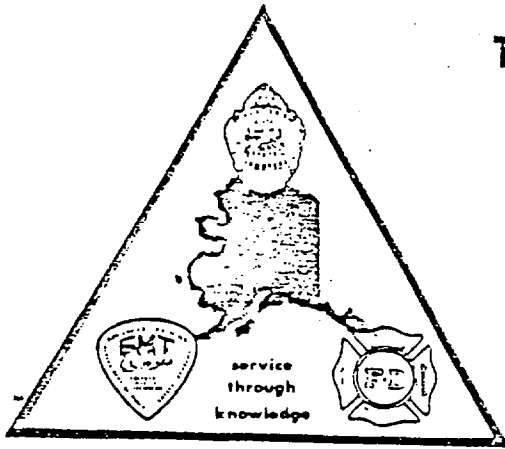


DEPARTMENT OF PUBLIC SAFETY

TRAINING ACADEMY

LEGAL BULLETIN NO. 79
March 5, 1984



PARTICIPANT MONITORING SEIZURE OF CONVERSATION OF ARRESTED PERSON

Reference: Laurence James O'NEILL
v.
State of Alaska

Alaska Court of Appeals
Opinion No. 333
675 P.2d 1288
January 27, 1984

FACTS:

A police officer observed a vehicle being operated in an erratic manner. The vehicle was stopped and the driver was arrested for driving while intoxicated. O'NEILL was one of two passengers in the subject vehicle. O'NEILL was subsequently arrested and charged with interfering with the arrest and assault in the fourth degree.

After the first defense witness testified and the District Attorney completed cross-examination, the court was advised that the arresting officer had tape-recorded the events that led to O'NEILL's arrest. The first time the officer had informed the District Attorney that he recorded the conversation was during the court's lunch recess (after the cross-examination). He said he recorded the arrest to avoid potential civil litigation and was not aware that it might be admissible at the trial. Immediately after the recess, the District Attorney advised the court of the existence of the tape and his intention to use it for rebuttal.

There was a dispute between the defendant and his witnesses and two police officers as to what took place. The defendant indicated he had approached the police car after the driver was arrested to learn what was going on. The officer testified that, at the request of the person arrested for driving while intoxicated, he had informed the passengers of the vehicle and the driver asked one of the passengers to take care of his car. It was after this contact that O'NEILL approached the police car and assaulted the officer. The tape recording substantiated the testimony of the officer.

ISSUE:

Should the tape have been suppressed since the recording was made without the knowledge or consent of O'NEILL?

HELD: No.

REASONING:

1. The police recording commenced with the detention of OLDS (the person arrested for driving while intoxicated) and proceeded to document that

arrest. OLDS clearly had no subjective expectation of privacy at the time nor could he reasonably have had such an expectation. (emphasis added)

2. In cases where electronic recording is commenced at the time of a lawful stop or arrest, consent to record is not required. (emphasis added)

NOTES:

This case seems to be at odds with Quinto v. State (see Legal Bulletin No. 72), but the court distinguishes between the two. Quinto dealt with a tape recording initiated during a routine police-citizen contact prior to any arrest or seizure. The officer made no effort to inform Quinto that he was being recorded, and there was no allegation that any exigency existed to justify the recording.

The court also cites Glass v. State (see Legal Bulletin No. 16) as another example of tape recordings obtained from a person not under arrest as a violation of the privacy clause (Article I, Section 22, of the Alaska Constitution).

In Footnote No. 2 of the O'Neill opinion, which we are dealing with in this bulletin, the court also gives us other examples where a warrant may not be required prior to recording a conversation before arrest or detention; these are: (1) when it is supported by exigent circumstances, (2) when a person is advised that a recording is being made and chooses to speak, (3) when the case involves the detention or arrest of an accused such as O'Neill, and (4) when there are traffic accidents where police are called to investigate and interview witnesses.

The state Supreme Court may elect to review this case; if so, perhaps it will result in a "hard and fast rule" easier for the police officer to understand.