

*STATE V. ELLIS*¹

In *State v. Ellis*, the Montana Supreme Court concluded that S.S., a thirteen-year-old victim of alleged sexual assault, could not give valid consent to the search of her bedroom in the defendant's home.² The Court affirmed the district court's ruling to suppress evidence—pajamas and bedding—seized in the defendant's home.³ The Court reversed the suppression ruling regarding S.S.'s underwear, concluding that the defendant “did not have an actual subjective expectation of privacy that society would find objectively reasonable.”⁴

On October 5, 2006, Butte-Silver Bow Patrol Officer Dan Murphy responded to a report of sexual assault.⁵ He met S.S., the victim, at the door of the residence of Dr. William Ellis, the defendant.⁶ Murphy entered the living room of the residence and sat on the couch next to S.S.⁷ Crying and upset, S.S. reported that her father, Ellis, inappropriately touched her on the previous evening.⁸

According to S.S., she had been sick the week leading up to the night of the alleged sexual assault; Ellis had twice given her medication that made her feel “goofy,” and on the night of the incident, Ellis had given her some blue and pink pills.⁹ S.S. reported she was sleeping when Ellis came into her room, removed her shirt, and pulled her pajama shorts and underwear down to her thighs.¹⁰ He then masturbated while fondling her breasts and vagina.¹¹ Though she

¹ *State v. Ellis*, 210 P.3d 144 (Mont. 2009).

² *Id.* at 151.

³ *Id.* at 156.

⁴ *Id.*

⁵ *Id.* at 146.

⁶ *Id.*

⁷ *Ellis*, 210 P.3d at 146.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

pretended to be asleep, she opened her eyes slightly to identify Ellis.¹² She saw that he was wearing a t-shirt and was nude from the waist down.¹³ Ellis replaced her clothing, covered her back up with the bedding, and left.¹⁴

When Murphy realized he was dealing with a child-sexual-abuse crime, he requested a detective to complete the investigation.¹⁵ While waiting for the detective to arrive, Murphy asked S.S. to show him where the alleged sexual assault occurred.¹⁶ S.S. led Murphy to her bedroom and, at his request, retrieved her pajamas from the side of the bed.¹⁷

When Detective George Holland arrived, Murphy briefed Holland and showed him the bedroom, bedding, and pajamas.¹⁸ Holland took photographs of S.S.'s bedroom.¹⁹ They collected S.S.'s sheets, comforter, blanket, pajamas, and underwear.²⁰

Defendant Ellis arrived at his home while Holland and Murphy were investigating.²¹ Murphy removed Ellis from the home and transported him to the police station.²² Ellis reported that he had given S.S. 12.5 milligrams of Ambien CR to help her sleep.²³ A drug test on S.S. revealed that she may have ingested about 50 to 60 milligrams of Ambien CR.²⁴ Ellis admitted he entered S.S.'s room to check on her but denied any sexual contact.²⁵ DNA tests on S.S.'s bedding revealed multiple semen samples containing Ellis's DNA.²⁶

¹² *Id.*

¹³ *Ellis*, 210 P.3d at 146.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 147.

¹⁹ *Ellis*, 210 P.3d at 147.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Ellis*, 210 P.3d at 147.

²⁶ *Id.*

The State charged Ellis with felony sexual assault under Montana Code Annotated § 45–5–502(1)(3) (2005).²⁷ Ellis moved to suppress evidence seized from his home without a warrant or his consent.²⁸ The district court granted the motion to suppress.²⁹ The district court concluded that under *Schwarz*,³⁰ S.S. did not have the capacity or authority to consent to a valid search because she was a child under age 16.³¹

The State appealed, arguing that the *per se* rule in *Schwarz* did not apply because S.S. was the victim of a crime.³² The State argued that, as a crime victim, she had authority to lead police to the scene of the alleged crime and had authority to turn over her pajamas, bedding, and underwear as evidence of that crime.³³

The Montana Supreme Court refused to distinguish *Schwarz* and carve out a child-victim exception, reasoning that “a parent does not surrender the privacy of his home to the discretion of the child, but rather, ‘the child has privacy at the discretion of the parent.’”³⁴ The Court focused “not on the general privacy rights of the child” but on “the violation of the privacy rights of the parent in the control of his or her home.”³⁵ The Court concluded that “S.S. was not asserting her own constitutional rights; rather, she was attempting to waive her father’s constitutional right to privacy.”³⁶ Because S.S. could not give valid consent, the Court suppressed the evidence as the product of an illegal search and seizure.³⁷

²⁷ *Id.*

²⁸ *Id.* at 147–148.

²⁹ *Id.* at 148.

³⁰ *State v. Schwarz*, 136 P.3d 989 (Mont. 2006).

³¹ *Ellis*, 210 P.3d at 148.

³² *Id.* at 149.

³³ *Id.* at 150–151.

³⁴ *Id.* at 151 (citing *Schwarz*, 136 P.3d at 992).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Ellis*, 210 P.3d at 156.

The Court rejected the State’s assertion that its ruling would prevent law enforcement from responding to calls from child victims.³⁸ The Court acknowledged law enforcement’s duty to investigate an alleged crime and secure potential evidence.³⁹ However, the Court reasoned the officers had ample time to secure a warrant, no exigent circumstances existed, Ellis was immediately taken into custody, the home could have been secured to prevent destruction of evidence, and neutral and detached magistrates would have been available to issue a search warrant.⁴⁰ The police did not attempt, or intend, to apply for a search warrant.⁴¹ Accordingly, the Court concluded that no exception to the warrant requirement applied and the search and seizure were *per se* unreasonable.⁴²

The Court maintained its hard-line rule that exceptions permitting a warrantless search will be “jealously guarded and carefully drawn.”⁴³ Because the police “had every opportunity to obtain a warrant to seize evidence” and “chose the expedient route over the constitutional one,” the Court flexed the might of the exclusionary rule and refused to create a fact-specific exception “to justify a palatable result in the hard case.”⁴⁴

Two Justices dissented and concluded that either Ellis did not have a reasonable expectation of privacy in his daughter’s pajamas and bedding or, alternatively, a victim exception to the *Schwarz* rule should be adopted.⁴⁵ District Court Judge Richard A. Simonton also dissented and would have abandoned the *Schwarz* rule.⁴⁶ The Montana practitioner should

³⁸ *Id.* at 151.

³⁹ *Id.*

⁴⁰ *Id.* at 151.

⁴¹ *Id.* at 155.

⁴² *Id.* at 158.

⁴³ *Ellis*, 210 P.3d at 158.

⁴⁴ *Id.* at 158–159.

⁴⁵ *Id.* at 161.

⁴⁶ *Id.* at 161–162.

be aware of the Montana Supreme Court's affirmation of the *Schwarz* rule and analytical focus on the adult's constitutional rights in cases where a minor consents to a search and seizure.

— *Nick Lofing*