

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
CRIMINAL DIVISION**

**THE PEOPLE OF THE STATE
OF ILLINOIS**

Plaintiff

v.

CHRIS DREW,

Defendant.

**Case No. 10 CR 0004601
Judge Stanley Sacks
Room #602**

**MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT'S MOTION TO DISMISS**

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SUMMARY OF ARGUMENT

Defendant Chris Drew respectfully requests that the charges against him for violating the Illinois Eavesdropping Law (“the Eavesdropping Law”), under which it is a crime to use an eavesdropping device to record any part of a conversation without the consent of all the participants, See 720 ILCS 5/14-1 et seq., be dismissed because (a) the Illinois Eavesdropping Law is unconstitutionally broad, violating Mr. Drew’s First Amendment newsgathering right; and (b) Mr. Drew did not, in fact, violate the Eavesdropping Law, since there was no “conversation” between Defendant Drew and the police officer, as the term “conversation” has been interpreted under relevant case law. 720 ILCS 4/14-2.

The first reason for dismissal is that First Amendment protects the freedom of the press to monitor, record and report on the conduct of public officials. The right to monitor and record the conduct of public officials promotes government accountability, one of our core national values. To be sure, the right to monitor and record the actions of public officials is not limitless – neither the media nor the citizenry can, for example, record private meetings or intrude upon private space to record public officials. But government officials, including police officers, do not have the same privacy interests as ordinary citizens, and the law is well established that public actions of police officers are subject to a public scrutiny and monitoring.

At its core, this case pits two competing values against each other — the privacy interests of police officers against the First Amendment interests of citizens to monitor the public conduct of police officers. Upon analysis, the Illinois Eavesdropping Law fails to properly balance these competing interests, privileging the privacy interests of police officers over the public’s right to monitor police conduct. This is because the Illinois Eavesdropping Law employs a crude, one-size-fits-all approach to any and all conversations, treating the private conversations of citizens in their homes the same as it treats conversations between citizens and police officers on the public way.

This one-size-fits-all approach is at fundamental odds with the right of citizens to monitor police conduct and puts the Eavesdropping Law at odds with citizen's First Amendment rights.

The second reason for dismissal is that Mr. Drew did not, in fact, even violate the Eavesdropping Law, since there was no "conversation" between him and the police officer, as the term "conversation" has been interpreted under relevant case law. The law is clear that not all oral communications or exchanges directed at one party from another constitutes a "conversation." For example, speakers at public events or public meetings directing remarks to an audience (and/or, logically speaking, professors in a classroom lecturing to students) are not engaged in a "conversation," as that term has been defined under the Illinois Eavesdropping Law. By the same logic, a police officer ordering a citizen to cease and desist from his conduct or face arrest, which are the circumstances here, does not qualify as a "conversation" under the law, as there is simply no real exchange going on between the parties.

BACKGROUND

Drew's Arrest

On Dec. 2, 2009, Defendant Chris Drew was arrested for violating the Illinois Eavesdropping Law ("the Eavesdropping Law"), 720 ILCS 4/14-2 for secretly recording a conversation on the public sidewalk in Chicago's Loop area between himself and Chicago police officer Robert Mizera. Mr. Drew is a professional silkscreen artist who seeks to sell his art, as well as the silkscreen art of others, on the public sidewalks in Chicago's Loop. At the time of his arrest, Mr. Drew was selling his silkscreen art in front of Macy's department store on 103 N. State Street. Drew Arrest Report attached hereto as Exhibit A at 1 ("Incident" section). While peddling his goods, police officer Robert Mizera approached Mr. Drew and told him that Mr. Drew was prohibited from peddling his art on the public sidewalks. *Id.* at 2 ("Incident Narrative" section). Officer Mizera threatened to arrest Mr. Drew if he did not cease his sales efforts. *Id.* Mr. Drew,

aware of the restrictive nature of Chicago's anti-peddling law having been ticketed previously for a similar offense, was determined to challenge the scope of the restrictions as a violation of his Constitutional rights and refused to stop selling. *Id.* In response to Drew's refusal, Officer Mizera arrested him for violating Chicago's peddling ordinances by (a) selling goods in a restricted peddling zone and (b) for peddling without a license. *Id.* at 1 ("Charges" section).

At the police station, a search was done of Mr. Drew's belongings, where an Olympus digital audio-recorder was found in Mr. Drew's poncho pocket. *Id.* at 2 ("Incident Narrative" section). Officers in the police station listened to the contents of the audio-recorder and determined that Mr. Drew had recorded the conversation between himself and Officer Mizera. Mr. Drew was then charged with violating the Illinois Eavesdropping Law for secretly recording a conversation between Officer Mizera and himself, a Class 1 felony. *Id.* at 1 ("Charges" section). Two days later, after spending one night in police lock-up and one night at Cook County jail, Mr. Drew was released from police custody on \$20,000 bond. See Drew \$20,000 C-Bond attached hereto as Exhibit B. At his probable cause hearing, the State dismissed the Ordinance charges related to his peddling activities, and now the only charge remaining against Mr. Drew is for Felony Eavesdropping.

The Illinois Eavesdropping Law

The Illinois Eavesdropping Law is among the broadest and most far-reaching Eavesdropping Laws in the United States. First, unlike most other states, it requires all parties to a conversation to consent to the recording of the conversation. 720 ILCS 5/14-2(a)(1) (West 1996). Illinois' all-party consent requirement, which only went into effect via amendment in 1994¹, is in

¹ The statute defines "conversation" as an "oral communication between two 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). *Id.* § 5/14-1(d). This definition was added by the Illinois legislature in December 1994, and it significantly altered the law. The relevant analysis under the amended Illinois Eavesdropping Law became not whether the parties had an expectation of privacy, but rather whether the "eavesdropper" had obtained the consent of all parties before recording.

stark contrast to the majority of state eavesdropping laws (as well as federal law, see 18 U.S.C. § 2511(2)(d) (2006)) which have a one-party consent requirement (i.e., requiring just one party, not all parties, to a conversation to consent). See Lisa A. Skehill, Cloaking Police Misconduct in Privacy: Why the Massachusetts Anti-Wiretapping Statute Should Allow for the Surreptitious Recording of Police Officers,” Suffolk University Law Review, Vol. XLII, 981, 985 fn. 78 (2009) (identifying the 11 of 50 States that require more than one-party consent); see also id. fn. 71. (discussing the one-party constant requirement of federal law). Further, connected to the all-party consent requirement, the Illinois Eavesdropping Law, unlike other states and federal law, does not have a reasonable expectation of privacy requirement. See fn. 1 *supra*.

It is a matter of First impression to Illinois law, but it defendant’s claim here that the extraordinary scope and breadth of the Illinois Eavesdropping Law, as applied and on its face, impinges upon Mr. Drew’s and all citizens’ constitutionally-protected right to monitor police conduct on the public ways.²

The Importance of Citizens’ Ability to Monitor Police Misconduct

Mr. Drew faces a Class 1 Felony charge in this case, 720 ILCS 5/14-4, and thus has a significant amount at stake here personally. But, beyond Drew’s own personal concerns, this case raises significant public issues involving the legal rights of citizens to monitor police misconduct

² It is not insignificant that defendant could find no other instance of this law being used against an individual who was arrested for recording a conversation between himself and a police officer on the public way in the involving the officers’ performance of his public duties. As a point of emphasis, it is worth noting that a recent article in the Chicago Tribune, dated March 19, 2010, reports of an incident involving a citizen who, like Mr. Drew, recorded a conversation between himself and a police officer. The recording, obtained by WGN-TV, reveals the officer made highly inappropriate comments to the citizen during a routine traffic stop, e.g., when the citizen asked why he was being stopped, the cop said that he “normally” tells people who ask that question that it’s because they are black. Police Superintendent Jody Weis is quoted in the article condemning the officer’s remarks. What’s interesting is that there is no indication that the individual was arrested; no suggestion by Superintendent Wies that he should be arrested; and no suggestion the police seek to arrest him. The incident also serves as an unfortunate example of the need to

and protect themselves against such misconduct. Police abuse is a serious and apparently growing community problem.³

The ability of citizens to monitor abuse is important to resist such abuse in at least two ways. First, photographs, video, and audio recording are effective monitoring techniques, creating an objective record of interactions between police officers and civilians and serving as an effective means of diminishing police misconduct. Fact is, cops who know they are being recorded, or fear they might be recorded, are less likely to engage in wrongdoing. See Massachusetts v. Hyde, 750 N.E.2d 963, 977 (Mass. 2001) (Marshall, J., dissenting) (suggesting officers would not have acted so unprofessionally had they known they were being recorded). As one scholar put it:

Where citizens are permitted to surreptitiously record the police, officers have incentives to be on their best behavior at all times, not just when their own recorders are on. Permitting citizen recording also allows citizens to control whether and when to record their interactions with the police. This respects citizens' privacy more than if police officers were required to record all citizens' interactions with them regardless of the citizens' consent.

Christopher Slobogin, Testilying: Police Perjury and What To Do About It, 67 U. Colo. L. Rev. 1037, 1052 (1996). The Illinois Eavesdropping Law, which takes away the ability of citizens to audio record police-citizen public interactions without first obtaining the approval of the cops, frees up cops who might be tempted so for wayward behavior.⁴

monitor police conduct through audio and video recording. See

<http://www.chicagotribune.com/news/local/ct-met-police-racial-comments-20100319,0,3145831.story>

³ See Lisa A. Skehill, Cloaking Police Misconduct in Privacy: Why the Massachusetts Anti-Wiretapping Statute Should Allow for the Surreptitious Recording of Police Officers,” Suffolk University Law Review, Vol. XLII, 981, 985 fn. 38 (2009) (providing a list of articles documenting the increasing problem of police abuse throughout the United States)

⁴ Audio recordings are often a necessary and appropriate part of monitoring police activity. Some police misconduct is verbal, including: (a) the threat of unlawful violence or a frame-up; (b) the use of racial epithets and other foul words; and (c) the failure to comply with department policy, such as the refusal by an officer on request to state his name or explain how to file a civilian complaint. Moreover, it will frequently be difficult or impossible to assess the reasonableness of a police officer’s use of force captured on videotape, in the absence of an audiotape of the conversation that preceded, accompanied, and followed that use of force

Second, where courts permit citizen recordings to be introduced as evidence, the recordings powerfully rebut jury bias favoring police credibility. When plaintiffs do bring section 1983 actions, they face significant evidentiary hurdles. Civil juries tend to trust police officers' testimony over suspected criminals' testimony. See Alison L. Patton, Note, *The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 Is Ineffective in Deterring Police Brutality*, 44 *Hastings L.J.* 753, at 754 (1993). . . Where courts permit citizen recordings to be introduced as evidence, the recordings powerfully rebut jury bias favoring police credibility. In short, audio and video and photographic evidence are instrumental in both civil and criminal cases against wayward police officers.

LEGAL ARGUMENT

The Illinois eavesdropping statute makes it a crime to (i) intentionally (ii) use any machine (iii) to record a conversation (iv) in the absence of consent from all conversation participants.⁵ Critically, the statute broadly defines “conversation” as “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.” See 720 ILCS 5/14-1(d). Drew is charged with violating this statute by intentionally using a commonplace Olympic audio recorder to record the sounds of a conversation in a public place between a police officer and himself. This criminal charge should be dismissed, because the Illinois eavesdropping statute is unconstitutional on its face and as applied to Mr. Drew’s actions. Specifically, the First Amendment protects his right to document law enforcement activity on the public way of on-duty officers acting in their official capacities, including by means of audiotape, so long as there is no actual interference with police work, and there was none here.

⁵ See 720 ILCS 5/14-2(a)(1) (“A person commits eavesdropping when he . . . [k]nowingly and intentionally uses an eavesdropping device for the purpose of hearing or recording all or any part of any conversation . . . unless he does so . . . with the consent of all of the parties to such conversation . . .”). See

A. The First Amendment Protects The Right To Gather Information About Public Officials.

The First Amendment protects the right to gather information about public officials. In particular, the First Amendment protects the right of civilians to videotape and photograph police officers performing their duties in public places. In Smith v. City of Cummings, 212 F.3d 1332 (11th Cir. 2000), the 11th Circuit held that plaintiffs had a First Amendment right to photograph or videotape police conduct. The court relied on precedent recognizing a right to film public meetings, as well as cases recognizing that the First Amendment rights of the media and the public are coextensive.⁶ Id. at 1333. The Smith court acknowledged that the First Amendment not only allows for the ‘gathering of information about...public officials,’ but also specifically protects the right to record matters of “public interest.” Id.

A number of district court decisions are also on point. In Robinson v. Fetterman, 378 F. Supp. 2d 534 (E.D. Pa. 2005), a truck driver videotaped state troopers conducting truck inspections on a public highway. Although he had obtained permission to film from the private property that he was standing on, conducted his filming 20 to 30 feet from the officers, and did not interfere with their inspections, he was arrested twice for harassment, pursuant to a state statute. The District Court held that the arrests constituted a violation of plaintiff’s First Amendment rights. Id. at 541.

The court’s reasoning is instructive for our case:

The activities of the police, like those of other public officials, are subject to public scrutiny. Indeed, "the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers." (citation omitted) Although Robinson need not assert any particular reason for videotaping the troopers, he was doing so in order to make a visual record of what he believed

also id. at § 5/14-1(a) (defining “[e]avesdropping device” as “any device capable of being used to hear or record oral conversation”).

⁶ Though a public citizen’s rights are coextensive with the media’s legal rights, Mr. Drew is also part of the internet media. For along with being a professional artist, he has his own website, called “Street Artist Adventures,” where he writes about and reports on the legal rights and struggles of artists to sell their art on the public space. See <http://www.c-drew.com/blog/>.

was the unsafe manner in which they were performing their duties.... Robinson's right to free speech encompasses the right to receive information and ideas. (citation omitted) He also has a First Amendment right to express his concern about the safety of the truck inspections to the appropriate government agency or officials, whether his expression takes the form of speech or conduct. (citation omitted) Videotaping is a legitimate means of gathering information for public dissemination and can often provide cogent evidence, as it did in this case. In sum, there can be no doubt that the free speech clause of the Constitution protected Robinson as he videotaped the defendants on October 23, 2002. (citations omitted)

Id.

This case is useful because it explicitly recognizes that the First Amendment protects criticism of the police and that the scope of this protection encompasses the “right to receive information and ideas” collected via videotape. Although the plaintiff in this case was motivated by concerns about the safety of the officers’ conduct, the court expressly states that “[he] need not assert any particular reason for videotaping the troopers...”. Id. See also Demarest v. Athol/Orange Cmty. TV, Inc., 188 F. Supp. 2d 82 (D. Mass. 2002) (plaintiffs have a constitutionally protected right to record matters of public interest and conduct of public officials are within the public interest); Lambert v. Polk County, 723 F. Supp. 128, 133 (S.D. Iowa 1989) (every person has a right to make and display videotapes of events, not just news organizations); Schnell v. City of Chicago, 407 F.2d 1084 (7th Cir. 1969) (holding that a class of news photographers who covered the 1968 Democratic National Convention and attendant demonstrations in Chicago stated a claim against the police for “interfering with the plaintiffs’ constitutional right to gather and report news, and to photograph news events”)⁷; Connell v. Town of Hudson, 733 F. Supp. 465, 473 (D.N.H. 1990) (holding that a police officer violated the First Amendment by ordering a news photographer

⁷ The Supreme Court later overruled Schnell on a separate (and here irrelevant) point relating to municipal liability. See City of Kenosha v. Bruno, 412 U.S. 507 (1973).

to stop taking photographs next to the scene of a car crash).⁸ See also Williamson v. Mills, 65 F.3d 155, 158 (11th Cir. 1995) (holding that photographing an undercover police officer at a public event “is a facially innocent act,” and that a police officer violated the Fourth Amendment by arresting the photographer).

Also, the First Amendment protects the right to make audio recordings of government activity.⁹ See Blackstone v. State of Alabama, 30 F.3d 117 (11th Cir. 1994) (striking down a ban on a civilian’s use of a tape recorder to document the meetings of a government body). See also Dorfman v. Meiszner, 430 F.2d 558 (7th Cir. 1970) (striking down on First Amendment grounds a ban on radio broadcasting in and around Chicago’s federal courthouse, including in the surrounding plaza and sidewalks and the interior lobby and non-courtroom floors); Iacobucci v. Boulter, 193 F.3d 14 (1st Cir. 1999) (upholding a damages award against a police officer who falsely arrested a civilian for using a video/audio camera inside a publicly accessible area of a government building to record a conversation between government officials after the close of an open meeting).

B. The Illinois Eavesdropping Law Fails To Balance the Right of Citizens To Monitor Police Misconduct With Police Officers’ Reasonable Privacy Interests, Thereby Putting the Law At Odds With the First Amendment.

Admittedly, even if there is a right to photograph and videotape and audiotape police activities, the right is limited by reasonable time, place, and manner restrictions and must be

⁸ With regard to gathering news in public places, members of the general public have all of the First Amendment rights of members of the press. See Smith v. City of Cummings, 212 F.3d 1332, 1333 (11th Cir. 2000) (the rights of media and the public are coextensive).

⁹ Should video versus audio recording be distinguished? Illinois law permits citizens to video or photograph police officers acting in their official capacities on the public way. Illinois Law only restricts the ability to audio record police-citizen interactions on the public way. This distinction seems suspect, if not downright illogical. It’s certainly true that audio and video enable citizens to record different forms of police misconduct (e.g., a video can record a punch to the face while an audio can document a verbal threat or vulgar epithet), but the First Amendment’s newsgathering right protects the citizens’ ability to monitor and record the actions of police officers on the public way, regardless of the particular form any misconduct might take. Accordingly, there appears to be no valid basis in law to distinguish between video and audio for purposes of monitoring police misconduct on the public ways.

balanced with reasonable privacy considerations. See Smith, 212 F.3d at 1333 (recognizing “a First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct”). Here, no one is suggesting that the public’s right to record the conduct of police officers, either by video or audio, is without limit. Police officers are still citizens and deserve a reasonable amount of privacy, but the key word here is “reasonable.” Police officers reasonably, for example, retain an expectation of privacy with respect to their own private spaces. See United States v. Speights, 557 F.2d 362, 363 (3d Cir. 1977) (recognizing that police officers have a reasonable expectation of privacy in at least areas associated with their work-place).

The issue to be confronted here is whether the Illinois Eavesdropping law properly balances the officers’ reasonable privacy interests with the right of citizens to monitor police misconduct. In the context here (as in virtually all contexts regarding First Amendment law), the balancing of interests is part and parcel of First Amendment jurisprudence. See Smith v. City of Cumming, 212 F.3d at 1333 (recognizing “a First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct”); see Jean v. Mass. State Police, 492 F.3d 24, 30 (1st Cir. 2007) (recognizing the importance of the public’s First Amendment right to gather and disseminate information of public concern, the United States Court of Appeals for the First Circuit held that the right to publish matters of great public concern, such as police misconduct, outweighs any privacy rights of police officers or governmental incentives to deter surreptitious recordings); see Massachusetts v. Glik, No. 0701 CR 6687, slip op. at 2-3 (Boston Mun. Ct. Jan. 31, 2008) (recognizing that First Amendment outweighs any police discomfort in being recorded while making an arrest).

Here, the Illinois Eavesdropping Law fails to reasonably balance these competing interests, unreasonably privileging the officers’ private interests by ignoring the well-established fact that police officers have a reduced privacy interest in their public conduct, and thereby restricting the

ability of citizens to monitor police-citizen interactions. As a result, the law is at odds with the First Amendment; it should be declared unconstitutional both on its face and as applied here; and it must be re-written to accord with constitutional requirements.

1. *The Privacy Interests of On-Duty Law Enforcement Officials Are Less Than the Privacy Interests of Ordinary Citizens.*

The courts have recognized that police officers in the line of duty must expect less privacy than private citizens, both because of the public interest in monitoring police for abuses of power and because police communications in the line of duty are generally less intimate in nature than private citizens' communications. See Biehunik v. Felicetta, 441 F.2d 228, 231 (2d Cir. 1971); Mason v. Stock, 869 F. Supp. 828, 833 (D. Kan. 1994); Guiney v. Police Comm'r, 582 N.E.2d 523, 528 (Mass. 1991). Courts have acknowledge that personal privacy of police officers is not a legitimate basis to restrict the use of photographs, videotapes, and audiotapes to document on-duty police activity. For example, in Cassidy v. ABC, Inc., 377 N.E.2d 126 (Ill. App. Ct. 1st Dist. 1978), the Illinois Appellate Court dismissed an undercover vice officer's invasion of privacy lawsuit against a journalist who surreptitiously videotaped him through a one-way mirror during a massage parlor bust. The court explained:

[N]o right of privacy against intrusion can be said to exist with reference to the gathering and dissemination of news concerning discharge of public duties. . . . [T]he conduct of a policeman on duty is legitimately and necessarily an area upon which public interest may and should be focused. . . . [T]he very status of the policeman as a public official . . . is tantamount to an implied consent to informing the general public by all legitimate means regarding his activities in discharge of his public duties.

Id. at 132.

Moreover, courts have implied that police officers cannot reasonably expect not to be recorded when they are engaged in arresting a citizen. In states with similar anti-wiretapping statutes, prosecutors have brought criminal and civil suits against individuals for surreptitiously recording police officers during arrests. See Hornberger v. Am. Broad. Cos., 799 A.2d 566, 626-27

(N.J. 2002) (distinguishing New Jersey's anti-wiretapping statute from Massachusetts's):

Washington v. Flora, 845 P.12d 1355, 1358 (Wash. 1992) (rejecting interpretation of anti-wiretapping statute to prohibit recording arrests). However, courts in these states have dismissed suits based on concerns about granting equal privacy rights to on-duty police officers. See Hornberger, 799 A.2d at 627 (ruling defendant did not violate anti-wiretapping statute); see also Flora, 845 P.2d at 1358 (preventing anti-wiretapping statute from leading to recording arrests).

To be clear, no one is saying that police officers are expected to give up all their privacy rights. This case is only about the limited ability to record police-citizen interactions on the public ways of officers acting in the performance of their official duties. An officer that seeks to exercise greater control over his privacy interests and/or seeks to protect sensitive investigative or personal information against citizen recording can still do so by communicating such information in their own private spaces or out of citizens' earshot.

Simply put, the Eavesdropping Law lacks sufficient nuance to pass Constitutional muster. Yes, in most typical situations, the Eavesdropping Law sensibly serves to protect citizens' privacy interest, but in this particular context, the Illinois Eavesdropping Law's blanket, all-party consent requirement is too black-and-white, too all-encompassing and too severe in its protections of police officers' privacy interests. The law unreasonably interferes with citizens' Constitutional rights to monitor the actions of public officials on the public way. The law demands to be re-written or, in the alternative, not applied to situations, as here, where a citizen is properly and fairly exercising his First Amendment right to monitor police officers' conduct on the public way.

2. *Certain Limits Do Exist On the Right to Document Law Enforcement Activity On The Public Way, But They Are Not Applicable Here.*

Civilians who wish to photograph, videotape, or audiotape police officers performing their duties in public places may not actually interfere with that police work. See State v. Lashinsky, 404 A.2d 1121 (N.J. 1979) (upholding the conviction of a photographer who disobeyed a police

instruction to get out of the immediate vicinity of a car crash, while a victim in need of medical care was still in the car). Cf. Connell, 733 F. Supp. at 470 (“Chief Brackett could not lawfully interfere with Nick Connell’s pictures-taking activities unless Connell unreasonably interfered with police and emergency functions”); Channel 10, Inc., 337 F. Supp. at 638 (the police could only order a television camera man to turn off his lighting device upon a “reasonable belief that such is interfering with or endangering them in their work”).

Here, there is no allegation that Drew interfered in any way with police work, including during the episode for which he has been charged. Drew had at least two good reasons to audiotape such conversation. First, many forms of police misconduct are verbal, including threats and racial epithets. Second, if a police officer uses force against a civilian, it will in many cases be difficult or impossible to assess whether such force was proper, in the absence of an audiotape of the relevant conversations that preceded or followed the force.

C. Defendant Drew Did Not Violate the Eavesdropping Law Because This Was Not A “Conversation” As Defined By the Law.

The Illinois Eavesdropping Act makes it a crime to use an eavesdropping device to record all or any part of a "conversation" without the consent of all of the participants, 720 ILCS 5/14-2. The statute defines “conversation” as: “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.” 720 ILCS 5/14-1(d). While this definition appears to be quite broad, courts are clear that not every exchange between parties constitutes a “conversation.”

For example, in DeBoer v. Village of Oak Park, 90 F. Supp. 2d 922 (N.D. Ill. 1999), the federal court, interpreting the Illinois Eavesdropping Law, ruled that recordings of remarks made by speakers at public events to those in the audience did not constitute a “conversation” under the law. The particular issue in DeBoer was whether a written transcript of the proceedings at

National Day of Prayer (NDP) celebration held as a public event in Oak Park could be admitted as evidence in a court proceeding or whether the transcript, which was made from an audio recording taken at the event, violated the Illinois Eavesdropping Law. The Court ruled that the transcript was admissible because the exchange between speaker and listener did not constitute a “conversation” under the Eavesdropping Law, stating “the ‘conversations’ to which the eavesdropping prohibition is directed are those between individuals in attendance at public events, not the remarks made by the speakers at such events to those in the audience. *Id.* at 923, adding “[i]t was not the legislature's intent to provide a definition of ‘conversation’ so broad as to encompass any audible expression whatsoever.” (citation omitted).” *Id.*

Just as the words of a speaker at a public event (or, by extension, the lectures of a professor in a classroom) do not constitute a “conversation” under the Eavesdropping law, the directions and/or commands by a police officer to a citizen to cease and desist from alleged illegal activity or be arrested, as occurred here, see exhibit A (**FILL IN ARREST REPORT!**), does not constitute a conversation “between citizens.” Such exchange constitutes a one-sided event, not a discussion, not a give-and-take, not a dialogue, and in this way is similar to a public lecture. It is a strained notion of “conversation” to see a police officer’s verbal directions, i.e., commands, for Mr. Drew to stop selling his artwork or face arrest as constituting a “conversation.”¹⁰ Therefore, Mr. Drew cannot be said to have violated the Eavesdropping Law.

CONCLUSION

For the foregoing reasons, Defendant Drew respectfully requests that this Court dismiss the criminal eavesdropping charge now pending against him.

¹⁰ Anybody who has ever tried to have a discussion with a police officer during an arrest about the officer’s application of the law is all too familiar with phrases like, “Tell it to the judge, buddy.” Realistically speaking, during an arrest or the threat of arrest, a conversation is not what is occurring between the parties.

Dated: March 26, 2010

Respectfully submitted,

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