

Recent Case Report

People v. Windham

(2006) __ Cal.App.4th __ [2006 WL 3222305]

ISSUE

Is court authorization required to monitor and record a jail or prison inmate's non-attorney phone calls?

FACTS

Windham was being held at the Contra Costa County Jail for various crimes against his girlfriend. While awaiting trial, he placed several calls to her, all of which were recorded per standard jail policy. Having made some incriminating statements during the calls, Windham filed a motion to suppress the recordings, contending that a wiretap order should be required. When the trial court denied his motion, he accepted a plea bargain.

DISCUSSION

Although the federal wiretap law applies to phone calls made by jail and prison inmates,¹ the law contains an expansive exception: a wiretap order is not required if the inmate expressly or impliedly consented to the monitoring. This exception has far-reaching consequences because the courts have ruled that implied consent occurs whenever an inmate talks over the phone after being given "meaningful" notice that his calls might be recorded. As the Court of Appeal explained in *People v. Kelley*,² "So long as a prisoner is given meaningful notice that his telephone calls over prison telephones are subject to monitoring, his decision to engage in conversations over those telephones constitutes implied consent to that monitoring, and takes any wiretap outside the [federal statute]."

What constitutes "meaningful" notice? While many jails and prisons give two or more types, it appears that any of the following will suffice:

Warning signs: Signs in the phone room or elsewhere give notice to the inmates that their calls may be recorded.

Orientation briefings and handouts: The recording policy is explained to inmates during orientation briefings or in handouts.

Recorded messages: When inmates place a call, a recorded message automatically notifies them that their conversations may be recorded.³

¹ See 18 U.S.C. §§ 2510 et seq.; *U.S. v. Faulkner* (10th Cir. 2006) 439 F.3d 1221, 1222-4.

² (2002) 103 Cal.App.4th 853, 858.

³ See *People v. Kelley* (2002) 103 Cal.App.4th 853, 859 [recorded warning plus sign, "Telephone calls may be monitored and recorded"]; *U.S. v. Footman* (1st Cir. 2000) 215 F.3d 145, 154 recording plus, ["Large stickers on the phones remind inmates that their calls are being monitored."]; *U.S. v. Workman* (2nd Cir. 1996) 80 F.3d 688, 693 [inmate handbook plus sign: "All inmate telephone conversations are subject to electronic monitoring by department personnel."];

As it turned out, the Contra Costa County Jail provided inmates with all three types of notice. For example, the following warning was printed in large letters in a sign over the telephones: "WARNING! Calls May Be Recorded and Monitored!!!"

Despite the warnings (and the multiple exclamation points), Windham argued that he did not voluntarily consent because he had no real choice. After all, if he didn't consent, he wouldn't be able to call anyone. The court responded philosophically, "Rarely are choices in life today free from opportunity costs; something must be foregone whenever one comes to a fork in the road."

Accordingly, the court ruled that Windham's motion to suppress the recordings was properly denied.⁴ POV

U.S. v. Sababu (7th Cir. 1989) 891 F.2d 1308, 1329 [phone monitoring is discussed during orientation briefing, plus, "[A] bilingual sign is mounted at eye level on each telephone indicating that the telephone is subject to monitoring."]; *U.S. v. Cheely* (D.Alaska 1992) 814 F.Supp. 1430, 1439 [inmate handbook, plus, "Clearly visible signs posted near each telephone . . . disclosed that inmate telephone calls to anyone other than a lawyer were subject to monitoring."]; *U.S. v. Amen* (2nd Cir. 1987) 831 F.2d 373, 379 ["[U]pon first arriving at Lewisburg [Federal Penitentiary] and upon returning to the institution after an absence of nine months or more, each inmate must attend an admission and orientation lecture in which the monitoring and taping system is discussed."]; *U.S. v. Willoughby* (2nd Cir. 1988) 860 F.2d 15, 18 ["Pursuant to MCC policy, of which inmates were advised upon their arrival at MCC, and notice of which they were requested to acknowledge in writing, all inmate calls from MCC institutional telephones, except properly placed calls to attorneys, were automatically recorded and were monitored on a random basis."]; *U.S. v. Rivera* (E.D.Va. 2003) 292 F.Supp.2d 838, 840 ["[O]n arrival at the facility, each inmate is given a handbook, either in English or Spanish, that sets forth the facility's rules. In the section entitled 'Telephone Use,' the handbooks alert inmates that 'the Sheriff's Office reserves the right to tape-record and/or monitor any inmate telephone call we deem necessary.']; *U.S. v. Faulkner* (D.Kan. 2004) 323 F.Supp.2d 1111, 1117 [recording plus discussion during orientation].

⁴ **NOTE:** The court also rejected Windham's argument that the warrantless monitoring violated California's Privacy Act (Pen. Code §§ 630 et seq.) which requires the consent of both parties. The court explained that the Act does not prohibit officers from recording communications they could have recorded before it went into effect; and that under the pre-existing law, consent by only one party was sufficient. Citations omitted.