Cell Phones -- Recording Law Enforcement Officers

Number: INFORMAL

Date: June 10, 2014

The Honorable Frank McKeithen
Sheriff of Bay County
3421 North Highway 77
Panama City, Florida 32405

Dear Sheriff McKeithen:

This office is in receipt of your letter of May 29, 2014, requesting assistance regarding a citizen who had been stopped by a law enforcement officer for a traffic offense. The citizen recorded his or her interaction with the law enforcement with a cell phone and without the knowledge or permission of the law enforcement officer. The recorded incident with the law enforcement officer was presented in traffic court to the traffic court judge.

After reviewing the information you have submitted, it does not appear that this is a matter upon which this office may formally comment at this time. I understand from your letter that this matter is being litigated and it is the policy of this office not to comment on matters before the judiciary.[1]

However, in an effort to assist you, I provide the following informal comments. It would be advisable for you to present the cases and material I am enclosing to the Sheriff's Department legal counsel for their consideration and assistance in determining future policy of your office and conduct of your officers. The Florida Sheriff's Association may also be of assistance in this matter. Ultimately, however, as cases prosecuted under Chapter 934, Florida Statutes, are criminal in nature, the facts of each case will be essential to a determination of how to proceed.

Your letter suggests that the fact situation you have posed relates to provisions of Chapter 934, Florida Statutes. Chapter 934, Florida Statutes, was enacted by the Florida Legislature in order to assure personal rights of privacy in oral and wire communications.[2] The legislative findings in section 934.01(4), Florida Statutes, reflect the Legislature's concern for protecting the privacy rights of the state's citizens. In enacting Chapter 934, the Legislature expressly undertook to "define the circumstances and conditions under which the interception of wire and oral communications may be authorized and to prohibit any unauthorized interception of such communications and the use of the contents thereof in evidence in courts and administrative proceedings."[3] In enacting Chapter 934, Florida Statutes, the Legislature stated that

"[t]o safeguard the privacy of innocent persons, the interception of wire or oral communications when none of the parties to the communication has consented to the interception should be allowed only when authorized by a court of competent jurisdiction and should remain under the control and supervision of the authorizing court. Interception of wire and oral communications should further be limited to certain major types of offenses and specific categories of crime with assurance that the interception is justified and that the information obtained thereby will not be

misused."[4] (e.s.)

I would note that, under the factual situation you have presented, one of the parties to the interception, the citizen who was the subject of the traffic stop and who did the recording, did consent to the interception.

Section 934.03(1), Florida Statutes, generally makes it unlawful to willfully intercept, endeavor to intercept, or procure any other person to intercept or endeavor to intercept any wire or oral communication. "Oral communication" is defined by section 934.02(2), Florida Statutes, as

"any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation and does not mean any public oral communication uttered at a public meeting or any electronic communication."

Section 934.03(4), Florida Statutes, prescribes penalties for violations of the statute and provides that any criminal action would be brought by the state attorney for the judicial circuit where the incident occurred.[5]

I am enclosing a University of Florida Law Review case comment which discusses the most widely cited court case considering these issues, *Glik v. Cunniffe*.[6] The *Glik* case is a Massachusetts case which considers not only that state's wiretap statute (which is similar to Florida's Chapter 934 provisions), but addresses federal constitutional First Amendment considerations. The court in *Glik* determined that filming or videotaping government officials who are engaged in their duties in a public place, including police officers performing their responsibilities, is protected by the First Amendment.

In addition to the law review article, I am enclosing a copy of the *Glik* case for your consideration and a number of other articles that present various views on your question. Again, I would suggest that you consult your legal counsel for a more definitive and fact specific response to your questions and, if you continue to have concerns in this regard following resolution of the litigation involved, this office will be glad to provide assistance. Because any prosecution of this type of case would fall to the State Attorney's Office, you may wish to coordinate your efforts with that office as well. If you determine that an Attorney General Opinion is necessary, we would request that you set forth a specific legal question and include a memorandum of law from your legal counsel touching on all points involved in your question and providing his or her legal opinion on the issue.

I trust that these informal comments and the material I am enclosing will be helpful.

Sincerely,

Gerry Hammond
Senior Assistant Attorney General

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Enclosures

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[1] *See* s. 16.01(3), Fla. Stat., and Department of Legal Affairs Statement Concerning Attorney General Opinions (available at www.myfloridalegal.com).

[2] *See* s. 934.01, Fla. Stat., reflecting the legislative findings for enactment of Ch. 934, Fla. Stat.

[3] Section 934.01(2), Fla. Stat.

[4] The Legislature also expressed its finding in s. 934.01(3), Fla. Stat., that "[o]rganized criminals make extensive use of wire and oral communications in their criminal activities. The interception of such communications to obtain evidence of the commission of crimes or to prevent their commission is an indispensable aid to law enforcement and the administration of justice." Toward that end, the Legislature has created certain exceptions for law enforcement agencies. See, e.g., s. 934.03(2)(c), Fla. Stat., stating that "[i]t is lawful under ss. 934.03 934.09 for an investigative or law enforcement officer or a person acting under the direction of an investigative or law enforcement officer to intercept a wire, oral, or electronic communication when such person is a party to the communication or one of the parties to the communication has given prior consent to such interception and the purpose of such interception is to obtain evidence of a criminal act."

[5] *And see* s. 934.10, Fla. Stat., prescribing civil remedies. *See also* s. 934.06, Fla. Stat., prohibiting the use of such intercepted wire or oral communications as evidence.

[6] 655 F.3d 78 (U.S. Ct. App. 1st Cir. 2011).