7-1-1973

Wiretap Evidence Inadmissible in Civil Cases Without Consent of One Communicant

Carlos E. Casuso

tion that municipal regulation of rates, collection practices, and termination practices may cause the utility to be so entwined with government as to lose its private status. However, courts will not hold that merely because a utility is pervasively regulated, any action taken by it is under "color of law." Only those activities which are subject to state regulation will be deemed "state action." *Hattell*, of necessity, was limited to the issue of what constituted state action and did not address the question of what was needed to conform to due process. Due process, when taken from principle to practice, demands only that what is available to the individual be fundamentally fair in light of the circumstances. No doubt, implementation of due process requirements will be a fertile source of future litigation.

JOHN D. SCHMELZER

WIRETAP EVIDENCE INADMISSIBLE IN CIVIL CASES WITHOUT CONSENT OF ONE COMMUNICANT

A wife brought an action for the dissolution of her marriage. During the presentation of testimony on the issue of temporary child custody, her husband offered in evidence recordings of intercepted telephone conversations he had obtained by tapping two telephone lines coming into the home of the parties.[1] The wife filed a motion to suppress the intercepted wire communications,[2] but the trial court denied the motion.[3] On appeal, the District Court of Appeal, First District, reversing the trial court, held that the statutory and constitutional law of the State of Florida precludes the admissibility of intercepted wire communications unless the interception be by consent of one of the parties to the conversation, or by authorization of a court of competent jurisdiction.[4] The Florida Supreme Court *held*, affirmed: The decision of the district court is adopted with the addition that the statute in question[5] makes no exception which allows the admission of wiretap evidence in domestic relation cases in which neither party to the communication has consented to the interception. *Markham v. Markham*, 272 So.2d 813 (Fla. 1973).

1. The husband and wife owned, as tenants by the entireties, the marital home. One of the telephones tapped was listed in the husband's name. The second telephone in the home is an extension of a phone installed in the "Nancy Markham School of Dance."

2. The wife relied on the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2518 (1970), and FLA. STAT. § 934.06 (1971).

3. The trial judge preserved to the wife the right to object to portions of the recordings only on grounds of relevancy or materiality.

4. Markham v. Markham, 265 So.2d 59 (Fla. 1st Dist. 1972). In light of the supreme court's adoption by reference of the district court of appeal's decision, citation to portions of the case herein will be to the district court's opinion.

5. FLA. STAT. § 934.01 (1971).

In criminal cases evidence which has been obtained by means of wiretapping devices has generally been found to have been illegally obtained and, therefore, inadmissible.[6] Although the exclusion of such evidence has been uniform in criminal actions, its admissibility in noncriminal proceedings varies among jurisdictions and according to the type of case involved.[7]

Markham presented to the supreme court a novel question. Although the Florida "Security of Communications" statute provides its own exclusionary rule,[8] its applicability was apparently intended to be confined to criminal matters.[9] In the instant case the problem facing the supreme court was one of statutory construction. The court viewed the statute[10] as "amplifying" the constitutional guarantee[11] against the "unreasonable interception of private communications."[12] This statutory amplification was strictly construed. The court in *Markham* interpreted the statute to allow interception of communications if either of two prerequisites were met: Either one of the parties to the communication could consent to the interception, or the interception could be authorized by a court of competent jurisdiction.[13]

The Court authorization would apparently not be available in a factual situation like *Markham*. Sections 934.01 and 934.07 of the Florida Statutes expressly limit court authorization to certain types of major crimes,[14] and such authorization is to be issued only when application has been made by a law enforcement agency having the responsibility to prosecute such crimes.[15] The legality and admissibility of such inter-

6. E.g. Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914).

7. For a discussion of the admissibility of such evidence in civil cases see Note, *Admissibility of Illegally Obtained Evidence in Noncriminal Proceedings*, 22 FLA. L. REV. 38 (1969).

8. FLA. STAT. § 934.06 (1971). The pertinent part of the statute reads: "Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court . . . ."

9. The statute is found in FLA. STAT. Title 45 (1971), encompassing §§ 900-42, which relates to criminal procedure.

10. The court in its opinion relied on FLA. STAT. § 934.01(4) (1971). The statute reads in part: "To safeguard the privacy of innocent persons, the interception of wire or oral communications when none of the parties to the communication has consented to the interception should be allowed only when authorized by a court of competent jurisdiction."

11. FLA. CONST. DECL. OF RIGHTS § 12 (1968).

12. Markham v. Markham, 265 So.2d 59, 61 (Fla. 1st Dist. 1972).

13. *Id.* FLA. STAT. § 934.03(2)(d) (1971) provides that it is not unlawful for a person to intercept his own oral communication or to intercept a communication when one of the parties thereto has previously consented. *See* United States v. Polakoff, 112 F.2d 888 (2d Cir. 1940) (Hand, J. suggesting that the rationale of implied consent can be used to handle such problems).

14. FLA. STAT. § 934.07 (1971) provides that court authorization may be issued when the interception may provide evidence of the commission of the offense of murder, kidnapping, gambling, robbery, burglary, grand larceny, prostitution, criminal usury, abortion, bribery, extortion, dealing in narcotics or dangerous drugs, or any conspiracy to commit any of the above stated offenses.

15. *Id.*

cepted communications depended, then, solely on whether one of the parties thereto had consented. In *Markham*, consent by the parties to the intercepted communications was clearly lacking.[16]

One final issue was presented in *Markham*. The husband argued that the interest reflected in his right to protect his marital relation was not intended to be curtailed by the statute. In *People v. Appelbaum*,[17] a New York court noted that the right of privacy may be subordinated to the paramount right of the subscriber-husband who authorized the use of the phone.[18] Such paramount rights include, among other things, the right to determine whether the use of the telephone line is to the detriment of the husband's marital relationship. The New York court stated that "the act of one having his own wire tapped to vindicate these paramount rights is not within the scope of the [exclusionary rule] statute or the objectives sought to be reached by its enactment."[19]

The *Markham* decision rejected the *Appelbaum* rationale. The district court pointed out that the subject statute made no exception allowing a subscriber-husband to wiretap. "[A] husband does not possess the right to invade his wife's right to privacy by utilizing electronic devices."[20] The court refused to subordinate the rights of a wife to those of her husband, and it rejected the common law concept that a husband is the head of the household. The opinion points out that

> [a] married woman is no longer her husband's chattel. . . . [H]er rights are as paramount as his. . . . They now occupy a position as equal partners in the family relationship. . . . A husband has no more right to tap a telephone located in the marital home than has a wife to tap a telephone situated in the husband's office.[21]

It was to this reasoning that Judge Wigginton dissented. Wigginton's dissent subscribed to the *Appelbaum* rationale[22] and to the principle which "recognized the husband of a marriage to be the head of his household, which carries with it the privilege and duty of protecting it against injury, harm, or the threat thereof."[23]

---

16. Markham v. Markham, 265 So.2d 59, 61-62 (Fla. 1st Dist. 1972).

17. 227 App. Div. 43, 97 N.Y.S.2d 807 (1950) [hereinafter cited as *Appelbaum*]. *Appelbaum* dealt with the criminal prosecution of a husband who had tapped his own telephone to record his wife's conversations. The statute involved therein is similar to the Florida "Security of Communications" statute. FLA. STAT. ch. 934 (1971); see notes 10 and 12 *supra*. For a discussion of state law on wiretapping *see* Greenwalt, *The Consent Problem in Wiretapping & Eavesdropping: Surreptitious Monitoring with the Consent of a Participant in a Conversation*, 68 COLUM. L. REV. 189 (1968).

18. People v. Appelbaum, 277 App. Div. 43, 44, 97 N.Y.S.2d 807, 809 (1950).

19. *Id.* at 45, 97 N.Y.S.2d at 810. *Accord*, Erlich v. Erlich, 278 App. Div. 244, 104 N.Y.S.2d 531 (1951); Commonwealth v. McCoy, 442 Pa. 234, 275 A.2d 28 (1971); Commonwealth v. Goldberg, 208 Pa. Super. 513, 224 A.2d 91 (1966).

20. Markham v. Markham, 265 So.2d 59, 62 (Fla. 1st Dist. 1972).

21. *Id.*

22. 277 App. Div. 43, 44, 97 N.Y.S.2d 807, 809 (1950).

23. Markham v. Markham, 265 So.2d 59, 62 (Fla. 1st Dist. 1972) (dissenting opinion).

The dissent in the supreme court decision was based on the principle that a wife, within the confines of the marital home, could not have a reasonable right to expect that such communication would be free from interception. This opinion also resorted to the argument that a wife's right to privacy is subordinate to the husband's right and duty to protect the marital home.[24]

The majority opinion in the supreme court decision reflects a reluctance to incorporate the *Appelbaum* exception[25] into the "Security of Communications" statute,[26] and simply provides a strict construction of the statute. It is likely that the impact of the case will be restricted to its facts. However, in light of the rationale of the court, the decision could very well set precedent for all noncriminal proceedings, in which intercepted communications obtained in violation of "Security of Communications" statute are sought to be introduced into evidence.

It is the writer's opinion that the court properly rejected the reasoning in *Appelbaum* and recognized a wife's right to privacy in her communications. It would have been an anachronism for the court to subordinate a wife's right to privacy at a time in our society when women are finally being recognized as the equals of men. The right to privacy is of such importance that it should not be diluted by antiquated and obsolete social norms. *Markham* is not to be interpreted to say that *all* illegally obtained evidence will be inadmissible in Florida, but the application to a civil matter of a statute obviously designed to affect criminal proceedings, in order to preserve an individual's right to privacy, is clearly an indication of the court's attitude toward the admissibility of evidence obtained in derogation of a person's right to privacy.

CARLOS E. CASUSO

"ONE STEP FORWARD, TWO GIANT STEPS BACKWARD" —THE COURT LOOKS AT STUDENT RIGHTS

Central Connecticut State College[1] allows only those student organizations officially recognized by the college to use campus facilities for meetings and other non-college sponsored activities. The petitioners, a group of students, sought to gain official recognition for an organization to be known as "A Local Chapter of Students for a Democratic Society."[2] Following the established procedures of the college,[3] the petitioners

24. Markham v. Markham, 272 So.2d 813, 814-15 (Fla. 1973).
25. 277 App. Div. 43, 44, 97 N.Y.S.2d 807, 809 (1950).
26. FLA. STAT. ch. 934 (1971).

1. A state supported university located at New Britain, Connecticut [hereinafter referred to as "the College"].
2. Hereinafter referred to as "S.D.S."
3. The university procedures briefly were as follows: An application was submitted to