BYU Law Review

Volume 1984 | Issue 4 Article 8

11-1-1984

The Crime Control Act of 1968 and Cordless Telephones: State v. Howard

Scott C. Smith

The Crime Control Act of 1968 and Cordless Telephones: *State v. Howard*

In *State v. Howard*[1] the Supreme Court of Kansas held that communications made over cordless telephones are not protected under the exclusionary rule as codified in title III of the Omnibus Crime Control and Safe Street Act of 1968.[2] By so holding, the court denied the *Howard* defendants fourth amendment protections guaranteed by title III itself. The *Howard* court first correctly determined that cordless telephone conversations are oral and not wire communications under title III. However, it then held incorrectly that the defendants had no reasonable expectation that cordless telephone conversations made in their own home were private. Consequently, the court concluded that the police could have the defendants' conversations recorded without a warrant.

I. The *Howard* Case

Timothy Ray Howard and Rosemarie Howard were charged with possession of cocaine and conspiracy to sell marijuana. The defendants' illegal activities first came to light when their neighbor inadvertently intercepted the defendants' telephone conversation while tuning his AM/FM radio. The neighbor recorded at least one of the defendants' conversations and then gave the information to local law enforcement officials. Without court authorization, the Kansas Bureau of Investigation (KBI) gave the neighbor a tape recorder, some blank tapes, and instructions to record other conversations between the defendants and their accomplices.[3] The neighbor recorded the conversations for approximately five weeks.

At the end of this period, the KBI obtained a search warrant based upon the recorded conversations, observations of the

---

1. 235 Kan. ___, 679 P.2d 197 (1984). Subsequent to *Howard*, the Rhode Island Supreme Court also held that the Omnibus Crime Control and Safe Street Act of 1968 does not apply to cordless telephones since the conversations are broadcast over public airwaves and not through telephone wires. State v. Delaurier, ___ R.I. ___, 488 A.2d 688 (1985).

2. 18 U.S.C. §§ 2510-2520 (1982) [hereinafter referred to as title III].

3. 235 Kan. at ___, 679 P.2d at 198.

defendants' movements, and the recordings of a pen register installed to record the numbers dialed on the defendants' telephone.[4] A KBI agent testified that he would not have attempted to obtain a search warrant based solely on the recordings made by the defendants' neighbor prior to the KBI's involvement. A search of the defendants' residence turned up narcotics.

The defendants moved to suppress the evidence based on title III of the Omnibus Crime Control and Safe Streets Act of 1968[5] and a similar provision of a Kansas statute.[6] The relevant sections of these statutes provide that evidence gathered through the interception of (1) wire communications or (2) oral communications entered into with a reasonable expectation of privacy in violation of these statutes is inadmissible in any trial.[7]

At a hearing on defendants' motion to suppress, an employee of the telephone manufacturer testified that the telephone owner's manual states that both the base and mobile components of the portable telephone were capable of receiving and transmitting FM radio signals, and that the range of communication between the two components was approximately fifty feet. Therefore, in his opinion, the average customer would be able to determine from the owner's manual that the telephone was a radio transmitter and receiver, and that a standard FM radio would be able to pick up signals from the telephone.[8]

The trial court granted the defendants' motion to suppress, holding that Kansas law enforcement officials had violated title III and that the violation required the suppression of the evidence in question. The State of Kansas took an interlocutory appeal of the trial court's order. On appeal, the Kansas Supreme Court held that the evidence seized as a result of the recorded telephone conversations should have been admitted as evidence for the following reasons: (1) they were not "wire communications," and (2) they were not protected as "oral communications" because the defendants had no justifiable expectation of privacy under the circumstances.[9]

---

4. *Id.* at ___, 679 P.2d at 199. The KBI had obtained a warrant to install the pen register. Apparently, that warrant was based on the recordings made by the neighbor before he contacted the police.

5. 18 U.S.C. §§ 2510-2520 (1982).

6. KAN. STAT. ANN. §§ 22-2514 to -2519 (1981).

7. 18 U.S.C. §§ 2511-2515 (1982).

8. 235 Kan. at ___, 679 P.2d at 199-200.

9. *Id.* at ___, 679 P.2d at 206.

II. ANALYSIS

Title III was an attempt to codify the *Katz v. United States*[10] line of exclusionary rule cases. *Katz* held that the fourth amendment "protects people, not places,"[11] and outlined the parameters of the right of privacy alluded to in earlier cases. Katz was accused of transmitting wagering information from a telephone booth. The government was not permitted to introduce evidence consisting of telephone conversations recorded by an electronic listening device attached to the outside of a public telephone booth from which Katz placed his incriminating calls. The fourth amendment, according to *Katz*, protects "what [a person] seeks to preserve as private, even in an area accessible to the public" but does not protect "what a person knowingly exposes to the public, even in his own home or office."[12] This came to be known as the "public exposure doctrine."

Communications falling within title III's definition of wire communications are conclusively protected and may be intercepted only after title III's special procedural safeguards have been satisfied.[13] The *Howard* court found correctly that the defendants' telephone conversations were not communications carried by aid of a wire, but in so doing, ignored completely title III's intention that some conversations carried by means other than wire are nevertheless considered wire communications. The statutory language of title III, considered in light of its legislative history and judicial interpretations, reveals that title III meant to classify as wire communications all communications while they are being carried by common carriers. By contrast, broadcast communications en route to common carrier facilities are not wire communications. This distinction eluded the *Howard* court.

Although oral communications do not receive the conclusive protection afforded wire communications, they are protected if the court finds independently that they were made with a reasonable expectation of privacy. The *Howard* court erred in holding that the defendants' had no reasonable expectation that their telephone conversations were private. A proper application of the principles articulated in *Katz* and its progeny leads to the

---

10. 389 U.S. 347 (1967).
11. *Id.* at 351-53.
12. *Id.* at 351.
13. 18 U.S.C. § 2518 (1982).

conclusion that police should not intercept private telephone conversations emanating from the confines of a private dwelling without a warrant or a showing of exigent circumstances.

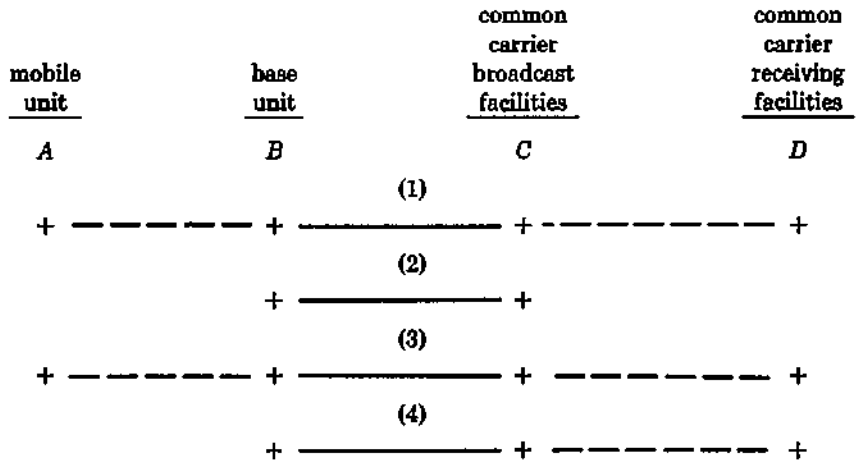
A. Wire Communications

The pertinent language of title III protects as wire communications those "communication[s] made in whole or in part through the use of facilities for the transmission of communications by the aid of wire . . . between the point of origin and the point of reception . . . operated by . . . a common carrier . . . ."[14] This ambiguous language suggests four possible interpretations: (1) communications are protected if at any time they are carried by wire, (2) communications are protected only as long as they are being carried by a wire, (3) communications are protected if at any time they pass through common carrier facilities, or (4) communications are protected as they are carried by wire or as they pass through common carrier facilities.[15]

---

14. *Id.* § 2510(1).

15. The four possible interpretations of protected wire communications are illustrated in the following diagram:



Interpretation (1) would protect any communication carried from point *A* to point *D* because it passes through wires between points *B* and *C*. Interpretation (2), the interpretation adopted by the *Howard* court, would protect a communication only as it passes through wire between points *B* and *C*. Interpretation (3) would protect any communication carried from point *A* to point *D* because from point *B* to point *D* it is carried by a common carrier. Interpretation (4), the interpretation adopted in this note, would protect communications as they pass through wire from point *B* to *C* and as they are broadcast by a common carrier from point *C* to point *D*.

The *Howard* court realized that title III's protection of wire communications should not logically apply to all conversations transmitted in any way by wire. For this reason, it found correctly that the defendants' conversations were not wire communications. However, the court's holding that wire communications were only "that portion of a radio-telephone communication which is actually transmitted by the wire and not broadcast in a manner available to the public"[16] left unprotected communications transmitted by common carriers through the use of microwave or other broadcasts. The *Howard* court's definition of wire communications is not in harmony with the legislative history of title III and the case law interpreting it because its definition fails to afford conclusive protection to common carrier microwave transmissions.

Title III's scant legislative history does not state specifically that the proper interpretation of the statute's "in whole or in part" language is that communications are protected as they are carried by wire and as they pass through common carrier facilities. Nevertheless, the Senate report on title III suggests that this protection is specifically limited in its application to communications that at some point are "carried by a common carrier, in whole or in part, through our Nation's communications network."[17]

The legislative history states that title III was "intended to reflect existing law,"[18] which would include primarily *Katz*. When read in light of *Katz*, title III seems to have been intended to protect communications as they pass through common carrier facilities, whether the common carrier transmits them "in whole or in part" by wire, cable, radio, or microwave. Because one cannot always safely assume that a radio-telephone is not broadcasting communications to uninvited ears, the *Katz* test for reasonableness should apply to communications intercepted before they enter the common carrier's facilities. As communications pass through a common carrier's facilities, one can safely assume that they are not being intercepted whether they are transmitted by wire or microwave; accordingly, the transmissions should receive conclusive protection as wire communications.

---

16. 235 Kan. at ___, 679 P.2d at 206.

17. S. REP. No. 1097, 90th Cong., 2d Sess. 89, *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 2112, 2178.

18. *Id.*

Well-reasoned case law supports the *Howard* court's determination that communications are not wire communications for purposes of title III simply because they are at some time carried by wire; however, the case law also supports the conclusion that under title III communications passing through common carrier facilities are protected as wire communications.

In *United States v. Rose*[19] the Court of Appeals for the First Circuit denied a motion to suppress information from conversations intercepted from a point-to-point communication transmitted on a ham radio operator's band, concluding that a transmission made over the airwaves from one marine vessel to another was "obviously not a wire communication."[20] In other words, the fact that a communication is at one time carried by a wire does not afford it complete protection as a wire communication.[21]

In *Willamette Subscription Television v. Cawood*,[22] a civil case decided one month prior to *Howard*, the District Court of Oregon held that individuals who used "pirate" antennas to intercept Home Box Office microwave broadcasts were not liable for damages under title III to the pay television service that transmitted the broadcasts. The court reasoned that communications transmitted by the same means used by common carriers, i.e., microwave signals, were not wire communications because " '[a]s with any broadcast into the air' . . . the HBO signal

---

19. 669 F.2d 23 (1st Cir. 1982), *cert. denied*, 459 U.S. 828 (1982).

20. *Id.* at 25.

21. The courts in United States v. Hall, 488 F.2d 193 (9th Cir. 1973), and Dorsey v. State, 402 So. 2d 1178 (Fla. 1981), along with the *Howard* court, were preoccupied with the dangers of finding that title III's "in whole or in part" language modified "wire" alone. If it does, any communication carried in any part by wire would receive conclusive protection. Their failure to tie the "in whole or in part" language to "[common carrier] facilities" was the principal cause of their misinterpretation of the term "wire communication." The *Hall* court read title III's "in whole or in part" language as meaning that conversations from a radio-telephone to a landline telephone are wire communications while conversations between radio-telephones are oral communications. 488 F.2d at 197. This led to what the *Howard* court called the absurd result of giving conclusive protection to the cordless telephone user who calls a person with a landline telephone while possibly denying him the benefits of that presumption when he dials someone with a cordless telephone.

Dorsey v. State, 402 So. 2d 1178 (Fla. 1981), the decision ultimately followed in *Howard*, solved the problem by virtually ignoring the "in whole or in part" language. *Dorsey* held that the prohibition against interceptions of wire communications applied "only to so much of the communication as is actually transmitted by wire and not broadcast in a manner available to the public." *Id.* at 1183. This holding would leave communications broadcast by common carriers subject to interception without full protection.

22. 580 F. Supp. 1164 (D. Or. 1964).

can be received by anyone with the proper equipment."[23] The court also seemed to base its decision on its finding of a lack of congressional intent to include "purely commercial microwave broadcasts" in title III's definition of wire communications.[24] By negative implication, the court's decision indicates that title III does protect microwave broadcasts carried by common carriers of private conversations, since if all microwave broadcasts are outside of title III's definition of wire communication, there would have been no need for the court to find that congress did not intend to include *commercial* microwave broadcasts.

Applying this legislative history and case law, the proper test for finding that a telephone conversation is a wire communication is whether, at the point of interception, the communication is being carried (1) by a common carrier or (2) by wire. Application of this test by the *Howard* court would still have resulted in a finding that the defendants' cordless telephone conversations were not wire communications as they were broadcast from the telephone's mobile unit to its base unit. It would, however, afford conclusive protection to conversations broadcast by a common carrier from one point to another by whatever means. Such a test would avoid the absurd result of making almost all cross-country telephone conversations susceptible to interception without a search warrant.

B. Oral Communications and the Expectation of Privacy

Telephone conversations that do not qualify for conclusive protection as wire communications under title III may nevertheless qualify for protection if they fall within title III's definition of "oral communications." Section 2510(2) of the statute protects "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception . . . ."[25] Section 2518 of title III outlines the steps necessary to obtain judicial authorization to intercept protected communications. This section was drafted as a codification of the "constitutional command of particularization" required to obtain a warrant and was patterned after the rules set forth in *Katz*.[26] If

23. *Id.* at 1168 (quoting United States v. Hall, 488 F.2d 193, 196 (9th Cir. 1973)).

24. *Cawood*, 580 F. Supp. at 1168.

25. 18 U.S.C. § 2510(2) (1982).

26. S. REP. No. 1097, 90th Cong., 2d Sess. 101, *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 2112, 2190. Professor Herman Schwartz contends that the protections offered by title III are unconstitutional because they are narrower than those guaranteed by

the Kansas Supreme Court had found that the *Howard* defendants possessed a justifiable belief that their telephone conversations were private, the court would have afforded them the procedural safeguards outlined in § 2518 of title III. Instead, the *Howard* court took a simplistic approach to the question of public exposure, and decided that the defendants, in transmitting their telephone conversations over FM radio waves, had no reasonable expectation that others would not hear them.[27]

The court based its conclusion on the testimony of the telephone manufacturer's employee called as an expert witness by the state. The court reasoned that the description of the equipment in the telephone operator's manual should have put the defendants on notice that their telephone conversations were not private.[28] In reaching this decision, the court overlooked judicial interpretations of *Katz* that require a closer look at the circumstances of the interception before fourth amendment protections can be sidestepped.

The legislative history of title III states that the defendants' expectation of privacy should be evaluated "in terms of all the facts and circumstances."[29] As indicated by *Katz* and its progeny, those facts and circumstances should include the place where the defendant made his incriminating calls, the means used to intercept the communication, the location of the interceptor, and the exigency of the situation. The *Howard* court gave no indication that it considered any of these factors in evaluating the reasonableness of the defendants' expectation that no one would hear their telephone conversations. Rather, the court based its decision solely on the assumption that a reasonable owner of a cordless telephone, who had access to an owner's manual that warned of the possibility that others might over-

---

Katz and *Berger*. Schwartz, *The Legitimation of Electronic Eavesdropping: The Politics of "Law and Order,"* 67 MICH. L. REV. 455, 457-77 (1969). During hearings on S. 2189, the draft for title III, U.S. Attorney General Nicholas de B. Katzenbach testified: "Should this committee agree that a strong case can be made out for limited wiretapping authority on the part of law-enforcement officials, I believe nevertheless that it should go even further than S. 2189 in circumscribing that authority. *Wiretapping, 1966: Hearings on S. 2189 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. 35 (1966) (statement of Attorney General Nicholas de B. Katzenbach).

27. 235 Kan. at ___, 679 P.2d at 206.

28. *Id.*

29. S. REP. No. 1097, 90th Cong., 2d Sess. 90, *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 2112, 2178.

hear conversations, could not have a reasonable expectation of privacy in his telephone calls.

1. The importance of place

The *Howard* opinion afforded no weight to the fact that the defendants' conversations originated in their home. By contrast, the Ninth Circuit in *United States v. Fisch*[30] found that the place where a defendant makes incriminating remarks, though no longer controlling, is an element that should be considered in deciding whether an expectation of privacy is justifiable.[31] Indeed, Justice Harlan observed in *Katz* that the scope of fourth amendment protection still "requires reference to a 'place.' "[32]

The Second Circuit in *United States v. Pui Kan Lam*,[33] refused to suppress evidence gained from a "bugged" apartment, emphasizing that the defendants carried on their incriminating conversations "in the house of complete strangers," rather than "in a public phone booth, a suspect's home, or office, or the home of a friend . . . ."[34] The defendants' suspicious visits to, and conversations in the home did not constitute the free exchanges of "daily life" that fall under fourth amendment protection.[35] The Ninth Circuit held in *United States v. McIntyre*[36] that a police chief whose conversations were intercepted by a "bugged" briefcase placed in his office had a reasonable expectation of privacy even though he commonly left his office door open. The court paid particular attention to place, holding that "[a] *business office* need not be sealed to offer its occupant a reasonable degree of privacy."[37] Since *Katz* still requires a reference to place in determining whether or not an expectation of privacy is justified, the *Howard* court should have considered

30. 474 F.2d 1071 (9th Cir.), *cert. denied*, 412 U.S. 921 (1973).

31. *Id.* at 1078.

32. 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

33. 483 F.2d 1202 (2d Cir. 1973), *cert. denied*, 415 U.S. 984 (1974).

34. *Id.* at 1206 [citations omitted]; *see also* Marullo v. United States, 328 F.2d 361, 363 (5th Cir.) ("A private home is quite different from a place of business or from a motel cabin. A home owner or tenant has the exclusive enjoyment of his home, his garage, his barn or other buildings . . . ."), *cert. denied*, 379 U.S. 850 (1964); United States v. Agapito, 620 F.2d 324, 331 (2d Cir.) ("[T]he reasonable privacy expectations in a hotel room differ from those in a residence. The reasonableness of an individual's privacy expectations appropriately may be considered in the context of a 'place.' "), *cert. denied*, 449 U.S. 834 (1980).

35. 483 F.2d at 1206.

36. 582 F.2d 1221 (9th Cir. 1978).

37. *Id.* at 1224 (emphasis added).

the fact that the defendants made their telephone calls from their own home and not from a thin-walled hotel room, a public telephone booth, or an automobile[38] and that their conversations were not within earshot of their neighbor.

2. Other elements of privacy

In *United States v. Carroll,*[39] the District Court for the District of Columbia listed several other factors to be considered in evaluating the reasonableness of an expectation of privacy. According to *Carroll,* that evaluation should include whether the informant heard the conversation unaided by an electronic device "more sensitive than the human ear," and if so, whether he heard the conversation from a contrived or unauthorized place.[40] Similarly, the *Fisch* court emphasized that the police in that case overheard the conversation with only the naked ear.[41] Although the radio that intercepted the defendants' telephone conversations in *Howard* was not an amplifying device in the form of an electronic "bug," it did enhance the police's ability to eavesdrop.

Application of *Carroll* to the facts of *Howard* yields an uncertain result. It cannot be argued that the eavesdropping neighbor was "in a position where an individual would not normally be expected to be."[42] However, it is equally obvious that the neighbor could not have overheard the Howards' conversations unless aided by a device "more sensitive than the human ear"—a radio. Therefore, on the factors listed in *Carroll* alone it is unclear whether the Howards had a reasonable expectation of privacy in their telephone conversations.

However, other factors suggest that the police action in *Howard* was not justified in light of the circumstances. The court in *Pui Kan Lam* pointed out that the "pressures of time" in that case gave the officers greater cause to record the conversations in the adjacent room without prior authorization.[43] The time limitations requiring quick action in *Pui Kan Lam* were

38. The court failed to distinguish between the place involved in *Howard* and the places involved in *Hall* and *Dorsey. Dorsey* dealt with portable "beepers" used in public and *Hall* dealt with radio-telephones in automobiles.

39. 337 F. Supp. 1260 (D.D.C. 1971).

40. *Id.* at 1263.

41. 474 F.2d at 1077.

42. 337 F. Supp. at 1263.

43. 483 F.2d at 1206-07.

absent in *Howard*. In fact, the neighbor in *Howard* listened to the defendants' conversations for five weeks before the police made a decision to obtain a warrant to search their home.[44] These circumstances should have been part of the "total atmosphere" considered in determining the justifiability of the defendants' beliefs that their telephone conversations would remain private.

A careful evaluation of this atmosphere, including a consideration of the fact that (1) the defendants made the calls from their own home, (2) they were using a traditional means of private communication, (3) the conversations were intercepted with an electronic device more sensitive than the human ear, (4) the neighbor was within close proximity to the defendants' home, and (5) the police were working under no apparent time constraints should have led to the conclusion that the defendants had a reasonable expectation of privacy in their telephone conversations. Therefore, the police should have been required to obtain a search warrant before recording the defendants' conversations.

III. The Person Who Innocently Intercepts Communications

Implicit in the *Howard* court's decision is the erroneous assumption that protecting a person who makes a telephone communication under title III means exposing any person who intercepts that communication to civil and criminal liability.[45] Citing *United States v. Hall*,[46] the court reasoned that a person who intercepts a wire communication does so "at his own risk."[47] Presumably, the *Howard* court also believed that a finding that the defendants had a justifiable expectation of privacy would have meant that their intercepting neighbor was automatically civilly and criminally liable.

Hall and *Howard* overlooked the fact that only persons who

---

44. 235 Kan. at ___, 679 P.2d at 198.

45. 18 U.S.C. § 2511(1) (1982) provides: "Except as otherwise specifically provided in this chapter any person who . . . willfully intercepts . . . any wire or oral communication . . . shall be fined not more than $10,000 or imprisoned not more than five years, or both." 18 U.S.C. § 2520 (1982) provides: "Any person whose wire or oral communication is intercepted . . . in violation of this chapter shall . . . have a civil cause of action against any person who intercepts . . . such communications . . . ."

46. 488 F.2d 193 (9th Cir. 1973).

47. 235 Kan. ___, 679 P.2d at 205.

willfully violate title III are subject to its civil and criminal penalties.[48] Cases dealing with the willfulness issue have found eavesdroppers liable for willful interceptions when their behavior was unusually intrusive. Title III's drafters stated that "good faith mistakes under the statute will not be subject to criminal sanctions. This seems only just in light of the technical character of the Act."[49] In other words, when there is good faith reliance by the eavesdropper on authoritative advice that his actions are lawful, he will not be held liable for a willful violation of the statute.

The Senate report on the statute cites *United States v. Murdock*[50] for its definition of willful. In *Murdock* the Supreme Court held that the defendant's good faith belief that he need not supply tax information to the Bureau of Internal Revenue was not a willful violation of the law imposing a criminal punishment for persons who failed to supply information to the Bureau. The *Murdock* court observed:

> The word [willful] often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal statute it generally means an act done with a bad purpose, without justifiable excuse, stubbornly, obstinately, perversely. The word is also employed to characterize a thing done without ground for believing it is lawful, or conduct marked by careless disregard whether or not one has the right so to act.[51]

Some courts have added to this definition the requirement that the defendant be found guilty of unusually intrusive behavior. *State v. Dwyer*,[52] was a case involving unusually intrusive behavior. A defendant accused of a murder moved to suppress

---

48. *See* 18 U.S.C. §§ 2511(1), 2520 (1982).

49. Blakey & Hancock, *A Proposed Electronic Surveillance Control Act*, 43 NOTRE DAME LAW. 657, 666 (1968).

50. 290 U.S. 389 (1933).

51. *Id.* at 394 (citations omitted). It might be argued that this definition of willful should apply only in criminal cases and that in civil cases, the willfulness of title III violations should rest only on the showing of a volitional act on the part of the defendant. On the other hand, the legislative history of title III suggests only one definition of willfulness: "A violation of each [subsection] must be willful to be criminal." S. REP. No. 1097, 90th Cong., 2d Sess. 93, *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 2112, 2181 (1968). No reference is made to a separate definition for civil cases. Furthermore, courts have employed the *Murdock* definition of willful in civil cases instead of using the common law definition. *See, e.g.*, By-Prod Corp. v. Armen-Berry Co., 668 F.2d 956 (7th Cir. 1982).

52. 120 Ariz. 291, 585 P.2d 900 (1978).

evidence of incriminating calls overheard by a telephone operator when she listened to the defendant's emergency telephone call to the deceased's wife. The state argued that the interception was not willful under the definition of 18 U.S.C. § 2511(1)(a). The Court of Appeals of Arizona disagreed, holding that the operator's listening to the conversation for a full fifteen minutes could not have been inadvertent. Neither could the operator's listening to the call for "no purpose at all, other than to fill a bored telephone operator's day" fall within the statutory exception for interceptions made in the ordinary course of a telephone company's business.[53]

Seemingly inapposite to *Dwyer* is *United States v. Axselle*,[54] wherein a motel switchboard operator overheard a caller ask a guest of the hotel whether he had allowed anyone near the trunk of his car. The operator listened to the conversation for another three to five minutes, overhearing information that seemed to suggest that criminal activity was afoot. The operator conveyed the information to drug enforcement officials. Indicating that its decision was a close call, the Tenth Circuit refused to overturn the district court's holding that the interception was inadvertent. The court stated that "[t]he question raised is serious because of the length of time [the operator] admits staying on the line—up to five minutes . . . . We are also concerned about her remarks that the comments overheard were 'interesting' and that they aroused her 'curiosity.' "[55]

Good faith reliance on authoritative advice that an eavesdropper's actions are not criminal may protect the eavesdropper from a finding of willfulness. In *Citron v. Citron*[56] the defendant's good faith reliance on expert advice negated the criminal element of willfulness in the case against her. In that case, the defendant was charged with criminal violation of title III for recording her husband's telephone conversations without his consent. The defendant argued that she had not acted in willful vio-

---

53. *Id.* at 294, 585 P.2d at 903. *Compare* State *ex rel.* Flournoy v. Wren, 108 Ariz. 356, 498 P.2d 444 (1972) (Supreme Court of Arizona quashed the trial court's order to suppress evidence gained when a motel operator, away from the switchboard, was unable to disconnect himself from the conversation on grounds that the interception was inadvertent), *with* Roberts v. State, 453 P.2d 898 (Alaska 1969) (a housewife's listening for ten minutes to a conversation over what she believed was her private line was inadvertent).

54. 604 F.2d 1330 (10th Cir. 1979).

55. *Id.* at 1335.

56. 539 F. Supp. 621 (S.D.N.Y. 1982).

lation of title III because her lawyer had assured her previously that the interceptions were legal. The District Court for the Southern District of New York agreed, but stated that an individual's actions could be considered willful if, for example, in cooperating with law enforcement personnel, he was "less than diligent in ascertaining the validity of an authorization which later turned out to have been invalid."[57] The court continued: "The Congress apparently concluded that it was important to the purposes of the Act that those called upon to implement officially sanctioned interceptions should be protected from liability as long as they relied in good faith on facially valid authorizations."[58]

Under the case law outlined above, the Howards' eavesdropping neighbor would not have been criminally liable for his initial, inadvertent tuning in of the defendants' telephone conversations. However, if he intentionally tuned in with a "perverse" motive, his actions, seemingly willful under the *Murdock* test, would give rise to criminal liability. The neighbors' liability for continuing to listen after inadvertently tuning in would hinge on the length of time he listened, and, according to *Dwyer* and *Axselle,* on his purpose in listening. Here also, a "perverse" motive would give rise to liability. Nevertheless, under *Citron* the neighbor's reliance on facially valid police instructions would negate any finding of willfulness for tuning in or for listening. A finding that the neighbor's behavior did not violate title III and that he was not criminally liable would not have meant that the information gathered was admissible. The court could have found that KBI's actions were willful and that, as a result, the information should have been excluded.[59]

---

57. *Id.* at 626.

58. *Id.*

59. Due to a higher standard of conduct for law enforcement officials, the defendants' burden for showing the police's willfulness would be lower that their burden for showing the neighbor's willfulness. *See, e.g.,* United States v. McIntyre, 582 F.2d 1221 (9th Cir. 1978), wherein two police officers "bugged" the office of their assistant chief without a warrant after seeking and following the advice of a communications technician for the state's Department of Public Safety. In upholding the officers' criminal convictions, the court found that the officers' reliance on the opinion of the Department of Public Safety amounted to a "defense of 'ignorance of the law,' which this and other courts have pointed out from time to time is no defense." *Id.* at 1224. The implication is that law enforcement officials' doubts about the legality of their searches call for prior judicial authorization. The absence in *Howard* of any time constraints or emergencies suggests that the KBI's actions, absent an effort to obtain a warrant, were reckless and hence, willful.

IV. Conclusion

In *State v. Howard* the Supreme Court of Kansas decided that a telephone conversation transmitted in part by FM radio waves and in part by wire was an oral communication within the meaning of title III. In determining that the defendants had no reasonable expectation of privacy in their private telephone conversation, the court overlooked important factors considered by a post-*Katz* line of cases. Principal among these was the fact that the defendants made the incriminating calls from their own home using a means of communication that is traditionally considered very private. The court erroneously presumed that excluding the information gathered meant finding the defendants' eavesdropping neighbor guilty of willfully violating title III. It overlooked the possibility of finding the law enforcement officials guilty of a willful violation and the neighbor innocent due to his reliance on facially valid police instructions. This result would have kept the eavesdropping neighbor out of jail and the damaging evidence out of consideration. In a world where traditionally private means of communication are coupled with nontraditional means of communication, one should be able to trust that traditional protections of his privacy still apply.

Scott C. Smith