



UNC
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 34 | Number 2

Article 9

2-1-1956

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Recommended Citation

William E. Zimtbaum, *Evidence -- Admissibility of Partially Inaudible Recordings*, 34 N.C. L. REV. 233 (1956).

Available at: <http://scholarship.law.unc.edu/nclr/vol34/iss2/9>

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procure a search warrant, but whether the search was reasonable";²⁷ and in giving the reasons for holding the search there concerned reasonable, he said: "The place of arrest was a business room to which the public, including officers, was invited, the room was small and *under the immediate and complete control* of the defendant, and the search did not extend beyond the room used for the unlawful purpose." (Emphasis added.)²⁸ Therefore, even though Justice Minton used the phrase "reasonable under the circumstances," he, nevertheless, applied the same criterion of reason found in previous cases. Thus, it can be seen that the *Rabinowitz* case neither extended the limits of search incident to arrest nor set up a new criterion for determining the reasonableness of such a search.

If homes can be searched and property seized as in the principal case, and such property held and used as evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value and might as well be stricken from the Constitution. To permit a search of the defendant's home when he is arrested outside the home is, in itself, an unreasonable extension of the right to search incident to arrest; but, to permit his home to be searched as incident to the arrest of a third party outside his home is an even greater encroachment upon the Constitutional guaranty; for in such a case the privacy of the owner is involved and not that of the arrestee.

JERRY A. CAMPBELL.

Evidence—Admissibility of Partially Inaudible Recordings

Since the ascertainment of truth is the ultimate aim of our judicial system, and because memory plays an important role in helping to realize that goal, it is not surprising that more and more scientific devices which aid in evaluating the uncertain memories of men have found their way into the courts.¹ The use of sound recordings as a means of proof is an example of how a scientific device can supplement or, in some cases, supplant the testimony of human witnesses in litigation.²

The problem of the introduction into evidence of mechanically preserved sound is not new. As far back as 1906, in a suit for damages because of an alleged diminution of property value due to noise, the

²⁷ *Rabinowitz v. United States*, 339 U. S. 56, 66 (1950).

²⁸ *Id.* at 64.

¹ For a discussion of the development of the use of scientific devices in the courtroom, see Baer, *Radar Goes to Court*, 33 N. C. L. REV. 355 (1955).

² For a discussion of the problems and advantages involved in the use of magnetic tape recordings as a means of proof and as a means of recording courtroom proceedings, see Conrad, *Magnetic Recordings in the Courts*, 40 VA. L. REV. 23 (1954).

Michigan court allowed a phonograph recording of sounds claimed to be incident to defendant's business to be played before the jury.³ The acceptance of such evidence has an obvious advantage, which accrues to both judges and jurors:⁴ it permits not only the proof by human witnesses of the making of the sounds, but also a reproduction of the sounds themselves by means of a mechanical witness. The disadvantages⁵ involved in the use of recorded evidence, especially in the area of confessions, are not so obvious. One of them—the introduction into evidence of a partially inaudible recording—will be discussed herein.

As with any other form of scientific evidence, a proper foundation must be laid in order to introduce a recording into evidence. What should constitute laying a proper foundation for introducing a recording into evidence is succinctly set out in the recent Georgia case of *Steve M. Solomon, Inc. v. Edgar*.⁶

"(1) It must be shown that the mechanical transcription device was capable of taking testimony. (2) It must be shown that the operator of the device was competent to operate the device. (3) The authenticity and correctness of the recording must be established. (4) It must be shown that changes, additions, or deletions have not been made. (5) The manner of preservation of the record must be shown. (6) Speakers must be identified. (7)

³ *Boyne City, G. & A. R. R. v. Anderson*, 146 Mich. 328, 109 N.W. 429 (1906). For a review of later cases sustaining the admission of recorded sound into evidence, see Annot., 168 A. L. R. 927 (1947).

⁴ "The wire recorder which reproduces the actual voice of the accused and those who may be questioning him should be of much more value to the court and the jury than a confession taken in shorthand and later reduced to writing, especially where an issue has been raised as to whether the confession was voluntarily made." *Williams v. State*, 93 Okla. Crim. 260, —, 226 P. 2d 989, 995 (1951); in *People v. Dabb*, 32 Cal. 2d 491, 499, 197 P. 2d 1, 5 (1948), the court, referring to sound movies, made a comment equally applicable to recordings: "Moreover, as a method of presenting confessions, [they] appear to have a unique advantage in that while presenting the admission of guilt, they simultaneously testify to facts relevant to the issue of volition."

⁵ *E.g.*, *Wright v. State*, 79 So. 2d 66 (Ala. App. 1954) (accused's own voice might unduly impress jury); *People v. Stephens*, 117 Cal. App. 2d 653, 256 P. 2d 1033 (1953) (recordings inadmissible because inaudible, unintelligible, and containing extraneous inadmissible matter); *People v. King*, 101 Cal. App. 2d 500, 225 P. 2d 950 (1950) (re-recordings of intentionally destroyed original recordings inadmissible because not best evidence); *Leeth v. State*, 94 Okla. Crim. 61, 230 P. 2d 942 (1951) (recorded conversation between county attorney and co-defendant inadmissible against defendant as hearsay and incompetent); *Hunter v. Hunter*, 169 Pa. Super. 498, 83 A. 2d 401 (1951) (recordings inadmissible because self-serving, violative of privileged husband-wife communication, and of very poor quality).

Mechanical disadvantages of the use of recordings in evidence include the fragility of wire and tape recordings; the breakability of disc recordings; and the ease with which wire and tape recordings can be spliced, erased, altered, etc.

⁶ 88 S. E. 2d 167 (Ga. App. 1955). See also *Leeth v. State*, 94 Okla. Crim. 61, 230 P. 2d 942 (1951); *Williams v. State*, 93 Okla. Crim. 260, 226 P. 2d 989 (1951).

It must be shown that the testimony elicited was freely and voluntarily made, without any kind of duress."⁷

With such a foundation required, it would seem that there could arise few, if any, problems concerning the admissibility of mechanically recorded sound into evidence. Nevertheless, in the area of recorded confessions and admissions, even the laying of such a foundation as suggested above does not necessarily solve the problem presented by a mechanically defective recording, such as one which is partially inaudible.

As with the more common written or oral confession, the trial judge, in most states, must pass upon the voluntariness of the confession before it is permitted to be put into evidence.⁸ Where a recorded confession is involved, it has been said to be within the discretion of the trial judge to determine, at the same time he decides upon the voluntariness of the confession, whether the recording is sufficiently audible and coherent to be of any probative value to the jury.⁹ After the proper foundation is laid, and the voluntariness of a partially inaudible recorded confession is established, the problem of its introduction into evidence boils down to this: How far should the courts go in treating this evidence like ordinary written or oral testimony?

Suppose defendant is indicted for the murder of Mr. Victim. After his arrest, while he is being escorted into the police station by the arresting officer, a passer-by overhears part of a conversation between defendant and the arresting officer, as follows: *Officer*: "Did you kill Mr. Victim?" *Defendant*: "Yes." The passer-by continues walking past the police station and hears no more of the conversation. For all he knows, defendant, following his "Yes" answer, might have added: "But I killed him in self defense." Without a doubt the passer-by would be permitted, at defendant's trial for murder, to testify to the portion of the conversation between defendant and the arresting officer which he overheard, even though his testimony, standing alone, might be completely misleading.¹⁰ Should a recorded confession or admission which might conceivably be just as misleading because of the inaudibility of portions of the defendant's statement be allowed into evidence just as the testimony of the passer-by in the hypothetical posed?

A California court in the case of *People v. Porter*¹¹ felt that this question should be answered in the affirmative. In that case the de-

⁷ *Steve M. Solomon, Inc. v. Edgar*, 88 S. E. 2d 167, 171 (Ga. App. 1955).

⁸ 20 AM. JUR., *Evidence* §§ 532-534 (1939).

⁹ *State v. Lorain*, 141 Conn. 694, 109 A. 2d 504 (1954); *State v. Alleman*, 218 La. 821, 51 So. 2d 83 (1950); *Leeth v. State*, 94 Okla. Crim. 61, 230 P. 2d 942 (1951); *State v. Slater*, 36 Wash. 2d 357, 218 P. 2d 329 (1950); *State v. Salle*, 34 Wash. 2d 183, 208 P. 2d 872 (1949).

¹⁰ 20 AM. JUR., *Evidence* § 531 (1939).

¹¹ 105 Cal. App. 2d 324, 233 P. 2d 102 (1951).

defendants were convicted of murder. On appeal, the admission of recordings (made to reduce background noises) of the original wire recording of a conversation between the defendants in the district attorney's office was claimed to be error on the ground that the recordings did not reflect the entire conversation. The appellate court affirmed the conviction and said that "such objection is without merit since a witness may testify to part of a conversation if that is all he heard and it appears to be intelligible."¹² Several other courts have adopted the same position, that the mere fact that some portion of a recording is inaudible does not render the entire recording inadmissible.¹³

The danger inherent in this position is aptly pointed out in the recent Alabama case of *Wright v. State*:¹⁴

"Mechanical methods of presenting evidence . . . can well serve in bringing the truth to the trier of facts. A search for the truth is the ultimate end of all legal proceedings. The value of this type of evidence however depends upon its inherent accuracy. Inaccurately produced mechanical evidence may distort the truth instead of producing it. While courts accept scientific aids which contribute to the ascertainment of the truth, enthusiasm for the modern should never be permitted to endanger the safeguards of personal liberties patiently erected by the legal architects through the years. . . .

"We think there is probable danger to the rights of an accused if the approach to the solution of the question [of the admissibility of partially inaudible recorded confessions] be made by a mechanical application by analogy of principles developed as to written or oral confessions which are placed in evidence through the medium of a third party. An accused's own voice reciting events must undoubtedly greatly impress a jury. For

¹² *Id.* at —, 233 P. 2d at 107.

¹³ *People v. Jackson*, 125 Cal. App. 2d 776, 271 P. 2d 196 (1954); *Williams v. State*, 93 Okla. Crim. 260, 226 P. 2d 989 (1951); *State v. Salle*, 34 Wash. 2d 183, 208 P. 2d 872 (1949); *United States v. Schanerman*, 150 F. 2d 941 (3rd Cir. 1945) (dictum); *State v. Gensmer*, 235 Minn. 72, 51 N. W. 2d 680 (1951), *cert. denied sub nom. Gensmer v. Minn.*, 344 U. S. 824 (1952) (dictum). *But see State v. Slater*, 36 Wash. 2d 357, 218 P. 2d 329 (1950) (recording not admissible if in the trial judge's discretion it is too fragmentary and incoherent to be of probative value).

¹⁴ 79 So. 2d 66 (Ala. App. 1954). Defendant was indicted and convicted of second degree murder for running over a woman while allegedly driving his car. In a recorded question and answer session at the police station, defendant admitted driving the car at the time of the accident. At the trial defendant claimed he was not the driver and objected to the trial court's permitting the prosecution to put the recording into evidence on the ground that parts of it were inaudible. Conviction was reversed on other grounds, but the court made several comments and suggestions concerning the use of recorded confessions.

this very reason it is essential that all material statements be accurately recorded. . . ."¹⁵

In a divorce case, *Hunter v. Hunter*,¹⁶ a Pennsylvania court apparently took the extreme opposite position from that taken in the *Porter* case: a recorded conversation should be treated as analogous to a writing¹⁷ or a deposition¹⁸ sought to be introduced into evidence. Its position was that the entire conversation must be audible or the whole recording is inadmissible.

But the position of the *Hunter* case is probably just as unsound as that taken by the *Porter* case. Conceivably, the only inaudible portions of a recorded question-and-answer-type confession might be the answers to immaterial questions. To exclude such a recording for that reason alone would hardly be fair to the prosecution. It would impede rather than expedite the ascertainment of the truth.

It would seem that in the area of recorded confessions, parts of which are inaudible, some middle ground should be taken with regard to their admissibility. If the recorded evidence is of the question and answer variety, this middle ground would seem to be fairly obvious: where all the questions are audible and only the answers to immaterial questions are inaudible, then the recording, if otherwise unobjectionable, should be admitted into evidence. Unhappily, not all situations present such obvious answers. The Washington court in *State v. Slater*¹⁹ came up with what in many cases is probably the only practical "answer" to the problem of fragmentary recordings: "Whether or not what can be heard on the playing of such a recording is sufficiently audible and coherent to have any probative value is a matter which should rest largely in the discretion of the trial judge."²⁰

It should be noted that even in cases in which partially inaudible recordings are held to be inadmissible to prove the statements contained in them, they might nevertheless be sufficiently coherent to be admissible for such purposes as impeachment²¹ or corroboration.²²

The Alabama court in *Wright v. State*²³ has demonstrated a keen insight into the problems incident to the introduction into evidence of

¹⁵ *Id.* at 71-72.

¹⁶ 169 Pa. Super. 498, 83 A. 2d 401 (1951).

¹⁷ Generally, the entire writing, or at least all material parts of it, must be offered or none of it is admissible. 20 AM. JUR., *Evidence* § 914 (1939).

¹⁸ Generally, a deposition must go into evidence in whole or not at all, unless it is shown that introduction of only part will not operate unfairly against the opposite party. 16 AM. JUR., *Depositions* § 118 (1938).

¹⁹ 36 Wash. 2d 357, 218 P. 2d 329 (1950).

²⁰ *Id.* at 364, 218 P. 2d at 333.

²¹ *State v. Porter*, 125 Mont. 503, 242 P. 2d 984 (1952).

²² *State v. Slater*, 36 Wash. 2d 357, 218 P. 2d 329 (1950).

²³ 79 So. 2d 66 (Ala. App. 1954).

a mechanically defective recording of a confession or admission. Its suggestions should prove valuable to courts which have not yet passed on the question:

"To insure the accused of the absolute protection of his rights to which he is entitled under the charitable policy of our criminal laws, and assuming that the voluntary character and the accuracy of the recording device has been established, we make the following suggestions as to trial procedure in the event an objection is interposed to the introduction of a recorded statement on the grounds that such statement is inaudible, or contains illegal, irrelevant, incompetent, or immaterial evidence.

"The trial court should first have the recording played or run off before it out of the presence of the jury, counsel being afforded the opportunity at this time of interposing appropriate objections. A transcription of the audible portions of the statement should of course be made at this time.

"If either of such defects infect the recording there can be doubt as to its admissibility.

"If the recording is inaudible in those portions likely to contain statements material to the issues, the recording should be rejected if it is the only evidence offered as to the statement.

"Since most recordings are in question and answer form, the question itself will shed light on the probable materiality of the answer.

"If the parties who were present when the recording was made are available and testify as to the statements made, the recording, even though inaudible, in parts, should be admitted as corroborative of the testimony of the witness or witnesses testifying to the statement. . . .

"If the recording contains illegal evidence it should be rejected unless such illegal portions can be erased from the tape, or kept from the jury by stopping and starting the playing instrument. This for the reason, as before stated, we doubt the effectiveness of oral instructions to eradicate the prejudicial effect of this type of evidence because of its inherent potency."²⁴

WILLIAM E. ZIMTBAUM.

Federal Jurisdiction—Suits Against a State

A recent case, *Lowes v. Manhattan City School District*,¹ presents some of the problems facing a federal court when it concludes the suit

²⁴ *Id.* at 73-74.

¹ 222 F. 2d 258 (9th Cir. 1955).