STATE OF NEW JERSEY

v.

RYAN KELLY, JR.,
Defendant - Appellant

A-07-1234-T3

Superior Court, Appellate Division

Submitted August 22, 2007 - Decided September 4, 2007

Before Judges GRIM, REAPER and MERCY.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Cr-06-028.

Lionel Hutz argued the cause for the defendant-appellant (Rothman, Chen, & Rabinowitz, L.L.P., attorneys for defendant-appellant; Mr. Hutz of counsel and on the brief)

Constance Harm, First Assistant Prosecutor, argued the cause for the State of New Jersey (Gil Gunderson, Essex County Prosecutor; Ms. Harm of counsel and on the brief).

GRIM, J.A.D. joined by **REAPER, J.A.D.**

Defendant Ryan Kelly, Jr., was convicted on March 16, 2007, following a four-day trial in Superior Court, Law Division, Essex County, of reckless manslaughter, sexual assault, and drug offenses arising from the death of a young woman after she ingested drugs and alcohol he had provided to her in his Newark home.

In this appeal, defendant contends that the trial court erred in two respects. First, he claims that the trial court improperly allowed the jury to consider his failure to act, as well as his actions, in determining whether he committed the crime of second-degree manslaughter and, therefore, the conviction of that crime cannot stand. Secondly, he claims that evidence seized from his bedroom should have been suppressed under the "fruit of the poisonous tree" doctrine as the result of a violation of his right to privacy in his internet subscriber information on file with Comcast and, therefore, his conviction as to the drug offenses cannot stand.

We disagree on both counts. We hold that defendant's failure to act was properly considered by the jury in determining his guilt as to manslaughter and that there was no violation of defendant's privacy rights either in his internet subscriber information or the subsequent search of his room.

The Facts

Evidence produced at trial established that, on Friday, September 9, 2005, seventeen-year-old Allison Taylor ("Allison"), then a senior at Bloomfield High School, died at University Hospital in Newark, New Jersey, as the result of ingestion of alcohol, methadone and marijuana. She had been brought to the hospital on the afternoon of Sunday, August 28, 2005, in an unconscious and unresponsive condition and never regained consciousness before her death.

Evidence further established that the methadone and marijuana and at least some of the alcohol that Allison ingested that led to her death had been provided by defendant Ryan Kelly, Jr., at his home in Newark on Saturday, August 27, 2005.

According to testimony at trial, Allison had met the defendant online and had "hooked up" with him on one or two occasions prior to August 27, 2005. On the afternoon of August 27, 2005, she went to the home of the then-twenty-five-year-old defendant in Newark, purchased methadone from him and ingested at least one tablet. Later that day, she attended a party in Bloomfield where, witnesses testified, she drank several beers, enough that they testified she "got hammered."

At the party, Allison asked two of her friends, Wendell Borton and Alex Whitney, if they wanted to go to defendant's home to "hang out." Allison and her friends arrived at defendant's home shortly after 10:00 p.m. The group, the defendant and the defendant's friend, Joey Buttafuco (who testified at trial under a grant of immunity), congregated in the common area of the basement of the Kelly house where Buttafuco provided them all with marijuana and drank they all drank beer.

After a short time, Allison complained that she was itching (a symptom of methadone withdrawal) and asked the defendant, "Can you give me some more of the good stuff?" Defendant led Allison toward his bedroom in the basement. Her friends told Allison that they wanted to leave soon and asked her if she wanted to leave with them. Allison told them that she needed to speak to the defendant and assured them that she would not take long. At that point, she proceeded with defendant to the bedroom and defendant closed the door.

After a short time, Borton said he was concerned about driving in Newark at such a late hour, and insisted that he wanted to leave. He knocked on the door of defendant's bedroom and tried to open it, but it was locked. When defendant opened the door, Borton saw Allison, who appeared to be "wasted", leaning back on defendant's bed. While defendant stood in the doorway, Borton told Allison he and Whitney were leaving and that she had to leave then if she wanted a ride. Allison mumbled that she and defendant needed to talk and that defendant would take her home. Defendant then closed the door again.

As soon as Whitney and Borton were ready to leave, Whitney knocked on the door and asked, "Allison, are you alright?" After receiving no response, she said, "We're

leaving. Okay?" Again there was no response. Whitney and Borton then left the Kelly home.

Sometime around 3 a.m., defendant woke Buttafuco, who had fallen asleep on the couch and told him, "I got a problem." He brought Buttafuco to his bedroom, where Allison was partially undressed and passed out on defendant's bed. Buttafuco described the defendant as nervous. Defendant stated that he and Allison had had sex and that afterwards, while they were lying on his bed talking, Allison "just fainted or fell asleep or something." In an attempt to awaken Allison, Buttafuco and the defendant shook her, slapped her face, and called her name. When Allison remained unresponsive, Buttafuco suggested they call 911. Defendant responded, "Are you crazy, man? Do you know what my stepmother would do to me? Let's wait. She's just sleeping it off."

Defendant and Buttafuco proceeded to fall asleep in the bed, with Allison lying between them. They awoke at 11:30 a.m. on Sunday. Once again, they tried to rouse Allison by throwing water on her and slapping her face. Other than a quiet snore, Allison did not respond. Again Buttafuco suggested calling 911. Defendant replied, "Let's wait a while longer. She'll wake up."

At about 1 p.m., defendant went to a nearby pharmacy and purchased ammonia to put under Allison's nose to revive her. The ammonia was not effective. Defendant then called an acquaintance, Doris Lunchlady, a school nurse, for advice on the situation. Defendant told Lunchlady that Allison had taken some methadone, drank beer, and now appeared to be in a heavy sleep. Lunchlady told defendant that Allison was probably in need of medical care and that he should call 911. Defendant ignored Lunchlady's advice and decided to wait.

Over the next two hours, defendant and Buttafuco stayed in defendant's room, played video games, watched television, and periodically checked Allison to "make sure she was okay." They propped her up in the bed to help her breathe easier. Although she slumped over several times, defendant and Buttafuco continued to prop her up. Defendant became extremely nervous and asked Buttafuco if he thought that Allison's condition was caused by the methadone that he had given her. Buttafuco said that he did not know what was going on and that he should call 911. Defendant again explained that he did not want to call 911 because he was fearful that his stepmother would throw him out of the house if she learned that he had supplied Allison with methadone. Finally, defendant decided to take Allison to the emergency room at University Hospital. When they arrived at the hospital at approximately 4:20 p.m., Allison was still unresponsive and unconscious.

Defendant was asked by the admitting hospital staff if he knew whether Allison had any medical or drug allergies. Defendant told the staff Allison was only an acquaintance and that he did not know her well enough to know the answer. Although he was not asked directly, defendant did not tell the hospital staff that he gave Allison alcohol and methadone. Defendant also told the staff that he did not know Allison's last name or where she lived, and then left the hospital before he could be questioned further.

Upon arriving at the hospital, Allison's temperature had fallen to eighty-seven degrees Fahrenheit. She had a strong pulse, but her blood pressure could not be measured, she was experiencing major organ failure, had already suffered severe brain damage, and was almost clinically dead. She was admitted and placed in the intensive care unit of the hospital. In the days that followed, Allison was on a respirator, her brain function ceased, and her major organ systems failed.

While this drama was playing out at the hospital, another was playing out in the Taylor home in Bloomfield after Allison failed to return home by her 2 a.m. curfew on Sunday, August 28. At 10 a.m., the parents called the friend at whose home the party was held on Saturday only to be told that Allison had left before 10 p.m. After several rounds of increasingly frantic calls to all of Allison's close friends, the parents then looked in Allison's computer to see if there were any clues as to where Allison might be. Earlier that summer, they had become increasingly suspicious that Allison may have been involved in drugs and spending time with an unknown boyfriend so they had installed "Parents CyberAlert" on her computer to track her online activities. A review of the log created by the program revealed various sexually explicit email messages from "R.KellyfromNewark@yahoo.com" and contacts from a similarly titled Myspace.com account. The last email message that was sent late on Friday, August 26, 2005, partly read, "I got some good stuff for you. Come by the house tomorrow and pick it up." None of the emails revealed the full name or physical address of the person that sent them.

The Taylors tried to identify or locate "R.KellyfromNewark@yahoo.com" over the next hours but were not successful. Finally, they called Bloomfield Police at 5 p.m. to report their daughter missing. Officer Carey Mahoney was detailed to the Taylor home to investigate. On his arrival, he was shown the email by the Taylors, who indicated that they believed that Allison probably left the party and was currently with the person who sent it. Allison's father then told Officer Mahoney that they were going to call their Internet Service Provider (ISP) to ask for the address of the email sender, but had decided to wait for the police to arrive. Officer Mahoney told them, "Call them and see what they tell you. But let me get you the IP address so that you can give it to them." In Allison's Yahoo account, Officer Mahoney opened the options, selected the general preferences tab, and turned on the "show all headers of incoming messages." This revealed that the emails originated from the IP address of 67.82.85.142. The Officer then entered the IP number at http://www.arin.net/whois/, showing the ISP as Cablevision's Optimum Online and its location as Newark, New Jersey. Allison's father was impressed with the amount of information and the quickness in which the Officer was able to find it. The Officer said, "I know a lot about computers and believe me, there is no such thing as privacy on the web. Unless you know what you're doing, everything that you do online can be tracked." The mother asked if he could find out the address of the email sender and Officer Mahoney told her that only Cablevision could tell her that.

Allison's mother called the customer service department at Cablevision, explained the situation and asked to be given the address and telephone number of the person that the IP number belonged to. The operator replied, "I'm not sure that I'm allowed to give you that." Mrs. Taylor repeated the operator's answer out loud, and Officer Mahoney replied:

“If they don't give it to you now, we'll just get a warrant later.” Mrs. Taylor repeated that statement to the operator, who then said, “Oh, okay then, hold on,” and finally told her that the IP number belonged to Ryan Kelly, Jr., and provided his address and telephone number.

Acting on that information, the Bloomfield Police Department contacted the Newark Police Department for assistance. It was at that point that the Taylors learned that an unidentified girl matching Allison’s description had been taken to the emergency room at University Hospital some hours earlier. The Taylors left for the hospital to see if the girl was Allison; the Newark Police then dispatched Lt. Frank Colombo to the Newark address that the Bloomfield Police provided to them in order to investigate.

When Lt. Colombo arrived at defendant's house, he was met by defendant's father, Ryan Kelly, Sr., and stepmother. Lt. Colombo told the Kellys of the reasons for this visit and Mr. Kelly replied, “I don't use the internet. You must be looking for my son.” Mrs. Kelly became extremely angry and yelled at Mr. Kelly, “I don't care if they cart him off to jail. Get that kid and his drugs out of my house!” The Kellys then led Lt. Colombo downstairs to defendant's bedroom. Mrs. Kelly knocked on the door and announced that the police needed to talk to him. Defendant opened the door slightly and said, “Let me get dressed and I'll come out.” Mrs. Kelly brushed past him into the room, leaving the door open. Lt. Colombo stepped inside the open doorway and spoke to defendant as he sat on his bed. He observed a red stain that appeared to be blood on the bed sheet, several empty condom wrappers on the floor, and a clear plastic bag containing pills inside of it lying on the floor next to the bed. Based on his observations, Lt. Colombo placed defendant under arrest.

Finally, on September 9, 2005, Allison died. The cause of death, established by the Essex County Medical Examiner, Dr. Julius M. Hibbert, was multi-organ system failure caused by the ingestion of alcohol and drugs. In particular, methadone was identified as a causative agent, along with alcohol.

The Prosecution

Defendant was indicted on October 13, 2005, in a five-count indictment charging second-degree reckless manslaughter, N.J.S.A. 2C:11-4b(1) (count 1), first-degree aggravated sexual assault, N.J.S.A. 2C:14-2a(7) (count 2), third-degree possession of a controlled dangerous substance (CDS), N.J.S.A. 2C:35-10a(1) (count 3), third-degree possession of CDS with intent to distribute, N.J.S.A. 2C:35-5a(1) and b(5) (count 4), and third-degree distribution of a CDS, N.J.S.A. 2C:35-5a(1) and b(5) (count 5).

Numerous motions were filed throughout 2006, which required consideration and resolution prior to trial. Of relevance to this appeal were two motions in particular. First, defendant moved to suppress all evidence resulting from the search of his bedroom, arguing that the search was the direct product of police misconduct in obtaining information from his Internet Service Provider in violation of his privacy rights. The trial court (Hon. Roy Snyder, J.S.C.) held that the evidence was not subject to suppression

and could be introduced at defendant's trial. Defendant also moved to limit the scope of the prosecution's case to only those specific acts the State could prove he committed, barring any consideration of or reference to any omissions or failure to act. The trial court denied that motion, holding that under the particular circumstances posed by the facts of this case, the jury was entitled to find liability because of either defendant's acts or his omissions.

Trial began on March 12, 2007. Over the defendant's objections at trial, the jury was charged as to the prosecution's theory of liability:

> You must find, beyond a reasonable doubt, that the defendant engaged in conduct or actions that caused the victim's death. Conduct means an action or omission or a series of actions or omissions. Action means a bodily movement, whether voluntary or involuntary. Omission means the failure to act. The law provides that criminal liability for an offense may not be based on an omission or a failure to act unaccompanied by action unless a duty to perform the omitted act is otherwise imposed by the law. Generally one has no legal duty to aid another person in peril, even when that aid can be rendered without danger or inconvenience to himself. However, there are situations that give rise to a duty to act. A person has a duty to act where he has voluntarily assumed the care of another and so secluded the helpless person as to prevent others from rendering aid. A person has the duty to act when the person is responsible for placing the victim in the position of danger or peril. If the person knows or has reason to know that by his conduct he has caused bodily harm to another so as to make her helpless and in danger of further harm, the person is under a duty to exercise reasonable care to prevent such further harm... Where a duty to act exists, and a failure to act results in harm, liability may be found.

The jury returned its verdict on March 17, 2007, finding the defendant guilty on all counts. On April 13, 2007, defendant was sentenced to 10 years imprisonment for second degree reckless manslaughter and 10 years imprisonment for first-degree aggravated sexual assault (count 2) pursuant to the guidelines of N.J.S.A. 2C:43-6(a)(1) and the presumption of imprisonment of N.J.S.A. 2C:44-1(d). Those sentences were consecutive to each other but concurrent to terms of two years on each of the drug charges. Defendant was committed to the custody of the Department of Corrections; bail pending appeal was denied.

On May 29, 2007, defendant filed a notice of appeal to this Court.

Discussion

We conclude, first, that the failure of the defendant to act in aid of Allison Taylor after she became unconscious and unresponsive was properly considered by the jury in determining his guilt of the crime of reckless manslaughter. We concur with the learned scholars of the criminal law, LaFave and Scott, Criminal Law, § 26 (1972), that criminal

liability may be imposed for failure to act when the peril faced by another is by the individual's own creation. Here, defendant provided the combination of alcohol and drugs that directly led to Allison Taylor's death. His failure to take appropriate action when she became ill is as much a proper basis for liability as was the provision of the drugs and alcohol themselves. See generally *Jones v. United States*, 308 F.2d 307, 310 (D.C.Cir. 1962); *State v. Morgan*, 936 P.2d 20, 23-24 (1997).

The common law, as reinforced by our court decisions, provides sufficient notice to defendant that his failure to act in this case subjected him to liability for acts and omissions. Indeed, a "mere act of omission" can surely be "so criminal or culpable as to be the subject of an indictment for manslaughter." *State v. O'Brien*, 32 N.J.L. 169, 171-172 (Sup. Ct. 1867). There, the defendant, a railway switch operator, negligently failed to adjust the switch, causing a passenger train to a side rail off the track, resulting in one passenger's death. Defendant was indicted and convicted of manslaughter, based on his omission, or the failure to perform his duty of adjusting the switch. On appeal, defendant's conviction was affirmed. The adoption of our Penal Code incorporates such common law legal duty concepts so that the existence of a legal duty accompanied by the knowledge of facts requiring the need to avert further harm imposes criminal liability for failing to act.

Such legal duty to exercise reasonable care to render aid is hardly a new notion in New Jersey law. See *Endre v. Arnold*, 300 N.J. Super. 136 (App. Div. 1997), which clearly establishes a duty by a social host to an injured guest. Here, the facts demonstrate a social guest/host relationship; Allison and others gathered in defendant's basement, where they "drank beer and smoked weed." Defendant and Allison knew each other and, in the past, had been intimate. Defendant was aware that Allison was a minor and she had purchased drugs from him on prior occasions. Finally, defendant escorted Allison from the common area of the basement into his bedroom, separating her from her other companions. Allison became unconscious and in need of medical attention while alone with defendant as a result of drugs and alcohol provided in part by defendant. Defendant's duty to assist Allison was triggered once she lapsed into unconsciousness. The exigencies of the situation presented called for medical attention at the earliest possible moment. Indeed, the medical examiner here testified that during the approximately twelve hours that Allison was unconscious and without medical attention, the oxygen in her blood gradually decreased, eventually causing brain death. Dr. Hibbert concluded that Allison's chance of survival would have greatly increased had defendant allowed Allison to receive medical attention when she first lost consciousness.

Defendant's failure to provide emergency medical care for Allison was the last event in a course of conduct that must be viewed in its entirety when examining whether a duty existed and whether the conviction should stand. Equally important, in this case, is the fact that defendant is not an innocent bystander, but an active participant. Defendant sold Allison methadone tablets, shared marijuana with her and supplied her with beer. See *State v. Thomas*, 118 N.J. Super. 377 (App. Div.), certif. den. 60 N.J. 513 (1972). Defendant then escorted Allison to his bedroom where additional drugs were consumed, after which Allison became unconscious and was slumped-over on defendant's bed.

Defendant locked the bedroom door to prevent intrusion by others, and he did not respond to the request of others to speak with Allison. Defendant continued Allison's isolation from her companions when she was helpless and in need of aid. These affirmative actions must be viewed in context with the omission to provide Allison medical attention. The two in combination adequately establish liability here.

We also conclude that defendant's privacy rights were not infringed when private parties obtained his address and telephone number from his Internet Service Provider. Clearly, the parents in this case had every right to secure the emails sent to their minor daughter on a computer in their home and every right to attempt to identify the person sending such emails. See *Burdeau v. McDowell*, 256 U. S. 465 (1921). Moreover, none of the identifying characteristics -- the name, city of residence, and IP address -- were private in any way. Although this is an issue of first impression in New Jersey, the question as to whether there is any reasonable expectation of privacy in one's identity on the Internet when it is associated as here with an IP address and user name has been resolved in many other jurisdictions, and the decisions overwhelmingly favor a conclusion that there is no reasonable expectation of privacy. See e.g. *Guest v. Leis*, 255 F.3d 325, 336 (6th Cir.2001); *United States v. Kennedy*, 81 F. Supp. 2d 1103, 1110 (D.Kan. 2000), *aff'd*, 106 Fed. Appx. 688 (10th Cir. 2004); *In re Forgione*, 49 Conn. Supp. 613, 908 A.2d 593, 607-08 (Super. Ct. 2006); *Hause v. Commonwealth*, 83 S.W.3d 1, 12-13 (Ky. App. 2001).

We expressly reject the argument of our dissenting colleague that internet subscriber records are the functional equivalent of telephone toll records and thus deserving of special protection under the New Jersey Constitution. Quite to the contrary, the association of an IP address and personal identity is the technological equivalent of the association of a license plate and a vehicle owner's identity and deserving of no more protection under the law. A person has no reasonable expectation of privacy in that which is exposed to the public. *Katz v. United States*, 389 U.S. 347 (1967). Additionally, this particular individual took no steps to protect his identity, using his own name and own municipality of residence as part of his user name and taking no steps to conceal his IP address despite his admitted knowledge of anonymizer software and services. Even were we to consider that a reasonable expectation of privacy might exist generally, we hold that it was waived in this case.

Additionally, even if we were to find a reasonable expectation of privacy in subscriber information, suppression of the evidence in this case would not be warranted. There were a number of witnesses who had seen the victim in defendant's home or in his company who were all independent sources in a position to identify him and, thus, inevitably lead police to his door. See *Nix v. Williams*, 467 U.S. 431 (1984). The police were admitted to the Kelly home by the owners of the home and brought to the bedroom door by those owners. The door was opened by an owner of the home who had every right to consent to the presence of the police at the location from which the incriminating evidence was found. *Coolidge v. New Hampshire,* 403 U.S. 443 (1971); *State v. White*, 305 N.J. Super. 322 (App. Div. 1997).

Accordingly, the decision of the trial court is hereby ***affirmed***.

MERCY, J.A.D., dissenting

I find the majority's conclusions to be irreconcilable with a proper reading of the law and the Constitution and, therefore, I respectfully dissent.

As our sister state has found, tort concepts of causation have no proper place in criminal homicide prosecutions; a conviction requires a more direct causal connection. *Commonwealth v. Root*, 403 Pa. 571 (1961). Moreover, even if we were to expand causation theory to include tort concepts, criminal liability requires notice; an essential element of the criminal law is that the law must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Here, the statutory scheme defining manslaughter provides that the person recklessly cause the death of another; it does not proscribe standing by and allowing it to happen. The criminal code is clear that "[l]iability for the commission of an offense may not be based on an omission unaccompanied by action unless: (1) The omission is expressly made sufficient by the law defining the offense; or (2) A duty to perform the omitted act is otherwise imposed by law..." N.J.S. 2C:2-1b. Despite the best efforts of the majority to characterize the case otherwise, this case was not presented to the jury as an actions-plus-inactions case; it was presented as an inactions case. Since the omission proved here is not an express part of the definition of manslaughter, there must be a clear unambiguous pre-existing duty that is "otherwise imposed by law" for this conviction to stand.

This statutory scheme makes it clear to me that reading N.J.S. 2C:2-1b(2) to incorporate principles derived from civil common law and particularly from the Restatement of Torts does not provide sufficient notice to satisfy prevailing standards of constitutionally adequate procedural due process. On those occasions where the courts of this state have been moved to incorporate common law principles, they have done so in clear and unambiguous terms. On no occasions have our courts definitively adopted the common law principles embodied in the jury charge at issue here. Certainly our Supreme Court has not done so. In the absence of such clear incorporation, I cannot say that the "duty to perform the omitted act is ... imposed by law" in this case. I cannot see how these civil common law principles could provide adequate notice to justify a criminal charge. A duty of care, upon which a duty to act is premised, must be so firmly established as to be beyond controversy or dispute if it is to provide presumed notice.

I further cannot conclude that this error was harmless, despite the evidence of various actions by the defendant as emphasized by the majority here. Allowing the victim into his bedroom was an action, but it did not cause Allison Taylor's death. Closing the door to her friends was an action, but it too did not cause Allison Taylor's death. No evidence in this case shows that defendant even knew Allison would, or was likely to, die if not given medical care. The testimony of Doris Lunchlady, characterized by the majority as having told defendant that Allison "was probably in need of medical care and that he should call 911," was in no way so clear. Her actual statement was: "I told him if he was worried because the girl was sick from drugs and alcohol, he should get her a doctor or call 911 or something, but don't go bugging me about it."

The great emphasis placed by the prosecution on the failure of defendant to secure medical help for Allison after she became unconscious and unresponsive and the

emphasis in the jury charge underscore the degree to which the State and perhaps even the trial court realized that this case could not be won, and surely not so easily, if the State had been required to prove its case based solely on what the defendant did, and not on what he failed to do. I thus conclude that defendant is entitled to a new trial at which the focus is, as it must be, on what he is alleged to have done to cause Allison Taylor's death, and not on the impermissible factor of what he might have done to prevent it.

Furthermore, I disagree with my colleagues with regard to the acquisition of the internet subscriber records that led, directly, to the identification of the defendant, the search of the defendant's home and the seizure of incriminating evidence there. I would hold that defendant had a reasonable expectation of privacy in those records that was violated when the police officer acted to obtain them from Comcast without a warrant or other lawful authority. Just as *Smith v. Maryland*, 442 U.S. 735 (1979), is cited in federal jurisprudence as establishing that there is no reasonable expectation of privacy under federal law as to internet subscriber records (by analogy to telephone records), in New Jersey, *State v. Hunt*, 91 N.J. 338 (1982), and *State v. Mollica*, 114 N.J. 329 (1989), must be considered as establishing contrary precedent here.

Time and again New Jersey has emphasized the degree to which it is prepared to recognize as reasonable an expectation of privacy not recognized in federal law. See *State v. McAllister*, 184 N.J. 17 (2005) (bank records); *State v. Hempele*, 120 N.J. 182 (1990) (garbage). Just as technological developments once made "the telephone an essential instrument in carrying on our personal affairs," *Hunt*, supra, 91 N.J. at 338, so have further developments made the personal computer an essential component of modern life, entitling individuals to at least the same degree of privacy with respect to its use as accorded to other forms of personal communication.

Information concerning the identity of an internet user can only be obtained by law enforcement through some means of proper judicial process. This is not an onerous burden to place on law enforcement. Just as with telephones or bank records, computers cannot be used with impunity for unlawful purposes. When there is probable cause to believe unlawful use has occurred, law enforcement has the tools to respond. It cannot do what it did here, and ride the coattails of allegedly private action to achieve an unlawful end. See *Lustig v. United States*, 338 U.S. 74 (1949).

Because the identification of defendant occurred as the result of a violation of his privacy rights, I conclude that the fruit of the poisonous tree doctrine applies to all evidence secured as the result of that information. See *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920). No exception applies to that doctrine that might permit use of this evidence, secured as it was as a direct result of a violation of the defendant's rights. This error too is not harmless as essentially all of the evidence used to convict defendant of sexual assault resulted from the evidence seized from his home. At a minimum, this case must be retried without the evidence secured in defendant's bedroom.

I dissent.

IN THE SUPREME COURT
OF THE STATE OF NEW JERSEY

No. 61,803

STATE OF NEW JERSEY	:	
	:	
v.	:	**ORDER**
	:	
RYAN KELLY, JR.,	:	
	:	
Defendant-Appellant.	:	
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This matter having been brought before the Court on September 7, 2007, by the defendant-appellant, it is, on this 10th day of September 2007, hereby docketed as to all appropriate issues. Simultaneous briefing is directed and both parties are to file briefs with the Court on or before November 28, 2007.

LINDA GARBACCIO, Deputy Clerk
For the Court