

1 STATE OF ILLINOIS }
2 COUNTY OF C O O K } SS.

3 IN THE CIRCUIT COURT OF COOK COUNTY
4 COUNTY DEPARTMENT - CRIMINAL DIVISION

5 THE PEOPLE OF THE
6 STATE OF ILLINOIS,

7 Plaintiff,

8 vs.

9 CHRISTOPHER DREW,

10 Defendant.

}
} Indictment No.
} 10 CR 00046-01

11 ARGUMENT ON MOTION

12 REPORT OF PROCEEDINGS had before the
13 HONORABLE STANLEY J. SACKS, Judge of the
14 Criminal Division, heard on the 11th day of
15 July, A.D., 2011.

16 APPEARANCES:

17 HON. ANITA M. ALVAREZ,
18 State's Attorney of Cook County, by
19 MR. JEFF ALLEN,
20 Assistant State's Attorney,
21 appeared on behalf of the
22 People;

23 MR. JOSHUA KUTNICK, Attorney at Law,
24 appeared on behalf of the
Defendant.

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I N D E X

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4 People vs. Christopher Drew
5 Date of Proceedings: July 11, 2011
6 Pages: 1 - 34
7 Reporter's Certificate: P. 34
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13 ARGUMENT ON MOTION
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1 THE COURT: Christopher Drew. Sheet
2 2.

3 (Brief pause.)

4 MR. KUTNICK: Good morning, Judge

5 THE COURT: Good morning.

6 You are Christopher Drew?

7 THE DEFENDANT: Yes.

8 THE COURT: You are on bond, I take
9 it?

10 THE DEFENDANT: Yes.

11 THE COURT: Your name, Counsel?

12 MR. KUTNICK: Joshua Kutnick,
13 K-u-t-n-i-c-k. Judge, I also have my law
14 clerk, Saren Stiegel, S-t-i-e-g-e-l, with me
15 today.

16 THE COURT: Just one second.

17 (Brief pause.)

18 THE COURT: Mr. Drew, how are you
19 feeling? Pretty good hopefully.

20 THE DEFENDANT: Yes.

21 THE COURT: This case was last here in
22 April. Mr. Drew was, unfortunately, under
23 the weather. Hopefully he is feeling better.

24 Is there a motion pending,

1 Mr. Kutnick about -- you filed an answer to
2 discovery talking about, if I recall
3 correctly, maybe I don't, an exemption as
4 being your defense?

5 MR. KUTNICK: That's correct.

6 THE COURT: Okay.

7 MR. KUTNICK: Judge, we filed what I
8 entitled a notice of intent to plead the
9 exception, the exception specifically to the
10 eavesdropping statute.

11 THE COURT: Okay. Fine. We can take
12 care of that, I think, as far as oral
13 arguments.

14 What's left after that, if
15 anything?

16 MR. ALLEN: Judge, there is raw
17 footage of these two encounters with the
18 police.

19 THE COURT: I have got that back there
20 as well. Mr. Drew wasn't -- I thought we
21 just waited until he got back until he was
22 feeling better.

23 MR. KUTNICK: Of course. We
24 appreciate that.

1 THE COURT: State, I take it you have
2 a position about the Defense pleading an
3 exemption.

4 MR. ALLEN: Judge, I do have a
5 position. I think we preliminarily argued
6 it. Counsel did provide me a case today that
7 he intends to rely on.

8 THE COURT: Is that People versus
9 Henry Lee Smith?

10 MR. KUTNICK: Yes, Judge.

11 THE COURT: 71 Ill.2d 95 (inaudible).

12 Your exemption -- you want this,
13 Mr. Kutnick -- this exemption, Mr. Kutnick,
14 for a jury to hear if it is a jury trial or
15 for me to hear if it is a bench trial as far
16 as the trial itself you mean?

17 MR. KUTNICK: Correct, Judge.

18 THE COURT: That's your defense, your
19 client is exempt?

20 MR. KUTNICK: Correct.

21 THE COURT: The section you are
22 talking about, 720 ILCS 5/14-3(i) states an
23 exception to the crime of eavesdropping
24 where, quotation marks, recording of a

1 conversation made by or at the request of a
2 person, not a law enforcement officer or
3 agent of a law enforcement officer, who is a
4 party to the conversation, under reasonable
5 suspicion that another party to the
6 conversation is committing, is about to
7 commit or has committed a criminal offense
8 against a person or a member of his or her
9 immediate household, and there is reason to
10 believe that evidence of the criminal offense
11 may be obtained by the recording.

12 Then you go on to paragraph two,
13 arresting officers in the case were
14 committing a federal crime of deprivation of
15 rights under color of law in violation of 18
16 USC Section 242 when they arrested
17 Christopher Drew for peddling without a
18 permit allegedly in violation of Chicago city
19 ordinance.

20 I thought we had a motion already
21 to establish probable cause to arrest your
22 client.

23 MR. KUTNICK: We did, Judge.

24 THE COURT: So if you maintain that

1 the police arrested your client without
2 probable cause when he was committing a
3 peddling violation, that would be an issue
4 for appeal, not an issue for a jury, wouldn't
5 it?

6 MR. KUTNICK: No, Judge.

7 I am not saying that the officers
8 didn't have probable cause to arrest him for
9 a peddling violation. What we are arguing is
10 that Christopher Drew, under exemption (i),
11 had a reasonable suspicion that his rights
12 would be violated under color of law pursuant
13 to 18 USC Section 242.

14 So it is not --

15 THE COURT: But you are conceding
16 there was no violation of your client's
17 rights because there was probable cause to
18 arrest him.

19 MR. KUTNICK: Well, that's what the
20 Court found, but we aren't bound --

21 THE COURT: You want the jurors to
22 reconsider the same issue I already found?

23 MR. KUTNICK: No. Judge, it is a
24 different issue.

1 The issue that you decided was
2 whether the police had probable cause to --
3 actually, whether or not the tape itself, the
4 recording, would be admissible, and you found
5 that -- your Honor found that they had
6 probable cause to arrest him, and then the
7 recording was properly discovered through an
8 inventory search.

9 So I think that the parties would
10 even agree that Christopher Drew was not
11 originally arrested for eavesdropping. He
12 was originally arrested for peddling.

13 THE COURT: We went through that
14 before. Once he was in custody for the
15 offense of peddling without a license
16 downtown, they recovered a recording device
17 that was on when Drew was taken into custody.

18 MR. KUTNICK: But the question I am
19 looking to put before the jury is not did the
20 police officers have probable cause to
21 arrest.

22 THE COURT: That's not an issue for a
23 jury in any event.

24 MR. KUTNICK: No, of course. Of

1 course not.

2 The issue before the jury as I am
3 proposing it is did Christopher Drew,
4 pursuant to the language of section (i), have
5 reasonable suspicion that another party,
6 meaning a police officer, was committing or
7 was about to commit a criminal offense
8 against Chris himself.

9 THE COURT: What was that criminal
10 offense?

11 MR. KUTNICK: It is 18 USC 242,
12 violation of rights under color of law.

13 THE COURT: What in particular?

14 MR. KUTNICK: Violation of his First
15 Amendment right, to start; to sell in a
16 public area, to express his artwork. That's
17 the deprivation that Chris contends happened
18 to him. He is not claiming it for purposes
19 of suppression of evidence, Judge. He is
20 claiming it for purposes of exemption.

21 THE COURT: You have sort of lost me
22 so far.

23 MR. ALLEN: Judge, that statute
24 actually -- when you look at that statute, it

1 talks about deprivation of any rights,
2 privileges, immunities, and then it continues
3 on, on the account of such person being an
4 alien or by reason of his color or race.

5 No allegation whatsoever that that
6 was the motivation for arresting Mr. Drew,
7 because of --

8 THE COURT: There is no question they
9 had a right to arrest him.

10 MR. KUTNICK: Correct.

11 But, Judge, the question is
12 whether or not Mr. Drew had a reasonable
13 suspicion that his rights would be violated.

14 THE COURT: You mean a subjective
15 viewpoint on his part?

16 MR. KUTNICK: No, reasonable; not
17 subjective.

18 THE COURT: What's the reasonable
19 suspicion on his part?

20 MR. KUTNICK: The reasonable suspicion
21 that he would be arrested for something
22 that's a violation of his rights, and he has
23 that reasonable suspicion. We can establish
24 that through uncontrovertible facts, and

1 that's for the jury to decide, whether or not
2 his suspicion was reasonable.

3 THE COURT: What's his suspicion?
4 What are you referring to? What are you
5 talking about?

6 MR. KUTNICK: That he would be
7 arrested for selling artwork on the street.
8 That's his suspicion.

9 THE COURT: Well, if a person is
10 committing a crime, whether the police arrest
11 him or not, what difference does that make?
12 Violating the law is violating the law. His
13 subjective viewpoint, what does that matter?

14 MR. KUTNICK: Judge, I didn't say
15 anything about his subjective. That would be
16 against the case law, Judge. It is not about
17 his subjective viewpoint. It is whether a
18 reasonable person -- whether it would be
19 reasonably -- a reasonable suspicion that his
20 rights would be violated, and then --

21 THE COURT: What's that reasonable
22 suspicion then?

23 MR. KUTNICK: Because he had been
24 harassed by the police two weeks earlier on

1 the same issue.

2 THE COURT: You propose to present
3 evidence to the jury to what effect then?

4 MR. KUTNICK: I propose that I am
5 allowed to present evidence to the jury that
6 the exemption does apply, that the jury would
7 then be able to decide whether it does apply,
8 and, if so, they could determine whether or
9 not he was guilty or not based on --

10 THE COURT: Guilty or not of what?

11 MR. KUTNICK: Of eavesdropping.

12 MR. ALLEN: Judge -- all right. I
13 will wait until Counsel is through before I
14 respond.

15 THE COURT: Yeah, that's true.

16 MR. KUTNICK: I am. I am just
17 responding to the Court's question.

18 THE COURT: All right. Go ahead.

19 MR. ALLEN: Judge, the eavesdropping
20 statute elicits affirmative defenses. It
21 lists a laundry list of affirmative defenses.
22 This exemption is not one of those
23 affirmative defenses.

24 This exemption is contained within

1 the statute, and, Judge, it is the State's
2 position that this exemption is something to
3 be determined or litigated pretrial. This is
4 not an issue for the jury. There are no IPI
5 instructions.

6 There is -- other than this case,
7 which is distinguishable -- actually, I
8 already had a copy of it -- where it actually
9 lists this exemption as an affirmative
10 defense, that's not the case here. That's
11 not the case here.

12 Under the eavesdropping statute
13 there are exemptions and there are
14 affirmative defenses. The exemptions, Judge,
15 would be a pretrial issue. It would not be
16 an issue for the jury to decide.

17 Furthermore, what would the jury
18 be deciding? How would you fashion that
19 argument; we find the defendant guilty or we
20 find that an exemption applies or we find him
21 not guilty?

22 MR. KUTNICK: The Smith case lays out
23 how it is done through jury instructions.

24 Judge, no, we are not claiming

1 this as an affirmative defense. It is not.
2 Counsel is right. There is an exemption.
3 There is a difference. The Supreme Court has
4 delineated the difference, and the difference
5 is important because it goes to the burdens
6 of proof of both parties.

7 Judge, as a matter of fact, we are
8 conceding what is -- I mean, I think from an
9 advocacy point of view I would rather see it
10 be an affirmative defense because then the
11 State has to rebut it, but I don't think that
12 that's a fair reading of the case law.

13 I think it is an exemption. We
14 should be permitted to put it before the
15 jury, and that is a question of fact to be
16 determined by the jury, whether or not
17 Mr. Drew had a reasonable suspicion, pursuant
18 to exemption (i), that he would be the victim
19 of a crime.

20 THE COURT: A reasonable suspicion
21 that he might be the victim of what?

22 MR. KUTNICK: Of 18 --

23 THE COURT: Being arrested legally?

24 MR. KUTNICK: Correct.

1 MR. ALLEN: Judge, maybe I didn't even
2 look at this earlier, Judge, but 14-3(i)
3 says, recording of a conversation made by or
4 at the request of a person, not a law
5 enforcement officer or agent of a law
6 enforcement officer, who is a party to the
7 conversation, under reasonable suspicion that
8 another party to the conversation is
9 committing, is about to commit or has
10 committed a criminal offense against the
11 person or a member of his or her immediate
12 household.

13 Judge, I don't even know if this
14 subsection applies to a situation where it is
15 the police being recorded. Not a law
16 enforcement officer. That's not contained
17 within the motion.

18 MR. KUTNICK: Judge, if I may respond
19 to that point, which is that the person who
20 is not a law enforcement officer is
21 Christopher Drew and --

22 THE COURT: Correct.

23 MR. KUTNICK: -- the person who is
24 being recorded doesn't have to be a law

1 enforcement officer. It can be any person.
2 In this case it happens to be a law
3 enforcement officer, and it actually word for
4 word does apply to this situation.

5 Christopher Drew is a party to the
6 conversation, not a law enforcement officer,
7 under reasonable suspicion that another
8 party, the police officer, is committing, is
9 about to commit or has committed a criminal
10 offense against Christopher Drew.

11 THE COURT: What's the criminal
12 offense you are referring to?

13 MR. KUTNICK: It is 18 USC 242.

14 THE COURT: What does that say again?

15 MR. KUTNICK: Judge, here is a copy of
16 it. I had given it to the State. I can't
17 find mine.

18 (Brief pause.)

19 THE COURT: Deprivation of rights
20 under color of law. Whoever, under color of
21 any law, statute, ordinance, regulation or
22 custom, willfully subjects any person in any
23 state, territory, commonwealth, possession or
24 district deprivation of any rights,

1 privileges or immunities secured or affected
2 by the constitution or the laws of the United
3 States or to different punishment, pains or
4 penalties on account of such person being an
5 alien, reason of his color or race that are
6 prescribed for the (inaudible) citizens,
7 shall be fined, et cetera.

8 Your client wasn't arrested
9 because he happened to be downtown because of
10 his race, color or anything else. The
11 defendant was peddling.

12 MR. KUTNICK: Judge, it doesn't matter
13 whether or not -- all that matters is whether
14 he was under a reasonable suspicion of it.
15 He doesn't have to actually be. That's why
16 it is a jury question.

17 THE COURT: Anything else you want to
18 add, gentlemen?

19 MR. ALLEN: No, Judge. I will rest on
20 our arguments.

21 MR. KUTNICK: Judge, I do want to just
22 briefly respond to what Counsel said --

23 THE COURT: Go ahead.

24 MR. KUTNICK: -- on the Smith case

1 specifically.

2 THE COURT: Sure.

3 MR. KUTNICK: Judge, in the Smith
4 case, that was a gun case, and it was an
5 issue of fact whether or not it was
6 immediately accessible. That's an exemption.
7 It is a statutory exemption to the UUW
8 statute.

9 We have exhaustively researched
10 whether or not there are any other appellate
11 cases on the pleading of exemptions and could
12 find none. So it is clear that the Illinois
13 Supreme Court, albeit some time ago, showed
14 how this is to be done, and it is a question
15 of fact. It is to be decided by the trier of
16 fact. The trier of fact, if a jury, is to be
17 instructed appropriately, and this is a
18 matter that is properly before the jury.

19 We ask you allow us to do that.

20 THE COURT: Okay.

21 It is apparent that what the
22 Defense is trying to do in this case,
23 Christopher Drew, is go to any lengths
24 possible to test the constitutionality of the

1 eavesdropping statute by filing a notice of
2 intent to plead exemption and by suggesting
3 the defendant's subjective viewpoint is just
4 another way of trying to challenge the
5 statute itself. I have already ruled before
6 that the statute is constitutional.

7 An exemption is an exemption.
8 That's not a question for a jury to decide,
9 whether or not defendant has a subjective
10 viewpoint dealing with the statute about
11 eavesdropping. It is apparent that's what he
12 is attempting to do by filing a notice of
13 intent to plead the exemption, which is to
14 test the subjective viewpoint that the
15 statute is unconstitutional.

16 He had a reasonable suspicion that
17 the party was about to commit a crime or
18 committed a criminal offense against either
19 him or his family is just another way of
20 saying, in my opinion at least, he is trying
21 to say the statute is unconstitutional as
22 applied to him or applied in general, and to
23 allow that to occur, him to testify or
24 present evidence that he was concerned about

1 a suspicion, a reasonable one, that the
2 police were about to do something illegal
3 when the evidence clearly shows they had
4 probable cause to arrest the man, I don't
5 believe is something for a jury to decide.

6 If there is an exemption that you
7 want someone to consider, direct that
8 exemption to me, as opposed to a jury, to
9 determine the issues, which are simple in the
10 case. Did Drew have this recording device?
11 Did he record the police? Did he do so in
12 violation of the state eavesdropping statute?

13 To allow this to occur is merely
14 in effect Drew saying that's a bad statute, I
15 don't like it, I want the jurors to consider
16 that issue. It is not an issue for the
17 jurors to decide.

18 So the State's motion, if it is
19 one, to strike that exemption is allowed.

20 What's the next step?

21 MR. KUTNICK: I have --

22 THE COURT: I have ruled. That's it.

23 MR. KUTNICK: I respect the ruling,
24 Judge, but I have a question, which is --

1 THE COURT: I don't answer questions.
2 I have made my ruling. What's your question?

3 MR. KUTNICK: Judge, you ruled saying
4 about reasonable --

5 THE COURT: This is not a law school.

6 MR. KUTNICK: -- suspicion -- it is a
7 point of clarification on your finding,
8 Judge. That's it.

9 THE COURT: Fine. What's your
10 question about the ruling?

11 MR. KUTNICK: The distinction between
12 whether or not Drew believed that he would be
13 arrested for eavesdropping versus peddling.
14 Those are two totally different questions,
15 and I think that the --

16 THE COURT: Well, let me clarify it
17 then.

18 MR. KUTNICK: Okay.

19 THE COURT: You cannot present
20 evidence either regarding suspicion for
21 eavesdropping or for violating the ordinance.

22 There is no question he was
23 violating the ordinance for peddling in the
24 city of Chicago downtown on State Street. He

1 was arrested for that. His subjective
2 viewpoint whether they were going to arrest
3 him or not is irrelevant. When a person is
4 committing a crime, they are committing a
5 crime. Whether they think that perhaps it is
6 not a crime or they would like it not to be a
7 crime, that is neither here nor there.

8 He cannot present evidence of his
9 subjective viewpoint, that he had a right to
10 sell stuff downtown without a license or he
11 had some issue with the eavesdropping
12 statute.

13 So that issue about intent to
14 plead the exemption, that's an issue I
15 believe is an issue of law for a judge as
16 opposed to an issue of fact to the trier of
17 fact, in this case the jury.

18 MR. KUTNICK: I would like to set this
19 for a hearing then before your Honor on the
20 exemption.

21 THE COURT: Okay. I won't strike the
22 intent to plead the exemption. I will leave
23 it for the time being because you are asking
24 for me to consider that issue. Correct?

1 MR. KUTNICK: Judge, I respectfully
2 disagree with the Court's finding.

3 However --

4 THE COURT: A lot of lawyers seem to
5 think so lately.

6 MR. KUTNICK: -- given the finding, I
7 think the appropriate next step would be
8 to --

9 THE COURT: Even when I rule in their
10 favor they seem to disagree.

11 MR. KUTNICK: I just think that the
12 Court should now determine whether or not
13 exemption (i) applies given your Honor's
14 ruling. I think that since that is a factual
15 issue that that should be a hearing with live
16 evidence.

17 THE COURT: Live evidence like what?

18 MR. KUTNICK: Like Christopher Drew
19 testifying about his reasonable suspicion.

20 THE COURT: I suppose he could do
21 that. Let's assume for the sake of
22 discussion I hear from Christopher Drew and
23 he says, hypothetically, I thought the police
24 arrested me illegal, that's why I had the

1 eavesdropping device on and working. Is that
2 a defense to anything?

3 MR. KUTNICK: Absolutely. That's
4 exemption (i). Word for word, Judge.

5 THE COURT: (I) talks about being
6 arrested because, I thought, of his race or
7 color or something.

8 MR. KUTNICK: Judge, it's a violation
9 of his First Amendment right, any illegal
10 conduct by him on any person, whether it be a
11 police officer or otherwise.

12 THE COURT: The ordinance actually
13 cites 242 of 18 USC, talks on account of such
14 persons being an alien, by reason of his
15 color or race.

16 MR. KUTNICK: Judge, I would then ask
17 just an opportunity to bring in additional
18 statutes that Mr. Drew believed he was -- the
19 police were violating at the time of his
20 arrest, and we can set a date --

21 THE COURT: I will let you do whatever
22 you want to do, Mr. Kutnick, but keep in mind
23 we are not discussing stuff about subjective
24 viewpoints of things.

1 Hypothetically, the guy goes into
2 the store with a gun and says, hey, man this
3 is a stickup. He sticks up the store and
4 takes the guy's money out of the register or
5 whatever. He testifies, well, I didn't think
6 that was illegal; part of the money in the
7 drawer was my own money; my subjective belief
8 was I could take the money back; I had a
9 subjective belief I might get arrested for
10 armed robbery, so, therefore, when I went in
11 the store to stick the guy up, I had a
12 recording device in my pocket to make sure
13 whatever I said when I stuck the man up was
14 recorded accurately.

15 Mr. Kutnick, we have tried this
16 issue before about the statute itself. I am
17 not going to go a whole lot longer about that
18 issue. I have already resolved the issue in
19 my opinion, and the record as well as, about
20 the validity of the statute, whether it is
21 constitutional or otherwise.

22 I am not the only one who said it
23 was constitutional. If they catch a burglar,
24 they catch a burglar. It is as simple as

1 that.

2 As far as these different things,
3 the exemption you cite would not apply in any
4 event. It talks about deprivation of rights
5 under color of law, deprivation being on
6 account of this person being an alien --
7 there is no question your client is not an
8 alien -- or by reason of his color or race.
9 This wouldn't apply in any event.

10 MR. KUTNICK: Judge, that may be the
11 wrong statute to cite, but --

12 THE COURT: It may be? Go ahead.

13 MR. KUTNICK: Judge, there is federal
14 case law against anybody violating anybody's
15 civil rights. I will be able to provide that
16 to the Court.

17 THE COURT: The next time you do. We
18 are not going back and forth with this issue.
19 I have already ruled about the statute. It
20 appears whatever you could possibly do to
21 challenge the statute you are doing it,
22 citing federal statutes that don't apply,
23 subjective beliefs by your client.

24 MR. KUTNICK: Judge, I want to respond

1 to the Court's comments.

2 THE COURT: No need to respond. File
3 whatever you want to file.

4 MR. KUTNICK: You had asked me at the
5 motion to suppress whether I was contesting
6 the arrest for peddling.

7 THE COURT: You said no.

8 MR. KUTNICK: I said no, absolutely.

9 THE COURT: If your client is in
10 lawful custody, you don't dispute he was
11 lawfully arrested, what do the other statutes
12 have to do with anything about then?

13 MR. KUTNICK: Because the exemption
14 says that if Christopher Drew, the recorder,
15 has a reasonable suspicion, meaning a
16 suspicion that would be objectively
17 reasonable, that he would be arrested -- now,
18 Judge, you have got the case back there. You
19 know that he was hassled by the police just
20 within two weeks before.

21 THE COURT: You call that hassling?

22 MR. KUTNICK: He had an interaction
23 with the police.

24 THE COURT: He was stopped for no

1 license. They said, okay, we will give you a
2 pass this time. You call that hassling?
3 They could have arrested him then. They
4 chose not to. Take your stuff, go home,
5 leave us alone. You call that hassling?

6 MR. KUTNICK: He had an interaction
7 with the police that led him to a reasonable
8 suspicion that a crime would be further
9 committed against him.

10 THE COURT: What crime would that be?

11 MR. KUTNICK: I will be able to get
12 you that, Judge. I don't have it with me
13 now.

14 THE COURT: Fine.

15 MR. ALLEN: Judge, there still is
16 outstanding the raw footage tapes from Nancy
17 Becktal (phonetic).

18 THE COURT: I will look at them
19 between now and next time.

20 MR. ALLEN: I believe that they would
21 be utterly -- I don't know what's on them. I
22 have a suspicion as to what's on them based
23 on what's recorded on Mr. Drew's audio
24 recorder, and I believe they would be

1 relevant to whatever Mr. Drew's subjective
2 intention and beliefs were.

3 THE COURT: They might be when we get
4 to that point.

5 MR. KUTNICK: At a hearing on the
6 exemption.

7 THE COURT: They might be if we get to
8 that point.

9 I think we said this before. If a
10 person wants to get arrested to prove a
11 point, how can he complain about getting
12 arrested? That's sort of rhetorical. We
13 will answer it at some point down the road.

14 If the person's objective is to
15 prove a point, therefore, I will do this to
16 prove the point, and doing this means to get
17 arrested, can you then complain about getting
18 arrested? Kind of makes me wonder.

19 MR. KUTNICK: I know that's
20 hypothetical, so I won't respond, Judge, but
21 I certainly do have a response to that.

22 MR. ALLEN: Judge, are we going to set
23 this down for status for Counsel to cite a
24 statute so we can respond to that?

1 THE COURT: Sure, if he can find one.
2 Then I will rule on the issue of -- after I
3 hear all the evidence we are going to hear,
4 if any, on that issue, the intent to plead an
5 exemption -- the one cited in paragraph two
6 would not apply in any event, 18 USC 742.

7 No one suggests that Drew was
8 arrested because of his being an alien or
9 because of his race or color. No one really
10 can dispute either he was arrested because he
11 was peddling downtown without a license.

12 So his subjective viewpoint I
13 guess is what we are talking about,
14 subjective viewpoint.

15 Hypothetically, guy walks down the
16 street, sees the guy, pulls out a gun and
17 shoots him. It happens. He wants to put up
18 a defense with no evidence to support it at
19 all, I thought the guy was going to shoot me,
20 so I shot him first. Subjective viewpoint.
21 I thought he was going to shoot me, so,
22 therefore, I shot him first.

23 No evidence whatsoever the guy did
24 anything at all before he was shot. Walking

1 down the street. Defendant's subjective
2 viewpoint was I think the guy is going to
3 shoot me, I better him first, and he shoots
4 and kills the guy.

5 Does that subjective viewpoint
6 solve anything at all in that case?

7 MR. KUTNICK: Yes.

8 THE COURT: Answer it next time.

9 You will get your eventual
10 challenge to the statute at some point,
11 Mr. Kutnick

12 MR. KUTNICK: I am not challenging the
13 statute. I want to make sure the record is
14 clear. I have already challenged the
15 constitutionality nationally. We respect
16 it. This is different.

17 THE COURT: You could have fooled me
18 with this issue about intent to plead
19 exemption, not even having the right one, if
20 there is a right one.

21 MR. KUTNICK: Judge, it is the right
22 exemption. I just have the wrong statute,
23 federal statute.

24 THE COURT: A party has a reasonable

1 suspicion another party to the conversation
2 is committing, is about to commit a criminal
3 offense against that person or someone in his
4 immediate family.

5 MR. KUTNICK: Judge, it goes to your
6 example.

7 THE COURT: He has reason to believe
8 the evidence of the criminal offense may be
9 obtained by the recording. Fine. Whatever
10 you want to put in writing, Mr. Kutnick, I
11 will read it and listen to the arguments.

12 Like I said before, you seem like
13 you are hell bent on challenging that statute
14 one way or the other.

15 What date do you want?

16 MR. KUTNICK: Judge, can I go to
17 August 30th, please?

18 THE COURT: Sure. That will be for me
19 to listen to the various --

20 MR. ALLEN: Judge, is there any way to
21 go the week of the 22nd? I am starting a
22 murder case in front of Judge Alonso on the
23 29th.

24 MR. KUTNICK: I am on trial the week

1 of the 22nd in Kane County.

2 THE COURT: What about September 6th
3 then?

4 MR. KUTNICK: That's fine.

5 THE COURT: By agreement for this
6 issue about the pleading of the exemption
7 September 6th. We will see you then.

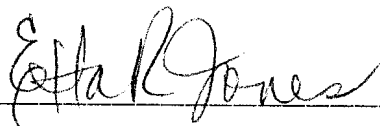
8 MR. KUTNICK: Thank you, Judge.

9 (WHICH WERE ALL THE PROCEEDINGS HAD.)
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1 STATE OF ILLINOIS)
2)SS.
3 COUNTY OF C O O K)
4

5 CIRCUIT COURT OF COOK COUNTY, ILLINOIS
6 COUNTY DEPARTMENT - CRIMINAL DIVISION
7

8 I, Etta R. Jones, Official Court
9 Reporter of the Circuit Court of Cook County,
10 Criminal Division, do hereby certify that I
11 reported in shorthand the proceedings had on
12 the hearing of the aforementioned cause; that
13 I thereafter caused the foregoing to be
14 transcribed into typewriting, which I hereby
15 certify to be a true and accurate transcript
16 of the Report of Proceedings had before the
17 HONORABLE STANLEY J. SACKS, Judge of said
18 court.

19
20 
21 _____
22 Official Court Reporter
23

24 Dated this 5th day of August, 2011.