Tenth Circuit

Legal Advisor

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Along with the electronic communication age came a major pain in the neck for police officers -- the obscene or harassing phone call.

Frank Pernas, SAO misdemeanor intake chief, takes you step-by-step through the complex process for handling this complaint in May Legal Advisor.

Investigative Procedures

By Frank Pernas

Obscene or harassing telephone calls

One of the most frequent complaints field police officers are called upon to respond to and investigate is that of the obscene or harassing phone call.

The Statute

Not all calls are criminal conduct that would fall within F. S. 365.16. The legislature has created distinct areas in its subsections to cover what is a proscribed act or course of conduct that would protect a person's right to privacy and also a person's right of free speech.

F.S. 365.16 contains four subsections that describe the type of calls and conduct that would be a misdemeanor of the second degree.

Section (1)(a) requires:

1. A telephone call to a location at which the person receiving the call has a reasonable expectation of privacy.

2. During such a call a comment, request, suggestion, or proposal is made that is obscene, lewd, lascivious, filthy, vulgar, or indecent; and

3. By such call or language the caller intends to offend, annoy, abuse, threaten, or harass any person at the number called.

It is important to keep in mind when weighing the facts in each case whether the call or caller's purpose for such call served any informative or legitimate communicative function.

The caller may have a legitimate purpose in calling and may not exercise good taste or manners in choosing the words to communicate his or her business to the receiver of such call. This may be an unpleasant call but not necessarily criminal.

Remember that these cases are not like trespass cases where the owner may give notice not to come onto his property. The fact that someone has been told not to call does not make future phone calls automatically harassing. There must be more to prove the intent to annoy, harass, offend, abuse or threaten.

Section (1)(b) requires:

1. A telephone call, (one or more)

2. Whether or not conversation ensues

3. Without disclosing his identity, and

4. Intended to annoy, abuse, threaten, or harass any person at the number called.

Even though the caller has not disclosed his identity, it is absolutely essential that the caller's identity be established by evidence or proof in order to charge a crime. It may be by voice identification, admission, witness to the call, or some other proof.

Ownership or access to a particular phone registered at the number that has been traced is never enough. Identity of the phone used can be and is important proof in these cases but alone it it not sufficient to support prosecution.

Section (1)(c) requires:

1. Make or cause the telephone of another to ring repeatedly or continuously

2. With intent to harass any person at the number called.

Generally, identity is the principal problem or issue in this type call. Every effort should be made to contact and interview the subject suspected of such call in hopes of obtaining some admission or evidence to help establish the identity of the caller.

Section (1)(d) requires:

1. Repeated telephone calls

(must be more than one call)

2. During which conversation ensues.

3. Solely to harass.

Identity is usually not a problem here but judging by the time of day, frequency, and stated purpose for the calls, they may not be criminal (such as the unwanted or uninvited calls from a former boyfriend). Again, there must be proof of the intent to solely harass.

Important points in making the case

1. The venue or jurisdiction for prosecution lies where the call is received.

2. Joint ownership or access of a telephone is like constructive possession of drugs or contraband, the essential elements of knowledge and control must be established by proof and not inferred, so that the actual identity of the caller must be established by proof in these cases and not inferred.

3. Interview of the subject suspected of making such calls is important to establish both identity and/or whether an informative or legitimate communicative function or purpose exists for the calls.

4. Remember that if you conduct a telephone interview you may not be able to use that interview later unless you can positively identify the subject by voice.

FROM THE COURTS

Edited by Chip Thullbery

Facts justified a frisk

The defendant was charged with possession of cocaine and paraphernalia and filed a motion to suppress.

The facts on the motion showed that he was a passenger in an automobile which was stopped for having a broken headlight.

While an officer talked to the driver, another officer acting as a backup went around to the passenger side of the vehicle and engaged the defendant in conversation.

During this conversation, the officer noticed that the defendant was looking around constantly and acting very nervously.

The officer then asked the defendant what the driver's name was and the defendant became very defensive.

At that point, as the defendant started to put his hand inside his pockets, the officer noticed a bulge in one of them.

The officer ordered the defendant out of the car and patted him down.

He felt a hard object and fearing that it was a weapon pulled it out of the pocket. It turned out to be a long metal crack pipe.

The trial court granted the motion to suppress but on appeal, the Fourth District reversed, holding that the circumstances known to the officer justified his decision to frisk the defendant.

State v. Doyle, 18 FLW D797 (Fla. 4th DCA Mar. 24, 1993).

Facts did not justify a frisk

The defendant was charged with possession of cocaine and filed a motion to suppress.

The evidence on the motion showed that while an officer was on routine patrol he was given information by a reliable confidential informant to the effect that a nearby car had a large amount of cocaine in it.

Based on this tip, the officer stopped the car and conducted a patdown search of the defendant, who was the driver.

The officer felt a hard object in the defendant's crotch area and removed it. The object contained cocaine.

The trial court denied the motion to suppress, and the defendant was convicted as charged.

On appeal, the Third District reversed, holding that while the officer had sufficient reason to stop the defendant, he did not have probable cause to frisk him.

Alexander v. State, 18 FLW D845 (Fla. 3rd DCA, Mar. 30, 1993).

Citizen encounter was not an illegal detention

The defendant was charged with theft and filed a motion to suppress. The evidence on the motion showed that an officer on routine patrol observed the defendant riding a bicycle with another bicycle in tow.

The officer pulled up alongside the defendant and asked if he would mind stopping and talking to her.

The defendant complied, and in response to the officer's inquiry, he explained that the second bicycle belonged to a friend.

(See "encounter" next page)

"encounter"

The officer then asked if she could look at the city license numbers on the bicycle, and the defendant did not object.

A radio check of the numbers confirmed that the bicycle was stolen, and the officer arrested the defendant.

The trial court granted the motion to suppress, ruling that the officer did not have a reasonable suspicion of criminal activity which would justify the stop of the defendant.

On appeal, the Second District reversed, holding that the conversation between the officer and the defendant was not a detention but rather a citizen encounter which did not require the officer to have a reasonable suspicion of criminal activity.

State v. Jenkins, 18 FLW D879 (Fla. 2nd DCA Mar. 31, 1993).

Cocaine residue on dollar bill did not justify possession conviction

The defendant was charged with possession of cocaine.

At his trial, the evidence showed that he was observed by an officer leaning into the window of a parked car speaking to an occupant.

As the officer approached, the defendant dropped a crumpled one dollar bill which the officer picked up. The defendant then fled.

Subsequent laboratory tests on the dollar bill showed that there was a microscopic amount of cocaine.

The defendant was convicted as charged and sentenced to six years in prison.

On appeal, the Third District reversed, holding that the mere presence of trace amounts of

(See "residue" next page)

"residue"

cocaine on a common object or implement in possession of an accused where the object is designed and widely used for other legal purposes is insufficient to sustain a conviction for possession of cocaine.

Lord v. State, 19 FLW D893 (Fla. 3rd DCA Apr. 6, 1993).

Facts only supported a second degree murder conviction

The defendant was charged with first degree murder, two counts of attempted first degree murder, and shooting into an occupied vehicle.

At his trial, the evidence showed that the defendant shot into a vehicle with the intent of killing the driver.

He was successful in this. In addition, he wounded one of two passengers.

He was convicted as charged.

On appeal, the Fourth District affirmed the first degree murder conviction, but reduced the attempted first degree murder convictions to attempted second degree murder, holding that the evidence did not establish that the defendant had the intent to kill the two passengers.

Shellman v. State, 18 FLW D 968 (Fla. 4th DCA Apr. 14, 1993).

Officer's testimony showed defendant had intent to sell

The defendant was charged with possession of cocaine with intent to sell.

The evidence at his trial showed that he was observed attempting to hide thirteen rocks of crack cocaine which were individually wrapped in clear plastic baggies. An experienced narcotics officer then testified as an expert that the

(See "intent" next page)

"intent"

quantity of cocaine involved indicated that it was for sale.

The defendant was convicted as charged and on appeal, the Third District affirmed, holding that the evidence was sufficient to justify the conviction.

Bruce v. State, 18 FLW D742 (Fla. 3rd DCA Mar. 16, 1993).

Sale/Purchase Near Public Housing Facility Statute unconstitutional

In these Polk County cases, the defendants were charged with sale or purchase of cocaine within 1,000 feet of a public housing facility in violation of section 893.13(1)(i), Florida Statutes.

They filed motions to dismiss, challenging the constitutionality of the statute.

The trial court granted the motions to dismiss, and on appeal, the Second District affirmed, holding that section 893(1)(i) is unconstitutionally vague.

State v. Thomas, 18 FLW D1067 (Fla. 2nd DCA Apr. 21, 1993).

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