



WILLIAM J. SCOTT
ATTORNEY GENERAL
STATE OF ILLINOIS
SPRINGFIELD

April 30, 1979

FILE NUMBER S-1433

CRIMINAL LAW:
Whether Security System
Violates Eavesdropping
Statute

Honorable Bernard Carey
State's Attorney, Cook County
Civil Division
500 Chicago Civic Center
Chicago, Illinois 60602

Dear Mr. Carey:

I have your letter wherein you ask whether a security system which a corporation proposes to install in its chain of restaurants violates the Illinois eavesdropping statute. (Ill. Rev. Stat. 1977, ch. 38, par. 14-1 et seq.) It is not possible to give a direct, unqualified answer to your inquiry because in each case the answer depends on the facts as found by the trier of facts. The security system you describe could be operated in such a way and the facts could be so found by the court or jury that there would be no violation of the eavesdropping statute. But the outcome of any given case cannot be predicted as a matter of law until findings on the relevant facts have been made.

Honorable Bernard Carey - 2.

The proposed system is activated by a restaurant employee when he determines that criminal activity is in progress or by the criminal activity itself, such as the entering of a restaurant during a burglary. Upon activation, persons at the restaurant's central security station are able to listen to and record conversations in the restaurant. On the basis of these conversations, the persons at the central security station hope to be able to advise the police as to what type of criminal activity is being undertaken. The corporation plans to place 6 inch by 7 inch notices at all restaurant doorways. These notices warn of the presence of the security system and state that the security system:

"WHEN ACTIVATED BY UNAUTHORIZED CONDUCT, CONTAINS A LISTEN-IN/RECORDING DEVICE --YOUR ENTRY UPON THESE PREMISES IS DEEMED TO BE YOUR CONSENT TO THE USE OF THIS SECURITY SYSTEM."

Section 14-2 of the Criminal Code of 1961 (Ill. Rev. Stat. 1977, ch. 38, par. 14-2) defines the offense of eavesdropping in pertinent part as follows:

"A person commits eavesdropping when he:

(a) Uses an eavesdropping device to hear or record all or any part of any conversation unless he does so (1) with the consent of all of the parties to such conversation or (2) with the consent of any one party to such conversation and in accordance with Article 108A of the 'Code of Criminal Procedure of 1963', approved August 14, 1963, as amended;

* * *

"

Honorable Bernard Carey - 3.

Section 14-1 of the Criminal Code defines the term "eavesdropping device" as follows:

"(a) Eavesdropping device.

An eavesdropping device is any device capable of being used to hear or record oral conversation whether such conversation is conducted in person, by telephone, or by any other means; Provided, however, that this definition shall not include devices used for the restoration of the deaf or hard-of-hearing to normal or partial hearing.

* * *

"

It is clear that the security system uses an "eavesdropping device". Thus, the system will result in eavesdropping unless (1) all parties to conversations monitored and recorded by means of the system consent to the listening and recording; or (2) one party consents and authorization to use an eavesdropping device is obtained by order of a court in accordance with article 108A of the Code of Criminal Procedure of 1963. (Ill. Rev. Stat. 1977, ch. 38, par. 108A-1 et seq.) The second alternative could not be used because it is not applicable to the operation of the proposed security system.

The legality of the proposed security system therefore depends upon having the "consent of all of the parties to * * * [the] conversation" in each case. The statute does not define "consent", but the courts have held that knowing acquiescence constitutes consent for the purposes of the Illinois eavesdropping statute. (In re Conservatorship

Honorable Bernard Carey - 4.

of Stevenson (1970), 44 Ill. 2d 525, 532.) The Supreme Court in People v. Ardella (1971), 49 Ill. 2d 517, 522, held that it was not error for the trial court to have concluded that the defendant had knowingly acquiesced to the recording of his conversation; testimony demonstrated that the defendant in Ardella had been orally informed that his conversation was to be recorded and further showed that the defendant had seen the recording equipment during his conversation.

Relying on the Ardella decision, I advised in opinion No. S-736 (1974 Ill. Att'y Gen. Op. 155, 159) that prisoners in a county jail impliedly consented to the monitoring of their conversations when they had been informed that the jail's monitoring system would be used to listen to their conversations. More recently, the Appellate Court for the Second District has stated in People v. Myles (1978), 62 Ill. App. 3d 931, that the eavesdropping statute was not intended to prohibit the monitoring of outgoing telephone calls from a jail inmate when the inmate was warned by two large signs next to the telephone that all calls were monitored.

Therefore, if the proposed security system was, in a given case, activated in accordance with the warning notices and if those notices were so posted and phrased that customers, invitees or intruders knew or should have reasonably known that the listening-recording might, in specified circumstances, come into operation, the authorities above

Honorable Bernard Carey - 5.

referred to would warrant the conclusion that there had been consent by acquiescence (or conduct) by all the parties to that conversation. A customer, invitee or intruder who sees and understands the restaurant's warning that its security system is activated by unauthorized activity can be said to have impliedly consented to the monitoring and recording of his conversation if the system is in fact activated under the circumstances stated in the warning notice.

In addition, so far as anyone who engages in criminal activity is concerned, any statements he makes may not be made with an expectation of privacy. Thus, they would not be communications which the eavesdropping statute is intended to protect. (See, People v. Klingenberg (1975), 34 Ill. App. 3d 705, 708.)

The questions of whether a customer, invitee, or intruder read the restaurant's notice and understood it to apply to his activity in the restaurant, or should have reasonably so read and understood it, and of whether the person's statements were made with an expectation of privacy are questions of fact. These questions of fact must be decided by the trial court based on the evidence in the particular case. The restaurant's conspicuous warnings of the operation of its security system in many cases will result in the parties to conversations consenting by their acquiescence (or conduct) to the monitoring and recording of

Honorable Bernard Carey - 6.

their conversations and thus the monitoring and recording will not constitute eavesdropping. Some conversations monitored and recorded by the restaurant's security system probably will not be made with an expectation of privacy and thus the monitoring and recording would not constitute eavesdropping. Because the security system will monitor and record each conversation within a unique factual setting, however, it is impossible to state that the restaurant's security system will never result in a violation of the eavesdropping statute.

Very truly yours,

A T T O R N E Y G E N E R A L