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Admissibility of Evidence Obtained by Wire Tapping - Hitzelberger v. State

ADMISSIBILITY OF EVIDENCE OBTAINED BY WIRE TAPPING

Hitzelberger v. State[1]

The appellant was indicted by the grand jury of Baltimore City for malfeasance in office. The indictment contained several counts, charging that while a member of the police force of said city, the appellant permitted, connived at and allowed several named persons to conduct houses of prostitution. Testimony was adduced by the state, through the production of one of the federal agents who made the vice investigations, to the effect that in the course of the investigation he tapped telephone wires connected with one of the disorderly houses, over which he intercepted communications between the appellant, the proprietor, and one of the inmates of the house. These communications were reduced to writing at the respective times at which they were intercepted, and kept by the investigator in the form of two volumes. On cross examination the appellant admitted many calls to the specified house.

The principal question involved for present purposes is, did the court err in admitting evidence of the telephone conversations intercepted by wire tapping? *Held:* Affirmed.

In recent years this question has been the subject of many interesting opinions found in the reports of the Supreme Court of the United States and the appellate courts of many States of the Union.

The common law rule is that the admissibility of evidence is not affected by the illegality of the means by which it is obtained.[2] This unbending rule of law must be considered in connection with the search and seizure and self-incrimination provisions of the Federal and Maryland constitutions.[3]

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[1] 174 Md. 152, 197 A. 605 (1938). See also Rowan et al. vs. State, 3 A. (2nd) 753 (Md. 1939), a case incidentally involving the use of evidence obtained by wire tapping, and holding that, had the witness been able to identify the voice (for lack of which the evidence was inadmissible), the evidence would not have been inadmissible, because the Federal Communications Act cannot limit the admissibility of evidence in State courts.

[2] Lawrence v. State, 103 Md. 17, 63 A. 96 (1906; Meisinger v. State, 155 Md. 195; 141 A. 536 (1928); Richardson v. State, 141 A. 538 (Md. 1928).

[3] U. S. Const., Amendment IV, provides: "The right of the people to be secure in their persons, papers, and effects against unreasonable searches and seizures shall not be violated . . ." *Ibid,* Amendment V, "No person shall be compelled, in any criminal case, to be a witness against himself". See also Maryland Declaration of Rights, Articles 22, 26.

The *Boyd* case[4] laid down for the first time the principle that evidence gathered illegally by Federal officers was inadmissible because contrary to the Fourth Amendment. Dean Wigmore has repeatedly denounced this "misguided sentimentality" on the part of the Federal courts.[5] Regardless of this criticism the Supreme Court in succeeding cases has consistently adhered to the principle enunciated above. The Court faltered somewhat in *Adams v. New York*,[6] but checked itself in a vigorous opinion in the leading case of *Weeks v. United States*.[7] These cases were followed and sustained in *Silverthorne Lumber Co. v. United States*,[8] and *Gouled v. United States*.[9]

Since 1914 various state courts have approved and accepted the principle laid down in the *Weeks* case, until at present eighteen States follow the Federal rule of inadmissibility and twenty-six the rule of admissibility.[10]

The case of *Olmstead v. United States*[11] was the first case calling for a direct holding as to whether or not the gathering of incriminating evidence by Federal officers, by tapping private telephone wires, was a violation of the Constitution of the United States. By a 5-4 decision the Court held it was not. This is apparently the first case which ever distinctly presented the question as to what is a search. It is also one of the few which has considered how much of the realm of privacy, in the light of modern conditions, the phrase "persons, houses, papers, and effects", encompasses and renders inviolable. Before the *Olmstead* case the nearest approach to a declaration that wire tapping violated the Fourth Amendment was in the case of *United States v. James*,[12] in which it was said:

> "Then too, if the immunity was only against law inflicted pains and penalties, the government could probe the secrets of every conversation".

The Supreme Court in its opinion in the *Olmstead* case arbitrarily decided that there is no analogy between tele-

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[4] Boyd v. United States, 116 U. S. 616, 29 L. Ed. 746, 6 S. C. 524 (1886).
[5] Wigmore, Evidence (Second Edition 1923) Sec. 2183.
[6] 192 U. S. 585, 48 L. Ed. 575, 24 S. C. 372 (1904).
[7] 232 U. S. 383, 58 L. Ed. 652, 34 S. C. 341 (1914).
[8] 251 U. S. 385, 64 L. Ed. 319, 40 S. C. 182 (1920).
[9] 255 U. S. 298, 65 L. Ed. 647, 41 S. C. 261 (1921).
[10] See Wigmore, Evidence (Second Edition 1923) Secs. 2183, 2184; and annotations, 24 A. L. R. 1408, 32 A. L. R. 408, 41 A. L. R. 1145, 52 A. L. R. 477, and 88 A. L. R. 348.
[11] 277 U. S. 438, 72 L. Ed. 944, 48 Sup. Ct. 564 (1928).
[12] 60 Fed. 257 (1894).

phone conversations and a letter. Mr. Chief Justice Taft said:

> "The United States takes no such care of telephone and telegraph messages as of mailed sealed letters. The Amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. The language of the amendment cannot be extended and expanded to include telephone wires, reaching to the whole world from the defendant's house or office".

Opening a letter taken from the mails is illegal, and evidence thereby obtained is inadmissible.[13] Similarly, private papers taken by stealth or fraud will not be admitted.[14] Yet evidence procured by immoral conduct on the part of an officer is admissible.[15]

Contumely and opprobrium have been heaped upon unethical methods of crime detection. Unethical wire tapping is the subject of criminal statutes in twenty-six states, and in thirty-four, including Maryland,[16] it is a criminal offence for a telephone or telegraph company, or its employees, to disclose, or to assist in disclosing any messages.

As to whether evidence obtained illegally should be admissible, the leading authorities have laid down two views. The first is that civil liberties should be protected as guaranteed by the Federal Constitution, and the second is that criminals should be prosecuted for their wrongs against society. One of the leading cases expressing the former view is *Youman v. Comm.*,[17] where it was said:

> "It seems to us that a practice like this (admissibility of illegally obtained evidence) would do infinitely more harm than good in the administration of justice; that it would create in the minds of the people the belief that courts had no respect for the Constitution or laws, when respect interferes with the ends desired to be accomplished. We cannot give our approval to a practice like this. It is much better that a guilty individual should escape punishment than that a court of justice should put aside a vital funda-

[13] Ex Parte Jackson, 96 U. S. 727, 24 L. Ed. 877 (1878).
[14] Gouled v. U. S., 255 U. S. 298, 65 L. Ed. 647, 41 S. C. 261 (1921).
[15] U. S. v. Lee Hee, 60 F. (2nd) 924 (C. C. A. 2d 1932).
[16] Md. Code, Art. 27, Sec. 489.
[17] 189 Ky. 152, 224 S. W. 860 (1920).

mental principle of the law in order to secure his conviction. In the exercise of their great powers, courts have no higher duty to perform than those involving the protection of the citizen in the civil rights guaranteed to him by the Constitution, and if at any time the protection of these rights should delay, or even defeat, the ends of justice in a particular case, it is better for the public good that this should happen than that a great constitutional mandate should be nullified. It is trifling with the importance of the question to say, as some courts have said, that the injured party has his cause of action against the officer, and this should be sufficient satisfaction."

Among the best judicial expositions of the orthodox view, the following language stands out in *People v. Mayen:*[18]

"The Constitution and the laws of the land are not solicitous to aid persons charged with crime in their efforts to conceal or sequester evidence of their iniquity. From the necessity of the case the law countenances many devious methods of procuring evidence in criminal cases. The whole system of espionage rests largely upon deceiving and trapping the wrongdoer into some involuntary disclosure of his crime. It dissimulates a way into his confidence; it listens at the key-hole and peers through the transom light. It is not nice, but it is necessary in ferreting out the crimes against society which are always done in darkness and concealment. Thus it is that almost from time immemorial courts engaged in the trial of a criminal prosecution have accepted competent and relevant evidence without question, and have refused to collaterally investigate the source or manner of its procurement, leaving the parties aggrieved to whatever direct remedies the law provides".

Since the decision in the *Olmstead* case, Congress has enacted what is known as the Federal Communication Act.[19] This provides:

"No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any inter-

[18] 188 Cal. 237, 205 Pac. 435 (1922).
[19] 47 U. S. C. A., Sec. 605.

state or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent or attorney, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender, shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person".

Subsequently to the enactment of this Federal Statute the case of *Nardone v. United States*[20] arose. The question involved was whether, in view of the provisions of this act, evidence procured by Federal officers tapping telephone wires and intercepting messages is admissible in a criminal trial in a United States District Court. It was held that the evidence is inadmissible, because the word "person" in the act comprehends Federal agents engaged in the detection of a crime. Thus the Supreme Court has decided that the Communications Act does expressly bar the use of the illegally obtained message as evidence, even though such exclusion is nowhere to be found in express terms within the act. It appears that the merits of wire tapping must have been considered by the Court in reaching its decision, and that its views on the constitutional and moral consideration have changed since the *Olmstead* case, which upheld the constitutionality of wire tapping, and sustained, on common law principles, the admission of evidence so procured. It is suggested that the *Olmstead* case might be overruled if the question came up today on an intra-state message, not covered by statute. Already the lower Federal courts have begun to limit the decision to inter-state messages and to allow interrupted intra-state messages to be put in evidence.[21]

The *Nardone* case will probably not hinder law officers to a great extent if evidence uncovered by means of inadmissible conversations is admitted. Such evidence should be admitted by analogy to the admissions of facts discovered on the basis of an inadmissible confession.[22]

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[20] 302 U. S. 379, 82 L. Ed. 314, 58 S. C. 275 (1937).
[21] See New York Times, January 12, 1934, p. 13.
[22] Wigmore, Evidence (Second Edition 1923) Sec. 859.

Doubtless the same attitude which underlies the Fourth and Fifth Amendments to the Federal Constitution led to the enactment of the Maryland statute known as the Bouse Act.[23] This provides:

> "No evidence in the trial of misdemeanors shall be deemed admissible when the same shall have been procured by, through, or in consequence of any illegal search or seizure, or of any search and seizure prohibited by the Declaration of Rights of this State; nor shall any evidence in such cases be admissible if procured by, through or in consequence of a search and seizure, the effect of the admission of which would be to compel one to give evidence against himself in a criminal case".

While, therefore, before the passage of the above act, evidence obtained or secured by virtue of an illegal search, with or without warrant, otherwise admissible, was permitted in this state, it follows that since the passage of the act, such evidence in cases of misdemeanor is no longer admissible. In the instant case the Court of Appeals stated that the evidence procured is not inadmissible under the statute for the obvious reason that the statute makes no reference to the interception of wire communications.[24]

[23] Md. Code Supp., Art. 35, Sec. 4 A.

[24] For a treatment of the Bouse Act generally, see Note, *Admissibility of Evidence Obtained by Unlawful Search and Seizure* (1938) 2 Md. L. Rev. 147.