

**IN THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT  
KANE COUNTY, ILLINOIS,  
CHANCERY DIVISION**

<i>Thomas M. Kaitera</i> Clerk of the Circuit Court Kane County, IL
<b>FEB 19 2013</b>
<b>FILED 082</b> <b>ENTERED</b>

BOARD OF EDUCATION OF GENEVA )  
 COMMUNITY UNIT SCHOOL DISTRICT 304, )  
 PATRICIA ONEIL, as Assistant Superintendent )  
 and in her individual capacity, and DAWN )  
 GEORGE, as Assistant Superintendent and in her )  
 individual capacity, )  
 )  
 Plaintiffs, )  
 v. )  
 )  
 MARGARET PENNINGTON, )  
 )  
 Defendant. )

No. 11 CH 1285  
 Hon. David R. Akemann

**FINDINGS & ORDER**

This cause comes to be heard on Defendant’s Motion to Dismiss the Complaint on the grounds that the Illinois Eavesdropping Statute is unconstitutional on its face. The Court having considered the pleadings, arguments of counsel, the applicable case law and being otherwise fully advised in the premises:

**FINDS:**

**I. Summary**

The Defendant has moved to dismiss the complaint herein because the Statute upon which the Complaint is based, 720 Ill. Comp. Stat. 13-2(a)(1)(A) (hereinafter “the eavesdropping statute”) on its face violates the Constitutions of the United States and the State of Illinois. This Court has previously had the opportunity to consider the constitutionality of the eavesdropping statute and found it facially invalid because it violates that substantive due process clause of the

Fourteenth Amendment of the United States Constitution and Article 1, Section 2 of the Constitution of the State of Illinois. *See Order People v. Clark*, 11CF464.

Illinois courts have consistently held that where a statute subjects wholly innocent conduct to criminal penalty without requiring a culpable mental state beyond mere knowledge it violates the constitutions of both Illinois and the United States. *People v. Madrigal*, 241 Ill. 2d 463, 466-67 (Ill. 2011). The eavesdropping statute on its face violates the protections of substantive due process by failing to include an element of criminal intent which necessarily means that it criminalizes wholly innocent conduct. Accordingly, the eavesdropping statute may not support a claim against the Defendant in this case and Defendant's Motion to Dismiss the Complaint with prejudice is granted.

#### **Applicable Statute**

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 conversation or intercepts, retains or transcribes electronic communication unless he does so A) with the consent of all the parties to such conversation or electronic communication or B) in accordance with Article 108(a) or Article 108 (b) of the Code of Criminal Procedure of 1963.

720 ILCS 5/14-2(a).

For the purpose of this article, the term conversation means any oral communication between two or more persons, regardless of whether one or more of the parties intended the communication to be of a private nature under circumstances justifying that expectation.

720 ILCS 5/14-1(d).

## **II. Standard of Review**

All statutes are presumed constitutional and the party challenging the constitutionality has the burden of clearly establishing that it violates the constitution. *People v. Madrigal*, 241

Ill. 2d 463, 466 (Ill. 2011). The United States Court of Appeals for the Seventh Circuit has already considered whether a fundamental right is implicated by Illinois' eavesdropping statute so as to require a heightened level of judicial scrutiny in *American Civil Liberties Union v. Alvarez*, 679 F. 3d 583 (7th Cir. 2012)(certiorari denied on November 26, 2012). The Seventh Circuit instructed in *Alvarez* that the eavesdropping statute "burdens First Amendment rights directly, not incidentally," *Id.* at 603, by "restricting the use of a common, indeed ubiquitous, instrument of communication." *Id.* at 597. The *Alvarez* court went on to indicate that "any way you look at it, the eavesdropping statute burdens speech and press rights and is subject to heightened First Amendment scrutiny." *Id.* at 600.

Strict scrutiny does not necessarily apply just because First Amendment rights are implicated. First Amendment jurisprudence allows for intermediate scrutiny where, as here, the governmental regulation on speech is content neutral. Intermediate scrutiny requires that the means of regulation be narrowly tailored to serve a significant governmental interest. *Id.* at 604. Thus, in order to survive a constitutional challenge on substantive due process grounds, the eavesdropping statute must utilize narrowly tailored means to achieve its purpose.

### **III. Legislative Intent**

In determining legislative intent and statutory purpose, the actual language of a statute itself is the best indicator. *Madrigal*, 241 Ill. 2d at 467 (citing *People v. Carpenter*, 228 Ill. 2d 250, 268 (2008)). A court must not read into the plain language exceptions, limitations, or conditions that the legislature did not intend." *Plock v. Board of Education of Freeport School District No. 145*, 396 Ill. App. 3d 960, 966 (2d Dist. 2009) (citing *People v. Roake*, 334 Ill. App. 3d 504, 510 (2d Dist. 2002)).

The statute at issue here specifically states that eavesdropping will occur when a person knowingly uses some sort of device to record all or part of a conversation without the consent of all parties involved. *See* 720 ILCS 5/14-2. The statute defines “conversation” as “any oral communication...regardless of whether one or more of the parties intended their communication to be of a private nature.” 720 Ill. Comp. Stat. 5/14-1(d). The language indicates that the legislature made the statute intentionally broad, reaching all conversations even where there is no expectation of privacy. The only limitations imposed by the language of the statute are when there is consent from all of the participants in the conversation or as found in Article 108A or B of the criminal code. 720 Ill. Comp. Stat. 5/14-2(a).

The legislative history of the statute confirms its expansive reach. In 1961, the Illinois legislature made it a crime to use “an eavesdropping device to hear or record all or part of any oral conversation without the consent of any party thereto.” 1961 Ill. Laws 1983. Since then, the statute’s protective reach has been continually broadened by the General Assembly; first requiring the consent of all parties to the conversation, Ill. Pub. Act. 79-1159 (1976)(codified at 720 Ill. Comp. Stat. 5/14-2(a)(1)), and then by amending the definition of “conversation” to extend “the coverage of the eavesdropping statute to all conversations, regardless of whether they were intended to be private.” *People v. Nestrock*, 316 Ill. App. 3d 1, 7 (2d Dist. 2000) (citing *People v. Siwek*, 284 Ill. App. 3d 7, 14 (2d Dist. 1996)).

The plain language and legislative history of the statute indicates that it is broadly designed to protect conversational privacy. The Seventh Circuit in *Alvarez* made a similar analysis and determination regarding the purpose of this statute, noting that it was intended to protect the privacy of conversations. *American Civil Liberties Union v. Alvarez*, 679 F. 3d 583, 605 (7th Cir. 2012). In the absence of a post *Alvarez* analysis by the Illinois Supreme Court, this

Court will follow the direction of the Seventh Circuit and find that the purpose of the statute was in fact to protect conversational privacy.

#### **IV. Narrowly Tailored and Substantially Related**

The question then becomes whether the means the statute utilizes for protecting conversational privacy is narrowly tailored to achieve that goal. The Illinois Supreme Court's decision in *People v. Carpenter*, 228 Ill. 2d 250 (Ill. 2008) is persuasive to the case *sub judice*. In *Carpenter*, the owners of vehicles that contained hidden compartments were convicted under a statute that made it unlawful to own or operate a motor vehicle that the individual knew had a false or secret compartment. *See Id.* at 269. The statute was intended to stop the use of secret vehicle compartments for contraband and weapons, but in order to be convicted under the statute the state did not have to establish that the owner intended to use the compartment for that illegal purpose. *Id.* Simply having a compartment in the vehicle and knowing it was there was enough to support a conviction under the statute. *Id.* The Illinois Supreme Court found that without a criminal intent requirement the statute included wholly innocent conduct that was outside of the purpose of the statute, and was therefore, facially unconstitutional. *Id.* at 273.

The purpose of the eavesdropping statute is to protect the conversational privacy of citizens; but the statute makes no requirement that there be a reasonable expectation of privacy in the conversations at issue in order for a violation of the statute to occur. Thus, a juror recording directions given by a police officer or a parent accidentally recording a conversation in the background of a little league game could be subject to a felony conviction. In this modern era, recording devices are in a growing number of hands and are used in everyday life in common ways which many persons would find an indispensable form of communication in their increasingly digital world. These devices come in a variety of forms such as cell phones, smart

phones, tablets and all manner of “mobile” devices allowing instant gathering and distribution of speech in multiple forms. It is not difficult for a person that has used one or more of such devices to realize very quickly that a lot of innocent conduct could result in persons being often in violation of the eavesdropping statute.

The purpose of the statute is to protect citizen’s conversational privacy but the legislature has actually removed the requirement that there be any reasonable expectation of privacy and thus subjecting any and all recorded conversations to potential exposure to the consequences of violating the eavesdropping statute. There is not a sufficient connection between the expansive means adopted by the statute and its purpose in protecting conversational privacy to even overcome a rational basis analysis, much less the rigor of intermediate scrutiny. Therefore, as the eavesdropping statute is facially unconstitutional, it cannot support a basis for the relief requested in this case. *See People of State of Ill. V. General Elec. Co*, 683 F.2d 206, 209 (7th Cir. 1982) (unconstitutionality as a defense to a civil penalty). Accordingly, the Defendant’s Motion to Dismiss the Complaint with prejudice is hereby granted.

**Rule 18 Findings:**

Pursuant to Illinois Supreme Court Rule 18, the Court finds:

- a) The Illinois eavesdropping statute is unconstitutional on its face;
- b) The eavesdropping statute lacks a culpable mental state and subjects wholly innocent conduct to prosecution thereby violating the substantive due process provisions of the Fourteenth Amendment of the Constitution of the United States and Article 1, Section 2 of the Constitution of the State of Illinois;

c) The eavesdropping statute cannot reasonably be construed in a manner that would preserve its validity;

d) That the finding of unconstitutionality is necessary to the decision and judgment rendered, and that such decision or judgment cannot rest upon an alternative ground; and

e) That the notice required by Rule 19 has been served, and that those served with such notice have been given adequate time and opportunity under the circumstances to defend the statute challenged.

**ORDER**

IT IS THEREFORE ORDERED AND ADJUDGED that the complaint be and is hereby dismissed with prejudice.

Entered this 15<sup>th</sup> day of February, 2013

**David Akemann**

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Circuit Judge