



LEGAL UPDATE

AUDIO AND VIDEO RECORDING OF UNDERCOVER PURCHASE OF NARCOTICS VIOLATED WIRETAP STATUTE

Commonwealth v. Du, Mass. Appeals Court (October 6, 2023).

RELEVANT FACTS

An undercover Boston police officer made three narcotics purchases from the defendant, each worth approximately \$100. Before each of the purchases, the officer began an audio-visual call with nearby surveillance officers using an application called Callyo. The defendant's image and voice were recorded by the app and transmitted without his knowledge or consent. Surveillance officers were able to watch and listen to what was happening in real time. The app also created recordings of these interactions which were stored on the cloud and later downloaded to a disc.

The defendant was charged with multiple counts of drug distribution as a subsequent offender. The defendant moved to suppress the recordings, arguing that they violated the Massachusetts wiretap statute. The judge found that the officers had violated the Massachusetts wiretap statute and suppressed the recording. This appeal followed.

DISCUSSION

MGL c 272 § 99, commonly referred to as the wiretap statute, requires that all parties consent to the interception of wire or oral communications. The term "Interception" includes secretly hearing or secretly recording the contents of any wire or oral communication through the use of an intercepting device without the prior consent of all parties. There is an exception in the statute for interceptions made by law enforcement officers in the course of investigating offenses designated in the statute which are committed in connection with organized crime and if the officer is a party to the communication.

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

Interceptions clearly took place in this case. Without the defendant's knowledge and consent, conversations he had with the undercover officer were transmitted via a cell phone application in real time to surveillance officers, were recorded and stored on the cloud, and later downloaded to a disc.

The Commonwealth argued that the interceptions in this case should not be suppressed because they fell within the law enforcement, one-party consent exception. The crime being investigated in this case was one of the crimes enumerated in the statute, specifically, an offense involving the possession or sale of narcotics. The Commonwealth; however, failed to establish a nexus to organized crime. There was no evidence that the defendant was acting with anyone else. In addition, the nature of the transactions, including the small amounts of drugs sold, did not give rise to a permissible inference that the drug sales here were part of organized crime. For these reasons, the law enforcement, one-party consent exception did not apply.

The defendant moved to suppress the contents of the interceptions under subsection P of MGL c 272 § 99 which allows a criminal defendant to move to suppress the contents of interceptions if the communication was unlawfully intercepted. The defendant did not argue that the recording violated his constitutionally protected reasonable expectation of privacy. The analysis of a violation of the wiretap statute is completely separate from Fourth Amendment and art. 14 considerations. Because the defendant was requesting suppression under the language of the wiretap statute and not for a Constitutional violation, he did not need to establish that he had a reasonable expectation of privacy in the communication.

Based upon the facts and circumstances of this case, the court found that the interceptions violated the wiretap statute and the recordings were suppressed. The undercover officer will still be able to testify about his observations and what was said to him during the interactions with the defendant.

PRACTICE TIP

The wiretap statute does allow criminal and civil culpability for a violation of the statute. The court noted that officers can insulate themselves from such liability by obtaining a warrant.

"In addition, the statute protects investigative and law enforcement officers from criminal and civil liability if they violate the statute "for the purposes of ensuring [officer] safety" while operating undercover. In such circumstances, although the officers will be insulated from liability, the contents of the unlawful interceptions are nonetheless excluded from evidence. In sum, the statute reflects the Legislature's careful balancing of competing concerns." (citations omitted.)

The court also made the following recommendation in a footnote:

"When police wish to use a novel surveillance tool such as Callyo, we encourage them to seek a search warrant beforehand. Because our statutes and Declaration of Rights may be more protective of individual privacy rights than similar laws in some other states, the police should not simply rely on the fact that the tool has been used in other jurisdictions."

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