No. 114852

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County,
	)	Criminal Division.
v.	)	No. 10 CR 8092
	)	
ANNABEL MELONGO,	)	
	)	
Defendant-Appellee.	)	The Honorable
	)	Steven J. Goebel,
	)	Judge Presiding.

REPLY BRIEF OF PLAINTIFF-APPELLANT PEOPLE OF THE STATE OF ILLINOIS

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ARGUMENT

The Trial Court Erred In Ruling That The Illinois Eavesdropping Statute Is Unconstitutional On Its Face And As Applied To Defendant's Case Where The Statute Includes A Culpable Mental State And Where Defendant Admitted That Her Conduct Was Intentional And Knowing Rather Than Innocent And Inadvertent.

In their opening brief, the People established that the trial court erred when it ruled that the Illinois Eavesdropping Statute (720 ILCS 5/14-2) was unconstitutional, both facially and as applied to defendant's case. Specifically, the People demonstrated that in striking down the statute, the trial court mistakenly relied upon the decisions in *ACLU v. Alvarez,* 679 F.3d 583 (7th Cir. 2012), and *People v. Christopher Drew,* No. 10 CR 00046 (Cook Cnty. Mar. 2, 2012), as the instant case involves the surreptitious recording of telephone calls rather than the open recording of publicly audible conversations, a fact that was essential to the courts' rulings in both of those cases. (People's Opening Br. at 13-14, 16-17, 21) In addition, the People established that the trial court erred when it ruled that the eavesdropping statute violated substantive due process because it specifically requires that a defendant act with both *knowledge* and *intent*, and for the *purpose* of recording a conversation without the parties' consent, and that in particular regard to the non-consensual recording of telephone conversations, there is no otherwise innocent conduct that would fall under the statute. (People's Opening Br. at 21)

In response, defendant argues not only that the statute violates substantive due process and that the trial court's ruling was correct under *Alvarez* and *Drew*, but also that the eavesdropping statute violates the First Amendment and the free speech guarantee contained in Article I, section 4 of the Illinois Constitution. Specifically, defendant claims

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that the recording provision contained in section 14-2(a)(1) of the statute is not a reasonable method of ensuring conversational privacy because, by prohibiting the recording of conversations where no reasonable expectation of privacy exists, it is overbroad and applies to "wholly innocent conduct." (Deft. Br. at 37-43) Defendant likewise contends that the prohibition on divulging information obtained through the use of an eavesdropping device under section 14-2(a)(3) violates due process because it applies regardless of whether the information disclosed was intended to be private. (Deft. Br. at 47-48)

Although the trial court never ruled that the statute violates the First Amendment (see People's Opening Br. at 11, n. 2), defendant now argues that under *Alvarez*, both the statutory prohibition on recording telephone conversations and on divulging such information violate her Federal and State constitutional rights to freedom of speech. (Deft. Br. at 10-37) In particular, defendant claims that the recording provision is facially unconstitutional because it is not narrowly tailored to serve the State's interest in conversational privacy. Defendant acknowledges that the facts underlying this dispute are distinct from those in *Alvarez* in that she "did not record openly and the conversations at issue here occurred over the telephone," but maintains that these differences are "constitutionally insignificant." (Deft. Br. at 23) Instead, she asserts that government employees – like the police officers in *Alvarez* and Ms. Taylor in this case –have no conversational privacy interests when performing public services and therefore do not possess the ability to refuse consent to the recording of their conversations. (Deft. Br. at 22-23) Similarly, defendant argues that the prohibition on divulging information is

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unconstitutional because it is not limited to the disclosure of illegally obtained information and because it could be construed to apply to wholly innocent conduct. (Deft. Br. at 29-37)

Defendant's arguments do not withstand scrutiny. First, as to defendant's substantive due process arguments, although defendant claims that requiring consent from all parties to a conversation is not an effective means of ensuring the privacy of that conversation (Deft. Br. at 39-40), the People point out that the constitution does not mandate that the legislature adopt a particular statutory structure. Rather, "[u]nder the banner of its police power, the legislature has wide discretion to fashion penalties for criminal offenses" (*People v. Madrigal*, 241 Ill. 2d 463, 466 (2011)), and the only restriction on this discretion is the requirement that the legislation "bear[] a reasonable relationship to a public interest to be served, and the means adopted are a reasonable method of accomplishing the desired objective." *People v. Adams*, 144 Ill. 2d 381, 390 (1991). See also *People v. Hollins*, 2012 IL 112754, ¶15 ("A statute will be upheld under the rational basis test so long as it bears a rational relationship to a legitimate legislative purpose and is neither arbitrary nor unreasonable.").

Here, although defendant apparently does not dispute that ensuring conversational privacy is a legitimate purpose (Deft. Br. at 38), she claims that the eavesdropping statute's focus on the lack of consent to recording rather than on a reasonable expectation of privacy in the conversation undermines that goal. However, as the Seventh Circuit recognized, "the legislature [is not] limited to using the Fourth Amendment 'reasonable expectation of privacy' doctrine as a benchmark." *Alvarez*, 679 F.3d at 606.

The General Assembly has determined that requiring the consent of the parties to a conversation (either express or implied) before it may be recorded is the most effective way

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of ensuring the privacy rights of everyone involved in the conversation. By focusing on the parties' *subjective* intent to consent to the recording, rather than an *objective* expectation of privacy, the eavesdropping statute guarantees that the privacy of conversations is defined by all the participants to the conversation, rather than one (or even none) of the parties. Also, while a statutory focus on the reasonableness of one party's expectation of privacy in the conversation would inevitably lead to disputes, the consent requirement provides clarity to all as to what is required before a conversation may be recorded. Thus, contrary to defendant's arguments, the consent requirement is directly related to the eavesdropping statute's goal of protecting conversational privacy and is neither arbitrary nor unreasonable.

This is especially true in situations involving the recording of telephone conversations. As stated in the People's Opening Brief, "where a silent and unseen device is used to record a telephone conversation, the other party is unable to make any knowing and intelligent choice regarding the giving of consent." (People's Opening Brief at 14). Accepting defendant's argument that the inquiry must be limited to the existence of a reasonable expectation of privacy in the conversation would effectively eliminate that person's ability to decide whether to consent and would place their right to conversational privacy solely in the hands of another. Thus, rather than ensure the legislature's goal of protecting conversational privacy, such a conclusion would actually defeat it.

Thus, it is clear that defendant's non-consensual recording of telephone conversations is not properly characterized as "innocent conduct" because it is precisely the behavior the legislature intended to prohibit when it amended the eavesdropping statute in response to this Court's decisions in *People v. Beardsley*, 115 Ill. 2d 47 (1986), and *People v. Herrington*, 163 Ill. 2d 507 (1994). See *Hollins*, 2012 IL 112754, at ¶ 28 ("the term

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'innocent conduct' mean[s] conduct not germane to the harm identified by the legislature, in that the conduct [is] wholly unrelated to the legislature's purpose in enacting the law").

Similarly, the prohibition on divulging information obtained through the use of an eavesdropping device also fosters the legislature's goal of ensuring conversational privacy by restricting the public dissemination of any recording of a conversation to those instances where the parties have consented to the recording. See 720 ILCS 5/14-2(a)(3) (prohibiting the use or divulging of information obtained through the use of an eavesdropping device "except as authorized by this Article"). Thus, this provision guarantees that the right to refuse consent is not a meaningless formality.

Therefore, because the eavesdropping statute requires a defendant to act with both *knowledge* and *intent*, and for the unlawful *purpose* of recording a conversation without the parties' consent, it satisfies the demand that a criminal statute "require a criminal purpose in addition to the general knowledge that one is committing the actions specified." *People v. Madrigal,* 241 Ill. 2d 463, 470 (2011). Furthermore, defendant admitted that she knew that recording her telephone conversations with Taylor was prohibited by the eavesdropping statute. Specifically, in her pro se "Amended Motion to Declare Statute Unconstitutional and to Dismiss," she invoked the statutory exemption contained in 720 ILCS 5/14-3(i) when she asserted that that the recordings were necessary because she had "explicitly threatened to file a complaint against [court reporter Laurel Laudien] long before the recordings were made," and that she therefore "recorded the conversations [with Taylor] to gather evidence of a crime committed against her." (C. 182) As such, this Court should reject defendant's arguments and

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reverse the trial court's ruling declaring the statute unconstitutional on substantive due process grounds.

In regard to defendant's freedom of speech arguments, defendant offers no authority from any jurisdiction holding that the First Amendment includes a right to surreptitiously record telephone conversations. Likewise, despite the fact that many jurisdictions permit the recording of a telephone call based upon the consent of a single party to the conversation, the People's research has found no decision recognizing a constitutional for that right. Instead, the only authority offered by defendant for this assertion is the Seventh Circuit's decision in *Alvarez*. However, aside from the fact that this decision is not binding on this Court (see *Wilson v. County of Cook*, 2012 IL 112026, ¶ 30), *Alvarez* itself makes clear that open recording is distinct from surreptitious recording, and that therefore its decision "ha[d] nothing to do with private conversations or surreptitious interceptions." 679 F.3d at 606. Because this Court is "not bound to extend the decisions of the [United States Supreme] Court to arenas which it did not purport to address, which indeed it specifically disavowed addressing, in order to find unconstitutional a law of this state" (*People v. Wagener*, 196 Ill. 2d 269, 287 (2001)), this Court should likewise refrain from extending the decision of a lower federal court.

Furthermore, although defendant claims that the eavesdropping statute infringes upon her freedom of expression, nothing in the Act prohibits her, or anyone else, from making any public statements of any sort. Rather, the provision simply restricts her ability to receive, and preserve, the speech of another person in the precise manner that she would prefer by requiring her to secure from that other person – in this case Taylor – consent to record the conversation so she can make an informed decision on whether to

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participate. Such a limitation on the ability to record other people's speech certainly comports with concepts of free expression because "[f]reedom of speech presupposes a willing speaker." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976). See also *Wallace v. Jaffree*, 472 U.S. 38, 51 (1985) (the First Amendment "includes both the right to speak freely and the right to refrain from speaking at all").

Of course, a right to receive information "is an inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution" because "the right to receive ideas follows ineluctably from the *sender's* First Amendment right to send them." *Bd. of Educ., Island Trees Union Free Sch. Dist Number 26 v. Pico*, 457 U.S. 853, 867 (1982) (emphasis in original). However, as the Seventh Circuit recognized, "the First Amendment does not prevent the Illinois General Assembly from enacting greater protection for conversational privacy." *Alvarez*, 679 F.3d at 606.

The fact that Taylor is a public employee does not change the analysis. Contrary to defendant's insinuation (Deft. Br. at 20), even government employees retain privacy interests. Cf. *City of Ontario v. Quon*, 130 S. Ct. 2619, 2628 (2010). To find otherwise would mean not only that all government employees and officials — be it an assistant in this Court's Clerk's office, an Assistant Public Defender or the Director of the Department of Corrections — could be subjected to surreptitious recording every time they answer the telephone, but that the legislature is powerless to even address the issue.

Moreover, the fact that defendant published the recordings of the conversations on her website, illinoiscorruption.net, does not require a contrary conclusion because the eavesdropping statute applies equally to the press and the general public. As the Supreme

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Court has recognized, "'a reporter's constitutional rights are no greater than those of any other member of the public.'" *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 609 (1978) (quoting *Estes v. Texas*, 381 U.S. 532, 589 (1965) (Harlan, J., concurring)). Thus, "the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally." *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972). See also *Zemel v. Rusk*, 381 U.S. 1, 17 (1965) ("[t]he right to speak and publish does not carry with it an unrestrained right to gather information."). As the *Zemel* Court explained:

> There are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. For example, the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right.

Id. at 16-17.

Finally, even if the eavesdropping statute somehow restricted defendant's First Amendment rights in this case, it is nonetheless a valid time, place, and manner restriction. *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989). See also *People v. Jones*, 188 Ill. 2d 352, 356-57 (1999) ("A content-neutral time, place and manner regulation . . . must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternative channels for communication of the information."). Here, the eavesdropping statute satisfies this test because it precludes the non-consensual audio-recording of most conversations, regardless of the subject or viewpoint of the conversation that is being recorded. As the Seventh Circuit recognized, "[t]he eavesdropping statute is content neutral on its face." 679 F.3d at 603.

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Moreover, as it relates to the surreptitious recording of telephone conversations, the eavesdropping statute is narrowly tailored because it targets and eliminates no more than the exact source of the "evil" it seeks to remedy (*Frisby v. Schultz*, 487 U.S. 474, 485 (1988)) because it simply requires consent from all participants to the phone conversation before that conversation may be recorded, thus ensuring that all participants' privacy interests are protected.

Also, the statute certainly leaves alternative channels available. Anyone interested in recording a telephone conversation need only seek the other party's consent or otherwise indicate that the conversation is being recorded. See *People v. Ceja*, 204 Ill. 2d 332, 349 (2003) (holding that consent to the recording of the conversation was implied where "the monitoring system emitted a clearly audible pinging sound"). See also *Hodgkins v. Peterson*, 355 F.3d 1048, 1063 (7th Cir. 2004) ("although an adequate alternative for expression does not have to be the speaker's best or first choice, it must provide the speaker with sufficiently adequate alternatives").

Finally, as to defendant's arguments that the prohibition on divulging information obtained through the use of an eavesdropping device contained in section 14-2(a)(3) violates the First Amendment, *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001), upheld statutes that virtually mirror the eavesdropping statute's prohibition on divulging information because they were content-neutral and do not violate the First Amendment. See also *Boehner v. McDermott*, 484 F.3d 573, 581 (D.C. Cir. 2007) (the First Amendment does not apply to congressional member's subsequent publication of illegally intercepted communication). As such, defendant's arguments are without merit and should be rejected.

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Therefore, because the eavesdropping statute satisfies the demands of both substantive due process and the First Amendment, the trial court's order declaring it unconstitutional is erroneous and should be reversed.

CONCLUSION

The People of the State of Illinois respectfully request that this Honorable Court reverse the trial court's judgment declaring the eavesdropping statute unconstitutional and remand the case to the trial court for further proceedings.

Respectfully Submitted,

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CERTIFICATE OF FILING AND SERVICE

The undersigned certifies that on January 3, 2013, the foregoing Reply Brief of Petitioner-Appellant People of the State of Illinois was filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and three copies were personally served upon defendant's counsel:

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Additionally, upon its acceptance by the court's electronic filing system, the undersigned will mail an original and 12 copies of the brief to the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois 62701.

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CERTIFICATE OF COMPLIANCE

I certify that this reply brief conforms to the requirements of Rules 341 (a) and (b). The length of this brief, excluding the pages containing the Rule 341 (d) cover, the Rule 341 (h)(1) statement of points and authorities, the Rule 341 (c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 10 pages.

By: /s/Alan J Spellberg
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