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THE ILLINOIS EAVESDROPPING STATUTE: CONSTITUTIONAL RIGHTS VERSUS FELONY CHARGES

by CORINNE KOOPMAN

In July 2010, Chicago police responded to reports of domestic violence at the home of Tiawanda Moore.¹ The investigation took an unthinkable turn when, according to Moore, an officer groped her breast and gave her his phone number.² In response to this incident, Moore attempted to file a complaint with the Chicago Police Department.³ However, officers there tried to dissuade her from reporting the incident.⁴

At that moment, Moore hit the “record” button on her Blackberry.⁵

101

When the police discovered that Moore was recording them, they arrested her and kept her in jail for two weeks.⁶ Though a victim of sexual assault, Illinois law dictates that Moore is a criminal.⁷

THE ILLINOIS EAVESDROPPING STATUTE: STATEWIDE PROBLEMS AND CHALLENGES

Along with Oregon and Massachusetts, Illinois has the strictest eavesdropping laws in the nation.⁸ According to the Illinois Eavesdropping Statute (“the Statute”), eavesdropping on a conversation “between any law enforcement officer. . .while in the performance of his or her official duties. . .is a Class I Felony,” punishable by up to 15 years in prison.⁹

A jury ultimately acquitted Moore.¹⁰ With such a harsh statute in place, however, cases like Moore’s are somewhat commonplace throughout the state.

For example, Chicago artist Christopher Drew was arrested in 2009 for selling art on the street without a permit.¹¹ Drew was ultimately charged with eavesdropping after he recorded his arrest with a recording device in his pocket.¹²

And in Crawford County, Michael Allison was arrested for bringing a recording device to his trial for other charges.¹³ The judge invoked the Statute and had him arrested him for “violating her privacy.”¹⁴ Allison faced five counts of eavesdropping after recordings of his initial arrest were also found on the device.¹⁵

Likewise, Tyrone Gillet began recording a video when he and a friend saw officers arresting another individual.¹⁶ The police politely asked his friend, who is white, to stop recording, while they assaulted Gillet, who is black.¹⁷ Gillet is now suing the City of Chicago, seeking to introduce his video as evidence, despite the fact that the Statute makes the recording illegal.¹⁸

SUPPORT FOR THE STATUTE

Despite some degree of outrage regarding these cases, there is still support for the Statute, rooted chiefly in the right to privacy. In a hearing before the Seventh Circuit Court of Appeals, Judge Richard Posner articulated these con-

cerns about eavesdropping on police, stating, "Yes, it's a bad thing. There is such a thing as privacy."¹⁹

Some police officers also believe the law allows them to do their job safely and effectively. "Someone coming up shoving a camera in your face. . . I can see how that would endanger lives," says Sheriff Bennie Vick of Williamson County, Illinois.²⁰ In spite of this support, others present numerous reasons why it should be repealed.

CHALLENGES TO THE LAW

The American Civil Liberties Union ("ACLU") of Illinois has challenged the law, filing a suit against Cook County State's Attorney Anita Alvarez.²¹ The ACLU claims that the law unconstitutionally burdens the First Amendment right to gather, receive and record information.²² Further, the ACLU asserts that the Statute does not advance privacy interests or the interests of law enforcement enough to warrant a violation of First Amendment rights.²³

Beyond First Amendment issues, the Statute faces other challenges. Joshua Kutnick, the attorney for Christopher Drew, argues that the Statute could also criminalize innocent conduct.²⁴ Kutnick provides the example of a lost motorist who asks an officer for directions and records the conversation.²⁵ Despite innocent intention, this motorist has committed a Class I Felony.²⁶

CURBING POLICE MISCONDUCT

Perhaps the most compelling reason for repeal of the Statute is that it may place a critical check on police misconduct. Torreya Hamilton, Tyrone Gillet's attorney, suggests that Illinois residents need to have the option to "police the police" and document any potentially insidious motives for how the police treat citizens.²⁷

Flint Taylor, an attorney instrumental in the conviction of Chicago police torture ringleader Officer Jon Burge, agrees.²⁸ Taylor cites the fact that cameras mounted on squad cars already videotape officers and have been helpful in catching assaults on everyday citizens.²⁹ According to Taylor, audio recordings would further hold officers accountable for their actions and prevent future abuse.³⁰

LOCAL OPINION CALLS FOR CHANGE

Anecdotal evidence indicates that the people of Illinois may want the Statute repealed. One of the jurors that acquitted Tiawanda Moore called the trial “a waste of time.”³¹ The jurors added, “If what those two investigators were doing wasn’t criminal, we felt it bordered on the criminal, and she had a right to record it.”³²

Even Chicago Police Superintendent Garry McCarthy suggests that the Statute should be repealed.³³ McCarthy states that the Statute “obstruct[s] transparency,” creating an unclear account of events by prohibiting audio recording.³⁴ McCarthy also suggests that allowing recordings would help benefit the police by preventing police brutality suits with concrete recordings of good police conduct.³⁵

WHAT COMES NEXT?

In March 2012, House Bill 3944, which would have made it illegal to record police in public, failed its third reading in the Illinois House of Representatives, essentially “killing” the bill.³⁶ Despite this failure in the House, the Illinois Eavesdropping Statute may still be on its last leg.³⁷

Mere weeks after this bill failed, Chicago corporate legal counsel announced that police would not enforce the Statute during the May 2012 NATO summit taking place in the city.³⁸ This is considered the city’s first acknowledgment of the “potential legal pitfalls” of trying to prevent recordings of police conduct and is viewed as a “blow” to the Statute.³⁹

Moreover, in the weeks and months preceding the publication of this article, two state judges found the Statute unconstitutional. A Crawford County judge in the case of Michael Allison found that the Statute violated the First Amendment, as well as the Due Process Clause.⁴⁰ The judge then added, “A statute intended to prevent unwarranted intrusions into a citizen’s privacy cannot be used as a shield for public officials who cannot assert a comparable right of privacy in their public duties.”⁴¹

In the case of Christopher Drew, Cook County Judge Stanley Stacks ruled that the Statute is too broad and criminalizes “wholly innocent conduct.”⁴²

According to the ACLU, these decisions have given those opposing the Statute momentum, but total clarity on the issue remains elusive.⁴³

In early May 2012, the Seventh Circuit Court of Appeals issued its ruling in the case of *ACLU v. Alvarez*, finding that the Illinois Eavesdropping Statute “likely violates” the First Amendment, and issuing a preliminary injunction banning enforcement of the Statute.⁴⁴ The Court found State’s Attorney Alvarez’s argument for privacy concerns unconvincing, holding that privacy interests are not implicated when police officers perform their duties in public.⁴⁵

As of the publication of this article, there is no word on plans to appeal the ruling. For now, only time will tell how this battle between constitutional rights and felony charges plays out.

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Loyola Public Interest Law Reporter

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