

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

---

|                                  |   |                       |
|----------------------------------|---|-----------------------|
| PEOPLE OF THE STATE OF ILLINOIS, | ) |                       |
|                                  | ) |                       |
| Plaintiff-Respondent,            | ) |                       |
|                                  | ) |                       |
| -vs-                             | ) | 10CR00046             |
|                                  | ) |                       |
| CHRISTOPHER DREW,                | ) |                       |
|                                  | ) |                       |
| Defendant-Petitioner.            | ) | Hon. Stanley J. Sacks |
|                                  | ) | Judge Presiding       |

---

**FILED**  
MAR 02 2012  
JEREMY BROWN  
Clerk Of The Circuit Court

**ORDER**

**CHRISTOPHER DREW**, by his attorneys by motion seek to have this court find the Illinois Eavesdropping Law, 720 ILCS 5/14 unconstitutional. As grounds for his motion Drew raises two, albeit related, issues:

(1) THE EAVESDROPPING STATUTE IS UNCONSTITUTIONAL ON ITS FACE BECAUSE IT LACKS A CULPABLE MENTAL STATE ENCOMPASSING WHOLLY INNOCENT CONDUCT, WHICH VIOLATES DUE PROCESS.

and/or

(2) THE EAVESDROPPING STATUTE IS UNCONSTITUTIONAL AS APPLIED SINCE THE DEFENDANT'S INTENT IS NOT IN CONTRADICTION TO THE STATUTE'S PURPOSE, WHICH SUBJECT'S INNOCENT CONDUCT TO CRIMINAL PENALTY AND VIOLATES DUE PROCESS.

## BACKGROUND

On December 2, 2009 at approximately 1:15 pm Sgt. Mizera of the Chicago Police Department, along with other police officers were in downtown Chicago. At approximately 103 N. State, while conducting a Homeland Security check, the officers observed Drew offering art patches for sale for \$1.00 U.S.C. Drew was wearing a red poncho with signs on it (front & back) indicating "art for sale \$1.00." Sgt. Mizera approached Drew and informed him that he could not peddle in a restricted area – Drew when asked, indicated that he did not have a peddler's license. Drew indicated that he would not desist from peddling. Mizera told Drew that if he did not stop peddling he would be arrested. Drew responded, in essence, go ahead and arrest me. Mizera then placed Drew under arrest. At the police station Drew's poncho was searched. The poncho contained numerous items that Drew was selling. In one of the pockets the police recovered an Olympus digital voice recorder. The recorder was on and recording at the time. Further investigation (by the police at the station) indicated that Drew had unbeknownst to the police been recording the conversation with the police while on State Street. Drew was then charged with the Class 1 felony of eavesdropping. Drew has never challenged the legality of his arrest for (a) peddling without a license (M.C.C. 4-244-030), and (b) peddling in a prohibited district (M.C.C. 4-244-140 (4)), nor has he challenged the police's right to inventory his property, ie. the recorder and the tape within it.

By a *Motion to Suppress* he unsuccessfully challenged the officer's authority to listen to the contents of the tape on the recorder.

## PROCEDURAL HISTORY

Drew was arrested on *December 2, 2009*. At a preliminary hearing on *December 9, 2009* the court (J. De Boni) entered a ‘finding of probable cause.’ Subsequently, on *December 30, 2009* Drew’s case was assigned to this court and Drew was arraigned. On *March 26, 2010* Drew filed his initial *Motion to Dismiss* on the basis that the Eavesdropping Act was ‘unduly broad and restrictive’ and thusly violated his long-standing ‘First Amendment right to monitor and record police activity on the public way through audio recording’ and also that defendant’s interaction with the police on a public street did not constitute a “conversation” as set forth in the eavesdropping statute. On *May 18, 2010* the Motion was denied.

On *September 22, 2010* Drew filed a *Motion to Suppress*, seeking to suppress, as mentioned earlier, the contents of the Olympus digital voice recorder. On *November 22, 2010* the Motion to Suppress was denied.

On *May 2, 2011* Drew filed a *Motion to Plead Exemption*, which Motion was subsequently denied after a hearing. Subsequently, (*September 6, 2011*) Drew filed an *Amended Notice of Intent to Plead Exemption*, which Motion apparently is still pending.

The current *Motion to Declare 720 ILCS 5/14 Unconstitutional* was filed *October 25, 2011*. Arguments were heard on *February 14, 2012*.

## ANALYSIS

“An evil intention and an unlawful action  
must concur in order to constitute a crime.”  
*Commonwealth v. Mixer*, 207 Mass. 141, 93  
N.E. 249 (1910).

Central to Drew’s argument that section 5/14 (Illinois Eavesdropping law) is unconstitutional is that section 5/14 does not require a culpable mental state (and

therefore punishes wholly innocent conduct). Accordingly, this court must determine whether section 5/14 requires a culpable mental state.

This court's review of the merits of defendant's constitutional challenge is guided by the following principles. Statutes are presumed constitutional, and a party challenging the constitutionality of a statute has the burden of establishing its invalidity. *People v. Lantz*, 186 Ill.2d 243, 254, 238 Ill. Dec. 592, 712 N.E.2d 314 (1999). Pursuant to its police power; the legislature has wide discretion to establish penalties for criminal offenses, but this discretion is limited by the constitutional guarantee that a person may not be deprived of liberty without due process of law. *In re K.C.*, 186 Ill.2d 542, 550, 239 Ill. Dec. 572, 714 N.E.2d 491 (1999)

**Scenario (a)**

“A person commits aggravated arson when he by means of fire or explosive knowingly damages partially or totally, any building or structure, including any adjacent building or structure, and a fireman or policeman who is present at the scene acting in the line of duty is injured as a result of the fire or explosion.” (Class X felony)

**Scenario (b)**

“A person commits theft when he knowingly: (5) obtains or exerts control over property in the custody of any law enforcement agency which is explicitly represented to him by any law enforcement officer or any individual acting in behalf of a law enforcement agency as being stolen.”

### **Scenario (c)**

- “(a) It is a violation of this Chapter for :
- (1) a person, without authority to do so, to damage a vehicle or to damage or remove any part of a vehicle;
  - (2) A person, without authority to do so, to tamper with a vehicle or go in it, on it, or work or attempt to work any of its parts, or set or attempt to set it in motion”.

### **Scenario (d)**

Under the Illinois Vehicle Code (625 Ill. Comp. Stat. 5-401.2 (a) (West 1996) certain individuals are required to keep records, including the year; make, and model of a part or vehicle; the style and color of a vehicle; the date of acquisition of the part or vehicle; the name and address of the person from whom the part or vehicle was acquired;.....

The failure to record any of the specific information required constitutes a failure to keep records.

### **Scenario (e)**

“It is unlawful for any person to own or operate any motor vehicle he or she knows to contain a false or secret compartment. It is unlawful for any person to knowingly install, create, build, or fabricate in any motor vehicle a false or secret compartment.”

### **Scenario (f)**

“A person commits the offense of identity theft when he or she knowingly: (7) uses any personal identification information or personal identification document of another for the purpose of gaining access to any record of the actions taken, communications made or received, or other activities or transactions of that person, without the prior express permission

of that person.”

A criminal statute that does not require an unlawful purpose sweeps too broadly by punishing innocent (as well as culpable) conduct. *People v. Wick*, 107 Ill.2d 62, 481 N.E.2d 676; 1985 Ill. Lexis 244; 89 Ill. Dec. 833 (1985)

As previously stated statutes are presumptively constitutional and the burden of establishing the unconstitutionality of a statute is on the party attempting to establish its invalidity. *Lantz*, supra. In all of the previously set forth scenarios the Illinois Supreme Court found the statutes unconstitutional.

#### **Scenario (a)**

The Illinois Supreme Court held that because the aggravated arson statute did not require an *unlawful purpose* in setting a fire the statute swept too broadly by punishing innocent conduct as well as culpable conduct. The statute violated due process. The court cited as an example of innocent conduct that could subject the defendant to a Class X sentence – the farmer who burns down his deteriorated barn to clear space for a new one, and a fireman standing nearby is injured by the fire. In *Wick*, a fire occurred at defendant’s place of business. A fireman was injured fighting the fire.

#### **Scenario (b)**

The theft statute held to be unconstitutional since it failed to require a *culpable mental state*. *People v. Zaremba*, 158 Ill.2d 36; 630 N.E. 2d 797, 1994 Ill. Lexis 6; 196 Ill. Dec. 632 (1994). The statute was not reasonably related to the purpose of enabling

police officers to break up fencing operations because, as written, *it subjected innocent persons to punishment.*

Section {16-1 (a) (5) could criminalize the actions of a police evidence technician who took from a police officer for safe keeping the proceeds of a theft that the police officer had received and that the police officer gave to the evidence technician with the representation that the goods were stolen.

#### **Scenario (c)**

*In re K.C.*, 186 Ill.2d 542; 714 N.E.2d 491; 1999 Ill. Lexis 957; 239 Ill. Dec. 572 (1999).

Illinois Supreme Court held that the statutory provisions swept too broadly and attempted to punish persons with *wholly innocent motives*. The statute in question imposed absolute liability. Examples of innocent conduct that could subject a person to criminal prosecution: (1) a person who enters an unlocked car to turn off the headlights violates the statute and is subject to a one year sentence; (2) a person who decorates the bride and groom's car during a wedding ceremony is subject to criminal sanctions. Other examples of innocent conduct that would subject a person to criminal penalties are set forth in the Supreme Court's opinion.

#### **Scenario (d)**

*People v. Wright*, 194 Ill.2d 1; 740 N.E.2d 755; 2000 Ill. Lexis 1234; 251 Ill. Dec. 469 (2000).

The Illinois Vehicle Code provisions requiring certain individuals to keep records (Class 2 felony) are unconstitutional because they potentially punish innocent conduct in violation of due process because they are not reasonably designed to achieve the purposes for which the statute was enacted, i.e. trafficking in stolen vehicles or parts. An individual who knowingly fails to record the color of a *single* vehicle could be convicted of failure to keep records, even if that failure was caused by disability, family crisis or incompetence.

### Scenario (e)

*People v. Carpenter, Garibaldi, & Montes-Medina* (consolidated) 228 Ill.2d 250; 888 N.E.2d 105; 2008 Ill. Lexis 314; 320 Ill. Dec. 888 (2008). Section 12-612, referred to as the Hidden Compartments Law unconstitutional as violative of substantive due process guarantees, as the statute sweeps too broadly, *potentially encompassing innocent conduct*.

“Assuming that the purpose of the statute is the laudable goal of protecting police and punishing those who hide guns and illegal contraband from officers, we must next consider whether ‘the means adopted are a reasonable method of accomplishing the desired objective.’ (citations omitted) We hold it is not.”

“The statute potentially criminalizes innocent conduct, as it visits the status of a felon upon anyone who owns or operates a vehicle he or she knows to contain a false or secret compartment, defined as one intended and designed to conceal the compartment or its contents from law enforcement officers. The contents of the compartment do not have to be illegal for a conviction to result. In these cases, there was in fact nothing illegal found within the compartments.”

As the appellate court noted in *Carpenter*, “an owner or driver who uses his concealed compartment to keep legally possessed items from view of law enforcement



officers has no criminal purpose.” *People v. Carpenter*, 368 Ill. App.3d 288 856 N.E.2d 551, 303 Ill. Dec. 746 (2006)

### **Scenario (f)**

*People v. Madrigal*, 241 Ill.2d 463; 948 N.E.2d 591; 2011 Ill. Lexis 454; 350 Ill. Dec. 311 (2011)

Subparagraph (a) (7) of the Identity Theft Statute does not require criminal intent, criminal knowledge, or a criminal purpose in order to subject someone to a felony conviction and punishment.

“The problem with section 16 (f) 15 (a) (7), then is that it lacks a culpable mental state, as it does not require a criminal purpose for a person to be convicted of a felony. Because the statute potentially punishes a significant amount of wholly innocent conduct not related to the statute’s purpose, we simply do not believe that this is a rational way of addressing the problem of identity theft.” (Examples of innocent conduct prohibited by the statute and possible criminal sanctions are set forth in the Supreme Court opinion).

One of the General Purposes of the “Criminal Code of 1961,..(effective January 1, 1962) is set forth in 720 ILCS 5/1-2 (b)

“Define adequately the *act* and *mental state* which constitute each offense, and limit the condemnation of conduct as criminal when it is without fault.”

Subsection (b) addresses the concern that the Code must clearly explain acts and related mental state’s fall within the gambit of the criminal law, while simultaneously avoiding the inclusion of behavior that does not merit or allow for criminalization. A criminal law violates due process if it fails to extend notice to the general populace about

(a) who falls within the reach of the law or (b) what conduct is prohibited. Also, if a criminal statute intrudes into behavior (conduct) that is innocent it may be rendered invalid due to its overbreadth.

720 ILCS 5/14-2

- (a) a person commits eavesdropping when he:
- (1) *knowingly* and *intentionally* uses an eavesdropping device for the purpose of hearing or recording all or any part of any conversations...unless he does so (A) with the consent of all of the parties to such conversations..

Eavesdropping of a police officer's "conversation" is a Class 1 felony authorizing a sentence of probation up to fifteen years in the penitentiary.

While the eavesdropping statute sets forth two requirements concerning the acts of the person recording: he act *knowingly* and *intentionally* in performing the physical acts of turning on the recording device and recording the conversation (unbeknownst to the other party); the Eavesdropping Act does not set out any evil intent (*mens rea*) that must accompany the acts (*actus reus*).

In *Carpenter*, *supra*. The Hidden Compartments Law prohibited a person from owning or operating a motor vehicle that he knew contained a secret compartment or from knowingly installing a secret compartment. The statute as indicated earlier, was declared unconstitutional because it contained no *mens rea* (mental state) and thusly potentially prohibited innocent conduct, as not everything placed the secret compartment would constitute contraband or be illegal to possess or own.

In the Eavesdropping Statute, the statute clearly sets forth the prohibited physical acts. The fault of the statute is that it does not require an accompanying culpable mental state, or criminal purpose for a person to be convicted of a felony.

The Illinois Eavesdropping Statute potentially punishes as a felony a wide array of wholly innocent conduct. For example, a juror using an audio recorder to record directions to the courthouse for jury duty given by a police officer would be in violation of the statute if he recorded the conversation without the consent of the officer. Recording of a police officer's instructions on where to pay a speeding ticket or where a towed vehicle could be picked up would violate the statute if done without the consent of the officer.

A parent making an audio recording of their child's soccer game, but in doing so happens to record nearby conversations would be in violation of the Eavesdropping Statute. Although it is extremely unlikely that this doting parent would be charged with a felony offense – the fact remains that she could – thusly punishing innocent conduct.

“The Eavesdropping Statute has the state interest” to protect individuals from unwanted invasions of privacy...Illinois citizens are entitled to be safeguarded from unnecessary governmental intrusion into their privacy. The Eavesdropping Statute is rationally related to the public interest of privacy. However, the means adopted are not a reasonable method of accomplishing the desired objective, because...it subjects wholly innocent conduct to criminal penalty without requiring a culpable mental state beyond mere knowledge” (para 10 DREW'S MOTION TO DECLARE 720 ILCS 5/14 UNCONSTITUTIONAL).

Wherefore, the court grants the motion to dismiss finding that the Illinois Eavesdropping Statute lacks a culpable mental state and subjects wholly innocent conduct to prosecution. Under Illinois Supreme Court Rule 18, the court finds the Illinois Eavesdropping Statute is unconstitutional on its face and as applied to defendant as the statute is violative of substantive due process. The court finds that the statute violates substantive due process under the Fourteenth Amendment to the United States Constitution (U.S. Const. Amend. XIV) and Article I, Section 2 of the Illinois Constitution (Ill. Const. 1970, Art. I, Sec.2). The court further finds that the statute cannot be constructed in a manner that would preserve its validity and judgment cannot rest upon an alternative ground. Notice under Illinois Supreme Court Rule 19 was given.

ENTERED:



Judge Stanley J. Sacks  
Circuit Court of Cook County  
Criminal Division

DATED: 3/2/12

