No. 33073 – State of West Virginia v. Eddie Mullens

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Maynard, Justice, dissenting:

I am deeply dismayed by the majority's ruling in this case! Rarely has a holding of this Court rested upon such a weak legal and rational foundation as the instant holding.

The bulk of the majority opinion amounts to essentially a concession that its holding is not supported by federal constitutional law, federal statutory law, the majority of state courts or legislatures, West Virginia statutory law, and the precedent of this Court. The majority's novel holding, rather, is based solely on the general observation that this Court has historically drawn a bright line between searches and seizures in the home versus searches and seizures outside the home. Significantly, in reaching this conclusion, the majority overlooks the fact that police informants who are not armed with electronic surveillance devices may enter the home of a suspect to obtain evidence which can then be used against the suspect. As a result, the majority does not have to undertake the impossible task of explaining the constitutional significance between the presence and absence of an electronic surveillance device in an informant's gathering of incriminating evidence.

Let me try to make this clear to the average West Virginian so that he or she will understand the practical implications of the majority opinion. If the police, without a warrant, send an informant into a criminal's house, that informant can write down any illegal acts he or she sees in the house, and later testify in court to his observation of all illegal acts, including all conversations he heard and events he saw, without violating the suspect's constitutional rights. But under the majority opinion, if that same informant enters the suspect's house and *electronically* records conversations, without a warrant first bring obtained, that recorded evidence cannot be used against the criminal. This is the type of nonsense that makes people shake their heads at court decisions.

Also, the majority opinion suffers from overblown rhetoric in its attempt to support its holding. The truth is the impact of permitting electronic surveillance via a confidential informant does not reach literally into the home of every citizen of our State. To the contrary, it reaches only into the homes of those criminal suspects who speak freely in the company of informants whom they willingly invite into their homes.

Further, the majority's novel holding partially rests on the flawed presumption that law enforcement agents are prone to arbitrarily investigate law-abiding citizens. Cash-strapped and overworked law-enforcement agencies have no incentive to arbitrarily send wired informants into the homes of law-abiding citizens when there are real crimes to

investigate. Also, even though police are currently permitted to use informants who are not wired for sound to obtain evidence against a suspect in the suspect's home without first obtaining a search warrant, there simply is no evidence that the police use such a practice to arbitrarily investigate law-abiding citizens. Why then should we presume that the fact that informants are permitted to wear a wire would spawn an orgy of arbitrary police conduct?

In contrast to the majority's spurious analysis is the reasoning of the United States Supreme Court in *United States v. White*, 401 U.S. 745, 91 S.Ct. 1122, 28 L.Ed.2d 453 (1971), in which the Court held that the Fourth Amendment was not violated by the failure of the police to obtain judicial authorization to have an informant enter a suspect's home wearing an electronic surveillance device. In *White,* the Court reasoned:

> Our problem . . . is what expectations of privacy are constitutionally "justifiable" – what expectations the Fourth Amendment will protect in the absence of a warrant. So far, the law permits the frustration of actual expectations of privacy by permitting authorities to use the testimony of those associates who for one reason or another have determined to turn to the police, as well as by authorizing the use of informants . . . . If the law gives no protection to the wrongdoer whose trusted accomplice is or becomes a police agent, neither should it protect him when that same agent has recorded or transmitted the conversations which are later offered in evidence to prove the State's case.
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> Inescapably, one contemplating illegal activities must realize and risk that his companions may be reporting to the police. . . . But if he has no doubts, or allays them, or risks what doubt he has, the risk is his. In terms of what his course will be, what he will or will not do or say, we are unpersuaded that he would distinguish between probable informers on the one hand and probable informers with transmitters on the other. Given the possibility or probability that one of his colleagues is cooperating with the police, it is only speculation to assert that the defendant's utterances would be substantially

> different or his sense of security any less if he also thought it possible that the suspected colleague is wired. for sound. At least there is no persuasive evidence that the difference in this respect between the electronically equipped and the unequipped agent is substantial enough to require discrete constitutional recognition, particularly under the Fourth Amendment which is ruled by fluid concepts of "reasonableness."
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> Nor should we be too ready to erect constitutional barriers to relevant and probative evidence which is also accurate and reliable. An electronic recording will many times produce a more reliable rendition of what a defendant has said than will the unaided memory of a police agent. It may also be that with the recording in existence it is less likely that the informant will change his mind, less chance that threat or injury will suppress unfavorable evidence and less chance that cross-examination will confound the testimony. Considerations like these obviously do not favor the defendant, be we are not prepared to hold that a defendant who has no constitutional right to exclude the informer's unaided testimony nevertheless has a Fourth Amendment privilege against a more accurate version of the events in question.
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> It is thus untenable to consider the activities and reports of the police agent himself, though acting without a warrant, to be a "reasonable" investigative effort and lawful under the Fourth Amendment but to view the same agent with a recorder or transmitter as conducting an "unreasonable" and unconstitutional search and seizure.

White, 401 U.S. at 752-753, 91 S.Ct. at 1126-1127 (citation omitted). I think that when the Supreme Court, in a well-reasoned opinion, finds that police conduct does not violate the Fourth Amendment, this Court should adopt the U.S. Supreme Court's reasoning with regard to our own constitutional search and seizure provisions.

In sum, the majority's new rule essentially is devoid of significant legal support and sound reasoning. The rule is unnecessary to protect the law-abiding citizenry from arbitrary use of confidential informants by the police. It is also useless in protecting

criminal suspects from arbitrary police conduct since police can use informants who are not armed with electronic surveillance devices to enter a suspect's home for the purpose of gathering incriminating evidence. Further, the new rule is at odds with the constitutional thinking of the United States Supreme Court, the United States Congress, the majority of states, and the precedent of this Court. Finally, and most troubling, is that the likely effect of the majority's new rule is to make legitimate police investigations of criminal suspects more time-consuming, complex, and difficult. For all of these reasons, I dissent.