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Judicial Non-Compliance with Fourth Amendment Requirements in the Case of a Wired Informer, United States v. White, 401 U.S. 745 (1971)

COMMENTS

JUDICIAL NON-COMPLIANCE WITH FOURTH AMENDMENT REQUIREMENTS IN THE CASE OF A WIRED INFORMER

United States v. White, 401 U.S. 745 (1971).

In 1966 defendant was convicted of federal narcotics violations.[1] The government's case was largely based on the testimony of federal narcotics agents about the content of several conversations between the defendant and a government informer.[2] The informer carried a radio transmitting device which enabled the agents to monitor conversations that took place in various locations—including the defendant's home during a one month period. The agents did not obtain a search warrant authorizing their activities.

During the trial the defense objected to the admission of the agents' testimony, contending that the eavesdropping techniques employed by the government violated White's fourth amendment protection against unreasonable searches and seizures.[3] These objections were overruled.

The Court of Appeals for the Seventh Circuit reversed the conviction.[4] On certiorari, the United States Supreme Court reversed.[5] *Held*:

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1. 26 U.S.C. § 4705(a) (1954), *repealed* Act of Oct. 27, 1970, Pub. L. No. 91-513, Title III, § 1101(b)(3)(A), 84 Stat. 1292. 21 U.S.C. § 174 (1954), *repealed* Act of Oct. 27, 1970, Pub. L. No. 91-513, Title III, § 1101(a)(2), 84 Stat. 1291.

2. The informer himself did not testify, the prosecution being unable to locate him. 401 U.S. 745, 753-54.

3. U.S. CONST. amend. IV: "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."

4. 405 F.2d 838 (7th Cir. 1969). The court read Katz v. United States, 389 U.S. 347 (1967) as overruling On Lee v. United States, 343 U.S. 747 (1952), a case involving a fact pattern almost identical to *White*. A further aspect of the case will not be discussed in this comment, that being the effect of the ruling in Desist v. United States, 394 U.S. 244 (1968), that *Katz* was to be applied prospectively only. The events in *White* occurred prior to the *Katz* holding.

5. 401 U.S. 745 (1971).

the use of a wired informer to enable agents to monitor conversations between the defendant and the informer does not violate the defendant's constitutional protection against unreasonable searches and seizures.[6]

Eavesdropping, though often viewed as an unsavory technique,[7] has been employed by law enforcement agencies to detect and combat crime with little judicial disapproval unless the government committed a trespass. The advent of electronic eavesdropping had no immediate impact on the court's traditional "trespass" criterion. In the first electronic eavesdropping case to come before the Supreme Court, *Goldman v. United States*,[8] the police placed a detectaphone against the wall of an office adjoining the defendant's office in order to hear his end of a telephone conversation. The Court, employing the same rationale to avoid the fourth amendment standard of "reasonableness" as it employed in the landmark wiretapping case,[9] held that (1) there could be no search and seizure without an actual trespass on the defendant's person or property; (2) the fourth amendment protects only persons, places and things, not oral statements.[10] The defense's attempt to distinguish eavesdropping from wiretapping on the basis of privacy expectations failed, the Court holding that there was not rational distinction between them.[11]

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6. The Court of Appeals erred in reading *Katz* as overruling *On Lee*. Other circuit courts faced with interpreting the *Katz* holding failed to read in it an overruling of *On Lee* and upheld similar government activity: Koran v. United States, 408 F.2d 1321 (5th Cir. 1969), *cert. denied*, 402 U.S. 948 (1971); United States v. Kaufer, 406 F.2d 550 (2d Cir. 1969); Dancy v. United States, 390 F.2d 370 (5th Cir. 1968); Holt v. United States, 404 F.2d 914 (10th Cir. 1968). *But see* Doty v. United States, 416 F.2d 892 (10th Cir. 1968).

7. Blackstone refers to eavesdroppers as those who "listen under walls or windows or the eaves of houses, and hearken for discourse, and thereupon frame slanderous and mischievous tales, and are a common nuisance." 4 W. BLACKSTONE, COMMENTARIES * 168.

8. 316 U.S. 129 (1942).

9. Olmstead v. United States, 277 U.S. 438 (1928).

10. Goldman v. United States, 316 U.S. 129, 135 (1942).

11. Thereafter the fruits of electronic eavesdropping could be excluded only if the police had committed a trespass. Weeks v. United States, 232 U.S. 383 (1913) (evidence obtained in violation of a constitutional provision excluded from a federal court proceeding). Congress responded to the Supreme Court's *Olmstead* ruling by passage of the 1934 Federal Communications Act prohibiting the interception and divulgence of wire communications, which the Supreme Court has interpreted to prohibit the admittance of wiretapping evidence in a court proceeding, Nardonne v. United

The trespass doctrine was denounced in *Silverman v. United States*[12] and finally disposed of in *Katz v. United States*.[13] The Court in *Katz*, with only one dissenting vote (but with three separate concurring opinions) held that the government's use of a listening device outside a telephone booth constituted a search in spite of the absence of trespass, thus destroying the trespass rationale which supported both the wiretapping and eavesdropping cases. The Court stated that "the fourth amendment protects people, not places"[14] and that it is one's privacy expectations which are determinative. The Court conceded that the police probably could have obtained a search warrant, but, in the absence of a warrant, the search was unreasonable.

Informers' testimony on the other hand, has consistently been utilized by the government both prior to and during the judicial proceeding with almost no judicial disapproval.[15] The supporting rationale is basically that each person runs the risk that what he tells another might be relayed to the police and used to incriminate him. The courts have been very reluctant to limit, in any way, the use of such testimony, even when the informer was an agent of law enforcement officers. For example, in *Hoffa v. United States*,[16] a union official under indictment was released from jail when he promised to be an "ear" for the police, who were interested in discovering any possible illegal activities surrounding Hoffa's "Test Fleet" trial. Through the informer who worked his way into the Hoffa camp, the police gathered enough evidence to convict Hoffa and others for attempting to bribe "Test Fleet" jurors.[17] The Court rejected Hoffa's argument that his fourth amendment rights had been violated stating that Hoffa was not relying on the security of the hotel room, where some of the conversations took place, but rather was relying on his misplaced confidence that the informer would not reveal Hoffa's wrongdoing.[18]

States, 302 U.S. 379 (1937). There was no immediate Congressional response to *Goldman* although the Court there found no rational or logical distinction between wiretapping and electronic eavesdropping.

12. 365 U.S. 505, 512 (1961).

13. 389 U.S. 347 (1967).

14. *Id.* at 351.

15. The only Court interference has come when the police have been guilty.

16. 385 U.S. 293 (1966).

17. Chief Justice Warren dissented vigorously in *Hoffa*, viewing the introduction of Partin (informer) into Hoffa's camp as distasteful. He would set up some guidelines for the use of informers to protect citizens from the guileful use of "friends." *Id.* at 313-21.

18. *Id.* at 302.

Government agents can likewise misrepresent themselves as lawbreakers[19] without violating an unsuspecting defendant's fourth amendment rights.[20] In short, the courts have consistently refused to protect an individual from his misplaced confidence.

However, judicial response to government utilization of a technique which combines electronic eavesdropping and an informer has not been so clearly favorable. In *On Lee v. United States*,[21] the government, without antecedent judicial approval, placed a radio transmitter on an informer to enable him to monitor conversations between the informer and the defendant. Justice Jackson, writing for the majority, held that because there was no trespass, the government's use of the wired informer could not constitute a search in the fourth amendment sense.

Four justices in four separate dissents objected to the techniques employed by the police. Justice Douglas quoting extensively from Brandeis' dissent in *Olmstead v. United States* warned of the demise of the fourth amendment's intended privacy protections. Justice Frankfurter labeled the governmental techniques "dirty business" which would spawn "lazy" and "immoral" police practices.[22]

The propriety of similar government techniques arose again in *Lopez v. United States*.[23] A government official carried a tape recorder on visits to the defendant's office to record an attempted bribe. The tape recording was admitted into evidence to corroborate the official's testimony at a subsequent criminal proceeding. Although the majority approved of the unwarranted technique, four justices believed that *On Lee* should be overruled, and three of them objected to the admission of the tape recording, again echoing Brandeis' concern for privacy. These justices contended that because of the nature of instantaneous monitoring and recording, the threat to individual privacy was far greater than that posed by traditional eavesdropping techniques.[24] Reflecting on the founding fathers' purpose in writing the fourth amend-

19. Lewis v. United States, 385 U.S. 206 (1966).

20. *See* Note, *Police Undercover Agents—New Threat to First Amendment*, 37 GEO. WASH. L. REV. 634, 652-58 (1968-69).

21. 343 U.S. 747 (1952).

22. *Id.* at 758-62.

23. 373 U.S. 427 (1963).

24. Justice Brennan dissenting, "Electronic aids add a whole new dimension to eavesdropping. They make it more penetrating, more indiscriminate, more truly obnoxious to a free society. Electronic surveillance, in fact, makes the police omniscient; and police omniscience is one of the most effective tools of tyranny." 373 U.S. 427 at 466.

ment,[25] they sought to bring these modern innovations within the limitations set up by that amendment. Chief Justice Warren, believing that *On Lee* should not be revitalized, conceded that advanced techniques in electronics pose constitutional problems, but did not believe the use of all such electronic devices was unconstitutional or unfair law enforcement practices.[26] Warren distinguished the use of the transmitter employed in *On Lee* and in *Lopez,* stating that in *Lopez* the transmitter was used to corroborate the informer's testimony but he could "not sanction by implication the use of these same devices to radically shift the pattern of presentation of evidence in the criminal trial, a shift that may be used to conceal substantial factual and legal issues concerning the rights of the accused and the administration of criminal justice."[27]

A first step in applying the fourth amendment to wired informer situations was achieved by two decisions which intervened between *On Lee* and *Lopez,* holding that verbalizations (intangible evidence) were within the scope of fourth amendment protections.[28] Then came the Court's ruling in *Osborn v. United States,*[29] which sanctioned the recording of a conversation by a participant, but only because (1) antecedent approval from a judge had been obtained and (2) the scope of the activity was particularly limited to meet forth amendment standards.[30] The majority opinion pointed out that the recording conformed to the standards set up by both the concurring and dissenting opinions in *Lopez.*[31] The following year the Court held in *Berger v. United States*[32] that a New York statute which regulated the use of eavesdropping by law enforcement officers, including antecedent judicial approval, was unconstitutional for failing to meet the particularity requirement of the fourth amendment.[33] While *Berger* dealt with the constant

25. For an excellent discussion of the background of the fourth amendment, *see* Boyd v. United States, 116 U.S. 616 (1886). Implicit in the discussion of fourth amendment rights are fifth amendment rights also.

26. Lopez v. United States, 373 U.S. 427 (1963) (concurring opinion).

27. *Id.* at 445-46.

28. Silverman v. United States, 365 U.S. 505 (1962); Wong Sun v. United States, 371 U.S. 471 (1963), both of these cases dealt with searches without warrants.

29. 385 U.S. 323 (1966).

30. *Id.* at 330.

31. *Id.* at 327.

32. 388 U.S. 41 (1967).

33. The particularity requirement set forth in the fourth amendment contains:

1. warrants issued only upon probable cause, supported by Oath or affirmation, and
2. particularity describing the place to be searched, and the persons or things to be seized.

electronic surveillance of an office rather than intermittant eavesdropping, the case made clear that if the use of electronic equipment cannot be strictly controlled to meet fourth amendment standards, then "the 'fruits' of eavesdropping devices are barred under the fourth amendment."[34] These two decisions then significantly restrict the use of electronic eavesdropping devices.

However, none of these post-*On Lee* cases clearly resolved the central issue in *White*—whether warrantless electronic eavesdropping using a wired informer is constitutional. Though *Katz* was interpreted by the Court of Appeals in *White* as controlling, it did not deal with a consenting participant, as did *White, Osborn, On Lee* and *Lopez,* thus explaining the apparent unanimity in excluding the evidence in *Katz.*[35] In fact, Justice White, the author of the plurality opinion in *White,* made it a point to mention in his concurring opinion in *Katz* that *On Lee* and *Lopez* were unaffected by that decision.

There is little doubt that cases before the *Katz* decision discarded the trespass doctrine, thereby overruling at least part of *On Lee.*[36] Yet, it has been contended that *On Lee* was fatally eroded even prior to *Katz,*[37] and that recent decisions which have broadened the definition of search,[38] limited the scope of permissible searches,[39] and required conformity to fourth amendment standards for the enlarged category of searches,[40] have discredited the whole *On Lee* rationale.

But although *White* reaffirms *On Lee,* it is questionable how much of *On Lee* has been revived. Whether the traditional acceptance of an

34. Berger v. United States, 388 U.S. 41, 63 (1967).

35. Another explanation for the unanimity is that *Katz* put to rest, once and for all, that increasingly uncomfortable trespass rationale first enunciated in *Olmstead.* For a long time it had been felt that to rest a personal protection doctrine on a property law concept was unsupportable. The "constitutionally protected areas" doctrine of Lanza v. United States, 370 U.S. 139 (1962), the then latest renovation of the trespass rationale, failed to foreclose the inevitable doom of the rationale which *Katz* finally tolled.

36. Katz v. United States, 389 U.S. 347, 353 (1967).

37. United States v. White, 401 U.S. 745, 774 (1971).

38. Berger v. United States, 388 U.S. 41 (1967); Osborn v. United States, 385 U.S. 323 (1966).

39. Terry v. Ohio, 392 U.S. 1 (1968) (any restraint of the person whatsoever subject to judicial inquiry for reasonableness); Mapp v. Ohio, 367 U.S. 643 (1961) (evidence from unlawful searches and seizures inadmissible in criminal trial in state courts).

40. Camara v. Municipal Court, 387 U.S. 523 (1967) (administrative searches must comply with fourth amendment).

informer's testimony as seen in *Hoffa* is foremost in the Court's mind is not certain. It is clear that the government may no longer use electronic devices, with few exceptions,[41] to gain access to a conversation it otherwise would be unable to overhear without first obtaining a warrant.[42] On the other hand, it may still use informers and agents to seek out and gather evidence without warrants.[43] The question is whether a warrant requirement should be imposed when both an informer and a listening device are utilized. *White* answers this question by reading *Katz* narrowly, limiting the warrant requirements to electronic devices only. If a liberal reading were given to *Katz*, any use of electronic devises would have to meet the particularity requirements of the fourth amendment, even when coupled with the use of an informer. But the objects of a conversation, which has not yet taken place, cannot often be particularly described. The ease with which a search warrrant can be obtained, depending on the varying requirements of different judges, emphasizes the problem of judicial noncompliance with the particularity requirements of the fourth amendment. It also raises the question of just what purpose a search warrant serves.

An important consideration in the use of electronic devices coupled with the use of an informer is its admission into evidence. Chief Justice Warren's concurring opinion in *Lopez* is concerned with the admission of an informer's testimony without the corroboration of the tape recording. A tape recording used as the only evidence of an illegal transaction is not open to impeachment, as would be an informer's testimony. Nor would the admission of the testimony of the informer alone be desirable, for in the end it would be one man's word against another's. The use of the tape recording serves to protect the credibility of the informer. Thus the most desirable evidence would be the testimony of an informer coupled with the tape recording, but neither of these admitted alone would serve the best interests of the accused or the administration of criminal justice.

White then stands as a significant setback to those urging the use of the fourth amendment to control government electronic eavesdropping. It, in effect, offers the government a way of avoiding the effect of *Katz* by interjecting an informer into the scheme. A possible explanation for this judicial withdrawal from a controversial area is the entrance

41. Katz v. United States, 389 U.S. 347, 357-58 (1967).
42. *Id.* at 357.
43. Hoffa v. United States, 385 U.S. 293, 301-02 (1966).

of Congress into the field through the Omnibus Crime Control and Safe Streets Act of 1968.[44] Justice White does make a reference to it in his opinion.[45] This, of course, does not prevent the Court from applying fourth amendment standards to electronic eavesdropping, as many people both on and off the Court have recommended.[46] But in light of the Court's difficulty in rationalizing an extension of constitutional safeguards in this area, it may well leave the line drawing to Congress.

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44. Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510-20 (1968). Title III of the Omnibus Crime Control and Safe Streets Act of 1968 permits wiretapping and electronic eavesdropping by federal and state law enforcement officers providing they have obtained a court order authorizing the interception. The Act delineates the circumstances in which the order will be granted and the form the authorization is to take. No authorization is necessary when one of the participants has consented to the interception. The Act also prohibits all wiretapping and electronic eavesdropping by private individuals unless there is the consent of one of the participants in the conversation.

For more discussion of Title III of the Omnibus Crime Control and Safe Streets Act discussing jurisdictions with statutes authorizing or approving the interception of wire or oral communications during a one year period *see* 117 CONG. REC. § 6476-81 (daily ed. May 10, 1971) and 117 CONG. REC. § 20041-46 (daily ed. Dec. 1, 1971).

45. 401 U.S. 745 (1971). *Accord,* Comment, *Electronic Surveillance: The New Standards,* 35 BROOKLYN L. REV. 49 (1968); Note, *Eavesdropping Provisions of the Omnibus Crime Control and Safe Streets Act of 1968: How Do They Stand in Light of Recent Supreme Court Decisions?* 3 VALPARISO L. REV. 89 (1968).

46. *Fourth Amendment Limitations on Eavesdropping and Wiretapping,* 16 CLEV. MAR. L. REV. 467 (1967); Comment, *Fourth Amendment and Electronic Eavesdropping: Katz v. United States,* 5 HOUSTON L. REV. 990 (1968); Note, *Constitutional Law: The Validity of Eavesdropping under the Fourth Amendment,* 51 MARY. L. REV. 96 (1968); Note, *Eavesdropping and the Constitution: A Reappraisal of the Fourth Amendment Framework,* 50 MINN. L. REV. 378 (1965-66); *From Private Places to Perstonal Privacy: A Post-Katz Study Fourth Amendment Protection,* 43 N.Y.U. L. REV. 968 (1968); Note, *Constitutional Law-Electronic Surveillance by Bugged Agents—Is Electronic Surveillance By Bugged Agents a Search and Seizure Within the Fourth Amendment?* 14 VILL. L. REV. 758 (1969).