

ANCHORAGE POLICE DEPARTMENT



BUREAU BULLETIN



LEGAL BULLETIN NO. 16

October 9, 1978

PARTICIPANT MONITORING

Reference: State of Alaska
v.
Theodore Glass

Alaska Supreme Court
File No. 3565
583 P2d 872
Opinion No. 1724
September 15, 1978

FACTS:

Police officers, without first obtaining a warrant, used informants to monitor and record the conversations of suspects. These recordings were made by a "wire", which the informant was equipped with, and were transmitted to officers in a police vehicle where the actual recordings were made. Other conversations were recorded (see State v. Michael THORNTON) from telephone conversations. Consent was always obtained from the "informant participant"; however, the defendant was not aware that he was being recorded.

ISSUE:

Can the recordings made be used against the defendant at trial?

HELD: No.

REASONING:

1. The Fourth Amendment governs not only the seizure of tangible items but extends as well to the recording of oral statements, independent of trespass considerations.
2. One who engages in a private conversation is entitled to assume that his words will not be broadcast nor recorded absent his consent or a warrant. The evidence, therefore, is inadmissible on any consent theory.
3. Few people would ever speak freely if they knew that all of their words were being captured by machines for later release before an unknown and potentially hostile audience. No-one talks to a recorder as he talks to another person.

4. The evidence is excluded "not because it is unreliable but because the transcendent values preserved by constitutional guarantee are of greater societal moment than the use of that evidence to obtain a criminal conviction."

5. Alaska's Constitutional "privacy amendment" prohibits the secret electronic monitoring of conversations upon the mere consent of a participant.

6. Anyone communicating private matters to someone else exhibits an actual (subjective) expectation of privacy whether or not the listener is equipped with electronic devices.

7. The expectation that a person's conversations will not be secretly recorded nor broadcast should be recognized as reasonable.

8. In the absence of limited exceptions, a search warrant should be obtained from an impartial magistrate, based on probable cause to believe that criminal activity will be discovered, before electronic monitoring of conversations should be allowed. It may be that, as in other search and seizure contexts, the requirement of a warrant may be obviated under exigent circumstances.

9. EVEN WITHOUT A WARRANT THE LIVE TESTIMONY OF THE INFORMANT IS STILL ALLOWABLE.

NOTES:

Besides the "obvious problems," this opinion lacks clearly defined guidelines on what is required of the police. Attorneys and judges are still analyzing this decision in an attempt to interpret its full meaning. The Attorney General has asked the Supreme Court to reconsider its decision.

The affidavit should contain a description of the person and what criminal conversation is expected to be recorded. A statement, such as "any unknown parties to the conversation", might be added to include any unanticipated parties to the conversation. The court order is directed at the person, not the place of the conversation.

This may be a two-way street---presumably, the defense is not allowed to record police officers, informants nor witnesses without so advising them.

The court will also answer, in the near future, the question of video taping suspects. It is suggested that a suspect (O.M.V.I., etc.) be informed that he is being video taped. Remember, he does not have the right to refuse---he just has the right to be told he is on video tape.

ADD:

Although the court didn't clearly decide the issue, in a similar case the Supreme Court of Montana recently noted that "The participant could still wear a "bug" to keep the monitors informed of his safety, but (without a warrant) the monitors would not be able to use evidence obtained from use of the "bug"." State v. Brackman, _____ P. 2d _____ (1978).