

No. 22311 - West Virginia Department of Health and Human Resources ex rel. Brenda Wright, Social Service Worker v. David L., Jill L., Chelsea L., Ashley L., and Joshua L.

Neely, J., concurring:

This case is like a single log floating upstream that neither notes nor considers the rush of other logs in downriver traffic. Although I agree that this log-- case -- is properly headed, I pause to consider the downriver traffic.

The majority holds, and I agree, that audiotapes surreptitiously recorded by one spouse in the house of the other estranged spouse are inadmissible under W. Va. Code 62-1D-3(a) (1) [1987]; however, the majority fails to see or consider the conflict between W. Va. Rules of Evid. and W. Va. Code 62-1D-3(a) [1987].<sup>1</sup>

First, under the Rules of Evid. these audiotapes are admissible. Rule 402 states that "[a]ll relevant evidence is admissible." Relevant evidence is defined by Rule 401 to mean

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<sup>1</sup>I recognize that this case can also be decided exclusively under 18 U.S.C. § 2511 and the U.S. Constitution Supremacy Clause. But the majority didn't decide that way, thus allowing me to have my usual fun with result-oriented principle manipulation.

"evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." In this case, the audiotapes are of Jill L.'s conversations with her children. These conversations show facts that are "of consequence to the determination of" the question of Jill L.'s alleged abuse of her children. Thus under Rule 402 the audiotapes are admissible.

Second, by using the reasoning of Gilman v. Choi, 185 W. Va. 177, 406 S.E.2d 200 (1990) (refusing to recognize the conflict between W. Va. Code 55-7B-7 [1986] and Rule 702, W. Va. Rules of Evid.) and Teter v. Old Colony Co., 190 W. Va. 711, 441 S.E.2d 728 (1994) (W. Va. Rules of Evid., Rule 702 prevails over W. Va. Code 37-14-3(a)'s license or certification requirement for real estate appraisers), the Court could have used the Rules to invalidate the specific statute. Indeed in this case the reasoning of Gilman and Teter requires the Court to ignore the legislature's prohibition against wiretapping-- a mere section of the Code -- to cite to this Court's rule-making authority as set forth in Syllabus Points 1 and

2 of Bennett v. Warner, 179 W. Va. 742, 372 S.E.2d 920 (1988) and to admit the audiotapes.

Today's opinion ignores the conflict between "procedural" and "substantive" mechanisms and circuit courts are left without guidance concerning when to follow a restrictive statute or the more liberal W. Va. Rules of Evid. As stated in my dissent in Gilman 185 at 190, 406 S.E.2d at 213, this Court should not use court-promulgated rules "to foreclose the use of tools such as modifications of the law of evidence traditionally thought to be available to legislatures." See Reed v. Phillips, \_\_\_ W. Va. \_\_\_, \_\_\_, \_\_\_ S.E.2d \_\_\_, \_\_\_ (No. 22196 Filed December 8, 1994) (Neely,

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<sup>2</sup>Syl. pts. 1 and 2 of Bennett, supra provide:

1. Under article eight, section three of our Constitution, the Supreme Court of Appeals shall have the power to promulgate rules for all of the courts of the State related to process, practice, and procedure, which shall have the force and effect of law.

2. "Under Article VIII, Section 8 [and Section 3] of the Constitution of West Virginia (commonly known as the Judicial Reorganization Amendment), administrative rules promulgated by the Supreme Court of Appeals of West Virginia have the force and effect of statutory law and operate to supersede any law that is in conflict with them." Syl.Pt. 1, Stern Brothers, Inc. v. McClure, 160 W.Va. 567, 236 S.E.2d 222 (1977).

J. dissenting) (judicial branch should not use "precious reasoning.  
. .[to] confound . . .[a] legitimate political compromise").

I concur in the direction of this log but pause to wonder  
at what the majority does not see or discuss.