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MAZZONE V. STATE: THE MARITAL PRIVILEGE UNBOUND

Philip S. Jackson

Unlike an earthquake, where the aftershocks are often pale imitations of the original tectonic surge, the effect of an appellate opinion can only be truly measured by its own "aftershock." With but little fanfare, the Court of Special Appeals of Maryland in *Mazzone v. State*,¹ reversed the conviction of the leader of a suburban Baltimore County narcotics conspiracy where police officers intercepted, and prosecutors used in evidence, the wiretapped telephone conversations of a husband and wife carried on in furtherance of the conspiracy. The initial ripple created by *Mazzone* was slight. At first, most members of the defense bar and prosecutors assumed the exclusionary holding of *Mazzone* confined itself to those instances where wiretapped husband/wife communications were sought to be used in evidence. However, on closer inspection, *Mazzone's* aftershock is proving far more profound and, from a prosecution perspective, far more cataclysmic than the relatively minor stir it originally caused.

Roland Mazzone was the manager of a bar/restaurant in Baltimore County, Maryland. Baltimore County narcotics detectives, in league with the Harford County Drug Task Force, developed Mazzone as a target for their investigation after a series of wiretaps had led them to believe that Mazzone was the ultimate Maryland source for cocaine that had made its way into other suspects' hands. The circuit court judge who authorized the wiretaps ordered that, in accordance with Maryland law, officers conducting the wiretap monitor it in such a way as to minimize the interception of communications not otherwise subject to interception.² To facilitate implementation of that aspect of the wiretap order, the State's Attorney's Office drafted the customary "Minimization Guidelines." These guidelines are issued to enable officers monitoring the wiretap to conform their conduct to the mandate of wiretap order by outlining the circumstances under which officers may lawfully listen to telephone conversations as well as the circumstances under which they must stop listening. Although "Minimization Guidelines" are not normally part of the wiretap order itself, the guidelines in *Mazzone* were separately approved in writing by the judge who issued the wiretap orders. Ultimately at issue in *Mazzone* was a passage in the minimization guidelines which authorized the

interception of those conversations between Mazzone and his wife that related to the crime under investigation.

The Court of Special Appeals of Maryland found (and the Attorney General's Office conceded) that, under the statutory scheme of Maryland wiretap law, even criminally-related conversations of a husband and wife are privileged and that a court cannot therefore lawfully authorize neither the interception of, nor the use of evidence of such conversations. Having made that concession, the Attorney General's Office argued that a harmless error analysis should be employed. The State asserted that only one conversation between Mazzone and his wife was played before the jury who had found him guilty. It urged that the weight of this one piece of evidence was minuscule compared to the mass of lawfully obtained evidence that had been ushered in against Mazzone.

The court of special appeals, however, adopted a more radical stand. It reasoned that precedent requires a strict compliance standard for statutory preconditions to the lawful interception of wiretapped conversations. The court stated that "[t]o the extent that they merely explain the scope and conditions of the [wiretap] order, [minimization guidelines] are, indeed, implementing provisions. What minimization guidelines *cannot* validly do, however, is authorize something that the statute prohibits . . ."³ On that basis, the court further held that:

The error may well have been an innocent and inadvertent one, but its nature and effect was no different than if it had been in the order itself. It is for this reason that we conclude that the court erred in denying the motion to suppress the fruits of the wiretaps.⁴

In sum, the sanction imposed by the *Mazzone* court was the suppression of all evidence obtained over the life of the wiretap, regardless of whether an intercepted conversation involved the privileged husband/wife communications between Mazzone and his wife. In the court's view, the flaw in the minimization guidelines rendered invalid the entire wiretap order; it did not matter whether the communications of a husband and wife were actually intercepted. Taken to its

logical conclusion, *Mazzone*'s holding requires the suppression of all wiretap evidence of a hypothetical group of bachelor drug dealers if the attendant minimization guidelines would have authorized the interception of privileged conversations, including those that were never in fact intercepted.

To anyone remotely familiar with the pervasive use of wiretaps in the investigation of drug traffickers, as well as other violent offenders, and the universal use of language in minimization guidelines similar to that found offensive in *Mazzone*, that holding represents a serious setback to the successful prosecution of such dangerous criminals. To compound the frustration of the law enforcement community, there are currently manifold joint federal/local investigations where, as part of the investigation, a state-authorized wiretap employed minimization guidelines sanctioning what was held unlawful in *Mazzone*. According to dicta in *United States v. Glasco*,⁵ wiretap evidence obtained in violation of state wiretap law, notwithstanding its legality under Title III, would be inadmissible in the federal courts as well.⁶ *Mazzone*'s reach apparently extends to at least those federal criminal cases where evidence was gathered pursuant to a state wiretap order.

To reach its conclusion, the court of special appeals made four discrete rulings of law:

- (1) Conversations between a husband and wife intercepted over a wiretap are privileged in nature.⁷
- (2) By enacting section 10-407(d) of the Courts and Judicial Proceedings Article, the legislature intended that such privileged communications could not be lawfully intercepted.⁸
- (3) The minimization guidelines authorized the interception of such protected conversations, and are therefore flawed.⁹
- (4) That flaw requires suppression of the entirety of the fruits of the wiretap.¹⁰

Remarkably, there is not one Maryland appellate case directly supporting any of these propositions. *Mazzone*'s conclusions are instead the product of analysis based on analogy and an attempt to discern the sometimes cryptic intent of the legislature. Accordingly, it is not surprising that the law enforcement community finds so much over which to despair in *Mazzone*. What follows is a dissection of each of the court's rulings leading to its conclusion.

The Application of the Marital Communication Privilege to Intercepted Wiretap Communications.

The court's underlying assumption is that the privileged nature of communications between a husband and wife intercepted via wiretap render them inadmissible evidence. Thus, an analysis of the parameters of Maryland's marital privilege is in order.

The marital privilege in Maryland has two facets, both of which deal with the testimonial competence of witnesses who happen to be spouses. The statutory privilege appears in sections 9-105 and 9-106 of Maryland's Courts and Judicial Proceedings Article. Section 9-105 reads as follows: "One spouse is not competent to disclose any confidential communication between the spouses occurring during their marriage."¹¹ As an example of that aspect of

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the marital privilege, the privilege can be invoked by a husband to prevent his wife from testifying against him by revealing confidential communications that have passed between them. Additionally, section 9-106 reads: "The spouse of a person on trial for a crime may not be compelled to testify as an adverse witness unless the charge involves the abuse of a child under 18."¹² Consequently, a wife can invoke the privilege to avoid bearing witness against her husband.

Neither aspect of the privilege addresses marital communications otherwise lawfully intercepted pursuant to a court order. Both statutory marital privileges appear in the Courts and Judicial Proceedings Article under the subtitle "Competence, Compellability and Privilege."¹³ On its face, the marital privilege has the limited impact of affecting only the competency of spouses as witnesses, and it is contextually so placed in Maryland's Annotated Code. The statutes defining the privilege say nothing about whether communications between a husband and wife can be received in evidence by a court if obtained by otherwise lawful means. This is in accord with the Court of Appeals of Maryland decision in *Coleman v. State*,¹⁴ where the court stated that, "The essence of the privilege is to protect confidences only . . . and thereby encourage such communications free from fear of compulsory disclosure, thus promoting marital harmony."¹⁵ The entire orientation of the privilege, as codified, is to confine its application to those instances where a spouse is postured to testify against another spouse. The broad brush with which the *Mazzone* court paints the privilege is not consonant with the privilege's plain language.

As the United States Supreme Court has observed,

“[t]estimonial exclusionary rules and privileges contravene the fundamental principle that the ‘public . . . has a right to every man’s evidence.’ As such, they must be strictly construed . . . only to the very limited extent that . . . excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.”¹⁶

Following that principle, the Maryland appellate courts have indicated a preference for narrowly interpreting the marital privilege.¹⁷

In glossing any statute, “[i]t is elementary that a statute should be construed according to the ordinary and natural import of the language used, unless a different meaning is clearly indicated by its context, without resorting to subtle or forced interpretation for the purpose of extending or limiting its operation.”¹⁸ “Where statutory language of a statute is plain and free from ambiguity and expresses a definite and sensible meaning, courts are not at liberty to disregard the natural import of words with a view towards making the statute express an intention which is different from its plain meaning.”¹⁹

Unfortunately, in its analysis, the court in *Mazzone* violated these precepts in its strained and unprecedented interpretation of the marital privilege. Rather than narrowly interpreting the privilege, the court of special appeals expanded it. Rather than according the statute its clear and unambiguous meaning, the court of special appeals read some inarticulate legislative intent into it. In contrast to the reasoning in *Mazzone*, the marital privilege protected by Maryland law simply does not cover those cases where a marital communication is lawfully obtained by and disclosed through a third party.

The Legality of Intercepting Marital Communications.

Assuming for the sake of argument that it is unlawful to use in evidence or to otherwise disclose privileged marital communications, one may not rule out the possibility that the interception of such communications is entirely lawful. Nonetheless, the decision in *Mazzone* is also premised on the court’s view that section 10-407(d) of the Courts and Judicial Proceedings Article, a provision of the Maryland wiretap statute, precludes even the interception of legally privileged communications. In fact, the court characterized the unlawfulness of intercepting marital communications as “the linchpin” of its ultimate holding that all of the evidence obtained under the wiretap orders must be suppressed.²⁰ The court in *Mazzone* came to such a conclusion only after a lengthy discussion of the legislative intent behind the language of section 10-407(d). Despite its reasoning, the court blithely ignored both the plain language of the statute and the well established axioms of statutory construction set by the Court of Appeals of Maryland.²¹

Section 10-407(d) of the Courts and Judicial Proceedings Article reads as follows: “An otherwise privileged wire, oral or electronic communication intercepted in accordance with, or in violation of, the provisions of the subtitle, does not lose its privileged character.”²² That language appears in a subsection of a statute titled, “Lawful disclosure or use of contents of communication.” Both contextually and on its face, 10-407(d) speaks only to circumscribing the disclosure of intercepted privileged communications and carries no prohibition against the interception of such privileged communications. An appellate court should only try to discern the intent of the legislature if the language of the statute is ambiguous.²³ Unfortunately, the court of special appeals has ignored its own rule of statutory construction in going beyond the plain and unambiguous language of 10-407(d).

Even if legislative intent was relevant, the legislature, in employing the language of section 10-407(d), anticipated that privileged communications could be lawfully intercepted in accordance with the subtitle governing Maryland wiretap law, as is evidenced by section 10-407(d) itself which reads, “an otherwise privileged wire, oral or electronic communication intercepted in accordance with . . . the provisions of the subtitle, does not lose its privileged character.”²⁴ If indeed its finding that 10-407(d) precludes the interception of privileged communication is “the linchpin” of its holding, then the *Mazzone* court’s flawed analysis of that issue completely undermines that holding.

The Legality of the Minimization Guidelines. Again, assuming *arguendo* that the scope of Maryland’s marital privilege encompasses communications between a husband and wife intercepted during the course of a court ordered wiretap and that such communications cannot be lawfully intercepted, it does not necessarily follow that all communications between a husband and wife are privileged. There exists a recognized breed of communications that passes between a husband and wife to which the privilege does not extend.

While it is presumed that communications between a husband and wife are confidential, that presumption can be rebutted.²⁵ Accordingly, not all communications between a husband and wife are *per se* privileged. An example of a non-privileged marital communication is a husband’s instruction to his wife to discuss a matter with certain other individuals. So, for instance, where a husband and wife are involved with others in a narcotics conspiracy, an intercepted communication of the husband directing the wife to pay off a supplier of narcotics would not be privileged. Consequently, the communication could theoretically be lawfully intercepted and used as evidence.

However, the *Mazzone* court did not even consider the potentiality of non-privileged marital communications when it evaluated the sufficiency of the minimization guidelines. Without discussion, the court found the minimization guide-

lines fatally flawed where the guidelines merely allowed the interception of conversations between husband and wife that involved the commission of the crime under investigation. Although marital communications *may* be inadmissible evidence, *Mazzone* represents an unprecedented extension of Maryland law in that a Maryland appellate court has never held that all communications between a husband and wife are privileged. The court in *Mazzone* erred when, as part of its rationale, it found, as a matter of law, that law enforcement officers could never intercept any communications between a husband and wife, even if a conversation was criminal in nature. Such a conversation may or may not be privileged, and that assessment must be made on a case-by-case basis by the monitoring officers and a reviewing court.

The Suppression of the Fruits of the Entire Wiretap.

Finally, even if marital communications cannot be lawfully intercepted under any circumstances, minimization guidelines indicating a contrary view do not warrant suppression of the entire wiretap. The fruits of a wiretap can be suppressed on the basis of either the Fourth Amendment or the statutory exclusionary rule. The court in *Mazzone* based its holding on its interpretation of the statutory exclusionary rule. Section 10-405 of the Maryland Courts and Judicial Proceedings Article reads in whole:

Whenever any wire or oral communication has been intercepted, no part of the contents of the communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of this State, or a political subdivision thereof if the disclosure of that information would be in violation of this subtitle.²⁶

Regarding the application of this sanction to the issue of law enforcement compliance with the statutory minimization mandate, the Court of Appeals of Maryland has said, “[o]nce the directives of the statute have been met and a valid order has been issued, compliance, at least in the area of minimization of unauthorized communications, . . . can be judged by a more lenient substantial compliance standard.”²⁷ The court of appeals has further said that “the standard for compliance with the requirement to minimize is the overall reasonableness of the totality of the conduct of the monitoring agents in light of the purpose of the wiretap and the

information available to the agents at the time of the interception.”²⁸ Finally, the court of special appeals has itself recognized that “the great weight of authority . . . maintains that the failure to minimize requires only the suppression of those conversations which should not have been seized *and not the suppression of those conversations which were appropriately seized.*”²⁹

Contrary to the above cited precedent, the court in *Mazzone* found that the statutory minimization mandate requires strict compliance, as opposed to substantial compliance, and that a failure to so comply necessitated the suppression of all of the intercepted conversations, as opposed to the suppression of those conversations which should not have been seized. The incongruity of that holding is manifest in comparing the following scenarios. Where a wiretap’s minimization guidelines direct that, in conformity with *Mazzone*, communications between a husband and wife can under no circumstances be intercepted and where an officer monitoring that wiretap purposefully proceeds to intercept non-criminal personal marital communications, the only conversations subject to suppression would be those marital communications. However, where the minimization guidelines allow for the

limited interception of crime-related marital communications, and where no marital communications of any kind are intercepted or used in evidence, then, according to *Mazzone*, all calls intercepted over the wiretap must be suppressed. Under such reasoning, a conscious violation of the minimization guidelines nets a better result for a law enforcement agent than a good faith effort to abide by the minimization guidelines. If “statutes are to be construed reasonably with reference to the purpose to be accomplished . . . and in light of the evils or mischief sought to be remedied,”³⁰ the court of special appeals should not have permitted such an illogical reading of the statutory exclusionary rule of the Maryland Wiretapping and Electronic Surveillance statute.

Alternate Grounds for the Admission of Evidence.

In *United States v. Leon*,³¹ the United States Supreme Court held that evidence need not be suppressed when obtained through the police’s good faith reliance on a facially valid warrant that is later found lacking in probable cause. The Court concluded that a “good faith” exception to the exclusionary rule was proper because suppression of evidence in this situation would not further the deterrent function of the exclusionary rule.³²

It is now clear that, at least at the federal level, the “good faith exception” also applies to the statutory exclusionary rule governing wiretaps.³³ In *United States v. Donovan*,³⁴

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the Supreme Court stated that "not every failure to comply fully with any requirement provided in Title III [the Federal wiretap statute] would render the interception of wire or oral communications 'unlawful' To the contrary, suppression is required only for those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device."³⁵

It is difficult to conceive of a more compelling case for the application of the "good faith exception" than the *Mazzone* case and cases like it. The officers who implemented the minimization guidelines in *Mazzone* were apparently not lawyers. The Office of the Assistant State's Attorneys from Baltimore County drafted the guidelines. The drafters had instructed the officers how and when to intercept telephone conversations, and the officers had a reasonable basis for relying on those instructions. Further, those same minimization guidelines were approved by the issuing judge when he issued the ex-parte wiretap orders; he had thereby placed his own stamp of approval on the minimization guidelines, giving the officers every reason to believe they were acting lawfully. Finally, at the suppression hearing, yet another circuit court judge found no moment to find fault with the minimization guidelines.

Prior to *Mazzone*, no Maryland court had ever spoken to the issue, and most federal jurisdictions followed a rule of law that would have allowed the interception of marital communications here assailed.³⁶ The officers were justified in relying on the minimization guidelines issued by the four attorneys, two of whom were judges, who had condoned the interception of crime-related marital communications, and they had no way of anticipating the holding of the court in *Mazzone*. Under such circumstances, the suppression of the wiretap evidence would wreak a profound injustice. In accordance with the clear interpretation of both federal and Maryland law regarding the suppression of wiretapped communications, the Court of Appeals of Maryland should revisit the decision in *Mazzone* and reverse it.³⁷

Endnotes

¹98 Md. App. 490, 633 A.2d 918 (1993).

²Md. Cts. & Jud. Proc. Code Ann. §10-408(e)(3) (1989 & Supp. 1993).

³*Mazzone*, 98 Md. App. at 501, 633 A.2d at 923. (Emphasis added).

⁴*Id.* at 502, 633 A.2d at 923.

⁵917 F.2d 797 (4th Cir. 1991).

⁶*Id.* at 798-99. Title III is the federal wiretap and electronic surveillance statute, as codified, in 18 U.S.C. §§2510-2521 (1994).

⁷*Mazzone*, 98 Md. App. at 495, 633 A.2d at 921.

⁸*Id.* at 500, 633 A.2d at 922.

⁹*Id.* at 495, 633 A.2d at 921.

¹⁰*Id.* at 502, 633 A.2d at 923.

¹¹Md. Cts. & Jud. Proc. Code Ann. §9-105 (1993).

¹²Md. Cts. & Jud. Proc. Code Ann. §9-106 (1993).

¹³See Cts. & Jud. Proc. Code Ann. §§9-101 *et seq.* (1993).

¹⁴281 Md. 538, 380 A.2d 49 (1977).

¹⁵*Id.* at 541, 380 A.2d at 52 (emphasis added).

¹⁶*Trammel v. U.S.*, 445 U.S. 40, 50 (1980) (quoting *U.S. v. Bryan*, 339 U.S. 323, 331 (1950) and *Elkins v. U.S.*, 364 U.S. 206, 234 (1960)).

¹⁷See *Gutridge v. State*, 236 Md. 514, 204 A.2d 357 (1964); *Matthews v. State*, 89 Md. App. 488, 598 A.2d 813 (1991).

¹⁸*Coleman*, 281 Md. at 546, 380 A.2d at 54 (citing *State v. Fabritz*, 276 Md. 416, 421, 348 A.2d 275, 278 (1975)).

¹⁹*State v. Fabritz*, 276 Md. 416, 421-22, 348 A.2d 275, 284 (1975) (quoting *Gatewood v. State*, 244 Md. 609, 617, 224 A.2d 677, 682 (1966)).

²⁰*Mazzone*, 98 Md. App. at 497, 633 A.2d at 921.

²¹See *Fabritz*, *supra* note 19.

²²Md. Cts. & Jud. Proc. Code Ann. §10-407(d) (1993).

²³*Fabritz*, 276 Md. at 421-22, 348 A.2d at 284.

²⁴Md. Cts. & Jud. Proc. Code Ann. §10-407(d) (1993).

²⁵*Coleman v. State*, 281 Md. 538, 543, 380 A.2d 49, 52 (1977).

²⁶Md. Cts. & Jud. Proc. Code Ann. §10-405 (1993).

²⁷*Bailey v. State*, 289 Md. 143, 153-54, 422 A.2d 1021, 1027 (1980).

²⁸*Spease v. State*, 275 Md. 88, 99, 338 A.2d 284, 290 (1975).

²⁹*Bell v. State*, 22 Md. App. 496, 505, 323 A.2d 677, 681-82 (1975) (emphasis added).

³⁰*State v. Fabritz*, 276 Md. 416, 421, 348 A.2d 275, 278 (1975) (citations omitted).

³¹468 U.S. 897 (1984).

³²The exception also applies when the police obtain evidence in reliance on a warrant later found technically defective. *Massachusetts v. Sheppard*, 468 U.S. 981 (1984).

³³18 U.S.C. §2515 (1994). See *United States v. Malekzadeh*, 855 F.2d 1492, 1497 (11th Cir. 1988), *cert. denied*, 489 U.S. 1029 (1989); *United States v. Butz*, 982 F.2d 1378 (9th Cir. 1993); and *United States v. Aiello*, 771 F.2d 621 (2d Cir. 1985).

³⁴429 U.S. 413 (1977).

³⁵*Id.* at 433-34.

³⁶See *United States v. Harrelson*, 754 F.2d 1153 (5th Cir. 1985); *United States v. Neal*, 743 F.2d 1441 (10th Cir. 1984); and *United States v. Kahn*, 471 F.2d 191 (7th Cir. 1972).

³⁷*Mazzone v. State* is scheduled for oral arguments in the Court of Appeals of Maryland in September, 1994.

About The Author

Philip S. Jackson is an attorney with the United States Attorney's Office for the District of Maryland. Mr. Jackson graduated from the University of Baltimore School of Law in 1984.