Louisiana Law Review

Volume 2 | Number 4
May 1940

Wire Tapping - Illegally Obtained Evidence - Derivative Use

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In other states which operate under similar statutes the courts have not reached the same result. In Massachusetts the Teacher Tenure Act was held not to limit the power of the school committee to reduce compensation or to change the duties of teachers.[7] This view was followed by an Indiana decision in which the court pointed out that although a teacher becomes a permanent employee of the school corporation at the expiration of the probationary term, the Act does not require that he continue to hold the same position. Consequently, it was held that a teacher may be either promoted or demoted at the will of the Board.[8]

The result reached in California and New York, that a teacher cannot be reduced in rank, is obviously sound, and the Louisiana court is to be commended for adopting this position. The evident purpose of the Act is to give security to those members of the teaching profession who have proved themselves to be capable. Hence, the instant opinion holding that the Act guarantees the same grade or status attained by permanent teachers is eminently correct.

J. B. D.

WIRE TAPPING—ILLEGALLY OBTAINED EVIDENCE—DERIVATIVE USE —In *Nardone v. United States*,[1] decided in 1937, the Supreme Court held that the Federal Communications Act[2] rendered inadmissible as evidence any facts gained by the surreptitious interception of interstate communications (wire tapping). Later these communications were used to obtain other evidence and the defendant was re-indicted. On certiorari the Supreme Court *held* that the statute also prevented the prosecution from making any derivative use of such evidence. *Nardone v. United States,* 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed. 227 (1939).[3]

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7. Boody v. School Committee, 276 Mass. 134, 177 N.E. 78 (1931).

8. School City of Peru v. State, 212 Ind. 255, 7 N.E. (2d) 176 (1937).

1. 302 U.S. 379, 58 S.Ct. 275, 82 L.Ed. 314 (1937). In this case the prosecution contended that the purpose of the Act was to transfer jurisdiction over radio and wire communications to the newly constituted Federal Communications Commission, and it was not intended to prohibit wire tapping to obtain evidence. The Court said that the provision of Section 605 "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effort or meaning of such intercepted communication to any person . . ." operates to render such evidence inadmissible.

2. 48 Stat. 1064, § 605 (1934), 47 U.S.C.A. § 605 (1939).

3. The Court quoting from Silverthorne Lbr. Co. v. United States, 251 U.S. 385, 392, 40 S.Ct. 182, 183, 64 L.Ed. 319, 321 (1920) said: "The essence of a provision forbidding the acquisition of evidence in a certain way is not merely

In *Olmstead v. United States*[4] the Supreme Court held that wire tapping was not an unreasonable search and seizure within the meaning of the Fourth Amendment[5] and it did not constitute a violation of the privilege against self-incrimination contained in the Fifth Amendment.[6] Hence, such evidence was admissible in federal courts even though obtained in violation of state law.[7] Six years later the Federal Communications Act was passed. It contained general language to the effect that no unauthorized person should intercept or divulge the contents of any communication.[8] Acting on this, the Supreme Court, in the instant case, reached a decision superseding the holding in *Olmstead v. United States*. In *Weiss v. United States*[9] the Act was further extended to cover intrastate communications,[10] thus settling the numerous conflicting holdings in the lower federal courts.[11]

In the instant case the court pointed out that the stern enforcement of criminal law must be harmonized with the protection of privacy. Although the language of the Act is very broad

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that the evidence so acquired shall not be used before the court, but it shall not be used at all." (308 U.S. 338, 340.) However, the Court pointed out that if knowledge of such facts is gained from an independent source they may be proved like any others. But the burden is on the defendant to prove that wire tapping was employed. Once he has established this, the trial judge must give the defendant an opportunity to prove that a substantial portion of the case against him was unlawfully procured.

4. 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944, 66 A.L.R. 376 (1928).

5. The Court in this case stated: "The amendment itself shows that the search is to be of material things, the person, the house, his papers or offices." (277 U.S. 438, 464.) The Court also emphasized the fact that there was no *trespass*.

6. The Court stated that since the obtaining of the evidence did not violate the Fourth Amendment its introduction did not violate the Fifth Amendment.

7. The Court in this connection adopted the common law rule that the admissibility of the evidence is not affected by the illegality of the means by which it was obtained.

8. See note 2, supra.

9. 308 U.S. 321, 60 S.Ct. 269, 84 L.Ed. 223 (1939). In this case the prosecution tried to evade the statute by persuading certain of the defendants who had participated in the telephone conversation to plead guilty and then at the trial to read a copy of the intercepted messages. The Court held that the Act applied to intrastate communications and that "the interception and divulgence were not authorized within the meaning of the act."

10. In Beard v. Sanford, 8 U.S. Law Week 503 (1940), the Supreme Court held that a defendant who was convicted on evidence obtained by wire tapping was not entitled to be discharged in a habeas corpus proceeding although such evidence had been held inadmissible in the *Nardone* and *Weiss* cases. The reason assigned by the Court was that at the time of the trial, the evidence was considered admissible under the *Olmstead* case.

11. Cf. Valli v. United States, 94 F. (2d) 687 (C.C.A. 1st, 1938); Sablowshy v. United States, 101 F. (2d) 183 (C.C.A. 3d, 1938). See also United States v. Bonanzi, 94 F. (2d) 570 (C.C.A. 2d, 1938); Ginsburg v. United States, 96 F. (2d) 433 (C.C.A. 5th, 1938); United States v. Reed, 96 F. (2d) 785 (C.C.A. 2d, 1938).

it is not known whether this rule will be limited to evidence intercepted by federal agents or those acting under color of federal authority, or will be further extended to include messages intercepted by individuals and municipal officers.[12]

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12. In Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914), the Court held that protection against individual misconduct of municipal police officers not acting under color of federal authority is not afforded by the guaranty of the Fourth Amendment. The limitations of this amendment reach only the federal government and its agents.