

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

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

MOTION TO SUPPRESS ALL TAPE RECORDED CONVERSATIONS
BETWEEN DEFENDANT GARY EYE AND ANY THIRD PARTIES WHICH
WERE RECORDED BY THE JACKSON COUNTY MISSOURI SHERIFF OR
ANY OF HIS AUTHORIZED OR DESIGNATED REPRESENTATIVES OR
EMPLOYEES AT THE JACKSON COUNTY DETENTION CENTER ON
GROUNDS THAT SAID RECORDINGS WERE MADE WITHOUT THE
KNOWLEDGE AND CONSENT OF DEFENDANT AND WERE OBTAINED IN
VIOLATION OF THE FEDERAL WIRETAP STATUTE WITH
SUGGESTIONS IN SUPPORT

COMES NOW defendant Gary Eye and moves the Court to order
the suppression of any and all tape recorded conversations
between defendant and third parties made by Jackson County Jail
authorities while defendant was incarcerated therein on grounds
that said recordings were made without the knowledge or consent
of defendant and made and obtained in violation of the Federal
Wiretap Statute. As grounds therefore, defendant states:

Defendant is presently charged in United States District
Court with murder in violation of the federal civil rights law.
Defendant was first charged in Jackson County Missouri by the
State. While pending those charges, defendant was incarcerated
in the Jackson County Detention Center. While incarcerated
defendant had numerous telephone conversations with third parties

while using a telephone or telephones made available to inmates for the specific purpose of telephoning persons outside the facility. Generally, these calls were collect.

Unbeknown to defendant and without his express consent, these telephone calls were apparently monitored and recorded by Detention Center Personnel. Counsel for defendant has received numerous recordings made at the facility from the Assistant United States Attorney as part of discovery and has reason to believe that the government will attempt to use a number of these recordings as evidence against defendant at trial in an attempt to establish that defendant has racist views which is of course a required element of the offense charged in this case.

The Electronic Communications Privacy Act of 1986, regulates the interception of wire, oral and electronic communications. 18 U.S.C. § 2510-22 (2000). The Act generally provides that it is unlawful to intercept telephone communications between individuals who are unaware their conversations are being recorded. United States v. Corona-Chavez, 328 F.3d 974 (8th Cir. 2003). Routine telephone calls are covered by the act because they are a classic form of wire communication that are transmitted by wire through automatic telephone switching systems which routinely operate in and route even local calls through interstate commerce.

There is an exception if a party to the communication has

given prior consent to the interception. 18 U.S.C. § 2511(2)(c) (2000). See United States v. White, 401 U.S. 745, 753 (1971). The government bears the burden of proving consent. United States v. Gomez, 900 F.2d 43, 44 (5th Cir. 1990). Also see Griggs-Ryan v. Smith, 904 F.2d 112, 118 (1st Cir. 1990) (treating consent under § 2511(2)(d) as legal issue where facts undisputed). Consent may be express or implied, but in either case, there must be actual consent. Deal v. Spears, 980 F.2d 1153, 1157 (8th Cir. 1992).

Deal holds:

Although constructive consent is inadequate, actual consent may be implied from the circumstances. See Griggs-Ryan v. Smith, 904 F.2d 112, 116 (1st Cir. 1990). Nevertheless, "[c]onsent under title III is not to be cavalierly implied. . . . [K]nowledge of the capability of monitoring alone cannot be considered implied consent." Watkins v. L.M. Berry & Co., 704 F.2d 577, 581 (11th Cir. 1983) (citations omitted).

Thus, only when someone voluntarily participates in a telephone conversation knowing that the call is being intercepted, does the act support a finding of implied consent to the interception. See United States v. Horr, 963 F.2d 1124, 1125 (8th Cir. 1992). Deal, supra, clearly holds as matter of law that consent cannot be inferred simply because someone at the Detention Center might have told defendant that they might monitor the phone, but not that they were in fact doing so.

Because there was no consent in this case the monitored telephone calls should be suppressed as evidence and their use disallowed as direct evidence or even as impeachment evidence

should defendant testify. 18 U.S.C. § 2510-22 (2000). But See United States v. Baftiri, 263 F.3d 856 (8th Cir. 2001) (use as impeachment allowed notwithstanding statutory language suggesting any further use for any purpose is prohibited).

WHEREFORE, Defendant Eye moves the Court to Order the suppression of all telephone recordings of conversations between defendant and any third parties made while defendant was an inmate at the Jackson County Detention center.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was caused to be emailed to David Ketchmark, Assistant US Attorney, WDMo, Kansas City, Missouri and other counsel in the case via the electronic document filing system on December 1, 2005.

/s/

JOHN R. OSGOOD