

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
CRAWFORD COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS	
V.	No. 2009-CF-50
MICHAEL D. ALLISON,	SEP 15 2011
Defendant.	

ORDER ON MOTION TO DECLARE 720 ILCS 5/14 UNCONSTITUTIONAL

This matter comes on for hearing on August 18, 2011 on the Motion to Dismiss filed April 29, 2011 by defendant Michael D. Allison. The State appears by State's Attorney, Thomas Wiseman of Robinson, Illinois and Assistant Attorney General, Eric Levin of Chicago, Illinois. Defendant, Michael D. Allison, appears with his counsel, William A. Sunderman, Brainard Law Offices, Charleston, Illinois. The State filed a response to the motion on July 5, 2011. Defendant filed a reply to the response on August 3, 2011.

Argument on the Motion to Dismiss began on May 2, 2011. However, the case was continued to allow the Illinois Attorney General the opportunity to intervene since the motion challenged the constitutionality of the Illinois Eavesdropping Statute.

Defendant, Michael D. Allison, received an ordinance violation from the City of Oblong concerning an alleged abandoned vehicle on his property. In his encounters with police, city attorney, circuit clerk's office and court, it is alleged he attempted to use a

DS-30 digital recorder to record conversations pertaining to matters concerning his alleged ordinance violation.

Defendant, Michael D. Allison, was charged in a five-count information filed April 8, 2009 alleging the offense of eavesdropping. All the counts allege a violation of 720 ILCS 5/14-2 (a) (1) by defendant using a DS-30 digital recorder for the purpose of recording conversations without consent between defendant and (1) Chief Bill Ackman, law enforcement officer, while in the performance of his official duties (Count I); (2) Officer William Rutan, law enforcement officer, while in the performance of his official duties(Count II); (3) Debbie Phillippe, employee of the Crawford County Circuit Clerk's office(Count III); (4) Nancy Ulrey and Craig Weber, Oblong City Attorney's office(Count IV); and (5) Honorable Kimbara Harrell, a judge, while in the performance of her official duties(Count V).

Defendant contends the Illinois Eavesdropping Statute is void for vagueness, it violates due process, and it violates his First Amendment rights.

"All statutes are presumed constitutional and the party challenging the constitutionality of a statute has the burden of clearly establishing that it violates the constitution." The People of the State of Illinois v. Claudia Madrigal, Ill.Sup.Ct. Docket 110194 (2011), citing also, People v. Carpenter, 228 Ill. 2d 250, 267 (2008).

VAGUENESS

In People v. Merchel, 91 Ill. App.3d 285, 291 (5th Dist. 1980) the court stated:

"The important considerations in determining whether a statute is void for being vague and indefinite include (1), whether the provisions gives reasonable guidance to the average person; and (2) whether it is designed to avoid arbitrary and discriminatory enforcement. (citation omitted) Impossible standards of specificity are not required and courts will assume absent contrary legislative intent, that the words of the statute have their ordinary and properly understood

meanings. (citation omitted) In addition to the language used, consideration is given to the evil the statutory provision seeks to remedy. A statute is presumed constitutional.”

While the scope of the eavesdropping statute may not be clear in every application, the language of the statute is clear in its application to defendant’s conduct. See People Ex Rel. Ryan v. World Church, 198 Ill.2d 115, 123-124 (Ill.Sup.Ct.2001); See also, Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2718-2719 (2010).

The court does not find the statute vague as to defendant’s conduct. As such, defendant’s claim of vagueness is denied.

DUE PROCESS

In Madrigal, the Illinois Supreme Court in its “Analysis” spoke of the Due Process Clause of the Illinois and United States Constitutions:

“Under the banner of its police power, the legislature has wide discretion to fashion penalties for criminal offenses, but this discretion is limited by the constitutional guarantee of substantive due process, which provides that a person may not be deprived of liberty without due process of law. People v. Wright, 194 Ill.2d 1, 24 (2000). When the challenged statute does not affect a fundamental constitutional right, the appropriate test for determining its constitutionality is the highly deferential rational basis test. Carpenter, 228 Ill. 2d at 267; Johnson, 225 Ill. 2d at 584-85. Under that test, a statute will be sustained if it ‘bears a reasonable relationship to a public interest to be served, and the means adopted are a reasonable method of accomplishing the desired objective.’” Wright, 194 Ill. 2d at 24 (quoting People v. Adams, 144 Ill. 2d 381, 390 (1991)).

Accordingly we must first determine the statute’s purpose in order to assess whether the prohibitions contained in 16G-15(a)(7) reasonably implement that purpose. The language of the statute itself is the best indicator of the legislative intent and statutory purpose. Carpenter, 228 Ill.2d at 268.”

The Illinois Eavesdropping Statute, 720 ILCS 5/14-2 states:

(a) A person commits eavesdropping when he: (1) knowingly and intentionally uses an eavesdropping device for the purpose of hearing or recording all or any part of any conversation or intercepts, retains, or transcribes electronic communication unless he does so (A) with the consent of all of the parties to such conversation or electronic communication....”

720 ILCS 5/14-1(d) defines "conversation":

"For the purposes of this Article, the term conversation means any oral communication between 2 or more persons regardless of whether one or more of the parties intended their communication to be of a private nature under circumstances justifying that expectation.

The Illinois Eavesdropping Statute has at its core the desire "to protect individuals from unwarranted invasions of privacy." 87 Illinois Bar Journal, p. 363 (July 1999).

"...Illinois citizens are entitled to be safeguarded from unnecessary governmental surveillance and other unreasonable intrusions into their privacy." Plock v. Board of Education of Freeport School District No. 145, 396 Ill. App.3d 960, 966 (2nd Dist. 2009).

Defendant contends that the Illinois Eavesdropping Statute violates Due Process and is therefore unconstitutional because the elements of eavesdropping do not require criminal intent. Defendant contends the eavesdropping statute subjects innocent conduct to criminal penalty. Defendant cites The People of the State of Illinois v. Claudia Madrigal, Ill.Sup.Ct. Docket 110194 (March 2011) and People v. Carpenter, 228 Ill.2d 250 (2008) in support of his contention. In Madrigal, (p.8) the Illinois Supreme Court struck down a portion of the Identity Theft Law because it did not require a culpable mental state or criminal purpose to be convicted of a felony. The portion of the statute stricken as unconstitutional only required "mere knowledge". The court noted the statute "punishes a significant amount of wholly innocent conduct not related to the statute's purpose,....(p.8). Defendant Allison contends the same analysis condemns the Illinois Eavesdropping Statute. Defendant alleges the eavesdropping statute does not contain a culpable mental state resulting in innocent conduct possibly being punished. Defendant argues that since the eavesdropping statute lacks a culpable mental state beyond both knowledge of the recorder's ability to record and the intent to record, the statute fails the

rational basis test. Defendant contends the Illinois Eavesdropping Statute does not contain a reasonable means of preventing the targeted conduct or evil purpose—the unwarranted intrusion into citizens privacy. Therefore, Defendant contends the statute violates due process.

In Madrigal at page 4, the court stated:

“Simply put, this court has held that in such cases, a statute fails the rational basis test because it does not represent a reasonable method of preventing the targeted conduct. See Carpenter, 228 Ill. 2d 269; Wright, 194 Ill. 2d at 25. In Carpenter, we considered the facial constitutionality of a statute that banned false or secret compartments in automobiles. Because the statute in that case lacked a culpable mental state beyond both **knowledge** of the compartment’s capacity to conceal and an **intent** to conceal, we held that the statute ‘did not contain a reasonable means of preventing the targeted conduct, and it therefore violated due process.’ Carpenter, 228 Ill.2d at 269.” (Emphasis supplied)

720 ILCS 5/14-2(a) requires only that a person “knowingly and intentionally uses an eavesdropping device for the purpose of hearing or recording all or any part of any (emphasis supplied) conversation...unless” it is done “with the consent of all the parties to such conversation.” The state (p. 17 transcript August 18, 2011 hearing) attempts to distinguish Madrigal from this case by arguing Madrigal only required “mere knowledge” while the eavesdropping statute requires knowledge and intent to use an eavesdropping device for the purpose of recording any conversation. However, Madrigal addresses this argument by citing to Carpenter (see quote above) where knowledge and intent to use the secret compartment were still found to lack criminal intent as not everything placed in the secret compartment would constitute criminal conduct. Wholly innocent conduct could potentially be subjected to a felony conviction. The same ordinary and properly understood meanings of the words of the eavesdropping statute that denied defendant’s vagueness argument condemn the statute for lack of criminal intent.

The state also argues that the word "purpose" creates a distinction. The state argues that a parent filming a son's little league game which records incidental conversations "would most likely have a very good argument that they are not guilty under this statute."

However, the statute in clear language refers to any conversation.

The Illinois Eavesdropping Statute would potentially punish as a felony a wide array of wholly innocent conduct. For example, a juror using an audio recorder to record directions to the courthouse for jury duty given by a police officer would be in violation of the statute without the consent of the officer. Recording a police officer's instructions on where to pay a speeding ticket or where a towed vehicle could be picked up would violate the statute without the consent of the officer. Other examples are set forth in defendant's motion and are not restated herein.

As noted above, the purpose of the eavesdropping statute is to safeguard Illinois citizens from unnecessary governmental surveillance and other unreasonable intrusions into their privacy. The problem with the statute is it sweeps in wholly innocent conduct that has nothing to do with intrusion into citizens privacy. The statute includes conduct that is unrelated to the statute's purpose and not rationally related to the evil the legislation sought to prohibit. For example, a defendant recording his case in a courtroom has nothing to do with intrusion into a citizen's privacy but with distraction. Distraction issues are handled by Supreme Court Rule 63 (A) (7). It is permitted only to the extent authorized by the Illinois Supreme Court. Under the state's contention, the same information permissibly recorded in a courtroom by electronic recording or by a court reporter becomes under the statute a class 1 felony intrusion of privacy rights if recorded by a defendant.

As noted by defendant, the Illinois Supreme Court broadcasts their oral arguments simultaneously on their website so they can be heard from any place in the country. A defendant could sit at home and record his case being argued as the electronic communication under 720 ILCS 5/14-1 (e) is not intended to be private. However, under the statute, the defendant would expose himself to a class 1 felony if the recording were attempted in the Illinois Supreme Court courtroom. The difference between distraction and intrusion into privacy is evident. As noted in Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2718 (2010): “Although this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute.”

Wherefore, the court grants the motion to dismiss finding that the Illinois Eavesdropping Statute lacks a culpable mental state and subjects wholly innocent conduct to prosecution. Under Illinois Supreme Court Rule 18, the court finds the Illinois Eavesdropping Statute is unconstitutional on its face and as applied to defendant as the statute is violative of substantive due process. The court finds the statute violates substantive due process under the Fourteenth Amendment of the United States Constitution (U.S. Const., amend.XIV) and article I, section 2 of the Illinois Constitution (Ill. Const. 1970, art.I, Sec.2). The court further finds the statute cannot be construed in a manner that would preserve its validity and the judgment cannot rest upon an alternative ground. Notice under Illinois Supreme Court Rule 19 was given.

FIRST AMENDMENT

Defendant, Michael D. Allison, also contends the eavesdropping statute violates his First Amendment right to gather information by audio recording from police officers

and public servants involved in his ordinance violation case. He maintains a right to gather information on matters of public concern. Defendant contends the First Amendment provides special protection for speech concerning the performance of government officials. (P. 3, Defendant Reply Brief). Defendant argues it is of paramount public interest for the free flow of information concerning public officials.

In this case, defendant was charged with a city ordinance violation that brought him into the court system. In dealing with his ordinance violation, defendant encountered public servants and public officials in the form of police officers, city attorney and his employee, circuit clerk employee and judge. In gathering information concerning his case, defendant is charged with violation of the eavesdropping statute as noted above. Defendant contends that “the right-to-record cases rest on principles: the First Amendment’s strong protection of speech about government officials and matters of public concern, speech in public forums and gathering information necessary for one’s own effective expression.” (Reply Brief, p.8).

The state response argues the prohibition on recording conversations without the consent of the public officials does not restrict the defendant’s ability to speak or express himself. The state contends that in spite of the eavesdropping statute, defendant can say anything he wants about his encounter with the public officials including the content of any recorded conversation. He just can’t record conversations between two or more persons without the consent of all parties.

There appears to be little caselaw on the matter other than some federal court decisions many of which are distinguishable on the facts. Am. Civil Liberties Union of Illinois v. Alvarez, No. 10 C 5235, 2001 WL 66030 (N. D. Ill. Jan. 10, 2011), never

reached the issue as it was dismissed on the issue of standing. "Although Illinois state courts are not bound to follow federal court decisions, such decisions can provide guidance and serve as persuasive authority." People v. Haywood, 407 Ill. App.3d 540, 546 (2nd Dist. 2011),

One persuasive authority is found in the recent case of Glik v. Cunniffe, No. 10-1764 ___F.3d___, 2011 WL 3769092 (1st Cir. Aug. 26, 2011). In Glik the U. S. Court of Appeals for the First Circuit noted:

*7 In summary, though not unqualified, a citizen's right to film government officials, including law enforcement officers, in the discharge of their duties in a public space is a basic, vital, and well-established liberty safeguarded by the First Amendment.

The case involved a young man arrested for filming with his cell phone several police officers on public property while they were arresting an individual. The court framed the First Amendment issue: "is there a constitutionally protected right to videotape police carrying out their duties in public? Basic First Amendment principles, along with caselaw from this and other circuits, answer the question unambiguously in the affirmative." (A. 1. (2) p. 4). The court further stated: *4 "The filming of government officials engaged in their duties in a public place, including police officers performing their responsibilities, fits comfortably within these principles." The court noted that the First Amendment does not grant a constitutional right to the press over an individual in gathering information. Technology and the "proliferation of electronic devices" have blurred the line between journalist and private citizen. Glik, (*5) points out that the First Amendment right "may be subject to reasonable time, place and manner restrictions."

The state cites Matheny v. Cnty. of Allegheny, Pennsylvania, 2010 WL 100859, 2010 U.S. Dist. LEXIS 24189, (W.D. Pa. March 16, 2010), for the proposition that a

limited right to videotape police conduct has not been recognized in the context of audio recording. However, the court in that case was dealing with the issue of qualified immunity and whether the First Amendment right to record was “clearly established”. The court found “the subject is plainly underdeveloped” and not “clearly established” but not that it didn’t exist. Moreover, in Kelly v. Borough of Carlisle, 622 F.3d 248, 262 (3rd Cir. 2010), subsequently decided after Matheny, the court stated:

“Moreover, even insofar as it *is* clearly established, the right to record matters of public concern is not absolute; it is subject to reasonable time, place, and manner restrictions, as long as they are ‘justified without reference to the content of the regulated speech, ... are narrowly tailored to serve a significant governmental interest, and ... leave open ample alternative channel for communication of the information.’ (citation omitted).

[See also Potts v. City of Lafayette, Indiana 121F.3d 1106, 1111 (7th Cir. 1997). While stating there is nothing in the Constitution which guarantees the right to record a public event, the safety regulation analysis by the court considered the time, place, or manner restriction on “First Amendment” activities.]

Insight into the First Amendment issue on the right to record is found in the article: Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record, 159 U.Pa.L.Rev. 335, *358 (Jan. 2011). In the article it is stated in part:

a. Privacy, Dignity, and Public Officials

Officials who invoke protections for privacy to justify punishing those who monitor public conduct mistake their own anxieties for constitutional justification.

The privacy interests recognized in Bartnicki, (citing Bartnicki v. Vopper, 532 U.S. 514 (2001)) like privacy interests that many commentators argue counter-balance the interest in free expression, guard free discourse by private citizens who use the shelter of privacy to “think and act creatively and constructively.” When privacy functions to underpin democratic society, the interests in free expression may balance one another. Suppression of free expression on the part of those who capture information may protect the freedom to converse of those whose words and images are captured.

But officers (emp. supplied) confronting demonstrators, motorists, or the subjects

of arrest (emp. supplied)-like other street-level bureaucrats providing services- neither engage in dialogue by which they define their private identities nor in discourse that contributes to public deliberation. Many of the official subjects of image capture are not engaged in discourse of any sort. Those who speak do so not as autonomous citizens working out their own thoughts and destiny, but as public servants carrying out their duties. The Court recently emphasized that 'when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes' and can claim scant protection under guarantees of free expression designed to shield the discourse of citizens. A fortiori, they can claim no compelling right as citizens to shield that speech from being recorded. (emp. supplied) Nor can public actors claim a right to preserve their personal dignity against public inspection when they carry out their duties....that protections against wiretapping not only 'encourage conversations that otherwise might not take place,' but they also protect opportunities for intimacy: 'They resemble laws that would award damages caused through publication of information obtained by theft from a private bedroom.' A police officer investigating a crime can assert no comparable right to intimacy with her suspects; still less can a public official engaged in her duties on a public street. Certainly, law officials have no constitutionally cognizable or legitimate expectation that their actions remain unrecorded; on the contrary, the actions of public officials are by definition a matter of public concern. (Citations omitted)

Wherefore, the court finds that the defendant possessed a First Amendment right to gather information by audio recording public officials involved in performing their public duties. The First Amendment right to record is not absolute as it is subject to reasonable time, place and manner restrictions such as Illinois Supreme Court Rule 63 (A)(7). Defendant would not be able to record in the courtroom under his First Amendment right to gather information because Supreme Court Rule 63 (A)(7) imposes reasonable time, place and manner restrictions. The Illinois Eavesdropping Statute is found to be unconstitutional in violation of defendant's First Amendment right as it prohibits any audio recordings of any public official's conversations with defendant in his attempt to gather information from public servants performing their duties on his case unless they consent to the recording of the conversation. There are no limitations. There are no time, place and manner restrictions to consider under the statute as it imposes a

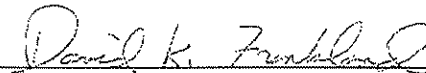
blanket rule on forbidding all recordings in such case without the consent of the public servant. A statute intended to prevent unwarranted intrusions into a citizen's privacy cannot be used as a shield for public officials who cannot assert a comparable right of privacy in their public duties. Such action impedes the free flow of information concerning public officials and violates the First Amendment right to gather such information.

The court finds that the motion to dismiss should be granted. The court finds the Illinois Eavesdropping Statute is unconstitutional as applied to defendant's First Amendment right under the First Amendment of the United States Constitution (U.S. Const., amend. I) to gather information about his case by audio recording. The court finds the statute cannot be construed in a manner that would preserve its validity and the judgment cannot rest upon an alternative ground. Notice under Supreme Court Rule 19 was given.

SUMMARY

For the reasons stated and the findings made as set forth above, the court denies the motion to dismiss the Illinois Eavesdropping Statute as unconstitutional on the claim of being void for vagueness. The court grants the motion to dismiss the charges on defendant's claim that the Illinois Eavesdropping Statute is unconstitutional as violating substantive due process and the First Amendment right to gather information.

Dated: September 15, 2011.



Judge David K. Frankland