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## Evidence - Wiretapping - Extension Telephones

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a crime which was "about to be committed."<sup>27</sup> This further suggests the awareness that a modernization of arrest privileges is needed to make them consistent with the conditions under which the police today must protect the public.

*Thomas P. Ruane*

**EVIDENCE—Wiretapping—Extension Telephones—**The Supreme Court of Pennsylvania has outlined the prohibitive reach of the wiretap statute as encompassing mechanical invasions over telephone extensions and listening on an extension without the consent of the communicating parties.

*Commonwealth v. Murray*, 423 Pa. 37, 223 A.2d 102 (1966).

The defendant, an employee of Summit Industries, contacted an old acquaintance and employee of a competitive firm, Lanston Company, and offered him a sum of money in exchange for confidential company information. This solicitation was reported to the Lanston officials and an effort was made to secure evidence in order to prosecute the defendant under the Penal Code of 1939<sup>1</sup> for offering to bribe or bribing a corporate employee. Private detectives were hired and they instructed the Lanston employee to telephone the defendant and make further arrangements for the transfer of the information while they listened on an extension phone and recorded the conversation with a mechanical device attached to the extension.<sup>2</sup>

Using the evidence that the detectives secured by listening on the extension phone the trial court convicted the defendant<sup>3</sup> despite defense's protestations that what was overheard was inadmissible under the Act of July 16, 1957, P.L. 956 section 1 which makes it a crime to "intercept a communication by telephone or telegraph without permission of the parties to such communication."<sup>4</sup> The Superior Court affirmed the con-

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27. *Commonwealth v. Hicks*, 209 Pa. Super. 1, 5, 223 A.2d 873, 875 (1966).

1. The statute provides in pertinent part: "Whoever offers or gives to any agent, employee, or servant of another . . . any commission, money, property or other valuable thing, without the knowledge and consent of the principal employer, or master as an inducement, bribe, . . . is guilty of a misdemeanor. . . ." PA. STAT. ANN. tit. 18, § 667 (1963).

2. The detectives took the contacted employee to their office and attached the device to their switchboard to record the conversation and simultaneously listened in while the employee phoned the call.

3. It should be noted that the evidence obtained by use of the mechanical recording was excluded under the Pennsylvania "wiretap" statute and specifically distinguished from evidence secured by listening over the extension.

4. The statute provides in pertinent part: "No person shall intercept a communication by telephone or telegraph without permission of the parties to such communication. No person shall install or employ any device for overhearing or recording communications pass-

viction but rejected the distinction drawn by the trial court between the mechanical eavesdropping and the overhearing and held that the Act of 1957 did not prevent the use of either method.<sup>5</sup>

Speaking for the court, Justice Musmanno reversed the holding of the Superior Court and interpreted the legislative intent and terminology as proscribing admission of all evidence secured by recording a conversation over an extension without the consent of the communicating parties. It was found as a matter of fact that the detective's testimony was so tainted by his reliance on the recording that independent testimony as to what he had heard eight months before was virtually inconceivable<sup>6</sup> and, therefore, the only determination made on the facts was that any evidence obtained through the use of a recording device attached to an extension violated the statute. In the court's opinion no procedure could more flagrantly violate the statute's proscriptions, for the unequivocal wording "interception" and "device for overhearing" manifestly demonstrate the legislature's aversion to all such forms of "wiretapping."<sup>7</sup>

The court did not, however, limit its holding to the facts of the instant case, but extended its interpretation of the statute by hypothesizing that even had there been no mechanical device used in the case, merely overhearing a conversation on an extension phone constitutes a violation of the statute. It arrived at this construction by emphasizing the sanctity of an individual's right to privacy and rejecting all alleged distinctions between using a mechanical device to record a conversation and listening on an extension as mechanical and artificial.

The dearth of Pennsylvania precedent interpreting this aspect of the statute well reflects the basis for the divergent views expressed on the present court<sup>8</sup> and would indicate that their decision was probably dic-

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ing through a telephone or telegraph line with intent to intercept a communication in violation of this act. No person shall divulge or use the contents or purport of a communication intercepted in violation of this act. . . . PA. STAT. ANN. tit. 15, § 2443 (1958).

5. *Commonwealth v. Murray*, 206 Pa. Super. 298, 213 A.2d 162 (1965). It held that neither using a recording device on an extension nor overhearing on an extension were "interceptions" within the statute.

6. Using the detective's admission that his testimony was based on the recording the instant court reversed the trial court's factual determination that he testified from his own recollection.

7. In *Olmstead v. United States*, 277 U.S. 438 (1928), it was conclusively established that wiretapping was not prohibited by the Constitution. So at the very least, the Pennsylvania statute was drafted to prevent those elementary forms of wiretapping involving the attachment of mechanical devices to means of communication.

8. Justice Musmanno in speaking for the court spoke only for himself and Justice Bell. Concurring, Justice Eagen, with whom Justice Jones joined, agreed with the factual holding but believed that the statute was being misconstrued when it was applied merely to overhearing on an extension. Also concurring was Justice Roberts, with whom Justice O'Brien joined, and unequivocally construed the Pennsylvania statute as proscribing the use of mechanical devices on extension phones as well as overhearing, but took time to attempt to

tated by personal predilections rather than by a construction of legal dogma. In *Commonwealth v. Smith*<sup>9</sup> evidence was admitted that an officer overheard by answering a telephone while participating in a gambling raid, and in *Commonwealth v. Bruno*<sup>10</sup> a recipient of a call was permitted to use in evidence a recording of that call. Although the court does not mention either of these cases in its opinion and neither of them are conclusively determinative of the law as it pertains to extension inter-  
 loping, it would not have been unreasonable for the court in applying the latter case to arrive at a contrary result. For if the legislative intent allows an individual to tape his own conversation and then divulge it to another without the consent of the other party, then it should be no greater an intrusion of privacy for that same person to permit another to listen in on a different device within his possession, *i.e.*, a telephone extension.

Additional support for a contrary interpretation could have been found in the United States Supreme Court decision, *United States v. Rathbun*,<sup>11</sup> in which under a federal statute similar in nature to Pennsylvania's<sup>12</sup> the Court interpreted the legislative intent as permitting the overhearing of a conversation over an extension phone.<sup>13</sup> However, the instant court dismissed the *Rathbun* decision as inapplicable because of different consensual requirements.<sup>14</sup> But perhaps the decision was erroneously considered, for the holding was not based on the consensual requirements but instead revolved around the interpretation of "interception" as not including overhearing on permanent family conveniences such as extension phones.<sup>15</sup> And since this was the very issue that concerned the present court, it could have used the federal decision as a guideline in examining the reach of the Pennsylvania act.

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solve some of the ramifications of the decision that Justice Musmanno skirted. Justice Cohen vehemently dissented, contending that neither the recording device nor the overhearing were interceptions within the act in light of the *Rathbun* decision. And that even if the recording was illegal the detective's testimony should have been admitted because it was certainly independent testimony not based on the recording.

9. 186 Pa. Super 89, 140 A.2d 347 (1958).

10. 203 Pa. Super 541, 201 A.2d 434 (1964), *cert. denied*, 379 U.S. 965 (1964).

11. 355 U.S. 107 (1957).

12. The statute provides in pertinent part: ". . . and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence . . . or meaning of such intercepted communication to any person. . . ." 48 Stat. 1103 (1934); 47 U.S.C. § 605 (1962).

13. This statute was held not to be binding on the states in *United States v. Schwartz*, 344 U.S. 199 (1952).

14. It should be noted that the federal act requires the consent of only the sender to permit an interception, whereas the Pennsylvania act requires the consent of all the communicating parties.

15. See Bradley and Hogan, *Wiretapping: From Nardone to Benanti and Rathbun*, 46 GEO. L.J. 418, 441 (1958) and Meletzke, *Admissibility in Federal Courts of Evidence Overheard on Extension Phones*, 19 OHIO L.J. 345, 349 (1958) as concluding that it was the interpretation of "interception" on which the ultimate decision hinged.

No matter how explicit and lucid a court is in interpreting a statute, there inheres in its decision, as in the instant case, perplexing ramifications for future cases involving similar though not identical facts. As indicated by the dissenting opinion,<sup>16</sup> many ordinary business and family practices of overhearing phone calls would seem to be prohibited by the broad interpretation of the statute that was given by the court, unless such situations are regarded, as some writers suggest,<sup>17</sup> as implying consent by the communicating parties<sup>18</sup> or treating the eavesdropper as an alter ego of one of the parties, and thus taking the "interception" outside of the statute. Another potential problem is the restrictions on usual police tactics employing extension phones for law enforcement; but possibly the solution to that problem is to treat such procedures as unwarranted invasions of an individual's privacy which should be curtailed.

Such minor uncertainties can easily be resolved as they arise and should not overshadow the advantages derived from the court's commendable interpretation assuring the individual's right to privacy. Furthermore, although the holding on the facts, prohibiting the unconsented use of mechanical devices on extension phones, is unassailable under the wording of the act, the extended interpretation also proscribing listening on an extension absent mechanical devices, could have been adversely influenced by proper consideration of the *Rathbun* decision and Pennsylvania precedent in the area. However, it should be kept in mind that these considerations were only discretionary in their application and their disregard in no way vitiates the soundness or validity of the court's conclusions, but rather reflects the court's political and social concern to bridge the gap of constitutional deficiency and preserve a most basic freedom—the right to privacy.

*David J. Pleva*

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16. 423 Pa. at 65, 223 A.2d at 116 (1966).

17. See *United States v. Polakoff*, 112 F.2d 888 (2d Cir. 1940) (L. Hand, J.), suggesting that the rationale of implied consent can be used to handle such problems.

18. Using a similar rationale the Superior Court in *Commonwealth v. Goldberg*, 208 Pa. Super. 513, 224 A.2d 91 (1966) excluded a unique fact situation from the purview of the statute where a telephone subscriber attached a mechanical device to his home phone in an effort to record conversations between his wife and her paramour. The court held that such actions did not violate the Act of 1957 because the act was not designed to prevent a subscriber from "intercepting" for a "rightly paramount purpose". Basing its rationale on a New York decision the court held that "When such a subscriber consents to the use of his line, by his employee or by a member of his household, or by his wife, there is a condition implied that the telephone will not be used to the detriment of the subscriber's business, household or marital status." The conclusions in this case, however, appear unsubstantiated since the wording of the act in no way imparts such an exclusion as arrived at in this case and hopefully the decision will be reconsidered if taken on appeal.