

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.) No. 05-00344-01/02-CR-W-ODS
)
GARY EYE,)
)
 Defendant.)

GOVERNMENT’S SUGGESTIONS IN OPPOSITION
TO THE DEFENDANT’S MOTION TO SUPPRESS

Comes now the United States of America, by and through its undersigned counsel, in opposition to the defendant’s Motion to Suppress Evidence. The government respectfully suggests that these claims are without merit and the defendant’s motion should be denied based upon the fact that the recording of the calls falls within the law enforcement exception to the Federal Wiretap Act and therefore do not constitute “interceptions” under the Act. Furthermore, assuming arguendo that the recording of the calls is covered by the Act, based upon the fact that each call begins with a disclosure that it is subject to being monitored and recorded, defendant Eye has implicitly consented to its interception and these calls are not subject to suppression. The government makes the following suggestions in support of its opposition to the defendant’s motion to suppress.

FACTUAL BACKGROUND

I. Procedural Background

On September 29, 2005, the defendant was indicted, along with his co-defendant Steven Sandstrom, by a federal grand jury on several counts surrounding the March 9th homicide of

William McCay, an African-American man who was shot and killed while walking down the public streets of Kansas City, Missouri.

On December 1, 2005, the defendant filed a Motion to Suppress Evidence requesting this Court to suppress during trial the use of any and all tape recorded evidence obtained from the Jackson County Detention facility where defendant Eye and co-defendant Sandstrom were incarcerated prior to the return of the federal indictment.

II. Summary of Relevant Facts

On March 9, 2005, William McCay, an African-American male, was murdered while walking to work on the public streets of Kansas City, Missouri. Based upon an initial investigation conducted by the Kansas City Missouri Police Department, Gary Eye was charged by the Jackson County Prosecutor's Office with first degree murder and armed criminal action. Steven Sandstrom, an associate of Eye's, was charged in the State of Missouri with tampering in the first degree and knowingly burning or destroying physical evidence. Both Eye and Sandstrom were incarcerated at the Jackson County Detention Center (hereinafter "Detention Center") located at 1300 Cherry Street, Kansas City, State of Missouri, pending the resolution of their state charges.

The Detention Center has a policy whereby any inmate's telephone calls are recorded. This procedure aids and assists the Detention Facility in maintaining the security of the facility. At the beginning of each inmate call, the parties to the telephone call are informed that it is a collect call from an inmate at the Jackson County Detention Facility and that it is subject to monitoring and recording.

On September 29, 2005, a federal grand jury returned a nine count indictment against Eye and Sandstrom alleging a variety of federal offenses committed in connection with the death of William McCay. During the course of the grand jury investigation a number of subpoenas were issued, with one such subpoena being issued to the Superintendent of the Detention Facility. The subpoena to the Superintendent requested a number of items be provided to the grand jury including copies of any recordings made by inmates of the Detention Facility to any of a group of relevant telephone numbers discovered through the investigation. The Superintendent of the Detention Center complied with this subpoena and turned over a large number of compact disks containing recorded phone calls. These recordings are the subject of Eye's motion to suppress.

DISCUSSION

The Electronic Communications Privacy Act of 1986 provides that absent an appropriate exception it is unlawful to intentionally intercept any wire, oral, or electronic communication. 18 U.S.C. § 2510-22 (2000). This prohibition includes the use of any electronic, mechanical, or other device to intercept an oral communication. However, there are a number of exceptions to the act, including what has commonly been referred to as the "law enforcement exception," which is found at 18 U.S.C. §§ 2510(5)(a)(ii) and 2517(1), and an exception based upon the consent of one of the parties to the communication, which is found at 18 U.S.C. § 2511(2)(c). In order to understand these exceptions, it is necessary to focus on several of the key terms that are defined by the Act.

Title 18 U.S.C. § 2510(4) provides that an "'intercept' means the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device." Title 18 U.S.C. § 2510(5)(a)(ii) goes on to provide that

“‘electronic, mechanical, or other device’ means any device or apparatus which can be used to intercept a wire, oral, or electronic communication *other than* any telephone or telegraph instrument, equipment or facility being used . . . by an investigative or law enforcement officer in the ordinary course of his duties.” This is what is commonly referred to as the “law enforcement exception” to the Wiretap Act.

Determining the applicability of the “law enforcement exception” is a two step process; first, whether or not the individual involved is an “investigative or law enforcement officer” and second, whether or not the communication in question was acquired “in the ordinary course of [that officer’s] duties.” *United States v. Lewis*, 406 F.3d 11, 16-17 (1st Cir. 2005).

Individuals employed by Jackson County and working in the Detention Facility would qualify as “investigative or law enforcement officers.” *See* Title 18 U.S.C. § 2510(7); *see also Lewis*, 406 F.3d at 17 (explaining that common sense dictates that “it is beyond question that as part of managing and regulating the day-to-day activities of a correctional institution, the prison officials must be empowered to investigate potential criminal violations in order to preserve the security and orderly management of the institution.”) (internal citation omitted)

Similarly, the second prong of the “law enforcement exception” is satisfied in this case based upon the established policy of the Detention Center wherein all inmate calls are recorded as part of its ordinary business operations. This conclusion is consistent with a number of circuit court decisions that have already addressed this particular issue. *See Smith v. U.S. Department of Justice*, 251 F.3d 1047 (D.C. Cir. 2001); *United States v. Van Poyck*, 77 F.3d 285, 291 (9th Cir.

1996); *United States v. Lewis*, 406 F.3d 11, 18 (1st Cir. 2005); *United States v. Paul*, 614 F.2d 115, 117 (6th Cir. 1980); *United States v. Feekes*, 879 F.2d 1562, 1565-66 (7th Cir. 1989).¹

In addition to the “law enforcement” exception, defendant Eye implicitly consented to the monitoring and recording of his calls. His implied consent is readily apparent based upon the fact that prior to each telephone conversation that he participated in, a recorded voice informed the parties to the call that it was subject to being monitored and recorded. This caveat or warning preceding each and every call brought the “intercepted” recording under the consent exception found at Title 18 U.S.C. § 2511(2)(c). This provision of the Act provides that “it shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where . . . one of the parties to the communication has given prior consent to such interception.”

Defendant Eye’s attempted reliance on the *Deal* opinion is without merit. *Deal* involved a civil actions brought under the act by a plaintiff alleging a violation of the wiretap act by the owner of a convenience store who had set up a machine to “automatically record all conversations made or received on [a particular phone line] with no indication to the parties using the phone that their conversation was being recorded.” *Deal v. Spears*, 980 F.2d 1153, 1155 (8th Cir. 1992). Furthermore, the plaintiff in *Deal* was only told that they needed to cut down on personal calls and that the owner of the store “might resort to monitoring calls or installing a pay phone in order to curtail the abuse.” *Id.* at 1156. Those facts are a far cry from

¹ The Eighth Circuit had an opportunity to address this issue in *United States v. Horr*, 963 F.2d 1124, 1126 (8th Cir. 1992), but elected instead to affirm the district court’s denial of a suppression motion in that case using the consent exception contained in Title 18 U.S.C. § 2511(2)(c) (which is also appropriate in this case) (*see infra*).

an institutional detention facility where each and every telephone call is preceded by a recording informing the parties to the call that it is subject to being monitored and recorded.

CONCLUSION

The policy and procedure of the Jackson County Detention Facility in recording all outgoing inmate calls is within the “law enforcement” exception and therefore should not be deemed to be an “intercepted” communication under the Wiretap statute. Furthermore, the warning present at the beginning of each and every call from the Detention Facility functions to establish implied consent by the parties to enable the monitoring and recording of the conversation. Therefore, the defendant’s Motion To Suppress Evidence should be denied.

Respectfully submitted,

Todd P. Graves
United States Attorney

By */s/ David M. Ketchmark*

David M. Ketchmark #46929
Assistant United States Attorney

Charles Evans Whittaker Courthouse
400 East Ninth Street, Fifth Floor
Kansas City, Missouri 64106
Telephone: (816) 426-2605

CERTIFICATE OF SERVICE

I hereby certify that on January 3, 2006, the foregoing document was electronically filed, and a "Notice of Electronic Filing" was sent via e-mail by the Electronic Case Filing System to:

John Osgood
305 Midland Bank Bldg.
740 NW Blue Parkway
Lee's Summit, MO 64086

John Gromowsky
1125 Grand Blvd.
Suite 900
Kansas City, MO 64106

John O'Connor
911 Main St.
Suite 2300
Kansas City, MO 64105-5319

/s/ David M. Ketchmark
David M. Ketchmark
Assistant U.S. Attorney