

Law enforcement, videotaping vehicle's occupants

Number: INFORMAL

Date: December 01, 2005

Mr. Sid Klein
City of Clearwater Police Chief
Post Office Box 4748
Clearwater, Florida 33758

Dear Chief Klein:

This is in response to your question as to whether a law enforcement officer conducting a stop for a noncriminal traffic infraction may make an audio recording of statements made by the occupants of the vehicle without the occupants' consent.

You state that the City of Clearwater Police Department has equipped some of its cruisers with video cameras that are capable of recording both video and audio during a traffic stop. In light of the restrictions on intercepting oral communications in Chapter 934, Florida Statutes, you question whether occupants of a stopped vehicle have an expectation of privacy that would preclude the audio recording of their statements without consent or judicial authorization. You have not indicated whether the statements are being recorded within or outside the vehicle, a factual issue that would have a significant impact on a determination of whether the occupants have a reasonable expectation of privacy.

Section 934.03, Florida Statutes, generally prohibits the intentional interception of the contents of an oral communication. Chapter 934 was enacted by the Florida Legislature in order to assure personal rights of privacy in the area of oral and wire communications.[1] The legislative findings in section 934.01(4), Florida Statutes, reflect the Legislature's concern to protect the privacy rights of the state's citizens:

"To safeguard the privacy of innocent persons, the interception of wire or oral communications when none of the parties to the communication has consented to the interception should be allowed only when authorized by a court of competent jurisdiction and should remain under the control and supervision of the authorizing court. Interception of wire and oral communications should further be limited to certain major types of offenses and specific categories of crime with assurance that the interception is justified and that the information obtained thereby will not be misused."[2]

Section 934.03(1), Florida Statutes, generally makes it unlawful for a person to willfully intercept, endeavor to intercept, or procure any other person to intercept or endeavor to intercept any wire or oral communication.[3] "Oral communication" is defined by section 934.02(2), Florida Statutes, as

"any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation and does not mean

any public oral communication uttered at a public meeting or any electronic communication."

The Supreme Court of Florida has interpreted the test set forth in this definition as substantially the same test used in a Fourth Amendment right-to-privacy analysis.[4] For a conversation to qualify as "oral communication," the speaker must have an actual subjective expectation of privacy in his oral communication and that expectation of privacy must be recognized by society as reasonable under the circumstances.[5] As stated by the Supreme Court of Florida in *State v. Inciarrano*,[6]

"This expectation of privacy does not contemplate merely a subjective expectation on the part of the person making the uttered oral communication but rather contemplates a reasonable expectation of privacy. A reasonable expectation of privacy under a given set of circumstances depends upon one's actual subjective expectation of privacy as well as whether society is prepared to recognize this expectation as reasonable. *Shapiro v. State*, 390 So. 2d 344 (Fla. 1980), cert. denied, 450 U.S. 982, 67 L.Ed.2d 818, 101 S.Ct. 1519 (1981). . . . To prevail *Inciarrano* must not only have had a subjective expectation of privacy, but also his expectation under the circumstances must have been one that society is prepared to recognize as reasonable."[7]

Such a determination, therefore, will depend upon the particular facts. The courts have considered such factors determining whether intercepted communication qualifies as "oral communication" protected under security of communication statutes to include the location in which the conversation or communication occurs, the manner in which the communication is made, and the kind of communication.[8]

Consideration of your question requires a determination of whether a reasonable expectation of privacy can exist for the passenger or occupant of a motor vehicle that has been stopped for a traffic infraction. Section 934.03(2)(c), Florida Statutes, recognizes that an investigative or law enforcement officer may legally intercept an oral communication when the officer is a party to the communication or one of the parties has given prior consent to such interception and the purpose of the interception is to obtain evidence of a criminal act. The Legislature, in section 318.12, Florida Statutes, has stated that the purpose of the "Florida Uniform Disposition of Traffic Infractions Act" is to

"decriminalize certain violations of chapter 316, the Florida Uniform Traffic Control Law; chapter 320, Motor Vehicle Licenses; chapter 322, Drivers' Licenses; chapter 338, Florida Intrastate Highway System and Toll Facilities; and chapter 1006, Support of Learning, thereby facilitating the implementation of a more uniform and expeditious system for the disposition of traffic infractions."

Generally, therefore, most traffic offenses are noncriminal infractions. While there are certain traffic infractions that are subject to criminal prosecution,[9] you have not indicated that your question is based upon such a specific circumstance. Clearly, the Legislature has not extended the exception in section 934.03(2)(c), Florida Statutes, to the interception of oral communications during a traffic stop that does not involve the collection of evidence of a criminal act.

This office has previously commented on the legality of making audio and video recordings of

citizens transacting business at city offices.[10] In discussing whether a reasonable expectation of privacy may exist in a public building, this office noted the reduced expectation of privacy afforded a place of business open to the public as compared to the privacy of an individual's home.[11] It could not be concluded, however, that the mere fact a conversation occurs in a public area would mean that it could never be made with an expectation of privacy.[12] Finding no decision by a court of this state upholding the audio recording of conversations occurring in a public building simply by virtue of the fact that the conversation occurred in a public building, this office could not find that the audio recording of conversations occurring in municipal offices would generally be permissible.

While a review of several cases involving traffic stops appear to have involved situations in which audio and video recordings were made,[13] this office has found no cases where the recording of conversations of occupants in a stopped vehicle has been considered by a court. You have cited *Migut v. Flynn*,[14] to suggest that an occupant of a stopped vehicle may have a reasonable expectation of privacy in a conversation with a law enforcement officer.

Migut, without consent, tape recorded a conversation he was having with a deputy sheriff who had stopped him for disobeying a stop sign. The officer arrested him for violating section 934.03, Florida Statutes. After the charge for intercepting the conversation was *nolle prossed*, Migut filed suit for false arrest and sought a declaratory judgment that section 934.03 is not violated when a motorist records a conversation with a police officer during a routine traffic stop. The district court dismissed the false arrest claim based upon qualified immunity and granted summary judgement to the defendants on the declaratory judgment claim; Migut appealed.

The Eleventh Circuit Court of Appeals affirmed the dismissal and the summary judgment, finding that the deputy sheriff had at least arguable probable cause to believe that Migut was violating section 934.03(1)(a), Florida Statutes, when he taped the conversation and that it was not unreasonable for the deputy to expect that the conversation would be protected. The court concluded that the district court had properly denied Migut's claim for declaratory relief, since section 934.03 "is unambiguous and does not include an exception for a private individual who records a police officer without the officer's consent." [15] The court further supported its conclusion by stating that there were no judicial decisions excepting communications with police officers conducting traffic stops from the protections of section 934.03 and noting that communications in public places are not necessarily excluded from the statute. Finally, the court noted the "intensely fact-specific inquiry" involved in determining whether a particular communication is protected under section 934.03(1)(a) to state it was "not prepared to hold that the Florida legislature intended to exclude from the protections of s. 934.03 all citizen communications with all police officers during all traffic stops on a public street." [16]

The above discussion would appear to provide guidance in evaluating generally whether the occupants of a vehicle that has been stopped for a noncriminal traffic infraction have a reasonable expectation of privacy that would protect their comments from being taped without their authorization. Ultimately, however, a determination of whether such communications are protected is a mixed question of fact and law that may not be made by this office. I trust that these informal comments will be of assistance to you.

Sincerely,

ALS/tfl

[1] See s. 934.01, Fla. Stat., setting forth the legislative findings.

[2] The Legislature also expressed its finding in s. 934.01(3), Fla. Stat., that "[o]rganized criminals make extensive use of wire and oral communications in their criminal activities. The interception of such communications to obtain evidence of the commission of crimes or to prevent their commission is an indispensable aid to law enforcement and the administration of justice." Toward that end, the Legislature has created certain exceptions for law enforcement agencies. See, e.g., s. 934.03(2)(c), Fla. Stat., stating that "[i]t is lawful under ss. 934.03-934.09 for an investigative or law enforcement officer or a person acting under the direction of an investigative or 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."

[3] See s. 934.03(4), Fla. Stat., prescribing penalties for violations of the statute. Any criminal action would be brought by the state attorney for the judicial circuit where the incident occurred. And see s. 934.10, Fla. Stat., prescribing civil remedies. See also s. 934.06, Fla. Stat., prohibiting the use of such intercepted wire or oral communications as evidence. Cf., *State v. Mozo*, 655 So. 2d 1115 (Fla. 1995), citing *United States v. Nelson*, 837 F.2d 1519 (11th Cir. 1988), *cert. denied*, 488 U.S. 829, 109 S.Ct. 82, 102 L.Ed.2d 58 (1988) (actual "interception" of a communication occurs not where such is ultimately heard or recorded but where the communication originates).

[4] See *Mozo v. State*, 632 So. 2d 623 (Fla. 4th DCA 1994), *approved* 655 So. 2d 1115 (Fla. 1995); *Stevenson v. State*, 667 So. 2d 410 (Fla. 1st DCA 1996).

[5] *Id.* And see *State v. Smith*, 641 So. 2d 849, 852 (Fla. 1994). Cf., *State v. Sarmiento*, 397 So. 2d 643 (Fla. 1981) (definition of "interception of private communications," in context of prohibition under Art. I, s. 12, Fla. Const., against such interception, is a function of one's reasonable expectation of privacy).

[6] 473 So. 2d 1272 (Fla. 1985).

[7] *Id.* at 1275.

[8] And see *Stevenson v. State*, 667 So. 2d 410 (Fla. 1st DCA 1996) (defendant had no reasonable expectation of privacy in a conversation that took place outside a van stopped in a public roadway in a known drug trafficking area); *Adams v. State*, 436 So. 2d 1132 (Fla. 5th DCA 1983) (audio and video recordings made by police officers in the course of a "sting" operation utilizing a storefront operation did not violate the defendant's right of privacy so as to preclude their admission into evidence, since the defendant came into the store and openly entered into a

transaction with the undercover officer and he could have had no reasonable expectation of privacy in transacting his business in a place of business open to the public). See *also State v. Smith*, 641 So. 2d 849, 850 (Fla. 1994), holding that recording of conversation between motorist and companion sitting in rear of police vehicle for safety and comfort reasons during consensual search of automobile did not violate statute since motorist had no reasonable expectation of privacy in a police car.

[9] See s. 318.17, Fla. Stat., stating that no provision of Ch. 318, Fla. Stat., is available to a person: charged with fleeing or eluding a police officer in violation of s. 316.1935; leaving the scene of a crash in violation of ss. 316.027 and 316.061; driving while under the influence of alcoholic beverages, chemical substances set forth in s. 877.111, or any substance controlled under ch. 893, or driving with an unlawful blood-alcohol level; driving recklessly in violation of s. 316.192; making false crash reports; willfully failing or refusing to comply with any lawful order of a police officer or member of a fire department; obstructing an officer in violation of s. 316.545(1); or charged with an offense in chapter 316 which is classified as a criminal violation.

[10] Informal Opinion to Mr. Patrick W. Gilligan, Ocala City Attorney, April 7, 2004.

[11] See, e.g., *U.S. v. Reyes*, 595 F.2d 275 (5th Cir. 1979); see *also U.S. v. Glasgow*, 658 F.2d 1036 (5th Cir. 1981); *Jatar v. Lamaletto*, 758 So. 2d 1167 (Fla. 3rd DCA 2000) (expectation of privacy in conversations conducted in a private home does not necessarily extend to conversations conducted in a business office where the intent of the speaker does not justify such an expectation). Compare, *LaPorte v. State*, 512 So. 2d 984 (Fla. 2nd DCA 1987) (audio and video taping of women in dressing room changing clothes for a "modeling-video" session violative of s. 934.03, Fla. Stat., since women were unaware they were being recorded and they had reasonable expectation of privacy in the dressing room).

[12] See *Brandin v. State*, 669 So. 2d 280 (Fla. 1st DCA 1996) stating:

"The effort to decide whether or not a given 'area,' viewed in the abstract, is 'constitutionally protected' deflects attention from the problem presented For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his home or office, is not a subject of Fourth Amendment protection. [Citations omitted.] But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."

[13] See, e.g., *Maxwell v. State*, 785 So. 2d 1277, 1280 (Fla. 5th DCA 2001), in which the court refers to a video to highlight that the officer had questioned the driver about matters which had nothing to do with the issuance of a traffic citation, but there is no indication that there was an attempt to have the videotape suppressed as an unlawful interception of an oral communication.

[14] 131 Fed. Appx. 262 (11th Cir. 2005).

[15] *Id.* at 267.

[16] *Id.*