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Privacy Rights in South Carolina after Singleton v. State

By Gregory S. Forman

"Before *Singleton* there was an argument that South Carolina's right to privacy did not protect personal autonomy interests. *Singleton* clearly rejects this argument."

The South Carolina Supreme Court's recent decision in *Singleton v. State,* Op. No. 23929 (S.C. Sup. Ct. filed August 30, 1993) (Davis Adv. Sh. No. 23 at 8) is the first step in the development of right to privacy jurisprudence under the state's constitution. The decision may signal the beginning of significant privacy rights litigation by South Carolina lawyers.

*Singleton* marks the first time the Court has based its holding on this right to privacy. This article will discuss the *Singleton* decision, consider other states that have an explicit privacy right in their constitutions, and analyze the various interpretations other state courts have given to their constitutional privacy rights.

The right to privacy encompasses three rights: a right to be free of unreasonable searches and seizures; a right to personal bodily autonomy; and a right to be free of public disclosure of private matters. The primary focus here will not be on search and seizure law but rather on rights that would not be recognized absent a right to privacy.

Privacy rights under the United States Constitution, located in "penumbras, formed by emanations" (See, *Griswold v. Connecticut,* 381 U.S. 479, 484, 85 S.Ct. 1678, 1681, 14 L.Ed.2d 210 (1965)), are subject to constant attack. In contrast, South Carolina's right to privacy is explicit. In 1971, South Carolina added the right toprivacy to its constitutional provision regarding search and seizure. See, *Acts and Joint Resolutions South Carolina 1971,* Vol. 57,

page 315, 316-317 (May 13, 1971). S.C. Const. art. I, §10 now reads in part: "The right of the people to be secure in their persons, houses, papers and effects against searches and seizures *and unreasonable invasions of privacy* shall not be violated. . " (emphasis added).

Other state courts have determined that the explicit privacy rights located in their state constitutions are broader than the United States Constitution's penumbral rights. See e.g., *State v. Glass* 583 P.2d 872, 874-75 (Alaska 1978). *Singleton* indicates the South Carolina Supreme Court is willing to follow this reasoning.

The *Singleton***Decision's Focus on Privacy**

Fred Singleton was convicted and sentenced to death for murder. In March 1990, he filed a second application for post conviction relief, alleging he was not competent to be executed. The circuit court determined Singleton was indeed incompetent to be executed, a conclusion the Supreme Court affirmed. *Singleton* at 10-15.

At this point the Court confronted whether the state could force Singleton to take medication that would treat his incompetence in preparation for execution. The Courtdetermined the state could not. The Court's decision to base its holding on the right to privacy was hardly compelled. The Court noted, and could have solely relied on, United States Supreme Court decisions interpreting the United States Constitution's due process clause. *Singleton* at 18, citing, *Washington v. Harper,* 494 U.S. 210, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990) and *Riggins v. Nevada,* 504 U.S._____, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1992). Those two cases hold that forced medication of inmates is allowed only when an inmate is dangerous to self or others and when the treatment is in the inmate's medical interest.

Instead, the Court found independent authority to prohibit Singleton's forced medication in the state constitution's right to privacy. Citing a recent Louisiana decision interpreting that state's constitutional right to privacy, *Louisiana v. Perry,* 610 So.2d 746 (La. 1992), the Court held:

> that the South Carolina Constitutional right of privacy would be violated if the State were to sanction forced medication solely to facilitate execution. An inmate in South Carolina has a very limited privacy interest when weighed against the State's penological interest; however the inmate must be free from unwarranted medical intrusions.

*Singleton* at 19. Before *Singleton* there was an argument that South Carolina's right to privacy does not protect personal autonomy interests. *Singleton* clearly rejects this argument.

### ***Right to Privacy*** **in Other States**

Ten states, including South Carolina, have explicit provisions regarding the right to privacy in their constitutions. Five of these states explicitly enumerate privacy as an individual right and place it separately from related protections against unreasonable searches and seizures: Alaska (Art. I, § 22); California (Art. I, § 1); Florida (Art. I, § 23); Hawaii (Art. I, § 6) and Montana (Art. II, § 10).

Six states protect against invasions of privacy in their constitutional provisions regarding searches and seizures: Arizona (Art. II, § 8), Hawaii (Art. I, § 7), Illinois (Art. I, § 6), Louisiana (Art. I, § 5), South Carolina (Art. 1, § 10) and Washington (Art. I, § 7). Hawaii protects privacy rights under both provisions.

With the exception of Montana, the states that have made privacy an explicit individual right generally have developed a more expansive notion of privacy rights. Washington state, in contrast, has the narrowest constitutional right to privacy of the 10 states, providing that "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Washington courts have interpreted this provision as having no greater protection of privacy in non-search and seizure cases than under federal law. *Ramm v. City of Seattle,* 66 Wash. App. 15, 830 P.2d 395 (1992). But see *In Re Welfare of Colyer,* 660 P.2d 783 (Wash. 1983) (terminally ill, competent adult has privacy right to refuse medical treatment that only serves to prolong the dying process).

Other states that place the right to privacy within the search andseizure clause also have applied the right to privacy in non-search and seizure cases. See, e.g., *State v. Bateman,* 113 Ariz. 107, 547 P.2d 6, cert. denied, 429 U.S. 864 (1976) (upholding a sodomy statute but noting a *right* to privacy for consensual sexual acts).

Certainly the decision in *Singleton* does not fit within traditional search and seizure jurisprudence. It appears the South Carolina Supreme Court is willing to apply the right to privacy outside search and seizure contexts.

**Expanding the Right to Privacy after *Singleton***

* **Search & Seizure** Law. Obviously, a prohibition against "unreasonable invasions of privacy" implies searches and seizures that do not offend the United States Constitution may offend the South Carolina Constitution. For example, Illinois has held that privacy expectations in financial records may deserve greater protection under that state's right to privacy. *People v. Jackson,* 72 Ill. Dec. 153, 116 Ill.App.3d 430, 452 N.E.2d 85, 88 (1983).

*State v. Church,* 538 So.2d 993 (La. 1989), rehearing denied, involved a question of the constitutionality of roadblocks to check for drunk drivers. The Louisiana Supreme Court determined that the roadblock in question met federal constitutional standards. The Court disallowed the roadblock, however, determining that it was an unreasonable invasion of privacy under the Louisiana constitution. Id. at 996-97.

Montana and Alaska prohibit the admission of surreptitiously taped conversations made by a private individual, even though the tapes would be admissible under federal standards. *State v. Brackman,* 582 P.2d 1216 (Mont. 1978); *State v. Glass,* supra.

These decisions show how a state constitutional right to privacymay prohibit searches and seizures that do not offend federal constitutional standards.

* **Public Disclosure Protection.** Privacy rights have an even greater application outside search and seizure jurisprudence. A Hawaii Supreme Court decision presents a suitable definition of what the right to privacy entails in non-search and seizure contexts: (1) a right to prevent disclosure of personal matters; and (2) a right to be free of state interference in important personal decisions. *McCloskey v. Honolulu Police Dep't,* 71 Haw. 568, 799 P.2d 953, 957 (1990).

California is at the forefront of public disclosure protection, which has applications outside criminal law. Four decisions show the tremendous scope of the protection against disclosure of personal matters.

*Vinson v. Superior Court* 43 Cal.3d 833, 239 Cal. Rptr. 292, 740 P.2d 404 (1987), used the constitutional right to privacy to protect litigants from intrusive discovery. *Vinson* involved a sexual harassment suit against the plaintiffs employer. The employer moved for an order compelling plaintiff to undergo medical and psychological evaluation, and plaintiff moved for a protective order prohibiting the defendant from inquiring into her sexual history or practices. The superior court granted defendant's motion but denied plaintiffs motion. Plaintiff petitioned the court of appeals for a writ of

prohibition. When that Court denied her petition, she petitioned the Supreme Court, which granted her writ, holding:

> [W]hile the filing of a lawsuit may implicitly bring about a partial waiver of one's constitutional right of associational privacy, the scope of such "waiver" must be narrowly, rather than expansively construed, so that plaintiffs will not be unduly deterred from instituting lawsuits



by the fear of exposure of their private associational affiliations and activities. Id., 74.0 P.2d at 410-11.

"In the hands of a creative practitioner, the right to privacy can be applied to almost any case involving public disclosure of private information or state intrusions on bodily integrity. With the *Singleton* decision, development of a substantial privacy rights jurisprudence in South Carolina is possible. If this occurs, privacy rights analysis may permeate almost every area of South Carolina law."

*Luck v. Southern Pacific Transp. Co.,* 218 Cal. App.3d 1, 267 Cal. Rptr. 618, cert. denied, 111 S.Ct. 344 (1990) indicates how the right to privacy can protect an employee's privacy in employment matters. *Luck* involved the discharge of an employee who refused to submit to random urine testing for drugs. She was fired and sued for wrongful discharge. The Court determined that her job, as a computer operator and programmer, did not affect railroad safety. It then found her employer's testing unconstitutional. Id., 267 Cal. Rptr. at 632. The firing thus gave rise to a wrongful discharge cause of action.

*Diaz v. Oakland Tribune, Inc.,* 139 Cal. App.3d 118, 188 Cal. Rptr. 762 (1983) created a constitutionally based tort remedy for violations of privacy rights. The plaintiff in *Diaz,* the first female student body president at a local college, had been involved in a number of controversies and was also a transsexual but had kept the fact of her sex change private. The defendant, a newspaper, discovered information about Diaz's sex change, considered it newsworthy and printed the story.

The Court determined that the newspaper's actions gave rise to a cause of action in tort for public disclosure of a private fact. Id., 188 Cal. Rptr. at 767.

The Court further concluded that, under these facts, it was a jury question whether this story fell outside the newsworthy privilege,which allows for such public disclosure. Id. at 772. See also, *Gill v. Curtis Publishing Co.,* 38 Cal.2d 273, 239 P.2d 630, 632 (1952) (one has a "right to live one's life in seclusion without being subject to unwarranted and undesired publicity.")

In *Planned Parenthood Affiliates of California v. Van de Kamp,* 181 Cal. App.3d 245, 226 Cal. Rptr. 361 (1986), the Court protected the sexual privacy of minors. State health care professionals challenged a requirement that they report any information about sexual activity involving minors under 14 to the child abuse agency. The Court struck down the requirement, holding it was an invasion of the right to sexual privacy of a mature under-14-year-old. Id., 181 Cal. App.3d at 278, 226 Cal. Rptr. at 379. See also, *Committee to Defend Reproductive Rights v. Myers,* 29 Ca1.3d 252, 172 Cal. Rptr. 866, 625 P.2d 779, 789 (1981) (because abortion is a constitutionally protected right, state violates right to sexual privacy when it refuses to fund abortions for poor women but funds health care for the poor in general).

The public disclosure protection imbedded in the right to privacy can have application in almost every area of law, including civil procedure, employment law, tort law, public funding and administrative agency decision making.

The South Carolina courts have not determined whether the prohibition against "unreasonable invasions" protects against privacy invasions by private individuals. However, the language of Art. I, § 10 does not limit the prohibition against "unreasonable invasions of privacy" to state actions. There is no logically compelling reason why this provision cannot be applied to situations in which the state is not involved.

* **Personal Autonomy Interest Protection.** The final branch of the right to privacy is even more far reaching. This privacy interest has its basis in the personal autonomy interests expressed by John Stuart Mill in his essay "On Liberty." Mill wrote, "that the sole end for which mankind are warranted, individual or collectively, in interfering with the liberty of action of any of their number is self-protection. . . . His own good, either physical or moral, is not a sufficient warrant." Crimes lacking a basis in society's self-protection resemble society's coercive action toward a non-conforming but nonthreatening individual.

Such coercion arguably violates an individual's right to privacy. A libertarian interpretation of this constitutional right to privacy would invalidate most "morals" laws, especially those dealing with private, consensual sexual practices or the possession of controlled substances for at-home, personal use.

No state has fully accepted Mill's approach to liberty interests. However, states have invalidated criminal laws or prohibited state actions based on personal autonomy interests embedded in the right to privacy.

In *State v. Smith,* 510 P.2d 793 (Alaska 1973), the Alaska Supreme Court developed a test for determining when privacy interests exist. Privacy interests exist when: ( 1) a



person has exhibited an actual (subjective) expectation of privacy; and

(2) that expectation is one that society is prepared to recognize as reasonable. Id. at 796-97, adopting rationale from *Katz v. United States,* 389 U.S. 347, 361, 88 S.Ct. 507, 19 L.Ed.2d. 576 (1967) (J. Harlin, concurring).

Using this test and finding that there was no evidence that marijuana was more dangerous than alcohol, the Alaska Court prohibited application of the state's drug laws to home use of marijuana by adults. *Ravin v. State,* 537 P.2d 494, 511 (Alaska 1975). The Court noted, "The state cannot impose its own notions of morality, propriety or fashion on individuals when the public has no legitimate interest in the affairs of those individuals." Id. at 503.

Alaska, however, did not adopt a purely libertarian approach. Confronted with evidence that cocaine presented a great danger to public health, the Alaska Supreme Court refused to limit application of the state law prohibiting its use. *State v. Erickson,* 74 P.2d 1,22 (Alaska 1978). However, before intruding on a citizen's privacy right the Alaska government must establish a legitimate and compelling interest. *Messerili v. State,* 626 P.2d 81 (Alaska 1980).

Similarly, Hawaii, finding a constitutional right to consume pornography, invalidated, as applied, the state law prohibiting the sale of pornography. *State v. Kam,* 69 Haw. 483, 748 P.2d 372, 380 (1988).

Arizona and California located a right to sexual privacy in their state constitutions. *Bateman,* supra.; *Morales v. Superior Court of Kern County,* 99 Cal. App.3d 283; 160 Cal. Rptr. 194 (1979). A California Appellate Court upheld an injunction preventing the application of a state law requiring unemancipated minors to get the consent of a parent, guardian or juvenile court before receiving an abortion. *American Academy ofPedi atrics v. Van*

*de Kamp,* 214 Cal. App.3d 831, 263 Cal. Rptr. 46 (1989). Relying on the earlier *Myers* decision, the Court held:

> The right of privacy . . . may not be intruded upon absent a compelling state interest, and the benefits which flow from the state action must "manifestly outweigh" the burden placed upon privacy rights.

Id., 263 Cal. Rptr. at 52.

Finally, states have considered their constitutional right to privacy in so-called "right to die" cases. A Florida court determined that parents had the right to make a decision to terminate use of a life support system on their 10 month old child, who was without any cognitive brain function. *In re Guardianship ofBarry,* 445 So.2d 365 (Fla. App. 2 Dist. 1984). The Court determined that the child's right to privacy, exercised through the parents' reasonable judgment, outweighed the state's interest in preserving life. Id. at 371. The court further held:

> A decision by parents [to terminate life support] supported by competent medical advice that their young child suffers from a permanent, incurable and irreversible physical or mental defect likely to soon result in the child's death should ordinarily be sufficient without court approval.

Id. at 372.

When a patient is incompetent and his or her own interests are unknown, state courts, citing a greater privacy interest within their constitutions, which can outweigh a state's interest in preserving life, have applied a "best interests" standard to a conservator's decisions. See, *Rasmussen by Mitchell v. Fleming,* 154 Ariz. 207, 741 P.2d 674, 682 (1987); *Conservatorship ofDrabicI4* 200 Cal. App.3d 185, 245 Cal. Rptr. 840, cert. denied, 488 U.S. 958 (1988). Citing the right to privacy, state courts also have granted terminally ill, competent adults the right to refuse medical treatment that only serves to prolong the dying process. See, *Barth* v. Superior Court,* 163 Cal. App.3d 186, 209 Cal. Rptr. 220 (1984); *Colyer,* supra.

Chapter two of Jennifer Friesen's *State Constitutional Law* (Matthew Bender & Co., Inc., 1992) provides useful authority on the application of privacy rights to individual cases. It can be of enormous guidance to practitioners attempting to base claims under a right of privacy.

## Conclusion

Because a right to privacy can be so far-reaching, state courts exhibit caution before beginning to develop a right to privacy jurisprudence. However, once a state court begins to develop this jurisprudence, it can develop rapidly. Florida added a constitutional right to privacy in 1980. The first decision by Florida courts based on this right came down in 1982. By 1992 over 20 decisions were based on this right.

In the hands of a creative practitioner, the right to privacy can be applied to almost any case involving public disclosure of private information or state intrusions on bodily integrity. With the *Singleton* decision, development of a substantial privacy rights jurisprudence in South Carolina is possible. If this occurs, privacy rights analysis may permeate almost

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