

Security of Communications Law

Number: INFORMAL

Date: October 23, 2000

The Honorable George Albright
Representative, District 24
111 Southeast 25th Avenue
Ocala, Florida 34471

Dear Representative Albright:

Thank you for considering this office as a source of assistance in responding to a constituent who is requesting information regarding the recording of conversations without the person's consent or knowledge. Attorney General Butterworth has asked me to respond to your letter.

Chapter 934, Florida Statutes, was enacted by the Florida Legislature in order to assure personal rights of privacy in the area of oral and wire communications.[1] Section 934.03(1), Florida Statutes, generally makes it unlawful for a person to willfully intercept, endeavor to intercept, or procure any other person to intercept or endeavor to intercept any wire or oral communication.[2] "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."

Thus, for a conversation to qualify as "oral communication," the speaker must have an actual subjective expectation of privacy in his oral communication, and that expectation of privacy must be recognized by society as reasonable under the circumstances.[3] As stated by the Supreme Court of Florida in *State v. Inciarrano*,[4]

"This expectation of privacy does not contemplate merely a subjective expectation on the part of the person making the uttered oral communication but rather contemplates a reasonable expectation of privacy. A reasonable expectation of privacy under a given set of circumstances depends upon one's actual subjective expectation of privacy *as well as whether society is prepared to recognize* this expectation as reasonable. *Shapiro v. State*, 390 So. 2d 344 (Fla. 1980), *cert. denied*, 450 U.S. 982, 101 S.Ct. 1519, 67 L.Ed.2d 818 (1981). . . . To prevail Inciarrano must not only have had a subjective expectation of privacy, but also his expectation under the circumstances must have been one that society is prepared to recognize as reasonable."

Such a determination, therefore, will depend upon the particular facts. Enclosed are copies of several cases discussing when a court has determined that there was (or was not) a reasonable expectation of privacy. For example, in *Inciarrano*, the Court held that where defendant went to the victim's office with the intent to do him harm, the defendant had no reasonable expectation of privacy; thus, the tape recording made by the victim which recorded the conversation between

the victim and the defendant regarding a business deal in which victim no longer wanted a part, the sound of a gun being cocked, shots being fired, and the victim falling from his chair to floor did not fall within statutory proscription of security of communications statute.

Similarly, the First District Court in *Stevenson v. State*,^[5] held that the "[d]efendant had no reasonable expectation of privacy in conversation which took place outside a van stopped in public roadway in known drug trafficking area[.]"^[6] In *Adams v. State*,^[7] the court held that:

"[a]udio and video recordings made by police officers in course of a "sting" operation utilizing a storefront operation did not violate defendant's right of privacy so as to preclude their admission into evidence, since defendant came into store and openly entered into transaction with undercover officer and he could have had no reasonable expectation of privacy in transacting his business in a place of business open to public."

On the other hand, the court in *LaPorte v. State*^[8] held that audio and video taping of women in a dressing room who were changing clothes for a "modeling-video" session violated section 934.03, Florida Statutes, since the women did not know that they were being recorded and they had a reasonable expectation of privacy in the dressing room.

I trust that the enclosed cases may be of some assistance.

Regarding the issue of exception for investigative and/or law enforcement officers, or persons acting under the direction of an investigative or law enforcement officer, contained in section 934.03(2)(c), Florida Statutes,^[9] section 934.02(6), Florida Statutes, defines "investigative or law enforcement officer as

"any officer of the State of Florida or political subdivision thereof, of the United States, or of any other state or political subdivision thereof, who is empowered by law to conduct on behalf of the Government investigations of, or to make arrests for, offenses enumerated in this chapter or similar federal offenses, any attorney authorized by law to prosecute or participate in the prosecution of such offenses, or any other attorney representing the State of Florida or political subdivision thereof in any civil, regulatory, disciplinary, or forfeiture action relating to, based upon, or derived from such offenses." (e.s.)

The above definition requires that in order to qualify as an investigative or law enforcement officer, he or she must be an officer of the state or any political subdivision thereof (e.g., city or county), of the United States, or any other state or political subdivision thereof. A private investigator, although licensed by the state, would not appear to normally qualify.

I trust that the above informal comments and enclosures may be of some assistance.

Sincerely,

Joslyn Wilson
Assistant Attorney General

JW/tgk

[1] See s. 934.01, Fla. Stat., setting forth the legislative findings.

[2] See s. 934.03(4), Fla. Stat., prescribing penalties for violations of the statute. Any criminal action would be brought by the state attorney for the judicial circuit where the incident occurred. *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. *Cf. State v. Mozo*, 655 So. 2d 1115 (Fla. 1995), citing *United States v. Nelson*, 837 F.2d 1519 (11th Cir.), *cert. denied*, 488 U.S. 829, 109 S.Ct. 82, 102 L.Ed.2d 58 (1988) (actual "interception" of a communication occurs not where such is ultimately heard or recorded but where the communication originates).

[3] See *State v. Smith*, 641 So. 2d 849, 852 (Fla. 1994). *Cf. State v. Sarmiento*, 397 So. 2d 643 (Fla. 1981) (definition of "interception of private communications," in context of prohibition under Art. I, s. 12, Fla. Const., against such interception, is a function of one's reasonable expectation of privacy).

[4] 473 So. 2d 1272, 1275 (Fla. 1985).

[5] 667 So. 2d 410 (Fla. 1st DCA 1996).

[6] *And see Thompson v. State*, 731 So. 2d 819, 821 (Fla. 5th DCA 1999), in which the court stated:

"we also note that Mr. Thompson did not have a right to privacy in his telephone conversation with the victim because a "wrongdoer who voluntarily speaks to another of his wrongdoings, only has the hope or expectation, not a constitutionally protected right, that the other person will not breach his confidence. . . ." *State v. Stout*, 693 So. 2d 657, 658 (Fla. 4th DCA 1997) (*quoting Franco v. State*, 376 So. 2d 1168, 1170 (Fla. 3d DCA 1979), *cert. denied*, 386 So. 2d 636 (Fla. 1980))."

See also State v. Smith, 641 So. 2d 849 (Fla. 1994) holding that recording of conversation between motorist and companion sitting in rear of police vehicle for safety and comfort reasons during consensual search of automobile did not violate statute since motorist had no reasonable expectation of privacy in a police car.

[7] 436 So. 2d 1132 (Fla. 5th DCA 1983).

[8] 512 So. 2d 984 (Fla. 2d DCA 1987).

[9] Section 934.03(2)(c), Fla. Stat., provides:

"It 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."