

Department of Legislative Services
Maryland General Assembly
2011 Session

FISCAL AND POLICY NOTE

House Bill 45
Judiciary

(Delegate Waldstreicher, *et al.*)

Criminal Law - Interception of Oral Communications - Law Enforcement
Officers

This bill authorizes a law enforcement officer to intercept an oral communication in the course of the officer's regular duty without informing all other parties to the communication of the interception at the beginning of the communication. The bill also authorizes a person to intercept an oral communication made by a law enforcement officer: (1) in a public place; and (2) in the course of the officer's regular duty.

Fiscal Summary

State Effect: None. The bill is procedural in nature and does not directly affect State finances.

Local Effect: None. The bill is procedural in nature and does not directly affect local finances.

Small Business Effect: None.

Analysis

Current Law: Under The Maryland Wiretapping and Electronic Surveillance Act, it is unlawful to willfully intercept any wire, oral, or electronic communication. Under the Act, "intercept" is defined, in part, as "the... acquisition of the contents of any... oral communication through the use of any... device." Therefore, the Wiretap Act does not regulate a video recording that does not contain an audio component. The statute does authorize the interception of an oral communication if all participants have given prior consent (sometimes called "two-party consent"). Maryland is 1 of 12 two-party consent

states, most of which spell out clearly that the consent is required only in circumstances where there is a “reasonable expectation of privacy.”

The Act does provide specified exceptions, including one for a law enforcement officer who intercepts an oral communication in the regular course of the officer’s duty, so long as the officer: (1) initially lawfully detained a vehicle during a criminal investigation or for a traffic violation; (2) is a party to the oral communication; (3) has been identified as a law enforcement officer to the other parties to the communication prior to any interception; (4) informs all other parties to the communication of the interception at the beginning of the communication; and (5) makes the interception as part of a video tape recording.

Each interception in violation of the Wiretap Act may be prosecuted as a felony, punishable by up to five-years imprisonment, and/or a \$10,000 fine. A person who is the victim of a violation of the Wiretap Act has a civil cause of action against the wire tapper for damages, attorney’s fees, and litigation costs.

Background: The application of the Maryland Wiretap Act to citizen recordings of police activity has made national headlines, particularly in reference to an incident in Harford County involving a motorcyclist.

On March 5, 2010, Anthony Graber was on his motorcycle traveling well above the speed limit on Interstate 95 when an off-duty State trooper in an unmarked vehicle cut him off, forcing him to the side of the road. The trooper, who was dressed in plain clothes, got out of his car, pointed his gun at Graber, and yelled before identifying himself as “State police.” Graber caught the incident on a video camera attached to his helmet and posted the video on YouTube. After the video quickly attracted widespread interest, police searched Graber’s house, seized his computers, and put him in jail for 26 hours. On March 15, the trooper obtained an arrest warrant charging Graber with a violation of the Maryland Wiretap Act for audio taping the encounter. Several weeks later, the Harford County State’s Attorney obtained a grand jury indictment that added several additional motor vehicle and wiretap violations. Graber faced 16 years in prison as a result of the charges.

On September 27, 2010, a Harford County judge dismissed the wiretapping charges against Graber. In his ruling, the judge wrote that the traffic stop “took place on a public highway in full view of the public. Under such circumstances, I cannot, by any stretch, conclude that the troopers had any reasonable expectation of privacy in their conversation with the defendant which society would be prepared to recognize as reasonable.” The judge went on to note that “[t]hose of us who are public officials and are entrusted with the power of the state are ultimately accountable to the public. When we exercise that

power in the public fora, we should not expect our actions to be shielded from public scrutiny.”

The ruling echoed predictions made in a July 7, 2010 advisory opinion issued by the Office of the Attorney General in response to an inquiry by a legislator on the application of the Maryland Wiretap Act to situations in which citizens record the public activities of police officers. In the opinion, the Attorney General concluded that of the possible outcomes to such a case under the State Wiretap Act, a Maryland court would most likely hold that a police stop of an individual is not a private conversation, and that the recording of one would be found not to violate the Wiretap Act. The Office of the Attorney General cited an opinion it issued in 2000 as to whether a police officer who had inadvertently made an audio recording as part of a video recording of a traffic stop had violated the Act. Though Maryland had enacted an exception authorizing interceptions of oral communications by police officers during traffic stops in specified circumstances, the officer had failed to meet the requirements of the exception. Nevertheless, citing federal and State precedents, the Attorney General advised the police in 2000 that a traffic stop was difficult to characterize as “private” and that the wiretap statute did not, therefore, appear to have been violated. Thus, the July 2010 letter from the Attorney General advised that if a police officer would not face prosecution or liability under the Act for recording an arrest or traffic stop in a public place, the same reasoning should apply to a private person involved in the same type of incident. Finally, the Attorney General reviewed cases from other jurisdictions on the issue. The letter noted that while no statute was exactly the same as Maryland’s, a number of states had concluded that such recordings did not violate their respective wiretap or eavesdropping statutes.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Allegany, Harford, Montgomery, and Talbot counties; Department of Natural Resources; Department of General Services; Judiciary (Administrative Office of the Courts); Department of State Police; Maryland Department of Transportation; University System of Maryland; Office of the Attorney General; Department of Legislative Services

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