TENTH CIRCUIT

Legal Advisor

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IS SURREPTITIOUS TAPING OF SUSPECTS PROPER?

BY JOHN AGUERO

This question has been asked by law enforcement and addressed by prosecutors and courts for many years. There is not an easy answer. The primary concern of the courts has been whether the suspect or suspects who are being video or audio taped enjoy an "expectation of privacy" in the place where they are being taped. There are also ancillary issues that arise such as marital privilege and whether the State has introduced someone into the process who may be seen as an "agent" of the State.

In order for a Fourth Amendment right to privacy to exist, the person must have a subjective expectation of privacy, and that expectation must be one that society recognizes as reasonable. *State v. Smith*, 641 So.2d 849,851 (Fla. 1994).

The easiest way to try to get a handle on this question is by using examples. In the *Bedoya v. State*, 779 So.2d 574 (Fla.App.5 Dist. 2001), Mr. Bedoya was taken to the police station and questioned concerning the murder of Shauna Card. Unbeknownst to Mr. Bedoya, the police videotaped and audio taped his conversation with the detectives. He tried to suppress his statement on the grounds that he did not know he was being taped. The court held that an individual does not have a reasonable expectation of privacy in a police interview room under these circumstances. Keep in mind though, he was being interviewed by detectives.

It would be a completely different situation if a suspect was in custody and asked to talk to a wife, girlfriend, or mother and the police provided that suspect with a room in the police station where they were told they could talk to each other privately. If a conversation such as this were surreptitiously taped, the statement would be suppressed because the suspect's expectation of privacy would be reasonable. This was the situation in *State v. Calhoun*, 479 So.2d 241 (Fla.App. 4 Dist. 1985), Mr. Calhoun and his brother were both inmates in the jail. David Calhoun was suspected of a new crime. When police asked to question him he stated that he first wanted to talk to his brother. The police brought his brother to see David and provided them with a "private" room where they could talk. The police videotaped their conversation without the knowledge of either brother. The statement was suppressed by the trial court and the appellate court upheld the suppression.

Probably the most common example of a situation where taping has been upheld is the classic one of putting

two suspects in the back of a patrol car and leaving them alone to talk to each other. Taping in this situation has been upheld repeatedly because there is no reasonable expectation of privacy in the back of a police car. This was the case in *State v. Smith*, 641 So.2d 849 (Fla. 1994). Mr. Smith was the passenger in a car stopped by police. Although he and the driver were free to leave, the driver consented to a search of his car. For safety purposes the officer placed both Smith and the driver in the back of his patrol car so that he could do the search. While in the back of the car the two discussed whether officer would find a package of cocaine that was in the car.

If you are going to tape a suspect's conversation with anyone except a police officer who the suspect knows is a police officer, it would be best to contact someone in the State Attorney's Office prior to the taping. When you do, be sure to give the Assistant State Attorney ***all the facts*** involved in our particular situation. Remember, the requirement for the suspect to prevail in his suppression hearing is that he or she has a subjective expectation privacy, and that his or her expectation is one that society recognizes as reasonable.

NOT ALL PRESCRIPTION DRUGS ARE CONTROLLED SUBSTANCES

BY MIKE CUSICK

There are two criminal violations regarding prescription drugs. Florida Statute 893.13 criminalizes the possession and sale of controlled substances. It also criminalizes obtaining or attempting to obtain a controlled substance by fraud or by a forged prescription. Violations under this statute are felonies. There are four schedules in F.S. 893.03 which classify certain drugs based upon their level of abuse and usefulness for medical treatment. Each drug is listed by its chemical name. Manufactured controlled substances are quite often identified by their brand name. Therefore it is important that the investigating officer takes the time to determine what the chemical name is for the brand name drug taken into evidence. The following are examples of brand name drugs and their chemical counterparts: Darvon/dextropropoxyphene, Dilaudid/hydromorphone, Tylenol #3/codeine and Xanax/ alprazolam. If you do not know whether an item is a controlled substance, contact a doctor or a pharmacist to assist you. Please specify the name of the controlled substance in the charge. For example, instead of titling the charge, "Possession of a Controlled Substance," call it, "Possession of Hydromorphone."

Most prescription drugs are not controlled substances. Sometimes we see an officer charging a defendant with possessing a controlled substance when the drug is merely a prescription drug. That is why it is important to check with a doctor or pharmacist to verify that the drug is actually a controlled substance.

F.S. 499.005 criminalizes the obtaining or attempting to obtain a prescription drug by fraud or by a forged prescription. F.S. 499.02 criminalizes the possession of a prescription drug without a prescription. A violation under these statutes is a second degree misdemeanor. Please remember that it is not a criminal violation for an individual to possess a prescription drug, prescribed to that individual, which is not in its original container. There is no law requiring that prescription drugs be kept in their original containers. Therefore, in order to show that the defendant is possessing a prescription drug without a prescription, it will be necessary to get an admission from the defendant that the defendant does not have a prescription. With the significant number of pharmacies and doctors that exist, it would be impossible to prove that the defendant did not have a prescription for the drug.

**********FROM THE COURTS**********

OXYCODONE WEIGHT IS MEASURED BY THE TABLET

The defendant was charged with trafficking in oxycodone and filed a motion to dismiss in which she asserted that the weight of the oxycodone contained in the tablets she possessed did not reach trafficking weight. The trial court denied her motion, and she pled to the lesser included offense of attempted trafficking. On appeal, the Supreme Court affirmed, holding that weight for trafficking in oxycodone is determined by the weight of the tablets containing the oxycodone. *State v. Travis*, 27 FLW S70 (Fla. Jan. 17, 2002).

IN THE RIGHT CIRCUMSTANCES BOTH CARJACKING AND ROBBERY CAN BE CHARGED

The defendant was charged with robbery and carjacking. At his trial, the evidence established that he and a co-defendant followed the victim home. While the co-defendant pointed a gun at the victim, the defendant took the victim's wallet and car keys. He and the co-defendant then left in the victim's car. He was convicted of carjacking for the taking of the vehicle and robbery for the taking of the wallet. On appeal, the Supreme Court affirmed, holding that where items in addition to a car are taken, double jeopardy does not prevent convictions for both robbery and carjacking. *Cruller v. State*, 27 FLW S85 (Jan. 24, 2002).

CHASE IN A MARKED CAR NECESSARY FOR FELONY FLEEING

In this Polk County case, the defendant was charged with, among other things, felony fleeing to elude. At his trial, an officer testified that he observed the defendant stopped at an intersection in a car with a cracked windshield. When traffic began to move, he followed the defendant and activated his overhead lights, air horn, and siren. However, the defendant traveled more than a mile before stopping. The defendant was convicted as charged, but on appeal, the Second District reversed, holding that the defendant could not be convicted of felony fleeing because the officer had not testified that his patrol car was marked with agency insignia. *Jackson v. State*, 27 FLW D213 (Fla. 2d DCA (Jan. 18, 2002).

SEARCH OF STUDENTS INITIATED BY SCHOOL EMPLOYEE CAN BE INITIATED ON REASONABLE SUSPICION

The defendant, a juvenile, was charged with possession of marijuana and filed a motion to suppress. The facts on which the motion was based were that an assistant principal received information that marijuana had been found on the floor in a particular classroom. She called upon the school resource officer, and together they confronted the class. They were told by one student that the marijuana had fallen from the defendant's pocket. The officer then searched the defendant and found additional marijuana. The trial court granted the motion to suppress, ruling that although the officer had a reasonable suspicion of criminal activity on the part of the defendant, he did not have probable cause to search. On appeal, the Second District reversed, holding that because the investigation was initiated by a school employee, the officer only needed a reasonable suspicion to justify the search. *State v. N.G.B.*, 27 FLW D249 (Fla. 2d DCA Jan.23, 2002).

STOP OF PERSON WHO FLED FROM OFFICERS IN A KNOWN DRUG AREA SUSTAINED

The defendant was charged with possession of cocaine and filed a motion to suppress evidence. The facts on which the motion was based were that officers saw the defendant standing in an area known for narcotics sales at 11:30 pm. As they approached him, he ran from them. When they caught up with him, he threw a piece of paper on the ground which they retrieved. It contained cocaine. The trial court denied the motion to suppress, and the defendant was convicted as charged. On appeal, the Second District affirmed, holding that under new standards announced by the United States Supreme Court, the officers had a reasonable suspicion of criminal activity on the part of the defendant based on the totality of the circumstances of which they were aware and thus were justified in stopping him. *McGee v. State*, 27 FLW D337 (Fla. 2d DCA Feb. 6, 2002).

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