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Criminal Law And Procedure—Evidence Obtained by Means of Wiretap Admissible in State Criminal Proceeding

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been safeguarded by having counsel. The harshness of the statute under which the accused was tried would not enter into the accepted calculation of due process, since it was admittedly not unconstitutional. The remaining element, the mental condition of the accused at the time of the commission of the act, which to the Court seemed deserving of great weight, has not been previously introduced into the formula. It is true that the mental condition of the accused at the time of plea, and even during the pre-arraignment stages of criminal proceedings, have been held to affect constitutionally the acceptance of a plea or in the latter instance the admissibility of a confession.[17] The mental condition of the accused at the time of the act had been regarded by the trial court, and its value as a defense presumably judged by the accused's attorney in advising the accused to plead guilty. Accordingly, fresh consideration of this factor in a coram nobis hearing does not seem especially called for by the demands of due process. It is quite clear that all of these factors entered into the Court's decision, and all the factors appear in toto to amount to the deprivation of due process. But little in the Court's holding suggests anything more than an ad hoc decision tied to a combination of facts having varied significance. The decision affords only limited authority for including any one factor as dominant in reaching the conclusion of whether there was due process, although now in a minimal way these new factors may properly be considered in determining whether or not the accused's plea has been fairly taken. The holding of the instant case is in accord with the recent pronouncement by the Court regarding the scope of coram nobis, "this court has not hesitated to expand its scope when necessary to afford the defendant a remedy in those cases in which no other avenue of judicial relief appeared available."[18]

W. J. L.

EVIDENCE OBTAINED BY MEANS OF WIRETAP ADMISSIBLE IN STATE CRIMINAL PROCEEDING

Defendants were convicted on gambling indictments through evidence obtained by intercepted telephone conversations. From adverse judgments of the County Court and Appellate Division, defendants appealed to the Court of Appeals. *Held*: convictions affirmed, three judges dissenting. Wiretap evidence secured pursuant to state law is admissible in evidence in New York criminal proceedings. *People v. Dinan*, 11 N.Y.2d 350, 183 N.E.2d 689, 229 N.Y.S.2d 406 (1962).[1]

In New York, though statute forbids such evidence to be introduced in

17. Gallegos v. Colorado, supra note 15; Culombe v. Connecticut, 367 U.S. 568 (1961); Haley v. Ohio, supra note 15; People v. Boehm, 309 N.Y. 362, 368, 130 N.E.2d 897, 900 (1955).

18. People v. Hairston, 10 N.Y.2d 92, 93-94, 176 N.E.2d 90, 91, 217 N.Y.S.2d 77, 78 (1961).

1. 15 A.D.2d 786, 224 N.Y.S.2d 624 (2d Dep't 1962).

a civil case,[2] wiretap information may be lawfully obtained by a state official through a court order.[3] Such information, although it violates a federal statute,[4] and exposes the state official to criminal penalties, has nonetheless been admissible in evidence in New York state criminal proceedings.[5] A federal officer, however, may not testify as to wiretap evidence in a state proceeding.[6] This federal procedural prohibition likewise applies to a state official who attempts to testify in a federal proceeding concerning such evidence, notwithstanding the fact that it was obtained according to state law.[7] In view of the federal statute and inconsistent positions between New York and federal courts, one judge has refused to issue such a court order permitting the use of electronic eavesdropping.[8]

The current problem was first brought before the Supreme Court in 1928, in *Olmstead v. United States*,[9] which held that wiretapping did not constitute an unreasonable search and therefore was not constitutionally prohibited. Within six years, Congress passed Section 605 of the Federal Communications Act which forbade either the interception or the divulgence of interstate or foreign communication by wire which was not authorized by the sender.[10] Although the statute was held to extend to federal officers,[11] private persons,[12] intrastate as well as interstate communication,[13] the Supreme Court in *Schwartz v. Texas* held that wiretap evidence migh be received in a state court, although the means of obtaining it and its divulgence violated federal law.[14] The resulting principles remained controlling until recently, when a question was raised whether the admissibility of wiretap evidence was any longer a procedural rule of the forum. In 1961, the focal point in the controversy centered on the Supreme Court decision of *Mapp v. Ohio,* which made applicable to the states the exclusionary rule that evidence obtained by illegal search and seizure was inadmissible.[15]

The issue in the case at bar was whether *Mapp* had the effect of depriving the states of giving effect to their own public policy "guaranteed" them by the Court in *Schwartz v. Texas.* Although the Supreme Court last month denied *certiorari* in the instant case, thus precluding review of this question for the

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2. N.Y. Civ. Prac. Act § 345(a).
3. N.Y. Const. art. I, § 12; see also N.Y. Code Crim. Proc. § 813(a).
4. 47 U.S.C. 605 (1934).
5. Schwartz v. Texas, 344 U.S. 199 (1952); People v. Feld, 305 N.Y. 322, 113 N.E.2d 440 (1953).
6. Schwartz v. Texas, supra note 5.
7. Benanti v. United States, 355 U.S. 96 (1957).
8. See in re Interception of Telephone Communications, 9 Misc. 2d 121, 170 N.Y.S.2d 84 (Sup. Ct., 1958).
9. 277 U.S. 438 (1928).
10. Supra note 4.
11. Nardone v. United States, 302 U.S. 379 (1937).
12. Ibid.
13. Weiss v. United States, 308 U.S. 321 (1939).
14. Supra note 5.
15. 367 U.S. 143 (1961).

time being,[16] the majority in *Dinan* believed that *Mapp* had no effect on the wiretap doctrine, *sub silentio,* in view of a decision on the eve of *Mapp* denying a federal injunction sought against a state court in the use of such evidence.[17] Indeed, the majority had few qualms about admitting wiretap evidence in such a case and stated that it would continue to do so until it is precluded by statute or Supreme Court ruling.[18] The Court reëmphasized the proposition that the question of admissibility of such evidence was a policy of the forum rather than a constitutional mandate or a congressional requirement. The Court said that the rationale behind *Mapp* was solely an effective means of enforcing constitutional prohibition against unreasonable search and seizure but that the same sanction could not be applied to the enforcement of a federal statute, to wit, section 605 of the Federal Communications Act.

The dissent attacked the majority on two grounds. First, it reasoned that the Court's decision resulted in legal sanctioning of criminal activities by state officials. It further declared that the concept of judicial integrity demanded conformity to the federal rule in this matter.

There are legal authorities who maintain that the New York method should be followed and the federal statute redrafted so as to allow in certain cases wiretapping or "mechanical overhearing."[19] The Justice Department earlier this year requested federal legislation to permit the use of wiretaps in specific major offenses.[20] Despite the fact that the need for efficient, effective, and modern crime detection is the basis for this New York decision, the Court offers no persuasive arguments to buttress their holding. If we as citizens under this statute, have neither a constitutional right nor a congressional mandate, we do have, at least a clearly defined substantive right as regards the privacy of our communications. If the Court of Appeals is going to allow our federal rights to be violated criminally, a cogent analysis of the problem and a reasoned result is in order. We may note that any attempt to vindicate wiretapping should be subject to an immediate attack, that personal privacy should be entitled to more judicial protection than property rights, which the courts have so scrupulously guarded in the past. The limited use of wiretapping should be sanctioned if two factors exist: first, that the requirements of national security necessitate such a use of wiretap; second, that wiretapping is essential and merely not convenient for combatting criminal activity. Such factors have not thus far been successfully demonstrated and there is doubt as to whether

16. —U.S.— (1962).
17. Pugach v. Dollinger, 365 U.S. 458 (1961).
18. People v. Dinan, 11 N.Y.2d 350, 183 N.E.2d 689, 229 N.Y.S.2d 406 (1962).
19. Fisch, New York Evidence § 728 (1959). "The prohibition embodied in section 605 of the Federal Communications Act should be redrafted so as to allow law enforcement officers to utilize all the mechanical and electronic devices available for intercepting messages and conversation provided certain safeguards to the right of privacy have been met. . . ."
20. Fisch, New York Evidence § 727 (Supp. 1962) (". . . Such wiretaps would be limited to the investigation of murder, kidnapping, blackmail, bribery and illegal narcotics traffic . . .").

they are susceptible of demonstration.[21] Mere convenience in crime detection as well as unproved allegations of threats to national security do not provide a convincing argument for mass governmental invasion of personal privacy. Under New York law the right against unreasonable search and seizure is substantially protected by requiring a warrant which describes with particularity "the place to be searched, and the person or things to be seized."[22] This provides an effective safeguard against government evidentiary expeditions in the area of real and personal property. Immediately following, a clause in the Constitution dealing with wiretapping states: "The right of the people to be secure against unreasonable interception of telephone communications shall not be violated." This clause, however, is completely negated by the following sentences which permit government officials to listen to each and every conversation of a citizen regardless of its relevance to the investigation in the hopes that something incriminating will turn up. Thus, while the law provides adequate protection against intrusions into a citizen's real and personal property rights, it has emasculated an individual's right to privacy. We have advanced beyond the Lockean concept of law as primarily the protector of property, to a realization of law "as the strongest link between man and freedom."[23] Such tactics are reminiscent of the monstrosities in George Orwell's *Nineteen Eighty-Four* and are inconsistent with the principles of a free society.

W. A. C.

EVIDENCE OF CONTEMPORARY COMMUNITY STANDARDS IRRELEVANT IN OBSCENITY PROSECUTION

Two bookstore operators in the City of New York were arrested by a plainclothes detective after his purchase of allegedly obscene publications. Both were charged with violating section 1141 of the Penal Law, which makes it a misdemeanor for anyone to sell or have in his possession with intent to sell any *obscene book*. Upon the trial of the action the defense counsel attempted to introduce into evidence various other publications similar in content to those the defendants had sold. These were offered in proof by presenting them to the arresting officer, who was then asked if he had seen such issues sold throughout the city. Moreover, counsel attempted to put two such publications, handled by other newsstands and bookstores, directly into evidence to show the state of contemporary community standards regarding obscenity. The trial court excluded such evidence. A collateral issue was raised as to whether the proof was sufficient to prove that the defendants had knowledge of the contents of the books. On appeal of convictions, *held*; affirmed, two judges concurring in separate opinions and two judges dissenting. The proffered evi-

21. Williams, One Man's Freedom, ch. 7 at 88-106 (1962). For an interesting argument against the use of wiretap evidence.
22. N.Y. Const. art. I, § 12; N.Y. Civ. Prac. Act § 345(a).
23. Proclamation of President John F. Kennedy, Law Day May 1, 1961.