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One Party's Consent to Electronic Surveillance

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Since the *Berkshire County* decision, courts have been obligated to vouchsafe national banks from the reach of state coffers. It was observed in *Berkshire County*:

> Because of § 548 and its legislative history, we are convinced that if a change is to be made in state taxation of national banks, it must come from the Congress, which has established the present limits.[48]

If anyone is to act in reversing the policy of according tax-free treatment to national banks[49] it must, indeed, be the Congress, for the courts have shown that they are unwilling to respond to change conditions in this area.

MICHAEL BRUCE SOLOMON

ONE PARTY'S CONSENT TO ELECTRONIC SURVEILLANCE

The defendant was a uniformed police officer who suggested to one Matthews, an employee of Wells Fargo Armored Service, that he allow the defendant and "pros" to "hold him up" with the understanding that no one would be hurt and that Matthews would get a share of the money. Matthews reported the proposition to his employer and the F.B.I., who persuaded him to pretend to acquiesce in the defendant's plan. Matthews arranged to meet the defendant and the "pro" at the Orange Bowl. The police and the F.B.I. put a microphone and transmitter on the person of Matthews and sent him to the meeting equipped to record the conversations of the parties. Thereafter, there were numerous telephone conversations between the defendant and Matthews in which the proposed robbery was discussed. These conversations were recorded by the police with the knowledge and consent of Matthews.

Subsequently the robbery took place. The numerous police officers who had staked out the scene of the robbery apprehended the defendant. The defendant was adjudicated guilty pursuant to a jury verdict. On appeal, the District Court of Appeal, for the state of Florida, Third District, *held*, affirmed: An incriminating recording received from electronic

48. 392 U.S. 339, 346 (1968).

49. Comptroller Fred O. Dickinson, shortly after the Supreme Court affirmance, sent a resolution to the Florida Congressional Delegation which expressed, in part, the following:

> In these days of rising costs and increased demand for public services, Florida can ill afford to lose even a penny in revenue much less the millions of dollars that would be taken away if needed legislation [is] not passed.
>
> It [the legislation] means that national banks will not be discriminated against, but at the same time they will no longer enjoy immunity from state and local taxes.

Miami Review, Mar. 6, 1969, at 16, col. 1.

See also address by Hon. Ralph Turlington, Speaker of the House, Fla. Legislature, Aug. 22, 1969, calling for federal legislation permitting states to tax national banks. Senator Spessard Holland of Florida has recently also called for federal legislation either modifying or repealing 12 U.S.C. § 548.

surveillance equipment upon the person of a consenting party to a conversation is admissible in evidence, as is such a recording obtained as the result of a wiretap on the telephone of one consenting conversant. *Walker v. State*, 222 So.2d 760 (Fla. 3d Dist. 1969).

At the trial, the numerous tape recordings introduced into evidence fell mainly into two general categories: (1) the recordings made at the Orange Bowl, for which the State's witness carried a hidden microphone, and (2) the telephone conversations between the witness, Matthews, and the defendant, recorded at Matthews' home. Matthews took the stand and testified as to these conversations. Each of the types of recorded conversations involved in *Walker* has been considered by the United States Supreme Court in landmark cases which support the result reached by the court in the instant case.

Lopez v. United States[1] involved a "wired" informer. The crux of the opinion allowing into evidence the recorded conversation thus obtained was stated by the Court as follows:

> Once it is plain that [the agent] could properly testify about his conversation with [the defendant], the constitutional claim relating to the recording of that conversation emerges in perspective . . . . [The device] was carried in and out by an agent who was there with petitioner's assent and it neither saw nor heard more than the agent himself.
>
> Stripped to its essentials, petitioner's argument amounts to saying that he has a constitutional right to rely on possible flaws in the agent's credibility without being beset by corroborating evidence . . . .
>
> Indeed, there has not even been any electronic eavesdropping on a private conversation which government agents could not otherwise have overheard.[2]

In essence, the Supreme Court has enunciated a principle that recorded conversations were properly admissible as corroborative evidence. That principle has been recognized by the Florida courts as well.[3] The same reasoning was properly applied in the case at bar, where the tape recordings served to corroborate the testimony of the witness, Matthews.

The leading case dealing with recorded telephone conversations is *Rathburn v. United States*.[4] In that case the police were allowed to testify that they heard the defendant make a threat while listening to a tele-

1. 373 U.S. 427 (1963).

2. *Id.* at 438-40.

3. In Florida, where the conversation has been recorded and the recording made with the consent of one of the parties to the conversation, even though the consenting party is an undercover agent, such conversation is admissible . . . . This is particularly true when the recording is used to corroborate testimony of a consenting party to the recording.

Parnell v. State, 218 So.2d 535, 541 (Fla. 3d Dist. 1969). *See also* Koran v. State, 213 So.2d 735 (Fla. 3d Dist. 1968); Hajdu v. State, 189 So.2d 230 (Fla. 3d Dist. 1966).

4. 355 U.S. 107 (1957).

phone conversation between the defendant and another person, who had consented to the police listening over a regularly used telephone extension. The Court held that the contents of a conversation are admissible in court since such an overhearing does not violate section 605 of the Federal Communications Act. The Act provides that no person not being authorized by the sender shall intercept any communication and divulge its existence or contents. The Court stated:

> The clear inference [of § 605] is that one entitled to receive the communication may use it for his own benefit or have another use it for him. The communication itself is not privileged, and one party may not force the other to secrecy merely by using a telephone. . . . [E]ither party may record the conversation and publish it . . . .
>
> . . . Each party to a telephone conversation takes the risk that the other party may have an extension telephone and may allow another to overhear the conversation. When such takes place there has been no violation of any privacy of which the parties may complain. Consequently, one element of § 605, *interception*, has not occurred.[5]

In the instant case, the State's chief witness could have, and did, testify to what he heard. To have excluded these conversations on the ground they were tape recorded would "amount to straining at a gnat while swallowing a camel."[6]

These cases have been and remain good law. A Florida case on this issue, *Lee v. Florida*,[7] distinguishes them factually but in no way alters the rule. In that case the defendant was a user of a *party line* (due to local inefficiency rather than choice). The police tapped the same party line in a neighboring house. The parties to the recorded conversations neither knew they were being recorded nor consented thereto. The Supreme Court recognizd that a party line user's privacy is vulnerable, but "[i]t does not necessarily follow that his telephone communications are completely unprotected by § 605."[8] The Court distinguished the facts of the case and limited its holding: "What was done here was a far cry from the police activity in Rathburn. . . ."[9] By contrast, *Rathburn* is virtually indistinguishable from the instant case.

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5. *Id.* at 110, 111 (emphasis by the court). *See* Barber v. State, 172 So.2d 857 (Fla. 1st Dist. 1965).

Prior to the adoption of section 605 and the judicial interpretations thereof, the same result was arrived at in *Olmstead v. United States*, 277 U.S. 438 (1928), wherein it was held that wiretapping was not violative of either the fourth or fifth amendments. Section 605 of the Federal Communications Act was enacted to lessen the effect of that decision. *See* David v. United States, 5 Crim. L. Rptr. 2364 (5th Cir. July 5, 1969).

The constitutional issues in Florida were discussed in Griffith v. State, 111 So.2d 282 (Fla. 1st Dist. 1959). This case indicated by dictum that wiretapping may well be a violation of those rights guaranteed by the Florida Declaration of Rights, both as an unreasonable search and seizure *and* as self-incrimination. This view, however, has not been followed.

6. Barber v. State, 172 So.2d 857, 860 (Fla. 1st Dist. 1965).

7. 392 U.S. 378 (1968).

8. *Id.* at 381n.5.

9. *Id.* at 381.

Cases considering the various implications of "wiretapping" and electronic surveillance are of current importance, and there have been a number of recent decisions which merit consideration. In *Katz v. United States*[10] the Supreme Court reversed a case in which the Government was permitted to introduce into evidence the petitioner's end of telephone conversations overheard by F.B.I. agents who had attached electronic listening and recording devices to the outside of the public phone booth from which he had placed his calls. The Court held that the reach of the fourth amendment can no longer turn upon the presence or absence of a physical intrusion into any given enclosure. This conclusion was expressed as follows:

> The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a "search and seizure" within the meaning of the Fourth Amendment.[11]

Apparently words are protected by the fourth amendment without any requirement of trespass. The decision was a proper one considering the invasion of privacy involved and the lack of consent by either party.[12]

Since *Katz*, several courts of appeals have considered similar situations. A divided United States Court of Appeals for the Seventh Circuit held in *United States v. White*[13] that *Katz* effectively overruled *On Lee v. United States*.[14] In *White*, incriminating conversations were transmitted to narcotics agents from a suspect's home, automobile, and

10. 389 U.S. 347 (1968). Since pre-*Katz* decisions did not hold nontrespassory eavesdropping unconstitutional, the Supreme Court held *Katz* to be entirely prospective in Desist v. United States,—U.S.—, 89 S. Ct. 1030 (1969). Although it is the author's contention that *Katz* is not applicable to the case under consideration, even if it were the surveillance conducted in the principal case occurred in April, 1967, prior to the cut-off date for retroactivity of December 18, 1967.

11. 389 U.S. at 353.

12. To view the decision in its proper perspective, a cogent portion of a separate concurring opinion by Mr. Justice White is extremely helpful:

> In previous cases, which are undisturbed by today's decision, the Court has upheld, as reasonable under the Fourth Amendment, admission at trial of evidence obtained (1) by an undercover police agent to whom a defendant speaks without knowledge that he is in the employ of the police *Hoffa v. United States*, 385 U.S. 293 . . . ; (2) by a recording device hidden on the person of such an informant, *Lopez v. United States*, 373 U.S. 427 . . . ; and (3) by a policeman listening to the secret micro-wave transmissions of an agent conversing with the defendant in another location, *On Lee v. United States*, 343 U.S. 747 . . . . When one man speaks to another he takes all the risks ordinarily inherent in so doing, including the risk that the man to whom he speaks will make public what he has heard. The Fourth Amendment does not protect against unreliable (or law abiding) associates. *Hoffa v. United States*, supra. It is but a logical and reasonable extention of this principle that a man takes the risk that his hearer, free to memorize what he hears for later verbatim repetitions, is instead recording it or transmitting it to another. The present case deals with an entirely different situation, for as the Court emphasizes the petitioner "sought to exclude . . . . the uninvited ear," and spoke under circumstances in which a reasonable person would assume that uninvited ears were not listening.

Katz v. United States, 389 U.S. 347, 363 (1967).

13. 405 F.2d 838 (7th Cir. 1969).

14. 343 U.S. 747 (1952).

place of business, by means of an electronic device attached to an informer who accompanied him. Writing for the three dissenters, Castle, C.J., emphasized that Mr. Justice White, who concurred in *Katz*, regarded *On Lee* as "undisturbed" by that decision.[15] Chief Judge Castle maintained that there is all the difference in the world between the search and seizure which was involved in *Katz*, and the misplaced confidence in this case.[16] A separate dissenting view relied on the "rather old-fashioned view that only the Supreme Court could set aside its holdings."[17]

On Lee,[18] of course, is itself distinguishable from the principal case because the transmitted conversation was obtained after the defendant's arraignment and was not used as corroborative evidence, since the agent did not testify. The court in *White* had a more difficult time with *Lopez v. United States*,[19] admitting that "[t]he important distinction between *Lopez* and this case is that here the informer . . . was not produced whereas in *Lopez*, the Government agent was a witness. . . ."[20] Thus the scope of the *White* case is evidently rather limited and certainly inapplicable to the instant case.

Perhaps the better reasoned case, following *White* by a week, is *United States v. Kaufer*.[21] The court deemed the overhearing of an incriminating telephone conversation between the suspect and the agent-informer by another agent who listened in on an extension to be outside the purview of *Katz*. The court stated:

> Katz v. United States . . . has no application to this case. Katz involved electronic surveillance performed without the knowledge of any of the participants in the intercepted conversation. The procedure used against Kaufer involved the recording of a conversation with the consent of one of the parties to that conversation, a procedure upheld in Lopez v. United States, 373 U.S. 427 (1963). A recording here, as distinguished from that in Katz, merely serves to preserve the consenting participant's recollection. . . . The risk that an unknown third party will intercept and record the conversation, as was done in Katz, is obviously of a far different order. The cases are thus clearly distinguishable, and it cannot be said, as appellant urges, that Lopez has been overruled, sub silentio, by Katz. . . . We are not persuaded by the contrary majority opinion of the Court of Ap-

15. 405 F.2d 838, 850-51 (7th Cir. 1969) (dissenting opinion).

16. *Id.* at 850, *citing* Lopez v. United States, 373 U.S. 427 (1963). The judge also discussed Lewis v. United States, 385 U.S. 206 (1966) and Hoffa v. United States, 385 U.S. 293 (1966). *Id.* at 849.

17. 405 F.2d at 852 (dissenting opinion of Hastings, J.).

18. 343 U.S. 743 (1951).

19. 373 U.S. 427 (1963).

20. 405 F.2d at 847.

21. 406 F.2d 550 (2d Cir. 1969).

> peals for the Seventh Circuit sitting en banc in United States v. White, decided January 7, 1969, by a divided court.[22]

Also urged as grounds for reversal in *Walker v. State*,[23] but lightly dismissed by the court, was the fact that there were over 150 parts of the tape recording wherein the conversation was unintelligible.[24] *Brady v. State*[25] makes it clear that partially inaudible and unintelligible recordings are nonetheless admissible. Impliedly, the criterion is the discretion of the trial judge as to the trustworthiness of the recordings.[26] Although it is not mandatory, the better procedure for determining relevancy, not intelligibility, is for the trial judge to review the tapes.[27] As to intelligibility:

> It has been universally held that because portions of a recording are unintelligible is no basis for keeping the intelligible part out. A partial incompleteness of a recording may be used by the defense as a factor to be considered by the jury when determining what value to place on the recordings.[28]

It thus appears that the instant decision is wholly in accord with the growing body of case law. Hopefully, it will represent the standard —a fair balance between the protection of individual freedom and the necessities of modern law enforcement—when the remaining questions and areas of confusion are ultimately resolved.

The instant decision permits evidence received by means of electronic devices, but does so with certain enumerated limitations, *i.e.*, corroborative testimony and a consenting conversant.[29] This should be as far as the courts will go if they are to remain within the already defined constitutional guidelines. The individual is, after all, entitled to know that he will remain free from unreasonable searches and seizures. As Mr. Justice Brennan recognized in his dissenting opinion in *Lopez v. United States:*

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22. *Id.* at 551, 552. That this is the view of the Fifth Circuit is apparent in Dancy v. United States, 390 F.2d 370 (5th Cir. 1968).

23. 222 So.2d 760 (Fla. 3d Dist. 1969).

24. *Id.*

25. 178 So.2d 121 (Fla. 2d Dist. 1965).

26. The requirements for admissibility, set forth in Gomein v. State, 172 So.2d 511 (Fla. 3d Dist. 1965), were met. These include testimony as to the accuracy of the recording and identification of the defendant's voice.

27. Gomein v. State, 172 So.2d 511, 515 (Fla. 3d Dist. 1965).

28. *Id.* at 515.

29. *See* Fla. Laws 1969, ch. 69-17, which enacts a comprehensive wiretapping and electronic surveillance law nearly identical to Title III of The Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-20 (Supp. 1969). Both acts authorize the interception and disclosure of oral and wire communications by "a party to the communication or [when] one of the parties to the communication has given prior consent to such interception." Fla. Laws 1969, ch. 69-17, § 3 (2)(c), (d); 18 U.S.C. § 2511 (2) (c), (d) (*Supp.* 1969).

Thus, neither enactment works any change in the case law with respect to consensual "taps" or "bugs" but merely codifies judicial decision on the point.

> Electronic surveillance strikes deeper than at the ancient feeling that a man's home is his castle; it strikes at freedom of communication, a postulate of our kind of society.[30]

Any electronic surveillance hereafter permitted must fall within the rigid limitations recognized in the instant case or must be a product of an antecedent order judicially sanctioning such intrusion. If these guidelines are adhered to the rights of the individual will be protected in our modern society.

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THE PRIVILEGE TO REMAIN SILENT AND THE PRESUMPTION OF LARCENY BASED ON UNEXPLAINED POSSESSION

Based upon stolen goods found in his possession, the defendant, who did not take the stand, was convicted of breaking and entering with intent to steal following the court's instruction to the jury that *unexplained* possession of such goods was a fact from which the defendant's guilt might be inferred. The District Court of Appeal, Fourth District, reversed and remanded on the grounds that the *Miranda* decision precluded such an instruction as a violation of the accused's constitutional privilege to remain silent, and that the privilege would be valueless if the defendant's silence might be used against him at the trial.[1] On certiorari to the Supreme Court of Florida, *held*, quashed and remanded: The *Miranda* decision discussed an accused's silence in the face of custodial interrogation, not a defendant's failure to testify at trial. In the instant case, the defendant was free to testify or remain silent, since the instruction concerned the fact of possession as circumstantial evidence of guilt (a fact that the defendant could rebut through explanation), not his silence *per se*. *State v. Young*, 217 So.2d 567 (Fla. 1968).

The Fifth Amendment's prohibition of compulsory self-incrimination applies to the states through incorporation into the Fourteenth Amendment Due Process Clause.[2] Unexplained possession of recently stolen property is an inference of fact which the jury may either weigh as evidence of guilt or find as sufficient evidence to support conviction, depending on the rule applicable in the given jurisdiction.[3] The court may generally so instruct the jury.[4] A majority of courts faced with a self-incrimination challenge to the presumption of guilt based

30. Lopez v. United States, 347 U.S. 427 (1963) (dissenting opinion).

1. Young v. State, 203 So.2d 650 (Fla. 4th Dist. 1967).
2. Malloy v. Hogan, 378 U.S. 1 (1964).
3. 3 H. UNDERHILL, CRIMINAL EVIDENCE § 601 (5th ed. 1957).
4. 1 F. WHARTON, CRIMINAL EVIDENCE § 146 (12th ed. 1955).