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The collection and analysis of DNA evidence, including "Touch DNA," lawfully in possession of the police does not violate the Fourth Amendment because it is not a constitutionally protected search.

QUESTION: **Do police need a warrant to search a "Touch DNA" sample lawfully in their possession?**

ANSWER: **No. The examination of DNA evidence lawfully in police possession is not deemed a search under the Fourth Amendment.**

CASE: ***Glenn Joseph Raynor v. State of Maryland*, Court of Special Appeals Decided September 29, 2011**

In this case, the Court of Special Appeals of Maryland considered whether police could lawfully examine "Touch DNA" evidence left by the suspect at the police barracks. "Touch DNA" is DNA that is left behind from skin cells when a person touches or comes into contact with an item. The facts showed that on April 2, 2006, after cutting the victim's phone line, Glenn Joseph Raynor gained entry to the victim's home by chiseling open the basement door. After entering her bedroom, Raynor pressed a pillow against her face and threatened to kill her if she moved. Then, tying a shirt over the victim's face as a blindfold, he raped her and fled. During the attack, the victim noticed that her attacker had a wedding band on his hand and had a "metallicky odor." The victim got up and ran to her neighbor's house and, from there, called the police. When the police arrived, they took swabs of blood stains that were found on a pillow case on the victim's bed and on the floor of the back patio of the victim's home, underneath a broken window. Later that day, swabs were taken of the victim's vagina and anus.

Raynor did not become a suspect in the investigation of the rape until, more that two years later, the victim sent an email to the lead investigator in the case, Trooper First Class Dana Wenger of the Maryland State Police (MSP), stating that she believed that Raynor was the man who raped her. She explained that, two years after the attack, she called Bruce Arthur, her former next door neighbor, for help with a tree on her property. Mr. Arthur owned a tree trimming business. Arthur did not return the victim's call. The victim then remembered that Raynor was Arthur's partner in the tree trimming business and used to live in the house occupied by the victim at the time of the attack. She remembered that Raynor was about the same size as her attacker and that he was married with children. She also recalled that she attended the same school as Raynor for a period of time. Trooper Wenger left a note at Raynor's house asking him to call her.

On July 28, 2008, Raynor called Trooper Wenger and agreed to come to the police barracks that afternoon. When he arrived, he was taken to a spare office. During the interview that ensued, Trooper Wenger and Sergeant James Decourcey asked Raynor for a DNA sample to compare with DNA recovered from the pillow case, the broken window, and the victim's body. Raynor agreed to provide a sample on the condition that it would be destroyed after the investigation was concluded. The officers declined to give Raynor this assurance. In response, Raynor refused to provide a DNA sample.

At the time of the interview, Raynor was wearing a short-sleeved shirt and kept rubbing his arms up and down the armrests of the chair. The trooper also noticed a "metallic" odor emanating from Raynor. Also, Raynor appeared nervous and provided several strange answers to the officers' questions. After Raynor left the barracks, Sergeant Decourcey swabbed the armrests of the chair on which Raynor had been sitting. The swabs were submitted to the MSP Forensic Lab, where the forensic sciences supervisor extracted DNA from the swabs and developed a DNA profile for comparison purposes. The DNA profile was found to match the DNA profile developed from the evidence taken from the pillow case and the patio at the scene of the crime. Based on all of the circumstantial evidence, including the DNA profile, Trooper Wenger obtained warrants to arrest Raynor, search his home, and obtain additional DNA samples. The DNA from the additional sample, gathered by swabbing Raynor's cheek, also matched the DNA on the pillow case and patio. Further comparison by an independent lab of the DNA from Raynor's cheek and the swabs from the victim's vagina and anus taken the day of the rape, concluded that neither Raynor nor any of his male paternal relatives could be excluded as a potential contributor to that DNA, but that 99.57% of the male population in a country the size of the United States could be.

Raynor was indicted for rape, assault, burglary, and sexual offense, as well as malicious destruction of property. His motion to suppress the evidence, including the swabs taken from chair at the barracks, was denied. Raynor was found guilty by a jury and sentenced to a hundred years' imprisonment. He appealed.

On appeal, the Court of Special Appeals affirmed Raynor's convictions. In doing so, the appellate court agreed with the trial court that Raynor lacked any reasonable expectation of privacy with regard to the sweat he left on the chair. Consequently, the police were in lawful possession of the DNA sample. There was simply no dispute that the officers had the right to swab their own chair without a warrant. It was the property of the police and not of Raynor, and thus he had no reasonable expectation of privacy in the chair itself. Raynor argued, however, that even if he had no expectation of privacy as to the "skin cells' recovered from the chair, he did have an expectation of privacy in the DNA contained in those cells. The court rejected this argument concluding that the DNA evidence was taken for identification purposes only, and that when DNA evidence is used solely for identification purposes it is essentially no different than fingerprint evidence. So, even if Raynor could demonstrate a subjective expectation of privacy in his DNA profile, he nonetheless had no objectively reasonable expectation of privacy in it because it was used for identification purposes only.

NOTE: To date, the Court of Appeals of Maryland has not drawn a distinction between DNA and fingerprint evidence. If this changes, it will be reported here. Also, note that this case did not involve the Maryland DNA Collection Act. (Md. Code §2-504 of the Public

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Safety Article). The DNA Act provides for the collection of DNA samples from individuals who are charged with or convicted of certain crimes. Here, Raynor's DNA sample was collected prior to the filing of charges against him. As such, the DNA Act did not apply.

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