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More on Admissibility of Evidence Obtained by Wire Tapping - Mcguire v. State

MORE ON ADMISSIBILITY OF EVIDENCE OBTAINED BY WIRE TAPPING

McGuire v. State[1]

Baltimore police officers, suspecting a bookmaker in Baltimore of conducting a bookmaking establishment, tapped the telephone wires leading into the building. As a result of the wiretap, the police officers overheard a conversation between the defendant-appellant in Washington and the bookmaker in Baltimore, whereby the defendant-appellant agreed to underwrite certain bets taken in Baltimore. The defendant-appellant was charged with conspiracy to violate the Maryland lottery laws, and was convicted in the trial court as a result of the wiretapping evidence which was admitted over his objection. The principal question on appeal was whether the trial court erred in admitting the evidence obtained by the interception of an interstate telephone message? *Held:* affirmed.

This was the fifth case to reach the Maryland Court of Appeals on the extremely controversial matter of the use of wire tapping evidence in a criminal prosecution.[2] Each of the previous cases had decided that there was nothing in the common law or by statute to prevent the use of such evidence.

At common law the rule was that the admissibility of evidence was not affected by the illegality of the means in which it was obtained.[3] This rule has been followed and adhered to by many of our courts and foremost legal writers. For instance, Mr. Justice Stone said:

> "A criminal prosecution is more than a game in which the government may be checkmated and the game lost merely because its officers have not played according to rule."[4]

Professor Wigmore, one of the foremost proponents of the admissibility of all pertinent evidence regardless of how

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[1] 92 A. 2d 582 (1952).

[2] Hitzelberger v. State, 174 Md. 152, 197 A. 605 (1938); Rowan v. State, 175 Md. 547, 3 A. 2d 753 (1939); Leon v. State, 180 Md. 279, 23 A. 2d 706 (1942), *cert. den.*, Neal v. Maryland, 316 U. S. 680 (1942); Bratburd v. State, 88 A. 2d 446 (1952).

[3] Baum v. State, 163 Md. 153, 161 A. 244 (1932); Heyward v. State, 161 Md. 685, 158 A. 897 (1932); Hitzelberger v. State, *supra*, n. 2.

[4] McGuire v. U. S., 273 U. S. 95, 99 (1927).

it was obtained, while admitting that wire tapping is dirty business, justifies it as necessary in the fighting of crime.[5]

The Federal courts departed from the common law rule on the theory that evidence obtained by an unlawful search and seizure was a violation of the Fourth Amendment.[6] The Fourth Amendment states:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated; . . ."

The Supreme Court, in *Weeks v. United States*, in reversing a conviction based on an illegal search and seizure, said:

> "The effect of the Fourth Amendment is to put the *courts of the United States and Federal officials*, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law."[7]

Also to be considered is the Fifth Amendment which states:

> "No person shall be . . . compelled in any criminal case to be a witness against himself; . . ."[8]

The first case to reach the United States Supreme Court involving the admissibility of wire tapping evidence directly was *Olmstead v. United States*,[9] where the court by a five to four decision decided that wire tapping was not an unreasonable search and seizure under the Fourth Amendment, nor was it a violation of the Fifth Amendment since it did not constitute forcing the witness to testify against himself. Here, too, the court decided that if Congress wished to protect the secrecy of telephone conversations by making such evidence inadmissible in a Federal Court, it could do so, but the court would not adopt such a rule by extending the Fourth Amendment.

Justices Holmes and Brandeis dissented vigorously. Justice Holmes said:

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[5] 8 WIGMORE, EVIDENCE (3rd ed., 1940), Sec. 2184b, p. 50:
"Kicking a man in the stomach is 'dirty business', normally viewed. But if a gunman assails you, and you know enough of the French art of 'savatage' to kick him in the stomach and thus save your life, is that 'dirty business' for *you*?"

[6] Boyd v. U. S., 116 U. S. 616 (1886); Weeks v. U. S., 232 U. S. 383 (1914).

[7] *Ibid*, 391-2. Italics added.

[8] See also Md. Declaration of Rights, Articles 22, 26.

[9] 277 U. S. 438 (1928).

> "We have to choose, and for my part I think it a less evil that some criminals should escape than that the government should play an ignoble part."[10]

Subsequently the law of wire tapping evidence was changed by the enactment of the Federal Communications Act of 1934[11] which provided that:

> "No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate 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; . . ."

With the enactment of this statute, the Federal courts held that wire tapping evidence was inadmissible in the Federal courts. The Supreme Court first reached this result in the two cases of *Nardone v. United States.*[12] In the second *Nardone* case they also held that any derivative evidence obtained as a result of the initial wire tapping was inadmissible. Both of these cases dealt with interceptions of interstate messages which the Communications Act expressly forbids. Later the Court went one step further in extending the rule to intrastate messages.[13]

Since these cases, the wire tapping situations that have reached the Supreme Court or have been settled in the lower Federal courts, have generally been concerned with whether it is wire tapping under the Federal Statute. The courts, it seems, have begun to view the Statute quite strictly in order to admit as much evidence as possible. To make the evidence inadmissible, the interception must be made without the consent of the sender of the message. Where one of the parties to the conversation consents to a third party listening, it is not a violation of the Communi-

[10] *Ibid*, 470 *(dis. op.)*.
[11] 47 U. S. C. A., Sec. 605. Hereinafter referred to as "Section 605".
[12] 302 U. S. 379 (1937) ; 308 U. S. 338 (1939).
[13] Weiss v. U. S., 308 U. S. 321 (1939).

cations Act.[14] Where an officer listens to a party speaking into a phone by use of a detectaphone, the Supreme Court held there was no communication or interception under the Communications Act.[15] Where individuals confessed when confronted with a recorded intercepted telephone message of their confederates, the Court held that such confessions were admissible because the Communications Act protects only parties to the conversation.[16] Where an undercover agent, wired for sound, induced a suspected criminal to make incriminating statements in his shop which were conveyed by sound wires to a radio receiver on the agent's confederate on the outside, the Court held no violation of the Communications Act, as there was no interference with any system of communication within the Act.[17] Where Federal marshals, while searching the premises, answered telephones as they rang and received messages, the District Court held there was no interception within the meaning of Section 605.[18]

Thus, we see that in the Federal courts the Federal Communications Act of 1934 governs the situation. But what of the State courts and especially our own Maryland courts? The first Maryland case on the point was the *Hitzelberger* case,[19] where the defense tried to exclude the evidence on the theory that it was a violation of the Bouse Act,[20] which says that:

> "No evidence in the trial of misdemeanors shall be deemed admissible where 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; . . ."[21]

The Bouse Act applied solely to misdemeanors, but this would seem to cover practically all wire tapping situations,

[14] U. S. v. Lewis, 87 F. Supp. 970 (D. C., Dist. Col., 1950).
[15] Goldman v. U. S., 316 U. S. 129 (1942).
[16] Goldstein v. U. S., 316 U. S. 114 (1942).
[17] On Lee v. U. S., 343 U. S. 747 (1952); *reh. den.*, 73 Sup. Ct. Rep. 5, ... U. S. ... (1952).
[18] Billeci v. U. S., 184 F. 2d 394 (C. A., Dist. Col., 1950).
[19] *Supra*, n. 2; see also casenote, *Admissibility of Evidence Obtained by Wire Tapping*, 3 Md. L. Rev. 266 (1939).
[20] Md. Code (1951), Article 35, Sec. 5.
[21] See Note, *Admissibility of Evidence Obtained by Unlawful Search and Seizure*, 2 Md. L. Rev. 147 (1938).

as wire tapping is generally done to secure evidence in gambling or other vice operations which are misdemeanors. Thus, if the Court had held that wire tapping was an illegal search and seizure as the dissenters in *Olmstead* most certainly would have done, it would have excluded wire tapping evidence to all intents and purposes from our courts. The Maryland court, however, held as did the Supreme Court in *Olmstead v. United States*[22] that wire tapping was not an illegal search or seizure and as such the Bouse Act was inapplicable because it said nothing of wire tapping evidence inadmissibility.

The defense in the *Hitzelberger* case[23] also contended that admitting such evidence was a violation of the Federal Communications Act which prohibited the interception of telephone messages. This was the first, but definitely not the last time such a contention was made.[24] The Maryland court held that the Federal Communications Act was a bar to evidence in the Federal courts only, and that Section 605 of the Act was inapplicable in the states.[25] This view is similar to that concerned with the Fourth and Fifth Amendments which were held to have been adopted at states' demand to protect the citizens from actions of the Federal government, and thus it was established that these amendments are limitations on Federal government solely.[26] Nor do the due process, and privileges and immunities clauses of the Fourteenth Amendment prohibit the states from acting. The Fourteenth Amendment does not guarantee against state action all that would be a violation of the first eight amendments if done by the Federal Government.[27] Where some of the privileges and immunities guaranteed by the Federal Bill of Rights have been incorporated into the Fourteenth Amendment, it has been done so in the belief that these privileges were so fundamntal as to be necessary under our concept of ordered liberty.[28] The case

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[22] *Supra*, n. 9.
[23] *Supra*, n. 2.
[24] Leon v. State, *supra*, n. 2; Bratburd v. State, *supra*, n. 2.
[25] See McGuire v. Amrein, 101 F. Supp. 414 (D. C., Md., 1951), a case where the Maryland plaintiff sought to enjoin the defendants from divulging various intercepted messages in a Maryland criminal action. Judge Chesnut said that Section 605 was passed in pursuance of power delegated to Congress to regulate commerce and was not passed for the protection of equal rights of citizens or others.
[26] Twining v. N. J., 211 U. S. 78 (1908); Spies v. Illinois, 123 U. S. 131 (1887).
[27] Palko v. Connecticut, 302 U. S. 319 (1937); Adamson v. California, 332 U. S. 46 (1947); *Cf.* Rochin v. California, 342 U. S. 165 (1952).
[28] *Ibid.*

of *Wolf v. Colorado*[29] went so far as to say that a search and seizure, illegal because in violation of the Fourth Amendment, is so abhorrent to our concept of ordered liberty as to be enforceable against the States under the Due Process Clause of the Fourteenth Amendment, were such action to be affirmatively sanctioned by a State. The Supreme Court, however, sustained a State court conviction in that case, based on such illegally obtained evidence, because the suppression of illegally obtained evidence is not an explicit command of the Fourth Amendment, but merely a judicially created rule of evidence, applicable in Federal prosecutions only. The Court said:

> "When we find that in fact most of the English-speaking world does not regard as vital to such protection (of the right of privacy) the exclusion of evidence thus obtained, we must hesitate to treat this remedy as an essential ingredient of the right."[30]

However, there are those who believe that Section 605 of the Communications Act is applicable to the States.[31] Section 605 says in broad terms, "no person" and "any person" which on its face could cover a witness in a state court. It can be argued that if the effect of Section 605 is merely to limit evidence in Federal courts, the protection it gives against invasion of privacy would be limited, for most criminal prosecutions occur in state courts and also, many criminal offenses normally prosecuted in Federal courts could by technical changes in the indictment be prosecuted in state courts where the wire tapping evidence would be admissible.

However, there has been an almost complete acceptance of the view that the Federal Communications Act is inapplicable to the state courts.[32] The Maryland court has adhered to this view in each of the five cases to reach our Court of Appeals.[33] The Supreme Court of the United States has directly passed on the question of the applicability of Sec. 605 in a state court in the very recent case of *Schwartz v. Texas*.[34] The Court agreed that Sec. 605 was merely a

[29] 338 U. S. 25 (1949). See particularly the tables in the Appendix to this case.

[30] *Ibid*, 29. Parenthetical material added.

[31] Rosenzweig, *The Law of Wire Tapping*, 33 Cornell L. Q. 73 (1947); Bernstein, *The Fruit of the Poisonous Tree*, 37 Ill. L. R. 99 (1942).

[32] Schwartz v. State, 246 S. W. 2d 174 (Tex. Cr. App., 1952), *cert. granted*, 343 U. S. 975 (1952), see *infra*, n. 34; People v. Channell, 107 Cal. App. 2d 192, 236 P. 2d 654 (1951).

[33] *Supra*, ns. 1, 2.

[34] ... U. S. ..., 73 Sup. Ct. Rep. 232 (1952).

federal rule of exclusion and was not binding upon the states, affirming the lower court.[35]

In the *McGuire* case,[36] the defense contended that the evidence was inadmissible because here the message intercepted was of an interstate nature, while in the previous Maryland cases the intercepted messages were intrastate. This distinction, however, does not seem relevant as we have initially said that the Federal Communications Act is inapplicable in this state. Also, since the decision in *Weiss v. United States*,[37] there has been no distinction whatsoever between interstate and intrastate telephone messages so far as the Federal Communications Act is concerned. Judge Henderson in the *McGuire* case says:

> "Evidence obtained by wire tapping has been held admissible in state prosecutions, not because the Federal Statute is limited to interstate communications, but because it is 'presumed to be limited in effect to the Federal jurisdiction and not to supersede a state's exercise of its police power unless there be a clear manifestation to the contrary'."[38]

In Maryland, as in most states and in the Federal government, there are various statutes making the molesting of wires a misdemeanor.[39] However, there has never been a criminal prosecution in this state for a violation of the statutes. There are two cases on record in other jurisdictions, but both failed because the facts did not put the situation within the particular local statute.[40] Since the penal laws to prevent wire tapping are so seldom invoked, the evils attendant upon indiscriminate use of wire tapping can be most practically met by prohibiting the use as evidence of information thereby obtained.

A compromise approach on wire tapping today is to be found in New York where, by constitutional amendment in

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[35] Lower court case cited, *supra*, n. 32.

[36] *Supra*, n. 1.

[37] *Supra*, n. 13.

[38] *Supra*, n. 1, 584.

[39] Md. Code (1951), Article 27, Sec. 629, provides:

> "Any person connected with any telegraph or telephone corporation, company or individuals . . . in any capacity, who shall willfully divulge the contents or nature of the contents of any private communication entrusted to him for transmission or delivery, . . . shall, . . . be adjudged guilty of a misdemeanor . . ."

See also Md. Code (1951), Art. 23, Secs. 297, 300.

[40] State v. Behringer, 19 Ariz. 502, 172 P. 660 (1918); State v. Nordskog, 76 Wash. 472, 136 P. 694 (1913).

1938, wire tapping was allowed with controls.[41] That state's Code of Criminal Procedure[42] provides for the issuance of *ex parte* orders by various judges, upon the oath or affirmation of a district attorney, attorney general, or a police officer above the rank of sergeant, of the need to intercept telephone or telegraphic communications. There must be reasonable ground to believe the evidence of crime may be obtained thereby; the particular telephone line or other means of communication must be identified, and the person whose communications are to be intercepted must be described. Through these means the indiscriminate use of wire tapping with all its inherent dangers is limited. That such dangers are to be found can be seen from the fact that a United States Committee on Interstate Commerce recommended an investigation of wire tapping because of its dangerous propensities.[43]

A law similar to that of New York was considered by the Maryland Legislative Council, as an outgrowth of a proposal to ban wire-tapping completely. The Council recommended to the 1953 Legislature a bill permitting wiretapping pursuant to Court order and permitting the introduction of evidence thus obtained,[44] but the bill failed of adoption.

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[41] N. Y. Constitution, Art. 1, Sec. 12:
"The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, . . ."

[42] Section 813a.

[43] Sen. Rep. No. 1304, 76th Congress, 3rd Session.

[44] Maryland Legislative Council, Report to The General Assembly of 1953, Vol. 1, p. 32.