

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

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff,)	
)	
v.)	No. 10 CR 46
)	
CHRISTOPHER DREW)	
)	
Defendant.)	

MOTION TO DECLARE 720 ILCS 5/14 UNCONSTITUTIONAL

NOW COMES the Defendant, **CHRISTOPHER DREW**, by the undersigned counsel, and moves this Honorable Court to find the Illinois Eavesdropping Statute (“Eavesdropping Statute”) 720 ILCS 5/14 unconstitutional. In support thereof, Defendant states as follows:

1. The Defendant was arrested for an ordinance violation in the City of Chicago at 1pm on December 2, 2009, concerning art peddling on State Street.

2. At the police station, a search was done of the Defendant’s belongings, where an Olympus digital audio-recorder was found in his pocket. Officers in the police station listened to the contents of the audio-recorder and determined that the Defendant had a recorder operating during his arrest. The Defendant was then charged with violating the Eavesdropping Statute for secretly recording a conversation between the Officer and himself, a Class 1 felony.

3. The Eavesdropping Statute, 720 ILCS 5/14-2, states:

(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 conversation or intercepts, retains, or transcribes electronic communication unless he does so (A) with the consent of all parties to such conversation or electronic communication...”

4. The Eavesdropping Statute, 720 ILCS 5/14-1(d) defines “conversation”:

“For the purposes of this Article, the term conversation means any oral communication between 2 or more persons regardless of whether one or more of the parties intended their communication to be of a private nature under circumstances justifying that expectation.”

5. This Court has previously denied the Defendant’s motion to dismiss because the Court

found that the First Amendment does not allow citizens the right to record police officers

in the discharge of their public duties. While Defendant acknowledges that this

Honorable Court has fairly ruled to deny the motion on *that* basis, Defendant now seeks

dismissal because the Eavesdropping Statute is unconstitutional (1) on its face because

the statute lacks a *culpable* mental state, and (2) as applied to the Defendant because his

mental state was not in contradiction to the purpose of the statute, personal privacy. Both

of these bases reveal that the Eavesdropping Statute violates due process. Neither of

these bases were raised in the previous motion.

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

6. The Eavesdropping Statute fails to require a *culpable* mental state and, therefore, can be

read to apply conduct that is wholly innocent, which violates substantive due process and makes the statute unconstitutional under the Fourteenth Amendment of the United States Constitution (U.S.Const., amend.XIV) and article 1, section 2 of the Illinois Constitution (Ill. Const. 1970, art.I, Sec.2).

7. In *Madrigal*, the Illinois Supreme Court noted the legislature’s wide discretion to create penalties for criminal offenses, “but this discretion is limited by the constitutional guarantee of substantive due process, which provides that a person may not be deprived of liberty without due process of law.” *The People of the State of Illinois v. Claudia Madrigal*, 241 Ill.2d 463, 466 (2011).
8. Notably, because the Eavesdropping Statute impinges on a fundamental constitutional right, a strict scrutiny analysis seems to apply. *Schultz v. Lakewood Elec. Corp.*, 362 Ill.App.3d 716, 721 (1st Dist. 2005) (“In a due process challenge, where the right infringed upon is among those rights considered ‘fundamental’ constitutional rights, the challenged statute is subject to strict scrutiny analysis.”). Even if this Honorable court finds that strict scrutiny does not apply, as discussed below, the Eavesdropping Statute does not survive under the more deferential rational basis standard.
9. “Under [the rational basis test], a statute will be sustained if it ‘bears a reasonable relationship to a public interest to be served, and the means adopted are a reasonable

method of accomplishing the desired objective.” *Madrigal*, 241 Ill.2d at 466, citing *Wright*, 194 Ill.2d 1, 24 (2000).

10. The Eavesdropping Statute has the state interest “to protect individuals from unwarranted invasions of privacy...Illinois citizens are entitled to be safeguarded from unnecessary governmental intrusion into their privacy.” See 87 *Illinois Bar Journal*, p. 363 (July 1999) and *Plock v. Board of Education of Freeport School District No. 145*, 396 Ill.App.3d 960, 966 (2nd Dist. 2009). Indeed, 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, as discussed below, it subjects wholly innocent conduct to criminal penalty without requiring a culpable mental state beyond mere knowledge.

11. The Illinois Supreme Court has repeatedly held that a statute violates the due process clauses of both the Illinois and United States Constitutions if it potentially subjects wholly innocent conduct to criminal penalty without requiring a culpable mental state beyond mere knowledge. See, e.g., *Wright*, 194 Ill.2d at 25 (struck down record-keeping statute because it “potentially subjects innocent conduct to a severe penalty”); *In re K.C.*, 186 Ill.2d 542, 549, 553 (1999) (invalidated criminal trespass to a vehicle statute that

prohibited entering a vehicle whenever it was done “knowingly and without authority” because it “potentially punish[ed] wholly innocent conduct without requiring proof of a culpable mental state”): *People v. Zaremba*, 158 Ill.2d 36, 42–43 (1994) (theft statute did not bear a reasonable relationship to its purpose because “it potentially subject[ed] wholly innocent conduct to punishment” and failed to require a culpable mental state other than that the defendant do the prohibited actions “knowingly”).

12. In *Madrigal*, the Illinois Supreme Court struck down a portion of the Identity Theft Law because it did not require a culpable mental state or criminal purpose to be convicted of a felony. *Madrigal*, 241 Ill.2d at 466. The Identity Theft Law required only that a person knowingly use any “*personal identification information* or personal identification document of another for the purpose of gaining access to any record...” *Id.* Because the Identity Theft Law did not require a culpable mental state, only “mere knowledge,” the Court noted that the Law “punishes a significant amount of wholly innocent conduct not related to the statute’s purpose...” *Id.* For example, under the Identity Theft Law, as it read, criminalized such innocuous conduct as someone using the internet to look up how their neighbor did in the Chicago Marathon or a husband who called a repair shop for his wife, without her “prior express permission,” to see if her car is ready, would be seeking information in violation of the statute. *Id.* at 466. Despite the narrow exemptions, the

Court found the Identity Theft Law to violate due process. *Id.*

13. In *Carpenter*, the Court considered the facial constitutionality of a statute that banned false or secret compartments in automobiles. *People v. Carpenter*, 228 Ill.2d 250, 269 (2008). In addition to the statute's mental state of the knowledge of the compartment's capacity to conceal, it contained an intent to conceal. *Id.* Yet, the Court reasoned that people can carry things in a secret compartment without criminal intent. *Id.* Thus, despite containing two mental states, because the statute lacked a *culpable* mental state, the Court held that the statute violated due process under the rational basis test since it did not contain a reasonable means of preventing the targeted conduct. *Id.*

14. Similarly, the Eavesdropping Statute lacks a culpable mental state beyond both knowledge of the recorder's ability to record and the intent to record. Notably, knowledge is not a contested issue in this case. Rather, like *Carpenter's* finding of the intent to conceal, the intent to record is not sufficient to define the culpable conduct prohibited by the Eavesdropping Statute. Accordingly, under the rational basis test, the Eavesdropping Statute fails to provide a reasonable method of accomplishing the desired objective as result of lacking a culpable mental state.

15. The Eavesdropping Statute encompasses wholly innocent conduct by not preventing the targeted conduct or evil purpose of the unwarranted intrusion into citizens' privacy. 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 Eavesdropping Statute without the consent of the officer. Even a parent recording their child's soccer game and accidentally recording nearby conversations would be in violation of the Eavesdropping Statute.

16. Therefore, on its face, the Eavesdropping Statute fails the highly deferential rational basis analysis, violating substantive due process and making the statute unconstitutional.

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

17. As applied to the Defendant, the Eavesdropping Statute is also violative of substantive due process. The Defendant's intent in operating a recorder during his arrest was not to intrude on the Officer's privacy, but to memorialize his experience with the Officer's discharge of his public duties.

18. In the recent case of *Glik v. Cunniffe*, a young man was arrested for filming with his cell phone several police officers on public property while they were arresting another individual. *Glik v. Cunniffe*, No. 10-1764____F.3d____, 2011 WL 3769092 (1st Cir. Aug. 26, 2011). The U.S. Court of Appeals for the First Circuit held that, under the First Amendment, citizens have a right to film police officers in the performance of their

public duties. *Id.* at 4. The Court reasoned:

In our society, police officers are expected to endure significant burdens caused by citizens' exercise of their First Amendment rights. *See City of Houston v. Hill*, 482 U.S. 451, 461 (1987) (“[T]he First Amendment protects a significant amount of verbal criticism and challenge directed at police officers.”)...The same restraint demanded of law enforcement officers in the face of “provocative and challenging” speech, *id.* at 461, must be expected when they are merely the subject of videotaping that memorializes, without impairing, their work in public spaces. *Id.*

In other words, in “citizens’ exercise of their First Amendment rights,” police officers’ right to personal privacy is limited.

19. As stated *supra*, the purpose of the Eavesdropping Statute is to protect individuals from unwarranted invasions of privacy and to ensure Illinois citizens are safeguarded from unnecessary governmental intrusion into their privacy. In this case, the Defendant “[memorialized], without impairing, [the Officer’s] work in public,” which is a challenge to the Officer’s right to privacy that “must be expected.” *Id.* Thus, the Defendant’s mental state is not in contradiction to the purpose of the Eavesdropping Statute.
20. Under the means of the Eavesdropping Statute, the Defendant’s intent to memorialize the Officer’s conduct is not within the method to accomplish the desired objective of protecting against invasions of privacy. Again, the Eavesdropping Statute violates the rational basis test by its ability to subject wholly innocent conduct to criminal penalty. Therefore, as applied to the case at bar, the lack of a culpable mental state that results in

encompassing the Defendant's conduct is violative of substantive due process and makes

the Eavesdropping Statute unconstitutional.

WHEREFORE, Defendant respectfully moves this Honorable Court to dismiss Defendant's charges under the Illinois Eavesdropping statute.

Respectfully submitted,

One of Defendant's Attorneys

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