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Evidence: The Wisconsin Electronic Surveillance Control Law

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mation actions, regardless of whether the identity of the sources is in any way required by the plaintiff to prove his cause of action.[31]

Under the statute, the testimony which would be compelled in criminal cases and civil actions, other than those specifically excluded, would be that for which there exists a "compelling and overriding national interest which cannot be served by an alternative means." What considerations, if any, went into the selection of the *Caldwell* wording, rather than that which the Wisconsin court used, cannot be determined. What is significant, however, is that the proposed statute, like the *Knops* holding itself, makes no differentiation in terms of how the privilege will be applied to various degress of criminal conduct, thereby providing no greater guideline.

CONCLUSION

While the case of *State v. Knops* will stand as a landmark decision in terms of its interpretation of the first amendment guarantee of freedom of the press, there still remain many unanswered questions concerning application of the privilege. When will a "compelling need" for knowledge of the source of information be deemed to exist? Will this be determined according to the court's estimation of the overall value of the information to the public? Will the state always have a "compelling interest" in any evidence relative to the prosecution of criminal activity, regardless of how minor the particular charges might be? The result of this uncertainty is a situation wherein lower courts, newsmen, and, most importantly, confidential news sources are left in substantial doubt as to how the privilege will be applied in their particular cases—a doubt uncleared by any legislation that has, thus far, been proposed in this state.

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Evidence: The Wisconsin Electronic Surveillance Control Law: Evidentiary Limitations—In 1969, the Wisconsin Legislature passed what is now referred to as the Wisconsin Electronic Surveillance Control Law.[1] This enactment is patterned after a similar provision

31. *See* note 24 *supra.*

1. Wis. Laws 1969, ch. 427; WIS. STAT. §§ 968.28-.34 (1969).

in the United States Code[2] and follows the intent of *The American Bar Association Project on Minimum Standards of Criminal Justice, Standards Relating to Electronic Surveillance*.[3] The new law is an attempt to codify the exact procedures to be followed by law enforcement officers in the use of electronic surveillance techniques.[4] The statutes provide detailed instructions for the procurement of the necessary authorization for the interception of oral and wire communications. In addition, they list the circumstances under which this authorization will be granted. Finally, they provide evidentiary sanctions as well as a civil cause of action and criminal penalties for noncompliance.

State ex rel. Arnold v. County Court of Rock County[5] is the first statement of the Wisconsin Supreme Court in interpretation of the new law. Dealing primarily with the admissability into evidence of certain tape recordings obtained with the consent of one of the parties to several conversations, the case indicates that the statutes dealing with this subject will be strictly construed.

The action began as a petition for a writ of prohibition entered with the permission of the supreme court. The relator, George Arnold, sought to restrain the county court of Rock County from receiving into evidence tape recorded conversations to which he was a party.[6] Arnold was the secretary and executive director of the Beloit Housing Authority. On August 28, 1970, he had conversations with Robert Lockhart, a Beloit contractor who had been the accepted bidder for 75 low cost housing units to be constructed in Beloit. The Rock County Sheriff's Department intercepted these conversations by means of microphones wired to a recording mechanism. "Lockhart gave his written consent for these electronic interceptions but Arnold had no knowledge of them and did not

2. 18 U.S.C. §§ 2510-2520 (1970).

3. Approved Draft, 1968 [hereinafter referred to as *Standards*].

4. The introduction to Wis. Laws 1969, ch. 427 states that the purpose of the legislation is "to prohibit electronic surveillance by persons other than law enforcement officers duly authorized by court order and engaged in the investigation or prevention of specific categories of offenses . . . ."

5. 51 Wis. 2d 434, 187 N.W.2d 354 (1971).

6. *Id.* The court held that nonjurisdictional error is a proper ground for issuance of the writ when the appeal comes too late for effective redress or is inadequate, when there is need for such intervention to avoid great hardship or the complete denial of the rights of the litigant, or when there is presented a question of great and immediate public concern, citing: State *ex rel.* Schulter v. Roraff, 39 Wis. 2d 342, 159 N.W.2d 25 (1968); State *ex rel.* Gaynor v. Krueger, 31 Wis. 2d 609, 143 N.W.2d 437 (1966); State *ex rel.* Sucher v. County Court, 16 Wis. 2d 565, 115 N.W.2d 611 (1962); Drugsvold v. Small Claims Court, 13 Wis. 2d 228, 108 N.W.2d 648 (1961).

consent thereto."[7] Arnold was subsequently arrested and charged with accepting a bribe contrary to Wisconsin Statutes section 946.10(2) and with misconduct in public office contrary to Wisconsin Statutes section 946.12(2). When his pretrial motion to suppress the tapes was denied, this original action followed.

The defense had objected to the admission of the recordings, alleging that they constituted an unreasonable search and seizure in violation of the fourth and fourteenth amendments to the United States Constitution. The state had contended that the interception of the oral communications was lawful under Wisconsin Statutes section 968.31(2)(b) and, therefore, that the resultant tapes were admissible in evidence.[8] Thus the issue presented to the court was whether or not recorded conversations obtained with the consent of one of the parties, but without court authorization, are admissible in evidence against the other (non-consenting) party.

In deciding the constitutional question of whether or not the interception was an unreasonable search, the majority quoted and relied upon the United States Supreme Court decision in *United States v. White*.[9] The court pointed out the holding in *White* that electronic eavesdropping was permissible under the fourth amendment in that case, on the ground that the defendant had no justifiable expectation that his conversation would not be reported verbally, and, therefore, that it would not be recorded by, or with the consent of, the other party. But the Wisconsin court took pains to point out that the decision in *White* was a 5-4 decision and that the majority in that case could not agree on a single opinion.[10] However, the court went on to deny the admissibility of the tapes in *Arnold* on two *non*-constitutional grounds.

First, the court stated that Arnold's conversations were privileged by statute and that their admission into evidence would be in

7. *Id.* at 437, 187 N.W.2d at 357.

8. WIS. STAT. § 968.31(2)(b) (1969) provides that it is not unlawful under §§ 968.28 to 968.34 (The Wisconsin Electronic Surveillance Control Law) "for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception."

9. 401 U.S. 745 (1971).

10. 51 Wis. 2d at 439, 187 N.W.2d at 357. Specifically, the Wisconsin Supreme Court said: "While this case is not satisfactory because of the diversity in its opinions, the disagreement on what the Court's prior decisions meant and the plurality holding, nevertheless, it controls, for the time being at least, the issue of constitutionality raised in this case."

violation of the Wisconsin Electronic Surveillance Control Law.[11] In coming to this conclusion, the court seems to have adopted a broad definition of the word "privilege" as used in the surveillance statutes. In the *Standards*, a provision identical to the Wisconsin section on privilege is discussed.[12] However, in the comment following this standard, there is a lengthy discussion of the traditional legally recognized areas of privilege: attorney-client, physician-patient, and priest-penitent.[13] It is clearly the intent of the *Standards* to use the word in its traditional legal sense. A study of past cases reveals that the Wisconsin courts have always used this definition of privilege and privileged communications.[14] In addition, the definition of privileged communications and the application of the privilege rule is a matter of statutory law in this state.[15] The court appears to have redefined the concept of privilege in terms of the surveillance law to broaden the enactment's protection.[16]

Second, the court went into an elaborate discussion of the pertinent provisions of the Wisconsin Electronic Surveillance Control Law itself. The opinion described the statutory provision which authorizes electronic eavesdropping.[17] Section 968.28 provides in some detail for the application for a court order prior to the interception of oral or wire communications. This section delineates the circumstances under which the order will be granted:

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11. WIS. STAT. § 968.29(4) (1969): "No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, ss. 968.28 to 968.34 or 18 U.S.C. 119, shall lose its privileged character."

12. § 5.11(b) *Privileged Communications.*

13. *Id.*, comment d. *Interception of Privileged Communications:*

> The privilege has come to be understood to be that of a client, spouse, patient or confidant to prevent not the interception but the disclosure of the conversation by the testimony of a lawyer, spouse, physician or clergyman concerning confidential communications in a legal proceeding.

14. State v. Knops, 49 Wis. 2d 647, 183 N.W.2d 93 (1971); Abraham v. State, 47 Wis. 2d 44, 176 N.W.2d 349 (1970); Alexander v. Farmer's Mut. Auto Ins. Co., 25 Wis. 2d 623, 131 N.W.2d 373 (1964).

15. WIS. STAT. §§ 885.18 (1969) (Husband and Wife), 885.20 (Confessions to Clergyman), 885.205 (Privileged Communication), 885.21 (Communication to Doctors), and 885.22 (Communications to Attorneys).

16. However, we think Arnold's conversations were privileged in character by statute and their admission in evidence by means of tape recordings would be in violation of The Wisconsin Electronic Surveillance Control Law, sec. 968.27 through 968.33, Stats.

51 Wis. 2d at 439, 187 N.W.2d at 357.

17. WIS. STAT. § 968.28 (1969). This section requires law enforcement officers to apply for a circuit court order authorizing or approving the interception of a wire or oral communication.

> The authorization shall be permitted only when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, commercial gambling, bribery, extortion and dealing in narcotics and dangerous drugs or conspiracy to commit any of the foregoing offenses.[18]

The next section of the statutes includes a provision authorizing disclosure of intercepted wire or oral communications:

> Any person who has received, by any means authorized by secs. 968.28 to 968.34 or 18 USC 119 or by any like statute of any other state, any information concerning a wire or oral communication or evidence derived therefrom intercepted in accordance with secs. 968.28 to 968.34, may disclose the contents of that communication or such derivative evidence only while giving testimony under oath or affirmation in any proceeding in any court or before any magistrate or grand jury in this state, or in any federal or state grand jury proceeding.[19]

In light of the above quoted sections, the remainder of the decision in *Arnold* turned upon an interpretation of section 968.31(2)(b).[20] This section provides that interception of oral or wire communications with the consent of one of the parties by a person acting under color of law shall not be unlawful. The majority in *Arnold* read this section together with sections 968.28 and 968.29 to impose an evidentiary restriction:

> We think the admissibility into evidence of the contents of eavesdropping interceptions is governed solely by sec. 968.29(3), Stats., and only communications "intercepted in accordance with" the state law may be disclosed by being admitted in evidence. An interception by a person under color of law who intercepts with the consent of one party but without the approval of the circuit court is not "intercepted in accordance with" as required in sec. 968.29(3). Nor is such interception "any means authorized by ss. 968.28 to 968.34 . . . ." While making such interception not unlawful, sec. 968.31(2)(b), Stats., does not "authorize" it as a procedure which is done by sec. 968.30 requiring an application for electronic surveillance to the circuit court.[21]

The court reasoned that the intent of the legislature was to

18. WIS. STAT. § 968.28 (1969).
19. WIS. STAT. § 968.29(3) (1969).
20. See note 8 *supra*.
21. 51 Wis. 2d at 442, 187 N.W.2d at 358.

distinguish between the terms "not unlawful" and "authorized." By arriving at this particular distinction, the court has in effect made electronic surveillance with consent of one of the parties a purely investigatory tool, and has deprived the fruits of such investigation of any evidentiary standing. The court considered this result necessary when weighed against the right to privacy enjoyed by a free people.[22]

In the *Standards*, the presence or absence of consent of one of the parties is treated as giving rise to separate sets of requirements. Section Four of the *Standards* deals with interception with consent. Section Five outlines the warrant procedure to be followed in the absence of consent. A reading of these sections together yields the conclusion that evidence obtained with the consent of one of the parties is admissible, while the absence of consent gives rise to the authorization requirements.

The interception of oral and wire communications is treated in Title 18 of the United States Code.[23] These provisions are essentially the same in language and content as the Wisconsin statutes interpreted in *Arnold*.[24] While the Wisconsin court in *Arnold* has construed identical statutory language to render evidence obtained with the consent of one of the parties inadmissible, the United States Supreme Court has held this type of evidence admissible. In *United States v. White*,[25] the Supreme Court held that the use of a transmitter on the person of an informant produced evidence that was admissible against the non-consenting defendant. Although, as pointed out in *Arnold*, the *White* court could not agree on a single opinion, the attitude expressed by the opinions in *White* are at least provisionally helpful in ascertaining the federal law on this issue:

> Inescapably one contemplating illegal activities must realize and risk that his companions may be reporting to the police. . . . Given the possibility that one of his colleagues is cooperating with the police, it is only speculation to assert that the defendant's utterances would be substantially different or his sense of security

22. *Id.*

23. 18 U.S.C. §§ 2510-2520 (1970).

24. 18 U.S.C. § 2511(2)(c) provides:

> It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

18 U.S.C. § 2517(3) and (4) are nearly identical to WIS. STAT. § 968.29(3) and (4).

25. 401 U.S. 745 (1971).

> any less if he also thought that the suspected colleague is wired for sound. . . .
>
> . . . .
>
> It is thus untenable to consider the activities and reports of the police agent himself, though acting without a warrant, to be "reasonable" investigative effort and lawful under the Fourth Amendment but to view the same agent with a recorder or transmitter as conducting an unreasonable and unconstitutional search and seizure.[26]

At this point, the Court pointed out that its opinion was consistent with the Title 18 provisions and the *Standards* section 4.1.[27]

It is interesting to note that while the Wisconsin court in *Arnold* made a detailed analysis of the Wisconsin statutes to arrive at its holding, the Supreme Court in *White* made only passing reference to the corresponding federal law in support of its position.

In the dissent to *Arnold*, Justice Hansen relied heavily on *White* and the other federal decisions in this area to argue for the admissibility of the evidence. The contention is that there is no constitutional bar to the interception of oral communications with consent of one of the parties, and further that the correct interpretation of the statute would, since this type of interception is lawful, allow the material thus obtained to be used in evidence.

CONCLUSION

In *Arnold* the Wisconsin Supreme Court has held that information obtained through the use of electronic surveillance with the consent of one of the parties, but without court authorization, is inadmissible against the non-consenting party. To arrive at this decision, the court has apparently redefined the term "privileged communications" to mean any communication uttered in private conversation with another. Further, the court has strictly construed sections 968.28 to 968.34 of the Wisconsin Statutes, and has indicated that for reasons of public policy and for the protection of individual privacy, the limitations placed on the use of electronic surveillance techniques will be strictly applied and enforced.

Since *Arnold* represents the first judicial pronouncement on this subject since the passage of the Wisconsin Electronic Surveillance Control Law, the decision is a valuable indication of the court's

26. *Id.* at 753.
27. *Id.*

views on this issue. In effect, the court has taken pains to limit the operation of the statute by establishing these evidentiary limitations.

FRANK THOMAS CRIVELLO

Insurance Law: Constitutionality of No-Fault in Massachusetts—For the past several years, everyone involved in negligence law has had to confront the question of reform in the traditional automobile accident reparations system. There is widespread agreement that some reform is needed, but at present a great deal of energy is being expended over whether any of the proposed "no-fault" systems of auto insurance is a proper means to reform.

First presented in the Columbia Plan,[1] no-fault was given its recent impetus by the work of Professors Robert Keeton and Jeffrey O'Connell,[2] who laid a network of criticism at the feet of the traditional tort-recovery system:

> It pays too little, too late, unfairly distributed and at wasteful cost, and through procedures that promote dishonesty and disrespect for the law. These are the symptoms of a fatally ill system. It cannot survive.[3]

The general theme of the Keeton-O'Connell Basic Protection Plan is that an injured person is automatically reimbursed for his economic loss—medical expenses and wage loss—regardless of who is at fault. In return, the insured surrenders his right to bring a traditional tort action, and consequently surrenders his right, in most cases, to recover general damages (pain, suffering, enjoyment of life, etc.). Variations on this theme have proliferated, differing in the type of benefits offered, the maximum amounts available, and the conditions under which tort recovery for general damages would be allowed.[4]

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1. COLUMBIA UNIVERSITY COUNCIL FOR RESEARCH IN THE SOCIAL SCIENCES, REPORT BY THE COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS (1932).

2. Professors of Law at Harvard University and Illinois University respectively, and authors of BASIC PROTECTION FOR THE TRAFFIC VICTIM (1965).

3. Keeton, *Basic Protection—An Answer to the Automobile Insurance Crisis*, 1 CONN. L. REV. 13, 16 (1968).

4. At present, some form of no-fault insurance system has been instituted in Delaware, Florida, Illinois, Massachusetts, Minnesota, Oregon and South Dakota. These systems are compared in THE BRIEF, Nov., 1971, published by the Section of Insurance, Negligence and Compensation Law of the American Bar Association. There is also a comparison of the basic no-fault proposals in TRIAL, Oct./Nov., 1970, at 8-9.