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MEMORANDUM FOR: John

FROM: **DIANNA G. HOLLAND**

ACTION

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COMMENT

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THE WHITE HOUSE

WASHINGTON

January 4, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Florida Law on Recording Telephone Conversations

The story in today's New York Times suggests that Florida law governing recording of telephone conversations may be of interest. Until October 1, 1974, Florida law was identical to Federal law on this subject, excepting from the general prohibition against interception of wire communications any interception by or with the consent of one party to the conversation. In 1974, however, the Florida legislature repealed this exception and substituted an exception reading: "It is lawful under this chapter for a person to intercept a wire or oral communication when all of the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." Fla. Stat. Ann. § 934.03(2)(d).

Since no exception covers one-party consent taping of telephone conversations, we are thrown back to the general prohibition. That general prohibition makes it a third degree felony in Florida for anyone willfully to "intercept" a wire or oral communication. Fla. Stat. Ann. § 934.03(1)(a). "Intercept" is defined as "the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device." Id. § 934.02(3). This is an awkward way of prohibiting the recording of one's own telephone conversations, and it is clear that the statute was primarily directed at the more common notion of third-party "bugging." Nonetheless, the language of the prohibition can be considered to embrace taping conversations to which one is a party, a conclusion fortified by the negative pregnant flowing from the explicit exception for taping conversations with the consent of all parties.

The question whether the Florida statute prohibits recording of one's own telephone conversations without the consent of the other party was decided in the affirmative in 1981 by the narrowest of margins, 4-3. State v. Tsavaris, 394 So. 2d 418 (Fla. 1981).

As correctly noted in the Times story, a third degree felony is punishable by imprisonment not to exceed five years and/or a fine not to exceed $5,000.

is a necessarily lesser included offense of robbery with a deadly weapon, we believe it is, it follows that the trial court erred in failing to give appellant's requested instruction." 350 So.2d at 124. The failure to instruct on the next immediate lesser included offense (one step removed) constitutes error that is per se reversible. *See State v. Abreau*, 363 So.2d 1063 (Fla. 1978) The requested instruction comes within that degree.

To affirm this decision we would have to recede from *Growden* and *Huff*. We decline to do so and therefore quash the decision of the district court of appeal with instructions to remand the cause for a new trial.

It is so ordered.

ADKINS, Acting Chief Justice, BOYD and OVERTON, JJ., concur.

ALDERMAN, J., dissents with an opinion.

ALDERMAN, Justice, dissenting.

I do not believe that the opinion of the Fifth District in the present case expressly and directly conflicts with *Growden* and *Huff* on the same point of law. As pointed out by Judge Beranek in his opinion for the Fifth District, *Growden* is distinguishable because in that case the jury was precluded from considering robbery with a weapon, whereas here the instruction given adequately covered this lesser included offense. 380 So.2d at 1332.

I, therefore, conclude that this Court is without jurisdiction and that Reddick's petition for review should be denied Art. V, § 3(b)(3), Fla.Const.

If we did have jurisdiction, I would approve the decision of the Fifth District.

[redacted] Petitioner,

v.

[redacted] Respondent

No. 54,098

Supreme Court of Florida.

Feb. 12, 1981.

Rehearing Denied March 18, 1981.

In prosecution for first-degree murder of one of his patients, psychiatrist requested that certain evidence be suppressed. The Circuit Court, Hillsborough County, Harry Lee Coe, III, J., entered nonfinal order granting psychiatrist's request, and State appealed. The District Court of Appeal, Danahy, J., 382 So.2d 56, reversed in part, affirmed in part, remanded, and certified to Supreme Court the question whether recording of conversation by one of participants constitutes interception of wire or oral communication within meaning of chapter governing security of communications, and psychiatrist raised issue on cross notice for review regarding validity of subpoenas directed to his secretary and suppression of office records produced pursuant to subpoenas. The Supreme Court held that: (1) medical examiner's recording of psychiatrist's telephone conversation with him was unlawful interception of wire or oral communication within meaning of chapter governing security of communications; (2) psychiatrist did not have standing to object to form or service of process of subpoenas duces tecum served upon his secretary, but did have standing to object on Fourth Amendment grounds; and (3) use of subpoenas duces tecum did not violate psychiatrist's Fourth Amendment rights since subpoenas were not overbroad and subpoenaed materials were relevant.

Certified question answered in the affirmative; result of district court's decision approved.

Adkins, J., concurred with Part I and dissented with Part II and filed opinion.

England, J., concurred with Parts I and II, but dissented to admissibility of documents, and filed opinion.

Alderman, J., concurred with Part II and dissented with Part I, and filed opinion, with which Boyd and McDonald, JJ., concurred.

1. Telecommunications ⇐491

"Aural acquisition" in context of interception of wire or oral communication, means to gain control or possession of a thing through sense of hearing. West's F.S.A. § 934.02(3).

See publication Words and Phrases for other judicial constructions and definitions.

2. Telecommunications ⇐494

"Intercept" in statute proscribing disclosure of contents of unlawfully intercepted communication, means to gain control or possession of a communication through the sense of hearing and through use of electronic or mechanical device. West's F.S.A. § 934.02(3).

See publication Words and Phrases for other judicial constructions and definitions.

3. Telecommunications ⇐494

Medical examiner's recording of telephone conversation with psychiatrist who was suspected of first-degree murder of one of his patients, without psychiatrist's consent, was unlawful interception as defined by statute proscribing such interceptions. West's F.S.A. §§ 934.02(3), 934.03(2)(d).

4. Constitutional Law ⇐46(1)

Supreme Court will not pass upon constitutional issue if case can be decided on other grounds

5. Telecommunications ⇐492

Chapter governing security of communications was intended to afford broad protection to private communications, evincing greater concern for protection of one's privacy interests in conversation than does federal act West's F.S.A. § 934.03(2)(d); 18 U.S.C.A. § 2510 et seq.; U.S.C.A.Const. Amend. 1

6. Telecommunications ⇐495

Amendment of statute to require all parties to defined wire or oral communication to give prior consent to its intercept was designed to proscribe recording of telephone conversation by one party without consent of other party. West's F.S.A. § 934.03(2)(d).

7. Telecommunications ⇐491

Where initial interception of wire or oral communication is illegal, recording of that interception must likewise be illegal. West's F.S.A. § 934.01 et seq.

8. Telecommunications ⇐491

It is immaterial to proper analysis of chapter governing security of communications that a recording may provide more trustworthy evidence of contents of conversation than mere oral testimony. West's F.S.A. § 934.01 et seq.

9. Constitutional Law ⇐70.3(9)

It is not for Supreme Court to question policy judgment behind legislative mandate that while person who engages in telephone conversation runs risk that another may later testify as to contents of that communication, he can at least be assured that conversation will not be recorded without his consent, but it is for Supreme Court simply to apply it. West's F.S.A. § 934.03(2)(d).

10. Witnesses ⇐9

If witness in criminal case appears in response to defective process and fails to interpose any objections to form or service of process, witness waives any right to be heard at later date on such matters.

11. Criminal Law ⇐394.5(2)

Illegal issuance of subpoena to witness is not grounds for suppression of witness' evidence on motion of defendant in criminal case, since objections to legality of subpoena are personal to and may be asserted or waived only by person searched or examined

12. Searches and Seizures ⇐7(26)

Psychiatrist did not have standing to object to form or service of process [illegible]

poenas duces tecum served on his secretary for office records, but did have standing to object on basis that such subpoenas violated psychiatrist's Fourth Amendment rights U.S.C.A.Const. Amend. 4.

13. Searches and Seizures ⇐7(25)

Fourth Amendment does not require that subpoena duces tecum be issued by detached magistrate. U.S.C.A.Const. Amend. 4.

14. Searches and Seizures ⇐7(25)

Use of subpoena that is properly limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome does not constitute unreasonable search and seizure under the Fourth Amendment. U.S.C.A.Const. Amend. 4.

Jim Smith, Atty. Gen., and Peggy A. Quince, Asst. Atty. Gen., Tampa, for petitioner.

Gerald C. Surfus of Lee & Surfus, Sarasota, for respondent.

PER CURIAM.

The District Court of Appeal, Second District, has certified the following question for our resolution:

> Does the recording of a conversation by one of the participants constitute the interception of a wire or oral communication within the meaning of Chapter 934, Florida Statutes (1979)?

State v. Tsavaris, 382 So.2d 56, 65 (Fla 2d DCA 1980). An additional issue is raised by Tsavaris on cross-notice for review regarding the validity of subpoenas directed to Tsavaris's secretary and the reversal of the trial court's suppression of the office records produced pursuant to these subpoenas.

We answer the certified question in the affirmative. As to Tsavaris's point on cross-notice, we hold that the district court correctly determined that only Tsavaris's secretary to whom the subpoenas were directed had standing to object to the form or service of process of the subpoenas and that, by failing to object, she waived any such defects. We also agree with the district court that suppression of the office records produced pursuant to the subpoenas was not required by the fourth amendment to the United States Constitution.[1]

Part I—Wire Interception

Louis Tsavaris, who had been indicted for the first-degree murder of Cassandra Ann Burton, one of his patients, moved to suppress certain evidence against him. One of the items he sought to suppress was a tape recording of a telephone call he made to the medical examiner, Dr. Feegel, inquiring as to Miss Burton's autopsy results. Dr. Feegel answered this call on his speaker phone in the presence of a sheriff's detective who had just informed Dr. Feegel that Tsavaris was involved in the circumstances surrounding Miss Burton's death. The detective overheard the entire conversation over the speaker phone. Although not instructed by the detective to do so, when Tsavaris identified himself as the caller, Dr. Feegel turned on a recording device and asked Tsavaris to identify himself again.[2] Tsavaris's response and the remainder of the conversation were recorded by Dr. Feegel. It is the admissibility of this recording which is now in issue. There is no dispute that the testimony regarding this conversation either by Dr. Feegel or by the detective who overheard the conversation is admissible. The district court so held, and Tsavaris does not contest this holding in his cross-review request.

The trial court granted Tsavaris's motion to suppress the recording of this telephone conversation on the basis that it was an unlawful interception of a wire communication in violation of chapter 934. The dis-

1. We refer only to those items described in the subpoenas. The trial court found that some items not mentioned in the subpoenas were not given up freely and voluntarily. This portion of the trial judge's order is not before us for review.

2. This case does not involve the issue of whether the interception was conducted by a law enforcement officer or a person acting under the direction of a law enforcement officer pursuant to section 934.03(2)(c), Florida Statutes (1979).

trict court affirmed this ruling only because it felt compelled to do so in light of this Court's decision in *State v. Walls*, 356 So.2d 294 (Fla.1978).

Section 934.06, Florida Statutes (1979), provides:

> Whenever any wire or oral communication has been *intercepted*, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the state, or a political subdivision thereof, if the disclosure of that information would be in violation of this chapter.

(Emphasis supplied.) But for exceptions specifically spelled out in chapter 934, anyone who willfully intercepts a wire or oral communication or who discloses the contents of an unlawfully intercepted wire or oral communication is guilty of a felony in the third degree. § 934.03(1)(a) and (c). None of the exceptions listed in section 934.03(2) applies in the present factual situation. Therefore, if the recording of Tsavaris's conversation by Dr. Feegel constitutes an "interception," no part of the contents of such communication may be received into evidence.

[1–3] Intercept is defined by section 934.02(3) to mean the "aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device." "Aural acquisition" means to gain control or possession of a thing through the sense of hearing.[3] Thus pursuant to section 934.02(3), "to intercept" means to gain control or possession of a communication through the sense of hearing and through the use of an electronic or mechanical device.[4] We think it is clear that Dr. Feegel's recording of his telephone conversation with Dr. Tsavaris fits the explicit terms of the statutory definition.

As noted by the district court, this Court need look no further than our recent opinion in *State v. Walls* to determine that Dr. Feegel's recording is an unlawful interception. In *Walls* a victim of extortion threats recorded a conversation he had with the extortionists in his home. At trial the alleged extortionists successfully sought to have the recordings suppressed because they were in violation of chapter 934. This Court affirmed the trial court suppression order and expressly held that the recordings were unlawful interceptions.

[4] The Court reached a similar conclusion in *Shevin v. Sunbeam Television Corp.*, 351 So.2d 723 (Fla.1977), *appeal dismissed*, 435 U.S. 920, 98 S.Ct. 1480, 55 L.Ed.2d 513 (1978). In that case various newspapers mounted a wholesale attack upon the constitutionality of section 934.03(2)(d), Florida Statutes (1979), which requires that all parties to a conversation give consent before that conversation may be lawfully intercepted. The newspapers complained that to prohibit a reporter from secretly recording conversations (such as telephone conversations) would unreasonably inhibit newsgathering activities protected by the first amendment. We rejected the newspapers' constitutional claim and upheld the state's right to require consent of all parties. While petitioner points out that the term "intercept" was not squarely in issue in *Shevin*, the entire controversy in that case was premised on the fact that the recording of telephone conversations and the like would constitute illegal interceptions. Moreover, had this Court believed that the recording of a conversation without the participants' consent did not fit within the term "interception," we most certainly would have decided the case on those grounds, for the Court will not pass upon a constitutional issue if the case can be decided on other grounds. *Wooten v. State*, 332 So.2d 15 (Fla.1976); *Singletary v. State*, 322

3. Webster's Third New International Dictionary (1961 unabridged).

4. Notably, the statute does not speak in terms of "wiretapping" or "eavesdropping," or any other specific means of acquiring the contents of a communication.

So.2d 551 (Fla.1975); *Jones v. City of Sarasota*, 89 So.2d 346 (Fla.1956).

[5] The history and recent amendments to chapter 934 demonstrate that the act was intended to afford broad protection to private communications. Chapter 934, the Florida Security of Communications Act, was patterned after Title III of the Omnibus Crime Control Act of 1968, 18 U.S.C. § 2510, *et seq.* Prior to 1974 the Florida act, like its federal counterpart, permitted the interception of defined wire or oral communications when *one party* to the communication gave consent:

> 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.

§ 934.03(2)(d), Fla.Stat. (1973). Effective October 1, 1974 however, chapter 74-249, laws of Florida, amended the act to require all parties to a defined wire or oral communication to give prior consent:

> 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.

§ 934.03(d)(2), Fla.Stat. (1979). This amendment "was a policy decision by the Florida legislature to allow each party to a conversation to have an expectation of privacy from interception by another party to the conversation" *Shevin v. Sunbeam Television Corp.*, 351 So.2d at 726–27. *Accord, State v. News-Press Publishing Co.*, 338 So.2d 1313, 1316 (Fla. 2d DCA 1976). While the federal wiretapping legislation envisions that one's right to privacy must be subordinate to law enforcement interests when one party consents to the interception of a conversation, "[t]he [Florida] Legislature has determined as a matter of state public policy that the right of any caller to the privacy of his conversation is of greater societal value than the interest served by permitting eavesdropping or wiretapping." *State v. Walls*, 356 So.2d at 296 (quoting from *Markham v. Markham*, 265 So.2d 59 (Fla. 1st DCA 1972), *affirmed*, 272 So.2d 813 (1973)). Hence, the Florida act evinces a greater concern for the protection of one's privacy interests in a conversation than does the federal act.

[6] Equally certain is the fact that the 1974 amendment to chapter 934 was designed to proscribe the method of interception used in this case. On the floor of the Florida House of Representatives, the only recorded debate on the two-party consent requirement of section 934.03(2)(d) was this comment by Representative Shreve:

> [What this bill does] is to prevent, make it illegal for a person to record a conversation, even though he is a party to it, without the other person's consent.[5]

With no further debate, the bill passed the House 109–1. We regard this lone and uncontested comment as telling evidence of the unlawful nature of Dr. Feegel's recording.

The district court decision in *Tsavaris* goes to great lengths to convince this Court that *State v. Walls* was incorrectly decided and should be overruled.[6] We remain wholly unpersuaded The district court rationale proceeds on two faulty premises. The first is that the term "interception" means only an interception of a communication in the course of transmission and before arrival of the communication at the receiving end. In other words, a classic "wiretap." But the federal cases cited by the district court simply do not support this proposition. The primary case relied upon for this first

5. Taken from the tape of the afternoon session, Florida House of Representatives' debate of SB 459, on May 30, 1974.

6. We are at a loss to understand why the district court went so far—in the absence of new or controlling wisdom—as to disavow its own recent decision, *State v. News-Press Publishing Co.*, 338 So.2d 1313 (Fla. 2d DCA 1976), on the "interception" issue. Obviously, we think *State v. News-Press* is persuasive and was rightly decided on that issue.

premise is *Rathbun v. United States*, 355 U.S. 107, 78 S.Ct. 161, 2 L.Ed.2d 134 (1957). In *Rathbun* the Supreme Court considered whether a former provision of the Federal Communications Act, 47 U.S.C. § 605, was violated when one of two parties to a telephone conversation permitted a police officer to listen in on an extension phone. The Court found no interception under the facts presented, but expressly grounded its decision upon the fact that section 605 permits an interception with one party's consent, and that one party had in fact consented to the interception:

> The telephone extension is a widely used instrument of home and office, yet with nothing to evidence congressional intent, petitioner argues that Congress meant to place a severe restriction on its ordinary use by subscribers, ... The clear inference [of the statute] is that one entitled to receive the communication may use it for his own benefit or have another use it for him. The communication itself is not privileged, and one party may not force the other to secrecy merely by using a telephone.

355 U.S. at 109–110, 78 S.Ct. at 162–63 (footnote omitted). As Mr. Justice Frankfurter points out in his dissent in *Rathbun*:

> The fact that the Court relies on "the consent of one party" evidently implies that it would not be without the purview of § 605 for a police officer to conceal himself in a room of a house or a suite of offices having several "regularly used telephone extensions" and surreptitiously to utilize such an extension to overhear telephone conversations.

355 U.S. at 113, 78 S.Ct. at 164. Based as it is on a statute requiring the consent of only one party to an interception, *Rathbun* is of no value in properly analyzing the Florida act, which requires the consent of all parties. *Accord, United States v. Harpel*, 493 F.2d 346, 349 (10th Cir. 1974). Moreover, *Rathbun* says nothing in support of the proposition that an interception must be an acquisition between the speaker and the receiver.

The other case cited by the district court in support of its interception theory is *Carnes v. United States*, 295 F.2d 598 (5th Cir. 1961), *cert. denied*, 369 U.S. 861, 82 S.Ct. 949, 8 L.Ed.2d 19 (1962). *Carnes* involved the recording of telephone conversations by means of an attachment on a phone receiver. In finding no interception under these facts, the Fifth Circuit made bare reference to the view that an intercept required the listening to occur between the parties. But as in *Rathbun*, the decision in *Carnes* expressly relied upon the fact that one party to the conversation had consented to the recording:

> The significant fact in the cases where eavesdropping has been approved is that a third person is listening to a conversation directly, or indirectly through an electrical device, with the consent, and often assistance, of one of the parties, and that the other party does not know that his words are overheard.

295 F.2d at 602. In any event, *Carnes* has been substantially undercut if not overruled by the recent decision in *United States v. Turk*, 526 F.2d 654 (5th Cir.), *cert. denied*, 429 U.S. 823, 97 S.Ct. 74, 50 L.Ed.2d 84 (1976), where the Fifth Circuit held that the recording of a telephone conversation, such as that involved in the present case, was clearly an interception.

[7–9] The second premise underlying the district court decision in *Tsavaris* is that tape recordings do not differ in principle from testimony as to the contents of conversations, and recordings have the advantage of furnishing trustworthy evidence.[7] The response to this contention is twofold. First, the cases cited all construe statutes which permit an interception with one party's consent. In upholding the use of recordings where one party has consented,

7. Some of the cases cited as authority include *United States v. Bastone*, 526 F.2d 97 (7th Cir. 1975), *cert. denied* 425 U.S. 973, 96 S.Ct. 2172, 48 L.Ed.2d 797 (1976); *Amsler v. United States*, 381 F.2d 37 (9th Cir. 1967); *State v. McDermott*, 167 N.J.Super. 271, 400 A.2d 830 (1979); *State v. Birge*, 240 Ga. 501, 241 S.E.2d 213, *cert. denied* 436 U.S. 945, 98 S.Ct. 2847, 56 L.Ed.2d 786 (1978).

these cases are merely saying that *where the initial interception is legal* so too is the recording of that interception. *State v. McDermott*, 167 N.J.Super. 271, 400 A.2d 830 (1979), a case relied upon by the district court, makes this explicit statement. 400 A.2d at 834. *Accord, Amsler v. United States*, 381 F.2d 37, 50 (9th Cir. 1967). Conversely, where under the Florida act an initial interception is illegal, the recording of that interception must likewise be illegal. Second, it is absolutely immaterial to a proper analysis of chapter 934 that a recording may provide more trustworthy evidence of the contents of a conversation than mere oral testimony. This would be just as true of a conversation recorded under patently illegal circumstances. Florida law mandates that while a person who engages in a telephone conversation runs the risk that another may later testify as to the contents of that communication, he can at least be assured that the conversation will not be recorded without his consent. It is not for us to question this policy judgment, but simply to apply it.[8]

Part II—Subpoenaed Records

Proceeding next to the issue of the subpoenaed records, the pertinent facts follow:

On Monday morning following Sally Burton's death on Saturday night, detectives from the Hillsborough County Sheriff's Department interviewed Chris Carlton, Dr. Tsavaris' part-time secretary. Apparently Dr. Tsavaris' office records were described and discussed in that interview. Miss Carlton declined to give the detectives any of the records or information from the records, stating that this information was confidential and disclosure would be unethical.

Later that same morning four detectives from the Sheriff's Department and an assistant state attorney went to Dr. Tsavaris' office. One member of the party served two subpoenas duces tecum on Jean Jones, Dr. Tsavaris' full-time secretary. Each subpoena was addressed to "custodian of records, 4600 Habana Suite 28, Tampa, Fla. (Office of Dr. Louis Tsavaris)." Each commanded the "custodian of records" to appear before the state attorney instanter. One subpoena directed that she bring with her all medical records relating to Cassandra Burton a/k/a Sally Burton, a/k/a Sandra Burton. The other subpoena directed the custodian to bring with her the personal appointment book of Dr. Tsavaris for the month of April, 1975.

Jean Jones thereupon went with two detectives to the office of the state attorney and there turned over to the state attorney four sets of records from Dr. Tsavaris' office. Personnel at the state attorney's office made copies of those records and returned the originals to Jean Jones.

The office records thus obtained by the state attorney were (1) sign-in sheets used for group therapy sessions, on which the patients signed their names and their comments about their feelings; (2) Dr. Tsavaris' appointment book, showing his daily appointments with patients, both groups and individuals; (3) a telephone ledger used to log incoming calls to Dr. Tsavaris' office and to note calls which he requested his secretary to make; and (4) Sally Burton's medical records.

With the exception of Sally Burton's medical records, Jean Jones maintained all of these records for Dr. Tsavaris in her capacity as his secretary. Both the appointment book and the telephone ledger were kept on her desk. After a group session, either Jean Jones or Chris Carlton made a record of attendance and put the sign-in sheet in a file for that particular group.

State v. Tsavaris, 382 So.2d at 66–67.

Tsavaris argued to the district court that the state attorney had obtained the subpoenaed office records in violation of his right to be free from unreasonable searches and

8. Indeed, it does not seem unreasonable to conclude that the nonconsensual recording of a telephone conversation, by itself, is a pernicious and intrusive act worthy of legislative proscription.

seizures. He further contended that the records should be suppressed because the subpoenas were defective and improperly served. Tsavaris also argued in the district court that his fifth amendment rights were violated by the production of these records, but he does not make this argument before us.[9] His brief on the merits is limited to his challenge to the district court's holding on standing and to his claim of fourth amendment violation.

[10, 11] The district court correctly determined that the duty rested on Tsavaris's secretary to object to the form of process served upon her. As stated by the district court:

> [I]f a witness appears in response to defective process and fails to interpose any objections to the form or service of the process, the witness waives any right to be heard at a later date on those matters. *Coleman v. State*, 134 Fla. 802, 184 So. 334 (1938). The illegal issuance of a subpoena to a witness is not grounds for suppression of the witness' evidence on motion of the defendant in a criminal case. Objections to the legality of a subpoena are personal to and may be asserted or waived only by the person searched or examined. "It was never heard that the defendant could object to the violation of the privileges of others not claimed by them because that violation discovers evidence by which he is convicted." *Sachs v. Government of the Canal Zone*, 176 F.2d 292 (5th Cir. 1949), *cert. denied*, 338 U.S. 858, 70 S.Ct. 200, 94 L.Ed. 525 (1949). . . .

382 So.2d at 67.

[12] Although Tsavaris did not have standing to challenge the form or service of process of the subpoenas, he did have standing to object to the subpoenas on the basis that they violated his fourth amendment rights. Considering Tsavaris's claim that his rights were violated because the subpoenaed records were the product of a warrantless search and seizure the district court found no violation of the fourth amendment. Relying upon *In re Horowitz*, 482 F.2d 72 (2d Cir. 1973), *cert. denied*, 414 U.S. 867, 94 S.Ct. 64, 38 L.Ed.2d 86 (1973), which traced the development of the United States Supreme Court's position on the application of the fourth amendment to a subpoena duces tecum and which was cited with approval by the United States Supreme Court in *Fisher v. United States*, 425 U.S. 391, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976), the district court accurately determined that as far as the fourth amendment is concerned, the only requirements are that the subpoena must not be unduly burdensome and the subpoenaed documents must be relevant in purpose. In the present case, as the district court points out, no claim was made that the subpoenas were overbroad or that the evidence sought is not relevant.

Relying solely on *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), for his fourth amendment challenge to the subpoenas, Tsavaris argues that the production of his papers could not be required without the intervention of a detached magistrate. *Coolidge* involved a search and seizure pursuant to a search warrant which had not been issued by a neutral and detached magistrate. The Supreme Court held:

> We find no escape from the conclusion that the seizure and search of the Pontiac automobile cannot constitutionally rest upon the warrant issued by the state official who was the chief investigator and prosecutor in this case. Since he was not the neutral and detached magistrate required by the Constitution, the search stands in no firmer ground than if there had been no warrant at all. If the seizure and search are to be justified, they must, therefore, be justified on some other theory.

403 U.S. at 453, 91 S.Ct. at 2031

The State responds that the present case involved issuance of a subpoena, not a search warrant, and there is no requirement

9. Consequently we intimate no opinion with respect to an individual's standing to assert nor upon the efficacy of any fifth amendment challenge to production of subpoenaed documents such as are here involved

that a subpoena be issued by a detached magistrate. It argues that the district court correctly reversed the trial court's order suppressing the office records.

[13] We are not persuaded by Tsavaris's argument which is contrary to precedent established by the Supreme Court of the United States. The fourth amendment does not require that a subpoena duces tecum be issued by a detached magistrate as Tsavaris now suggests. Although in the early decision of *Boyd v. United States*, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886), the Supreme Court declared that the fourth amendment applied to subpoenas duces tecum in the same manner in which it applied to search warrants, the Supreme Court retreated from this broad view in subsequent decisions.

In *Hale v. Henkel*, 201 U.S. 43, 26 S.Ct. 370, 50 L.Ed. 652 (1906), the Supreme Court announced that the search and seizure clause of the fourth amendment was not intended to interfere with the power of courts to compel the production of evidence through a subpoena duces tecum but further explained that a test of reasonableness should be applied in considering whether a subpoena duces tecum amounted to an unreasonable search and seizure. Applying the test of reasonableness, it held that the particular subpoena under review was too sweeping in its terms to be regarded as reasonable. *Cf. Consolidated Rendering Co. v. Vermont*, 207 U.S. 541, 28 S.Ct. 178, 52 L.Ed. 327 (1908), wherein, employing this test of reasonableness, the Supreme Court enforced a subpoena because it described in reasonable detail what was to be produced.

Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 66 S.Ct. 494, 90 L.Ed. 614 (1946), involved the issuance of subpoenas duces tecum by the wage hour administrator in the course of an investigation pursuant to the Fair Labor Standards Act, which were challenged on the basis that they violated the fourth amendment proscription against unreasonable searches and seizures. The Supreme Court found that there was no fourth amendment violation and explained that there was a misconception of the fourth amendment's function as it related to subpoenas and that this misconception lay with the identification of cases involving "figurative" or constructive search with cases of actual search and seizure. The Court held that, if the fourth amendment was applicable at all to the subpoenas in question, at the most, it only ensures relevancy and guards against abuse of too much indefiniteness or breadth in the things required to be particularly described. *Oklahoma Press v. Walling*, 327 U.S. at 208, 66 S.Ct. at 505. *See also, See v. Seattle*, 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967). In *United States v. Dionisio*, 410 U.S. 1, 11–12, 93 S.Ct. 764, 770, 35 L.Ed.2d 67 (1973), the Court reiterated: "The Fourth Amendment provides protection against a grand jury subpoena duces tecum too sweeping in its terms 'to be regarded as reasonable.' *Hale v. Henkel*, 201 U.S. 43, 76 [26 S.Ct. 370, 379]; *cf. Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 208, 217 [66 S.Ct. 494, 505, 509]." *See also, United States v. Mara*, 410 U.S. 19, 93 S.Ct. 774, 35 L.Ed 2d 99 (1973).

The distinction between searches and seizures and subpoenas insofar as the fourth amendment's application is concerned was again made by the Supreme Court in *Fisher v. United States*, 425 U.S. 391, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976), wherein the Court stated that the fourth amendment protects against seizures without warrant or probable cause and "against subpoenas which suffer from 'too much indefiniteness or breadth in the things required to be "particularly described,"' *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 208, [66 S.Ct. 494, 505] (1946) . . . ." 425 U.S. at 401, 96 S.Ct. at 1576.

[14] The use of a properly limited subpoena does not constitute an unreasonable search and seizure under the fourth amendment. All that is required is that the subpoenaed materials be relevant to the investigation being conducted and that the subpoena not be overly broad or burdensome. A proper subpoena is one that is properly limited in scope, relevant in purpose, and specific in directive so that compliance will

not be unreasonably burdensome. *See United States v. Palmer*, 536 F.2d 1278 (9th Cir. 1976); *In re Horowitz.*

In the present case, the district court correctly observed:

> No claim has been made that the subpoenas duces tecum in this case were overbroad or that the evidence sought is not relevant. Neither claim would be successful. Accordingly, we hold that the requirements of the Fourth Amendment were met with regard to the subpoenas duces tecum in this case.

State v. Tsavaris, 382 So.2d at 71. The district court further appropriately remarked:

> We pause to observe that, in our view, the procedure followed by the state in this case—that is, using subpoenas duces tecum to obtain the evidence it sought in connection with its investigation of Dr. Tsavaris—was much less intrusive than would have been a search pursuant to a search warrant. *O'Connor v. Johnson*, Minn., 287 N.W.2d 400 (1979). We see no basis for criticizing the state for choosing to use subpoenas duces tecum to obtain the records in question in lieu of seeking the issuance of a search warrant, assuming there was probable cause for such a warrant.

382 So.2d at 71 (footnote omitted).

Subpoenas duces tecum are different from search warrants and are indisputably less intrusive. While there is no opportunity to challenge a search warrant, a subpoena duces tecum is subject to a motion to quash prior to the production of the requested materials. While a search warrant may involve the police rummaging through one's belongings and may involve the threat or actual use of force, a subpoena duces tecum requires the subpoenaed person to bring the materials sought at a time and place described in the subpoena. *See Stanford Daily v. Zurcher*, 353 F.Supp. 124 (N.D. Cal.1972); *Hynes v. Moscowitz*, 44 N.Y.2d 383, 406 N.Y.S.2d 1, 377 N.E.2d 446 (Ct. App. 1978), *appeal dismissed*, 439 U.S. 92, 99 S.Ct. 302, 58 L.Ed.2d 315 (1978).

In summary, we hold that Dr. Feegel's recording of Tsavaris's conversation with him was an unlawful interception of a wire or oral communication within the meaning of chapter 934. Further, we hold that the subpoenaed records are admissible and the district court correctly reversed the trial court's suppression of these records.

Accordingly, the result of the district court's decision is approved.

It is so ordered.

SUNDBERG, C. J. and OVERTON, J., concur with Part I and II.

ADKINS, J., concurs with Part I and dissents with Part II with an opinion.

ENGLAND, J., concurs with Parts I and II, but dissents to the admissibility of documents with an opinion.

ALDERMAN, J., concurs with Part II and dissents with Part I with an opinion, with which BOYD and McDONALD, JJ., concur.

ADKINS, Justice, concurring in part and dissenting in part.

I concur in Part I of the opinion holding that the recording of the Tsavaris-Dr. Feegel conversation was an unlawful interception.

I dissent from Part II of the opinion authorizing the seizure of private papers by use of a subpoena duces tecum.

In the first appearance of this case (*Tsavaris v. Scruggs*, 360 So.2d 745 (Fla.1977)), four members of the Court held that Tsavaris was not entitled to immunity because of the seizure of his office records. Three judges refrained from expressing any view on the question of whether the materials from Tsavaris' office should be suppressed. One justice stated that "the law enforcement authorities in the instant case may have unwittingly victimized Dr. Tsavaris for which he has recourse under an appropriate motion to suppress." *Id.* at 754. Three justices opined that Tsavaris was granted immunity. As stated by Justice [illegible] "It is often said that hard cases [illegible]" *Id.* at 753.

The trial judge in analyzing the decisions in *Tsavaris v. Scruggs, supra*, correctly received the implied message that the motion to suppress should be granted. In my opinion he followed our directions.

The majority says that Tsavaris' secretary, to whom the subpoenas were directed, had standing to object to any defects in the subpoenas and that, by failing to object, she waived any defect.

As stated by Justice Alderman in *Shapiro v. State*, 390 So.2d 344 (Fla.1980):

> First, we note that the trial court's conclusions of fact come to us clothed with a presumption of correctness, and, in testing the accuracy of these conclusions we must interpret the evidence and all reasonable deductions and inferences which may be drawn therefrom in the light most favorable to the trial judge's conclusions. *State v. Nova*, 361 So.2d 411 (Fla. 1978).

The original record discloses the following findings and conclusions by the trial judge:

> *I feel that Dr. Tsavaris has a constitutional Fourth Amendment right to be secure in his office against unreasonable search and seizures of his papers and that he, in these circumstances, had a reasonable expectation of privacy to these documents.* And that primarily I did read syllabuses at least of all the cases that I took out of here.
>
> Primarily the cases Mr. Cannella cites deal, I believe, with third party cases and I don't believe that the law would treat his personal secretary as a third party in these circumstances to come within the purview of those cases.
>
> I recommend that the State Attorney has a duty and obligation to issue subpoenas and subpoenas duces tecum, but they cannot be used to abrogate a Fourth Amendment to the Constitution of the State of Florida and the United States Constitution. They are not based on probable cause and they don't have the equally as important element of a neutral and detached judge passing on these sort of situations. And to authorize the State to just issue a subpoena duces tecum and go out and seize the matters that are particularly described therein and take the position, which may turn out to be the right position, that even assuming that the parties do not have to comply with the subpoena duces tecum, that all they have to do is say, "no, I am not complying with them," then go in and be heard in a court of law, is somewhat analogous to me at least in a situation of stating that you can or cannot resist an unlawful arrest.
>
> There is a valid distinction, obviously, when you are resisting arrest. There is violence involved, and we are not contemplating violence here. But, in Florida we decided that you must comply with an unlawful arrest and then you have your remedies later. And that you can't in the streets say, "Well, this is an unlawful arrest, therefore, I am going to resist it," and law and order breaks down.
>
> And that is the situation we are confronted with here; *that the secretary is supposed to, in effect, say, "Well, I am not complying with what appears to be a lawful court order. I am not going to comply with it."*
>
> *Number one, I don't think it is good public policy, and, number two, I think it's, for whatever it is worth and maybe it is worth nothing, unreasonable to expect that citizens faced with subpoena duces tecum or invalid search warrants are going to be knowledgeable enough to resist them on the spot.*
>
> Therefore, I think that these matters that have been seized here and the manner in which they have been seized, also—I don't know that on the matter of Mr. Freeman issuing the or serving the duces tecum, I don't believe I am going to pass on that or make any mention of that.
>
> Mr. Cannella makes a good argument. Of course, Mr. Surfus does, too. I don't know that it is necessary to decide whether or not a State Attorney can serve that which he's authorized to issue.
>
> However, I think that perhaps I should comment, in the event that I am wrong

my ruling, I further want to state that in the event that I am wrong in this ruling that in my judgment that *portion of the items seized which were seized only after the Assistant State Attorney said "Well, if you don't give them to us, we will go get another warrant for them," were not given up freely and voluntarily, were given up only under an implied coercion and were not, consent wasn't given and there was no waiver of any rights there.* That, even in the event I am wrong, *I think those portions that were secured that were not mentioned in the subpoena duces tecum, even though given up voluntarily, were given up under an unintentional compulsion of the State.* (Emphasis added.)

The majority opinion completely ignores this testimony as well as the specific finding by the trial judge by holding that the evidence was admissible because Tsavaris' secretary failed to object. Unbelievably, the majority opinion authorizes issuance of a subpoena duces tecum by a prosecuting attorney so long as it is "properly limited in scope, relevant in purpose, and specific in directive so that compliance would not be unreasonably burdensome." The majority opinion does not require the existence of probable cause that the person to whom the subpoena is directed has committed any offense or violated any laws of the state or country. Nor does it require a finding of reasonableness. In other words, as long as the subpoena duces tecum is not overbroad, as long as the evidence might be relevant to an investigation, there is no need for the prosecuting attorney in the future to secure any type of search warrant.

This has been a bad case. I am well aware of the problems facing law enforcement officers in their zealous attempts to enforce the law and prosecute crime. They have an obligation to the people and to the state to see that all criminals are brought to the bar of justice. On the other hand, even in the face of public criticism, we have an obligation to each individual citizen of the state of Florida. If a mistake is made during an investigation of a crime, our duty is to apply the case law and statutory law, even if a suspect goes free. We should never recede from well-established precedent in order to correct an obvious error made by law enforcement or prosecuting officials. Stability and certainty in the law are more important than convicting any one suspect. I firmly believe that the law enforcement officers and the prosecuting officers are guided by good intentions, and I also believe that those same officers and same prosecutors are more interested in the preservation of established legal principles than in the prosecution of one suspect.

I would answer the certified question in the affirmative and hold that the recording of a conversation by one of the participants constitutes an interception of a wire or oral communication within the meaning of chapter 934, Florida Statutes (1979). Furthermore, I would quash the decision of the district court of appeal and affirm the trial court's suppression of the office records produced pursuant to the subpoenas duces tecum.

ENGLAND, Justice, concurring in part and dissenting in part.

I cannot fault the Court's analysis of the wire intercept and Fourth Amendment issues, for which reason I concur in today's decision on those issues. Nonetheless, I persist in my view, expressed when this case first came to us for review,[1] that Florida's constitutional protection against self-incrimination [2] bars the use of Dr. Tsavaris' seized personal documents. The trial court ruled these documents inadmissible, and I would reinstate his suppression order.

ALDERMAN, Justice, concurring in part, dissenting in part.

I agree that the subpoenaed records are admissible into evidence and that the district court correctly reversed their suppression. I disagree, however, with the majori-

1. *Tsavaris v. Scruggs*, 360 So.2d 745 754-55 (Fla.1977) (England, J., dissenting)

2. Art. I § 9, Fla.Const.

ty's holding that the recording of the conversation which Dr Feegel had with Tsavaris constituted an unlawful interception of a wire or oral communication within the meaning of chapter 934. Florida Statutes (1979).

The district court affirmed the trial court's ruling that this recording was an unlawful interception because it felt it had no alternative but to follow our recent pronouncement in *State v. Walls*, 356 So.2d 294 (Fla.1978). In a detailed and well-reasoned opinion, however, Judge Danahy explained why our decision in *State v. Walls*, as well as its own prior decision in *State v. News Press Publishing Co.*, 338 So.2d 1313 (Fla. 2d DCA 1976), was incorrect.

In my view, the district court's rationale for its view that Dr. Feegel's recording did not amount to an interception within the contemplation of section 934.06 is convincing, and for the following reasons I would hold that the recording is admissible.

Section 934.06, Florida Statutes (1979), provides:

> Whenever any wire or oral communication has been *intercepted*, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the state, or a political subdivision thereof, if the disclosure of that information would be in violation of this chapter. [Emphasis supplied.]

Section 934.03(1)(a), Florida Statutes (1979), provides:

> (1) Except as otherwise specifically provided in this chapter, any person who:
>
> (a) Willfully *intercepts*, endeavors to intercept, or procures any other person to intercept or endeavor to intercept any wire or oral communication; ...
>
> shall be guilty of a felony of the third degree, punishable as provided in s. 775.082, § 775.083, or § 775.084. [Emphasis supplied.]

Since none of the exceptions enumerated in section 934.03 apply to the present facts, if Dr. Feegel's recording was an interception within the contemplation of chapter [illegible] then he is guilty of a third-degree felony and none of the contents of the recorded conversation is admissible into evidence. Section 934.06.

This recording, however, was not an interception. Intercept is defined by section 934.02(3) to mean the "aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device." Intercept is defined in general to mean "to take, seize, or stop by the way or before arrival at the destined place." Webster's Third New International Dictionary (unabridged). I find highly persuasive the rationale of the United States Circuit Court of Appeals, Fifth Circuit, in *Carnes v. United States*, 295 F.2d 598 (5th Cir. 1961), *cert. denied*, 369 U.S. 961, 82 S.Ct. 949, 8 L.Ed.2d 19 (1962), for finding that the recording of a conversation by a participant thereto does not amount to an interception. Relying on the United States Supreme Court's decision in *Rathbun v. United States*, 355 U.S. 107, 78 S.Ct. 161, 2 L.Ed.2d 134 (1959), the Fifth Circuit explained that interception does not mean the obtaining of what is to be sent before [illegible] the moment it leaves the possession of the sender or after or at the moment it comes into the possession of the intended [illegible] It held that the consenting participant to the conversation would be free to divulge its contents in the courtroom or elsewhere and that "the only function served by the recording is to preserve a permanent and accurate record of the conversation." 295 F.2d at 602. The Court further stated:

> In the case at bar this point is particularly clear since the recording was made by the very individual who was participating in the conversation. Taking a realistic view of it, the only difference between a person testifying to a conversation to which he participated in or overheard and a recording of the conversation is that the recording has the advantage of furnishing trustworthy evidence (assuming a showing that the tape has not been tampered with).

295 F.2d at 602.

In the present case, there was no [illegible] acquisition by means of any electronic

mechanical device. Dr. Feegel received the conversation over a telephone receiver and recorded it only after it had reached its destination. The telephone receiver was the means used to acquire the conversation. The recorder was not the acquiring device but was merely an accessory designed to preserve the contents of the communication and to thereby obtain the most reliable evidence. *See United States v. Santillo*, 507 F.2d 629 (3d Cir. 1975), *cert. denied, sub nom. Buchert v. United States*, 421 U.S. 968, 95 S.Ct. 1960, 44 L.Ed.2d 457 (1975); *United States v. Harpel*, 493 F.2d 346, 350 (10th Cir. 1974). One does not intercept a conversation made directly to himself. Tsavaris's communication was lawfully received over the telephone receiver; therefore, the recording of it by Dr. Feegel was not an interception, and the tape is admissible at Tsavaris's trial.

State v. Walls and *Shevin v. Sunbeam Television Corp.*, 351 So.2d 723 (Fla.1977), *appeal dismissed*, 435 U.S. 920, 98 S.Ct. 1480, 55 L.Ed.2d 513 (1978), are not controlling here. In neither case was this Court confronted with the question of whether a recording of a conversation by a party thereto is an "intercept." In *State v. Walls*, the victim of extortionary threats recorded a conversation which occurred in his home between himself and the extortionist without the consent of the extortionist. Therein, this Court held that the recording should be suppressed based upon the premise that the extortionary threat was an oral communication within the definition of section 934.02(2), Florida Statutes (1975). The issue of whether the recording was an "interception" within the definition of section 934.02(3) was not presented to this Court. The thrust of the State's argument was that the extortionary threats were not an oral communication. In *Walls*, the State expressly conceded in its brief that if the threats were oral communications, then the recording was an interception. Not being confronted with the issue of whether the recording was actually an interception, this Court, for the purpose of deciding that case, accepted this concession that there was an interception.

Likewise, in *Shevin v. Sunbeam Television Corp.*, this Court was not confronted with the issue of whether the recording of a conversation by one of the participants without the consent of the other was an interception. Sunbeam Television Corporation had filed a complaint challenging the constitutionality of section 934.03(2)(d) insofar as it required all parties to consent before a legal interception of a conversation could be had. Sunbeam alleged that this statute was a prior restraint in violation of the first amendment. This Court held that section 934.03(2)(d) is not a restraint on the press and does not violate the first amendment. In order to hold that the present recording is not an interception, it is not necessary that we recede from our holding in *Sunbeam* that where, in fact, there has been an "interception" by a member of the press, the first amendment does not exempt that interception from the requirement of section 934.03(2)(d) that all the parties to the oral or wire communication consent before the interception is lawful.

In the present case, for the first time, this Court is confronted squarely with the issue of whether the recording of a conversation by one of the participants is an interception as that term is defined in chapter 934, and I would hold that it is not. Other courts which have considered this issue have consistently held that such a recording is not an interception.[1]

I agree with the majority's statement that "where under the Florida act an initial interception is illegal, the recording of the interception must likewise be illegal." Slip op. at 8. But this principle of law does not apply to the present case because here there was no illegal *interception*, the recording of which would likewise have been illegal. There was no nonconsensual tapping of the telephone line to intercept the wire commu-

1. The district court has given a detailed list of cases of other jurisdictions, state and federal, holding that the recording [illegible] a participant thereto is not an interception. *State v. Tsavaris*, 382 So.2d at 63–64.

nication between Tsavaris and Dr. Feegel before it reached its intended destination. Such tapping clearly would have been an illegal interception even if the communication had not been recorded.

In the present case, no interception took place when Dr. Feegel heard Tsavaris's voice over his telephone receiver. This clearly was a legal reception of a wire communication, and it therefore cannot be said that Dr. Feegel's recording of this communication after it had arrived at its destined place was the recording of an initial illegal interception. Dr. Feegel can be guilty of misconduct only if the recording of a lawfully received communication is itself illegal. There is no provision in chapter 934 that makes the recording of a communication by itself illegal. Consequently, I conclude that Dr. Feegel is not guilty of an illegal interception and that the recording is admissible.

I cannot believe that the legislature intended to brand as a third-degree felon the victim of extortionary threats, who, while in his home, electronically records the threats made against him. *E. g. State v. Walls* Likewise, I do not believe the legislature intended that a public-spirited citizen like Dr. Feegel, who, in the course of his employment as medical examiner, records a lawfully received telephone communication relevant to a pending murder investigation, should be subjected to the possibility of criminal prosecution. If the legislature had intended to make it unlawful for any person to record an oral or wire communication, it could easily have done so in plain and simple language. It did not. Instead, it criminalized only the willful *interception* of wire or oral communication. Section 934.03(1)(a). When section 934.02(2)(d) was amended to provide that it was lawful to intercept a wire or oral communication when *all* of the parties to the communication have given prior consent to such interception, the legislature still referred only to interceptions, not recordings. While it is true that it is illegal to record an illegal interception, the recording of an otherwise lawfully received oral or wire communication is not an unlawful interception.

All that Dr. Feegel did in the present case was preserve the wire communication lawfully *received* by him from Tsavaris, the same as if he had taken down in shorthand the communication and then made a verbatim transcript. The majority says that the legislature intended that for this public-spirited action Dr. Feegel is guilty of a third-degree felony. Surely, the legislature did not intend such an absurd result. I hope that the legislature will correct what I perceive to be the majority's judicial distortion of chapter 934.

Accordingly, I would approve the district court's decision insofar as it reverses the trial court's suppression of the *subpoenaed* office records, but I would quash that portion of the district court's decision holding the tape recording of Dr. Feegel's conversation with Tsavaris inadmissible.

BOYD and McDONALD, JJ., concur.

West's

FLORIDA STATUTES ANNOTATED

§§ 933.01 to End

Under Arrangement of the
Official Florida Statutes

Volume 24

Title XLV
CRIMINAL PROCEDURE

Title XLVI
CORRECTIONAL SYSTEM

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CHAPTER 934

SECURITY OF COMMUNICATIONS

Sec.

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934.08 Authorization for disclosure and use of intercepted wire or oral communications.
934.09 Procedure for interception of wire or oral communications.
934.10 Recovery of civil damages authorized.

934.01 Legislative findings

On the basis of its own investigations and of published studies, the legislature makes the following findings:

(1) Wire communications are normally conducted through the use of facilities which form part of an intrastate network. The same facilities are used for interstate and intrastate communications.

(2) In order to protect effectively the privacy of wire and oral communications, to protect the integrity of court and administrative proceedings, and to prevent the obstruction of intrastate commerce, it is necessary for the legislature to define the circumstances and conditions under which the interception of wire and oral communications may be authorized and to prohibit any unauthorized interception of such communications and the use of the contents thereof in evidence in courts and administrative proceedings.

(3) Organized 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.

(4) 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.

Historical Note

Derivation:

Laws 1969, c. 69-17, § 1.

Legislative Reference Bureau—1969:

Of most significance to the war against organized crime is House Bill 2, Chapter 69-17, the electronic surveillance or "wire tapping" bill. Chapter 119 of the "Omnibus Crime Control and Safe Streets Acts of 1968" established procedure for wire interception and interception of oral communications on the Federal level. Prior to the enactment of the wiretap bill, the injuring or tapping of telegraph or telephone lines was prohibited in Florida by Section 822.10, Florida Statutes, which prescribed a penalty upon conviction of not more than five years in prison or fine not exceeding $5,000 or both. It has long been recognized by law enforcement officers that one of the key instruments utilized by organized crime in the conducting of its business is the telephone. The wire tapping statute will now permit state, county and municipal law enforcement officers to conduct an electronic surveillance under certain conditions, after following proper procedures, as outlined in the act, and after obtaining court permission. It further provides that any evidence lawfully obtained can be used in evidence in prosecution of any case made. With one exception the state law follows closely the Federal act. The Florida act however, does not contain the provision for an "emergency" wiretap as contained in the Federal act. It must be noted that this act does not permit indiscriminate wire tapping under any and all conditions but as a matter of fact prohibits the same and calls for civil and criminal damages for the illegal possession of wire tapping or electronic surveillance equipment or the unlawful placing of a wiretap without court authority or the conducting of an electronic surveillance without court authority. This act is effective September 1, 1969.

Library References

Telecommunications ⇐493 et seq. C.J.S. Telegraphs, Telephones, Radio and Television §§ 122, 287, 288.

934.02 Definitions

As used in this chapter:

(1) "Wire communication" means any communication made in whole or in part through the use of facilities for the transmis-

sion of communicatio
connection between th
tion, furnished or ope
carrier in providing
mission of intrastate, i

(2) "Oral communi
tered by a person exh
cation is not subject t
ing such expectation;

(3) "Intercept" me
any wire or oral comm
ic, mechanical, or othe

(4) "Electronic, m
vice or apparatus whi
communication other t

(a) Any telephone
cility or any compone
user by a communic
course of its business
in the ordinary cours
munications common
ness, or by an investig
dinary course of his du

(b) A hearing aid
normal hearing to not

(5) "Person" mean
litical subdivision the
ciation, joint stock com

(6) "Investigative
ficer of the state or p
States who is empowe
to make arrests for, o
lar federal offenses a
ecute or participate in

(7) "Contents," wh
communication, includ
of the parties to such
purport, or meaning o

(8) "Judge of com
supreme court, judge
or judge of any court
state;

sion of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception, furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of intrastate, interstate or foreign communications;

(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;

(3) "Intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device;

(4) "Electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire or oral communication other than:

(a) Any telephone or telegraph instrument, equipment or facility or any component thereof furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business, or being used by a communications common carrier 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;

(5) "Person" means any employee or agent of the state or political subdivision thereof and any individual, partnership, association, joint stock company, trust, or corporation;

(6) "Investigative or law enforcement officer" means any officer of the state or political subdivision thereof or of the United States who is empowered by law to conduct investigations of, or to make arrests for, offenses enumerated in this chapter or similar federal offenses and any attorney authorized by law to prosecute or participate in the prosecution of such offenses;

(7) "Contents," when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication;

(8) "Judge of competent jurisdiction" means justice of the supreme court, judge of a district court of appeal, circuit judge, or judge of any court of record having felony jurisdiction of the state.

(9) "Aggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

Historical Note

Derivation:

Laws 1972, c. 72-294, § 1.
Laws 1969, c. 69-17, § 2.

Laws 1972, c. 72-294, § 1, amended subsec. (6) to include officers of the United States within the definition of investigative or law enforcement officer.

934.03 Interception and disclosure of wire or oral communications

(1) Except as otherwise specifically provided in this chapter, any person who:

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

(b) Willfully 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:

1. Such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

2. Such device transmits communications by radio or interferes with the transmission of such communication;

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

(d) Willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be guilty of a felony of the third degree, punishable as provided in § 775.082, § 775.083, or § 775.084.

(2) (a) It is not unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment

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1 47 U.S.C.A. § 1

Derivation:

Laws 1971, c. 71-
Laws 1969, c. 69-

Laws 1971, c. 71
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while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication; provided, that said communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(b) It is not unlawful under this chapter for an officer, employee, or agent of the federal communications commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the commission in the enforcement of 47 U.S.C. ch. 5,[1] to intercept a wire communication or oral communication transmitted by radio or to disclose or use the information thereby obtained.

(c) It is not unlawful under this chapter for a person acting under color of law to intercept a wire or oral 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.

(d) 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.

1 47 U.S.C.A. § 151 et seq.

Historical Note

Derivation:

Laws 1971, c. 71-136, § 1163.
Laws 1969, c. 69-17, § 3.

Laws 1971, c. 71-136, § 1163, made the offense defined by subsec. (1) (d) of this section a "felony of the third degree, punishable as provided in § 775.082, § 775.083, or § 775.084" in lieu of the provision that offenders "be fined not more than $10,000 or imprisoned in the state penitentiary for not more than five years, or by both such fine and imprisonment upon conviction therefor."

Library References

Telecommunications ⇐493, 494, 497.

C.J.S. Telegraphs, Telephones, Radio and Television §§ 122, 287, 288.

934.04 Manufacture, distribution, possession, and advertising of wire or oral communication intercepting devices prohibited

(1) Except as otherwise specifically provided in this chapter, any person who willfully:

(a) Sends through the mail or sends or carries any electronic, mechanical, or other device, with the intention of rendering it primarily useful for the purpose of the illegal interception of wire or oral communications as specifically defined by this chapter; or

(b) Manufactures, assembles, possesses, or sells any electronic, mechanical, or other device, with the intention of rendering it primarily useful for the purpose of the illegal interception of wire or oral communications as specifically defined by this chapter;

shall be guilty of a felony of the third degree, punishable as provided in § 775.082, § 775.083, or § 775.084.

(2) It is not unlawful under this section for:

(a) A communication common carrier or an officer, agent, or employee of, or a person under contract with, a communication common carrier, in the normal course of the communication common carrier's business; or

(b) An officer, agent, or employee of, or a person under contract with, bidding upon contracts with, or in the course of doing business with, the United States, a state, or a political subdivision thereof, in the normal course of the activities of the United States, a state, or a political subdivision thereof,

to send through the mail, send or carry in interstate or foreign commerce, or manufacture, assemble, possess, or sell any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications.

Historical Note

Derivation:

Laws 1971, c. 71-136, § 1164.
Laws 1969, c. 69-17, § 4.

Laws 1971, c. 71-136, § 1164, made the offense defined by subsec. (1)(b) of this section a "felony of the third degree, punishable as provided in § 775.082, § 775.083, or § 775.084" in lieu of the provision that offenders "shall be fined not more than ten thousand dollars or imprisoned in the state penitentiary not more than five years, or by both such fine and imprisonment, upon conviction therefor".

Library References

Telecommunications ⇐493. C.J.S. Telegraphs, Telephones, Radio and Television §§ 122, 287.

934.05 Confiscation of wire or oral communication intercepting devices

Any electronic, mechanical, or other device used, sent, carried, manufactured, assembled, possessed, or sold in violation of this chapter may be seized and forfeited to the state.

Historical Note

Derivation:
Laws 1969, c. 69-17, § 5.

934.06 Prohibition of use as evidence of intercepted wire or oral communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the state, or a political subdivision thereof, if the disclosure of that information wou'd be in violation of this chapter.

Historical Note

Derivation:
Laws 1969, c. 69-17, § 6.

934.07 Authorization for interception of wire or oral communications

The governor, the department of legal affairs, or any state attorney or any county solicitor having jurisdiction to prosecute felonies in his respective jurisdictions may authorize an application to a judge of competent jurisdiction for, and such judge may grant in conformity with this chapter, an order authorizing or approving the interception of wire or oral communications by the department of law enforcement or any law enforcement agency of this state or any political subdivision thereof having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder,

kidnapping, gambling (when the same is of an organized nature or carried on as a conspiracy in violation of the laws of this state), robbery, burglary, grand larceny, prostitution, criminal usury, abortion, bribery, extortion, dealing in narcotic drugs or other dangerous drugs, or any conspiracy to commit any violation of the laws of this state relating to the crimes specifically enumerated above.

Historical Note

Derivation:

Laws 1969, c. 69-106, §§ 11, 20, 35. Laws 1969, c. 69-17, § 7.

Laws 1969, c. 69-106, §§ 11 and 20, transferred the powers, duties and functions of the attorney general to the department of legal affairs and the bureau of law enforcement to the department of law enforcement.

Library References

Telecommunications ⇐496.

C.J.S. Telegraphs, Telephones, Radio and Television §§ 122 287, 288.

Notes of Decisions

In general 1
Conspiracy 3
Discovery 4
Lottery 2

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1. In general

This section authorizing principal prosecuting attorney of state to apply for an order authorizing a wire interception permits each state to fit its scheme into framework of federal statute even though the distribution of power or the names of the officers may differ from state to state. U. S. v. Lanza, D.C., 341 F.Supp. 405 (1972).

Governor of state is within contemplation of federal statute authorizing the "principal prosecuting attorney" of state to apply for order authorizing a wire interception. Id.

State Supreme Court justice was a "state court judge of competent jurisdiction" under federal statute permitting the principal prosecuting attorney of a state to apply to a state court judge of competent jurisdiction for an order authorizing a wire interception. Id.

This section providing that State Attorney may authorize application for court order permitting interception of wire or oral communications permits delegation of such authority to any Assistant State Attorney. State v. Angel, App., 261 So.2d 198 (1972).

2. Lottery

Affidavit in support of wiretap application to obtain evidence of violation of state lottery law was sufficient to warrant granting application. U. S. v. Lanza, D.C., 341 F. Supp. 405 (1972).

A violation of Florida lottery law is an offense for which intercept order may be issued under federal statute authorizing wiretap application to provide evidence of commission of offense of "gambling" and this section which permits wire interception for offense of "gambling." Id.

3. Conspiracy

On facts of case with reference to alleged conspiracy to commit robbery, court did not commit error in admitting certain taped conversations revealing admissions of defendant, nor

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238 So.2d 120 (1970).

4. Discovery

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did court err in denying defendant's motion for severance based on admission thereof. Smith v. State, App., 238 So.2d 120 (1970).

4. Discovery

Order denying parts of motion of defendants for a wiretap inventory and inspection was not an appealable order so reviewing court would treat the assignments of error and points on appeal as defendants' petition for certiorari and limit scope of review accordingly. Barnes v. State, App., 248 So.2d 660 (1971).

Trial court properly denied request of defendants for production and inspection of items which were not within the scope of the inventory or of the intercepted communications, applications and orders to be made available on motion for inspection under this section relating to an electronic surveillance of telephonic communications pursuant to court order. Id.

934.08 Authorization for disclosure and use of intercepted wire or oral communications

(1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication or evidence derived therefrom may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

(2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any criminal proceeding in any court of the state or of the United States or in any grand jury proceeding, if such testimony is otherwise admissible.

(4) No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.

(5) When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized herein, intercepts wire or oral communications relating to offenses for which an order or authorization or approval could have been secured pursuant to § 934.07, other than

those specified in the order of authorization or approval, the contents thereof and evidence derived therefrom may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction when such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

Historical Note

Derivation:

Laws 1972, c. 72-294, § 2.
Laws 1969, c. 69-17, § 8.

Laws 1972, c. 72-294, § 2, amended subsec. (3) to include courts of the United States among courts in which evidence intercepted pursuant to chapter 934 may be disclosed.

934.09 Procedure for interception of wire or oral communications

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) The identity of the investigative or law enforcement officer making the application and the officer authorizing the application;

(b) A full and complete statement of the facts and circumstances relied upon by the applicant to justify his belief that an order should be issued, including details as to the particular offense that has been, is being, or is about to be committed, a particular description of the nature and location of the facilities from which, or the place where, the communications are to be intercepted, a particular description of the type of communications sought to be intercepted, and the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) A full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

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(d) A statement of the period of time for which the interception is required to be maintained and, if the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) A full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities, or places specified in the application, and the action taken by the judge on each such application; and

(f) When the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application, the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting if the judge determines on the basis of the facts submitted by the applicant that:

(a) There is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in § 934.07;

(b) There is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) Normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) There is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify:

(a) The identity of the person, if known, whose communications are to be intercepted;

(b) The nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) A particular description of the type of communication sought to be intercepted and a statement of the particular offense to which it relates;

(d) The identity of the agency authorized to intercept the communications and of the person authorizing the application; and

(e) The period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, or in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and upon the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective or in any event in thirty days.

(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

(7) (a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication

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under this subsection shall be kept in such a way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of § 934.08(1) and (2) for investigations.

(b) The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under § 934.08(3).

(c) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

(d) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

(e) Within a reasonable time but not later than ninety days after the termination of the period of an order or extension thereof, the issuing or denying judge shall cause to be served on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of:

1. The fact of the entry of the order or the application;

2. The date of the entry and the period of authorized, approved, or disapproved interception, or the denial of the application; and

3. The fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may make available to such person or his counsel for inspection such portions of the intercepted communications, applications, and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction, the

serving of the inventory required by this paragraph may be postponed.

(8) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order and accompanying application under which the interception was authorized or approved. This ten day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(9) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that:

1. The communication was unlawfully intercepted;

2. The order of authorization or approval under which it was intercepted is insufficient on its face; or

3. The interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the state shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection or the denial of an application for an order of approval if the attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

Derivation:
Laws 1969, c. 69-17, § 9

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Section 934.07 providin
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934.10 Recover

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Derivation:
Laws 1969, c. 69-17, § 10.

Telecommunications ⇐

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Historical Note

Derivation:

Laws 1969, c. 69-17, § 9.

Library References

Telecommunications ⇐496. C.J.S. Telegraphs, Telephones, Radio and Television §§ 122, 287, 288.

Notes of Decisions

1. In general

Section 934.07 providing that State Attorney may authorize application for court order permitting interception of wire or oral communications permits delegation of such authority to any Assistant State Attorney. State v. Angel, App., 261 So.2d 198 (1972).

934.10 Recovery of civil damages authorized

Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use, such communications, and shall be entitled to recover from any such person:

(1) Actual damages, but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;

(2) Punitive damages; and

(3) A reasonable attorney's fee and other litigation costs reasonably incurred.

A good faith reliance on a court order shall constitute a complete defense to any civil or criminal action under the laws of this state.

Historical Note

Derivation:

Laws 1969, c. 69-17, § 10.

Library References

Telecommunications ⇐498. C.J.S. Telegraphs, Telephones, Radio and Television §§ 287, 288.

CHAPTER 935

Reserved as in Florida Statutes for Future Expansion

FLORIDA STATUTES ANNOTATED

Official Classification

Vol. 24

§§ 933 to End

Cumulative Annual Pocket Part

[redacted]

Replacing prior Pocket Part in back of volume

Including Legislation Enacted Through The Second Regular Session and Special C to H Sessions Of The Seventh Legislature (1982)

ST. PAUL, MINN.
WEST PUBLISHING CO.

933.29 Powers of state agency not restricted

Nothing contained herein shall be construed to restrict the powers granted by general law to an agency of the state, or to a unit of local government acting on behalf of such agency pursuant to a contract with the agency, to conduct inspections with or without warrant as authorized by general law. Added by Laws 1982, c. 82-8, § 1, eff. July 1, 1982.

Library References
Inspection ⇐5.
C.J.S. Inspection § 9 et seq.

933.30 Inspector; restrictions on giving information, testifying, etc.

A person performing an inspection pursuant to the authority of this act shall not give information as a confidential informer, testify as a witness, or execute an affidavit as a predicate for the issuance of a criminal search warrant or for probable cause to search any dwelling or other building without a criminal search warrant.
Added by Laws 1982, c. 82-8, § 1, eff. July 1, 1982.

Library References
Inspection ⇐5.
C.J.S. Inspection §§ 1, 5 et seq.

CHAPTER 934. SECURITY OF COMMUNICATIONS

Sec.
934.091 Unlawful to publish names of parties to intercepted communications; penalty [New].

Law Review Commentaries
Intercepted communications: "Just cause" for refusing to answer questions of grand jury. 29 U.Miami L.Rev. 334 (1975).

Key to legal bugging. James H. Walsh, 47 Fla.Bar J. 355 (1973).

934.01 Legislative findings

Law Review Commentaries
Electronic eavesdropping: Body bugs. Barry Krischer, 52 Fla.Bar J. 553 (1978).

Consenting party to conversation recorded by police without warrant required to verify at trial consent to recording prior to its admission against other party to conversation. 2 Fla.State L.Rev. 188 (1974).

United States Supreme Court
Use of pen registers to investigate offenses committed by means of telephone, see United States v. New York Tel. Co. 1978, 98 S.Ct. 364, 434 U.S. 159, 54 L.Ed.2d 376.

Index to Notes

In general 1
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Validity ½

½. Validity

Provisions of this chapter relating to security of communications were constitutional as applied to case in which prosecution was precluded from introducing electronic recording to corroborate extortion victim's testimony as to oral threats. State v. Walls, 356 So.2d 294 (1978).

1. In general

This chapter governing security of communications was intended to afford broad protection to private communications, evincing greater concern for protection of one's privacy interests in conversation than does federal act (18 U.S.C.A. § 2510 et seq.). State v. Tsavaris, 394 So.2d 418 (1981), appeal after remand 414 So.2d 1087.

Use of wiretaps infringes upon individual's right to privacy. State v. McGillicuddy, App., 342 So.2d 567 (1977).

This chapter prohibiting all unauthorized eavesdropping by use of extension telephone instruments by persons other than telephone subscribers, in absence of knowledge and consent of at least one of the parties to the conversation, applies to private citizens as well as to government agents. Horn v. State, App., 298 So.2d 194 (1974).

Evidence obtained through federal wiretap under federal court order predicated on purported authority of Assistant Attorney General was properly suppressed for failure of application to have been properly authorized. State v. De Frisco, App., 278 So.2d 325 (1973).

Husband had no right to invade wife's right of privacy by utilizing electronic devices, and in absence of court authorization for husband's recording of wife's telephone conversations, or the consent of a party to the conversations, husband's recordings of such conversations made by tapping lines coming into the marital home were inadmissible in dissolution of marriage action. Markham v. Markham, 272 So.2d 813 (1972).

Under Constitution and this section husband had no right to invade his wife's right of privacy by utilizing electronic devices, and in absence of court authorization for husband's recording of wife's telephone conversations or the consent of a party to the conversations, husband's recordings of intercepted telephone conversations of wife were inadmissible in dissolution of marriage action. Markham v. Markham, App., 265 So.2d 59 (1972), affirmed writ discharged 272 So.2d 813.

Use of taped telephone conversations between wife and her lover, which conversations were obtained when husband tapped his own residence telephone on instructions from detective agency, for purposes of impeaching wife's testimony in divorce action was not prevented by provisions of Omnibus Crime Control Act or of other federal or state statutes or constitutions. Beaber v. Beaber, 322 N.E.2d 910, 41 Ohio Misc. 95 (1974).

While regulation promulgated by a municipal police department notifying personnel that department telephones may be monitored with listening and recording devices removes reasonable expectations of privacy regarding monitoring of calls on department telephone lines as to employees or other persons with knowledge of the regulation, it does not remove the privacy expectations of persons calling into the department on telephone lines not used as "hot lines," publicized numbers to contact police regarding crimes, etc., since those persons have no knowledge of the regulation. Op.Atty.Gen., 076-195, Sept. 23, 1976.

Conversations obtained by lawfully monitoring municipal police department telephones would be admissible as evidence in court for the prosecution of crimes not set forth in § 934.07. Id.

If a conversation or communication is lawfully obtained, it should be admissible in departmental internal discipline proceedings. Id.

2. - Consent

Except under safeguards of proper authentication, informer's consent to interception of conversation with suspect is not sufficient to obviate necessity of securing warrant for interception. Tollett v. State, 272 So.2d 496 (1972).

Constitutional provision (Const. Art. 1, § 12) relating to interception of private communications requires prior approval of magistrate of intervention into conversations or that participants in conversation testify he gave consent to wiretap. Id.

3. Federal preemption

Federal law has preempted field of wiretaps, and any state regulated interception of wire communication must provide safeguards at least as stringent as those set out in the federal statute. State v. Aurilio, App., 366 So.2d 71 (1978).

In passing Title III of Omnibus Crime Control and Safe Streets Act, Congress preempted field of interception of wire communications under its power to regulate interstate communications. State v. McGillicuddy, App., 342 So.2d 567 (1977).

States are permitted to regulate wiretaps providing their standards are at least as strict as those set forth in Omnibus Crime Control and Safe Streets Act. Id.

934.02 Definitions

As used in this chapter:

[See main volume for text of (1)]

(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 and does not mean any public oral communication uttered at a public meeting;
Amended by Laws 1974, c. 74-249, § 1, eff. Oct. 1, 1974.

[See main volume for text of (3) to (9)]

(10) "Law enforcement agency" means an agency of the state or a political subdivision thereof or of the United States if the primary responsibility of the agency is the prevention and detection of crime or the enforcement of the penal, traffic, or highway laws of this state and if its agents and officers are empowered by law to conduct criminal investigations and to make arrests.
Added by Laws 1980, c. 80-27, § 1, eff. May 20, 1980.

Laws 1974, c. 74-249, § 1, redefined "oral communication".
Laws 1980, c. 80-27, § 1, added the definition of "law enforcement agency".

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1. In general

Since Florida Constitution empowers chief justice to assign justices and judges of state courts to judicial service in any other state court of the same or lesser jurisdiction, the Constitution, not the particular designation of assignments by chief justice, confers general criminal jurisdiction on justices of the Supreme Court, and wiretap order authorized by justice of the Supreme Court was valid, despite claim that Florida Supreme Court had no general criminal jurisdiction. U. S. v. Pacheco, C.A., 489 F.2d 554 (1974), rehearing denied 491 F.2d 1272, certiorari denied 95 S.Ct. 1558, 421 U.S. 909, 43 L.Ed.2d 774.

"Aural acquisition" in context of interception of wire or oral communication, means to gain control or possession of a thing through sense of hearing. State v. Tsavaris, 394 So.2d 418 (1981), appeal after remand 414 So.2d 1087.

Detective did not violate provision of § 934.03 proscribing disclosure of intercepted wire communications when he listened in on telephone conversation without the knowledge of the caller where the person called answered by use of "speaker phone" and thus, by using telephone instrument furnished to a subscriber in ordinary course of business, prevented there being an "interception" within the meaning of the Disclosure Act. State v. Tsavaris, App., 382 So.2d 56 (1980), certified question answered 394 So.2d 418, appeal after remand 414 So.2d 1087.

The Florida Security of Communications Act prohibits a party to a con-

versation from recording such conversation without the consent of all the parties to the conversation, provided the conversation is not public and that the intercept is not conducted for the purpose of obtaining evidence of a criminal act as provided in the Act. State v. News-Press Pub. Co., App., 338 So.2d 1313 (1976).

Tape recordings made by newspaper reporter of her telephone conversation with a second person, without the knowledge or consent of the second person, and of a conversation between the second person and a third person in car, without knowledge or consent of such persons and after such persons had asked to be left to talk alone for a few minutes, were illegal intercepts. Id.

Purpose of the Florida Security of Communications Act was to protect victims of illegal intercepts, not those who perpetrate them, and thus newspaper whose reporter made illegal intercepts lacked standing to assert, when charged with destruction of evidence, that the illegal tape recordings would have been inadmissible in evidence, and such circumstances would not preclude prosecution for destruction of evidence. Id.

Statute relating to the interception of any wire or oral communication, which statute defines "intercept" to mean the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical or other device, was inapplicable to the alleged inculpatory statement of defendant which, because of his loud voice, was overheard by two police officers in hall outside closed door of lineup room. Taylor v. State, App., 292 So.2d 375 (1974).

A municipal police department is not authorized by the provisions of this chapter governing wire communications to intercept and record all incoming telephone calls to that department whether or not such telephone lines are equipped with an operating "beep" tone device. Op.Atty.Gen. 080–5, Jan. 15, 1980.

Information received by a law enforcement agency through the use of a "Shot Gun Mike" can form the basis for the issuance of a search warrant if there is full compliance with the provisions of Chapter 934, security of communications, inasmuch as a "Shot Gun Mike" is a device described in this section. Op.Atty.Gen., 074–67, March 1, 1974.

State Constitution does not preclude any justice of Supreme Court from issuing an interception order pursuant to statutory authority. State ex rel. Kennedy v. Lee, 274 So.2d 881 (1973).

2. Oral communication

Where conversations took place in parking lot, and not in enclosed or secluded area and where it was not shown that defendant took any measures to ensure his privacy, this section under which agent with electronic listening device transmitted conversations to other officers stationed nearby who monitored and recorded entire marijuana sale transaction was not show to be unconstitutional. Ruiz v. State, App., 416 So.2d 32 (1982).

Private citizen's tape recording of oral "walkie-talkie" conversation between defendants was not an interception of a communication transmitted by wire or cable furnished or operated by a common carrier within meaning of this section prohibiting such an interception so as to require suppression of tape recording in prosecution growing out of burglary; defendants, who were two police officers, did not have any reasonable expectation that their conversation would remain private. Chandler v. State, App., 366 So.2d 64 (1978) certiorari denied 376 So.2d 1157, affirmed 101 S.Ct. 802, 449 U.S. 560, 66 L.Ed.2d 740.

Extortionary threat delivered personally to victim in victim's home was "oral communication" within this section defining oral communication for purposes of statutes relating to security of communications as one uttered by person exhibiting expectation that communication is not subject to interception under circumstances justifying such expectation. State v. Walls, 356 So.2d 294 (1978).

3. Intercept

"Intercept" as defined in this section means to gain control or possession of a communication through the sense of hearing and through use of electronic or mechanical device. State v. Tsavaris, 394 So.2d 418 (1981), appeal after remand 414 So.2d 1087.

Medical examiner's recording of telephone conversation with psychiatrist who was suspected of first-degree murder of one of his patients, without psychiatrist's consent, was unlawful interception as defined by § 934.03 proscribing such interceptions. Id.

4. Wire communication

Prohibition of interception of wire communications made in whole or in part through the use of facilities for the transmission of communication by the aid of wire applies only to so much of the communication as is actually transmitted by the wire and not broadcast in a manner available to the public. Dorsey v. State, 402 So.2d 1178 (1981).

934.03 Interception and disclosure of wire or oral communications prohibited

[See main volume for text of (1)]

(2)(a) 1. It is lawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication; provided, that said communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

2. It shall not be unlawful under this chapter for an officer, employee, or agent of any communication common carrier to provide information, facilities, or technical assistance to an investigative or law enforcement officer who, pur-

suant to this chapter, is authorized to intercept a wire or oral communication.
Amended by Laws 1977, c. 77-104, § 249, eff. Aug. 2, 1977; Laws 1978, c. 78-376, § 1, eff. June 20, 1978.

(b) It is lawful under this chapter for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by th commission in the enforcement of 47 U.S.C. Ch. 5, to intercept a wire communication or oral communication transmitted by radio or to disclose or use the information thereby obtained.
Amended by Laws 1977, c. 77-104, § 249, eff. Aug. 2, 1977.

(c) It is lawful under this chapter for a law enforcement officer or a person acting under the direction of a law enforcement officer to intercept a wire or oral 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.

(d) 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.

(e) It is unlawful to intercept any communication for the purpose of committing any criminal act.
Amended by Laws 1974, c. 74-249, § 2, eff. Oct. 1, 1974.

(f) It is lawful under this chapter for an employee of a telephone company to intercept a wire communication for the sole purpose of tracing the origin of such communication when the interception is requested by the recipient of the communication and the recipient alleges that the communication is obscene, harassing, or threatening in nature. The individual conducting the interception shall notify local police authorities within forty-eight hours after the time of the interception.

Added by Laws 1974, c. 74-249, § 3, eff. Oct. 1, 1974.

(g) It is lawful under this chapter for an employee of:

1. An ambulance service licensed pursuant to s. 401.25, a fire station employing firefighters as defined by s. 633.30, a public utility as defined by ss. 365.01 and 366.02, a law enforcement agency as defined by s. 934.02(10), or any other entity with published emergency telephone numbers, or

2. An agency operating an emergency telephone number "911" system established pursuant to s. 365.171,

to intercept and record incoming wire communications; however, such public utility may intercept and record incoming wire communications on published emergency telephone numbers only.

Added by Laws 1978, c. 78-376, § 1, eff. June 20, 1978. Amended by Laws 1979, c. 79-164, § 187, eff. Aug. 5, 1979; Laws 1980, c. 80-27, § 2, eff. May 20, 1980.

Laws 1974, c. 74-249, amended subsecs. 2)(c) and (d) to authorize interception of wire or oral communications by law enforcement officers or persons acting under the direction of law enforcement officers with consent of only one party for the purpose of obtaining evidence of a crime and to authorize interception of such communications where all parties to same have given prior consent to such interceptions. Subsection (2)(f) was added by this act.

Laws 1977, c. 77-104, a reviser's bill amended subsecs. (2)(a) and (2)(b). See Reviser's Note—1977.

Laws 1978, c. 78-376, designated subpar 1 and added subpar 2 to subsec (2)(a) and added subsec. (2)(g).

Laws 1979, c. 79-164, a reviser's bill corrected statutes by deletion of expired, obsolete, invalid, inconsistent or redundant provisions, codified cross references and grammar and otherwise improved the clarity of statutes interpretation of the statutes. See Reviser's Note—1979.

Laws 1980, c. 80-27, § 2, inserted in subsec. (2)(g)1 "a law enforcement agency, as defined by s. 934.02(10)".

Reviser's Note—1977:
Amendment conforms to grammatical construction of paragraphs (c), (d), and (e) as amended and created by ch. 74-249, Laws of Florida.

Reviser's Note—1979:
Paragraph [(2)(g)] rearranged to conform to the apparent legislative intent of the interrelated amendments to C.S. for H.B. 320 appearing at pp. 262, 285, and 956, 1978 House Journal.

Law Review Commentaries
Consensual electronic surveillance. Kirk W. Munroe, 56 Fla.Bar J. 355 (1982).

Consenting party to conversation recorded by police without warrant required to verify at trial consent to recording prior to transmission against

other party to conversation. 2 Fla. State L.Rev. 188 (1974).

Intercepted communications: "just cause" for refusing to answer questions of grand jury. 29 U.Miami L.Rev. 334 (1975).

Intraspousal wiretapping and eavesdropping in domestic relations cases. Cynthia L. Greene, 56 Fla. Bar J. 643 (1982).

United States Supreme Court

Covert entry to install electronic bugging equipment, see Dalia v. United States, 1979, 99 S.Ct. 1682.

Wire-taps, identification of person committing offense on application for judicial approval, see United States v. Donovan, 1977, 97 S.Ct. 658.

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½. Validity

This section which authorizes law enforcement officer to intercept an oral communication when such person is a party to the conversation or where one of the parties to the communication has given prior consent to the interception is unconstitutional insofar as it authorizes the warrantless interception of a private conversation conducted in the home. State v. Sarmiento, 397 So.2d 643 (1981).

Fact that electronic interception of private conversation conducted in the home is authorized without a warrant by the United States Supreme Court under the Federal Constitution does not affect prohibition by Const. Art. 1, § 12 of such an interception as state citizens under their constitution may provide themselves with more protection from governmental intrusion than that afforded by the United States Constitution. Id.

Provisions of this chapter relating to security of communications were constitutional as applied to case in which prosecution was precluded from introducing electronic recording to corroborate extortion victim's testimony as to oral threats. State v. Walls, 356 So.2d 294 (1978).

This section prohibiting interception of defined wire or oral communications unless all parties thereto give prior consent does not exclude any source from press, intrude upon activities of news media in contacting sources, prevent parties to communication from consenting to recording or restrict publication of any information gained from communication, and, hence, is not unconstitutional as representing prior restraint or as impairing news-gathering activities. Shevin v. Sunbeam Television Corp., 351 So.2d 723 (1977), appeal dismissed 98 S.Ct. 1480, 435 U.S. 920, 55 L.Ed.2d 512, rehearing denied 98 S.Ct. 1892, 435 U.S. 1018, 56 L.Ed.2d 398.

Electronic devices and hidden mechanical contrivances cannot be said to be indispensable tools of investigative news reporting, and thus are not within First Amendment guarantee of freedom of the press, since such reporting was successfully practiced long before invention of such devices. Id.

1. In general

A motel room is not functional equivalent of a home within meaning of Florida Supreme Court decision holding that communication transmitted from person's home under supervision of law enforcement officers and intercepted by witness outside home is not admissible in evidence. Miller v. State, App., 411 So.2d 944 (1982).

This section creates exceptions to warrant requirement with respect to interception of private communications in cases of an interception involving law enforcement officers, requiring the consent of only one party and in cases of interception based on the consent of all parties. Chiarenza v. State, App., 406 So.2d 56 (1981).

Municipal police officers acting outside their jurisdiction acted unlawfully in intercepting oral communication where only one party had given prior consent to interception. Wilson v. State, App., 403 So.2d 982 (1980).

Definition of "interception of private communications," in context of prohibition under Const. Art. 1, § 12, against such interception, is a function of one's reasonable expectation of privacy. State v. Sarmiento, 397 So.2d 643 (1981).

Medical examiner's recording of telephone conversation with psychiatrist who was suspected of first-degree murder of one of his patients, without psychiatrist's consent, was unlawful interception as defined by this section proscribing such interceptions. State v. Tsavaris, 394 So.2d 418 (1981), appeal after remand 414 So.2d 1087.

Rule in Sarmiento v. State, 371 So.2d 1047 (Fla.3d DCA 1979), that an eavesdropping officer without a warrant can testify to contents of conversation which occurs in a defendant's home is clearly limited to its discreet setting, that is, monitoring by police officers stationed outside defendant's home of a conversation between defendant and another within defendant's home, about which monitoring officers, not officer engaged in conversation with defendant, testified. State v. Shaktman, App., 389 So.2d 1045 (1980).

Tape recordings of defendant's conversations were not subject to suppression where they were secured without an intercept warrant though in accordance with requirements of provision of this section. State v. Steinbrecher, App., 389 So.2d 1043 (1980).

Testimony of police officers who overheard defendant's drug-related conversations with an undercover officer equipped with a "body bug" for which an intercept warrant had not been obtained was properly admitted, since the subject conversation did not take place in defendant's home but in the "residence" of a codefendant; furthermore, the admission of the testimony of the officers who were outside the house could have been no more than harmless error, since it merely corroborated that of the undercover man, who himself related his transaction with the defendant and whose credibility and interest was not challenged below. Trinidad v. State, App., 388 So.2d 1068 (1980) certiorari denied 101 S.Ct. 3113, 422 U.S. 963, 69 L.Ed.2d 974.

Where officer observed defendant recording conversation with officer, officer had probable cause to believe that defendant had violated provision of this section relating to intercepting oral communication of another and second officer, who was told by first officer of what had occurred, had probable cause to arrest defendant and seizure of re-

Note 1

cording device was valid. State v. Keen, App., 384 So.2d 284 (1980).

Detective did not violate provision of this section proscribing disclosure of intercepted wire communications when he listened in on telephone conversation without the knowledge of the caller where the person called answered by use of 'speaker phone" and thus, by using telephone instrument furnished to a subscriber in ordinary course of business, prevented there being an "interception" within the meaning of the Disclosure Act. State v. Tsavaris, App., 382 So.2d 56 (1980) certified question answered 394 So.2d 418, appeal after remand 414 So.2d 1087.

Recordings of communications should be and are admissible after individual in whom accused has confided has testified both as to his consent and the contents of his discussion; disapproving State v. Muscara, 334 So.2d 167. Franco v. State, App., 376 So.2d 1168 (1979).

Electronic reproductions of communications between an informer and accused may be introduced in evidence on compliance with requirements of this section and securance of an intercept warrant or order are not necessary regardless of whether there was sufficient time to obtain one. Id.

A wrongdoer who voluntarily speaks to another of his wrongdoings only has the hope or expectation, not a constitutionally protected right, that the other person will not breach his confidence and testify as to the contents of their conversations. Id.

Electronic recordings of conversations which were obtained from defendants by federal police officer without an intercept warrant and which concerned statements made by defendants to effect that they gave narcotics to confidential informants in exchange for information were admissible in perjury prosecution for falsely testifying before grand jury with respect to those statements where fellow police officer took witness stand and testified as to his consent to recording of conversations and contents thereof prior to actual introduction of recordings. Id.

The Fourth Amendment of the U. S. Constitution does not protect a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it. Id.

State agents' warrantless electronic eavesdropping of conversations between undercover police officer and defendant in his home constituted an "interception" within meaning of Const. Art. 1, § 12 that right to be secure against the unreasonable interception of private communications shall not be violated and such interception, when it was practicable for officers to have obtained prior intercept warrant, was an "unreasonable interception" within meaning of such provision; and thus refusal to suppress testimony relating to that which was heard on electronic monitor was reversible error. Sarmiento v. State, App., 371 So.2d 1047 (1979) approved 397 So.2d 643.

When information acquired through interception of communications under procedure authorized by this section governing issuance of wiretap orders was used only to establish probable cause, the State did not need to establish consent through direct testimony of consenting party, and thus the trial judge did not err in bookmaking prosecution in denying defendants' motion to disclose identity of confidential informant and to produce him for cross-examination by the defense. An issue of consent. Zupparul v. State, 367 So.2d (1978).

Since interception and disclosure of wire or oral communications is illegal, any communications between client and her attorney in planning taping of phone conversation by client would be discoverable. Roberts v. Jardine, App 366 So.2d 124 (1979).

Telephone users, who alleged that employees of telephone company had directed that illegal electronic device be placed upon their telephone line, had no cause of action under § 934.03 dealing with interception, disclosure or use of wire or oral communication where device attached to their telephone line, although affording connection by which eavesdropping or recording equipment could have been attached, did not itself have capability of intercepting or recording contents of any oral communication but only recorded telephone numbers called, and there was no evidence that anyone actually heard coversation or attempted to do so. Armstrong v. Southern Bell Tel. & Tel. Co., App., 366 So.2d 88 (1978).

Suppression of all wiretap evidence for continuing wiretap beyond authorized objective is only mandated if procedural requirements to minimize interception are blatantly ignored. State v. Aurillo, App., 366 So.2d 71 (1978).

Prohibition against interception of defined wire or oral communications unless all parties thereto give prior consent represents a policy decision by Legislature to allow each party to a conversation to have an expectation of privacy from interception by another party to conversation. Shevin v. Sunbeam Television Corp., 351 So.2d 723 (1977) appeal dismissed 98 S.Ct. 1480, 435 U.S. 920, 55 L.Ed.2d 513, rehearing denied 98 S.Ct. 1892, 435 U.S. 1018, 56 L. Ed.2d 398.

State provided an adequate predicate as to authenticity of recorded conversations between defendant and an informant so as to enable tapes of conversation to be introduced in evidence. Crespo v. State, App., 350 So.2d 507 (1977).

The Florida Security of Communications Act prohibits a party to a conversation from recording such conversation without the consent of all the parties to the conversation, provided the conversation is not public and that the intercept is not conducted for the purpose of obtaining evidence of a criminal act as provided in the Act. State v. News-Press Pub Co., App., 338 So.2d 1313 (1976).

Tape recordings made by newspaper reporter of her telephone conversation with a second person, without the knowledge or consent of the second person, and of a conversation between the second person and a third person in car, without knowledge or consent of such persons and after such persons had asked to be left to talk alone for a few minutes, were illegal intercepts. Id.

Purpose of the Florida Security of Communications Act was to protect victims of illegal intercepts, not those who perpetrate them, and thus newspaper whose reporter made illegal intercepts lacked standing to assert, when charged with destruction of evidence, that the illegal tape recordings would have been inadmissible in evidence, and such circumstances would not preclude prosecution for destruction of evidence. Id.

All unauthorized eavesdropping by use of extension telephone instruments by persons other than telephone subscribers, in absence of knowledge and con-

sent[illegible] at le st one of the parties to the [illegible]sation, is unlawful, crim.nal in nature and pun shable as a third-degree felony under Security of Commu cations Act. H rn v. State[illegible] App., 291 So. 2d 194 (1974).

This chapter prohibiting all unauthorized eav sdr pping by use of extension telephone instruments by persons other than telephone subscribers, in absence of knowledge and consent of at least one of the parties to the conversation, applies to private citizens as well as to government agents. West's F.S.A. § 934.01 et seq. Id.

Use of taped telephone conversations between wife and her lover, which conversations were obtained when husband tapped his own residence telephone on instructions from detective agency, for purposes of impeaching wife's testimony in divorce action was not prevented by provisions of Omnibus Crime Control Act or of other federal or state statutes or constitutions. Beaber v. Beaber, 322 N.E.2d 910, 41 Ohio Misc. 95 (1974).

A municipal police department is not authorized by the provisions of this chapter governing wire communications to intercept and record all incoming telephone calls to that department whether or not such telephone lines are equipped with an operating "beep" tone device Op.Atty.Gen. 080-5, Jan. 15, 1980.

A municipal police department is not an "other entity" within the purview of subsec. (2)(g) 1 of this section, for the purpose of intercepting and recording incoming wire communications on published emergency telephone numbers. Op.Atty.Gen., 079-93, Oct. 29, 1979.

The recording of conversations between telephone solicitors and customers by telephone solicitors without the consent of the customer violates this section. Op.Atty.Gen., 077-32, March 28, 1977.

2. Consent

Personal and telephone conversations between defendant and police informants at defendant's pawnshop, which were monitored and recorded by police with consent of the informants were admissible at trial of defendant for attempted trafficking in stolen property under this section authorizing interception of communication when law enforcement officer or one under his direction is a party to it or where one of the parties to such communication is given prior consent to the interception. Morningstar v. State, App., 405 So.2d 778 (1981).

A communication obtained in a manner otherwise permissible under this section authorizing the interception of a communication when a law enforcement officer or one under his direction is a party to it or where one of the parties to such communication is given prior consent to the interception is inadmissible only where that communication emanates from the defendant's home. Id.

Amendment of this section to require all parties to defined wire or oral communication to give prior consent to its intercept was designed to proscribe recording of telephone conversation by one party without consent of other party. State v. Tsavaris, 394 So.2d 418 (1981), appeal after remand 414 So.2d 1087.

As a predicate to admission of a tape recording or a seized conversation, consenting party must testify that he consented to recording, but once predicate for admissibility is met, tape recording between consenting party and accused may be introduced in evidence, and absence of a warrant or order lack of probable cause and nonexistence of exigent circumstances are all without significance. State v. Shakman, App., 389 So.2d 1[illegible]

Based on a possible authorities, Florida District Court of Appeal would recede from its holding in prior case that tape recording of a telephone conversation by one party to conversation without consent of other party was illegal intercept, if such court were free to do so, but it may not do so, because it was bound to follow case law on subject set forth by Florida Supreme Court, but District Court of Appeal would certify to Supreme Court as question of great public interest the question whether recording of a conversation by one of participants constituted interception of a wire or oral communication within meaning of this section. State v. Tsavaris, App., 382 So.2d 56 (1980), certified question answered 394 So.2d 418, appeal after remand 414 So.2d 1087.

Where county medical examiner was not law enforcement officer, and he was not acting under direction of detective when he made tape recording of telephone conversation with defendant psychiatrist, examiner's tape recording was not lawful because psychiatrist, a party to communication, did not give his prior consent to interception, and thus provision of this section governing security of communications required that tape recording be suppressed as evidence, but testimony of examiner and detective as to conversation did not also have to be suppressed. Id

The participant in a communication must himself take the witness stand and testify that he gave his consent to the interception as a predicate to the introduction of the electronic reproduction of the communication. Franco v. State, App., 376 So.2d 1168 (1979).

Tape-recorded conversations between defendant and confidential informant were admissible in evidence without testimony of informant that he had given his consent to interception where informant had died before trial and State produced form signed by informant and witnessed by police officers in which informant consented to be equipped with body recording device and transmitter. State v. Leonard, App., 376 So.2d 426 (1979).

Defendant's alleged attempt to bribe investigator for state attorney's office who was represented to defendant as a docket clerk for a circuit judge came within the broad language of bribery statute, despite fact that investigator could not have accomplished what defendant desired, and therefore, the consent interception of conversation between defendant and the investigator was authorized by statute. State v. Napoli, App., 378 So.2d 933 (1979).

The statutory custody and seal requirements relating to contents of intercepted wire or oral communications apply only to intercepts made pursuant to court authorization, and therefore such requirements were not applicable to consent interceptions authorized by statute. Id.

3. Party to communication

Tapes of conversations between defendant and undercover agents at a public restaurant were not subject to suppression and interceptions made without a warrant, outside defendant's home of telephone conversation between defendant in his home and undercover agents outside the home were lawful. State v. Vanyo App., 417 So.2d 1104 (1982).

...sence of police officer during private citizen's taping of conversation with defendant was sufficient to bring recording of conversation within purview of this section declaring it lawful for law enforcement officer or person acting under direction of law enforcement officer to intercept communication ... such person is a party to the communication or a party has given prior consent to interception and purpose of interception is to obtain evidence of criminal act. Miller v. State, App., 411 So.2d 944 (1982).

Where tape recordings of defendant's conversation with informant occurred in a restaurant, defendant's truck and at an outdoor rural setting, tape recordings were obtained under direction of law enforcement personnel in order to obtain evidence of criminal activity and tape recordings were made with prior consent of a participant to the conversation, that is, the informant, who testified at trial, warrantless interceptions, by tape, of the subject conversations were authorized by this section and thus, the tapes were properly admitted into evidence. Pittman v. State, App., 397 So.2d 1205 (1981).

Electronic tape of a telephone conversation between defendant and another employee of corporate victim, a conversation which occurred during a call which other employee, by prearrangement and at direction of police officers, had placed to defendant at latter's home, was admissible once prerequisites under provision of this section were met even though officers did not obtain an intercept warrant. Jacobs v. State, App., 389 So.2d 1054 (1980).

Rule in State v. Muscara, 339 So.2d 167 (Fla.3d DCA 1976) that a recording made by undercover police officers of a conversation they had with defendant was inadmissible because of failure of officer to secure an intercept warrant is no longer viable by reason of rule in Franco v. State, 376 So.2d 1168 (Fla.3d DCA 1979) that a tape recording between consenting party and accused may be introduced in evidence once predicate for admissibility is met. State v. Shaktman, App., 389 So.2d 1045 (1980).

Consent of undercover officer to recording of telephone conversations he received from defendant was enough to validate that recording so as to warrant admission of evidence of defendant placing bets with officer notwithstanding whether officer obtained a court order or warrant authorizing recording of conversation. Id.

Section 934.09 requiring recording, if possible, of communications intercepted pursuant to court order did not apply to interception of communication, not authorized by court order, by officer who was party to the communication and intercepted it for purpose of obtaining evidence of crime; nothing in Security of Communications Act required that the officer's testimony concerning statements made by defendant and intercepted by the officer be suppressed, even though no tapes were made of communication. Campbell v. State, App., 365 So.2d 751 (1978), certiorari denied 100 S.Ct. 282, 444 U.S. 934, 62 L.Ed.2d 193.

Investigators of the department of professional regulation acting independently and not under the direction of law enforcement officers are not authorized by this section, to intercept or make application for authorization to intercept wire or oral communications regardless of whether any such investigator is or may be a party to any such communication or one of the parties thereto has given prior consent to any such interception and irrespective of the purpose of such interception. Op.Atty. Gen., 081-36, May 15, 1981.

3.5 Dwellings

Florida Supreme Court decision holding that communication transmitted from person's home under supervision of law enforcement officers and intercepted by witness outside home is not admissible in evidence is inapplicable in situation where a party to the telephone conversation is located outside person's home and is acting pursuant to this section declaring it lawful for person acting under direction of law enforcement officer to intercept communication when such person is party to communication or a party to the communication has given prior consent to interception and purpose of interception is to obtain evidence of criminal act. Miller v. State, App., 411 So.2d 944 (1982).

4. Informant

Evidence consisting of tape recordings made by the police by virtue of a transmitter placed in the home of a police informant was admissible under this section and Const. Art. 1, § 12 since the interception occurred under police supervision in a place other than defendant's home. Chiarenza v. State, App., 406 So.2d 66 (1981).

Motel room defendant used in furtherance of offense of unlawful compensation was not the "functional equivalent" of a home; thus warrantless reception, pursuant to this section, of conversations between defendant and police informant occurring in the room was not unlawful. Padgett v. State, App., 404 So.2d 151 (1981).

Interception of telephone conversation between defendant and a confidential informant was not an illegal interception where one party consented. Bouler v. Stage, App., 389 So.2d 1197 (1980).

Tape recording of defendants' conversations with informant in the home of one of the defendants did not violate either the prohibition against unreasonable interception of private communication in Const. Art. 1, § 12 or U.S.C.A. Const. Amend. 4, where the informant participating in the conversations gave prior consent for the recording and the purpose of the interception was to obtain evidence of a criminal act. State v. Scott, App., 385 So.2d 1044 (1980).

5. Foreign court authorization

Defendants were entitled to suppression of oral and wire communications which were seized pursuant to a wiretap authorization where the primary basis for the wiretap authorization was a prior wiretap allegedly ordered by a trial court in the State of New Jersey and where the affidavit supporting the wiretap application stated that the New Jersey court order was attached as an exhibit and, in fact, no New Jersey court order was attached as an exhibit and the record did not even reflect the existence of such an order. State v. Stolpen, App., 386 So.2d 581 (1980).

6. Recordings

It is not for Supreme Court to question policy judgment behind legislative mandate that while person who engages in telephone conversation runs risk that another may later testify as to contents of that communication, he can at least be assured that conversation will not be recorded without his consent, but it is for Supreme Court simply to apply it. State v. Tsavaris, 394 So.2d 418 (1981). Appeal after remand 414 So.2d 1087.

It is immaterial to proper analysis of this chapter governing security of com-

munications that a recording may provide more trustworthy evidence of contents of conversation than mere oral testimony. Id.

Where initial interception of wire or oral communication is illegal, recording of that interception must likewise be illegal. Id.

934.06 Prohibition of use as evidence of intercepted wire or oral communications

Law Review Commentaries

Electronic eavesdropping: Body bugs. Barry Krischer, 52 Fla Bar J. 553 (1978).

United States Supreme Court

Pen register used by telephone company, search and seizure, see Smith v. Maryland, 1979, 99 S.Ct. 2577.

Wire-taps, identification of person committing offense on application for judicial approval, see United States v. Donovan, 1977, 97 S.Ct. 658, 429 U.S. 413, 50 L.Ed.2d 652.

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1. In general

Section 934.09 requiring recording, if possible, of communications intercepted pursuant to court order did not apply to interception of communication, not authorized by court order, by officer who was party to the communication and intercepted it for purpose of obtaining evidence of crime; nothing in Security of Communications Act required that the officer's testimony concerning statements made by defendant and intercepted by the officer be suppressed, even though no tapes were made of communication. Campbell v. State, App., 365 So.2d 751 (1978) certiorari denied 100 S.Ct. 282, 444 U.S. 934, 62 L.Ed.2d 198.

Detective did not violate provision of § 934.03 proscribing disclosure of intercepted wire communications when he listened in on telephone conversation without the knowledge of the caller where the person called answered by use of "speaker phone" and thus, by using telephone instrument furnished to a subscriber in ordinary course of business, prevented there being an "interception" within the meaning of the Disclosure Act. State v. Tsavaris, App., 382 So.2d 56 (1980) certified question answered 394 So.2d 418, appeal after remand 414 So.2d 1087.

Where county medical examiner was not law enforcement officer, and he was not acting under direction of detective when he made tape recording of telephone conversation with defendant psychiatrist, examiner's tape recording was not lawful because psychiatrist, a party to communication, did not give his prior consent to interception, and thus § 934.03 governing security of communications required that tape recording be suppressed as evidence, but testimony of examiner and detective as to conversation did not also have to be suppressed. Id.

Where earlier telephone call to murder victim at her place of employment had left victim visibly upset, it was reasonable for victim's supervisor to listen to later conversation between defendant and victim, and such use of a telephone was for the benefit of the victim's employer and in the ordinary course of business, and thus supervisor's testimony regarding threat made by defendant to victim during conversation was not a prohibited use of an intercepted oral communication. State v. Nova, App., 361 So.2d 411 (1978) on remand 362 So.2d 973

Evidence supported holding of trial court that witness who listened to telephone conversation between murder victim and defendant was acting for the benefit of victim's employer and in the ordinary course of business, and thus District Court of Appeal erred in finding that witness' eavesdropping was not done in her capacity as a supervisor of victim in that District Court was substituting its judgment for that of the trial court. Id.

The implanting of an electronic beeper on defendants' vehicle did not render marijuana seized from vehicle the fruit of the poisonous tree where surveillance of the vehicle was maintained visually and independently of the beeper. Fotianos v. State, App., 329 So.2d 397 (1976).

Contents of alleged telephone conversation which resulted from admitted eavesdropping by use of an extension receiver without knowledge of either of parties to the conversation, and absent authority from subscriber to telephone service, was not admissible in evidence. Horn v. State, App., 298 So.2d 194 (1974).

This section which prohibits use as evidence of intercepted wire or oral communications applies to criminal cases as well as to civil cases. Id.

Denial of defendant's motion, in murder prosecution, to strike testimony of third party relative to intercepted telephone conversation between defendant and his deceased wife, including identification of voice, did not violate defendant's due process rights. Id.

Although it is not a crime for interested witness to seek to testify as to communications or transactions with the deceased person nor is it a crime for witness to seek to testify as to "hearsay," unless such offered testimony falls within one of the recognized exceptions, such is not admissible in evidence and if the trial court, over timely objection, admits such and if it is relevant, material and prejudicial then a conviction based thereon will, upon timely appeal, be reversed. Id.

In its adjudication of whether murder conviction should be reversed because of an unauthorized eavesdropping of telephone conversation, the reviewing court passed upon admissibility of evidence and not upon comparability of crimes and did not weigh the crime of murder against the crime of unauthorized eavesdropping. Id.

Statute relating to the interception of any wire or oral communication, which statute defines "intercept" to mean the aural acquisition of the contents of any wire or oral communication through the use of any electronic mechanical or other device, was inapplicable to the alleged inculpatory statement of defendant which, because of his loud voice, was overheard by two police officers in hall outside closed door of lineup room. Taylor v. State, App., 292 So.2d 375 (1974).

A witness summoned before a grand jury to testify concerning wiretap interceptions is an aggrieved person involved in any "proceeding in or before any court" and, thus, has right to challenge legality of interception by way of a preindictment hearing on a motion to suppress prior to being interrogated. In

re Grand Jury Investigation, 287 So.2d [illegible] (1973).

Responsibility of supervising statutory prohibition against unauthorized wiretap information being received by a grand jury lies within officers of courts, i. e., judges and prosecutors primarily (because of ex parte nature of grand jury proceeding). Id.

Husband had no right to invade wife's right of privacy by utilizing electronic devices, and in absence of court authorization for husband's recording of wife's telephone conversations, or the consent of a party to the conversations, husband's recordings of such conversations made by tapping lines coming into the marital home were inadmissible in dissolution of marriage action. Markham v. Markham, 272 So.2d 813 (1972).

In prosecution for extortion and conspiracy to commit extortion, testimony of experts concerning their spectrographic voiceprint identification of defendant and voiceprints upon which experts' opinions were based were admissible. Alea v. State, App., 265 So.2d 96 (1972).

Tape recordings of extortionary telephone calls to prosecution witness depicting voice of defendant, two of which telephone calls were recorded by the prosecution witness himself and the third of which was recorded by prosecution witness while police officer was listening with witness' consent, were admissible in prosecution for extortion and conspiracy to commit extortion. Id.

Use of taped telephone conversations between wife and her lover, which conversations were obtained when husband tapped his own residence telephone on instructions from detective agency, for purposes of impeaching wife's testimony in divorce action was not prevented by provisions of Omnibus Crime Control Act or of other federal or state statutes or constitutions. Beaber v. Beaber, 322 N.E.2d 910, 41 Ohio Misc. 95 (1974).

If a conversation or communication is lawfully obtained, it should be admissible in departmental internal discipline proceedings. Op.Atty.Gen., 076-195, Sept. 23, 1976.

Conversations obtained by lawfully monitoring municipal police department telephones would be admissible as evidence in court for the prosecution of crimes not set forth in § 934.07. Id.

2. Admissibility of evidence

Tapes of conversations between defendant and undercover agents at a public restaurant were not subject to suppression and interceptions made, without a warrant, outside defendant's home of telephone conversation betwen defendant in his home and undercover agents outside the home were lawful. State v. Vanyo, App., 417 So.2d 1104 (1982).

Confidential informant's consent to interception of communication which took place in defendant's truck was not rendered involuntary by fact that it was given in exchange for resolution of criminal offense committed by informant, and, therefore, alleged lack of consent did not render interception invalid. Hurst v. State, App., 409 So.2d 1059 (1982).

Recording of conversation that took place in defendant's truck by means of "bodybug" placed on confidential informant did not violate Const. Art. I, § 12 prohibiting "unreasonable" interception of private communications by any means, and, therefore, that information could be used for purpose of establishing probable cause for issuance of warrant authorizing search of defendant's truck. Id.

Absent any issue as to admission of tapes of conversations or testimony of persons who were monitoring conversations, trial court did not err in refusing to suppress testimony by undercover police officer who illegally taped conversation he personally had with defendant in defendant's home. U.S.C.A.Const. Amend. 4. Smith v. State, App., 407 So.2d 399 (1981).

Defendants in prosecution under Racketeer Influenced and Corrupt Organization Act (F.S.A. § 943.46 et seq.) were not entitled to suppression of evidence acquired as a result of a wire tap order based upon communications of a pocket pager intercepted by police, as such communications were not actually transmitted by wire, but rather were broadcast in a manner available to anyone with the proper receiving equipment to hear. Dorsey v. State, 402 So.2d 1178 (1981).

Evidence discovered in defendant's home during search executed pursuant to search warrant, which relied on information obtained from illegal wiretap should have been suppressed. Bagley v. State, App., 397 So.2d 1036 (1981).

Tape recording of defendants' conversations with informant in the home of one of the defendants did not violate either the prohibition against unreasonable interception of private communication in Const. Art. 1, § 12 or U.S.C.A. Const. Amend. 4, where the informant participating in the conversations gave prior consent for the recording and the purpose of the interception was to obtain evidence of a criminal act. State v. Scott, App., 385 So.2d 1044 (1980).

Evidence obtained by police interception of telephone call from informant to defendant recorded under police direction and supervision was obtained by means sufficiently distinguishable from a previous illegally intercepted telephone call from the same informant to be purged of the primary taint of the previous call. Shayne v. State, App., 384 So.2d 711 (1980).

3. Recordings

It is immaterial to proper analysis of this chapter governing security of communications that a recording may provide more trustworthy evidence of contents of conversation than mere oral testimony. State v. Tsavaris, 394 So.2d 418 (1981), appeal after remand 414 So.2d 1087.

934.07 Authorization for interception of wire or oral communications

The Governor the Attorney General, or any State Attorney may authorize an application to a judge of competent jurisdiction for, and such judge may grant in conformity with this chapter, an order authorizing or approving the interception of wire or oral communications by the Department of Law Enforcement or any law enforcement agency of this state or any political subdivision thereof having responsibility for the investigation of the offense as to which the application is made when such interception may provide or has

provided evidence of the [illegible] of the offense of murder kidnapping gambling, robbery, burglary, theft, dealing in stolen property prostitution, criminal usury, bribery, extortion or dealing in narcotic drugs or other dangerous drugs; any violation of the provisions of the Florida Anti-Fencing Act; or any conspiracy to commit any violation of the laws of this state relating to the crimes specifically enumerated above

Amended by Laws 1973, c. 73-334, § 42, eff. Aug. 5, 1973; Laws 1977, c. 77-174, § 1, eff. Aug. 2, 1977; Laws 1977, c. 77-342, § 15 eff. Oct 1 1977; Laws 1979, c. 79-8, § 33, eff. Aug 5, 1979.

Laws 1973, c. 73-334, a reviser's bill, amended various sections of the statutes to conform terminology to the revision of the judiciary brought about by the adoption of revised Article 5 of the Florida Constitution, effective January 1, 1975.

Laws 1977, c. 77-174, a reviser's bill, amended this section to reflect language editorially inserted or substituted in the interest of clarity by the division of statutory revision and indexing.

Laws 1977, c. 77-342, modified the list of crimes by deleting grand larceny and abortion and the words "(when the same is of an organized nature or carried on as a conspiracy in violation of the laws of this state)" following "gambling", and added the crimes of theft, dealing in stolen property, and any violation of the provisions of the Florida Anti-Fencing Act.

Laws 1979, c. 79-8, a reviser's bill, substituted references to the "department of criminal law enforcement" with "department of law enforcement" and "division of law enforcement" with "division of criminal investigation" to conform with agency name changes made by Laws 1978, c. 78-347.

Cross References

Florida Anti-Fencing Act, see § 812.005 et seq.

Law Review Commentaries

Covert entry to plant bugs. 31 U. Fla.L.R. 994 (1979).

Governmental deception in consent searches. Richard E. Warner, 34 U. Miami L.Rev. 67 (1979).

United States Supreme Court

Pen register used by telephone company, search and seizure, see Smith v. Maryland, 1979, 99 S.Ct. 2577.

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1. In general

U. S. v. Lanza, D.C., 341 F.Supp. 405 (1972) [main volume] supplemented 349 F.Supp. 929.

State v. Angel, App., 261 So.2d 198 (1972) [main volume] affirmed 270 So.2d 715.

Official oversights by those applying for and issuing order of custody and order of interception if satisfactorily explained will not constitute fatal defect where the same are not proscribed by law and defendant is not prejudiced. State v. McManus, App., 404 So.2d 757 (1981).

Despite fact that defendants failed to show a property or possessory interest in the tapped telephone, defendants, who were arrested pursuant to search warrant which in turn grounded its probable cause on information gained from the wiretap, had standing to contest the wiretap order. Scheider v. State, App., 389 So.2d 251 (1980)

District Court of Appeal could not consider arguments concerning alleged invalidity of wiretap intercept orders, where record contained neither the orders nor applications and affidavits which supported their issuance, and, although documents relating to earlier wiretap order which supposedly initiated entire investigation were before court, there was no showing either that results of interceptions authorized by that order, which did not themselves involve defendants, had been related to later ones which did, or even that defendants had standing to challenge initial order. Salomon v. State, App., 385 So.2d 148 (1980).

Where despite their extensive efforts during more than two years since notices of appeal had been filed, appellants had been unable to secure and supplement record with allegedly invalid wiretap intercept orders or applications and affidavits which supported their issuance, appellants request for still further time to attempt to do so would be denied. Id.

Application for authority to intercept wire communications, considered in its entirety, was sufficient to support determination that normal investigative procedures had been tried and had failed or reasonably appeared to be unlikely to succeed if tried or to be too dangerous. Daniels v. State, App., 381 So.2d 707 (1979), affirmed 389 So.2d 631.

State agents' warrantless electronic eavesdropping of conversations between undercover police officer and defendant in his home constituted an "interception" within meaning of Const. art. 1, § 12, that right to be secure against the unreasonable interception of private communications shall not be violated and such interception, when it was practicable for officers to have obtained prior intercept warrant, was an "unreasonable interception" within meaning of such provision; and thus refusal to suppress testimony relating to that which was heard on electronic monitor was reversible error. Sarmiento v. State, App., 371 So.2d 1047 (1979), approved 397 So.2d 643.

Statutes concerning proper description of communications to be intercepted require that intrusion of privacy of those persons whose communications are intercepted be held to a minimum consistently with purposes of wiretap. Hudson v. State, App., 365 So.2d 899 (1979).

Authorized purpose of wiretap, to intercept telephone voice communications related to or concerning sale and traffic of cocaine, marijuana and other con-

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fied substances, met statutory requirements of particularity and order likewise was sufficiently limited in duration, in that it was to terminate upon attainment of authorized objective or, in any event, in 30 days from signing of order. Id.

Contents of intercepted wire communications were properly suppressed where original affidavit for wire tap order did not reflect the presence of sufficient probable cause to believe that facility from which the communications were to be intercepted was being used or about to be used in connection with the commission of an offense enumerated in this section authorizing wire tap. State v. Alphonse, App., 315 So.2d 506 (1975).

Any "investigation of the offense" or information derived from wiretaps which may directly or indirectly "provide * * * evidence of the commission of the offense" relative to any person or persons is limited directly and indirectly to only those offenses specifically set forth in authorizing statute. In re Grand Jury Investigation, 287 So. 2d 43 (1973).

Portion of this section authorizing interception of wire or oral communications is a statutory exception to constitutional (federal and state) right to privacy and, therefore, must be strictly construed and narrowly limited in application to uses delineated by legislature. Id.

To allow police to indiscriminately place "bugs" on telephones without first obtaining warrants is as much a violation of individual's rights as to allow officers to arbitrarily enter homes without obtaining prior judicial approval. Tollett v. State, 272 So.2d 490 (1972).

Court is not at liberty to relax state constitutional protection of privacy in area of communications. Id.

Order suppressing evidence resulting from a telephone intercept, though valid when based on grounds as indicated, could not be based on additional ground that a valid application for intercept could not be made by an assistant state's attorney. State v. Berjah, App., 268 So.2d 696 (1972).

1.5 Construction with federal law

Florida court wiretap orders, procured on application of Florida governor under this section authorizing interception of wire communication on application of governor, department of legal affairs, or the state attorney or county solicitor, were not invalid under federal statute permitting principal state prosecuting attorney to make application for wiretap order. U. S. v. Pacheco, C.A., 489 F.2d 554 (1974), rehearing denied 491 F. 2d 1272, certiorari denied 95 S.Ct. 1558, 421 U.S. 909, 43 L.Ed.2d 774.

Where applications by governor and wiretap orders issued by justice of Florida Supreme Court recited that the proposed wire intercepts might provide evidence of violation of Florida statute making it unlawful to conduct lottery, orders were not invalid on ground that lottery was not gambling within meaning of Florida wiretap statute, since "gambling" is used in its generic sense and comprehends any otherwise qualifying activity including conducting a lottery. Id.

Federal law has preempted the ability of certain state officials to authorize an application for the interception of oral communications; federal law reference to the "principal prosecuting attorney" or to the appropriate state attorney authorizes the exercise of that power by a general class of prosecutors known as assistant state attorneys. State v. Birs, App., 394 So.2d 1054 (1981).

Notwithstanding that under § 934.09 governing interception of wire or oral communications assistant state attorney would be authorized to make application for authority to intercept communications, federal statute (18 U.S.C.A. § 2516) governing such interception was preemptive and assistant state attorney was not "principal prosecuting attorney" for purposes of federal statute which provided that only the "principal prosecuting attorney" was authorized to make application for order authorizing or approving interception of oral or wire communications. Daniels v. State, App., 381 So.2d 707 (1979), affirmed 389 So.2d 631.

This section setting forth instances in which wiretaps may be authorized did not require that offense involved be punishable by imprisonment for more than one year; such a provision was not required by federal statute [18 U.S.C.A. § 2516] notwithstanding that comparable federal statute contained specifically enumerated offenses plus provision for other offenses punishable by imprisonment for more than one year. State v. Aurilio, App., 366 So.2d 71 (1978).

Federal statute relating to applications for interception of wire communications contemplates that applicant will be an investigative or law enforcement officer and does not require specified prosecuting official to be applicant. State v. McGillicuddy, App., 342 So.2d 567 (1977).

State attorney's authorization for application for interception of wire communications sufficed for purposes of applicable federal and state statutes, and thus it was permissible for state attorney's investigator rather than state attorney himself, to make application for interception of wire communications which was signed by state attorney. Id.

1.6 Federal law

With regard to telephone communications, Congress enacted legislation [see 18 U.S.C.A. § 2516] regulating practice of interception of wire or oral communications under commerce clause of U. S.C.A.Const. Art. 1, § 8. State v. Daniels, 389 So.2d 631 (1980).

With regard to interception of oral communications other than telephone communications, Congress enacted legislation [see 18 U.S.C.A. § 2516] regulating practice of interception of wire and oral communications under enforcement clause of U.S.C.A.Const. Amend. 14. Id.

1.8 Persons qualified to authorize interception

State attorney's authorization for municipal police officer to apply for order of interception was not proscribed by 18 U.S.C.A. § 2516 and this section. State v. McManus, App., 404 So.2d 757 (1981).

Section 27.181 providing that assistant state attorney should have all power as state attorney appointing him and this section governing authorization for interception of wire or oral communications did not empower assistant state attorney to authorize applications for electronic eavesdropping orders, in that Congress intended such authority to be limited to narrow class of officials to insure that such decisions come from centralized, politically responsible source, and assistant state attorney was not specifically enumerated as official who may exercise such power in § 934.07. State v. Daniels, 389 So.2d [illegible] (1980).

State attorney may delegate authority to assistant state attorney to

long as such provision for delegation is narrowly confined to insure centralization and uniformity of policy; thus, provision for delegation of authority cannot be unlimited in scope, but can be designed to allow for continuity of administration when state attorney is absent for extended period of time. Id.

Section 27.181 providing that assistant state attorney shall have all powers of state attorney appointing him is not specific grant of authority to authorize electronic surveillance applications. Id.

Notwithstanding that under § 934.09 governing interception of wire or oral communications assistant state attorney would be authorized to make application for authority to intercept communications, federal statute governing such interception was preemptive and assistant state attorney was not "principal prosecuting attorney" for purposes of 18 U.S.C.A. § 2516 which provided that only the "principal prosecuting attorney" was authorized to make application for order authorizing or approving interception of oral or wire communications. Daniels v. State, App., 381 So.2d 707 (1979), affirmed 389 So.2d 631.

Under Florida law, application for authority to intercept wire or oral communications authorized by assistant state attorney is valid. Id.

Authorizing order for wiretaps obtained on application by assistant state attorney was violative of 18 U.S.C.A. § 2516 governing wiretaps in that assistant state attorney was not "principal prosecuting attorney" who was only party authorized under said federal statute to make application for order authorizing wiretap and thus evidence obtained as result of such wiretaps should have been suppressed. Id.

4. Discovery

If state attorney, who conducted authorized wiretap, failed to comply with discovery rules or if he failed to comply with judicial guidelines, defendant would have access to the courts for an appropriate order compelling state attorney to comply with discovery procedure. Eagan v. DeManio, 294 So.2d 639 (1974).

State attorney and his assistant, who conducted authorized wiretap, were not immune from discovery; however, defendant was required to follow statutory procedure. Id.

That investigation conducted by state attorney occurred incident to authorization of an application for interception of wire or oral communications did not subject state attorney and his assistant summarily to discovery by oral deposition, on ground that they had acted in an investigatory as opposed to prosecutoria capacity; subjecting prosecutors to such type of discovery of their investigations would require disclosure of their work product and seriously impede criminal prosecutions. Id.

5. Affidavit

When continuing pattern of criminal activity is alleged in search warrant affidavit, issue as to staleness of information relied upon for probable cause must be examined more liberally and such result is even more defensible in wiretap cases than in ordinary search warrant cases. U. S. v. Hyde, C.A., 574 F.2d 856 (1978 rehearing denied 579 F.2d 643, 644.

Supplement and amendment to original affidavit in support of wiretap warrant was insufficient on its face and intercepted communications should have been suppressed where amendment did not set forth any additional information which had been gained through conventional surveillance techniques justifying wiretap on a different telephone number made no reference at all to success or failure of surveillance techniques employed at new location, and failed to disclose information about prior wiretaps and wiretap applications involving persons whose communications were going to be intercepted; that original valid affidavit was incorporated by reference and thus "tacked" onto subsequent affidavit could not cure insufficiency. Bagley v. State, App., 397 So.2d 1036 (1981).

Sufficiency of an affidavit to establish necessary elements to support the issuance of a wiretap order must be determined from a reading of the affidavit as a whole, not from bits and pieces read in isolation; in assessing probable cause, the issuing magistrate must use his own judgment based on the entire picture presented to him and utilize his common sense. State v. Birs, App., 394 So.2d 1054 (1981).

Fact that affiant represented that reference in a conversation to "that thing we went up to West Palm about" was a reference to the narcotics did not show misrepresentation on the part of the informant, whose information was relied upon to secure wiretap order, despite the fact that no cocaine was obtained on the particular trip where cocaine was the purpose of the trip. Id.

Disregarding recited evidence in support of affidavit on which intercept order was issued, since that evidence was based on another intercept which was found to be unwarranted affidavit on which intercept order was issued was sufficient to show probable cause to believe that defendant was engaged in marijuana marketing offenses by use of specified telephone, especially in light of eyewitness recitals by affiant. Ramos v. State, App., 394 So.2d 460 (1981).

Where affidavit in support of wiretap indicated a continuing pattern of criminal activity with sufficient currency as to be legally fresh and viable, order authorizing wiretap was not illegal on the ground that the information upon which it was based was stale. Bouler v. State, App., 389 So.2d 1197 (1980).

Wiretap procedures prior to search were not improper and, hence, did not require suppression of fruits thereof on ground that authorizations therefor were not based upon legally sufficient affidavits of probable cause and that information contained therein was stale. Robinson v. State, App., 389 So.2d 1067 (1980) certiorari denied 102 S.Ct. 504, 454 U.S. 1056, 70 L.Ed.2d 598.

Sufficiency of affidavit to establish necessary elements supporting issuance of wiretap order must be determined from reading all the affidavit and it should be tested in common sense and realistic fashion. Amerson v. State, App., 388 So.2d 1287 (1980).

Affidavit for wiretap order, which set forth detailed account of widespread drug operations of defendants and others part of which was related to affiant by two confidential informants, established probable cause to believe that defendants were involved in a conspiracy to violate drug laws through use of their telephones. Mitchell v. State (1979) 381 So.2d 1066 (1979).

Information received by affiant from informants, which was included in application for wiretap order, was not stale in that staleness could not be computed from dates of first meetings where numerous subsequent meetings

took place between sources and affiant. Id.

Although allegations in support of wiretap order evidenced criminal activity only up until January 23, 1976, it was permissible for magistrate to infer that, if criminal activities and conversations had been occurring over defendant's telephone lines for the past several years, they had not mysteriously stopped during the ensuing weeks, and thus lack of allegations that defendant was using or was about to use her phones to commit a crime from January 23 until April 14, the date of the application, did not render affidavit stale. Hudson v. State, App., 368 So.2d 899 (1979).

Wiretap order affidavit did not contain alleged misrepresentations as evidenced by testimony presented at hearing on motion to suppress and any inaccuracies contained therein were not of such magnitude to render wiretap order invalid. Id.

Affidavits in support of wiretap order are invalid if error in affidavit was committed with intent to deceive magistrate, whether or not error is material to showing of probable cause, or if error was made nonintentionally but erroneous statement is material to establishment of probable cause. Id.

Affidavit, which asserted that surveillances were conducted at defendant's residence and that at least one police officer was seen and suspected by person known to be an associate of defendant's, was sufficient to comply with statutory requirement that application for wiretap order provide full and complete statement about other investigative techniques. Id.

Wiretap affidavit, which set out reliability of four confidential agents, each of whom had advised affiant that over past several years they had telephoned defendant numerous times and had managed to make purchases of narcotics at her residence, and which stated that investigation by affiant failed to reveal that defendant had any lawful visible means of support or income to maintain her affluent lifestyle, sufficiently demonstrated probable cause to believe that defendant was involved in protracted and continuous conspiracy of dealing in narcotics. Id.

Error in one number in accused's street address in application, affidavit and order for a telephone wire interception, which documents correctly identified accused and his telephone number, was a mere clerical error which did not render such documents fatally defective. State v. Buffa, App., 347 So.2d 688 (1977).

Evidence secured pursuant to search warrant was properly suppressed where warrant was predicated on affidavit which relied on fruits of improperly intercepted wire communications. State v. Alphonse, App., 315 So.2d 506 (1975).

Sufficiency of an affidavit to establish necessary elements to support issuance of a wiretap order must be determined from a reading of the affidavit as a whole, not from bits and pieces read in isolation. Rodriquez v. State, 297 So.2d 15 (1974).

Affidavit which indicated that accused had two prior lottery convictions, that there was evidence of gambling transactions involving accused during the preceding year, that house had three telephones, each listed to a bona fide occupant, that woman had stated 38 days previously that her husband had worked for accused as a bolita seller and that 17-year-old former boyfriend of accused's stepdaughter had made unconfirmed statements that he had seen gambling transactions in house at some undisclosed past time or times, was insufficient, in view of staleness, to establish probable cause to support issuance of wiretap order. Id.

5. Consent

In prosecution for bribery and unlawful compensation for official behavior, tape recordings of private conversations between defendant and third person at defendant's home, which were transmitted to police by "body bug" planted on third person, should have been suppressed. Hoberman v. State, 400 So.2d 758 (1981).

Representation that narcotics dog was properly trained, which representation was not a false statement knowingly or recklessly made, conferred probable cause, standing alone, for issuance of search warrant for defendant's briefcase following dog's positive alert at airport and truth or falsity of other statements in affidavit was irrelevant. Vetter v. State, App., 395 So.2d 1199 (1981).

Prohibition under Const. Art. 1, § 12 against unreasonable interception of private communications may be satisfied either by obtaining a warrant or by assuring that one of the parties to the communication has given prior consent to the interception, and, if consent is relied upon, such consent is evidenced by the testimony of the consenting party, subject to cross-examination, as a condition precedent to the introduction of the recording into evidence. State v. Scott, App., 385 So.2d 1044 (1980).

There is no impediment under U.S.C.A.Const. Amend. 4 to surreptitious recording of criminally incriminating conversations between a consenting police agent or informant and one who has been or is engaged in criminal activity Id.

No error occurred in denying defendant's motion to suppress video tape evidence, because even if consent were required, though State alleged it did not apply because one of parties was a police officer, there was testimony at trial that consent of one of parties to communication being recorded was obtained. Moore v. State, App., 378 So.2d 792 (1979).

Participant in communication must himself take witness stand and testify that he gave his consent to interception as predicate to introduction of electronic reproduction of communication. Tollett v. State, 272 So.2d 490 (1972).

6. Warrants

Failure to obtain intercept warrant before taping conversations between defendant and an informant was not violative of defendant's rights under U.S.C.A.Const. Amend. 4 where confidential informant was present at trial and testified as to both contents of conversations and his consent to taping. Crespo v. State, App., 350 So.2d 507 (1977).

Tapes made by police officers at approximately 6:00 P.M. on same date as informant had arranged for police officers to meet with defendant, subsequently charged with buying, receiving and concealing stolen property, which conversation consisted of agreement on price and quantity of goods to be purchased, would be admissible at defendant's trial as officers were available to testify and as they did not have sufficient opportunity to secure intercept warrant. State v. Muscara, App., 334 So.2d 167 (1976).

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subsequently charged with buying, receiving and concealing stolen property which conversation occurred day after meeting had been arranged through informant, would be inadmissible at defendant's trial as officers knew they were to meet defendant and others, what was to take place, etc., and had ample time in metropolitan area to secure intercept warrant yet failed to do so. Id.

Where officer had sufficient time to obtain warrant and had participated in setting up conversations to be overheard and recorded, interceptions of conversations between defendant and informer were "unreasonable" and should not have occurred unless officer first obtained search warrant or had secured consent from one of parties to communication and established such consent under proper safeguards and conditions. Tollett v. State, 272 So.2d 490 (1972).

Noncompliance with warrant procedures to intercept conversation cannot be excused even though those making interception later demonstrated at trial that probable cause in fact existed and that warrant or order would have been issued had it been requested. Id.

Where there was no warrant or testimony of participant to communication that he consented to its interception, hearsay testimony of officer who made wiretap that participant had consented to his making wiretap was insufficient to allow admission of wiretap in evidence. Id.

Information received by a law enforcement agency through the use of a "Shot Gun Mike" can form the basis for the issuance of a search warrant if there is full compliance with the provisions of Chapter 934, security of communications, inasmuch as a "Shot Gun Mike" is a device described in § 934.02. Op.Atty.Gen., 074-67, March 1, 1974.

7. Probable cause

If affidavit in support of issuance of wiretap order alleges facts from which it can be reasonably believed that parties whose communications are sought to be intercepted is committing or is about to commit proscribed offense and that interception will reveal communication relating to that offense, probable cause is established which will justify issuance of order authorizing interceptions. Amerson v. State, App., 388 So.2d 1287 (1980).

Before wiretap order can be issued, judge must find existence of probable cause to believe that individual is committing, has committed or is about to commit statutorily enumerated offense, that particular communication concerning that offense will be obtained through wiretap, and that facilities from which communications are to be intercepted are being used or are about to be used in connection with commission of offense or are leased to, listed in name of or commonly used by such individual. Hudson v. State, App., 368 So.2d 899 (1979).

Information given magistrate in application for wiretap order must be timely; proof must be of facts so closely related to time of issuance of authorization order as to justify finding of probable cause at that time. Id.

Preliminary information furnished in application for wiretap authorization was sufficient to warrant intercept authorization to investigate suspected gambling offenses. State v. Aurilio, App., 366 So.2d 71 (1978).

Probable cause for issuance of wiretap order is the existence of reasonable grounds for belief that party whose communications are to be intercepted is committing or is about to commit one of the statutorily enumerated offenses; that particular communications concerning that offense will be obtained through such interception and that facilities or place involved is being used or about to be used in connection with the offense. Rodriquez v. State, 297 So.2d 15 (1974).

Mere suspicion is insufficient to authorize issuance of a wiretap order. Id.

7.5 Validity of wiretap order

Failure of circuit judge to sign his name, affix a jurat, the date, or his seal of office on application for an order of interception and affidavit, which in all other regards was in compliance with federal and state statutes, was an oversight and thus the explained absence of a jurat or court seal was not fatal and did not destroy the otherwise lawful force and effect of order of custody and order of interception. State v. McManus, App., 404 So.2d 757 (1981).

Written authorization by a state attorney of an application for a wiretap is sufficient; the state attorney need not actually make the application. State v. Birs, App., 394 So.2d 1054 (1981).

When magistrate uses his own judgment based on the entire picture presented to him in determining to issue a wiretap order, his determination is conclusive in the absence of arbitrariness. Id.

Where defendant was not a party to any intercepted conversations nor were his premises the site of any electronic surveillance, he did not have standing to contest the validity of application and order for wiretap or the information derived therefrom; and thus defendant was not entitled to suppression of tangible evidence seized during a warrantless search of his person and of vehicle following his arrest, which resulted from surveillance of vehicle undertaken because of information received from a court-ordered intercept of telephone conversations. State v. Albano, 394 So.2d 1026 (1981).

Even though affiant's direct observations and reasonable inferences derived from those observations were not sufficient to justify conviction for conspiracy to violate narcotics laws, where it was reasonable for affiant, due to codefendant's representations that he could supply affiant weekly with large amounts of cocaine, to believe that codefendant in turn was being provided cocaine from another source, wiretap order on codefendant's telephone was valid in order to discover source from which codefendant was reasonably believed to be purchasing and later distributing cocaine and, therefore, fruits of such wiretap could be used in subsequent prosecution of defendant for conspiracy to sell cocaine. Amerson v. State, App., 388 So.2d 1287 (1980).

8. Scope of authorization

Where order authorized wiretap for 30 days, tap was terminated after 13 days and no authorized objectives were set out in order, there was no violation of authorization order on basis that electronic surveillance was maintained beyond time authorized objective was reached, even if authorization was restricted to objectives set out in application for authorization. State v. Aurilio, App., 366 So.2d 71 (1978).

Where only effort at minimization of interception of telephone conversations pursuant to wiretap order which, based on allegations of gambling activity, authorized interception of communications for all three telephone lines within

Note 8

house was the discontinuation of one line in which no communications relevant to the offense occurred, requirement that wiretap be conducted so as to minimize interception of communications not otherwise subject to interception had been blatantly ignored; thus, entire wiretap evidence was admissible. Rodriquez v. State, 297 So.2d 15 (1974).

If procedural requirements to minimize interception pursuant to wiretap order are blatantly ignored, entire wiretap evidence must be suppressed, but if violations of minimization requirements occurred despite efforts to meet such requirements, only the unauthorized interceptions may be suppressed. Id.

8. Inventories

Application for extension of serving of inventories was not rendered invalid merely because it was authorized by assistant state attorney rather than state attorney. Mitchell v. State, App., 381 So.2d 1066 (1979).

934.08 Authorization for disclosure and use of intercepted wire or oral communications

[See main volume for text of (1) and (2)]

(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any criminal proceeding in any court of the state or of the United States or in any grand jury proceedings, or in any investigation or proceeding in connection with the judicial qualifications commission, if such testimony is otherwise admissible.

Amended by Laws 1973, c. 73-361, § 1, eff. June 28, 1973.

[See main volume for text of (4) and (5)]

Laws 1973, c. 73-361, § 1, amended subsec. (3) to provide that information received may be disclosed to the judicial qualifications commission.

United States Supreme Court

Pen register used by telephone company, search and seizure, see Smith v. Maryland, 1979, 99 S.Ct. 2577.

934.09 Procedure for interception of wire or oral communications

[See main volume for text of (1) to (3)]

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify:

(a) The identity of the person, if known, whose communications are to be intercepted;

(b) The nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) A particular description of the type of communication sought to be intercepted and a statement of the particular offense to which it relates;

(d) The identity of the agency authorized to intercept the communications and of the person authorizing the application; and

(e) The period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

An order authorizing the interception of a wire or oral communication shall, upon the request of the applicant, direct that a communication common carrier, landlord, custodian, or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier, landlord, custodian, or person is according the person whose communications are to be intercepted. Any communication common carrier, landlord, custodian, or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant at prevailing rates.

Amended by Laws 1978, c. 78-376, § 2, eff. June 20, 1978.

[See main volume for text of (5) to (9)]

Laws 1978, c. 78-376, added the paragraph following subsec. (4)(e).

Law Review Commentaries

Electronic eavesdropping: Body bugs Barry Kamine, 52 Fla. B. J. 553 (1978).

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½. Validity
Under Florida law, application for authority to intercept wire or oral communications authorized by assistant state attorney is valid. Daniels v. State, App., 381 So.2d 707 (1979), affirmed 389 So.2d 631.

¾. Construction with federal law
Notwithstanding that under this section governing interception of wire or oral communications assistant state attorney would be authorized to make application for authority to intercept communications, federal statute (18 U.S.C.A. § 2516) governing such interception was preemptive and assistant state attorney was not "principal prosecuting attorney" for purposes of federal statute which provided that only the "principal prosecuting attorney" was authorized to make application for order authorizing or approving interception of oral or wire communications. Daniels v. State, App., 381 So.2d 707 (1979), affirmed 389 So.2d 631.

1. In general
State v. Angel, App., 261 So.2d 198 (1972) [main volume] affirmed 270 So.2d 715

Requirement, for wiretap order, that intrusions of privacy be held to minimum consistently with purposes of wiretap is applied with test of reasonableness to peculiar facts of each case, and factors to be considered are nature and scope of criminal enterprise under investigation, Government's reasonable inference from character of conversation from parties to it, and extent of judicial supervision. U. S. v. Hyde, C.A., 574 F.2d 856 (1978), rehearing denied 579 F.2d 642, 644.

In observing requirement, for wiretap order, that intrusions of privacy be held to minimum consistently with purposes of wiretap, Government agents were not required to ignore completely any call to attorney or doctor, despite contention of privilege. Id.

Authorized purpose of court-ordered wiretap, to intercept "any and all conversations having discussions related to or concerning sale, possession, smuggling, or unauthorized trafficking in narcotics and dangerous drugs" in violation of named Florida statutes, met statutory requirement of sufficient specificity of order. U. S. v. Cohen, C.A., 530 F.2d 43 (1976), certiorari denied 97 S.Ct. 149, 429 U.S. 855, 50 L.Ed.2d 130.

As an exception to constitutional right to privacy, this section authorizing interception of wire or oral communications of persons must be strictly construed. Bagley v. State, App., 397 So.2d 1036 (1981).

Purpose of this section providing that state furnish defendant a copy of court-ordered intercept and the accompanying application at least ten days prior to the hearing is to provide a defendant notice so that he can move to suppress wiretap evidence. State v. Albano, 394 So.2d 1026 (1981).

Judicial doctrines developed in search warrant area apply when examining sufficiency of a wiretap application. Mitchell v. State, App., 381 So.2d 1066 (1979).

Witness' knowledge of probable cause for wiretap order is essential. State v. Manning, App., 379 So.2d 1307 (1980).

Mere substantial compliance with checklist under this section for obtaining a wiretap authorization is not enough to justify authorization. Wilson v. State, App., 377 So.2d 287 (1979).

Although defendants contended that trial court should have suppressed all evidence procured by State by use of wiretaps because there was an unexcused delay between time of authorization and time of execution of order, in violation of this section, defendants did no more than claim that authorization to intercept was not executed as soon as practicable, and there was no showing from record that there was any purposeful delay, but, on contrary, police work appeared to have been expeditiously carried out, especially in view of limited manpower shown to be available. Vinales v. State, App., 374 So.2d 570 (1979) affirmed 394 So.2d 993.

State agents' warrantless electronic eavesdropping of conversations between undercover police officer and defendant in his home constituted an "interception" within meaning of Const. art. 1, § 12, that right to be secure against the unreasonable interception of private communications shall not be violated and such interception, when it was practicable for officers to have obtained prior intercept warrant, was an "unreasonable interception" within meaning of such provision; and thus refusal to suppress testimony relating to that which was heard on electronic monitor was reversible error. Sarmiento v. State, App., 371 So.2d 1047 (1979) approved 397 So.2d 643.

Statutory requirement of this section that application provide complete statement about other investigative techniques was intended to ensure that wiretap authorization procedures were not routinely employed as initial step in criminal investigation; however, it is not necessary to show comprehensive exhaustion of all possible techniques. Hudson v. State, App., 368 So.2d 399 (1979).

Authorized purpose of wiretap, to intercept telephone voice communications related to or concerning sale and traffic of cocaine, marijuana and other controlled substances met statutory requirements of particularity and order likewise was sufficiently limited in duration, in that it was to terminate upon attainment of authorized objective or, in any event, in 30 days from signing of order. Id.

Statutes concerning proper description of communications to be intercepted require that intrusion of privacy of those persons whose communications are intercepted be held to a minimum, consistently with purposes of wiretap. Id.

This section requiring recording, if possible, of communications intercepted pursuant to court order did not apply to interception of communication, not authorized by court order, by officer who was party to the communication and intercepted it for purpose of obtaining evidence of crime; nothing in Security of Communications Act required that the officer's testimony concerning statements made by defendant and intercepted by the officer be suppressed, even though no tapes were made of communication. Campbell v. State, App., 365 So.2d 751 (1978) certiorari denied 100 S.Ct. 282, 444 U.S. 934, 62 L.Ed.2d 193.

Circuit judge to whom application was made and who entered wiretap or-

Note 1

...ier met requirement of a neutral and detached magistrate." Cuba v. State, App., 362 So.2d 25 (1978).

Wiretap orders issued in connection with investigation of criminal lottery activities were properly limited as to scope and duration and were not over-... Id.

...onvictions would be reversed where state made no effort to comply with wiretap minimization requirements. Rodriquez v. State, App., 298 So.2d 206 (1974).

A witness summoned before a grand jury to testify concerning wiretap inter-... is an aggrieved person involved ...y "proceeding in or before any court" and, thus, has right to challenge legality of interception by way of a preindictment hearing on a motion to suppress prior to being interrogated. In re Grand Jury Investigation, 287 So.2d 43 (1973).

Responsibility of supervising statutory prohibition against unauthorized wiretap information being received by a grand jury lies within officers of courts, i. e., judges and prosecutors primarily (because of ex parte nature of grand jury proceeding). Id.

Pretrial delivery of copy of wiretap application and order for intercept was not required in prosecution for avoiding telephone charges by use of mechanical device where it appeared that telephone intercept order had been obtained, that intercepts occasioned surveillance of public pay telephone, and in course of surveillance defendant was observed using device to obtain return of his toll. Dade County v. Frangipane, App., 281 So.2d 338 (1973).

State Constitution does not preclude any justice of Supreme Court from issuing an interception order pursuant to statutory authority. State ex rel. Kennedy v. Lee, 274 So.2d 881 (1973).

Information received by a law enforcement agency through the use of a "Shot Gun Mike" can form the basis for the issuance of a search warrant if there is full compliance with the provisions of Chapter 934, security of communications, inasmuch as a "Shot Gun Mike" is a device described in § 934.02. Op.Atty.Gen., 074-67, March 1, 1974.

2. Inventory

Where defendant demonstrated no prejudice arising from delayed service of notice of wiretap, the violation of the notice provision of this section did not render the resulting evidence inadmissible. Bouler v. State, App., 389 So.2d 1197 (1980).

Application for extension of serving of inventories was not rendered invalid merely because it was authorized by assistant state attorney rather than state attorney. Mitchell v. State, App., 381 So.2d 1066 (1979).

This section authorizing an order postponing (for cause) service of an inventory showing fact and date of entry of an order on an application for a telephone intercept does not fix a time limit therefor (as it does for an order extending period for an intercept), but, in view of express time limitations contained in statute, permission to postpone service of inventory should be regarded as authorizing its extension only for a period for which good cause for such postponement is shown, and not as constituting authority to extend same for an indefinite or unlimited period. State v. Berjah, App., 266 So.2d 696 (1972).

Where matter submitted as good cause for extension of time for serving an inventory showing fact and date of entry of an order on an application for a telephone intercept did not show need for extension for any set period, and extension ordered was used as a basis for delay of service of inventory for more than 90 days following lapse of first 90 days after termination of intercept, suppression of evidence resulting from intercept was not an abuse of discretion. Id.

2.2 Application for authorization to intercept

Failure to disclose in affidavit for wiretap order information about prior wiretaps and wiretap applications involving persons whose communications were going to be intercepted requires suppression of evidence obtained by such wiretaps. Bagley v. State, App., 397 So.2d 1036 (1981).

Authorizing order for wiretaps obtained on application by assistant state attorney was violative of 18 U.S.C.A. § 2516 governing wiretaps in that assistant state attorney was not "principal prosecuting attorney" who was only party authorized under said federal statute to make application for order authorizing wiretap, and thus evidence obtained as result of such wiretaps should have been suppressed. Daniels v. State, App., 381 So.2d 707 (1979), affirmed 389 So.2d 631.

Application for authority to intercept wire communications, considered in its entirety, was sufficient to support determination that normal investigative procedures had been tried and had failed or reasonably appeared to be unlikely to succeed if tried or to be too dangerous. Id.

Notwithatanding that under this section governing interception of wire or oral communications assistant state attorney would be authorized to make application for authority to intercept communications, federal statute governing such interception was preemptive and assistant state attorney was not "principal prosecuting attorney" for purposes of 18 U.S.C.A. § 2516 which provided that only the "principal prosecuting attorney" was authorized to make application for order authorizing or approving interception of oral or wire communications. Id.

2.3 Motion to suppress

Defendant, who was not a subject of court-ordered intercept of telephone conversations, and who was not a party to such conversations, received actual notice of application and order of intercept, thereby satisfying this section providing that state furnish defendant a copy of court-ordered intercept and the accompanying application at least ten days prior to the hearing, and thus defendant was not entitled to suppression of tangible evidence seized during a warrantless search of his person and vehicle following his arrest, which resulted from surveillance of the vehicle undertaken because of information received from intercept of telephone conversations. State v. Albano, App., 394 So.2d 1026 (1981).

Evidence on motion to suppress evidence obtained from wiretaps was not sufficient to support finding that oral reports by law enforcement officer were not made in accordance with requirement in order authorizing wiretaps. State v. Aurilio, App., 366 So.2d 71 (1978).

2.4 Service of inventory

Trial court did not abuse discretion in granting extension of time for serving postinterception inventories of electronic surveillance based on good cause

or in delaying motion to suppress based on delay of service of [illegible] interception inventory where [illegible] was shown by service of inventory on defendant the day after service of indictment. Hicks v. State, App., 359 So.2d 473 (1978).

Under this section relating to electronics surveillance, trial court's discretion is properly exercised as to post-interception procedures, including extension of time for serving inventory. Id.

Service of "inventory" immediately after determination by investigating police officers that defendant's voice appeared in telephone conversations intercepted pursuant to court order was proper under portion of this section requiring such service "within a reasonable time but not later than 90 days after the termination of the period of an order," and thus contents of intercepted telephone conversations were admissible into evidence. Quintana v. State, App., 352 So.2d 587 (1977).

2.5 Affidavits

Where information contained in supporting affidavit for order authorizing wiretap comes from confidential informants, magistrate's search for probable cause must be guided by and measured against familiar standards judicially expressed, under which magistrate must be told of underlying circumstances and particular facts which will support confidential informant's conclusions, and he must also be told why informant should be considered reliable, and application for order is insufficient if either of such tests is unmet. U. S. v. Hyde, C.A., 574 F.2d 856 (1978), rehearing denied 579 F.2d 648, 644.

Where statements in search warrant affidavit did perhaps give rise to misleading impression but were not made with an intent to deceive magistrate but were made rather with an intent to deceive other persons, in order to protect informants, and where other of affiant's statements complained of were not shown to be misrepresentations, and in view of nature of statements, no statements complained of warranted invalidation of wiretap order. Id.

When continuing pattern of criminal activity is alleged in search warrant affidavit, issue as to staleness of information relied upon for probable cause must be examined more liberally, and such result is even more defensible in wiretap cases than in ordinary search warrant cases. Id.

Supplement and amendment to original affidavit in support of wiretap warrant was insufficient on its face and intercepted communications should have been suppressed where amendment did not set forth any additional information which had been gained through conventional surveillance techniques justifying wiretap on a different telephone number made no reference at all to success or failure of surveillance techniques employed at new location, and failed to disclose information about prior wiretaps and wiretap applications involving persons whose communications were going to be intercepted; that original valid affidavit was incorporated by reference and thus "tacked" onto subsequent affidavit could not cure insufficiency. Bagley v. State, App., 397 So.2d 1036 (1981).

Authorization to intercept telephone communications satisfied requirement under provision of this section that affidavit contain statement as to whether or not other investigative procedures [illegible] tried and failed and why they [illegible] reasonably appear to be unlikely to succeed if tried or to be too dangerous. Schneider v. State, App., 389 So.2d 251 (1980).

Affidavit for wiretap order, which set forth detailed account of widespread drug operations of defendants and others part of which was related to affiant by two confidential informants, established probable cause to believe that defendants were involved in a conspiracy to violate drug laws through use of their telephones. Mitchell v. State, App., 381 So.2d 1066 (1979).

Information received by affiant from informants, which was included in application for wiretap order, was not stale in that staleness could not be computed from dates of first meetings where numerous subsequent meetings took place between sources and affiant. Id.

Prime consideration in evaluating an affidavit in support of a wiretap is whether it shows probable cause to believe that an offense is being committed or is about to be committed and the telephone sought to be tapped is being used or is about to be used in connection with that offense. State v. Manning, App., 379 So.2d 1307 (1980).

Affidavit which stated that defendant had agreed to cooperate with police in connection with drug investigation and admitted being involved in a large-scale smuggling enterprise, which stated evidence of the police officer's knowledge confirming the defendant's claims, and which stated that police had been allowed to listen in on three telephone calls made from the defendant's home from February to August provided probable cause for issuance of wiretap on the defendant's telephone on October 4, despite contention that the evidence was stale; the showing of a continuous and protracted criminal enterprise negated a finding of staleness. Id.

Supplement and amendment to affidavit requesting court authorization for wiretaps was insufficient and, hence, invalid where it made only one reference to conventional investigative procedures in statement that certain persons and vehicles were observed at defendant's new apartment complex and made no reference at all to success or failure of surveillance techniques employed at new location or to reasons for abandoning routine methods of surveillance in favor of wiretaps. Wilson v. State, App., 377 So.2d 237 (1979).

Where a supplement to an affidavit for wiretap refers to a different telephone at a different address, reasons necessitating additional wiretap order should be set out with specificity. Id.

Application for a 20-day extension of wiretap order should not have been granted when supplement and amendment to original valid affidavit was insufficient on its face and, hence, invalid. Id.

Affidavit in support of application for order authorizing wiretap was sufficient to justify wiretap despite alleged oral misrepresentations to issuing judge at application proceedings, where judge based his conclusion solely upon those facts set forth in affidavit. State v. Brainard, App., 376 So.2d 864 (1979).

Where facts alleged in affidavit in support of order for wiretap demonstrated existence of a well-organized drug smuggling ring which had been operating for at least several months and which had, during that time, made constant use of telephone in its operations, and information obtained on August 24 indicated that defendants intended to continue their operation despite August

Note 2

pattern of crimi activ- f telephones w suffi- cient to justify issu nce of a wiretap order on September 23. Id.

Record in proceeding on motion to suppress certain evidence gathered from three wiretaps which had led to defendants' arrest did not support hearing court's conclusion that judge did not see full set exhibits to the origin affidavit when he issued the wiretap order. Id.

Wiretap affidavit, which set out reliability of four confidential agents, each of whom had advised affiant that over past several years they had telephoned defendant numerous times and had managed to make purchases of narcotics at her residence, and which stated that investigation by affiant failed to reveal that defendant had any lawful visible means of support or income to maintain her affluent lifestyle, sufficiently demonstrated probable cause to believe that defendant was involved in protracted and continuous conspiracy of dealing in narcotics. Hudson v. State, App., 368 So.2d 899 (1979).

Although allegations in support of wiretap order evidenced criminal activity only up until January 23, 1976, it was permissible for magistrate to infer that, if criminal activities and conversations had been occurring over defendant's telephone lines for the past several years, they had not mysteriously stopped during the ensuing weeks, and thus lack of allegations that defendant was using or was about to use her phones to commit a crime from January 23 until April 14, the date of the application, did not render affidavit stale. Id.

Affidavits in support of wiretap order are invalid if error in affidavit was committed with intent to deceive magistrate, whether or not error is material to showing of probable cause, or if error was made nonintentionally but erroneous statement is material to establishment of probable cause. Id.

Wiretap order affidavit did not contain alleged misrepresentations as evidenced by testimony presented at hearing on motion to suppress and any inaccuracies contained therein were not of such magnitude to render wiretap order invalid. Id.

Affidavit, which asserted that surveillances were conducted at defendant's residence and that at least one police officer was seen and suspected by person known to be an associate of defendant's, was sufficient to comply with statutory requirement that application for wiretap order provide full and complete statement about other investigative techniques. Id.

Convicted bookmakers' complaint on appeal that the State failed to file for record originals of affidavits and wiretap orders was barred by their stipulation to use of copies in the trial court and their failure to request the trial court to compel production of the originals. Zuppardi v. State, 367 So.2d 601 (1978).

Statement of underlying circumstances is essential to factual predicate of affidavit offered in support of order for wiretap; mere boilerplate recitation of difficulties of gathering usable evidence in bookmaking prosecutions is not sufficient basis for granting wiretap order. Id.

Sufficiency of affidavit offered in support of wiretap order must be tested by reference to affidavit as whole, and not merely bits and pieces read in isolation. Id.

Where affidavits offered by police officers in support of order to tap suspected bookmakers' telephones explained that the suspects were known to deal exclusively with club members, that they communicated only through codes, and that all available informants were unable or unwilling to assist law enforcement personnel in establishing direct contact with the suspects due to fear of physical danger such recitations constituted sufficient factual predicate on which magistrate could properly conclude that requirements of this section governing issuance of wiretap orders were satisfied and that normal investigative procedures were not likely to succeed. Id.

Bare allegations in affidavits of police officers in support of wiretap order asserting concern for safety or for premature disclosure of investigation, in totality of allegations of the affidavits, were sufficient to justify conclusion that potential for harm was real and that under this section governing issuance of wiretap orders alternate procedures reasonably appeared to be too dangerous. Id.

Where affidavit in support of wiretap order contained items of information based on material activities observed by police officers on physical surveillance of the area that were only three, four and five days prior to the date of the affidavit, such affidavit was not insufficient due to "staleness." Cuba v. State, App., 362 So.2d 29 (1978).

Affidavit in support of wiretap order in connection with investigation of criminal lottery activities was not insufficient because of absence of a "complete statement" as to failure of alternative investigation techniques, or as to why the latter was not utilized, in view of fact that conventional investigative techniques generally are insufficient for adequate and successful prosecutorial termination of criminal lottery activities. Id.

Fact that affidavit for subsequent wiretap order was based in part on information derived from prior affidavit did not invalidate the former where the second affidavit did not depend solely on the facts set out in the first, the facts of prior affidavit were not insufficient, and subsequent affidavit was based in part on facts derived by new and further investigation and upon subsequent information supplied by FBI agent. Id.

Sufficiency of an affidavit to establish necessary elements to support issuance of a wiretap order must be determined from a reading of the affidavit as a whole, not from bits and pieces read in isolation. Rodriquez v. State, 297 So.2d 15 (1974).

Affidavit, which indicated that accused had two prior lottery convictions, that there was evidence of gambling transactions involving accused during the preceding year, that house had three telephones, each listed to a bona fide occupant, that woman had stated 38 days previously that her husband had worked for accused as a bolita seller and that 17-year-old former boyfriend of accused's stepdaughter had made unconfirmed statements that he had seen gambling transactions in house at some undisclosed past time or times, was insufficient, in view of staleness, to establish probable cause to support issuance of wiretap order. Id.

3. Probable cause

Order authorizing wiretap, like ordinary search warrant, must be supported by probable cause found by magistrate. U. S. v. Hyde, C.A., 574 F.2d 856 (1978), rehearing denied 579 F.2d 643, 644.

Various factors including details of information supplied by confidential in-

formants, verification of some information by independent police investigation, fact that some confidential informants were acting against penal interest and that information supplied by confidential informants was mutually reinforcing and corroborative permitted finding of probable cause for wiretap. Id.

Magistrate could properly find probable cause, for issuance of wiretap order, as against contention of staleness, from affidavit which alleged conspiracy that had continued for at least two years and included information considerably less than two months old as well as most recent telephone records available. Id.

Determination as to when government has satisfied requirement, for wiretap order, that magistrate determine from information before him that normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous must be made against flexible standards, and each case must be examined on its own facts. Id.

Probable cause to intercept communications may exist even where no tangible evidence can be found, and recital of affidavit for wiretap order that probable cause could not be developed for ordinary search did not preclude finding of probable cause for wiretap order. Id.

Judge issuing a wiretap order cannot be informed of the difficulties where the application is silent on the subject or where general conclusory statements are substituted for specific facts. Wilson v. State, App., 377 So.2d 237 (1979).

Before wiretap order can be issued, judge must find existence of probable cause to believe that individual is committing, has committed or is about to commit statutorily enumerated offense, that particular communication concerning that offense will be obtained through wiretap, and that facilities from which communications are to be intercepted are being used or are about to be used in connection with commission of offense or are leased to, listed in name of or commonly used by such individual. Hudson v. State, App., 368 So.2d 899 (1979).

Information given magistrate in application for wiretap order must be timely; proof must be of facts so closely related to time of issuance of authorization order as to justify finding of probable cause at that time. Id.

Florida wiretap law contemplates that communications of unnamed individuals may be intercepted, provided that there is probable cause to believe that someone is violating the law and that he is named if that name is known, and provided that wiretap appears to be the most reasonable investigative technique under the circumstances to secure other and conclusive evidence of criminal involvement. State v. Barnett, App., 354 So.2d 422 (1978).

Probable cause for issuance of wiretap order is the existence of reasonable grounds for belief that party whose communications are to be intercepted is committing or is about to commit one of the statutorily enumerated offenses, that particular communications concerning that offense will be obtained through such interception and that facilities or place involved is being used or about to be used in connection with the offense. Rodriquez v. State, 297 So.2d 15 (1974).

Mere suspicion is insufficient to authorize issuance of a wiretap order. Id.

4. Minimization requirement

If minimization requirement for wiretap order is requirement that the intrusions of privacy of those whose communications are intercepted be held to minimum consistently with purposes of wiretap, is blatantly disregarded, information obtained through wiretap may be suppressed. U. S. v. Hyde, C. A., 574 F.2d 856 (1978), rehearing denied 579 F.2d 643, 644.

On record, agents complied with requirement, for wiretap order, that intrusions of privacy be held to minimum, in view of reports of ongoing surveillance furnished to justice in course of monitoring and in view of fact that wiretap lasted only 30 days and that there was no evidence of intent by monitoring agents to exceed scope of order. Id.

Where criminal activity under investigation by officers who testified that it was their understanding they could listen to conversations involving narcotics transactions and were instructed not to record personal calls, was large and complex conspiracy, extensive monitoring of calls was appropriate and wiretap's minimization requirement was met. Hudson v. State, App., 368 So.2d 899 (1979).

Where only effort at minimization of interception of telephone conversations pursuant to wiretap order which, based on allegations of gambling activity, authorized interception of communications for all three telephone lines within house was the discontinuation of one line in which no communications relevant to the offense occurred, requirement that wiretap be conducted so as to minimize interception of communications not otherwise subject to interception had been blatantly ignored; thus, entire wiretap evidence was inadmissible. Rodriquez v. State, 297 So.2d 15 (1974).

Mere fact that every conversation made on phone, which is subject of wiretap order, is recorded in its entirety does not necessarily violate minimization requirement, but, such a continuous recording is a factor tending to show a failure to minimize. Id.

If procedural requirements to minimize interception pursuant to wiretap order are blatantly ignored, entire wiretap evidence must be suppressed, but if violations of minimization requirements occurred despite efforts to meet such requirements, only the unauthorized interceptions may be suppressed. Id.

5. Exhaustion of other techniques

Federal statutory requirement that, before wiretap order issue, magistrate determine from information before him that normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous is intended to insure that federal wiretap authorization procedures be not routinely employed as initial step in criminal investigation. U. S. v. Hyde, C. A., 574 F.2d 856 (1978), rehearing denied 579 F.2d 643, 644.

Courts will not invalidate wiretap order simply because defense lawyers are able to suggest post factum some investigative technique that might have been used and was not. Id.

Government is not required to subject its agents and informants to undue personal danger to satisfy requirements, for wiretap order, that normal investigative procedures be tried and fail or reasonably appear to be unlikely to succeed if tried or to be too dangerous. Id.

...n the record, appli... wiretap order satisfied require... showing that normal investiga... procedures had been tried and had ... reasonably appeared to be unlik... to succeed if tried or to be too dangerous. Id.

Statutory requirement that normal investigative procedures must be exhausted prior to application for a wiretap order must be viewed in a practical and common-sense fashion; it is not necessary that all possible techniques or alternatives to wiretapping be first exhausted; the showing must be that other reasonable investigative procedures have been tried and either have failed or appear likely to fail or to be too dangerous; if other techniques had not been tried, the reasons as to why they reasonably appear unlikely to succeed must be demonstrated. State v. Birs, App., 394 So.2d 1054 (1981).

Even though informant appeared to have some trust and confidence established with defendant, fact that informant knew the defendant's friends only by their nicknames, that he was not allowed to visit the defendant's home at his leisure but had to call first, and that defendant would not identify the persons involved in the drug smuggling operations to the informant and evidence that physical surveillance was dangerous to the investigation because the defendant had spotted surveillance vehicles demonstrated that investigative procedures other than a wiretap would probably fail or would be dangerous. Id.

Purpose of requirement relative to exhaustion of normal investigative procedures in order to obtain authorization for interception of wire communications is to assure that wiretapping is not resorted to in situations where traditional techniques would suffice to expose crime; however, it is not necessary that all possible techniques or alternative to wiretapping be first exhausted. Daniels v. State, App., 381 So.2d 707 (1979), affirmed 389 So.2d 631.

For purposes of obtaining authorization to intercept wire or oral communications, it must be shown that other reasonable investigative procedures have been tried and have either failed or reasonably appear likely to fail or to be too dangerous, or if other techniques have not been tried, reasons why they reasonably appear to be unlikely to succeed if tried or to be too dangerous. Id.

Where there was showing of exhaustion of other investigatory techniques with respect to the five individuals named in wiretap orders, one of whom was the listed owner of the telephone tapped, and defendant, who was not listed, made no showing that sufficient probable cause existed of his criminal involvement as to require that he be named or identified the wiretap application and order, and where defendant's identity was subsequently ascertained through monitoring of the tap, his communications were properly discovered and admissible without showing of exhaustion of other investigatory techniques as to him, despite contention that he was caught in a "dragnet" resulting from the wiretap. State v. Barnett, App., 354 So.2d 422 (1978).

It is not necessary that all possible techniques alternative to wiretap be exhausted, and with respect to such techniques, this section requires that they be reasonably exhausted only with respect to those individuals known, though perhaps their names are not known, to be criminally involved. Id.

6. Admissibility of evidence

It is not necessary that a defendant be named in wiretap application or accused of using suspected telephone before evidence obtained by wiretap can be used against him. U. S. v. Hyde, C.A., 574 F.2d 856 (1978), rehearing denied 579 F.2d 643, 644.

In view of stipulation by attorney for defendants that proper chain of custody of wiretap tapes had been maintained and that tapes had not been tampered with, evidence would not be suppressed on mere ground that tapes had not been unsealed in manner required by wiretap order. Id.

Trial court erred in admitting testimony at sentencing hearing which was derived from intercepted wire communication, without requiring disclosure provided in statute governing procedure for interception of wire or oral communication, defendant's sentence would be vacated and cause remanded for resentencing. Jackson v. State, App., 416 So.2d 853 (1982).

Prosecution was not precluded from using evidence acquired through wiretaps merely because, at time application for wiretap was filed, government already possessed probable cause to arrest the person on whose phone the tap was to be placed, where, at the time, such person was not the sole focus of state's investigation and state desired to investigate scope of drug operation and co-conspirators involved with that person in the operation. State v. Carney, App., 401 So.2d 240 (1981).

Affidavit filed in support of application for order authorizing interception of communications on defendant's phone failed to establish reasonable grounds that defendant, whose communications were to be intercepted, was committing or was about to commit an offense, since no more than a suspicion was raised that the phone itself was being used for a gambling operation; thus evidence derived from electronic surveillance conducted on the phone should have been suppressed. Murphy v. State, App., 402 So.2d 1265 (1981).

Where defendants failed to present any reasonable theory upon which admission of condensed version of tape recording, which was originally made by private citizen, which was introduced in burglary prosecution and which tended to connect defendants with offense, would have helped prove their alibi defense, trial court's failure to admit condensed version of tape recording was not reversible error. Estate of Harper v. Orlando Funeral Home, Inc., App., 366 So.2d 126 (1979).

Although failure to disclose names of all potential persons to be intercepted by wiretaps may not play substantive role in authorization process, failure to disclose information about prior wiretaps and wiretap applications involving persons whose communications were going to be intercepted required suppression of evidence obtained by such wiretaps. State v. Aurilio, App., 366 So.2d 71 (1978).

7. Reports

Provision of this section for periodic reporting on wire interceptions is not mandatory, and thus failure to comply with reporting requirements will not mandate suppression of evidence obtained through interceptions absent showing of express prejudice by defendant. State v. Aurilio, App., 366 So.2d 71 (1978).

8. Consent interceptions

The statutory custody and seal requirements relating to contents of inter-

...epted ...re or ...
...ply only ... interception ...
...court ...uthorization. ...
...require...ents were ...
...consent ...nterception ...
...statute. State v. N...
...2d 933 (1979).

Defendant's allege... investigator for stat... who was represented ... docket ...lerk for a ... within ...he broad ... statute, despite fact ... could not have acco... fendant desired, and ... sent interception of ... tween defendant and ... was authorized by sta...

8.5 Orders

Sentenci... hearing ... within mea...ng of th... ing proced...re for inte...

934.091 Unlawful to ... penalty

(1) No person shal... published, or broad... other publication, or ... name or identity of ... or notification of in... § 934.09(7)(e) until ... appropriate prosecuti...

(2) Whoever is con... is guilty of a felony ... by a fine not to exce...

Added by Laws 1974, ...

Cross References
Libel and slander, see ...

Library references
Telecommunications ... C.J.S. Telegraphs, T... and Television §§ 28...

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In general 2
Validity 1

1. Validity

This section making ... felony for any person ...

934.10 Recovery of civil ...

Any person whose w... used in violation of this ... person who intercepts, d... cept, disclose, or use, s... from any such person:

(1) Actual damages, b... rate of $100 a day for ...

(2) Punitive damages, ...

(3) A reasonable attorn...

A good faith reliance on ... in this chapter shall co... action under the laws of ...

Amended by Laws 1978, ...

cepted wire or oral communications apply only to intercepts made pursuant to court authorization and therefore, such requirements were not applicable to consent interceptions authorized by statute. State v. Napoli, App., 372 So.2d 933 (1979).

Defendant's alleged attempt to bribe investigator for state attorney's office who was represented to defendant as a docket clerk for a circuit judge came within the broad language of bribery statute, despite fact that investigator could not have accomplished what defendant desired, and therefore, the consent interception of conversation between defendant and the investigator was authorized by statute. Id.

8.5 Orders

Sentencing hearing is "proceeding" within meaning of this section governing procedure for interception of wire or oral communication which provides that contents of any intercepted wire or oral communication shall not be received in evidence in any "proceeding" unless each party not less than ten days before proceeding has been furnished with copy of court order and accompanying application under which interception was authorized or approved. Jackson v. State, App., 416 So.2d 853 (1982).

9. Review

Federal court was precluded from hearing on habeas corpus review of state court judgment petitioner's claims under U.S.C.A.Const. Amend 4 in connection with evidence consisting of court-obtained wiretaps under this section, absent showing that state courts did not provide petitioner with opportunity for full and fair litigation of his claims. Llamas-Almaguer v. Wainwright, C.A., 666 F.2d 191 (1982).

934.091 Unlawful to publish names of parties to intercepted communications; penalty

(1) No person shall print, publish, or broadcast, or cause to be printed, published, or broadcasted, in any newspaper, magazine, periodical, or other publication, or from any television or radio broadcasting station, the name or identity of any person served with, or to be served with, an inventory or notification of interception of wire or oral communications pursuant to § 934.09(7)(e) until said person has been indicted or informed against by the appropriate prosecuting authority.

(2) Whoever is convicted of the violation of the provisions of this section is guilty of a felony of the third degree, punishable as provided in § 775.082, by a fine not to exceed $10,000, or as provided in § 775.084.

Added by Laws 1974, c. 74-95, § 1, eff. Oct. 1, 1974.

Cross References

Libel and slander, see § 770.01 et seq.

Library references

Telecommunications ⇐91.

C.J.S. Telegraphs, Telephones, Radio, and Television §§ 287, 288.

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In general 2
Validity 1

1. Validity

This section making it third-degree felony for any person to publish or broadcast in newspaper, publication, or electronic media the name of any person who is party to interception of wire or oral communications until that person has been indicted or informed against violated freedom of press provision of First Amendment. Gardner v. Bradenton Herald, Inc., 413 So.2d 10 (1982).

2. In general

State in person of state attorney had no standing to assert privacy rights of persons it had wiretapped. Gardner v. Bradenton Herald, Inc. 413 So.2d 10 (1982).

934.10 Recovery of civil damages authorized

Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use, such communications and shall be entitled to recover from any such person:

(1) Actual damages, but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher.

(2) Punitive damages; and

(3) A reasonable attorney's fee and other litigation costs reasonably incurred.

A good faith reliance on a court order or legislative authorization as provided in this chapter shall constitute a complete defense to any civil or criminal action under the laws of this state.

Amended by Laws 1978, c. 78-376, § 3, eff. June 20, 1978.

Laws 1978, c. 78-277, inserted in the last sentence "or legislative authorization as provided in this chapter".

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Husband and wife 1.5
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Self incrimination 1
Summary judgment 2

½. In general

Corporation had standing to assert claim under this section stating "any person whose wire or oral communication is intercepted in violation of this chapter shall have a civil cause of action against any person who intercepts such communications." Brown v. Shearson Hayden Stone, Inc., D.C., 94 F.R.D. 159 (1982).

In action to recover with respect to claim that defendant made tape recording of her telephone conversation with plaintiff without plaintiff's knowledge, order compelling defendant's former attorney to answer deposition questions in regard to how he acquired tape, how he knew that it was made during certain month, whether it was made at attorney's request, whether he was aware that tape was going to be made, whether defendant made tape, whether attorney knew how tape was made and whether he knew where tape was made violated defendant's attorney-client privilege. Roberts v. Jardine, App., 366 So.2d 124 (1979).

Telephone users, who alleged that employees of telephone company had directed that illegal electronic device be placed upon their telephone line, had no cause of action under § 934.03 dealing with interception, disclosure or use of wire or oral communication where device attached to their telephone line, although affording connection by which eavesdropping or recording equipment could have been attached, did not itself have capability of intercepting or recording contents of any oral communication but only recorded telephone numbers called, and there was no evidence that anyone actually heard conversation or attempted to do so. Armstrong v. Southern Bell Tel. & Tel. Co., App., 366 So.2d 88 (1978).

1. Self incrimination

Where defendant invoked privilege against self-incrimination in refusing to answer interrogatories in civil action for interception of telephone conversation, court could not punish her for exercising privilege by entering default judgment in civil action, although court might impose less severe sanctions such as striking her testimony. Roberts v. Jardine, App., 358 So.2d 588 (1978) appeal after remand 366 So.2d 124.

Court could not compel defendant to answer plaintiff's interrogatories in civil action for interception of telephone conversations by means of electronic or mechanical device, as answers relating to defendant's alleged interception might incriminate her for violation of criminal statute governing interception of telephone conversations. Id.

Where defendant published contents of tape recording by permitting playing of tape during deposition of plaintiff in earlier action, defendant waived any privilege she might have had in regard to contents of that tape, and thus trial court order that defendant comply with request of plaintiff for copy of tape recording or suffer default judgment was not in violation of petitioner's rights against self-incrimination under U.S.C.A.Const. Amend. 5. Id.

1.5 Husband and wife

Wife's civil action against husband based upon husband's alleged willful interception and willful disclosure of her telephone communications was barred by doctrine of interspousal immunity. Burgess v. Burgess, App., 417 So.2d 1173 (1982).

2. Summary judgment

Contradictory statements as to whether device attached to telephone line was capable of having listening device or tape recorder attached to it did not create issue of material fact in telephone users case against telephone company since question was not whether device was capable, either itself or via modification, of intercepting or recording oral communications but whether it in fact did so and since record stood uncontradicted that no oral communications were ever intercepted. Armstrong v. Southern Bell Tel. & Tel. Co., App., 366 So.2d 88 (1978).

3. Pleading

In action asserting that an employee of defendant acting within course and scope of his employment made various alleged misrepresentations to plaintiff by his use of means and instrumentalities of interstate commerce, specifically by use of the telephone, counterclaim alleging that the very same telephone conversations were intercepted and recorded by plaintiff in violation of this section was compulsory, where conversations may have been viewed as same core of operative facts upon which claim rested. Brown v. Shearson Hayden Stone, Inc., D.C., 94 F.R.D. 159 (1982).

CHAPTER 936. INQUESTS OF THE DEAD

Sec.
936.001 Purpose [New].
936.002 Inquest defined [New].
936.003 Procedure [New].

Laws 1977, c. 77-294, §§ 1, 2, added the provisions comprising Fla. St.1977, Chapter 936, §§ 936.001 to 936.003, and § 3 of the law repealed the provisions which comprised Fla.St.1975, Chapter 936, §§ 936.02 to 936.22, pertaining to the same subject matter.

Former § 936.01 was repealed by Laws 1973, c. 73-334, § 43. Prior to repeal, §§ 936.03, 936.04, 936.06, 936.10, 936.15, 936.18, 936.19, and 936.22 were amended by Laws 1973, c. 73-334, § 44

936.001 Purpose

The purpose of this chapter is to provide a procedure whereby a public inquest may be made into a death for which an autopsy is required, when