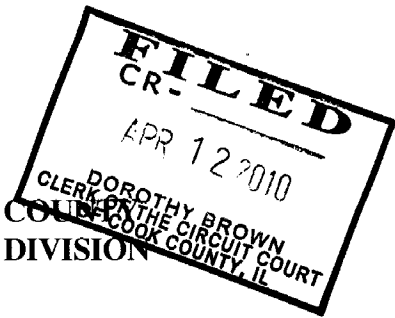


STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)



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

PEOPLE OF THE STATE OF ILLINOIS)
)
 vs.) 10 CR 46
)
CHRISTOPHER DREW)
)

ANSWER TO DEFENDANT' S MOTION TO DISMISS

Now come the PEOPLE OF THE STATE OF ILLINOIS, by their Attorney, ANITA ALVAREZ, State's Attorney of Cook County, Illinois, through her Assistant, GENE WOOD, and answer Defendant's motion to dismiss:

In Illinois, a person who “[k]nowingly 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” is guilty of eavesdropping unless the recording occurs “with the consent of *all* the parties to such conversation or electronic communication.” 720 ILCS 5/14-2(a)(1) (emphasis added). The Defendant seeks to disqualify the Illinois Legislature’s attempts to prohibit eavesdropping.

The Defendant claims that the Illinois law fails to properly balance the officers’ reasonable privacy interests with the right of citizens to monitor police misconduct. In so claiming, the Defendant overlooks the Illinois Legislature’s efforts to specifically prevent inquiry into the reasonable expectations of privacy with respect to the Eavesdropping Statute. In 1994 the Legislature amended Section 14-1 of the Statute to define “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 5/14-2(d). Illinois courts have found that this amendment “prohibits the recording of any conversation without the consent of all parties regardless of any party’s expectation of privacy.” In *re Marriage of Almqvist*, 299 Ill. App. 3d 732, 736 (3d Dist. 1998). The court recognized the amendment as “an effort narrowly tailored to the goal of removing any expectation of privacy element from the crime of eavesdropping.” *Id.* at 737.

The amended definition of “conversation” emphasizes Illinois’ strong commitment to privacy found in the Illinois Constitution, which provides Illinois citizens the right “to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures,

invasions of privacy or interceptions of communications by eavesdropping devices or other means.” Ill. Const. Art. I(6).

The amended definition of “ conversation” recognized and closed a gap in protection that was discovered in *People v. Beardsley*, 115 Ill.2d 47 (1986). In *Beardsley*, the defendant was convicted of eavesdropping after he recorded two officers’ conversation while the officers were in the front seat and Beardsley was in the back seat of a squad car. One officer had previously asked Beardsley to stop recording the conversation, but left the tape recorder in Beardsley’ s possession until Beardsley was placed in a cell. The Illinois Supreme Court, in reversing Beardsley’ s eavesdropping conviction, relied heavily on the common law understanding that eavesdropping can “ occur only when parties intend their conversations to be secret or private.” *Id.* at 50. Against the plain language of the Statute, the court stated, “ [t]he primary factor in determining whether the defendant in this case committed the offense of eavesdropping is not . . . whether all of the parties consented to the recording of the conversation.” *Id.* at 54.

If the Illinois Legislature believed, as Defendant contends in his motion, that police were entitled to a lesser expectation of privacy, they could have included such an exemption among the twenty such exemptions located in Section 14-3 of the Statute. However, no such exemption exists and no such exemption should be here created.

None of the cases cited by Defendant regarding a First Amendment right to record the police discuss this right in Illinois where the interest in privacy, as detailed above, is stronger than in the U.S. Constitution. One such case that does discuss a First Amendment right to record police against the interest of a state eavesdropping statute is *Matheny v. County of Allegheny Pennsylvania*, 2010 U.S. Dist. LEXIS 24189 (W.D. Penn. 2010). In that case, Matheny was arrested for violating Pennsylvania’ s Wiretapping and Electronic Surveillance Control Act after he recorded a conversation between a University of Pittsburgh Police Officer and another individual on his cell phone. *Id.* at *1. In evaluating the cases also cited by Defendant in this case, the District Court stated that, “ [a]lthough these cases may recognize a limited right to videotape police conduct, subject to reasonable, time, place, and manner restrictions, such a right notably has not been recognized in the context of an audio recording.” *Id.* at *15. In holding that the police officers were entitled to qualified immunity from Matheny’ s First Amendment retaliation claim, the Court reiterated that no right to record police was “ clearly established” as claimed by Matheny. The Court further stated that, “ [a]s an initial matter, neither the United States Supreme Court nor the Third Circuit has held that individuals have an unfettered First Amendment right to record police officers in the performance of their official duties.” *Id.* at *13. The Seventh Circuit and the Illinois Supreme Court have likewise not held that individuals have a right to record police officers.

The parallels between the Pennsylvania statute and the Illinois Eavesdropping Statute here in question are notable. The Pennsylvania Superior Court stated that, “ [I]n Pennsylvania, we have enacted a much more stringent Act. . . our Legislature has determined that although intercepting a communication to which one is a party may not be a violation of a constitutional privacy interest, it so threatens the private nature of social communication as to be considered

unlawful in this Commonwealth.” *Commonwealth v. McIvor*, 448 Pa. Super. 98, 108 (Super. Ct. Pa. 1996). The Court further explained, “[r]ecognizing this concern of the legislation, any analysis of what constitutes an oral communication under the Wiretap Act cannot be limited to an analysis on strict constitutional privacy grounds.” *Id.*

Similarly, Massachusetts also disregards any analysis of expectation of privacy when applying its Electronic Surveillance Statute. In *Commonwealth v. Hyde*, 750 N.E.2d 963 (Mass. 2001), a motorist was found guilty of the Massachusetts Statute after secretly recording his encounter with police during a traffic stop. In rejecting the motorist’s claims that the police had a lesser expectation of privacy than ordinary citizens, the Court stated, “we are not convinced that the widespread clandestine recording of encounters between individuals and police officers would be desirable or even efficacious The value of obtaining probative evidence of occasional official misconduct does not justify a failure to enforce the clear terms of the statute.” *Id.* at 969. *Hyde* is analogous to the present case where Defendant makes similar claims as to the decreased expectation of privacy of police, but the statute unambiguously precludes such an argument.

The other cases Defendant cites from New Jersey and Washington are likewise not analogous. In *Hornberger v. Am. Broad. Cos.*, 799 A.2d 566 (N.J. 2002), the New Jersey Wiretapping Statute in question defined conversation as “any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation.” *Id.* at 590. Therefore, the New Jersey Statute includes an expectation of privacy of analysis, which Illinois, as discussed above, specifically precludes. Likewise, the Washington Statute at issue in *State v. Flora*, 845 P.2d 1355 (Wash. App. 1992) prohibited recording any “[p]rivate conversation, by any device electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or actuated without first obtaining the consent of all the persons engaged in the conversation.” *Id.* at 1357. Again the Court focused its analysis on the expectation of privacy of the officers, an analysis precluded by the Illinois Eavesdropping Statute’s definition of “conversation.”

Defendant next contends that he did not violate the Eavesdropping Statute because no “conversation” took place within the meaning of the Statute. Again, 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 5/14-2(d). What occurred between arresting officers and Defendant was a conversation within this definition. Within the arrest report, the incident narrative recalls the following, “Sgt. Mizera asked arrestee to stop peddling, at which time arrestee told him he would not stop. Sgt. Mizera then told arrestee that he would be arrested if he did not cease peddling, at which time, arrestee told him, ‘Arrest me then.’ ” Drew Arrest Report p. 2. Although this narrative serves only as a summary of the incident, it is indicative of a “conversation” occurring between Sgt. Mizera and Defendant.

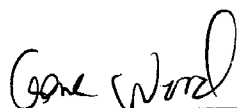
In *DeBoer v. Village of Oak Park*, 90 F. Supp. 2d 922 (N.D. Ill. 1999), cited by Defendant, a group organized a gathering for the annual National Day of Prayer in the village hall of Oak Park. The Village granted use of the hall so long as the group limited their agenda to civic


matters. *Id.* at 923. One of the Village's attorney's recorded the gathering. *Id.* In applying the Illinois Eavesdropping Statute to the facts, the Court specifically analyzed an exemption to the Statute found in 720 ILCS 5/14-3(c). That provision exempted "[a]ny broadcast by radio, television or other wise . . . of any function where the public is in attendance *and the conversations are overheard incidental to the main purpose for which such broadcasts are then being made.*" *Id.* at 924 (emphasis in original). The Court further explained that the conversations at such functions that would be protected are those "*between individuals* in attendance at public events." *Id.* (emphasis in original). In holding that the recordings were exempted under the Statute, the Court found that "at no time did the audience engage in any oral *exchange or discourse* with the speakers." *Id.* (emphasis in original). The present case is simply not analogous to the facts in *DeBoer*. Here, Defendant and Sgt. Mizera engaged in an oral exchange that clearly falls under the Statute's definition of "conversation" and is not otherwise exempted by the Illinois Eavesdropping Statute. Again, the Illinois Legislature provides twenty some exemptions to the proscribed conduct in question, none of which include police discussions with arrestees.

CONCLUSION

For the foregoing reasons, the PEOPLE OF THE STATE OF ILLINOIS respectfully requests that this Court deny Defendant's motion to dismiss.

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