



# LEGAL UPDATE

## AUDIO/VIDEO RECORDING OF UNDERCOVER DRUG BUY VIOLATED WIRETAP STATUTE

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Commonwealth v. Du, SJC decision (November 27, 2024).

### RELEVANT FACTS

In November 2019, Boston police conducted a drug investigation in which an undercover officer purchased \$100 worth of fentanyl on three separate occasions from the defendant. Just prior to each buy, the officer activated an application called “Callyo” on his department-issued cell phone. The application video and audio recorded the sales, which included at least a partial view of the defendant’s face in each of the recordings. The defendant was arrested after the third buy.

The defendant was charged with three counts of distribution of a class A substance as a subsequent offense. The defendant moved to suppress the recordings arguing that the recordings were made in violation of the wiretap statute. The motion judge excluded the audio recordings but ruled that the video portion was still admissible evidence and that the Commonwealth could play the video silently. The Appeals Court (in a decision covered in this year’s Legal Updates In-Service class) ruled that both the audio and video portions must be suppressed. The Commonwealth appealed.

### DISCUSSION

MGL c 272 § 99 makes it a criminal offense to willfully intercept a wire or oral communication. “Interception” means to “secretly hear, secretly record, or aid another to secretly hear or secretly record the contents of any wire or oral communication through the use of any intercepting device.” The statute also provides a process law enforcement officers must follow to obtain a warrant to allow them to intercept such communications. No warrant was sought in this case.

The Court found that the defendant was secretly recorded in violation of the statute. The issue then became what the appropriate remedy should be.

**For specific guidance on the application of this case or any law, please consult your supervisor or your department’s legal advisor.**

Subsection P of MGL c 272 § 99 allows criminal defendants to “move to suppress the contents of any intercepted wire or oral communication or evidence derived therefrom” when there is an unlawful interception. The audio portion of the recording clearly falls within the definition of “contents.” For this reason, the audio recording must be suppressed.

Whether the video portion of the recording fell within the definition of “contents” was a closer call. The statute defines “contents” broadly and includes “any information concerning the identity of the parties to the wire or oral communication or the existence, contents, substance, purport, or meaning of that communication.”

“We conclude that, where an unlawfully intercepted communication is an audio-visual recording showing one of the parties to the communication, the statute’s suppression remedy extends to the recording in its entirety, including the video footage.”

The court found that suppressing the video under these circumstances was consistent with the intent of the Legislature to impose a strong remedy for violations. Suppressing video that was recorded simultaneously with the “offending audio” “furthers the deterrence policy consistent with the breadth of the term “contents” in the wiretap act.”

“Permitting routine introduction in evidence of video footage captured as part of unlawful warrantless audio-visual recordings of oral communication - readily made using today’s ubiquitous cellular telephones – would undermine the deterrent effect the Legislature intended to safeguard the privacy of the Commonwealth’s residents.”

“We conclude that, where the police secretly make such a warrantless audio-visual recording of a defendant’s oral communication in violation of the wiretap act, the video footage must be suppressed together with the audio component.”

The next issue the court addressed was whether the undercover officer who participated in the drug buys would be able to testify about their observations. The court addressed this issue in Commonwealth v. Jarabek, 384 Mass. 293 (1981). In Jarabek, the court ruled that “if live testimony is not the product of an unauthorized interception but is independent of it, its suppression would go beyond the policy of deterring law enforcement officers from committing unauthorized interception.”

The court suppressed both the audio and video portions of the recordings. The undercover officer will be allowed to testify about the drug buys.

**PRACTICE TIP:** This case focused on what evidence in a criminal case would be suppressed for a violation of the wiretap statute. Officers should be mindful that the wiretap statute also provides civil and criminal penalties for violations of the wiretap statute. The best practice would be for officers to obtain a warrant, following the specific requirements laid out in MGL c 272 § 99 before committing a secret interception.

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