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Wiretap Evidence from the Viewpoint of the Law Enforcement Officer

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NOTES

WIRETAP EVIDENCE FROM THE VIEWPOINT OF THE LAW ENFORCEMENT OFFICER

This article is offered as a guide to, and explanation of, the law pertaining to evidence gathered by means of wiretap apparatus. The subject will be discussed primarily from the point of view of the local and state law enforcement officer, and will indicate what procedures he may employ in gathering such evidence without rendering it inadmissible at a subsequent trial, and without subjecting himself to possible criminal and civil liabilities. The writer has been for a number of years a member of the Cheyenne, Wyoming Police Department, and has tried approach the subject at a practical and working level. Detail as regards court decisions construing federal and state law is necessary, but this will be kept to a minimum. Beginning with a look into the history of the question with its various ramifications, the discussion will follow first the line of federal decisions, then delve into some aspects of existing state law, and conclude with a discussion concerning the prospects of the admissibility of such evidence in the courts of Wyoming. As wiretapping is one form of

eavesdropping, other types of eavesdropping devices which do not technically constitute wiretapping will be discussed, but only as collateral to the main subject of wiretapping.

The law pertaining to evidence obtained by means of wiretap apparatus, although of relatively recent origin in the field of criminal jurisprudence, can be traced to common law rules regarding the admissibility of illegally obtained evidence. At common law, the fact that evidence was obtained by illegal means was not a valid objection to its admissibility, if relevant to the issue.[1] Within this general rule evidence gathered by eavesdropping was inadmissible because, although eavesdropping itself is not a crime, unless made so by statute,[2] it is often found that the eavesdropper's advantageous position resulted from some illegal act, such as trespass. At this point the modern scientific eavesdropping devices become relevant, since wiretap apparatus is a type of mechanical eavesdropping device. Wiretapping has been defined as the act of taking or seizing of a communication while on its way, by physical interruption, before its arrival at its destination.[3] A wiretapper is one who cut in on, or taps, by physical interruption, telephone or telegraph lines, and intercepts messages.[4]

The common law rule under which illegally obtained evidence is nonetheless admissible has undergone considerable change as the result of the interpretation by the United States Supreme Court of the Fourth and Fifth Amendments to the United States Constitution.[5] These amendments now operate as a complete bar to the admissibility, in both state and federal courts, of all evidence obtained by means of an illegal search and seizure.[6] The rule has not, however, always been applied this broadly. The so-called "federal exclusionary rule" was first applied in *Weeks v. United States,*[7] when the Court excluded from federal courts evidence obtained by illegal search and seizure. Originally the rule did not apply to evidence obtained by state officers for use in state prosecutions, or in federal prosecutions if obtained by state officers,[8] when there was no collusion between the two sets of officers. In 1956, the Court further restricted the use of such evidence by excluding it in state courts when gathered by federal officers.[9] In 1960, with the decision in *Elkins v.*

1. 1 Greenleaf on Evidence, § 254(a), (15th ed. 1892); VIII Wigmore on Evidence, §§ 2183 & 2184(b), (3rd ed. 1940); see also Commonwealth v. Dana, 2 Metc. 329, 337 (Mass. 1841); State v. Peterson, 27 Wyo. 185, 194 Pac. 342 (1920).
2. Mass. Ann. Laws, ch. 272, § 99.
3. 45 Words and Phrases, 125.
4. Webster, New International Dictionary.
5. The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The Fifth Amendment provides in part: ". . . nor shall any person be compelled in any criminal case to be a witness against himself. . . ."
6 Mapp v. Ohio, 367 U.S. 643 (1961).
7. Weeks v. United States, 232 U.S. 383 (1914).
8. Wolf v. Colorado, 338 U.S. 25 (1949).
9. Rea v. United States, 350 U.S. 214 (1956).

United States,[10] the Court excluded from federal courts evidence obtained from unlawful searches and seizures by state officers. Thus the *Rea* and *Elkins* cases opened the door to the decision in the *Mapp* case.[11]

Wiretap evidence, however, may be obtained otherwise than by unlawful search and seizure. In 1928 the Supreme Court decided its first wiretapping case in *Olmstead v. United States.*[12] The prosecution was based on evidence gathered by tapping the phone lines of a building which was the headquarters of a large-scale bootlegging operation. The taps were installed outside the building and there was no trespass upon the defendant's property and no illegal entry into the defendant's offices. The Court held under these circumstances that wiretapping did not involve a search and seizure. Moreover, the majority of the Court was of the opinion that the Fouth Amendment applied to tangible things and not intangibles such as recordings of conversations,[13] saying:

> Here we have testimony only of voluntary conversations secretly overheard. The Fourth Amendment itself shows that the search is to be of tangible material things, the person, the house, his papers, or his effects. The warrant calls for a description of the things to be seized. The amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the sense of hearing and that only. There was no entry of the houses or offices of defendants. . . .

It must be noted that this evidence was obtained in violation of a state criminal statute.[14] The doctrine of the *Olmstead* case is still the law today in federal courts as far as constitutional questions are concerned. Wiretapping, without trespass, or other modifying circumstances such as the commission of a battery, does not involve a violation of federal constitutional rights. The objection that a state criminal statute forbids wiretapping is pertinent only in state courts. This was the law of the federal courts until 1937.[15]

Three years after the passage of the Federal Communication Act of 1934[16] the case of *Nardone v. United States*[17] reached the Supreme Court. This wiretapping case was decided, not on any constitutional grounds, but on the basis of the Federal Communications Act. 47 U.S.C.A. § 605 provides in part as follows:

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10. Elkins v. United States, 364 U.S. 206 (1960).
11. Mapp v. Ohio, supra note 6.
12. Olmstead v. United States, 277 U.S. 438 (1928).
13. Ibid., 277 U.S. at 464, 468.
14. Wash. Rev. Code, ch. 9.61.010 (6) & (18) (1959).
15. For supplementary decisions in the lower federal courts see: Valli v. United States, 94 F.2d 687 (1st Cir. 1938); Beard v. United States, 65 App. D.C. 213 (1st Cir. 1938); Foley v. United States, 64 F.2d 1 (5th Cir. 1933); Morton v. United States, 60 F.2d 696 (7th Cir. 1932); Kearns v. United States, 50 F.2d 602 (6th Cir. 1931); Dowdy v. United States, 46 F.2d 417 (4th Cir. 1931).
    It is noted that the wiretapping involved in two or these cases, Morton v. United States and Valli v. United States, violated state criminal statutes.
16. 47 U.S.C. § 605.
17. Nardone v. United States, 302 U.S. 379 (1937).

> . . . No person, not being authorized by the sender, shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person. . . .

The Court held that the term "no person" included federal officers and since neither party to the conversation had authorized the wiretap, excluded such evidence. Thus deprived of the direct use of such evidence the officers then used it as an an indirect means of producing other evidence. In the so-called second *Nardone* case,[18] the Court rejected the evidence (which was otherwise admissible) thus obtained and held that not only were the recorded conversations themselves excludable, but also any other evidence obtained through the use of the illegal taps.

It must be remembered that although the Fourth Amendment bars the use of evidence secured by unreasonable search and seizure in both federal and state courts under the *Mapp* decision, Section 605 does not necessarily preclude the use of wiretap or other eavesdrop evidence in state courts. This question was settled in *Schwartz v. Texas,*[19] and more recently in *Pugach v. Dollinger.*[20] In the *Pugach* case the defendant was prosecuted in a New York state court. Much of the evidence against him was obtained by wiretaps in violation of Section 605. On this basis he petitioned the federal district court[21] for an order enjoining the use of this evidence against him in the New York court. The federal district court denied him relief and the Supreme Court affirmed on the authority of *Schwartz v. Texas* and *Stefanelli v. Minard.*[22]

There was some conflict in the lower federal courts over the *Nardone* construction of Section 605 with respects to intrastate telephone calls. As the Federal Communication Act of 1934 was enacted under the power of the commerce clause of the Constitution, the contention was made that it did not apply to strictly intrastate phone calls. This contention was upheld by some Courts of Appeal,[23] and denied in others.[24] This conflict of opinion was resolved in 1939 when the Court ruled in *Weiss v. United States*[25] that evidence acquired by means of tapping intrastate, as well as interstate, calls was covered by Section 605 and thus inadmissible in federal prosecutions.

Since the Supreme Court's interpretation of Section 605 apparently hinged on the word "interception" as accomplished by an actual physical touching or connection in the true wiretapping situation, federal agents began empolying new techniques with other types of eavesdropping equipment.

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18. Nardone v. United States, 308 U.S. 338 (1939).
19. Schwartz v. Texas, 344 U.S. 199 (1952).
20. Pugach v. Dollinger, 363 U.S. 836 (1961).
21. Pugach v. Dollinger, 277 F.2d 739 (2nd Cir. 1960).
22. Stefanelli v. Minard, 342 U.S. 117 (1951).
23. United States v. Bruno, 105 F.2d 921 (2nd Cir. 1939); Valli v. United States, 94 F.2d 687 (1st Cir. 1938).
24. Diamond v. United States, 108 F.2d 859 (6th Cir. 1938); Soblowski v. United States, 101 F.2d 183 (3rd Cir. 1938).
25. Weiss v. United States, 308 U.S. 321 (1939).

There followed many cases in which fine lines were drawn as to whether an "interception" had occurred, and this depended on whether or not an actual physical connection or touching had been employed which would bring the act within the meaning and operation of Section 605. When officers gathered information by holding a microphone against a telephone receiver and recording the conversation, a lower federal court held that there had been an interception within the meaning of Section 605 and excluded the recorded conversation from evidence.[26] However, when a microphone was merely placed in a position so that the words spoken into a phone could be heard and recorded on their way into the transmitter, the U. S. Supreme Court said there was no interception and the evidence was admitted,[27] and that there was nothing improper about the witness testifying as to what he heard another person say into the receiver.

In another case, where the evidence was obtained by placing a recording device on the bell box of a phone, the court excluded it on the grounds it was an interception within Section 605.[28] But the evidence was admissible when an agent put his ear next to a receiver and overheard a conversation with the accused,[29] and the evidence obtained by overhearing a conversation by means of a radio transmitter concealed on the person of an informer was not a violation of Section 605,[30] and admissible.

Several cases have involved the use of extension phones. In *Douglas v. United States,*[31] evidence gathered by a government agent by listening to a conversion between the accused and an informer over an extension phone was admitted. But such evidence was excluded when obtained by attaching a recording device to an extension phone.[32] Apparently the mere act of listening to a conversion over an extension phone is not a violation, but at least one state case indicates that if the extension was put in for this purpose alone there would be an interception within the meaning of the state statute, and the evidence obtained thereby excluded.[33]

The question of whether a third party has standing to object to the admission of wiretapped conversations was decided in *Goldstein v. United States,*[34] where the Court held that even though such evidence was obtained in violation of Section 605, this alone would not render it inadmissible against a stranger to the recorded conversation, i.e., only the sender, which includes both parties to the conversation, has standing to object.

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26. United States v. Hill, 149 F. Supp. 83 (S.D.N.Y. 1957).
27. Irvin v. People (Calif.), 347 U.S. 128 (1954).
28. United States v. Stephenson, 121 F. Supp. 274 (D.D.C. 1954).
29. United States v. Bookie, 229 F.2d 130 (7th Cir. 1956).
30. Lee v. United States, 343 U.S. 747 (1952).
31. Douglas v. United States, 250 F.2d 576 (4th Cir. 1957).
32. United States v. Polakoff, 112 F.2d 888 (2nd Cir. 1940).
33. Williams v. State, 109 So. 2d 379, . . . Fla. . . . (1959).
34. Goldstein v. United States, 316 U.S. 114 (1942. See also: United States v. Gris, 247 F.2d 860 (2nd Cir. 1957); United States v. Weinberg, 108 F. Supp. 567 (D.D.C. 1957).

Following the reasoning of these cases then, there apparently is no interception within the remaining of Section 605 if there is no physical interference with the telephone lines, or with the phones themselves. Furthermore the Fourth Amendment will not, per se, operate to bar eavesdrop evidence from admission unless the means used to gain access to the premises where the conversations are recorded is unlawful, or the gathering of the evidence is accomplished by some other unlawful action.[35] Although wiretapping in and of itself is not search and seizure, the Fourth Amendment becomes important in connection with the manner by which the tap is installed.

When devices such as dictaphones and detectaphones are used, it is usually necessary to gain access to the premises where the conversations are to be recorded in order to install them. Since these premises are seldom under the control of the officers, care must be exercised to make such access lawful. If the officers commit a trespass, or violate a breaking and entering statute, etc., in order to install their devices, then the Fourth Amendment may bar the admission of any evidence obtained thereby. This factor can best be realized by considering two cases bearing on this point which were decided by the United States Supreme Court. In *Goldman v. United States*[36] the Court held that recordings made by placing a detectaphone against the walls of an adjoining room where the defendant spoke into a telephone receiver violated neither the Fourth Amendment nor Section 605. However, the Court reached an entirely different conclusion in *Silverman v. United States.*[37] Here, the officers used a "spike-mike", which is a sensitive listening device resembling an ordinary spike. They drove the device through the wall from an adjoining room and penetrated a heating duct in the defendant's premises. The Court held this unlawful intrusion violated the Fourth Amendment and the evidence was excluded.

It will be noted that at some undetermined point of time, the United States Supreme Court tacitly abandoned the position adopted in the *Olmstead* case that there is no search and seizure unless the evidence obtained thereby is something tangible. In the *Silverman* opinion the Court assumes that a voice recording obtained as a result of a trespass is inadmissible because of the Fourth Amendment.

Let us turn now to state law and state courts. At this level, the criminal statutes and constitutions of each state, as interpreted by its court of last recort, are largely determinative.[38] Apparently only six states, not including Wyoming, have statutes permitting wiretapping by officers.[39]

35. Irvin v. People, supra note 27.
36. Goldman v. United States, 316 U.S. 129 (1942).
37. Silverman v. United States, 365 U.S. 505 (1961).
38. Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, 86th Congress, 1st Session, pp. 1529 (1959). (Hereinafter cited as 1959 Hearings.)
39. 1959 Hearings, pp. 1528: La. Rev. Stat. Ann. (West 1950) § 14:322; Md. Code Ann. (Mitchie's 1957) art. 27, § 125A (b), art. 35, § 94 (Supp. 1959); Mass. Gen.

Only Louisiana has made express provision for its officers to wiretap, without a special court order, in the discharge of their duties to detect crime.[40]

The statutes of eleven states are evidently concerned only with such malicious acts as cutting, molesting, or otherwise injuring phone lines. This aspect was well illustrated in the recent New Hampshire case of *State v. Tracey*[41] where the court said in part:

> . . . this statute . . . is a typical malicious mischief statute and has no application to the wiretap involved in this proceeding. . . . Similar statutes have been uniformly construed as applicable only to damage or injury to the wires and property of the public utility and are in no sense regarded as regulating or prohibiting wiretapping. . . .

As has already been noted, Section 605 of the Federal Communications Act does not apply in state courts except when the wiretap is accomplished through a trespass, or some other unlawful action which violates the Fourth Amendment or the Due Process Clause. The states are left free to determine whether wiretapping shall or shall not be unlawful.[42] Of interest in this connection is a recent Florida case, *Griffith v. State*.[43] After disregarding any state or federal statutory provisions, the court held wiretapping to be violative of the Florida Constitution, Sections 12 and 22 of the Declaration of Rights,[44] which are counterparts of the Fourth and Fifth Amendments to the United States Constitution.

Whether or not wiretap evidence is admissible in the courts of Wyoming is still an open question. Research does not disclose that the Wyoming Supreme Court has ever had this question before it. The answer would depend upon construction of the applicable statute,[45] and

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Laws Ann. (West 1959) ch. 272, § 99 (Supp. 1959); Nev. Rev. Stat. §§ 200.660 through 200.690; New York Const., art. 1, § 12, Penal Law (McKinney's) § 739; Ore. Rev. Stat. § 141.720.

40. 1959 Hearings pp. 1528.
41. State v. Tracey, 100 N.H. 267, 125 A.2d 774 (1956).
42. Pugach v. Dollinger, 363 U.S. 836; Schwartz v. Texas, 344 U.S. 199; also see, People v. Velella, 200 N.Y.2d 966; People v. Ross, 206 N.Y.2d 473; People v. Naples, 208 N.Y.2d 688; Leon v. State, 108 Md. 279, 23 A.2d 706; Rowan v. State, 175 Md. 574, 3 A.2d 753 (1959).
43. Griffith v. State, 111 So. 2d 282, . . . Fla. . . . (1939).
44. Fla. Const., §§ 12 & 22 of the Declaration of Rights. Also see Fla. Stat. Ann., tit. 44, ch. 822.10.
45. Wyo. Stat. § 37-259 (1957): "Whoever shall wilfully and maliciously cut, break, tap, or make any connection with, or read, or copy by use of telegraph or telephone instruments, or otherwise, in any unauthorized manner, any message, either social or business, sporting, commercial, or other news reports, from any telegraph or telephone line, wire or cable, so unlawfully cut or tapped in this state; or make unauthorized use of the same, or who shall wilfully and maliciously prevent, obstruct or delay, by any means or contrivance whatsoever, the sending, conveyance or delivery, in this state, of any authorized communication, sporting, commercial or other news reports, by or through any telegraph or telephone line, cable, or wire, under the control of any telegraph or telephone company doing business in this state, who shall wilfully and maliciously communicate, report or deliver to any unauthorized person any message or copy thereof, received by him in the line of his employment by such company, shall be deemed guilty of a felony, and shall be punished by a fine of not less than fifty dollars nor more than five hundred dollars or by imprisonment in the penitentiary for not more than five years, or both."

the Wyoming counterparts of the Fourth and Fifth Amendments.[46]

The language of the statute is not clear and there are several possible ways in which the courts could interpret its meaning. First of all, the statute prohibits only "unauthorized" tapping and "unauthorized" divulgence, and provides that such acts are felonies. Perhaps this does not include the acts of officers wiretapping in the line of duty, as was held by the New Hampshire court in the *Tracey* case.[47] Secondly, the context in which the statute appears may be quite significant as it is included in a chapter entitled Crimes Against Public Utilities. A literal interpretation may mean that the wiretapping statute is a malicious mischief statute, as held in the *Tracey* case, and a crime only against the owner of the lines, and as such, only the owner could validly raise the issue. The senders of the tapped message would thus have no standing to object.

For some time Wyoming has followed the "federal exclusionary rule" prohibiting the admission of illegally obtained evidence, at least if it is obtained by unreasonable search and seizure.[48] The court could either follow the *Olmstead* case and declare wiretapping not to be search and seizure, if the means are lawful, or as in the Florida case of *Griffith v. State* and the minority decision in *Olmstead* could declare it to be unlawful search and seizure and therefore excludable on that basis, or could hold, as in *State v. George,* that it would violate a defendant's privilege against self-incrimination. It should be noted that what the Wyoming Supreme Court said in *State v. George* concerning the admission of evidence obtained by unlawful search and seizure was dicta since the search in the case was held lawful. However, this dicta is quite persuasive as far as Wyoming trial courts are concerned.

With two conflicting philosophies equally available to the Wyoming Supreme Court, policy considerations might well be determinative. The choice is not easy. The individual rights to privacy guaranteed by the Constitution must be weighed against the need for a very effective investigative tool (wiretapping) used to bring to justice the very people the Fourth and Fifth Amendments would protect.[49]

Since Wyoming's Supreme Court has not yet interpreted the applicable wiretapping statute, any such ventures should be approached with a great deal of caution. However, in the event the court should construe it in a light favorable to law enforcement, the police officer should keep in mind

46. Wyo. Const., art. 1, § 4, provides as follows: "The right of the people to be secure in their houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrant shall issue but upon probable cause, supported by affidavit, particularly describing the place to be searched or the person or thing to be seized."
47. State v. Tracey, supra note 39.
48. State v. George, 32 Wyo. 223, 231 Pac. 683 (1924); Mapp v. Ohio, supra note 6.
49. Olmstead v. United States, 277 U.S. at 474. Mr. Justice Brandeis in the dissenting opinion stated in part: "It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right to personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense."

the following considerations which represent the writer's conclusions as to the law in this area:

1. Remember the emphasis on the word "interception" as connoting a physical touching, interruption, or connection.
2. The officer cannot take any evidence obtained by wiretapping into the federal courts, if it is offered against one or both parties to the tapped conversation, because Section 605 bars it.
3. Mechanical and electrical eavesdropping devices are not governed by the same applicable laws as wiretap apparatus.
4. Wiretap apparatus, and the actual taps, should never be installed on property that is owned or controlled by the subject. Entry into the subject's home, office, etc., by either the tapper or the apparatus would undoubtedly be an unlawful entry, and any evidence thereby obtained would be in violation of the Fourth Amendment and inadmissible in any court.
5. If the wiretap recording itself is inadmisible, so is any other evidence obtained as a result of the tap information.
6. Wiretap evidence can be used in federal and state prosecutions against a third person who was not a party to the tapped conversations. This fact, however, would not relieve the officer of penalties which may be invoked by the owner or controller of the property invaded.
7. Wyoming's wiretapping status provides that the violation is a felony, and punishable by a fine of not less than $50.00 nor more than $500.00, or imprisonment in the penitentiary for not more than five years, or both. The officer should acquaint himself with the dangers of testing criminal statutes which have not been interpreted by the state's highest court. The question of civil liabilities is present in this situation also. If the statute applies to activity of law enforcement officers, the officer's official character would probably not protect him from personal liability, civil or criminal.
8. Wiretap information can be of unlimited value if used not as an end in itself, but as an intelligence-type function. Perhaps this is the best purpose wiretapping can serve. If used in an intelligence-type operation, then great care should be exercised to see that the information, and the operation itself, is kept strictly confidential.

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