Jerry Hill
State Attorney

LEGAL ADVISOR

OFFICE OF THE STATE ATTORNEY TENTH JUDICIAL CIRCUIT

January 2016

INSIDE

THE EVIDENTIARY VALUE OF THE CONTROLLED CALL

By: Ashley Krieger

From the Courts

Office Locations

Bartow
P.O. Box 9000, Drawer SA
Bartow, FL 33831-9000
Phone: (863)-534-4800
Fax: (863)-534-4945

Child Support Enforcement
215 N. Floral Avenue
Bartow, FL 33830
Phone: (863)-519-4744
Fax: (863)-519-4759

Lakeland
930 E. Parker Street, Suite 238
Lakeland, FL, 33801
Phone: (863)-802-6240
Fax: (863)-802-6233

Sebring
411 South Eucalyptus
Sebring, FL 33870
Phone: (863)-402-6549
Fax: (863)-402-6563

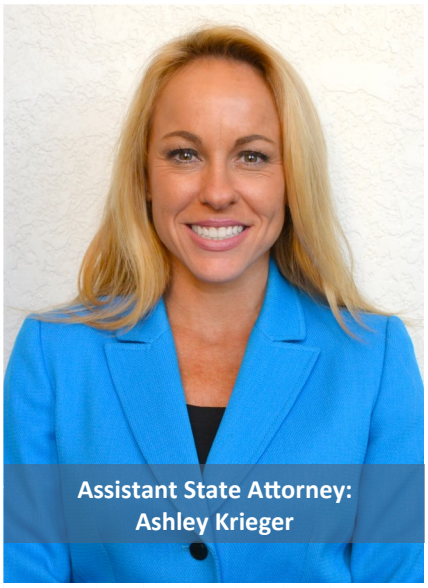
Wauchula
124 South 9th Avenue
Wauchula, FL 33837
Phone: (863)-773-6613
Fax: (863)-773-0115

Winter Haven
Gill Jones Plaza
3425 Lake Alfred Rd. 9
Winter Haven, FL 33881
Phone: (863)-401-2477
Fax: (863)-401-2483

THE EVIDENTIARY VALUE OF THE CONTROLLED CALL

Assistant State Attorney: Ashley Krieger

As you probably already know, pursuant to Florida Statute § 934.03, it is illegal for citizens to intercept and /or record any wire, oral or electronic communication. In fact, the punishment for this action ranges from a first degree misdemeanor to a third degree felony depending on the intent, purpose, and frequency with which it was done. Not only is it illegal, the contents and any evidence derived from it are inadmissible at trial. Fortunately, this rule does not apply when law enforcement is a party to that communication. We are very fortunate for this statute in Florida. Not all law enforcement agencies in the U.S. get this investigative advantage. This statute allows for law enforcement to conduct the controlled call which can be the most important piece of evidence in a case. Sadly, this tool is widely underused in our circuit.



F.S. § 943.03 APPLIED TO CONDUCTING A CONTROLLED CALL

[It is lawful under this section and ss. 934.04-934.09 for an investigative or law enforcement officer or a person acting under the direction of law enforcement officer to intercept a wire, oral, or electronic communication when such person is a party to the communication or one of the parties to the communication has given prior consent to such interception and the purpose of such interception is to obtain evidence of a criminal act.]

The statute provides that if law enforcement is a party to the communication, the communication is not only legal but admissible at trial! This also extends to one party acting under the direction of law enforcement. For example, if you are investigating **Suspect A** for drug trafficking and **Witness B** cooperates and agrees to call **Suspect A** and incriminate him or her; the recording is admissible. Again this is only legal and admissible if under the direction of law enforcement. That also means that there is no legal issue with law enforcement directing the cooperative witness on what to say during the call.

ISSUES TO BE AWARE OF: THE HUSBAND-WIFE PRIVILEGE.

Some issues that frequently come up in investigations regard the parties participating in the controlled phone call. The controlled call is frequently used in crimes against children cases. Specifically, the controlled call is used in child molestation and abuse cases. Sometimes the child victim calls the suspect. This scenario should not present any issue once you understand the law. But, what if the mother of that child, the suspect's wife, is the other participant to the call?

The first instinct for most of us in the legal and law enforcement community is to think of the ***husband-wife*** privilege. This really isn't a law enforcement problem because the prosecutor will handle this evidentiary issue later on. However, you should be aware of this law and its exceptions. This privilege provides that parties to a valid marriage may refuse to disclose and prevent his or her spouse from disclosing confidential communications between the spouses made ***during*** the marriage. Essentially, if an intentionally confidential conversation takes place during the marriage between the spouses then one or both of the spouses can invoke the privilege. Ultimately, they

would not be compelled to testify regarding the communication and/or they would be prevented from testifying to the communication.

This privilege would apply in a controlled call between spouses because the suspect has a reasonable expectation of privacy while speaking with their spouse. However, there are limited circumstances where this privilege does not apply and you should be aware of them.

1. If the suspect is accused of a crime against the person or property of his or her spouse, the privilege does not apply.
2. There is also no husband-wife privilege if the crime charged is against the child of ***either*** spouse.

That means that if **Spouse A** is the victim of the crime charged or if the crime is charged against the child of **Spouse A** and/or **Suspect**; then **Spouse A's** controlled call to suspect is admissible at trial. It is obvious that there are so many investigations beyond child crimes cases where the controlled call between spouses can still be used. I hope this knowledge clears up any hesitation to use this investigative technique.

THE RECENT EXCEPTION TO F.S. § 934.03.

[It is lawful under this section and ss. 934.04-934.09 for a child under 18 years of age to intercept and record an oral communication if the child is a party to the communication and has reasonable grounds to believe that recording the communication will capture a statement by another party to the communication that the other party intends to commit, is committing, or has committed an unlawful sexual act or an unlawful act of physical force or violence against the child]

The statute recently added this exception and we should be very grateful. Again, this will be in child crimes cases. But, it is important for all law enforcement to know that surreptitious recordings taken by these brave children will be admissible!

In closing, I can't emphasize enough how important and useful the controlled call can be. First of all, you are getting some of the most untainted statements from the suspect. These statements are not polluted by the suspect trying to minimize to law enforcement. Remember, they are on the phone with someone they trust. Although they may minimize to that person as well, they are more likely to incriminate themselves to a friend or family member. Also, these calls are rarely subject to any motion to suppress because there is no ***Miranda*** requirement or any possibility that the statement wasn't voluntary. Finally, I hope law enforcement doesn't hesitate to attempt these calls because there is some line of thinking that the suspect won't confess. Any statement by the suspect can be useful later. The inconsistencies can be more compelling than a confession in many cases. Inconsistencies can also be used to refute the suspect's possible testimony later. Even the slight pause or hesitance to answer questions can be powerful. A denial can be extremely useful as well. Finally, juries love them! I hope this leaves you with some new found information and inspiration to use this functional tactic. Good luck and please stay safe.

FROM THE COURTS...

The Legal Advisor is published by:

Office of the State Attorney,
10th Judicial Circuit
P.O. Box 9000 Drawer SA
Bartow, FL, 33831

– The Legal Advisor Staff –

Jerry Hill, Publisher
Email: jhill@sao10.com

Brian Haas, Managing Editor
Email: bhaas@sao10.com

Nicole Orr, Content Manager
Email: norr@sao10.com

Steven Titus, Graphic Design
Email: stitus@sao10.com

www.SA010.com

SEARCH AND SEIZURE -- WARRANT -- PROBABLE CAUSE

The defendant was charged with possession of methamphetamine and possession of drug paraphernalia. The case began with a search warrant obtained by law enforcement for the defendant's residence. The search warrant was based upon an anonymous tip received through Crime Stoppers that a white female was selling methamphetamine from a particular residence. The defendant challenged the search warrant in a motion to suppress; alleging that the affidavit was insufficient to establish probable cause to issue the search warrant and that the good faith exception was inapplicable. At the hearing on the motion to suppress, the detective who prepared the affidavit was asked "What did you corroborate to put a connection, a nexus between the tip and actually drug sales going on at the location?" The detective responded, "Nothing." The trial court denied the motion to suppress, finding that there was probable cause in the affidavit and there was no evidence that the detective acted in willful disregard of the truth. On appeal, the Second District reversed the trial court, holding that nothing in the current investigation showed evidence of current drug sales in the residence. The DCA also rejected the state's argument that the detective was acting in good faith and that the good faith exception applies. Additionally, the court concluded that the affidavit showed no nexus between the object of the search and the residence. *Sanchez v. State*, 39 Fla. L. Weekly D1514e (Fla. July 23, 2014).

DRIVING UNDER THE INFLUENCE – EVIDENCE

The defendant was charged with DUI which resulted in an accident that caused injury to the defendant. The defendant refused to take a breath, blood or urine test. The state obtained his medical blood draw of .208. The defendant filed a motion to suppress arguing that having refused to submit to a legal blood test and having suffered the consequences of that decision, prosecutors should be prevented from introducing his medical blood into evidence. The defendant asserted that allowing the prosecution to do so would violate double jeopardy. The trial court denied the motion to suppress. On appeal, the Second District affirmed the trial court's denial of the motion to suppress. The court discussed three county court cases which the defendant relied upon to support his argument. The court distinguished and disagreed with the cases in affirmed the trial court. *Laws v. State*, 39 Fla. L. Weekly D1775a (Fla. 2d DCA August 22, 2014).