Easing up on Eavesdropping: Challenges to Illinois' Eavesdropping Act

by Adam Sheppard

Almost everyone these days seems to carry a smart-phone. The device has the capacity to make high quality audio-visual recordings which can upload to the internet in a matter of moments. A recent trend is citizens recording encounters with police officers on their cell phones. What many citizens don't know, however, is that, in Illinois, it is a felony to audio record "all or any part of a conversation" without obtaining the prior consent of all of the parties to the conversation. 720 ILCS 5/14–2(a)(1).[1] The offense is ordinarily a class 4 felony but is elevated to a class 1 felony – punishable by a prison term of 4-15 years – if the recording is of a police officer, while in the performance of his or her official duties. Id; 5/14-4(b).[2] This is so even if the officer is in a public place and the person making the recording is doing so openly, as opposed to surreptitiously. *See id.; see also American Civil Liberties v. Alvarez,* 679 F.3d 583, 595 (7th Cir. 2012). Stated differently, the law applies regardless of whether the parties to the conversation intended it to be of a private nature or not. *See* 720 ILCS 5/14-1(d).

A series of Cook County cases brought heightened scrutiny to Illinois' eavesdropping statute. In 2011, a Cook County jury acquitted a woman who recorded Chicago Police internal affairs investigators whom she believed were trying to dissuade her from filing a sexual harassment complaint against another officer. *See* http://www.huffingtonpost.com/2012/01/16/illinois-eavesdropping-la_n_1208770.html (last visited 12/17/12). One of the jurors after the trial stated that the prosecution was a "waste of time." *Id.*

In another well-publicized case, Christopher Drew, a Chicago artist recorded his arrest on State Street for selling art without a peddler's license. Prosecutors later charged him with felony eavesdropping. In court, a Cook County judge dismissed the case, declaring the eavesdropping law unconstitutional. *See People v. Drew,* No. 10–cr–46 (Cook Cnty., Ill., Cir.Ct. Mar. 7, 2012) (cited in *Alvarez,* 679 F.3d at 593, fn. 2). The judge had cited the capacity of the eavesdropping statute to criminalize "wholly innocent conduct." See *Drew,* No. 10–cr–46 (Cook Cnty., Ill., Cir.Ct. Mar. 7, 2012).

Such prosecutions led to the case of *American Civil Liberties Union v. Alvarez*, 679 F.3d 583 (7th Cir. 2012) filed in the district court in August, 2010. The ACLU had devised a "police accountability" program whereby individuals would record conversations with police officers who were performing their public duties in a public place and speaking in a voice loud enough to be heard by the unassisted human ear. *See id* at 588. The ACLU intended on publishing these recordings online and through other forms of electronic media. However, the ACLU held off on implementing its program because it feared that the State's Attorney would prosecute those who made such recordings. Instead, the ACLU filed a "pre-enforcement action" seeking to declare the statute unconstitutional and bar the State's Attorney from enforcing the statute against the ACLU's program.

The ACLU asserted that it had a First Amendment right to make such recordings and disseminate them. The district court judge, however, disagreed and denied the ACLU leave to file a proposed complaint in the case. *See American Civil Liberties Union of Illinois v. Alvarez*, 2011 WL 66030, * 3 (N.D.Ill., 2011.) (not Reported in F.Supp.2d). The ACLU appealed the district court's ruling to the Court of Appeals for the Seventh Circuit. (Several national news and media organizations joined as amici curiae on ACLU's behalf.)

In May, 2012, in a 2-1 decision (Posner, J. dissenting), the Seventh Circuit reversed the district court's order and remanded the case with instructions to the district court to enter the ACLU's requested injunction. *Alvarez*, 679 F.3d at 608. The court of appeals held that making it a crime to "openly audio record the audible communications of law-enforcement officers (or others whose communications are incidentally captured) when the officers are engaged in their official duties in public places" likely violates the First Amendment. *Alvarez*, 679 F.3d at 608. The court held that there was a constitutional right to make such recordings and the Illinois statute unduly restricted that right. *Id.*

The State's Attorney petitioned for certiorari to the U.S. Supreme Court. On November 26, 2012, the Court denied cert. without comment. 2012 WL 4050487 (U.S. November 26, 2012). On December 18, 2012, the district court granted the ACLU's requested injunction. *Alvarez*, 10-cv-05235 (N.D. Ill., Dec. 18, 2012).

Although *Alvarez* was a clear victory for First Amendment advocates, several questions regarding application of the eavesdropping law still exist: (1) Can individuals, unaffiliated with a civic or news organization such as the ACLU, audio record officers? (Technically *Alvarez* was limited to the ACLU and its planned recording program); (2) In light of *Alvarez*, is it now lawful to record conversations in which the parties do not have a "reasonable expectation of privacy"– e.g., when the parties are speaking openly in a public place? (Many other states' eavesdropping statutes and the federal statute only ban recording conversations of a private nature); (3) If it is now lawful to record officers in a public place, what constitutes a "public place"? (One proposed amendment to the statute offered a broad definition of that term; it seemingly authorized citizens to record conversations with officers during traffic stops. (*See* SB 1808); (4) What effect, if any, will *Alvarez* have on the section of the Eavesdropping Act (720 ILCS 5/14-6) which authorizes civil remedies, *i.e.*, damages, for a recorded party?

It is unclear whether the legislature will answer such questions in the immediate future. Prior attempts to amend the Eavesdropping Statute failed to pass both houses. *See e.g.* House Bill 3944; Senate Bill 1808. (Some law enforcement groups lobbied heavily against amending the statute.) Perhaps the Supreme Court's recent denial of cert. in *Alvarez* will be the catalyst needed to loosen the legislative logjam on this matter.

One immediate lesson from *Alvarez* is that the law is struggling to keep pace with the "inexorable march" of smart-phone technology. See *United States v. Warshak*, 631 F.3d 266, 285 (2010). "[T]he typical recorder nowadays is a cell phone," *Alvarez*, 679 F.3d at 613 (Posner, J., dissenting), and the law is rushing to adapt to this reality. For example, Cook County Chief Judge Evans recently ordered that, beginning January 14, 2013, the public is barred from bringing cell phones or "any electronic devices" capable of making such recordings into Cook County courthouses where criminal matters are heard (except for the Daley Center). *See.* http://www.cookcountycourt.org/MEDIA/ViewPressRelease/tabid/338/ArticleId/2094/Chief-Judge-Evans-enters-order-which-prohibits-cell-phones-in-courthouses-where-criminal-matters-are.aspx (last visited 12/24/12). Such developments further confirm that when it comes to technology and the law, technology is the proverbial tail wagging the dog.

[1] The statute does not ban taking silent video recordings. 720 ILCS 5/14–2(a)(1). The statute also exempts audio-visual recordings made by law-enforcement officers for law-enforcement purposes in a variety of circumstances, *e.g.*, during a "traffic stop." *Id*; 5/14–3(h). Another provision of the statute authorizes law-enforcement officers to make surreptitious recordings in certain circumstances. *See id.*, 5/14–3(g), (g–5), (g–6). The statute also contains a media exemption; it exempts any recording made for "broadcast by radio, television, or otherwise" for live or "later broadcasts of any function where the public is in attendance and the conversations are overheard incidental to the main purpose for which such broadcasts are then being made." *Id.* 5/14–3(c).

[2] The eavesdropping statute also provides for civil remedies including actual or punitive damages. *Id.* 5/14-6. Additionally, any evidence obtained in violation of the statute is inadmissible in any civil or criminal trial (unless it is a criminal trial or grand jury proceeding brought against a person charged with violating the statute). *Id.*, 5/14-5.

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