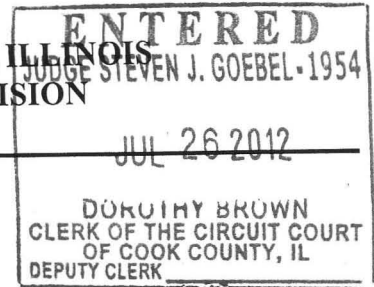


IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CRIMINAL DIVISION



PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff

v.

ANNABEL K. MELONGO,

Defendant.

10 CR 8092

Honorable Steven J. Goebel
Judge Presiding

ORDER

On June 19, 2012, this court granted defendant, Annabel K. Melongo's, motion to declare the Illinois Eavesdropping Statute (720 ILCS 5/14-2) unconstitutional. Defendant has now filed an emergency motion requesting that this court amend its June 19, 2012 order declaring the Illinois Eavesdropping Statute unconstitutional in order to comply with Supreme Court Rule 18.

BACKGROUND

Defendant was charged with six counts of eavesdropping in violation of 720 ILCS 5/14-2(a)(1)(a)(3) (West 2008). Count I alleged that defendant "knowingly and intentionally used an eavesdropping device...for the purpose of recording a conversation...between [defendant] and Pamela Taylor...and without the consent of all parties such conversation." Counts II and III alleged the same acts against the same victim on two other occasions. Counts IV, V and VI alleged that defendant "used or divulged any information which she knew or reasonably should have known was obtained through the use of an eavesdropping device...an audio recording of a conversation between [defendant] and Pamela Taylor...knowing that such a recording was obtained without Pamela Taylor's consent."

PROCEDURAL HISTORY

On December 13, 2010, Judge Brosnahan denied defendant's motion to declare the Illinois Eavesdropping Statute to be unconstitutional based on *People v. Bearsley*, 115 Ill. 2d 47 (1986).

On November 14, 2011, defendant filed an amended motion to declare the Illinois Eavesdropping Statute unconstitutional, arguing that the Statute is unconstitutional on its face and as applied to defendant and violates substantive free speech, freedom of the press, petition and due process guarantees.

On February 14, 2012, the State filed a response in opposition to defendant's motion to declare 720 ILCS 5/14 unconstitutional, arguing that the Eavesdropping Statute: (1) does not violate the first amendment; (2) does not violate due process; and (3) is constitutional as applied to defendant.

On June 19, 2012, this court granted defendant's motion to declare the Illinois Eavesdropping Statute (720 ILCS 5/14-2) unconstitutional.

On June 22, 2012, defendant filed an emergency motion requesting that this court amend its June 19, 2012 order declaring the Illinois Eavesdropping Statute unconstitutional in order to comply with Supreme Court Rule 18.

ANALYSIS

All statutes are presumed to be constitutional, and the burden of rebutting that presumption is on the challenger, who must clearly establish a constitutional violation. *People v. Greco*, 204 Ill. 2d 400 (2003).

The Illinois Eavesdropping Statute (the "Statute") provides:

"A person commits eavesdropping when he:

(1) Knowingly and intentionally uses an eavesdropping device for the purpose of hearing and recording all or any part of any conversation or intercepts, retains, or transcribes electronic communication unless he does so (A) with the consent of all of the parties to such conversation or electronic communication ***

(2) Uses or divulges *** any information which he knows or reasonably should know was obtained through the use of an eavesdropping device.”

720 ILCS 5/14 *et seq.*

The Statute allows citizens to make silent video of police officers performing their duties in public. 720 ILCS 5/14 *et seq.* However, the Statute elevates this conduct to a class 1 felony when a person audio records all or any part of any conversation unless all parties to the conversation give their consent. 720 ILCS 5/14 *et seq.* The Statute applies to all oral communication regardless of whether the communication was intended to be private. 720 ILCS 5/14 *et seq.* A party’s consent may be inferred from the surrounding circumstances indicating that the party knowingly agreed to the surveillance, but express disapproval defeats any inference of consent. 720 ILCS 5/14 *et seq.*

In the instant case, defendant argues that the Statute is unconstitutional on its face because it violates her First Amendment and due process rights. Defendant also argues that the Statute is unconstitutional as applied to her because Ms. Pamela Taylor was a willing speaker during the conversation and defendant had the right to receive the information and record its protected content if she so wished.

The State asks this court to interpret the court’s ruling in *ACLU* as a limited ruling. Specifically, the State contends that the *ACLU* court only addressed the section of the Statute that

applies to audio recordings of police officers in a public place where others can see and hear them. The State argues that the facts in the instant case are distinguishable from those in *ACLU* and that the case should therefore move forward and go to trial.

As noted above, this court issued an oral opinion granting defendant's motion to declare the Illinois Eavesdropping Statute (720 ILCS 5/14-2) unconstitutional on June 19, 2012. In making this decision, this court relied on a recent decision by the United States Court of Appeals for the Seventh Circuit where the court held that the Statute was likely unconstitutional based on First Amendment considerations and the issues presented in that case. The court subsequently issued a preliminary injunction enjoining the State's Attorney from applying the Statute against the ACLU and its employees or agents. *ACLU v. Alvarez*, 679 F.3d 583, 608 (7th Cir. 2012).

In *ACLU*, the court noted that the Statute is not closely tailored to the government's interest in protecting conversational privacy. Rather, "the gravamen of the Illinois eavesdropping offense is not the secret interception or surreptitious recording of a private communication. Instead, the statute sweeps much more broadly, banning *all* audio recording of *any* oral communication absent consent of the parties regardless of whether the communication is or was intended to be private." *Id.* at 595. The court went on to note that:

"Of course, the First Amendment does not prevent the Illinois General Assembly from enacting greater protection for conversational privacy than the common-law tort remedy provides. Nor is the legislature limited to using the Fourth Amendment "reasonable expectation of privacy" doctrine as a benchmark. But by legislating this broadly – by making it a crime to audio record *any* conversation, even those that are *not* in fact private – the State has severed the link between the eavesdropping statute's means and its end. Rather than attempting to tailor the

statutory prohibition to the important goal of protecting personal privacy, Illinois has banned nearly all audio recording without consent of the parties – including audio recording that implicates *no* privacy interests at all.”

ACLU, 679 F. 3d at 606. Although the *ACLU* court did not find make a specific finding that the Statute was unconstitutional, the court concluded that the ACLU has a “strong likelihood of success on the merits of its First Amendment claims.” *Id.* at 608.

Additionally, this court relied on Associate Judge Stanley Sacks’ recent opinion in *People v. of the State of Illinois v. Christopher Drew*, case number 10 CR 00046 (March 2, 2012) where the court ruled that the Illinois Eavesdropping Statute was unconstitutional on its face and as applied to the defendant. *Drew*, at p. 12. In *Drew*, the court stated that, although 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. *Drew*, at p. 11.

Here, this court also finds that the Statute appears to be vague, restrictive and makes innocent conduct subject to prosecution. At this stage, this court will not conduct any fact-finding nor will this court filter the Statute and deem certain sections to be constitutional and others to be unconstitutional.

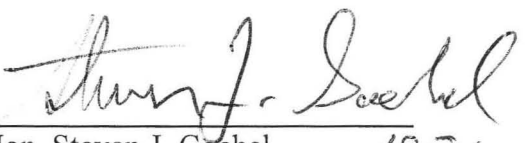
Therefore, based on the foregoing discussion, this court finds that the Illinois Eavesdropping Statute is unconstitutional on its face and as applied to defendant pursuant to Illinois Supreme Court Rule 18. This court holds that the Illinois Eavesdropping Statute lacks a culpable mental state, subjects wholly innocent conduct to prosecution, and 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).

This 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 has been given.

CONCLUSION

Based upon the foregoing discussion, this court grants defendant's motion to declare the Illinois Eavesdropping Statute (720 ILCS 5/14-2) unconstitutional.

ENTERED:


Hon. Steven J. Goebel
Circuit Court of Cook County
Criminal Division

DATED:

7-26-12