

What Happens Between Spouses, Stays Between Spouses – Even If It's A Crime

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The New Jersey Rules of Evidence contain a strong privilege protecting communications between married couples. The Rule provides that “*no person shall disclose any communication made in confidence between such person and his or her spouse.*” The privilege is based upon the strong societal policy encouraging spouses to share confidences and to protect the concept of marital harmony and privacy. This is why you may have seen on crime shows that spouses cannot be compelled to testify against one another.

However, if other third parties overhear a conversation between spouses, the privilege is waived and lost.

Recently, the New Jersey Supreme Court decided the case of [State v. Yolanda Terry and Teron Savoy](#), in which State investigators listened to and reviewed marital communications while they were monitoring a wire-tap. The Ocean County Prosecutor's Office had identified the husband as a head of a drug-trafficking network. Throughout the period of interception, State investigators recorded several phone calls and intercepted 5 text messages between the husband and his wife. During those conversations, the husband asked his wife about drug money from a third party. In another intercepted communication, the husband asked his wife to retrieve something from a motor vehicle which had been seized as a result of the investigation. That vehicle contained drugs, money and other cell phones. The husband and wife were indicted with 20 other individuals and charged with various drug offenses. The husband and wife applied to the Court to prevent the State from introducing the phone and text conversations between them, contending that the marital communication privilege protected those communications.

The Trial Court denied that application stating that the conversations would not be disclosed by either of the spouses, but would be disclosed at trial through the testimony of the police officers. Upon appeal, the Appellate Division reversed the Trial Court's decision finding that marital communication privilege did apply. That Court noted that strong public policy surrounding marital privilege existed. They did note, however, that the crime-fraud exception to the privilege rule was also a public policy concern. The crime-fraud exception permits the use of otherwise privileged communications if the communications were made in furtherance of a crime.

The issue before the New Jersey Supreme Court was whether marital communication privilege applied to the facts of the case and, if a crime-fraud exception existed. The Court decided that no such exception existed under the present Rules of Evidence and Statutes. The Court noted that the marital communication privilege arose from a strong public policy encouraging free and uninhibited communication between spouses necessary to protect the sanctity and tranquility of marriage. They found that the privilege was considered to be essential to the preservation of the marital relationship. The Court rejected the State's position that since a third party, that is the police who were listening to the conversation through a wire-tap, would be testifying about the communication, that the marital privilege did not apply. It noted that marital communications would lose their privilege only "accidentally or by eavesdropping," and which were simply casually overheard by a third party. The Court held that the wire-tap statute recognized the existence of the privileged information. The Court then rejected the State's reasoning that a wire-tapper, a neighbor or other third party would be free to repeat a communication if it was overheard. It reasoned that but for the State's active listening into the conversation, the marital communication would have remained a private one and subject to the privilege.

The State tried to convince the Supreme Court that the exception should apply under the crime-fraud exception which is recognized in most other privileges such as the attorney/client, patient/physician or cleric/parishioner privileges. The Supreme Court declined to make such a broad sweeping change on its own. It ruled that if the marital communication privilege were to be up-dated and to permit the crime-fraud exception, such action would have to come from the Legislature. The Court noted that such a change was too serious and far reaching to be imposed by the Courts. It would be left to the other branch of government.

