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Strict vs. Substantial Compliance... The Rocky Road of Maryland Wiretap Law: A Comment on Recent Maryland Wiretap Decisions

by Michael McDonough

In the landmark case of *State v. Siegel*, 266 Md. 256, 292, A.2d 86 (1972), (hereinafter cited as *Siegel*), the Maryland Court of Appeals held that “[T]he [Maryland Wiretap] statute sets up a strict procedure that must be followed and we will not abide any deviation, no matter how slight, from the prescribed path.” Id. at 274, 292 A.2d at 95. Applying this standard, the Court suppressed evidence from a wiretap in which the order of authorization did not include provisions as to “whether or not the interception shall automatically terminate when the described communication has been first obtained,” 18 U.S.C. §2518(4) (e) (1976). The court stated that interception would “be conducted in such a way as to minimize the interception of communications not otherwise subject to interception” Id. ¶2518(5). 18 U.S.C. §§2510 et seq. (1976) required that every order of authorization contain such provisions. The scrutiny applied by the court in *Siegel* has become known as the strict compliance standard.


It was in this regard that the Court of Appeals said in the *Siegel* case: 'The statute sets up a strict procedure that *must* be followed and we will not abide any deviation, no matter how slight from the prescribed path,' and we said in the *Lee* case: '... the procedure required by the federal act must be strictly followed and... a substantial compliance *is* insufficient.' We are not here faced, however, with the legitimacy of the authorizing order itself and do not, therefore, feel that language pertinent thereto is necessarily controlling when reviewing every subsidiary action taken in execution of an order which does meet all constitutional requirements. *Spease and Ross* 21 Md. App. at 275, 319 A.2d at 564.
That standard was also applied to service of inventory in the same case. The Court of Appeals, reviewing Spose and Ross, affirmed, also applying the substantial compliance standard. Id. at 99, 338 A.2d at 290-291.

The ultimate result of these two cases appeared to be clear. The Court would apply the strict compliance standard in analyzing the legality of the authorization for and issuance of the wiretap order, while applying the more lenient substantial compliance standard to analysis of the execution and post-execution procedures.


Any aggrieved person may move to suppress wiretap evidence on the grounds that:

(i) The communication was unlawfully intercepted;

(ii) The order of authorization under which it was intercepted is insufficient on its face, or was not obtained or issued in strict compliance with this subtitle; or

(iii) The interception was not made in conformity with the order of authorization. Id. at §10-408(h)(i)(i).

The statute simply codifies the law as developed by the Court in Siegel, and Spose and Ross. Under The Wiretapping Act, strict compliance is the standard in determining the legal sufficiency of the application, supporting affidavits, and order. Id. at §10-408 (h)(i)(ii). If these documents do not meet the stringent test of Siegel, suppression is the remedy. The enunciation of this strict compliance language is conspicuous in its absence from The Wiretapping Act. Id. at 10-408(h)(i) concerning illegal interceptions and concerning the manner in which the authorization is executed Id. at 10-408 (h)(i)(iii).

The only rational conclusion is that the Legislature intended to codify the pronouncements of the Court in Siegel and Spose and Ross.

In Poore v. State, 39 Md. App. 44, 384 A.2d 103 (1978) (hereinafter cited as Poore) Chief Judge Richard Gilbert, speaking for the Maryland Court of Special Appeals took the first in a series of steps which resulted in the uneven path that the wiretap case law has traversed. Although the issues, minimization and service of inventory, were the same as those raised in Spose and Ross, Judge Gilbert postulated a new rationale for the same result:

At first glance Spose appears to conflict with Siegel. A careful reading of both cases makes it transparent that Siegel is directed to pre-intercept and intercept conditions. As to these two (2) happenings, not the slightest deviation from the statute will be sanctioned. On the other hand, Spose indicates that when post-intercept events are brought into question, the Court looks to the facts so as to ascertain whether there has been substantial compliance with the post-intercept provisions of the act and whether there has been actual prejudice to the defendant. Id. at 53, 384 A.2d at 110.

That this statement is a radical departure from the holding in Spose and Ross is underscored by Judge Gilbert's own words. He categorically states "Spose and Ross v. State... distinguishes between pre-order compliance and post-order compliance." Id. at 52, 384 A.2d at 109 (emphasis added). This statement accurately categorizes Spose and Ross. The pre-intercept, intercept, post-intercept analysis of Spose and Ross, and Siegel, explicated by Judge Gilbert in Poore, has generated more confusion and insecurity than any other single Maryland decision in the area of electronic surveillance.

At first glance, the addition of the requirement of strict compliance during the intercept stage of a wiretap does not appear to be a radical change in the prior law. Closer examination, however, reveals that such a requirement significantly reduces the possibilities for application of the substantial compliance standard and is inconsistent with the application of that lesser standard to minimization.

The three-phase analysis ostensibly applied in Poore, cannot survive careful scrutiny even in its own context. The two major issues in Poore were minimization and service of inventory. Service of inventory is to be made "within a reasonable time but not later than 90 days after the termination of an order or extensions thereof." The Wiretapping Act, at §10-408(4)(g)(4). Thus, service of inventory is clearly a post-intercept matter governed under the three-phase framework, by the standard of substantial compliance. But what of minimization? Both federal and Maryland law require that interceptions be conducted "...in such a way as to minimize..." 18 U.S.C. §2518(3) (1976), The Wiretapping Act, §10-408 (e). It seems clear, then, that minimization occurs during the intercept stage. Under Judge Gilbert's three-phase framework, strict compliance is clearly required. Yet in both Spose and Ross, and Poore, a substantial compliance standard was utilized. Significantly, Judge Gilbert does not even attempt to fit minimization into his framework. He simply follows Spose and Ross and the federal cases on
which that decision was founded.

In Baldwin v. State, 43 Md. App. 378, 413 A.2d 246 (1980) (hereinafter cited as Baldwin) Judge Gilbert again deviates from the path laid out by the Court of Appeals and the Maryland Wiretap Act, marking his route with the signpost—P.I.P. . . . He explains his framework thus:

The first part, known as the pre-intercept stage, requires, under Siegel and its progeny, strict compliance with the Md. Cts. and Jud. Proc. Code Ann. (1980 Rep. Vol.) §§10-401 through 10-412. The second part may be characterized as the interception or on-going phase, at which time the law enforcement agency actually conducts the electronic interception of the communication. The second phase also necessitates that there not be the slightest deviation from the letter of the act. The third part is stylistically known as the post-interception phase. It dictates what is to be done after the interception has been completed. Violation of the latter does not mandate suppression of the evidence derived from the interception, unless the party whose communication was intercepted can show that he has been prejudiced by the non-compliance with the statute. Spease v. State, supra. Thus, aware of P.I.P.—i.e., pre-interception and post-interception,—we turn our attention to the instant case. Baldwin at 381-382, 413 A.2d at 249.

Just how this framework was applied in Baldwin is a matter for speculation. After deciding that the order of authorization must contain a designation of intervals at which reports are to be made to the issuing judge (clearly a pre-intercept matter), Judge Gilbert finds an intercept stage violation to which he applies a strict compliance standard. It is unclear from the opinion what intercept stage violation occurred.


In affirming the judgment of the Court of Special Appeals, the Court of Appeals in State v. Baldwin, 289 Md. 635, 426 A.2d 916 (1981), (hereinafter cited as State v. Baldwin), clearly rejected the P.I.P. analytical framework. After referring to the harmonizing of Spease and Ross and Siegel, the Court of Appeals in Baldwin v. State stated:

The establishment of these intervals by the issuing judge is essential to safeguard against unwarranted intrusions on personal privacy rights, and, unlike the situation in Spease and Ross, is central to the statutory scheme—a precondition to the issuance of a valid order, as in Siegel and Bailey. It is clear to us that the Maryland Legislature, in enacting the provisions of §§10-408 (i) that suppression was an appropriate remedy where the order of interception was not issued “in strict compliance” with the Act, intended to adopt the Siegel standard to govern violations of preconditions to the issuance of a valid order. Id. at 643-44, 639-49, 426 A.2d at 921-22.

The Court of Appeals is slowly but surely smoothing over the ruts left in the road by the Court of Special Appeals. The analysis applied in Baldwin v. State is somewhat strained. Unlike provisions required by statute to be included in the order of authorization such as that omitted in Bailey, which were clearly preauthorization, the failure of an issuing judge to designate reporting intervals after the order is signed is not so easily categorized. The Court seems to conclude that, because the establishment of reporting intervals “. . . is essential to safeguard against unwarranted intrusions on personal privacy rights. . . .” is central to statutory scheme. . . .”, it is therefore a pre-authorization requirement. Baldwin v. State at 643, 426 A.2d at 922. These two factors do not, however, necessarily lead to the conclusion reached. More logical test to determine whether a matter is pre-authorization or post-authori-
zation is whether it may occur before or after issuance of the order. Under the Court of Appeals *State v. Baldwin* standard, the judge may designate reporting intervals after the order itself is issued. Thus, at least in a mechanical sense, the designation of reporting intervals is a post-authorization matter.

At this point it is important to recall that the Court has not drawn a bright line categorically requiring a substantial compliance test for post-authorization matters. The language used, both in *Spease and Ross*, and *Bailey*, was permissive—substantial compliance *may* be permitted with regard to post-authorization requirements.

It was, therefore, not necessary for the Court to force the designation of reporting intervals into the pre-authorization mold. It could have determined that, with regard to post-authorization matters, a substantial compliance test would be applied unless the requirement was "...essential to safeguard against unwarranted intrusions on personal privacy rights and...[was] central to the statutory scheme." *State v. Baldwin* at 643, 426 A.2d at 922. This reasoning satisfies the stringent strict compliance mandate of the *Maryland Wiretap Act*, and provides a reasonable standard for determining whether strict or substantial compliance should be required for particular post-authorization matters. It eliminates the danger of breaking the mold which was only bent by the Chief Appeals in *State v. Baldwin*. This approach would be both consistent with the statutory scheme and would provide a substantive rather than a mechanical test in this area, which so greatly affects fundamental principles of privacy.

Hopefully, this is an accurate map of the path the Court of Appeals has followed, and a correct prognosis as to its ultimate destination. However, until the Court explicitly rejects the three-phase framework set forth by the Court of Special Appeals in *Baldwin*, and develops a comprehensive substantive test to determine when substantial compliance will be permitted, the electronic surveillance road in Maryland is likely to remain rocky.