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Criminal Procedure - Dismissal - Eavesdropping by Sheriff on Consultations between Criminal Defendant and His Attorney Requires Dismissal of Charges against Defendant

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by one is imputed to the other. However, if the principal in the first degree is guilty of no crime it seems to follow that no crime can be imputed.

The opinion in *Atencio* leaves little clue as to the rationale of the court's holding that the defendants are guilty of involuntary manslaughter. However, it is likely that the court affirmed the conviction on the theory that the acts of defendants were the proximate cause of the death. It is unlikely that the court fell into the same pitfall as did the Court of Criminal Appeals in *Bourne* in its enthusiasm to punish a morally evil, but not criminally responsible, person. If the court reached its conclusion on the theory of proximate cause, it is a border line, yet justifiable, decision. If the court reached its conclusion on the "imputation of guilt" theory the decision is incorrect and will have little value as a precedent.

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CRIMINAL PROCEDURE—DISMISSAL—EAVESDROPPING BY SHERIFF ON CONSULTATIONS BETWEEN CRIMINAL DEFENDANT AND HIS ATTORNEY REQUIRES DISMISSAL OF CHARGES AGAINST DEFENDANT.

State v. Cory (Wash. 1963)

During the course of his trial for burglary and larceny, the defendant discovered that the sheriff and his officers had placed a microphone in the attorney-client consultation room. The defendant informed the trial court, and in the subsequent investigation a microphone and several tape recordings were discovered. The court refused to dismiss the information, but ordered the tapes to be played in the presence of the defendant, his counsel and the prosecuting attorney. The trial judge stipulated that upon proper motion he would exclude any use of the tape recordings. The defendant was convicted and appealed. The Washington Supreme Court reversed, *holding* that eavesdropping by the sheriff and his officers upon private consultations between defendant and his attorney vitiated the whole criminal proceeding, requiring dismissal of the charges. *State v. Cory*, 382 P.2d 1019 (Wash. 1963).

Though it is a person's Sixth Amendment right to effective counsel that is involved in this case, it is beneficial for purposes of introduction and comparison to discuss briefly the rights guaranteed by the Fourth and Fifth Amendments to the United States Constitution and the methods by which these rights have been secured.

Unlawful search and seizure is prohibited by the Fourth Amendment. Though the courts have always demanded that a search and seizure be

conducted in accordance with constitutional rights, it was not until *Weeks v. United States*[1] that an exclusion rule offered protection in the federal courts against evidence which was the fruit of an unlawful search and seizure.[2] In 1961, the Supreme Court held the exclusion rule to be a constitutional mandate applicable to state proceedings under the due process clause of the Fourteenth Amendment.[3] Thus, the Court established a more adequate and effective protection for the rights secured under the Fourth Amendment, but this remedy of inadmissibility cannot eliminate all prejudice, and in the instant case it is totally ineffective, because wiretapping and electronic eavesdropping do not constitute a search and seizure.[4] Electronic eavesdropping is also distinct from wiretapping,[5] and thus not within the protection afforded by the Federal Communication Act.[6] Recourse to the attorney-client privilege would be similarly unavailing, for the courts have consistently held that the privilege does not extend to eavesdroppers, whether they be such deliberately or by chance.[7]

The use of confessions obtained by duress,[8] prolonged questioning,[9] physical[10] or psychological coercion,[11] or where obtained after an unwarranted delay in presenting the accused before a commissioner or magistrate[12] is a violation of the Fifth Amendment privilege against self-incrimination. A confession, to be admissible, must be voluntary by federal

1. 232 U.S. 383, 34 S.Ct. 341 (1914). Evidence obtained exclusively by state officers acting under state law has also been excluded when the means used were opposed to federal standards. Elkins v. United States, 364 U.S. 206, 80 S.Ct. 1437 (1960). For the position of the states at the time see Appendix, Tables A-J, Wolf v. Colorado, 338 U.S. 25, 33-39, 69 S.Ct. 1359, 1364-67 (1949). Evidence obtained unlawfully by federal agents and rejected in the federal courts cannot be used in a state court. Rea v. United States, 350 U.S. 214, 76 S.Ct. 292 (1956). Evidence obtained unlawfully by state officers and passed on to federal agents is also excluded in the federal courts. Lustig v. United States, 338 U.S. 74, 69 S.Ct. 1372 (1949).

2. In the early cases even though a search and seizure was declared unconstitutional, the evidence obtained thereby was still admissible and competent proof. United States v. La Jeune Eugenie, 26 Fed. Cas. 832 (No. 15551) (D. Mass. 1822).

3. Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684 (1961).

4. *E.g.*, Olmstead v. United States, 277 U.S. 438, 48 S.Ct. 564 (1928).

5. Goldman v. United States, 316 U.S. 129, 62 S.Ct. 993 (1942); United States v. Silverman, 166 F. Supp. 838 (D.D.C. 1958). For an excellent analysis of the wiretap problem, see Lopez v. United States, 83 S.Ct. 1381 (1963); On Lee v. United States, 343 U.S. 747, 72 S.Ct. 967 (1952) (dissenting opinion).

6. 48 Stat. 1103 (1934), 47 U.S.C. § 605 (1958).

7. 8 WIGMORE, EVIDENCE § 2326 (McNaughton rev. 1961) "One who overhears the communication, whether with or without the client's knowledge, is not within the protection of the privilege." Wolfe v. United States, 64 F.2d 566 (9th Cir. 1933); State v. Sullivan, 60 Wash.2d 214, 373 P.2d 474 (1962); State v. Falsetta, 43 Wash. 159, 86 Pac. 168 (1906). The MODEL CODE OF EVIDENCE, rule 210 (1942) retained the "eavesdropper" exception to the attorney-client privilege, whereas the UNIFORM RULE OF EVIDENCE 26(1)(c)(ii) would prevent the revelations of an eavesdropper if the client could not reasonably anticipate the manner in which the communication was intercepted.

8. Haley v. Ohio, 332 U.S. 596, 68 S.Ct. 302 (1948).

9. Ashcraft v. Tennessee, 327 U.S. 274, 66 S.Ct. 544 (1946).

10. Lee v. Mississippi, 332 U.S. 742, 68 S.Ct. 300 (1948).

11. Macon v. Commonwealth, 187 Va. 363, 46 S.E.2d 396 (1948).

12. State v. Cooper, 2 N.J. 540, 67 A.2d 298 (1949); State v. Harvey, 145 Wash. 161, 259 Pac. 21 (1927).

standards,[13] and if not, the confession[14] and any evidence obtained thereby[15] will be excluded in the federal courts under the *McNabb* rule.[16] However, the present case does not involve an involuntary confession,[17] and the privilege against self-incrimination does not bar the testimony of third party eavesdroppers.[18]

The denial of the right to counsel to one accused of serious crime has been a thorny problem in the past, but the law now affords an indigent greater protection. In *Powell v. Alabama*[19] it was held a violation of due process to deny an indigent the right to counsel in the federal courts. Although this protection was not at first thought applicable to state proceedings,[20] the recent case of *Gideon v. Wainwright*[21] held this right an element of due process and therefore applicable to the states under the Fourteenth Amendment. Merely appointing counsel is not sufficient, however, to satisfy the commands of the Sixth Amendment, for it is a violation of due process not to grant counsel sufficient time to prepare,[22] or to deny the defendant opportunity to privately confer with counsel,[23] or to render useless the assistance of counsel by some extrinsic force, such as wire-tapping.[24]

The invasion of private consultations between counsel and a criminal defendant by an official eavesdropper is as clear a denial of the right to counsel as any of the aforementioned violations. The difficulty is not in identifying the nature of the violation, but in determining the proper remedy to make certain the defendant will not be prejudiced at trial, and to find

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13. Brown v. Mississippi, 297 U.S. 278, 56 S.Ct. 461 (1936).

14. The federal exclusion rule for coerced confessions, unlike the one against unlawful search and seizure, was recently held not binding on the states as a requisite of due process of law. Culombe v. Connecticut, 367 U.S. 568, 81 S.Ct. 1860 (1961); State v. Keating, 378 P.2d 703 (Wash. 1963). *But cf.* People v. Ditson, 369 P.2d 714, 727, 20 Cal. Rptr. 165, 178 (1961), where the California court presents a strong argument for the adoption of a state exclusionary rule.

15. The early cases held that a coerced confession was inadmissible, but permitted it to be used in obtaining additional information. State v. Turner, 87 Kan. 787, 109 Pac. 654 (1910). For a collection of English and early American cases in support of this view, see 53 L.R.A. 402 (1900).

16. 318 U.S. 332, 63 S.Ct. 608 (1943), 21 ROCKY MT. L. REV. 98 (1948).

17. In Olmstead v. United States, 277 U.S. 438, 48 S.Ct. 564 (1928), it was held that evidence obtained by eavesdropping was not inadmissible under the Fifth Amendment as an involuntary confession, unless the means employed constituted an unlawful search and seizure.

18. The privilege against self-incrimination would not offer a defense. Only when evidence has been unlawfully obtained is its introduction deemed a violation of the Fifth Amendment. Olmstead v. United States, *supra* note 17.

19. 287 U.S. 45, 53 S.Ct. 55 (1932).

20. Betts v. Brady, 316 U.S. 455, 62 S.Ct. 1252 (1942). This decision prolonged the existing double standard so that the federal courts insisted that the defendant have counsel, Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019 (1938), but the state courts provided counsel only for capital crimes and did not regard the denial of counsel itself sufficient to invalidate an otherwise fair trial. Gallegos v. Nebraska, 342 U.S. 55, 72 S.Ct. 141 (1951); Truelove v. Warden, 207 Md. 636, 115 A.2d 297 (1955).

21. 372 U.S. 335, 83 S.Ct. 792 (1963).

22. Betts v. Brady, 316 U.S. 455, 62 S.Ct. 1252 (1942).

23. United States v. Venuto, 182 F.2d 519 (3d Cir. 1950).

24. Coplon v. United States, 191 F.2d 749 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 926, 72 S.Ct. 363 (1952).

within that remedy the proper deterrent to make such conduct unappealing to law enforcement officers. An analysis of the problems presented in the leading cases on eavesdropping indicates there is an urgent need for a proper remedy, and that dismissal may be the only just one.

Matter of Fusco v. Moses,[25] the most noted informer case, involved an employee who suspected unlawful practices among his fellow employees. At the urging of his superior, he gained the suspects' confidence, attended their meetings with counsel and then dutifully reported all that he discovered. The court held this to be a clear denial of the right to counsel, and ordered the administrative hearing determination annulled and the reinstatement of the employees in their jobs. The New York Court of Appeals dismissed the action rather than permit the prejudice at the first hearing to be compounded by ordering a new hearing.

In *Caldwell v. United States*,[26] Bradley, an undercover agent for the prosecution, attended many conferences between the defendant and his counsel and was quite active in the preparation of the defense. He even simulated participation in a conspiracy to steal the defendant's file from the United States Attorney's office in order to aid in the conviction of the conspirators. The court, in awarding a new trial, condemned this activity on the part of the prosecution saying, "The prosecution is not entitled to have a representative present to hear the conversations of the accused and counsel."[27] The question avoided by the court is whether the awarding of a new trial under the facts of this case will in any way prevent prejudice to the defendant in the second trial. The harm in this situation is irreparable and no amount of diligence by the court in the second trial will eradicate the knowledge the prosecution has acquired by its subterfuge.

In New York where wiretapping was permitted, a state legislative committee investigating parole procedures wired the room set aside at the county jail for the accused to meet with their counsel. One of the prisoners discovered that recordings had been made and sought to prevent the publication of the tape recordings. The court declared this to be a denial of the right to counsel, but refused to enjoin the legislative committee from this practice or from the use of the tapes.[28] The public outcry from this decision resulted in several statutory modifications designed to curb this activity.[29]

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25. 304 N.Y. 424, 107 N.E.2d 581 (1952).

26. 205 F.2d 879 (D.C. Cir. 1953). The motion for a new trial was the only motion urged on appeal, but the court indicated that had the defendant shown prejudice an acquittal would have been granted. *Id.* at 881-82, n.11.

27. Coplon v. United States, 191 F.2d 749, 759 (D.C. Cir. 1951).

28. Lanza v. New York State Joint Legislative Comm. on Gov't Operations, 3 N.Y.2d 92, 143 N.E.2d 772, 164 N.Y.S.2d 9 (1957), *cert. denied*, 355 U.S. 856, 78 S.Ct. 85 (1957).

29. Chapter 851 of the Session Laws of 1958 amended the New York Civil Practice Act by extending the attorney-client privilege to include a person who obtains without the client's knowledge evidence of such communication, and is thereby excluded from testifying as to the contents of that communication. See 27 FORDHAM L. REV. 390 (1958). In 1963, Article 73, §§ 738-45, of the New York Penal Laws was enacted to deter and prohibit eavesdropping activity except under court supervision.

The celebrated case of *Coplon v. United States*[30] involved the interception of telephone conversations between the defendant and her attorney by means of wiretapping set up by the F.B.I. The court, in reversing and remanding the conviction, held that this activity was more than a mere breach of ethics, but rather constituted a denial of the right to counsel, which right did not depend on the proof of demonstrable prejudice for its vindication. This decision marked an advance in that the defendant need only show the interference with his right to have the conviction reversed and need not show prejudice in order to have his rights protected. This in effect put the burden on the prosecution to show its evidence had been lawfully obtained. The burden was easily circumvented by merely following up leads gained by the wiretapping in a lawful manner and thereby obtaining the same proof without having the difficulty of trying to get taped conversations past the trial judge.[31]

The oft-cited case of *Glasser v. United States*[32] must also be considered. Glasser and several others, United States attorneys, were charged with conspiracy to defraud the United States by allegedly accepting bribes in return for favorable treatment of those charged with violation of the federal liquor tax laws. Glasser obtained counsel and cocounsel. Kretshe, one of the codefendants, was without counsel and the court appointed Glasser's cocounsel to defend him. The attorneys for Glasser objected since there was a conflict of interests between Glasser and Kretshe because many of the supposedly incriminating statements and incidents set forth as proof of the conspiracy involved only Kretshe. The Supreme Court reversed the conviction and held that appointing Glasser's attorney to defend a defendant where there was such a conflict of interest was a denial of the right to the effective assistance of counsel. The court stated: "The right to have the assistance of counsel is too fundamental and absolute to allow the courts to indulge in nice calculations as to the amount of prejudice resulting from its denial."[33]

It is precisely to prevent this blind groping and judicial second-guessing that dismissal is urged as the only proper remedy where eavesdropping has destroyed the defendant's right to the assistance of counsel. Apart from the dismissal given in *Matter of Fusco v. Moses,*[34] the instant

30. 191 F.2d 749 (D.C. Cir. 1951).

31. The "fruit of the poisonous tree" doctrine which prohibits the derivative use of evidence obtained by wiretapping was established in Nardone v. United States, 308 U.S. 338, 60 S.Ct. 266 (1939). The doctrine was intended to prevent the use of "leads" obtained by wiretap. It places the primary burden on the defendant to prove that a wiretap has been used, but once this burden has been met, the onus shifts to the prosecution which then must show the lawful origin of the evidence it intends to introduce. The exclusionary effect of this rule has been circumvented in the past. Many times the defendant has been ignorant that a listening device was employed, and the initial burden is therefore impossible to meet, or the evidence obtained by a derivative use may be subsequently acquired in a perfectly legal manner which would be extremely difficult to discredit.

32. 315 U.S. 60, 62 S.Ct. 457 (1942).

33. *Id.* at 76, 62 S.Ct. at 467 (1942).

34. 304 N.Y. 424, 107 N.E.2d 581 (1952).

case is the first to award an outright dismissal because of electronic eavesdropping or wiretapping; in all the other cases, the appellate court either remanded or granted a new trial.

Any attempt to decide the correctness of an outright dismissal in situations such as the instant case presents must begin with an analysis of the nature of eavesdropping and of the possible remedies available.

Eavesdropping differs considerably from a coerced confession and evidence secured as a consequence of an illegal search and seizure. In the latter case documentary or real evidence (as opposed to testimony) will be excluded if illegally obtained. It is evidence of a definite quantity and quality; its prejudice to the defendant can be easily measured, and its illegal acquisition is easily proven by the defendant. If it is irrelevant, it will be excluded; if relevant, but unconstitutionally procured, the judge need only look to the circumstances of its acquisition. The rule of exclusion leaves the prosecutor in no better position than he was before he obtained the evidence. Even in the case where the state is better prepared to present its case (in the sense that the evidence may have led to other incriminating evidence) the relative infrequency of this case balanced against the need for correct convictions argues persuasively for the limitation of the remedy to its present form.

The efficacy of a new trial or an exclusionary rule to compensate the defendant for the introduction of a coerced confession presents a much closer question. Though untrustworthiness may be the theory for excluding such confessions, as a practical matter they speak often the truth and contain not only the admission of guilt, but also the circumstances of the crime, names of witnesses, and any number of other facts on which the prosecution can build a case. Since most confessions are procured as a result of intensive questioning, the inability to determine accurately the extent of the evidence obtained makes invoking the fruit of the poisoned tree doctrine much more difficult. The defendant thus bears an often insurmountable burden of proving that the prosecution's facts were gained as a result of the coerced confession rather than independent investigation. The prosecutor is surely in a more advantageous position once having had possessed the information. A new trial in such a case does not fully nullify the fruits of the coerced confession.

It is readily apparent that many of the dangers to a defendant's rights in these circumstances are also lurking in the situation presented by the instant case. But to compare the two cases and to require comparable remedies in both would perhaps argue more strenuously for a re-examination of the remedies given in the confession cases than to apply those remedies in the instant case.

Leaving that question aside, the two situations are not completely comparable. The instant case is laden with dangers far greater than those involved in the confession cases. Not only does the prosecution here gain facts and figures which it can investigate independently, but it also has a

direct preview of the strategy of the defense. Armed with this knowledge, no number of new trials will completely remedy the harm done to the defendant's right to effective counsel. This fact coupled with the uncertainty as to what the prosecution has overheard and the burden of proof it places upon the defendant if he wishes to have the evidence excluded, argue persuasively for the correctness of the dismissal as granted in this case.

On the other hand, the difficulty of crime detection and the obstacle this holding places in the way of police effectiveness might argue against the case. These considerations, while often weighty, do not stand on firm ground here. The police activities in the instant case are certainly not of such great necessity as to require much judicial protection. Nor, as a practical matter, will many correct convictions be lost. If the courts in general recognize dismissal as the only effective remedy in similar situations as this court has had the foresight to do, police and prosecutors will not be long in putting a stop to this unjust practice. Those public servants will lose no advantage to which they are entitled, and the defendant will have his rights fully protected.

Obstructing crime detection is not the only argument to be raised against dismissal. Society is entitled to obtain convictions of those guilty of crime. It may strongly be urged that dismissal, especially in cases where guilt is obvious from the information obtained, is too high a price to pay. Dismissal is a high price, but in this country, personal freedoms have always had a high value. It may allow some guilty persons to go free but there can be no denying that it effectively protects the personal rights guaranteed by the Constitution. The very harshness of the remedy may argue most persuasively for its general adoption. It need not be used often. Its exercise in only one case should be sufficient warning to the violators. If it is ruled that final dismissal[35] is the remedy to be applied in such cases, only foolish public servants would attempt to use the outlawed methods to obtain evidence.[36] As a result, few correct convictions would in practice be lost. Dismissal appears to be the only effective way to fully protect the right to counsel while avoiding ". . . nice calculations as to the amount of prejudice resulting from its denial."[37]

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35. Final dismissal would of course mean that the principles of double jeopardy would apply, and the defendant could not be tried a second time for the same offense.

36. This case involved an intentional eavesdropping. Whether dismissal should be given in a case of unintentional eavesdropping was a situation not mentioned by the court, but it would seem that the same dangers to the defendant would be present, and the same reasons would call for dismissal in that situation also. Another reason for allowing it in such cases would be to avoid the problem of giving the police a defense to their actions which they would undoubtedly raise in practically every case, thereby nullifying the remedy in all cases where the defendant could not prove it was intentional.

37. Glasser v. United States, 315 U.S. 60, 76, 52 S.Ct. 457, 467 (1942).