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Criminal Procedure—Search and Seizure—Electronic Eavesdropping—Abortion: Recording of Voluntary Conversation Between Police Agent and Defendant Admissible in Evidence.—State v. Wright, 74 Wn. 2d 355, 444 P.2d 867 (1968)

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CRIMINAL PROCEDURE—SEARCH AND SEIZURE—ELECTRONIC EAVESDROPPING—ABORTION: RECORDING OF VOLUNTARY CONVERSATION BETWEEN POLICE AGENT AND DEFENDANT ADMISSIBLE IN EVIDENCE.—*State v. Wright*, 74 Wn. 2d 355, 444 P.2d 867 (1968).

Informed that defendant had committed an abortion in his home, the police hired a female agent who made arrangements with the defendant by telephonic conversations, which were monitored and recorded. The agent, equipped with a hidden transmitter, kept her appointment and transmitted defendant's explanation of the abortion to the police, who again monitored and recorded the conversation. That evening she returned to defendant's home and paid the fee, and, as defendant prepared her for the operation, sent the conversation to monitoring police, who recorded it. All monitoring was done without prior court order. Just before the operation was to occur, the agent alerted the police, who then entered, seized the defendant's medical instruments, and arrested him. At trial, defendant was convicted of abortion and unlawful medical practice. On appeal to the Washington Supreme Court, *Held:* Recordings of the conversations, monitored in defendant's home, were properly admitted into evidence[1] since, under existing United States Supreme Court decisions, there was no "search and seizure" of the conversations, and thus, even though the monitoring was undertaken without a warrant, there was no violation of defendant's rights under the fourth amendment.[2] *State v. Wright*, 74 Wn. 2d 355, 444 P.2d 867 (1968).

The United States Supreme Court had faced a similar situation in *On Lee v. United States*.[3] There Chin Poy, an old acquaintance of the defendant, had concealed a transmitter on his person, entered defendant's laundry, and engaged him in conversation during which the defendant made incriminating statements, which in turn were transmitted to a narcotics agent outside. At trial, Chin Poy did not testify,

1. If the evidence had been obtained in violation of the fourth amendment, it would be inadmissible in the state courts. Mapp. v. Ohio, 367 U.S. 643 (1961).

2. 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. U.S. CONST. amend. IV,

3. 343 U.S. 747 (1952).

but the content of the monitored conversation was revealed in testimony given by the agent. Defendant contended that this evidence was obtained in violation of the fourth amendment because the eavesdrop had been made without a judicial order, and thus was inadmissible in federal courts.[4] The Court ruled that since neither Chin Poy nor the narcotics agent was a trespasser, the evidence was legally obtained; this was no different, reasoned the Court, from a witness using field glasses to magnify his vision of a "private" indiscretion.[5] Justice Burton, dissenting, denied that there was no trespass, arguing that the presence of the transmitter was the presence of the agent's ear and that the words were seized without warrant or consent.[6] Justices Frankfurter and Douglas, also dissenting, condemned such "dirty business" as a violation of a constitutionally guaranteed right to privacy.[7]

The same question concerned the Supreme Court in *Lopez v. United States*,[8] in which an Internal Revenue agent, without a search warrant, recorded a conversation in defendant's office, during which defendant made a bribe offer. The Court reasoned that the agent's feigned willingness to accept the bribe did not make his entry an illegal one. This was not even "eavesdropping," since the[9]

> Government did not use an electronic device to listen in on conversations it could not otherwise have heard. Instead, the device was used only to obtain the most reliable evidence possible. . . .

The Court then proposed an assumption of risk test: that is, when defendant made the bribe offer he took the risk that his statements would be used against him in court, whether by memory or recording.[10] Chief Justice Warren, concurring, distinguished *Lopez* from *On Lee* (of which he disapproved): whereas the agent in *Lopez* was a known IRS agent, the informer in *On Lee* was an old friend;[11] moreover, the monitored conversation in *On Lee* was placed in evidence without the

4. *See* Weeks v. United States, 232 U.S. 383 (1914).
5. 343 U.S. at 754.
6. *Id.* at 765-67.
7. *Id.* at 761.
8. 373 U.S. 427 (1963).
9. *Id.* at 439.
10. *Id.*
11. *Id.* at 441-43. Under an assumption of risk analysis, the assumption by defendant is obviously clearer when he attempts to bribe a government agent than when speaking to a friend.

informer having been put on the stand. Justices Brennan, Douglas and Goldberg dissented on the grounds that such a recording violated an affirmative right to privacy guaranteed by the fourth amendment.[12]

The *Lopez* assumption of risk test, however, has been somewhat eroded by later Supreme Court decisions. In *Osborn v. United States,*[13] a federal agent had recorded a conversation with the defendant, an attorney, in which the defendant asked the agent to attempt to bribe a prospective juror at the trial of his client. The recording was used at trial to corroborate the agent's testimony. The Court concluded that since the use of the recording device under the particular and precise circumstances had been authorized by a prior court order, it need not rest its decision "upon the broad foundation" of its opinion in *Lopez* because "it is evident that the circumstances . . . fall within the narrower compass of the *Lopez* concurring and dissenting opinions."[14] The conviction was affirmed based upon "the procedure of antecedent justification before a magistrate that is central to the fourth amendment."[15] However, Justice Douglas dissented, reasoning that any electronic surveillance violated the fourth amendment right to privacy.[16]

In *Berger v. New York,*[17] the Supreme Court overturned New York's permissive eavesdrop statute because it failed to require a highly specific and particularized judicial order to authorize eavesdropping. The opinion seems to approve of *Osborn* only because such stringent requirements were met in granting the warrant.[18]

The shift in the Supreme Court's fourth amendment analysis from

12. *Id.* at 469-71.
13. 385 U.S. 323 (1966).
14. *Id.* at 327.
15. *Id.* at 330.
16. 385 U.S. at 405-13. Douglas related this right to privacy with the right he noted speaking for the Court in Griswold v. Connecticut, 381 U.S. 479 (1965), which held that the specific guarantees of the first, third, fourth, fifth and ninth amendments have penumbras guaranteeing a positive right to privacy. *Griswold* throws a shadow of doubt on *On Lee* and *Lopez*, although the holding was restricted explicitly to the marital relationship, for there searching the marital bedroom for evidence of a minor crime was unreasonable per se, with or without a warrant. *See Griswold, supra* at 485.
But the proclamation of such a *broad* constitutional "right of privacy" is both confusing and misleading. The fourth amendment prohibition does invest the individual with specific rights, and as such safeguards a positive right to privacy; but the nature of this right in a search and seizure situation needs to be precisely defined. Reliance on a general right to privacy based upon several amendments only clouds the issue. Note, *From Private Places to Personal Privacy: A Post-Katz Study of Fourth Amendment Protection,* 43 N.Y.U.L. REV. 968, 980 (1968); *accord,* Katz v. United States 389 U.S. 347, 350 (1967).
17. 388 U.S. 41 (1967).
18. *Id.* at 57.

property concepts to a balance between personal privacy and the necessities of effective police procedure[19] crystallized in *Katz v. United States*.[20] In this case, the Court overturned the conviction because evidence against the defendant had been obtained by attaching a listening device to the exterior of the public phone booth from which defendant transmitted wagering information across state lines. The Court ruled that such evidence was obtained in violation of the fourth amendment because prior judicial authorization had not been procured.[21]

> The Fourth Amendment protects people not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection . . . . But what he seeks to preserve as private, even in an area accessible to the public may be constitutionally protected . . .

if he has justifiably relied on that privacy. In sum, the fourth amendment is violated by a governmental invasion of an individual's privacy whenever the individual expects to be free from such intrusions and justifiably relies on this expectation of privacy.[22]

The effect of *Katz, Berger,* and *Osborn* on *On Lee* and *Lopez* is unclear. The propriety of the Washington Supreme Court's ruling in *Wright* depends upon the continued validity of *On Lee* and *Lopez*.[23] While none of the later cases expressly overruled either *On Lee* or *Lopez,* some writers have suggested that they have done so "sub silentio".[24] On the other hand, Justice White, concurring in *Katz,* reasoned that *On Lee* and *Lopez* were undisturbed by the decision[25] since the assumption of risk test of *Lopez* was equivalent to the reasonable expectancy formulation of *Katz*. He thought a reasonable man would assume the risk inherent in speaking with another that the latter might

19. Greenawalt, *The Consent Problem in Wiretapping and Eavesdropping*, 68 COLUM. L. REV. 189, 196 (1968) [hereinafter cited as Greenawalt]. Previously emphasis had been on constitutionally protected physical areas. Olmstead v. United States, 277 U.S. 438 (1928).

20. 389 U.S. 347 (1967).

21. *Id.* at 351-52.

22. *Id.* at 353.

23. The Washington Supreme Court itself recognized indirectly that its ruling was dependent on the "continued viability" of these two cases. State v. Wright, 74 Wn. 2d 355, 359, 444 P.2d 676, 678 (1968).

24. *See* Dash, *Katz—Variations on a Theme by Berger*, 18 CATHOLIC U.L. REV. 296, 311 (1968); Pitler, *Eavesdropping and Wiretapping—The Aftermath of Katz and Kaiser: A Comment*, 34 BROOKLYN L. REV. 223, 224 (1968) [hereinafter cited as Pitler].

25. 389 U.S. at 363 n.**. It can be inferred that Harlan's opinion is in agreement. *See* Pitler, *supra*, note 24, at 226.

memorize what he hears for later repetition or, similarly, that he might be recording the conversation.[26]

If *Katz* did not overrule *Lopez* and *On Lee, Osborn* may have. In basing its opinion on a narrower ground than *Lopez,* the Court left in doubt the status of non-trespassary eavesdropping done without a warrant. At least, the holding may indicate a disposition of the Court to overrule *Lopez.*[27]

Under the combined force of *Katz, Berger,* and *Osborn* it appears that the United States Supreme Court is straying somewhat from its position in the earlier cases, but, at least in the opinion of the Washington Supreme Court, not to the extent of overruling *Lopez* and *On Lee.* The Washington Court in *Wright* rejected defendant's contention that *Katz* was dispositive of the issue, relying on Justice White's concurring opinion and distinguishing *Katz* on its dissimilar fact pattern. It is true that the facts in the *Katz* case were not so similar as to absolutely compel a reversal in *Wright.*[28] In *Katz* the surveillance was done without the knowledge of any of the participants; in *Wright* it was done with one party's consent and had only the evidenciary function of preserving the consenting party's recollection.[29] Yet the emphasis in *Katz* on a right to be free of warrantless police searches obscures somewhat the distinction between consensual and third-party eavesdropping, and thus may render the factual differences between

26. It is not clear that a reasonable man would necessarily assume the risk of eavesdropping by a third party when speaking to a friend as in *On Lee,* but not when talking to an associate in a public phone booth as in *Katz,* except to the extent he relies on the fact that legal protections are less stringent in the former situation. Perhaps the proper question is this: what risks of eavesdropping ought the criminal system impose on individuals. Note, *The Supreme Court, 1966 Term,* 81 HARV. L. REV. 69, 193-94 (1967) [hereinafter cited as *The Supreme Court, 1966 Term*].

While a man could reasonably expect that no one was secretly listening in on his conversation, whether speaking face-to-face with his friend or on the telephone, could he also reasonably expect a listener to keep his words in complete confidence and never testify against him at trial? It is settled that the fourth amendment does not protect against a mistaken belief that a person in whom one confides will not reveal such information. Hoffa v. United States, 385 U.S. 293 (1966); Lewis v. United States, 385 U.S. 206 (1966). *But see* United States v. Jones, 292 F. Supp. 1001 (D.D.C. 1968). Nor is it a violation of the fourth amendment for police to obtain evidence by listening in on an extension line with the permission of the party at their end. Rathbun v. United States, 355 U.S. 107 (1957).

27. *The Supreme Court, 1966 Term, supra* note 26, at 186. *But* see Greenawalt, *supra* note 19, at 202.

28. *See* Dancy v. United States, 390 F.2d 370, 371 (5th Cir. 1968).

29. *See* United States v. Kaufer, 406 F.2d 550 (2d. Cir.), *cert. granted* and *aff'd per curiam,* 394 U.S. 450 (1969) (the memorandum opinion was not decided on the constitutional question).

the cases legally insignificant.[30] It can be argued that in both cases the right of privacy had been violated, since the respective defendants did not consent to the overhearing of their statements and the statements were overheard by uninvited third parties.[31]

Such an interpretation of *Katz* was urged on the Washington court by the defendant in *Wright* on the authority of *United States v. White*.[32] In *White*, the Seventh Circuit ruled that the fourth amendment, as interpreted by *Katz*, protected an affirmative right to privacy which could not be invaded by electronic surveillance of any sort, unless either a warrant was obtained or the right was waived by the speaker.[33] The Washington court distinguished *White* on a factual circumstance,[34] but further reasoned that in any event the defendant had waived the right to privacy referred to in *White*. The waiver found was not expressed, but was implied from the conclusion that he could not reasonably expect that his statement might not be repeated in court.[35] Apparently the Washington court decided, as did the Second Circuit in *United States v. Kaufer*,[36] that the distinction between surveillance done without either party's knowledge and that done with one party's consent is still valid, and that *Katz* applies only to the former. Further, while *White* holds only that *On Lee* no longer controls, the ruling in *Wright* can clearly be supported by the authority of *Lopez* alone.[37]

The Washington court's interpretation of *Katz* and *Osborn* as not overruling *On Lee* or *Lopez* seems correct. Thus, in *Wright* the re-

30. *See* United States v. Jones, 292 F. Supp. 1001, 1008 (D.D.C. 1968).
31. *See* United States v. White, 405 F.2d 838 (7th Cir.), *cert. granted*, 394 U.S. 957 (1969); *accord*, United States v. Doty, 416 F.2d 887 (10th. Cir. 1968).
32. 405 F.2d 838 (7th Cir.), *cert. granted*, 394 U.S. 957 (1969).
33. 405 F.2d at 845. The court conceded that *On Lee* would control in a consensual eavesdrop situation had it not been eroded by subsequent cases.
34. 74 Wn. 2d at 359 n.2, 444 P.2d at 678 n.2. The factual circumstance was that the agent in *White* did not testify, but did so in *Wright*.
35. *White* differs as to whether this right to privacy can be waived by one's actions. 405 F.2d at 845.
36. United States v. Kaufer, 406 F.2d 550 (2d Cir.), *cert. granted and aff'd per curiam*, 394 U.S. 450 (1969).
37. Of those Justices who participated in the decision of both *On Lee* and *Lopez*, only one, Chief Justice Warren, detected any difference between the two cases, and this was on the fact that the agent did not testify in *On Lee*, which was not the situation in *Wright*. *But cf.* Dancy v. United States, 390 F.2d 370, 372 (5th Cir. 1968) (Fahy, J. dissenting), in which it is argued that there is a significant legal difference between carrying the recorder as in *Lopez* and carrying a transmitter as in *On Lee*.

corded evidence was properly held admissible.[38] *Wright* was a case of misplaced confidence, not of search and seizure; the recorded conversation could therefore stand in the stead of the informant's own testimony and the fact that the evidence was obtained without prior judicial authorization does not make it violative of the fourth amendment.[39]

If the constitutional problems presented by eavesdropping are analyzed by balancing personal liberty and the exigencies of efficient criminal law enforcement (apparently the *Katz* approach),[40] the Washington court's opinion is on firm ground. All governmental actions, especially police practices, should afford respect to the dignity and integrity of each citizen,[41] and the fourth amendment protects the sanctity of the privacy of the individual—but it does not shield him from all governmental intrusions. It is certainly an annoyance and a humiliation for a defendant to be confronted with a recording of a supposedly private conversation, taped by the other party to the conversation;[42] however, in a consensual eavesdropping case, defendant's humiliation arises not so much from the existence of a recording as it does from a realization that he has misjudged the character of his confidant, who has betrayed him.[43] It is also an indignity for a defendant when at trial a friend testifies from memory on the content of their private conversations; but the fourth amendment protects an individual's privacy and dignity only insofar as it prohibits unreasonable searches and seizures. What one openly exposes to the public is

38. Congressional interpretation of the fourth amendment protection in this area supports the Washington court's ruling. Title III § 2511(2)(c) of the Omnibus Crime Bill of 1968 (Pub. L. 90-351) states that interception of an oral communication by a law officer in a consensual eavesdrop situation without a warrant is not unlawful. This law was passed after the United States Supreme Court's ruling in *Katz* and thus can be viewed as a congressional interpretation of that decision. It was enacted after *Wright* was decided and is not retroactive (§ 2520 Sec. 804(k)) but it does purport to supersede state law prospectively (§ 2511(1)(b)(v)).

39. Holt v. United States, 404 F.2d 914, 919 (10th Cir.), *cert. denied*, 393 U.S. 1086 (1968); United States v. White, 405 F.2d 838, 850, *cert. granted* 394 U.S. 957 (1969) (Castle, J. dissenting); stating that an informer's testimony is admissible. *See* cases cited in note 26 *supra*.

40. Greenawalt, *supra* note 19, at 196.

41. Miranda v. Arizona, 385 U.S. 436, 460 (1966).

42. The indignity is not on the order of a frisk made by police without a warrant, as in Terry v. Ohio, 392 U.S. 1 (1968). There the court found the search to be a severe intrusion on personal dignity, but held it reasonable since the officer had a reasonable suspicion that the frisked person was carrying a dangerous weapon.

43. *See* Greenawalt, *supra* note 19, at 197.

not subject to protection;[44] similarly, what one reveals to a single person is not protected with respect to that person.[45]

> The Fourth Amendment [does not protect] a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.

Since a participant in a conversation may repeat at trial what he has heard, why should it not be permissible, even highly desirable, to have an accurate record of this conversation to support or rebut the witness's testimony, and why should there be any restrictions placed on this evidence beyond that placed on the testimony? The individual's sanctity must be weighed against the demands of the public interest to determine the scope of the protection afforded the individual under the fourth amendment.[46] The reliability of evidence submitted at trial is one of the most compelling public interests within the criminal process. All methods which enhance the trustworthiness of trials ought to be promoted as being in the best interests of both the defendant (at least, if he is innocent) and the people of the state.

One would think that where the informer is, according to appellant's description, "of dubious reputation"[47] the defendant would welcome at trial an independent record of their conversation. In fact, in any situation where the agent's testimony may be impeachable, it is highly undesirable that the defendant's fate should hinge on the outcome of a testimonial battle between the two people who know the truth—one the informer, the other the defendant, perhaps a person of previous good repute.[48] The contention of the defendant in *Wright* was that a prior judicial order was necessary before an eavesdrop could be made; but there is no reason why consensual eavesdropping should ever be disallowed.[49]

In its attempt to achieve reliability of evidence the court must not

44. Katz v. United States, 389 U.S. 347, 351 (1967).
45. Hoffa v. United States, 385 U.S. 293, 302 (1966).
46. *See* Camara v. Municipal Court, 387 U.S. 523, 536-537 (1967).
47. Brief for Appellant at 2, State v. Wright, 74 Wn. 2d 335, 444 P.2d 676.
48. Osborn v. United States, 385 U.S. 323, 330 (1966).
49. If the procedure of requiring prior authorization by a magistrate is to have any significance, it must be assumed that in some instances such requests will be denied.

tread upon the individual's rights.[50] But when evidence from a consensual eavesdrop is sought to be introduced, objections from a defendant in *Wright's* position must in effect lay claim to[51]

> a constitutional right to rely on possible flaws in the agent's memory, or to challenge the agent's credibility without being beset by corroborating evidence that is not susceptible of impeachment. For no other argument can justify excluding an accurate version of a conversation that the agent could testify to from memory.

Only where the recorded eavesdrop is sought to be introduced as a replacement for the testimony of the agent does a problem arise.[52] At any trial where, as in *Wright,* the informer is allowed to testify,[53] the evidentiary products of consensual eavesdropping should be held to be admissible.

50. But considering the magnitude of the state's interest in obtaining reliable evidence, only the invasion of a specific Constitutional or statutory right should override this interest and cause the evidence to be declared inadmissible. Lopez v. United States, 373 U.S. 427, 440 (1963).

Ethical considerations about the deception involved should not be given any weight. The breach of confidence in *Wright* was not substantially different from others that the law fails to recognize. The police practice in *Wright* was no more objectionable than if the agent had merely elicited the information and then testified himself. *See* Greenawalt, *supra* note 19, at 193, 214-27.

51. Lopez v. United States, 373 U.S. 427, 439 (1963).

52. *Id.* at 443-44 (Warren, C.J., concurring). As mentioned in note 34 *supra,* the informer in *Wright* did in fact testify.

53. *Cf.* cases cited in note 26 *supra.*