



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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FILE NO.: 96-035

CRIMINAL LAW AND PROCEDURE:
Tape-Recording the Unsolicited
Comments of Another Under the
Illinois Eavesdropping Statutes

Honorable Michael D. Clary
State's Attorney, Vermilion County
Vermilion County Courthouse
7 North Vermilion Street
Danville, Illinois 61832

Dear Mr. Clary:

I have your letter wherein you inquire whether a person in police custody may be deemed to have consented to the recording of his or her conversation, for purposes of the Illinois eavesdropping statutes, when a law enforcement officer notifies the individual that his or her comments are being recorded and places the tape-recorder in full view, and, thereafter, the person continues to make unsolicited comments and statements. For the reasons set forth below, it is my opinion that a party's consent to the recording of his or her statements and comments may be inferred from the surrounding circumstances,

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and that continuing to speak after being advised that a conversation is being recorded may signify consent thereto.

You have noted that law enforcement officers often carry portable tape-recorders with them, and that "[o]ccasionally, while placing individuals under arrest or transporting them, the officers would like to be able to record what the individuals are saying to them." You have suggested that your question does not primarily concern custodial interrogations, but rather those situations in which a person placed in police custody is "* * * making threats toward the [law enforcement] officer or otherwise making unsolicited comments." Frequently, the individuals continue to make threats and other unsolicited comments to the law enforcement officer after being informed that their comments will be recorded, and a tape recorder is produced. You have asked whether, by continuing to make such statements and comments, an individual may be deemed to have consented to the recording of his or her unsolicited remarks and statements.

Section 14-2 of the Criminal Code of 1961 (720 ILCS 5/14-2 (West 1994)) 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 or Article 108B

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of the "Code of Criminal Procedure of 1963",
approved August 14, 1963, as amended; * * *

* * *

"

(Emphasis added.)

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

"

* * *

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.

* * *

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." (Emphasis
added.)

The primary rule of statutory construction is to
ascertain and give effect to the intent of the General Assembly.
(People v. Tucker (1995), 167 Ill. 2d 431, 435.) Legislative
intent is best evidenced by the language used in a statute. Bubb
v. Springfield School Dist. (1995), 167 Ill. 2d 372, 381.

Under the language quoted above, it is clear that the
offense of eavesdropping is committed when an eavesdropping

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device is used to record any part of a conversation without the consent of all parties thereto, or as otherwise provided by law, and that a tape-recorder can be an "eavesdropping device," for purposes of these statutes. An argument can be made that unsolicited comments do not constitute a "conversation", and that the consent of the speaker would therefore not be required to record them. Assuming, however, that a conversation does occur in circumstances in which a law enforcement officer makes no comments other than to advise an individual that his or her statements or threats are going to be recorded, and the individual continues to make comments or threats to the officer, it is my opinion that consent may be inferred therefrom.

Under ideal circumstances, all parties to a conversation would verbally convey in clear, concise language their express consent to a recording. Frequently, however, consent must be inferred from the surrounding circumstances in a given situation. In this regard, our courts have recognized that acquiescence may constitute consent, for purposes of the eavesdropping statutes. People v. Ardella (1971), 49 Ill. 2d 517, 522; In re Conservatorship of Stevenson (1970), 44 Ill. 2d 525, 532, cert. denied, 400 U.S. 850, 91 S.Ct. 50 (1970).

In People v. Ardella (1971), 49 Ill. 2d 517, the supreme court was asked to determine whether a law enforcement officer had acted unlawfully by videotaping the defendant performing certain coordination-performance tests and responding

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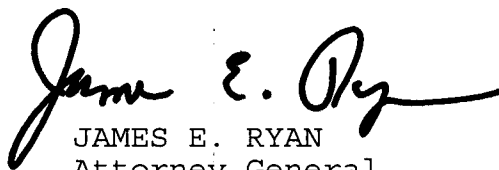
to certain questions pursuant to an investigation of defendant for driving while under the influence of alcohol. In reaching its conclusion that defendant's acquiescence constituted consent, for purposes of the eavesdropping statute, the court reviewed the defendant's actions and the circumstances surrounding the recording. Specifically, the court noted that the law enforcement officer told the defendant that he wanted to film him and that the officer requested the defendant to step into another room for that purpose. While the tests were being recorded in the filming room, the law enforcement officer held a microphone in his hand. At all pertinent times, the microphone was held in plain view from one to three feet from the defendant. The supreme court concluded that the trial court had not erred in determining that the defendant was aware that a recording was being made and that he had knowingly acquiesced therein.

Similarly, in In re Conservatorship of Stevenson (1970), 44 Ill. 2d 525, the court was asked, inter alia, to determine whether certain telephone recordings were made without obtaining the requisite consent. In concluding that the defendant had acquiesced in the recording of her telephone conversations, the court noted that the defendant had been informed that her telephone conversations were being recorded and that the defendant indicated that she, too, was recording the conversations. Thus, the defendant was deemed to have consented by acquiescence to the recording of her conversations.

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Based upon the foregoing, it is my opinion that a person who continues to speak or makes additional comments to a law enforcement officer after receiving actual notice that his or her statements will be recorded may be deemed to have consented to the tape-recording of those comments, for purposes of the Illinois eavesdropping statutes, if the surrounding circumstances indicate acquiescence in such recording. There are, of course, numerous other constitutional and statutory provisions applicable to persons who are in police custody or otherwise detained which may impact upon the propriety of recording statements and the purposes for which such statements may ultimately be used. Nothing contained herein should be construed as contemplating anything less than scrupulous compliance therewith.

Sincerely,

A handwritten signature in black ink, appearing to read "James E. Ryan". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

JAMES E. RYAN
Attorney General