

IN THE COUNTY COURT OF  
THE EIGHTEENTH JUDICIAL CIRCUIT  
IN AND FOR BREVARD COUNTY  
STATE OF FLORIDA

CASE NO. 05-2014-TR-27348-AXXX-XX

STATE OF FLORIDA,

Plaintiff,

vs.

MICHAEL BROSS,

Defendant.

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ORDER

This cause came to be heard before the Court on March 19, 2015 the Defendant's *Motion to Suppress Recorded Oral Communications*. Thomas J. Moffett, Jr., Esq. appeared on behalf of the Department of Highway Safety and Motor Vehicles, Florida Highway Patrol and A. Michael Bross, Esq. represented himself. The Court having heard and evaluated the arguments of counsel, reviewed the relevant statutory and case law, considered and adopted the facts as set forth in the State of Florida's Memorandum of Law and being otherwise advised in the premises, finds as follows:

The Florida Security of Communications Law (Florida Statute 934.01 et seq.) generally prohibits recording of conversations without the participants' knowledge and consent. Florida Statute 934.03 (2)(c) creates an exception to this rule:

It is lawful under ss. 934.03 for an investigative or law enforcement officer . . . to intercept a[n] . . . oral . . . communication when such a 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 gravamen of the Defense's argument is that Trooper Behrenshouser's unconsented recording of his conversation with Mr. Bross did not fall under this exception because it was done in the course of a traffic infraction investigation which was not criminal in nature. The Defense interprets the statutory exception to require that the recording take place only during the course of a criminal investigation regardless of whether the recording party is a law enforcement officer or a civilian who has given consent to a law enforcement officer to record their conversation with another party. In support of this proposition, the Defense relies on *State v. Sobel*, 743 So. 2d 38 (Fla. 5<sup>th</sup> DCA 1999) and *Atkins v. State*, 930 So. 2d 678 (Fla. 4<sup>th</sup> DCA 2006). Although *Sobel* and *Atkins* do confirm that where a civilian is one of the parties to the recorded conversation the intent must be to obtain criminal evidence, neither opinion addresses the situation in this case where one of the parties is a law enforcement officer. Therefore, while persuasive, the cases cited by Defense are distinguishable and do not completely answer the statutory interpretation question raised in this motion.

Conversely, the State's position is that the statute's criminal purpose requirement limits only the consenting citizen's ability to record their conversation with another citizen but does not restrict a law enforcement officer from recording any conversation - criminal or non-criminal - with a citizen. The State bases their argument on what they view as the plain language of the statute. Unlike the State's position, the court finds the statute unclear in this regard, and there does not appear to be any case law directly on point to clarify the statutory language. In an effort to understand the legislative intent in creating this exception, the court reviewed the legislative analysis of Senate Bill 459 which was added to the Florida Security of Communications law as Florida Statute 934.03(2)(c) in 1974. In a memorandum to the Florida Senate's Committee on Criminal Justice there is an analysis section which states the following:

The bill would afford greater protection to the privacy of individuals' communication by allowing interception only when:

1. One party to the communication had consented and the interception was performed by a law enforcement officer or person acting under the direction of a law enforcement officer and the purpose of the interception was to obtain evidence of a criminal act;

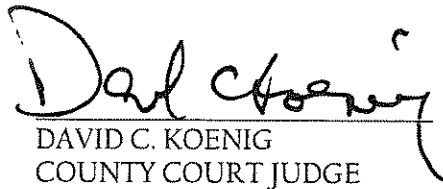
Copy of Memorandum to Members of the Florida Senate Criminal Justice Committee Re: Senate Bill 459, Florida State Archives, 1974.

Accordingly, the court agrees with the Defense that regardless of whether it is a law enforcement officer or a private citizen, the exception allowing the surreptitious recording of oral communications applies only when the purpose of the recording is to obtain evidence of a crime.

However, the analysis does not end there because to fall under the purview and prohibitions of the Florida Security of Communications Law, the subject conversation must be an "oral communication". Oral communication is defined in the statute as: "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation . . .". Florida Statute 934.02(2). The Florida Supreme Court has interpreted this to mean that "[f]or an oral conversation to qualify as an "oral communication," the speaker must have an actual subjective expectation of privacy in his oral communication, and society must be prepared to recognize the expectation as reasonable under the circumstances". *Stevenson v. State*, 667 So. 2d 410 (Fla. 1<sup>st</sup> DCA 1996) citing *State v. Smith*, (641 So. 2d 849, 852 (Fla 1994). Given Mr. Bross's extensive knowledge of Florida law he may have had a subjective expectation that his roadside conversation with Trooper Behrenshouser would be private and not recorded. However, societal perceptions in 2015 about whether citizens' verbal interactions with law enforcement are, or should be, private and not recorded has changed considerably since this part of the law was introduced in 1974. In this regard, the court finds the reasoning set forth in the State's Memorandum of Law compelling, and concludes that modern society would not recognize Mr. Bross's expectation of privacy as reasonable under the circumstances presented in this case.

It is therefore ORDERED and ADJUDGED that Defendant's Motion to Suppress Recorded Oral Communications is hereby denied.

DONE and ORDERED on this 6<sup>th</sup> day of May, 2015, in Chambers at the Moore Justice Center, Viera, Florida.

  
DAVID C. KOENIG  
COUNTY COURT JUDGE

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