

# Criminal Procedure - Admissibility of Wiretap Evidence in State Courts - *People v. Dinan*, 11 N.Y.2d 350, 183 N.E.2d 689 (1962)

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CRIMINAL PROCEDURE—ADMISSIBILITY OF WIRETAP  
EVIDENCE IN STATE COURTS

Dinan was convicted on charges of both conspiracy and bookmaking in the County Court of Westchester County, New York. The principal evidence presented against him was obtained by wiretap interception of telephone conversations. Prior permission for the wiretapping was secured by a court order as authorized under the New York State Constitution<sup>1</sup> and the New York Criminal Code.<sup>2</sup> Appealing to the Supreme Court of New York, Appellate Division, the defendant took exception to the admission of the wiretap evidence. After affirmation, another appeal was taken to the New York Court of Appeals. In a four-to-three decision, the Court held that wiretap evidence obtained pursuant to a court order is admissible in a state court prosecution notwithstanding the fact that both the procurement and the divulgence of such evidence violates Section 605 of the Federal Communications Act.<sup>3</sup> *People v. Dinan*, 11 N.Y. 2d 350, 183 N.E. 2d 689 (1962).

Few subjects in law are as bitterly controverted as wiretapping. Although the majority of states have now concurred that wiretapping is "dirty business"<sup>4</sup> and prohibit it in any form, a significant number of law enforcement officials obdurately defend its utilization in the detection and conviction of criminals.<sup>5</sup> The wiretap imbroglio is again brought into sharp focus by several recent important cases. In New York, where some judges refuse to issue orders authorizing wiretapping, the confusion is increasingly acute, and the status of legalized wiretapping and its admissibility as evidence in state criminal trials is becoming more and more precarious.<sup>6</sup>

*Benanti v. United States*<sup>7</sup> may have sounded the death-knell of wiretapping. Its final impact remains yet to be ascertained, but there is little

<sup>1</sup> N. Y. CONST. art. I, § 12.

<sup>2</sup> N. Y. CODE OF CR. PROC., § 813-a.

<sup>3</sup> 47 U.S.C. § 605 (1958). Hereafter referred to as Section 605.

<sup>4</sup> Justice Holmes' colorful description of wiretapping in his dissent to *Olmstead v. United States*, 277 U.S. 438, 470 (1928).

<sup>5</sup> DASH, SCHWARTZ & KNOWLTON, *THE EAVESDROPPERS* (1959).

<sup>6</sup> See Judge Medina's reluctant affirmance in *United States ex rel Graziano v. McMann*, 275 F. 2d 286, 287 (2nd Cir. 1960), cert. denied, 358 U.S. 851. While relying on *Schwartz v. Texas*, 344 U.S. 199 (1952), Judge Medina admits in dictum that New York's constitutional provision, legislation, and rules of evidence permitting wiretapping, in view of *Benanti v. United States*, 355 U.S. 96 (1957), and the Supremacy Clause of the United States Constitution, art. VI, Clause 2, may well constitute an invasion of due process under the fourteenth amendment. He concludes that "the point is novel and the solution far from clear."

<sup>7</sup> 355 U.S. 96 (1957).

doubt that the *Benanti* case, with its unanimous opinion by the United States Supreme Court, presages a showdown in the wiretap controversy. First, it abolishes the so-called "silver platter doctrine" whereby wiretap evidence could be used in a federal case when it was obtained and turned over by state officers, without any participation in the tap by federal authorities.<sup>8</sup> Secondly, the *Benanti* case makes wiretapping by state law enforcement officials a federal offense regardless of the fact that it is done pursuant to a court order and for the purpose of apprehending criminals. Thirdly, it makes the divulgence of wiretap evidence to a jury, petit or grand, literally a crime committed in a courtroom. Finally, in its most ominous portent, it interprets Section 605 and finds that Congress "setting out a prohibition in plain terms, did not mean to allow legislation which would contradict that section and that policy."<sup>9</sup>

In *Schwartz v. Texas*,<sup>10</sup> which was qualified by *Benanti*, the United States Supreme Court held that the introduction of wiretap data into evidence, while it "would itself be a violation of the statute,"<sup>11</sup> could nevertheless be used by the states pursuant to the rule of *Wolf v. Colorado*.<sup>12</sup> In *Pugach v. Dollinger*,<sup>13</sup> an application was made to a federal court for an injunction against the use of evidence obtained by court-ordered wiretaps in a New York state criminal trial. Sitting en banc, the federal court, while conceding that Section 605 would be violated by the reception of such evidence, nonetheless affirmed denial of the injunction on the basis of the *Schwartz* case and *Stefanelli v. Minard*.<sup>14</sup> In a per curiam opinion, which merely cited the *Schwartz* and *Stefanelli* cases, the United States Supreme Court reaffirmed the *Pugach* case.<sup>15</sup> It would seem that in view of the distinction in *Benanti* of the limited holding in the *Schwartz* case, the Court, at that time, continued to adhere to the doctrines of the *Wolf* case, and *People v. Defore*.<sup>16</sup>

<sup>8</sup> See Note, 7 DE PAUL L. REV. 267 (1958).

<sup>9</sup> *Benanti v. United States*, 355 U.S. 96, 105, 106 (1957).

<sup>10</sup> 344 U.S. 199 (1952).

<sup>11</sup> *Id.* at 201.

<sup>12</sup> 338 U.S. 25 (1949). The *Wolf* case holds that evidence obtained by a state officer by means which constitute an unlawful search and seizure under the fourth amendment to the Constitution is nevertheless admissible in a state court.

<sup>13</sup> 365 U.S. 458 (1961).

<sup>14</sup> 342 U.S. 117 (1951). The *Stefanelli* case ruled that no such injunction should be issued to preclude the use in a state court even of unconstitutionally seized evidence, and cited *Wolf v. Colorado* as authority for the traditional reluctance of federal courts to interfere collaterally in state judicial (especially criminal) proceedings.

<sup>15</sup> 365 U.S. 458 (1961).

<sup>16</sup> 242 N.Y. 13, 150 N.E. 585 (1926). The *Defore* case ruled that decisions of the Supreme Court of the United States construing the fourth and fifth amendments of the Constitution are not binding on state courts, and that a state may make its own rules as to the admissibility of illegally obtained evidence.

Only four months later, the noteworthy case of *Mapp v. Ohio*,<sup>17</sup> involving introduction into evidence of material procured by an unlawful search and seizure, was decided. For the first time, the Supreme Court held that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court."<sup>18</sup> Both the *Wolf* case, and the key precedent for the admissibility of wiretap evidence in New York state courts, the *Defore* case, were specifically overruled by rejection of their holdings that United States Supreme Court decisions construing the fourth and fifth amendments of the Constitution are not binding upon the states. By this overruling of *Wolf*, the authority of the federal precedent for the constitutionality of wiretap legislation in New York, the *Schwartz* case, is weakened still further. First, the later *Benanti* case severely limited the extension of *Schwartz*, and now the *Mapp* case destroys the pillar on which *Schwartz* rested, the case of *Wolf v. Colorado*. By the same token, the reiteration in the *Stefanelli* case of the traditional reluctance of federal courts to meddle in state criminal proceedings is now brought into question. Thus, at least to the extent that the admission of wiretap evidence is dependent upon precedent cases ruling that evidence may be admitted which has been procured in violation of Constitutional prohibitions, wiretapping in New York is subjected to a twofold attack: First, the *Mapp* case overrules *Defore*, the state case upon which its constitutionality depends; secondly, *Mapp* also severely undermines its federal precedent, the *Schwartz* case, by overruling *Wolf v. Colorado*, upon which *Schwartz* relies. The ultimate question is, of course, whether or not the *Mapp* case will be extended, by analogy, to include violation of federal statutes notwithstanding state legislation purporting to allow such abridgment.

Certain *dicta* may be considered as offering some indication as to the trend of future decisions. Justice Douglas, in his dissent to *Pugach v. Dollinger*,<sup>19</sup> holds that the *Benanti* case sweeps away the rationale of the *Schwartz* case. In his dissent to *Rathbun v. United States*,<sup>20</sup> Justice Frankfurter rejects the plausible contention that "the well-known authorization of wiretapping by some states ought to have qualified the strict purpose of Congress (expressed in Section 605)."<sup>21</sup> With perhaps less weight, but a much firmer indication of a trend, is the dissent in the *Dinan* case. Here, the three justices cited *Benanti* and *Mapp* as controlling, and despite a prior recent decision *contra*,<sup>22</sup> contended that the use of wiretap evidence in the courts of New York should be barred as a matter of law.

<sup>17</sup> 367 U.S. 643 (1961).

<sup>18</sup> *Id.* at 655.

<sup>19</sup> 365 U.S. 458, 460 (1961).

<sup>22</sup> *People v. Variano*, 5 N.Y. 2d 391, 157 N.E. 2d 857 (1959).

<sup>20</sup> 355 U.S. 107 (1957).

<sup>21</sup> *Id.* at 114.

On the other hand, a more conservative approach to these questions is indicated by the case of *Williams v. Ball*.<sup>23</sup> In that case, petitioners, under indictment, sought a declaration in a federal court that the New York constitutional provision and New York statute authorizing wiretapping be declared unconstitutional, and that a temporary injunction be issued against the state prosecution in which the wiretap evidence was to be used. In affirming dismissal of the petition, the federal court said, "we do not read *Mapp v. Ohio* as overruling *sub silentio Schwartz v. Texas*, on which six justices expressly relied, only four months earlier, in a per curiam affirmance of *Pugach v. Dollinger*."<sup>24</sup> Negating any notion that the *Pugach* case should be reconsidered in the light of the *Mapp* case, the court went on to assert that *Mapp* can be said to furnish no basis for an extension of its application to a state's receiving evidence of which the divulgence would violate a federal statute.<sup>25</sup> In a timely judicial aside, the court, lamenting the fact that Congress has not acted on the many proposals dealing with the wiretap problem,<sup>26</sup> announced its intention of holding to the *Pugach* case which refused to enjoin the introduction of wiretap evidence in a state criminal proceeding. That the true assessment of the *Schwartz*, *Benanti*, *Pugach* and *Mapp* cases remains yet to be determined is illustrated by *Bolger v. Cleary*.<sup>27</sup> In that case, it was held that a federal court has power to enjoin a state official from testifying in a state criminal proceeding as to information learned by him as a result of his cooperation with federal officials in an unlawful search and seizure and in an illegal detention. In granting the injunction, the court relied on the *Mapp* case.

Under the new Illinois Criminal Code<sup>28</sup> and by the avowed intention of its drafters, Illinois is classified with the majority of states which are "total prohibition" jurisdictions in the matter of wiretapping. *People v. Dixon*<sup>29</sup> may, however, subject the new code to a test. In that case, police officials cooperated with a narcotics user in arranging for a controlled purchase of narcotics from the defendant. The Illinois Supreme Court decided that the testimony of a police officer regarding a monitored telephone conversation between the user and the defendant was not inadmissible in the trial under the Electronic Eavesdropping Statute,<sup>30</sup> where the officer listened in on an extension telephone, and the user, who made

<sup>23</sup> 294 F. 2d 94 (2d Cir. 1961).

<sup>24</sup> *Id.* at 96.

<sup>25</sup> *Id.* at 96 (dictum).

<sup>26</sup> S. 1086 and S. 2813 are now pending in Congress.

<sup>27</sup> 293 F. 2d 368 (2d Cir. 1961).

<sup>28</sup> ILL. REV. STAT. ch. 38 (1961).

<sup>29</sup> 22 Ill. 2d 513, 177 N.E. 2d 224 (1961).

<sup>30</sup> ILL. REV. STAT. ch. 38, § 14-1 to § 14-7 (1961).

the call, consented to the action. Similarly, in *People v. Malotte*,<sup>31</sup> it was held that police officials may listen in if they obtain the consent of one of the parties to the conversation. This ruling has been stretched to cover a vast area of wiretapping with the subscriber's permission, whether or not the subscriber is a party to the conversation. While the Supreme Court of the United States decided in *Rathbun v. United States*<sup>32</sup> that listening in on a regular extension line is not wiretapping, the possibility of such an extension of the *Dixon* case to allow limited wiretapping in Illinois by law enforcement officials remains an intriguing subject for conjecture.

In the final analysis, it is apparent that until Congress resolves the problem by clarifying legislation, or the United States Supreme Court grants certiorari to another wiretap case which addresses the question of the relation of the *Schwartz*, *Benanti*, *Pugach* and *Mapp* cases, the final denouncement of the wiretap drama will necessarily remain an enigma. Until the strongly implied condemnation of wiretapping expressed in the *Benanti* case is less qualified, or the rationale of the *Mapp* case is extended from constitutional prohibitions to federal statutes, *Dinan* points to a tenacious adherence by New York to its legislation permitting wiretapping by police officials.

<sup>31</sup> 46 Cal. 2d 59, 292 P. 2d 517 (1956).

<sup>32</sup> 355 U.S. 107 (1957).

### CRIMINAL PROCEDURE—SEARCHES AND SEIZURES AND ADMISSIBILITY OF EVIDENCE

In a trial which took place prior to the United States Supreme Court's decision in *Mapp v. Ohio*,<sup>1</sup> defendant was convicted of having violated the State of New York's gambling laws.<sup>2</sup> On appeal, after the *Mapp* decision, defendant initially raised the issue that the evidence upon which he was convicted was obtained by an unlawful search and seizure. The New York Court of Appeals affirmed the conviction without looking into the question of the alleged illegality of the search and seizure. In so holding the Court found that it had no grounds upon which to review as no objection was taken at the trial to the introduction of the evidence. It was also stated by the Court that there was no mention in the record of the circumstances of the alleged illegal search and seizure. Further, the

<sup>1</sup> 367 U.S. 643 (1961). The *Mapp* case held that evidence obtained as a result of an illegal search and seizure must be excluded in State courts as it violates the Due Process Clause of the fourteenth amendment.

<sup>2</sup> N.Y. PENAL LAW § 986, 986b.