.* at 89, 99 A.3d at 763; *see Skinner v. Railway Labor Executives' Association*, 489 U.S. 602, 609-10, 616-17 (1989) (holding that toxicological testing of employee's blood and urine to detect alcohol and drugs constituted an unreasonable search)). Even if the police dusted Raynor's chair for fingerprints, the evidence would have been used for the *same* purpose, to reveal identifying characteristics. *Id.* The court also relied on other jurisdictions, which hold that the Fourth Amendment is not implicated where DNA testing only reveals identifying characteristics. *Id.* at 89-90, 99 A.3d at 763-64; *see United States v. Davis*, 690 F.3d 226 (4th Cir. 2012); *see also Williamson v. State*, 413 Md. 521, 993 A.2d 626 (2010).

Finally, the court looked to *Kyollo v. United States* to address whether the DNA analysis constituted a physical intrusion. *Raynor*, 440 Md. at 94, 99 A.3d at 766 (*citing Kyollo v. United States*, 533 U.S. 27 (2001)). In *Kyollo*, the Court held that the government's use of a thermal imager to monitor a suspect's home constitutes an unreasonable physical intrusion. *Raynor*, 440 Md. at 94, 99 A.3d at 766 (citing *Kyllo*, 533 U.S. at 40).

Raynor attempted to draw an analogy between *Kyllo* and the case sub judice, arguing that the use of biotechnology is similar to the thermal scanners in *Kyllo* because both reveal characteristics of an individual's private life "not visible to the naked eye." *Id.* at 95, 99 A.3d at 767 (citing *Kyllo v. United States*, 533 U.S. 27). Raynor argued, and the court acknowledged, that society is generally oblivious to the fact that individuals shed genetic material every day in public. *Id.* at 94, 99 A.3d at 766. However, the court opined that though Raynor *unknowingly* exposed himself to the public, the government did not physically intrude on or into his body in the way described in *Kyllo*, and therefore did not constitute an unreasonable search. *Id.*

The dissent took great concern with the court's execution of its Fourth Amendment analysis. *Raynor*, 440 Md. at 105, 99 A.3d at 773 (Adkins, J., dissenting). Specifically, the dissent addressed the majority's ignorance of an individual's privacy interests in his or her DNA. *Id.* The dissent also recognized that as technology expands, the discovery of personal details in DNA material is inevitable and creates an enormous risk of intrusion. *Id.* at 106, 99 A.3d at 773. Due to this risk, the dissent believed Raynor deserved the utmost protection under the Fourth Amendment. *Id.* Further, the dissent argued that the State's interest in safety and identification of criminal suspects does not suffice because the police already knew Raynor's identity and were not arresting him at the time of his interview. *Id.*

In *Raynor*, the Court of Appeals of Maryland held that the DNA testing of Petitioner's thirteen junk loci did not constitute a search under the Fourth

Amendment. The court's decision runs the risk of severely diminishing an individual's Fourth Amendment privacy interests. As DNA analytical techniques evolve, so does their potential to reveal massive amounts of personal information. The State has a significant interest in identifying criminal suspects, but the State cannot do so to the detriment of an individual's privacy interests. Maryland criminal defense attorneys will be faced with an uphill battle in their ability to challenge DNA testing due to the court's reluctance to recognize the ambit of information potentially available in DNA.