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RECENT DEVELOPMENT

SEAL V. STATE: PURSUANT TO § 10-402(C)(2)'S EXCEPTION TO THE WIRETAP BAN, AN INDIVIDUAL IS NOT UNDER THE SUPERVISION OF AN INVESTIGATIVE OR LAW ENFORCEMENT OFFICER WHEN INTERCEPTING AN ORAL COMMUNICATION, ABSENT RESTRICTIONS ON EQUIPMENT USE AND SOME SUBSEQUENT CONTACT.

By: Ashley N. Simmons

The Court of Appeals of Maryland held that a detective providing recording equipment to an individual, absent any limitations for use and no interaction thereafter, did not amount to the individual acting under supervision of an investigative or law enforcement officer. *Seal v. State*, 447 Md. 64, 80, 133 A.3d 1162, 1172 (2016). The court found that guidelines must be given to the person conducting the wiretapping, as well as at least *some* contact to monitor the progress. *Id.* at 79-81, 133 A.3d at 1172.

During the summer of 1982, ten-year-old Donald W. (“Donald”) frequently stayed at his step-grandmother’s house. Donald’s step-uncle, David Seal (“Seal”), also resided in the Montgomery County home. Donald testified that he awoke one night to Seal fondling his private parts. The sexual abuse continued until Donald entered the seventh grade. Approximately twenty years later, Donald contacted Seal about the abuse. Seal apologized for his prior behavior and offered to make payments to Donald, which Donald declined.

On January 22, 2013, Donald, a resident of West Virginia, went to the Montgomery County Police Station and spoke with Detective Tracey Copeland (“Copeland”) regarding the abuse. Copeland and Donald made several unsuccessful phone calls to Seal in an attempt to obtain a confession. Ultimately, Copeland provided Donald with the recording device, showed him how to operate it, and then sent him home with the equipment.

On February 5, 2013, Donald used the equipment to record Seal making incriminating statements during a phone call. Copeland then met Donald to obtain the equipment and download the recording. There was no evidence of any contact between Donald and Copeland from the time Donald received the equipment to the time he recorded Seal.

The Circuit Court for Montgomery County denied Seal’s motion to suppress the recorded phone call. A jury found Seal guilty of child sexual abuse and other sex offenses, resulting in a sentence of forty-five years in prison with concurrent sentences imposed on remaining counts. Seal appealed to the Court of Special Appeals of Maryland, which affirmed the lower court’s ruling in a split decision, finding that Copeland “sufficiently supervised” Donald to intercept the phone call. The Court of Appeals of Maryland granted Seal’s petition for *writ of certiorari*.

The issue before the court was whether Donald was acting under Copeland's supervision when he recorded the phone call with Seal. *Seal*, 447 Md. at 72, 133 A.3d at 1167. The Court of Appeals of Maryland began its analysis by clarifying how statutory construction would aid the court in examining the legislative intent of the Maryland Wiretapping and Electronic Surveillance Act (the "Act") and its exceptions. *Id.* at 70, 133 A.3d at 1166. When the language is ambiguous, analysis of the statutory purpose and structure become essential. *Id.*

The general provision of the Act prohibits persons from intercepting any wire, oral, or electronic communication. *Seal*, 447 Md. at 71, 133 A.3d at 1167. However, the single-party consent exception ("supervision exception") permits this conduct when the person is acting at the direction and under the supervision of an investigative or law enforcement officer, in order to obtain evidence for crimes listed within the Act. *Id.* In order to determine what sufficed as supervision, the court compared the Act to the federal wiretap statute, which allows an individual to intercept communication under "color of law" or a communication in which they are a party, so long as the reason for the interception is not criminal or tortious. *Seal*, 447 Md. at 72-73, 133 A.3d at 1168 (citing 18 U.S.C. § 2511(2)). This consequently makes Maryland's wiretap statute more restrictive in order to provide higher protection for privacy. *Id.* at 73, 133 A.3d at 1168 (citing *Mustafa v. State*, 323 Md. 65, 70, 74, 591 A.2d 481, 483, 485 (1991)).

The court then summarized the legislative history of the Act whereby a change in language from "color of law" to "direction and supervision" demonstrates the intent that the state should maintain at least minimal control of wiretapping devices. *Seal*, 447 Md. at 74-75, 133 A.3d at 1169. The court examined federal cases interpreting the meaning of "supervision," many of which were relied on by the court of special appeals. *Id.* at 76, 133 A.3d at 1170. The court reasoned that because the intermediate appellate court narrowed its analysis to the "direction of" language in the Act, it failed to properly address the instant issue of "supervision." *Id.* at 77, 133 A.3d at 1170-71.

As a result, the court looked to common facts throughout other federal cases that interpreted the supervision exception. *Seal*, 447 Md. at 77, 133 A.3d at 1170. In each case, law enforcement maintained some contact over the individual conducting the interception. *Id.* at 80, 133 A.3d at 1172. Regular meetings and remote-controlled monitors provide evidence of supervision, neither of which were present here. *Id.* at 78, 133 A.3d at 1171 (citing *United States v. Andreas*, 216 F.3d 645, 661 (7th Cir. 2000)). In addition, an officer listening to the interception in "real time" would have met the supervision exception, which Copeland did not do. *Seal*, 447 Md. at 78, 133 A.3d at 1171 (citing *United States v. Shields*, 675 F.2d 1152, 1154-55 (11th Cir. 1982)). Finally, the court reasoned that even a lack of direct supervision could be overcome by continuous contact and instructions on how to conduct the phone calls. *Seal*, 447 Md. at 78-79, 133 A.3d at 1171 (citing *Obron Atl. Corp. v. Barr*, 990 F.2d 861, 865 (6th Cir. 1993)). The

court determined that when comparing these cases with the instant case, Copeland had little to no supervision over Donald. *Id.* at 81, 133 A.3d at 1173.

The court relied on Judge Raker's dissent in the court of special appeals opinion to reinforce the requirements needed to satisfy the supervision exception. *Seal*, 447 Md. at 79, 133 A.3d at 1172. Restrictions should be set by the investigative or law enforcement officer that would limit the equipment usage of the individual. *Id.* In addition, there should be at least *some* contact between the officer and the individual. *Id.* The court of appeals pointed out that the legislature would not have authorized private citizens to intercept conversations without both parties' consent, unless the individual was under the supervision of a trained officer. *Id.* at 80, 133 A.3d at 1172. Due to the lack of supervision, the court found that the circuit court erred in denying Seal's motion to suppress the recorded telephone call. *Id.* at 84, 133 A.3d at 1175.

In Judge McDonald's concurrence, he agreed with the majority in regards to this assertion, but took a jurisdictional analysis approach. *Id.* at 85, 133 A.3d at 1175. He read the language of the Act to support the argument that Copeland, as a Maryland officer, was not authorized to provide any supervision, regardless of the degree, over an out-of-state investigation. *Id.* at 85-86, 133 A.3d at 1175.

In *Seal*, the Court of Appeals of Maryland held that in order to meet the supervision exception within Maryland's wiretap statute, an officer must provide guidelines for equipment use and have *some* contact with the individual conducting the wiretap. This ruling reflects Maryland's longstanding interest in protecting the privacy of its citizens. Furthermore, it provides a clearer understanding for law enforcement on what should be done to ensure confessions obtained from wiretaps are admissible in court. This case can serve as a model for the court to determine what is *not* enough to constitute supervision in future cases. The holding alerts practitioners to the importance of analyzing each specific fact of a wiretapping case in order to better argue whether those facts satisfy the court's interpretation of the Act.