IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

CASE No. 5D23-1354
(L.T. Case No. 2021-CF-000253-A)

MICHAEL L. WAITE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On Appeal from the Circuit Court for the Fifth Judicial Circuit,
Citrus County, Florida
Lower Tribunal Case No. 2021-CF-000253-A

BRIEF OF AMICI CURIAE

FLORIDA SHERIFFS ASSOCIATION
FLORIDA POLICE CHIEFS ASSOCIATION

Robert Wayne Evans, Esq.
Florida Bar No. 198862
revans@anblaw.com
ALLEN NORTON & BLUE, P.A.
906 North Monroe St., Suite 100
Tallahassee, Florida 32303
Tel.: (850) 561-3503
Fax: (850) 561-0332
Counsel for Florida Sheriffs Association

J. David Marsey, Esq.
Florida Bar No. 0010212
dmarsey@rumberger.com
RUMBERGERGER KIRK & CALDWELL
101 North Monroe St., Suite 1050
Tallahassee, Florida 323019
Tel.: (850) 222-6550
Fax: (850) 222-8783
Counsel for Florida Police Chiefs Association

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes **Page(s)**

Other Authorities **Page(s)**

STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE

The Florida Sheriffs Association ("FSA") is a statewide organization comprised of the sheriffs of the state of Florida. Its mission as a self-sustaining charitable organization is to foster the effectiveness of the office of sheriff through leadership, education and training, innovative practices, and legislative initiatives. On occasion, the FSA appears as amicus curiae in cases of interest to the sheriffs that may impact their operational duties and responsibilities.

The Florida Police Chiefs Association ("FPCA") is composed of more than 900 law enforcement executives representing every region of the state. The FPCA is committed to law enforcement training, legislation, professional development, and other issues impacting public safety and Florida's law enforcement agencies, administrators, and officers. The FPCA's efforts include the promotion of legislation that would enhance public and officer safety by providing superior police protection for the residents of Florida and its many visitors and providing communication, education, and training for the state's various police agencies and personnel.

The present case involves issues of great interest to the FSA and FPCA. Law enforcement officers frequently communicate telephonically with members of the public. These calls may range from anything as minor as a noise complaint to something more significant such as vandalism, burglary,

or robbery. On occasion the public calls to complain about the conduct of a member of a sheriff's office or police department.

Due to the nature of these calls with the public, officers do not anticipate that their calls will be recorded. As in the case of any two-party telephonic conversation, they expect that both parties would be required to consent to any interception of these conversations. Indeed, the law requires it.[1]

As further explained in this brief, a nonconsensual interception of a telephone conversation is an unlawful interception of a wire communication, and no expectation of privacy is implicated. In this case, Defendant was charged with interception of a wire, oral, or electronic communication but the lawfulness of his conduct was decided by the issue of the officers' expectation of privacy in their phone calls. The Court's holding that no expectation of privacy exists when an officer communicates telephonically with a member of the public is inconsistent with legislative intent and relevant case law.

The FSA and FPCA submit this brief for the purposes of not only enlightening the Court as to the underlying authority for such an expectation of privacy but also the operational implications arising from its opinion. In

[1] Unless the recording is made by or at the direction of a law enforcement officer pursuant to a criminal investigation. *See* § 934.03(2)(c), Fla. Stat.

sum, the FSA and FPCA urge this Court to reconsider its decision and hold that the surreptitious recording of a telephone conversation with an officer in the course of his or her official duties is an unlawful interception of a wire or an oral communication.

ARGUMENT

I. Introduction

This case involves an individual (Waite) who recorded without permission his telephone conversations with a sergeant and deputies of the Citrus County Sheriff's Office ("CCSO"). The Court notes that this is a case of first impression. Indeed, the case is unique because although Waite intercepted a wire (telephone) conversation, the case turned on whether this was an unlawful interception of an oral communication.

The Florida Wiretap Act proscribes intentionally intercepting any wire, oral, or electronic communication and excludes the use of such interceptions and evidence derived from them in court. §§ 934.03(1), 934.06, Fla. Stat.; *Ramos v. Delphi Behav. Health Grp., Ltd. Liability Co.*, No. 21-11218, 2022 U.S. App. LEXIS 12021, at 2* (11th Cir. May 4, 2022).

Under normal circumstances, the Court would not be required to decide whether the officers who interacted with Waite enjoyed a reasonable expectation of privacy in their phone conversations. Typically, a suspect who records a telephone call is charged with interception of a wire

communication. In such a case, section 934.03(1)(a), Florida Statutes, requires no threshold showing of an expectation of privacy for the offense to be violated.

The present case, therefore, is an anomaly. Regrettably, the Court's opinion gives the impression that officers' telephone calls may be lawfully recorded because they enjoy no expectation of privacy while performing their duties.

At the outset, the FSA and FPCA support the State's argument that the interception was unlawful as a wire communication. If the Court declines to entertain this argument, it should at least clarify that its decision is limited to those cases in which a defendant has been charged with interception of an oral rather than a wire communication.

The Court should also reconsider its holding that no expectation of privacy exists because the Court's decision is unsupported by the case law upon which it relies. Alternatively, as advanced in the State's motion for rehearing, in view of the significance of this issue and its import to the public and law enforcement, the Court should certify the issue of the lawfulness of an interception of a telephone conversation with a law enforcement officer to the Florida Supreme Court.

II. Waite Unlawfully Intercepted Wire Communications By Recording the Phone Conversations.

As previously noted, Florida's wiretapping law, section 934.03(1)(a), Florida Statutes, provides that it is unlawful for any person to intentionally intercept or endeavor to intercept any wire, oral, or electronic communication. Unless certain defined exceptions are met, all parties must give prior consent before the interception of the communication in order for the interception to be lawful. § 934.03(2)(d), Fla. Stat. Waite's recording of the CCSO Sergeant and deputies did not fall under any statutory exemption to the two-party consent rule.

The Florida Legislature has defined wire and oral communications[2] in section 934.02, Florida Statutes. A "wire communication" is 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 intrastate, interstate or foreign communications or communications affecting intrastate, interstate, or foreign commerce. § 934.02(1), Fla. Stat. "Aural acquisition" means to gain control or

[2] The definition of electronic communications specifically excludes wire and oral communications and therefore electronic communications will not be addressed by the FSA or FPCA in this argument. *See* § 932.02(12)(a), Fla. Stat.

possession of a thing through the sense of hearing. *State v. Tsavaris*, 394 So. 2d 418, 421 n.3 (Fla. 1981) (citing Webster's Third New Int'l Dictionary (1961 unabridged)).

It is well established that the interception of a telephone conversation is an interception of a wire communication. *See Tsavaris*, 394 So. 2d at 423-24 (nonconsensual recording by medical examiner of a telephone conversation initiated by the defendant held to be an unlawful interception of a wire communication). Cell phone communications similarly fall within the protection of 934.03(2)(a). *See United States v. McCullough,* 523 Fed. Appx. 82, 84 (2d Cir. 2013); *United States v. Booker*, No. 1:11-cr-00255-TWT-RGV, 2012 LEXIS 188404, at *22-24 (N.D. Ga. Sept. 6, 2012).

An oral communication, however, is distinguished by the requirement of an expectation of privacy. Section 934.02(2) defines "oral communication" to mean 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.

One exception to a violation of section 934.03 is for a person acting under the direction of an investigative or law enforcement officer to intercept a wire, oral, or electronic communication when this person is a party to the communication or one of the parties to the communication has given prior

consent to the interception and the purpose of the interception is to obtain evidence of a criminal act. § 934.02(2)(c), Fla. Stat. The Legislature has also carved out an exception in section 934.02 for communications "uttered at a public meeting." For example, in *McDonough v. Fernandez- Rundle*, 862 F. 3d 1314, 1320 (11th Cir. 2017), the Eleventh Circuit held that the interception of a meeting between the chief of police and two members of the public was not unlawful due to the public nature of the meeting. Waite's recording, however, does not fall within any recognized exception.

The FSA and FPCA support the State's argument in the Motion for Rehearing that Waite was sufficiently charged with the interception of a wire communication. Accordingly, this court should exercise its discretion to entertain the State's argument that the interception was unlawful on rehearing.

Because the Court's opinion addresses only the interception of an oral communication, it has been portrayed by the media as a license to secretly record phone calls with law enforcement officers.[3] Such an interpretation of

[3] *See e.g. Florida law officers' phone calls can be recorded secretly, appeal court rules*, ORLANDO SENTINEL (Apr. 15, 2024, 10:15 AM), https://www.orlandosentinel.com/2024/04/15/florida-law-officers-phone-calls-can-be-recorded-secretly-appeal-court-rules/; *Florida appeals court: Phone conversations with law enforcement can be recorded without their consent*, WUFT (Apr. 15, 2024, 10:35 AM), https://www.wuft.org/fresh-take-florida/2024-04-15/florida-appeals-court-phone-conversations-

the wiretapping law, of course, is obviously incorrect, and suggests, at a minimum, that the Court's ruling should be reconsidered.

Certainly, if the Court agrees with the State that Waite violated section 934.03(1), because he intercepted a wire communication, and grants the motion for rehearing, then this distinction should be apparent in the Court's ruling. However, if the Court denies rehearing, then to avoid any unnecessary confusion the Court should clarify that the surreptitious recording of a phone call with an officer is an unlawful interception of a wire communication. As the opinion currently stands, the public may be misled into believing that they may freely record a telephone call with an officer and incorrectly assume that no criminal violation might occur.

In any event, the FSA and FPCA posit that Waite's recordings of the phone calls made by the sergeant and the deputies were also an unlawful interception of an oral communication. As further explained in this brief, an officer who engages in his or her official duties by interacting with a member

---

with-law-enforcement-can-be-recorded-without-their-consent; *Phone calls with law enforcement can be recorded without their consent, court rules*, TALLAHASSEE DEMOCRAT (Apr. 15, 2024, 10:51 AM), https://www.tallahassee.com/story/news/local/state/2024/04/15/appeals-court-rules-phone-calls-with-law-enforcement-can-be-recorded-without-their-consent/73327242007/; *Phone conversations with law enforcement can be recorded without their consent, court says*, ORLANDO WEEKLY (Apr. 15, 2024, 10:31 AM), https://www.orlandoweekly.com/news/phone-conversations-with-law-enforcement-can-be-recorded-without-their-consent-court-says-36640808.

of the public telephonically has a reasonable expectation of privacy within the meaning of section 934.02(2), Florida Statutes, and the Court should reconsider its holding on this issue.

III. The Nonconsensual Recording of a Telephone Conversation With an Officer Acting in the Course of His or Her Official Duties Constitutes an Unlawful Interception of an Oral Communication.

As the Court correctly acknowledges in the opinion, for an oral conversation to be protected under section 934.03, "the speaker must have an actual subjective expectation of privacy, along with a societal recognition that the expectation is reasonable." Op. at p. 4, quoting *State v. Smith*, 641 So. 2d 849, 852 (Fla. 1994) (citing *State v. Inciarrano*, 473 So. 2d 1272, 1275 (Fla. 1985). In determining that officers could enjoy no such expectation of privacy because they were performing their official duties, the Court erred.

When a law enforcement officer communicates telephonically with a member of the public, a reasonable expectation of privacy in the call exists. The position of the FSA and FPCA on this issue is supported by the legislative history of the wiretapping statute and the context in which these calls are made.

Until 1974, section 934.03(2)(d), Florida Statutes, permitted the interception of an oral or wire communication when *one party* of the communication gave prior consent. At that time the statute read as follows:

> It is not unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication when such person is a party to the communication or when *one* of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal act.

(Emphasis added).

The statute was amended in 1974 to require all parties to the wire or oral communication to give prior consent to an interception. Ch. 74-249, Laws of Fla. As amended, Section 934.03(2)(d), required all parties to the defined wire or oral communication to give prior consent to a defined interception:

> It is lawful under this chapter for a person to intercept a wire or oral communication when *all* of the parties to the communication have given prior consent to such interception.

(Emphasis added).

The Florida Supreme Court commented on the significance of these legislative changes in *Shevin v. Sunbeam Television Corp.*, 351 So. 2d 723, 726-27 (Fla. 1977). In *Shevin*, the court observed that requiring two-party consent was a policy decision by the Legislature to allow each party to a conversation to have an expectation of privacy from interception by another party to the conversation. *Id.*

The Supreme Court's decision in *Shevin* underscores the importance of the privacy rights implicated by the wiretapping law. The media argued

that they had an overriding First Amendment right enabling them to use concealed recording equipment in investigative reporting. The Supreme Court was not persuaded, holding that section 934.03(2)(d) did not violate the First Amendment by precluding the media from surreptitiously recording a conversation in the interest of accurately recording an interview. *Id.* at 727.

The court bolstered its decision with opinions from other courts that protected privacy rights at the expense of the media's right to know. One of these cases, *Dietemann v. Time, Inc.*, 449 F. 2d 245 (9th Cir. 1971), is particularly illuminating given the issues raised in the present case.

In *Dietemann*, a reporter was wired to transmit conversations for recording, and a photographer secretly took pictures of a physician in an attempt to secure information concerning criminal violations in the practice of medicine. The physician sued the press for damages to his privacy. *Id*. at 246-47

In finding for the physician, the court reasoned that a person "should not be required to take the risk that what is heard and seen will be transmitted by photograph or recording in full living color and hi-fi to the public at large." *Id*. at 249. Added the court, "A different rule could have a most pernicious effect upon the dignity of man and it would surely lead to guarded conversations and conduct where candor is most valued, *e.g.* in the case of doctors and lawyers." *Id.*

The same logic applies to a telephone conversation made by a law enforcement officer to a member of the public. On any given day an officer may be addressing anything from juveniles speeding through a residential neighborhood to a burglary of a neighbor's house. In each case the content is personal to the caller and the officer speaks specifically to someone about his or her particular issues, and certainly not to the public at large. Candor and discretion are paramount to these discussions between the officer and the caller.

The officers should reasonably expect that their conversations will not be recorded. Paraphrasing from *Dietemann*, an officer should not be required to take the risk that his phone call or selected portions of the phone call, taken out of context, will be broadcast through social media.

In other words, it is integral to an officer effectively performing his or her duties that there is an expectation of privacy in the telephone conversation with a member of the public. The medium, as well as the context, objectively establishes an expectation of privacy in these telephone calls. By choosing to speak telephonically with a member of the public, an officer necessarily exhibits an expectation that the communication is not subject to interception as required by Section 934.02, Florida Statutes.

The cases upon which the Court relies in concluding that no reasonable expectation of privacy exists are simply not persuasive on this

issue. The First Amendment decisions address the public's right to record officers performing their duties in official settings. *See e.g. Pickett v. Copeland,* 236 So.3d 1142, 1146 n.2 (Fla. 1st DCA 2018). Without any doubt, the public has a First Amendment right to photograph, film, or record police officers conducting their official duties in public. *See id.*; *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000).

However, Waite did not use his cell phone to record the sergeant or deputies conversing with him in a public setting. These cases offer little support to the issue of whether officers who engage in telephonic conversations with a member of the public have an expectation of privacy in the phone calls.

The public meeting cases are similarly inapposite. As the Eleventh Circuit decided in *McDonough,* discussions among persons attending a public meeting may be recorded because they meet the exception in Section 934.02 for communications "uttered at a public meeting." 862 F. 3d at 1320. Additionally, a meeting that may have been intended to be private may be deemed public in nature because none of the participants demonstrated any expectation of privacy, and the tenor of the meeting was clearly public. *See id.*

This was the result in *McDonough*. The police chief permitted not only the plaintiff, who had lodged a series of complaints against the Homestead

Police Department, to attend the meeting but also permitted another individual to attend who had not been invited. The chief's failure to establish privacy-related "ground rules" in advance of the meeting factored significantly in the court's ruling that the chief had no expectation of privacy in the meeting. *Id.* at 1319.

Importantly, the Eleventh Circuit highlighted another factor – the number of people attending the meeting (four) – which, the court intimated, "rendered any subjective expectation of privacy unreasonable." *Id.* at 1320 (citing *Department of Agric. & Consumer Servs. v. Edwards*, 654 So. 2d 628, 632-33 (Fla. 1st DCA 1995)). The court added that police misconduct, the topic of the meeting with the police chief, was one of "acute public interest." *McDonough*, 862 F. 3d at 1320.

Unlike the plaintiff in *McDonough*, however, Waite did not attend a meeting at the CCSO with the sheriff or any supervisor to complain about his property boundary dispute with the city or the conduct of the deputies. His issues were particular to him and did not involve matters of public interest. Nothing about the intercepted conversations conveys any impression that they were the equivalent of public meetings.

The Court also relies upon *Morningstar v. State*, 428 So. 2d 220, 221 (Fla. 1982) in which the Florida Supreme Court concluded that individuals conducting business over the phone do not enjoy a reasonable expectation

of privacy on business phone calls. The Court reasoned that the constitutional protections of the home do not extend to a defendant's office or place of business. *Id.*

In *Morningstar*, however, telephone calls were placed to the defendant *at his place of business*. While the defendant maintained that he had a reasonable expectation in his private office, the Supreme Court held that an expectation under these circumstances "is not one which society is willing to recognize as reasonable or which society is willing to protect." *Id.*

Along the same lines, this Court cites *Avrich v. State*, 936 So.2d 739, 742 (Fla. 3d DCA 2006) to support its holding that individuals conducting business over the phone (such as the CCSO sergeant and deputies) enjoy no expectation of privacy. However, in *Avrich*, the defendant was convicted of a violation of Section 365.16(1)(a), Florida Statutes, which prohibits making obscene or harassing telephone calls *to a location at which the person receiving the call has a reasonable expectation of privacy.* The defendant made telephone calls to the victim's business telephone line, located in the victim's home where he conducted his business. The Third District, citing *Morningsta*r, held that the victim was not entitled to a reasonable expectation of privacy to satisfy the requirements of the statute. *Avrich*, 936 So.2d at 742.

Again, the conversations between Waite and the officers did not occur at his place of business or at the CCSO. In its analysis, the Court draws no distinction between a conversation that occurs at a place of business and a private telephone conversation by an officer on an agency phone. Respectfully, there is a significant difference in the expectation of privacy to be accorded to each of these interactions with the public.

Turning to the instant case, the Court highlights the fact that the telephone calls concerned matters of public business, occurred while the deputies were on duty, and involved agency phones. Although the deputies and the sergeant were on duty and used their CCSO phones when they spoke with Waite, it cannot be assumed that Waite's personal complaints constitute a "public matter" undeserving of privacy.

There is no evidence, for example, that the sergeant and the deputies involved the public in Waite's concerns. Waite may have quarreled with city employees, but there is no evidence that he involved the city commission with his concerns. The media apparently did not publicize his disputes with the city and the CCSO. The record reflects nothing more than private telephone conversations directly relating to his singular complaints against the city as well as the deputies.

In short, in each of these calls the sergeant and the deputies reasonably expected that the calls would not be recorded. Indeed, it would

be fair to say that whenever an officer calls a member of the public, the officer presumes that the conversation is just between the two of them.

The sweeping nature of the Court's pronouncement that if a telephone conversation occurs in the performance of the official duties of an officer there can never be an expectation of privacy is also inconsistent with other decisions that have opined on similar issues. In particular, the Court's holding is at odds with the Eleventh Circuit's decision in *McDonough* in which the court appeared to leave the door open for circumstances in which an expectation of privacy could occur.

In *McDonough*, the Eleventh Circuit held that the police chief's failure to exhibit any expectation of privacy undermined any expectation of privacy in the meeting. 862 F.3d at 1319. Presumably, if the chief had posted a sign indicating that no recordings in his office were permitted, he could have established such an expectation of privacy.

The Fourth District's opinion in *State v. Sells, 582* So. 2d 1244, 1245 (Fla. 4th DCA 1991) also conflicts with the Court's decision. In *Sells,* the court concluded that the issue of the reasonableness of an officer's expectation of privacy should be addressed by a jury. *Id.*

The Court incorrectly distinguishes *Sells* on the grounds that the chief deputy suspected he was being recorded by a deputy and *Sells* did not involve a public meeting or a conversation between officers and members of

the public involving public business. Op. at p. 5-6, n.4. The mere fact that the chief deputy suspected that the deputy (Sells) was recording their conversation would not appear to be material as to whether there was an expectation of privacy. Furthermore, as previously noted, the intercepted communications in the present case did not stem from a public meeting or involve the "public business."

The Court's decision has created uncertainty for every officer who speaks telephonically with a member of the public. In each call, the officer must anticipate that this call may be manipulated to damage the officer in the public eye. It will inhibit the free flow of communication essential to an officer's ability to gather essential facts when speaking to the public.

Therefore, when an officer speaks with a member of the public in the officer's official capacity, the interception of such a phone call without the officer's knowledge or permission should be deemed unlawful. Subjectively, an officer anticipates the conversation to remain private, and objectively, society should also be prepared to recognize this expectation as reasonable.

IV. Conclusion

Ironically, as previously noted, if this case had been decided on whether Waite unlawfully intercepted a wire communication, the question of the officers' privacy in their telephone calls would never have been an issue in this case. For the reasons previously discussed, it should not matter

whether the phone call with the officer is deemed to be a wire communication or an oral communication. Under either circumstance, a nonconsensual interception of the recording is a violation of section 934.02, Florida Statutes, and should be treated as such.

Respectfully submitted,

/s/ R.W. Evans
Robert Wayne Evans, Esq.
Florida Bar No. 198862
revans@anblaw.com
ALLEN, NORTON & BLUE, P.A.
906 North Monroe St., Suite 100
Tallahassee, Florida 32303
Tel.: (850) 561-3503
Fax: (850) 561-0332
Counsel for Florida Sheriffs Association

/s/ J. David Marsey
J. David Marsey, Esq.
Florida Bar No. 0010212
dmarsey@rumberger.com
RUMBERGERGER KIRK
& CALDWELL
101 North Monroe St., Suite 1050
Tallahassee, Florida 323019
Tel.: (850) 222-6550
Fax: (850) 222-8783
Counsel for Florida Police Chiefs Association

CERTIFICATE OF SERVICE

I HEREBY CERTIFY on May 20, 2024, a true and correct copy of the foregoing was filed with the Clerk of the Court by using the CM/ECF system which will send a notice of this electronic filing to all counsel of record including:

Steven L. Brannock
Sarah B. Roberge
Brannock Berman & Seider
1111 W. Cass Street, Suite 200
Tampa, Florida 33606
(813) 223-4300
sbrannock@bbsappeals.com
sroberge@bbsappeals.com
eservice@bbsappeals.com

Alexei V. Lizanich
Law Offices of Melisa Melitello
107B W. Main Street
Inverness, Florida 33450
alexei.lizanich@gmail.com
militellolawyer@gmail.com

Counsel for Appellant

Henry C. Whitaker
Solicitor General
Jeffrey Paul DeSousa
Chief Deputy Solicitor General
Office of the Attorney General
The Capitol, PL-01
Tallahassee, FL 32399
(850) 414-3300
jeffrey.desousa@myfloridalegal.com
jenna.hodges@myfloridalegal.com

Counsel for Appellee

/s/ R.W. Evans
Robert Wayne Evans, Esq.

/s/ J. David Marsey
J. David Marsey, Esq.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFIED that pursuant to Rules 9.045 and 9.210(a)(2) Florida Rules of Appellate Procedure, this brief has been prepared in Arial 14-point font, and the word count is 3,940.

/s/ R.W. Evans
Robert Wayne Evans, Esq.

/s/ J. David Marsey
J. David Marsey, Esq.