



OFFICE OF THE ATTORNEY GENERAL
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CRIMINAL LAW AND PROCEDURE:
Licensed Private Detective
Recording Conversation Under
Exemption to Eavesdropping Statute

Honorable James W. Glasgow
State's Attorney, Will County
14 West Jefferson Street
Joliet, Illinois 60432

Dear Mr. Glasgow:

I have your letter wherein you inquire whether, pursuant to subsection 14-3(i) of the Criminal Code of 1961 (720 ILCS 5/14-3(i) (West 1994), as amended by Public Act 89-452, effective May 17, 1996), a licensed private detective may lawfully stand in for or otherwise participate with a person to record a conversation under the reasonable suspicion that another party to the conversation is committing, is about to commit or has committed a criminal offense against the person or a member of his or her immediate household, and there is reason to believe that evidence of the criminal offense may thereby be obtained. Specifically, you have asked whether a private detective may:

Honorable James W. Glasgow - 2.

- 1.) Take the place of a person who would be statutorily authorized to tape record a conversation with another for the purpose of confronting the suspected perpetrator and recording the conversation? Or,
- 2.) Accompanying a person who is statutorily authorized to tape record a conversation for the purpose of operating a device or devices for the recording of a conversation between that person and the suspected perpetrator?

For the reasons hereinafter stated, it is my opinion that a licensed private detective may not stand in for, but may otherwise assist a person to record a conversation under such circumstances without violating section 14-2 of the Criminal Code (720 ILCS 5/14-2 (West 1994)).

Section 14-2 of the Criminal Code of 1961 defines the offense of eavesdropping, in pertinent part, as follows:

" * * *

A person commits eavesdropping when he:

(a) Uses an eavesdropping device to hear or record all or any part of any conversation unless he does so (1) with the consent of all of the parties to such conversation or (2) in accordance with Article 108A of the 'Code of Criminal Procedure of 1963', approved August 14, 1963, as amended; or

(b) Uses or divulges, except as authorized by this Article or by Article 108A or 108B of the 'Code of Criminal Procedure of 1963', approved August 14, 1963, as amended, any information which he knows or reasonably should know was obtained through the use of an eavesdropping device.

* * *

"

Honorable James W. Glasgow - 3.

Section 14-1 of the Criminal Code of 1961 (720 ILCS 5/14-1 (West 1994)) defines the terms "eavesdropping device" and "eavesdropper" as follows:

"(a) Eavesdropping device.

An eavesdropping device is any device capable of being used to hear or record oral conversation whether such conversation is conducted in person, by telephone, or by any other means; Provided, however, that this definition shall not include devices used for the restoration of the deaf or hard-of-hearing to normal or partial hearing.

(b) Eavesdropper.

An eavesdropper is any person, including law enforcement officers, who operates or participates in the operation of any eavesdropping device contrary to the provisions of this Article.

* * *

"

The term "conversation" was not defined in section 14-1 until the enactment of Public Act 88-677, effective December 15, 1994, which added the following definition:

" * * *

(d) 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."

Section 14-3 of the Criminal Code of 1961 enumerates activities which are exempt from the purview of the eavesdropping

Honorable James W. Glasgow - 4.

statute. Subsection 14-3(i) of the Act, which was also added by Public Act 88-677, provides as follows:

"* * * The following activities shall be exempt from the provisions of this Article:

* * *

(i) Recording of a conversation made by or at the request of a person, not a law enforcement officer or agent of a law enforcement officer, who is a party to the conversation, under reasonable suspicion that another party to the conversation is committing, is about to commit, or has committed a criminal offense against the person or a member of his or her immediate household, and there is reason to believe that evidence of the criminal offense may be obtained by the recording." (Emphasis added.)

Prior to the addition of the statutory definition of "conversation", the Illinois Supreme Court, in People v. Beardsley (1986), 115 Ill. 2d 47, had held that a party to a conversation, or a person whose presence was known to the conversing parties, could record the conversation without violating the statutory prohibition against eavesdropping. In that case, an uncooperative subject of a traffic stop tape-recorded two police officers' conversation while seated in the back of the squad car. The police officers were sitting in the front seat of the car and knew that the defendant had a tape recorder. The court relied not so much upon the issue of consent, but on whether the parties to the conversation "* * * intended their conversation to be of a private nature under

Honorable James W. Glasgow - 5.

circumstances justifying such expectation * * *". People v. Beardsley (1986), 115 Ill. 2d at 54.

The Illinois Supreme Court ruled on the issue again in People v. Herrington (1994), 163 Ill. 2d 507. In People v. Herrington, an alleged victim of sexual abuse called the defendant at the request of the police department. The conversation was recorded by the police with the consent of the alleged victim. No court order was obtained to record the conversation and no emergency circumstances existed. Reaffirming its holding in People v. Beardsley, the Illinois Supreme Court held that the eavesdropping statute did not prohibit a party to the conversation from recording that conversation. According to the court, no expectation of privacy could be found when a party to the conversation recorded it. People v. Herrington (1994), 163 Ill. 2d at 510-11.

Against this background, the purpose and intent of Public Act 88-677 must now be considered. The law is presumed to be changed when the General Assembly enacts material changes thereto. (Board of Trustees of Southern Illinois University v. Department of Human Rights (1994), 159 Ill. 2d 206.) As noted previously, the 1994 amendment to the eavesdropping statute defined the term "conversation" and exempted additional activities from the purview thereof. Subsection 14-1(d) now defines "conversation" differently from the interpretation of that term by the court in People v. Beardsley. A conversation

Honorable James W. Glasgow - 6.

occurs, as defined by the eavesdropping statute, whether or not the parties intended that it be private. It is apparent that this statutory definition and the additional exemptions were intended to modify the law as interpreted in People v. Beardsley and People v. Herrington.

Furthermore, the legislative history of Public Act 88-677 supports this conclusion. For example, Senator Dillard, during the Senate debate on Senate Bill 1352 (which subsequently became Amendment number four to House Bill 356, which was enacted as Public Act 88-677), stated that this definition of conversation "* * * restores an all-party consent provision to our law in Illinois, regardless of whether the parties really intended their conversation to be private or not." (Remarks of Sen. Dillard, April 21, 1994, Senate Debate on Senate Bill No. 1352, at 139.) Further, Senator Dudycz, explaining the addition of Senate Bill 1352 as Amendment four to House Bill 356, described the Bill as one which was intended "* * * to reverse the Beardsley eavesdropping case * * *". Remarks of Sen. Dudycz, May 18 and 20, 1994, Senate Debate on House Bill No. 356, at 56 and 42.

While providing that all parties must consent to the recording of a conversation, the amendment also carved out three additional exemptions permitting one party consent to recording in certain situations. Two of the three exemptions involve specific law enforcement activities. (See 720 ILCS 5/14-3(g),

Honorable James W. Glasgow - 7.

(h) (West 1994)). The third exemption, incorporated as subsection 14-3(i) of the Act, permits persons who are not law enforcement agents to record conversations which may produce evidence of criminal activity directed at those persons or members of their households. The following example was given during Senate debate regarding Senate Bill 1352 which illustrates the General Assembly's intent: "* * * if a stalking victim has someone call them up on the telephone, they can clearly record that to help them in the prosecution of that crime against them, if they believe that--the recording will help them obtain evidence that can be used to--to prevent offenses." Remarks of Sen. Dillard, April 21, 1994, Senate Debate on Senate Bill No. 1352, at 139-140.

Statutory language should be given its plain or ordinary and popularly understood meaning, as well as the fullest possible meaning. (Collins v. Board of Trustees of Firemen's Annuity & Benefit Fund of Chicago (1993), 155 Ill. 2d 103, 111.) While no statute may be construed more broadly than its express language and reasonable implications permit, any such implications are as much a part of the statute as the express language thereof. (Baker v. Miller (1994), 159 Ill. 2d 249, 260.) Subsection 14-3(i) of the Act allows the recording of a conversation "made by or at the request of" a person who has reasonable suspicion to believe that another party to the conversation has committed, is committing or will commit a crime

against the person or a member of the person's immediate household, where there is reason to believe that the recording will capture evidence of the crime. The person recording the conversation may not, however, be a law enforcement officer or agent.

Licensed private detectives are regulated by statute and licensed by the Illinois Department of Professional Regulation. (225 ILCS 446/1 et seq. (West 1994).) It is unlawful for a private detective to imply that he or she is part of government or to have any identification that contains the words "law enforcement". (225 ILCS 446/85 (West 1994).) One can conclude, therefore, that a licensed private detective is not considered to be a law enforcement officer or agent.

Nevertheless, a licensed private detective, even though working for a person who is permitted to record, is not the victim or potential victim or a member of the victim's immediate household. Consequently, it is my opinion that a licensed private detective cannot substitute for a person who is permitted to record a conversation because that person must be a party to the conversation in order for subsection 14-3(i) to be applicable.

Subsection 14-3(i), however, also permits the recording of a conversation made "at the request of" a person who has reasonable suspicion to believe that another party to the conversation has committed, is committing or will commit a crime against the person or a member of the person's immediate

Honorable James W. Glasgow - 9.

household. That language implies that another person may participate in the recording of a conversation that could result in obtaining evidence of a crime. A licensed private detective would not be in violation of the statute by assisting a participant to record a conversation because he or she would not be participating in the operation of an eavesdropping device contrary to the statute.

While certain criteria must be met in order for a crime victim or potential victim to record without the consent of all parties to the conversation, the intent of the General Assembly in creating this exemption was clearly to allow persons to record conversations in order to gather evidence against the perpetrators of crime and to aid in the prosecution or prevention of crime. Therefore, it is my opinion that a licensed private detective may not stand in for, but may otherwise accompany and participate with or assist a person to tape record a conversation under the reasonable suspicion that another party to the conversation is committing, is about to commit, or has committed a criminal offense against the person or a member of his immediate household and there is reason to believe that evidence of the criminal offense may be obtained by the recording.

Sincerely,



JAMES E. RYAN
Attorney General