

The Confidential Spousal Communication Privilege

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It is hornbook law that "[a] confidential communication between husband and wife is privileged and neither spouse may be compelled to disclose it when testifying as a witness." 1 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* 419 (6th ed. 2004). See also G.S. 8-57(c). Just today, the court of appeals decided a case that addresses when a spousal communication is "confidential."

The case is [State v. Terry](#). Officers received reports of drug activity at the defendant's home and obtained a search warrant for the residence. When they executed the warrant, they found marijuana and drug paraphernalia. They arrested the defendant and his wife. The two arrestees were placed, alone, in an interview room at the sheriff's office. They proceeded to discuss their situation, and in the course of the conversation, both "showed obvious knowledge of the drugs found in the residence." Without the knowledge of the defendant and his wife, video and audio of the conversation was recorded. Prior to trial, the defendant moved to suppress any evidence about the conversation, contending that it was protected by the confidential spousal communication privilege.

The trial judge denied the motion on two grounds. First, he concluded that the "conversation appeared to be a conversation between two individuals . . . suspected of a crime and was not a conversation that would appear to be one between a husband and wife, *per se*. It was not a conversation that appeared to be . . . induced by the marital relationship . . . but instead a conversation between two individuals that were implicated in some crime." Second, he ruled that the "defendant did not have a reasonable expectation of privacy as to these conversations," i.e., they were not *confidential* communications, because "there are warning signs in the Sheriff's Department to the effect [that the location is] under audio and visual surveillance," and indeed, there are cameras "throughout the facility."

The court of appeals affirmed, relying exclusively on the second ground. As precedent, it cited the recent case of *State v. Rollins*, 363 N.C. 232 (2009), in which the state supreme court held that the defendant "had no reasonable expectation of privacy in the conversations between his wife and him in the public visiting areas of the DOC facilities" in which he was imprisoned.

There are plenty of cases across the country finding the privilege inapplicable to telephone calls between spouses when one spouse is in jail, on the grounds that the jailed spouse was warned that jail phone calls are subject to recording and monitoring. And there are a handful of cases, like *Rollins*, about in-person prison visits. I couldn't quickly find another case concerning face-to-face conversations between arrested spouses in an interview room, though. The result in *Terry* strikes me as an extension -- not just an application -- of *Rollins*, though perhaps a correct one if the warning signs were sufficiently prominent. In any event, I suspect that the result in *Terry* will lead police to leave arrested spouses alone together more often, in the hopes of capturing just the type of conversation that took place in this case.