



DPS TRAINING BULLETIN



LEGAL BULLETIN NO. 343

August 17, 2009

SURREPTITIOUS RECORDING OF INMATES TELEPHONE CALLS

Reference:

State of Alaska
v.
Ezial Avery

Alaska Court of Appeals
Opinion No. 2225
_____P.3d._____
July 17, 2009

FACTS:

Avery was in jail awaiting trial on charges that he kidnapped and sexually assaulted his wife. At that time, Avery was subject to a court order which prohibited him from contacting his wife. In spite of the court order, Avery telephoned his wife from jail on numerous occasions and tried to persuade her to not testify against him in front of the grand jury.

Alaska Statute 33.30.231(c) requires the Department of Corrections to monitor the phone calls of prisoners in whatever manner the Commissioner determines is appropriate. The statute specifically exempts telephone calls between an attorney and a prisoner, as well as calls between the office of the Ombudsman and a prisoner.

When the police learned that Avery had been contacting his wife, they obtained a warrant that authorized them to obtain and listen to the recordings of the telephone calls Avery had made to his wife. Based, in part, on these recorded telephone calls, Avery was indicted on twelve counts, including first degree tampering with a witness.

At the time the warrant was served, the Department of Corrections had a written policy (810.01) which declared that "calls of prisoners . . . who have not been convicted of a crime may only be monitored and recorded when authorized by court order." Although this policy was on the books at the time of the calls, the Department was no longer following the policy and correction officers later testified they did not know such a policy existed. This policy was revised in 2007 to provide that "all calls may be monitored and recorded at any time." Signs are, and were at the time of this case, posted above the prisoner telephones warning that "telephone calls may be monitored and recorded." In addition, each prisoner phone call is preceded by an auditory warning that "this phone call may be monitored and recorded."

Avery argued (successfully at a suppression hearing) that the recording of his conversations violated the U.S. Constitution (Fourth Amendment); the Alaska Constitution (Articles 14 & 22) and the written Department of Corrections policy.

The State of Alaska appealed the Superior Court Judge opinion to the Court of Appeals.

ISSUE:

Did the State violate Avery's rights under the United States and Alaska Constitutions when it recorded his telephone conversations without a warrant?

HELD: No - Avery had no actual subjective expectation of privacy and his expectation of privacy in this setting is one that our society is not prepared to recognize as reasonable.

REASONING:

1. In Juneau v. Quinto (see bulletin no. 83), the Alaska Supreme Court held that when a person "is aware, or reasonably should be aware, that he or she is speaking to a police officer who is in the process of executing either a lawful arrest or lawful investigative stop," society is not prepared to recognize as reasonable an expectation that the conversation will not be surreptitiously recorded.

2. In the present case, Avery was not speaking directly to law enforcement or corrections officials, but the circumstance clearly placed him on notice that his telephone conversations were not private.

3. AS 33.30.231(c) authorizes the monitoring of prisoners' telephone calls "to preserve the security and orderly administration of the correctional facility and to protect the public."

4. The violation of Department of Corrections policy 810.01 does not justify the application of the exclusionary rule.

NOTES:

Review of State v. Glass (bulletin no. 16) where Alaska Supreme Court ruled Alaska's Constitution "privacy amendment" (Article 22) prohibits the (warrantless) secret electronic monitoring of conversations upon the mere consent of a participant; Juneau v. Quinto (see bulletin no. 83), where there is no expectation of privacy in talking with a police officer and surreptitious recordings are permissible.

NOTE TO SUBSCRIBERS TO THE ALASKA LEGAL BRIEF MANUAL:

File Legal Bulletin No. 343 numerically under Section R of the manual.