



ROLAND W. BURRIS
ATTORNEY GENERAL
STATE OF ILLINOIS

March 24, 1994

FILE NO. 94-001

CRIMINAL LAW AND PROCEDURE:
Tape-Recording of Cellular or
Cordless Telephone Conversations
under Eavesdropping Statutes

Honorable Richard J. Ringhausen
State's Attorney, Jersey County
201 West Pearl Street
Jerseyville, Illinois 62052

Dear Mr. Ringhausen:

I have your letter wherein you inquire whether a person commits the offense of eavesdropping when he or she tape-records a cellular or cordless telephone conversation received on a police scanner radio. For the reasons hereinafter stated, it is my opinion that the tape-recording of conversations in these circumstances does not constitute the offense of eavesdropping.

Section 14-2 of the Criminal Code of 1961 (Ill. Rev. Stat. 1991, ch. 38, par. 14-2; 720 ILCS 5/14-2 (West 1992)) provides, in pertinent part, as follows:

* * * * A person commits eavesdropping
when he:

(a) Uses an eavesdropping device to hear or record all or any part of any conversation unless he does so (1) with the consent of all of the parties to such conversation or (2) in accordance with Article 108A or Article 108B of the 'Code of Criminal Procedure of 1963', approved August 14, 1963, as amended; or

(b) Uses or divulges, except as authorized by this Article or by Article 108A or 108B of the 'Code of Criminal Procedure of 1963', approved August 14, 1963, as amended, any information which he knows or reasonably should know was obtained through the use of an eavesdropping device.

* * *

"

Section 14-1 of the Criminal Code (Ill. Rev. Stat. 1991, ch. 38, par. 14-1; 720 ILCS 5/14-1 (West 1992)) defines the term "eavesdropping device" as follows:

"(a) Eavesdropping device.

An eavesdropping device is any device capable of being used to hear or record oral conversation whether such conversation is conducted in person, by telephone, or by any other means; Provided, however, that this definition shall not include devices used for the restoration of the deaf or hard-of-hearing to normal or partial hearing.

* * *

"

The seminal case interpreting section 14-2 of the Criminal Code of 1961 is People v. Beardsley (1986), 115 Ill. 2d 47. In People v. Beardsley, the defendant was placed in the back seat of a squad car after being stopped for a traffic violation. While seated in the back seat of the squad car, Beardsley tape-

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recorded the conversation that the officers were having in the front seat. The officers subsequently testified that they did not consent to having their conversation taped and that they were unaware that the defendant's recorder was on. They were aware, however, that the defendant had a tape recorder. The defendant was convicted of eavesdropping in violation of section 14-2 of the Criminal Code, and the appellate court affirmed the conviction. People v. Beardsley (1985), 139 Ill. App. 3d 819.

The Illinois Supreme Court reversed Beardsley's eavesdropping conviction, holding that "* * * our eavesdropping statute should not prohibit the recording of a conversation by a party to that conversation or one known by the parties thereto to be present. * * *" (Emphasis in original.) (People v. Beardsley (1986), 115 Ill. 2d at 56.) Moreover, the court stated that the primary factor in determining whether Beardsley was guilty of eavesdropping was not whether all of the parties consented to the recording, but rather, whether the officers justifiably expected and intended their conversation to be private. People v. Beardsley (1986), 115 Ill. 2d at 54.

Under People v. Beardsley and its progeny (see Smith v. Associated Bureaus, Inc. (1988), 177 Ill. App. 3d 286, appeal denied, 126 Ill. 2d 566 (1989); People v. Cole (1989), 186 Ill. App. 3d 1002, appeal denied, 128 Ill. 2d 666 (1989)), the issue of whether the tape-recording of cellular or cordless telephone

conversations picked up on police scanners constitutes eavesdropping will be determined by whether the parties to a cellular or cordless telephone conversation have a justifiable expectation of privacy. In this regard, it is helpful to understand the operational dynamics of cellular and cordless telephones.

A cordless telephone operates as a two-way radio. It consists of a base unit and a hand-held mobile unit. The base unit is physically attached to two separate wires, one of which is the land based telephone line and the second of which is an AC power source. The hand-held mobile unit is a self-contained unit with its own batteries which are recharged when the mobile unit is physically rested upon the base unit. No cord, line or physical connection of any kind exists between a mobile unit and a base unit. Rather, the mobile and base units communicate with each other by means of FM radio signals. When a person speaks into a hand-held mobile unit, his or her voice is converted into radio waves and transmitted to a base unit, which in turn transmits the voice to the receiving party. Transmission of the speaker's voice from the base unit to the receiving party is accomplished by means of ordinary telephone transmission lines. Conversely, incoming callers' voices are transmitted through telephone lines to the cordless telephone owner's base unit, which then transmits those voices to the hand-held mobile unit by means of FM radio waves.

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The FM signal utilized by both the mobile and base units is the same as any other FM signal; it is not specialized in any way. The FM signal which is utilized by cordless telephones will reach out in all directions simultaneously and will penetrate and pass through almost any material, including normal concrete or wood. Moreover, the FM signal transmitted by cordless telephones is of the same or similar frequency utilized by commercial FM radio stations. Thus, cordless telephone conversations are subject to reception by standard FM radios, including police scanners.

Similarly, cellular telephone services use both radio transmission and wire transmission to make portable telephone service available in a car, a briefcase or in rural areas not reached by telephone wire. In a cellular radio telephone system, large service areas are divided into honeycomb shaped segments or "cells", each of which is equipped with a lower-power transmitter or base station which can receive and radiate messages within its parameters. When a caller dials a number on a cellular telephone, a transceiver sends signals over the air on a radio frequency to a cell site. From there the signal travels over phone line or a microwave to a computerized mobile telephone switching office or station. The station automatically and inaudibly switches the conversation from one base station and one

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frequency to another as the portable telephone, typically in a motor vehicle, moves from cell to cell.

In reviewing the operational dynamics of cellular and cordless telephones, it is apparent that radio scanners, which are readily available to the general public, are capable of picking up the radio signals which cellular and cordless telephones use to transmit their signals. Moreover, it also appears that any scanner operating on the same frequency as a cordless or cellular telephone could pick up the audio sound as if it were picking up a broadcast from a radio station.

Based upon the foregoing factors, in People v. Wilson (1990), 196 Ill. App. 3d 997, appeal denied, 133 Ill. 2d 571 (1990), the court held that a standard radio scanner was not an eavesdropping device. Further, the court indicated that the purpose of the eavesdropping statute is to protect an individual's right to a legitimate expectation of privacy and that persons who use a telephone which transmits by radio waves have no justifiable expectation of privacy. (People v. Wilson (1990), 196 Ill. App. 3d at 1010.) Consequently, because there can be no reasonable expectation of privacy when a person uses a telephone which transmits by radio waves, it is my opinion that a person does not commit the offense of eavesdropping when he or she

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listens to and tape-records cellular or cordless telephone conversations received on a police scanner. I express no opinion, however, on the extent, if any, to which recordings of such conversations may lawfully be used for any purpose.

Respectfully yours,

A handwritten signature in cursive script, reading "Roland W. Burris". The signature is written in black ink and is centered on the page.

ROLAND W. BURRIS
ATTORNEY GENERAL



ROLAND W. BURRIS
ATTORNEY GENERAL
STATE OF ILLINOIS

April 8, 1994

Honorable Richard Ringhausen
State's Attorney, Jersey County
201 West Pearl Street
Jerseyville, Illinois 62052

Dear Mr. Ringhausen:

As you will recall, on March 24, 1994, Attorney General Burris issued opinion No. 94-001, addressed to you, in which he concluded that a person who tape-records a cordless or cellular telephone conversation received on a police scanner radio does not thereby commit the offense of eavesdropping under Illinois law (720 ILCS 5/14-2 (West 1992)). Since your inquiry pertained solely to the issue of whether such conduct constituted an offense under State law, the opinion did not address the provisions of Federal law relating to the interception of cordless or cellular telephone communications. Because of the questions concerning the Federal law which have been raised following the issuance of opinion No. 94-001, however, Attorney General Burris has asked that I provide you with further information in this regard.

18 U.S.C. § 2511 is the Federal statute which generally governs the interception and disclosures of wire, oral or electronic communications. Section 2511 provides, in pertinent part:

"(1) Except as otherwise specifically provided in this chapter any person who -

(a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;

(b) intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical,

or other device to intercept any oral communication when -

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; or

(d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having rea-

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son to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

* * *

(4) (a) Except as provided in paragraph (b) of this subsection or in subsection (5), whoever violates subsection (1) of this section shall be fined under this title or imprisoned not more than five years, or both.

(b) If the offense is a first offense under paragraph (a) of this subsection and is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain, and the wire or electronic communication with respect to which the offense under paragraph (a) is a radio communication that is not scrambled or encrypted, then -

(i) if the communication is not the radio portion of a cellular telephone communication, a public land mobile radio service communication or a paging service communication, and the conduct is not that described in subsection (5), the offender shall be fined under this title or imprisoned not more than one year, or both; and

(ii) if the communication is the radio portion of a cellular telephone communication, a public land mobile radio service communication or a paging service communication, the offender shall be fined not more than \$500.

* * *

"

18 U.S.C. § 2510 provides the following definitions:

"As used in this chapter -

(1) 'wire communication' means any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception (including the use of such connection in a switching station) furnished or operated by any person engaged in providing or operating such facilities for the transmission of interstate or foreign communications or communications affecting interstate or foreign commerce and such term includes any electronic storage of such communication, but such term does not include the radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit;

(2) 'oral communication' means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but such term does not include any electronic communication;

* * *

(4) 'intercept' means the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device.

(5) 'electronic, mechanical, or other device' means any device or apparatus which can be used to intercept a wire, oral, or electronic communication other than -

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or

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user by a provider of wire or electronic communication service in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business or furnished by such subscriber or user for connection to the facilities of such service and used in the ordinary course of its business; or (ii) being used by a provider of wire or electronic communication service in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

(b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal;

(6) 'person' means any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation;

* * *

(12) 'electronic communication' means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce, but does not include -

(A) the radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit;

(B) any wire or oral communication;

(C) any communication made through a tone-only paging device; or

(D) any communication from a track

ing device (as defined in section 3117 of this title);

* * *

(14) 'electronic communications system' means any wire, radio, electromagnetic, photooptical or photoelectronic facilities for the transmission of electronic communications, and any computer facilities or related electronic equipment for the electronic storage of such communications;

* * *

(16) 'readily accessible to the general public' means, with respect to a radio communication, that such communication is not -

(A) scrambled or encrypted;

(B) transmitted using modulation techniques whose essential parameters have been withheld from the public with the intention of preserving the privacy of such communication;

(C) carried on a subcarrier or other signal subsidiary to a radio transmission;

(D) transmitted over a communication system provided by a common carrier, unless the communication is a tone only paging system communication; or

(E) transmitted on frequencies allocated under part 25, subpart D, E, or F of part 74, or part 94 of the Rules of the Federal Communications Commission, unless, in the case of a communication transmitted on a frequency allocated under part 74 that is not exclusively allocated to broadcast auxiliary

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services, the communication is a two-way
voice communication by radio;

* * *

(Emphasis added.)

As is apparent, the provisions of 18 U.S.C. § 2511 (sometimes referred to as the Electronic Communications Privacy Act of 1986) are not a model of clarity. It is clear, however, that § 2511 does not protect the radio portion of any communication made by cordless telephones from interception, since such communications are expressly excluded from the definitions of both "wire communication" and "electronic communication", and would not constitute an "aural communication" as defined in § 2510. See also Senate Report No. 99-541, Senate Bill No. 2575, as reprinted in 1986 U.S. Code Cong. & Admin. News 3555 et seq.

Cellular telephone communications, however, are afforded protection under the Electronic Communications Privacy Act of 1986. Although cellular telephone communications are not expressly mentioned as such within the definition of either "wire communication" or "electronic communication", according to the Senate Report cited above, cellular telephone communications are intended to be included as a form of "wire communication", despite the fact that most people think of such communications as being essentially wireless. The fact that cellular communications utilize wire or cable connections in switching stations brings them within the definition of "wire communications". Since cellular telephone communications are treated as "wire communications", it appears that the intentional interception of such communications is prohibited by 18 U.S.C. § 2511(1)(a).

The questions which you posed to the Attorney General concerned whether the interception and recording of cordless or cellular telephone conversations by private persons would constitute eavesdropping under Illinois law. The conclusion that such actions did not constitute the offense of eavesdropping is fully supported by People v. Wilson (1990), 196 Ill. App. 3d 997, wherein the court held that a scanner used to monitor a cellular telephone conversation was not an eavesdropping device, regardless of the possibility that use of the scanner in that fashion would have violated Federal law. This decision, which appears to be the only Illinois case on point, is precedent which the Attorney General is bound to follow.

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If, however, the person concerning whom you inquired obtained information through the intentional, rather than inadvertent, monitoring of a cellular telephone communication, it appears that a violation of 18 U.S.C. § 2511 may have occurred, notwithstanding that his or her conduct did not constitute eavesdropping under Illinois law. Based upon the facts at our disposal, we cannot determine whether Federal law was violated.

In hindsight, it appears that it would have been helpful to have included a discussion of the Federal Electronic Communications Privacy Act of 1986 in opinion No. 94-001. It was not the intention of the Attorney General to create uncertainty in this area. Hopefully, this letter will provide a more complete overview of both State and Federal law concerning the interception of electronic communications.

This is not an official opinion of the Attorney General. If we may be of further assistance, please advise.

Very truly yours,



MICHAEL J. LUKE
Senior Assistant Attorney General
Chief, Opinions Division

MJL:cj