Michigan Law Review

Volume 40 | Issue 8

1942

EVIDENCE - ADMISSIBILITY OF EVIDENCE GAINED BY USE OF DETECTAPHONE

Michigan Law Review

EVIDENCE — ADMISSIBILITY OF EVIDENCE GAINED BY USE OF DETECTAPHONE — Appellant was indicted for conspiracy to violate the Bankruptcy Act.[1] An agent of the Federal Bureau of Investigation was permitted by the custodian of the building to enter appellant's office without his knowledge, and to install a dictaphone connecting with an adjoining room. However, the dictaphone failed to operate, and the only evidence which the agents were able to get was by means of a detectaphone which was in the same room with the agents, and which was not connected with the dictaphone. *Held*, the detectaphone recordings were admissible in evidence because no trespass was committed in getting the information, and no communication was intercepted within the meaning of section 605 of the Communications Act of 1934.[2] *Goldman v. United States*, (U. S. 1942) 62 S. Ct. 993, affirming *United States v. Goldman*, (C. C. A. 2d, 1941) 118 F. (2d) 310.

The United States Supreme Court has given a broad interpretation to section 605 of the Communications Act by applying its prohibitions to officers of the federal government,[3] by holding that it applies to intrastate as well as interstate communications,[4] and by ruling that evidence made accessible because of information obtained by "tapping" is also inadmissible.[5] In the light of this broad interpretation of the statute, and in view of the Court's attitude toward wire tapping, it might well have been assumed, before the principal case was decided, that evidence garnered by means of the detectaphone would be excluded by the Supreme Court. Indeed, under the Supreme Court's former definition of "interception," as used in the Communications Act, it might be argued that

[1] 30 Stat. L. 554, § 29 (b) (1892), 11 U. S. C. (1940), § 52 (b).

[2] ". . . 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." 48 Stat. L. 1064 at 1103, 47 U. S. C. (1940), § 605.

This restraint upon the activities of our law enforcement officers does not rest upon the search and seizure provisions of the Federal Constitution, but arises under the commerce power, and the power of Congress over federal officers. See Sablowsky v. United States, (C. C. A. 3d, 1938) 101 F. (2d) 183.

[3] Nardone v. United States, 302 U. S. 379, 58 S. Ct. 275 (1937).

[4] Weiss v. United States, 308 U. S. 321, 60 S. Ct. 269 (1939); United States v. Jenello, (C. C. A. 3d, 1939) 102 F. (2d) 587; Diamond v. United States, (C. C. A. 6th, 1938) 108 F. (2d) 859, denying rehearing in 94 F. (2d) 1012; Sablowsky v. United States, (C. C. A. 3d, 1938) 101 F. (2d) 183.

[5] The second Nardone case, Nardone v. United States, 308 U. S. 338, 60 S. Ct. 266 (1939).

the detectaphone falls within its scope.[6] Though the decision of the courts are based on the concrete prohibitions of the Communications Act, or on the Constitution, the courts are inclined to stress the breach of privacy in strengthening the case against the admission of evidence procured by means of unauthorized interceptions of communications.[7] This tendency appears to be the result of the courts' adopting the view that it is better that some wrongdoers go free than to have government officers "resort to methods deemed inconsistent with ethical standards and destructive of personal liberty." [8] However, the Court felt that to apply the prohibitions of the Communications Act to evidence gained by use of the detectaphone, which use here was not in violation of the constitutional provision against unreasonable search and seizure, would be extending the scope of the section beyond that intended by Congress. The detectaphone is not in any way connected with the wire which carries the conversation of the parties; the device does not receive the communications of both parties, but only that of the person in the room in which the sounds are picked up by the detectaphone. There is no "tap" made; the instrument does no more than make audible sounds which would otherwise be inaudible to the human ear.[9] Since evidence gained by means of eavesdropping is admissible,[10] it seems that evidence obtained by means of the detectaphone comes within the same principle. In view of the facts that Congress has never expressly prohibited wire tapping by our law enforcement officers, that the detectaphone does not intercept communications in the manner of "tapping," that a secret entry or trespass is not necessary for its operation,

[6] United States v. Polakoff, (C. C. A. 2d, 1940) 112 F. (2d) 888. Although the Communications Act provides that the permission of the sender removes the prohibition against disclosure, the court in this case held that the permission of both parties is necessary, and that the permission of the person originating the call is not sufficient. Here also there was no "tap," but rather an extension was made on the originator's telephone, yet the court held that this was an interception within the act. It would seem that this view places no discernible limit upon the extent to which the act may be interpreted.

[7] This appears to be the basis for the dissent by Justice Murphy in the principal case. The dissent by Justice Holmes in Olmstead v. United States, 277 U. S. 438, 48 S. Ct. 564 (1928), is typical of the opposition towards government officers indulging in the "unethical" practice of "tapping." See 9 INT. JUR. ASSN. BULL. 97 (1941) for a rather detailed account of the opposition to wire tapping; it seems that the spectre of an American "Gestapo" looms large in the thinking of those who would bar the use of this device to our law enforcement officers. It should be noted, however, that not allowing the evidence gathered by means of the outlawed device to be admitted in court is no deterrent to its use for other purposes. It would seem that enforcement of the existing penalties would be a greater deterrent than merely refusing to admit the evidence. See 27 MICH. L. REV. 78 (1928); 30 J. CRIM. L. 945 (1940); 20 BOST. UNIV. L. REV. 362 (1940).

[8] Nardone v. United States, 302 U. S. 379 at 383, 58 S. Ct. 275 (1937). See the dissent by Justice Sutherland in which he says, 302 U. S. at 387, that the "necessity of public protection against crime is being submerged by an overflow of sentimentality."

[9] This is the view held by the district court in the principal case. See 118 F. (2d) 310.

[10] Olmstead v. United States, 277 U. S. 438, 48 S. Ct. 564 (1928).

and that there is an increased need for the detection of crime, it is submitted that the Court was correct in allowing the testimony of the agents as to the remarks heard by means of the detectaphone.