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Illinois Supreme Court Strikes Down Illinois Eavesdropping Law

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Individuals and organizations wishing to avoid having conversations recorded and replayed can no longer rely on the protections of the **Illinois Eavesdropping Act**. The Illinois Supreme Court in ***People v. Clark*, 2014** IL 115776 and ***People v. Melongo***, 2014 IL 114852, two unconsolidated cases, each held that the Illinois Eavesdropping Act is unconstitutional due to its violation of the First Amendment of the U.S. Constitution. This ruling moves Illinois out of the minority of states which require all parties to a conversation to consent to its recording and leaves the state of the law regarding the recording and distribution of private conversations in Illinois undefined.

Illinois Eavesdropping Prohibitions

In 1994, the Illinois legislature amended the Eavesdropping Act so that it applied broadly to "any oral communication between two or more persons, regardless of whether one or more of the parties intended their communication to be of a private nature under circumstances justifying that expectation." Ill. Pub. Act 88-677 (1994) (codified at 720 Ill. Comp. Stat. 5/14-1(d)). The Act defined an "eavesdropping device" to include "any device capable of being used to hear or record oral conversations or intercept, retain, or transcribe electronic communications […]." 720 Ill. Comp. Stat. 5/14-1(a). The Act criminalized not only the recording of any such conversation, but also criminalized the use or divulging of "any information […] obtained through the use of an eavesdropping device." 720 Ill. Comp. Stat. 5/12-2. Violation of the Act is a class 4 felony, punishable by up to one year in prison.

Clark and Melongo

Both cases involved the criminal prosecution of individuals who recorded conversations which occurred in or were related to separate court room proceedings. In *Clark,* the defendant made recordings of his court hearing on a child support matter and in *Melongo,* the defendant made recordings of phone calls with a court reporter regarding an allegedly inaccurate transcript. In both cases, the Illinois Supreme Court found that the Act was "unconstitutional on its face because a substantial number of its applications violate the first amendment."*Melongo*, at ¶31.

In striking down the Act, the Illinois Supreme Court noted the variety of situations where the Act, as written, would prohibit the recording of conversations that were never intended to be private,

including arguments on the street, political debates on a college campus, or shouting fans at an athletic event. Noting that the Act would criminalize the recording of these conversations, conduct which the Court defined as innocent, the Court held that the Act was far too broad in application for its intended purpose of protecting conversational privacy.

However, the Court highlighted the fact that individuals do have a legitimate interest in the privacy of their conversations and ensuring that their private conversations are not being recorded. The Court went so far as to note that "the fear of having private conversations exposed to the public may have a chilling effect on private speech." *Clark*, at ¶21. As a result, the Court indicated that a prohibition and the criminalization of recordings of truly private conversations would likely be held to be Constitutional. Ultimately, the Court ruled that the Act's blanket ban on audio recordings of both private and public conversations went too far and overstepped the protections of the First Amendment, necessitating that the Act be struck down.

Implications

As a result of these rulings, Illinois is currently left without a law generally regulating the recording and distribution of conversations by private citizens. However, public comments by some lawmakers, including State Representative Elaine Nekritz, indicate that the State Legislature will likely take up this issue and attempt to craft a more narrow version of the Act which complies with the holdings of the Illinois Supreme Court. Whether or not Illinois will attempt to remain an "all party" consent state or join the majority of "single party" consent states remains to be seen. In the meantime, individuals and organizations should be aware that the law no longer prohibits the recording and distribution of conversations by a private individual. In short, individuals and organizations need to be careful of what they say and to whom.

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