
FLORIDA CASE LAW UPDATE 14-07

Case: McDade v. State, 39 FLW S752b (Fla. 2014)

Date: December 11, 2014

Subject: Digital recording made by a juvenile of her stepfather soliciting her for sexual activity, and confirming previous sexual abuse, constituted an illegal interception of communications under Florida law, and was not admissible at trial

FACTS: McDade was arrested and charged with numerous crimes after his sixteen year old stepdaughter reported that he had been sexually abusing her since she was ten years old. Prior to the report, the victim, on two occasions, secreted a digital recorder in her clothing and approached McDade, in his bedroom, in the home they shared. The decision notes that she was basically "conducting her own investigation," potentially prompted by the fact that she had previously reported the abuse to her mother and others, however, she was not believed, and had been persuaded to recant. In both of the surreptitiously recorded conversations made by the victim, McDade appeared to be asking the victim to again engage in sexual acts with him, and also informed her that he was doing her a favor by not reporting the previous sexual activity to the victim's mother, whom he threatened would then return her to Mexico. The victim provided the recordings to the police, and the same day McDade was arrested and charged with multiple offenses. At trial, McDade moved to suppress the recordings, arguing that they constituted illegally intercepted communications under Chapter 934, Florida Statutes. The trial court denied the motion, and the case proceeded to the jury. McDade was convicted on numerous counts, and received, among other punishments, two life sentences. McDade appealed to the Second District Court of Appeal, arguing that the trial court erred in admitting the recordings. The 2d DCA, relying upon the previous Florida Supreme Court case of *State v. Inciarrano*, 473 So.2d 1272 (Fla. 1985), affirmed the trial court, concluding that "the narrow factual circumstances of this case do not fall within the statutory proscription of Chapter 934." The 2d DCA decision also explained that the statutory protections against interception of communications contained within Chapter 934 only apply when the person uttering the communication has a reasonable expectation of privacy in that communication under the circumstances. The court reasoned that in this case, the recordings made by the victim were of the very criminal acts by which she was victimized, and although the recordings took place in the defendant's home, it was also the victim's home. Considering the circumstances, the District Court concluded that any expectation of privacy McDade may have had is not one which society is prepared to accept as reasonable. McDade then appealed to the Florida Supreme Court. (The appellate arguments in this case also involved a hearsay issue relating to statements made by the victim to her boyfriend; this issue is not discussed in this update.)

RULING: The Supreme Court, in a 7-0 decision, reversed the District Court, and concluded that the recordings constituted illegally intercepted communications under Florida law.

DISCUSSION: The Supreme Court began its analysis by noting that Section 934.03(1), Florida Statutes, contains a general prohibition on the interception of any wire, oral, or electronic communication. While Section 934.03(2) does contain exceptions to the general prohibition, none of the exceptions allow for the interception of conversations based upon one's status as the victim of a crime. The court noted that Section 934.06 clearly states that the contents of any improperly intercepted communication may not be used as evidence in any proceeding, other than in the prosecution of a person who illegally intercepted the communication. The Court analogized the instant case to the facts in *State v. Walls*, 356 So.2d 294 (Fla. 1978), where a victim of extortionary threats recorded the threatening conversations between himself and the defendants. In *Walls* the Court excluded the recordings, reasoning that the conversations constituted an "oral communication," that the recording did not fall into any of the statutory exceptions, and therefore they could not be used as evidence. Similarly, the court reasoned that McDade's conversations with the victim in his bedroom constituted oral communications, the recordings were made surreptitiously and without his consent or knowledge, and none of the exceptions listed in Section 934.03(2) applied. Therefore, the recordings are prohibited and inadmissible. The court went on to distinguish the *Inciarrano* case relied upon by the 2d DCA, noting that the recording in that case was of a murder while it was actually occurring, which did not constitute an oral communication. In that case, the crime took place in the victim's place of business (a quasi-public place), the location was proximate and accessible to bystanders, and the microphone was located in a manner to be visible to occupants of the room. Thus, the *Inciarrano* case presented a clearly different set of circumstances from those present in the instant case. The Supreme Court was also clearly troubled by the 2d DCA's reference to whether "society is

prepared to recognize [McDade's expectation of privacy] as reasonable." The Court notes that the "whether-society-is-prepared-to-recognize" analysis is actually a product of Fourth Amendment law, originating in the U. S. Supreme Court case of *Katz v. U. S.*, 389 U.S. 347 (1967). According to the McDade Court, "this formulation cannot be understood to justify a categorical rule that persons involved in criminal activities have no justified expectations of privacy in conversations related to those activities." In fact, noted the Court, many Fourth Amendment issues arise precisely because the defendants were engaged in criminal acts on premises where they enjoyed an expectation of privacy. The Florida Supreme Court concludes by noting that while a compelling case might be made for an exception to Chapter 934's exclusionary rule for recordings such as those made by the victim in this case, the adoption of such an exception is within the purview of the legislature, not the courts. The conviction was reversed, the recordings were suppressed, and the case was remanded for a new trial.

COMMENTS: Note that had the victim made the recordings under the direction of a law enforcement officer for the purpose of obtaining evidence of a crime, the interception would constitute an exception to the general prohibition, and would most likely have been admitted. See Section 934.03(2)(c), Florida Statutes (It is lawful for person acting under the direction of a law enforcement officer to intercept a communication when such person is a party to the communication and the purpose of such interception is to obtain evidence of a criminal act.) However, since the recordings in this case were made before police involvement, no such exception exists.

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Officers should consult with their agency legal advisors to confirm the interpretation provided in this Update and to determine to what extent the case discussed will affect their activities.