

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

Case Nos. F01-7975
F06-32696

Judge Thornton

vs.

SEAN CASEY,
Defendant.

ORDER GRANTING MOTION TO SEAL TRANSCRIPTS OF
UNLAWFULLY RECORDED CONVERSATIONS

THIS CAUSE came before the court upon the State of Florida's Motion to Seal Transcripts of Unlawfully Recorded Conversations.

In support of its motion, the State of Florida argues that a tape recorded conversation between the defendant and his attorney and a tape recorded conversation between the defendant and his therapist, recorded without the consent of either the attorney or therapist, are illegal and inadmissible pursuant to chapter 934, Florida Statutes.

In opposition, the defendant, *pro se*, and through counsel, alleges that the tape recordings are exempt from chapter 934, and more specifically the exclusionary provision of section 934.06, because the recordings are of a criminal act, to wit: the aiding, abetting, counseling, encouraging or procurement of the defendant's failure to appear while on bail in violation of section 843.15(1)(a), Florida Statutes. The defendant further argues that even if the recordings were

made in violation of section 934.03, the tapes are nonetheless admissible to impeach the post conviction testimony of both the defendant's trial counsel and therapist. Through counsel, the defendant argues that at the very least, an *in camera* review of the recordings is required to determine whether the recordings were made in violation of chapter 934. Counsel further argues that the recordings and the transcripts thereof should not be sealed if an *in camera* review demonstrates that the post conviction hearing testimony of either the attorney or therapist is inconsistent with the contents of the tape. In this regard, counsel not only argues that the statute should not be used "to assist a party in the commission of perjury or the miscarriage of justice," but once again invites the trial court to determine whether the communications by the attorney and the therapist were made "by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation." According to counsel, this question can be answered only by determining whether the recordings capture the commission of a crime.

The Court has also heard and considered the argument, through counsel, of San Francisco Bay Guardian Editor & Publisher Bruce B. Brugmann as well as The Reporters' Committee for Freedom of the Press.

Chapter 934, Florida Statutes

Section 934.02(2), Florida Statutes, defines "Oral communication" as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation and does not mean any public oral communication uttered at a public meeting or any electronic communication."

Section 934.02(3), Florida Statutes, defines “intercept” as “the aural or other acquisition of the contents of any ... oral communication through the use of any electronic, mechanical, or other device.”

Section 934.03, Florida Statutes, provides, in relevant part:

1) Except as otherwise specifically provided in this chapter, any person who:

(a) Intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept any wire, oral, or electronic communication;

(c) Intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

(d) Intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; or

shall be punished as provided in subsection (4).

Section 934.03(4), Florida Statutes, provides, in relevant part, that any person who violates section 934.03(1) is guilty of a felony of the third degree.

Section 934.06 further provides:

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the state, or a political subdivision thereof, if the disclosure of that information would be in violation of this chapter. The prohibition of use as evidence provided in this section does not apply in cases of prosecution for criminal interception in violation of the provisions of this chapter.

Factual Findings

1. The legality and admissibility of the tape-recorded conversation between the defendant and his attorney was litigated by the State and the defendant at the post conviction evidentiary hearing held on January 8, 2007. The tape recording was specifically deemed inadmissible by the Honorable Leonard Glick. Contrary to the defendant's claim that Judge Glick made no ruling on the legality of this tape, a review of the transcripts shows that Judge Glick, at the conclusion of the post conviction evidentiary hearing expressly found that the attorney had a legitimate expectation that his conversation with his client in his law office would not be surreptitiously recorded, that the conversation was illegally recorded and that, but for the fact that the defendant and his mother both asserted their Fifth Amendment rights when asked about the recordings, they would have been properly charged with violating chapter 934. (Transcripts, January 8, 2007, p. 160-161).

2. The legality and admissibility of the tape-recorded conversation between the defendant and his attorney was litigated by the State and the defendant on appeal from the denial of the defendant's motion for post conviction relief as reflected by the briefs filed in *Casey v. State*, 3D08-510, offered into evidence at the hearing held on July 29, 2009. The denial of the defendant's motion for post conviction

relief was affirmed by the Third District Court of Appeal on March 25, 2009. *Casey v. State*, 8 So. 3d 1144 (Fla. 3d DCA 2009). The fact that the decision was affirmed, *per curiam*, does not support the defendant's suggestion that the issue may be litigated once again. *See, e.g., South Florida Hospital Corp. v. McCrea*, 118 So.2d 25, 31 (Fla. 1960) (the word "affirmed" when used as the sole utterance of an appellate court in disposing of a case ... "necessarily means that the appellate court has carefully examined all points raised by all appealing parties and found them to be without merit."); *Specialty Restaurants Corp. v. Elliott*, 924 So.2d 834, 837 (Fla. 2d DCA 2005) ("Under the law of the case doctrine, questions of law that have actually been decided on appeal must govern the case in the same court and in the trial court through all subsequent stages of the proceedings."); *Mitzenmacher v. Mitzenmacher*, 656 So. 2d 178, 179 (Fla. 3d DCA 1995) ("A per curiam decision of the appellate court is the law of the case between the same parties on the same issues and facts, and determines all issues necessarily involved in the appeal, whether mentioned in the court's opinion or not."); *New England Ins. Co. v. International Bank of Miami, N.A.*, 537 So. 2d 1025 (Fla. 3d DCA 1988) (a per curiam decision of the appellate court is the law of the case between the same parties on the same issues and facts, and determines all issues necessarily involved in the appeal, whether mentioned in the court's opinion or not); *State Com'n on Ethics v. Sullivan*, 430 So. 2d 928, 932 (Fla. 1st DCA 1983) ("The case law on the effect of a 'per curiam, affirmed' decision (PCA) is clear: It becomes the law of the case, is res judicata, but is not stare decisis.").

3. When given an opportunity to offer a copy of the tape-recorded conversation between the defendant and his therapist into evidence, the defense counsel expressly declined the opportunity to do so, stating "I'm only seeking the one involving Mr. Hirsch because there is a disputed point as to what exactly he said in

that meeting. I'm not seeking the rest of them." (Transcripts, January 8, 2007, p. 147). Notwithstanding, Judge Glick expressly addressed the legality of this tape recording by stating,

So the long and short of it is that the Court is not going to allow this evidence and is not going to consider any surreptitiously recorded conversation by Mr. Hirsch, by Dr. Rappaport, by anybody, in making the decision as to whether or not the defendant freely and voluntarily entered the plea in this case, number one; and, number two, whether or not there was (sic) actions by the attorney that proved him to be incompetent and therefore not representing the defendant properly so that the plea would be overturned. So that piece of evidence is not coming in.

(Transcripts, January 8, 2007, p. 161). The defendant not only failed to object to this ruling, he also failed to raise this express ruling on appeal, focusing instead on the admissibility of the attorney's tape-recorded conversation. (Transcripts, January 8, 2007, p. 161; Initial Brief of Appellant, *Casey v. State*, 3D08-510; Reply Brief of Appellant, *Casey v. State*, 3D08-510). These actions are inconsistent with the defendant's present claim that publication of this conversation is necessary to impeach the post conviction testimony of the attorney and the therapist, expose perjury by these witnesses or otherwise correct a manifest injustice resulting from the denial of his motion for post conviction relief.

4. The defendant's claim that publication of the tape-recorded conversations is required to prevent chapter 934 from being used "to assist a party in the commission of perjury or the miscarriage of justice," regardless of whether the recordings were made in violation of section 934.03, ignores the clear mandate of section 934.06, which expressly prohibits the contents of any illegally intercepted communication or evidence derived therefrom from being received in evidence in any trial, hearing, or other proceeding in or before any court except in cases of

prosecution for criminal interception in violation of the provisions of chapter 934. Because concern for the truth and the prevention of perjury is paramount in all cases, the "exception" suggested by the defendant would swallow the rule and render section 934.06 meaningless.

Reliance on the concurring opinion of *Morales v. State*, 513 So. 2d 695 (Fla. 3d DCA 1987), is misplaced as the language quoted by the defendant is not necessary to the ruling in that case. See *Bunn v. Bunn*, 311 So.2d 387, 389 (Fla. 4th DCA 1975) ("Additionally, under the doctrine of stare decisis, an appellate court's decision on issues properly before it and decided in disposing of the case, are, until overruled by a subsequent case, binding as precedent on courts of lesser jurisdiction. But a purely gratuitous observation or remark made in pronouncing an opinion and which concerns some rule, principle or application of law not necessarily involved in the case or essential to its determination is obiter dictum, pure and simple. While such dictum may furnish insight into the philosophical views of the judge or the court, it has no precedential value."); *State ex rel. Biscayne Kennel Club v. Board of Business Regulation of Dept. of Business Regulation of State*, 276 So. 2d 823, 826 (Fla. 1973) ("The statement of the District Court of Appeal in its opinion requiring the allocation of dates to be on the fiscal year basis in the future was not essential to the decision of that court and is without force as precedent.").

5. The suggestion that chapter 934 does not apply simply because the parties testified about the underlying conversations at the post conviction evidentiary hearing is equally unavailing. The fact that the parties discussed the underlying conversation does not render the tapes admissible as the statute prohibits the recording, not the conversation, and prevents the introduction of the recording itself. As noted in *State v. Walls*, 356 So.2d 294 (Fla. 1978), where the Supreme

Court of Florida upheld the suppression of an unlawfully recorded conversation between the victim and the defendant on the basis of the 934 proscription, "Sub judice, no harm derives from the suppression of the tape recording since the victim is free to testify as to the alleged extortionary threats." In other words, chapter 934 protects the parties from interception, i.e. recording, but does not create an absolute privilege or protection from testimony related to the conversation. In this case, both the defendant and his mother had ample opportunity to testify that his attorney unlawfully told the defendant to flee to avoid prosecution. Instead, both testified that counsel never directly told him to flee nor provided any affirmative assistance before his flight. (Transcripts, January 8, 2007, p. 12-17, 20, 42-43, 55, 67, 80-81).

6. The fact that both the defendant and his mother testified that counsel never directly told the defendant to flee nor provided any affirmative assistance before his flight, together with the fact that the defendant admits in a letter written to his counsel before the post conviction evidentiary hearing that the recording "reveals very little" because Mrs. Casey was in the room, refutes the defendant's claim that the recording contains direct evidence of criminal actions by the attorney. (Transcripts, January 8, 2007, p. 12-17, 20, 42-43, 55, 67, 80-81; Petition for Writ of Habeas Corpus Granting a Belated Appeal, App. 4 *Casey v. State*, 3D08-95).

7. Importantly, on July 29, 2009, this Court, in camera, listened to the tape-recorded conversation between the defendant, his mother and his attorney. This Court finds that the lawyer had an expectation of privacy and an expectation that his voice would not be recorded. After listening several times to the entire tape, this Court finds that the partial transcripts attached to the pleadings are not fully accurate, are incomplete, and are misleading. This Court further finds that the recording contains no direct or indirect evidence of criminal actions by the attorney.

8. Section 934.06, Florida Statutes, expressly provides that “no part of the contents” of any intercepted oral communication and “no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court ... if the disclosure of that information would be in violation of this chapter.” The fact that the defendant has transcribed the unlawfully intercepted communications and filed the transcripts as an attachment to a pleading seeking relief from the order denying his motion for post conviction relief, does not remove the taint of the initial illegality nor render the recordings exempt from the proscriptions contained in chapter 934.

Upon review of the State’s motion, the defendant’s responses, and the court file, it is hereby ORDERED AND ADJUDGED that

1. The defendant, and all in possession of the tape recording or a transcript of its contents, is prohibited from using or disclosing the contents of the tape-recorded conversations between the defendant and his attorney, Milton Hirsch, on or about May 12, 2004, in any pleading or in any manner without leave of court. This prohibition is not intended to deny the defendant access to the courts, but to prevent further dissemination of the communication illegally recorded in violation of chapter 934, Florida Statutes.

2. The defendant, and all in possession of the tape recording or a transcript of its contents, is prohibited from using or disclosing the contents of the tape-recorded conversations between the defendant and his therapist, Michael Rappaport, on or about May 13, 2004, in any pleading or in any manner without leave of court. This prohibition is not intended to deny the defendant access to the courts, but to prevent further dissemination of the communication illegally recorded in violation of chapter 934, Florida Statutes.


3. The defendant's *pro se* motion seeking relief of judgment because of alleged fraud upon the court filed on or about April 22, 2009, the defendant's *pro se* addendum to this motion, filed on or about April 29, 2009, together with the appendices to these pleadings shall be maintained in the court file under seal.

4. The defendant's "Special Appearance of Counsel for Sean Casey for the Limited Purpose of opposing the State's Motion to Seal Transcripts and Request for Leave to File Memo of Law" filed on or about July 27, 2009, and the defendant's supplemental motion in opposition to the State's motion to seal transcripts filed on or about August 12, 2009, shall be maintained in the court file under seal.

5. In the event that the defendant takes an appeal of this order, the Clerk of this Court is hereby ordered to transport, as part of this order, to the appellate court the following:

- a. Transcript dated January 8, 2007;
- b. Initial Brief of Appellant, *Casey v. State*, 3D08-510;
- c. Reply Brief of Appellant, *Casey v. State*, 3D08-510;
- d. Answer Brief of Appellee, *Casey v. State*, 3D08-510;
- e. Petition for Writ of Habeas Corpus Granting a Belated Appeal (with appendix).

DONE AND ORDERED at Miami, Dade County, Florida, this 18th day of August, 2009.


John Thornton
Circuit Court Judge

Copies Provided To:

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