

324 N.W.2d 58, 117 Mich. App. 476, Sullivan v. Gray, (Mich.. 1982)

\*58 324 N.W.2d 58

117 Mich.. 476

Thomas A. SULLIVAN, Plaintiff Appellant,

v.

James GRAY, Edward A. Katz, and David M. Black, jointly and severally, Defendants Appellees.

Docket No. 57301.

Court of Appeals of Michigan.

Submitted Jan. 21, 1982.

Decided June 23, 1982.

Released for Publication Sept. 22, 1982.

Plaintiff brought action against defendants alleging that defendant eavesdropped on telephone conversation between plaintiff and defendant by recording conversation in violation of statute prohibiting recording of conversation without consent of all parties and that all three defendants violated statute by using or divulging recorded conversation. The Oakland Circuit Court, Richard D. Kuhn, J., granted summary judgment in favor of defendants, and plaintiff appealed. The Court of Appeals held that such participant recording was not prohibited under statute.

Affirmed.

V. J. Brennan, J., dissented with reasons.

#### 1. TELECOMMUNICATIONS k495

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372V Interception or Disclosure of Communications; Electronic Surveillance

372V(A) In General

372k494 Acts Constituting Interception or Disclosure

372k495 Persons concerned; consent.

Mich.. 1982.

Applicable statute does not prohibit a party to a telephone conversation from tape recording conversation absent consent of all other participants. M.C.L.A. Secs. 750.539 et seq., 750.539c.

[117 Mich.. 477] Bushnell, Gage, Doctoroff, Reizen & Byington, Southfield by Noel A. Gage and Eugene H. Beach, Jr., Southfield, for plaintiff appellant.

Simpson, Moran & Burnett, Birmingham, and Sullivan, Ranger, Ward & Bone, Detroit, for defendants appellees.

Before KAUFMAN, P. J., and V. J. BRENNAN and TAHVONEN (FN\*), JJ.

[117 Mich.. 478] PER CURIAM.

The issue presented in this appeal is whether M.C.L. Sec. 750.539 et seq.; M.S.A. Sec. 28.807 et seq. prohibits a party to a telephone conversation from tape recording the conversation absent the consent of all other participants. The trial court ruled that such participant recording is not prohibited, and, therefore, dismissed by summary judgment \*59 plaintiff's civil suit based upon the statute. Plaintiff appeals as of right.

This litigation arose out of a January 3, 1978, telephone conversation between plaintiff and defendant James Gray. The conversation related to the breakdown of negotiations between defendants Gray and Edward Katz and plaintiff involving the sale of plaintiff's automobile dealership. Unbeknownst to plaintiff, Gray recorded the discourse with a cassette tape recorder. The recording was subsequently transcribed and utilized by defendants in the course of litigation stemming from the dealership negotiations. Defendant Black was an associate attorney with one of the law firms representing Gray and Katz that lawsuit.

M.C.L. Sec. 750.539c; M.S.A. Sec. 28.807(3) provides:

"Any person who is present or who is not present during a private conversation and who willfully uses any device to eavesdrop upon the conversation without the consent of all parties thereto, or who knowingly aids, employs or procures another person to do the same in violation of this section, is guilty of a felony punishable by imprisonment in a state prison for not more than 2 years or by a fine of not more than \$2,000.00, or both."

The act further prohibits the use or divulgence of information obtained by eavesdropping. M.C.L. Sec. 750.539e; M.S.A. Sec. 28.807(5). The pertinent counts of plaintiff's complaint were brought pursuant to M.C.L. Sec. 750.539h; M.S.A. Sec. 28.807(8), which provides for [117 Mich.. 479] civil remedies for violations of the statute. (FN1) Plaintiff essentially alleged that Gray eavesdropped on the January 3, 1978, telephone conversation by recording it, and that all three defendants further violated the statute by using or divulging the transcribed dialogue.

M.C.L. Sec. 750.539a(2); M.S.A. Sec. 28.807(1)(2) expressly defines the term "eavesdrop":

" 'Eavesdrop' or 'eavesdropping' means to overhear, record, amplify or transmit any part of the private discourse of others without the permission of all persons engaged in the discourse. Neither this definition or any other provision of this act shall modify or affect any law or regulation concerning interception, divulgence or recording of messages transmitted by communications common carriers."

The question of whether participant recording is forbidden is a novel one to this jurisdiction. Although prior cases have examined the eavesdropping statute with regard to its impact on the admission of evidence in criminal trials, none have directly resolved the issue now before us. Cf. *People v. Artuso*, 100 Mich. 396, 298 N.W.2d 746 (1980); *People v. Sacorafas*, 76 Mich. 370, 256 N.W.2d 599 (1977); *People v. Livingston*, 64 Mich. 247, 236 N.W.2d 63 (1975); *People v. Mattison*, 26 Mich. 453, 182 N.W.2d 604 (1970). Moreover, while decisions from other jurisdictions are instructive, they ultimately are not dispositive since they are based on statutes significantly distinguishable from MCL Sec. 750.539 et seq.; M.S.A. Sec. 28.807 et seq. (FN2)

[117 Mich. 480] The issue here is strictly one of statutory construction. The rules for statutory interpretation were most recently summarized in *Charter Twp. of Pittsfield v. City of Saline*, 103 Mich. 99, 104105, 302 N.W.2d 608 (1981):

"In construing this statute, we are governed by traditional rules of construction. Thus, if the statute is unambiguous on its face, we will avoid further interpretation or construction of its terms. *Detroit v Redford Twp*, 253 Mich 453; 235 NW 217 (1931). However, if ambiguity exists, it is our duty to give effect to the intention of the Legislature in enacting the statute. *Melia v Employment Security Comm*, 346 Mich 544; 78 NW2d 273 (1956). To resolve a perceived ambiguity, a court will \*60 look to the object of the statute, the evil or mischief which it is designed to remedy, and will apply a reasonable construction which best accomplishes the statute's purpose. *Bennetts v State Employees Retirement Board*, 95 Mich App 616; 291 NW2d 147 (1980), *Stover v Retirement Board of St Clair Shores*, 78 Mich App 409; 260 NW2d 112 (1977). Also, ambiguous statutes will be interpreted as a whole and construed so as to give effect to each provision and to produce an harmonious and consistent result. *In re Petition of State Highway Comm*, 383 Mich 709; 178 NW2d 923 (1970), *People v Miller*, 78 Mich App 336; 259 NW2d 877 (1977). Further, specific words in a given statute will be assigned their ordinary meaning unless a different interpretation is indicated. *Oshtemo Twp v Kalamazoo*, 77 Mich App 33, 39; 257 NW2d 260 (1977), MCL 8.3a; MSA 2.212(1)."

The operative language of M.C.L. Sec. 750.539c; M.S.A. Sec. 28.807(3) prohibits a person from "willfully us[ing] any device to eavesdrop upon [a] conversation without the consent of all parties thereto". As used in the statute, the term "eavesdrop" means [117 Mich. 481] to "overhear, record, amplify or transmit any part of the private discourse of others without the permission of all persons engaged in the discourse". M.C.L. Sec. 750.539a(2); M.S.A. Sec. 28.807(1)(2). We believe the statutory language, on its face, unambiguously excludes participant recording from the definition of eavesdropping by limiting the subject conversation to "the private discourse of others". The statute contemplates that a potential eavesdropper must be a third party not otherwise involved in the conversation being eavesdropped on. Had the Legislature desired to include participants within the definition, the phrase "of others" might have been excluded or changed to "of others or with others".

Plaintiff argues that M.C.L. Sec. 750.539c; M.S.A. Sec. 28.807(3) must apply to both participants and non participants since it relates to "[a]ny person who is present or who is not present during a private conversation \* \* \* ". We disagree. Although the phrase arguably creates an ambiguity as to the persons affected by the act, the interpretation requested by plaintiff would render inoperative the words "of others" in the statutory definition of eavesdropping. A more logical interpretation may be made that gives full effect to that statutory definition. The words "[a]ny person who is present or who is not present" merely acknowledge that eavesdropping may be committed by one who is actually in close physical proximity to a conversation or by one who is some distance away but eavesdrops utilizing a mechanical device. Quite plainly, one may be "present" during a conversation without being a party to the conversation and without his presence being apparent to those conversing. For example, the eavesdropping party could literally be under the eaves outside an open window.

[117 Mich. 482] This construction does lead to one anomaly. While a participant may record a conversation with apparent impunity, his sole consent is insufficient to make permissible the eavesdropping of a third party. Thus, while a participant may record a conversation, he apparently may not employ third parties to do so for him. However, this result, although incongruous on its face, is not necessarily an inconsistency. An individual may not expect those he converses with to record their discourses. Still, absent a request that discussions be held "off the record", it is only reasonable to expect that a conversation may be repeated, perhaps from memory or from the handwritten notes of a party to the conversation. A recording made by a participant is nothing more than a more accurate record of what was said. Whether an individual should reasonably expect that an ostensibly private conversation will be related by a participant to third parties depends on that individual's relation to the other participant. The individual may gauge his expectations according to his own evaluation of the person to whom he speaks. He has the ability to limit what he says based upon that expectation. When a third party is unilaterally given permission to listen in upon a conversation, unknown to other participants, those other participants are no longer able to evaluate and form accurate expectations since they are without knowledge of the third party. Therefore, it is not inconsistent \*61 to permit a person to record and utilize conversations he participates in yet deny him the right to unilaterally grant that ability to third parties.

In applying this construction to the instant case, we are led to the conclusion that summary judgment was appropriate. Plaintiff's claims are based on the alleged recording of his conversation by [117 Mich.. 483] defendant Gray, a participant in that conversation. The conduct alleged does not come within the statutory prohibition, and, therefore, plaintiff's claims are unenforceable as a matter of law. No factual development could possibly justify a right to recover under the eavesdropping statute. Cf. Partrich v. Muscat, 84 Mich.. 724, 729730, 270 N.W.2d 506 (1978).

Affirmed.

V. J. BRENNAN, Judge (dissenting).

I respectfully dissent. I find that the statute prohibits the recording of a conversation, whether by a third party or participant, unless all persons involved in the conversation have given their permission.

On its face, the statute does not state that a person who is a party to the conversation cannot violate the statute. Rather, if the Legislature had intended that the statute not apply to participants, I think that it would have stated that intention in clear language. As a matter of fact, the very first phrase of the statute indicates that participants to the conversation can violate the statute: "Any person who is present \* \* \*" (emphasis added). If the Legislature intended to exclude participants, I think that it would have stated any person not a party to the conversation. Moreover, the statute also states that all participants in the conversation must consent to the overhearing, recording, amplifying or transmitting of the conversation. To me, this plainly prohibits participants, as well as third parties, from the activities designated in the statute without disclosure to the other persons to the conversation that the conversation is being overheard, recorded, amplified or transmitted.

Moreover, I think the fact that the Legislature even defined the word "eavesdropping" is significant. [117 Mich.. 484] If the statute did not apply to participants, I think that the Legislature would not have defined the word eavesdropping since the common meaning of the word is to overhear. Therefore, if one violated the statute by overhearing (eavesdropping) a conversation, then any conduct, such as recording, amplifying or transmitting, resulting from the overhearing would be prohibited. However, the Legislature did define eavesdropping, using the disjunctive "or", as not only overhearing but also recording, amplifying or transmitting the conversation. Thus, to violate the statute, one needs only to overhear or record or transmit or amplify. This clearly indicates to me that the Legislature specifically prohibits conduct beyond the ordinary meaning of the word eavesdropping, by prohibiting conduct that not only could be accomplished by a third party but also by a participant.

Further, the majority seems to focus on the phrase "private discourse of others", contained in the definition, as supporting their conclusion that the statute does not apply to participants. By reading the phrase in context, with the definition substituted for the word eavesdrop in the statute, the majority's interpretation is not supported:

"Any person who is present or who is not present during a private conversation and who willfully uses any device to [overhear, record, amplify or transmit any part of the private discourse of others without the permission of all persons engaged in the discourse] or who knowingly aids, employs or procures another person to do the same in violation of this section, is guilty of a felony \* \* \*." M.C.L. Sec. 750.539c; M.S.A. Sec. 28.807(3), M.C.L. Sec. 750.539a(2); M.S.A. Sec. 28.807(1)(2).

The phrase "of others" modifies "private discourse", [117 Mich.. 485] which does not necessarily imply that a potential eavesdropper must be a third party not otherwise involved in the conversation. Moreover, the phrase is followed by the words "without the permission of all persons engaged in the discourse" (emphasis added), indicating that the unilateral recording of a conversation, unbeknownst to the others involved, is not permitted. \*62. Thus, reading the statute as a whole, I would find that a participant is prohibited from recording the private discourse of any other person involved in the conversation unless all persons consent.

It is incumbent on the courts to protect conversations from secret recordings because of the sophisticated electronic equipment that private companies and government agencies have at their disposal. The use of these recordings intrudes into every phrase of a person's or a company's internal affairs and requires strict policing. There is obviously more credence given to a tape recording than a verbal recollection. Further, the recorded conversation is easily edited and the only rebuttal would be another recording. Violations of these restrictive statutes should carry strict and serious penalties so as to discourage future use. I cannot repeat enough for emphasis that there has been a deluge of sophisticated electronic listening equipment within the last two decades that threatens all privacy. Therefore, I conclude that the statute prohibits the recording of a conversation, whether by a third party or a participant, unless all persons involved in the conversation have given their permission. I would reverse.

FN\* Randy L. Tahvonen, 29th Judicial Circuit Judge, sitting on Court of Appeals by assignment, pursuant to Const. 1963, Art. 6, Sec. 23, as amended 1968.

FN1. An additional count of plaintiff's complaint alleged that defendants violated plaintiff's right to privacy. That count was also dismissed by summary judgment but has not been the subject of appeal to this Court.

FN2. See e.g., 18 U.S.C. Sec. 2511; Cal. Penal Code Sec. 631 et seq.; Ga. Code Ann. Sec. 263001 et seq.; Okla. Stat. tit. 21, Sec. 1782; Pa. Stat. Ann. tit. 18, Sec. 5701 et seq.