

ISSUE

Under what circumstances may authorities secretly record a jail inmate's phone conversations?

FACTS

Kelley shot and killed a man during an argument in Oakland. Based mainly on circumstantial evidence, Kelley was arrested and charged with murder.

Shortly before Kelley's trial was to begin, an Alameda County prosecutor asked county jail officials to record all of his phone calls. The calls yielded information that resulted in the issuance of a warrant to search Kelley's jail cell and the home of his girlfriend. During the searches, officers found incriminating letters which, according to the court, "formed a central part of the prosecution's case."

Kelley was convicted of first degree murder.

DISCUSSION

Kelley contended the recordings of his jailhouse phone calls were obtained in violation of federal and state wiretap laws and should therefore have been suppressed. The court disagreed.

Under federal and California law, officers may secretly monitor and record a jail or prison inmate's telephone calls if the inmate expressly or impliedly consented to the monitoring.¹ As the court explained, "California's wiretapping statutes, like [the federal wiretapping statutes], do not apply to the monitoring and recording of conversations where one party consents."

Although Kelley did not expressly consent to having his calls recorded, the prosecution argued he impliedly did so because, (1) he had been warned that his calls may be recorded; and (2) despite the warning, he spoke freely over the phone. The question, then, was whether this constituted implied consent.

This precise issue has not been directly decided by the California courts.² It has, however, been addressed by several federal circuit courts. And they all agreed that an inmate impliedly consents to such monitoring if he speaks on the phone after being warned that his conversations may be recorded. The *Kelley* court said it agreed with the reasoning of these cases:

So long as a prisoner is given meaningful notice that his telephone calls over prison phones are subject to monitoring, his decision to engage in conversations over those phones constitutes implied consent to that monitoring and takes any wiretap outside the prohibition of [the federal wiretap law].

The court then had to determine whether Kelley had been given "meaningful notice" that his calls may be monitored. Such notice is commonly given as follows:

¹ See 18 USC §2511(2)(c); Penal Code §631(a). **NOTE:** The court in *Kelley* pointed out that Penal Code §631(a) prohibits only "unauthorized" wiretaps, but that a wiretap in which one party consents is authorized.

² **NOTE:** Although the California Supreme Court in *People v. Loyd* (2002) 27 Cal.4th 997 ruled that such jailhouse monitoring was lawful under state law, it was unnecessary for the court to decide whether an inmate impliedly consents when he speaks on the phone after being given notice that such calls may be monitored. The *Kelley* court noted, however, that Justices Moreno and Kennard, in their concurring opinion, agreed with the federal position.

Warning signs: Notice in the phone room or on the telephone.³

Inmate rules and regulations: Notice given to inmates in prisoner orientation material.⁴

Recorded messages: Notice given through a recorded message that is played automatically when a prisoner places a call.

In *Kelley*, two of these three methods were used. Said the court:

Kelley's housing unit had a warning sign above its telephones, which stated, "Telephone calls may be monitored and recorded." In addition, the prison phone system contained a warning at the beginning of each call stating that all calls were subject to monitoring or recording. Meaningful notice includes a monitoring notice posted by the outbound telephone, or a recorded warning that is heard by the inmate through the telephone receiver, prior to his or her making the outbound telephone call.⁵

Consequently, the court ruled, "Because Kelley had notice that his calls were subject to monitoring, he consented when he used the prison's phone system." Kelley's conviction was affirmed.

DA's COMMENT

Kelley clears up some uncertainty as to the type of notice that inmates must get for their use of a phone to constitute implied consent. Prior to *Kelley*, it was at least arguable that inmates must be notified that their calls "will," in fact, be monitored—that recording is inevitable. But in *Kelley*, the warning was not so definite. As noted, the sign in the jail stated that telephone calls "may be" monitored, and the phone warning stated that calls "were subject to" monitoring.

It, therefore, appears that inmates need only be notified of the possibility that their calls may be monitored.

³ See *U.S. v. Paul* (6th Cir. 1980) 614 F.2d 115, 117; *U.S. v. Van Poyck* (9th Cir. 1996) 77 F.3d 285, 292; *U.S. v. Amen* (2nd Cir. 1987) 831 F.2d 373, 379; *U.S. v. Willoughby* (2nd Cir. 1988) 860 F.2d 15, 20.

⁴ See *U.S. v. Amen* (2nd Cir. 1987) 831 F.2d 373, 379.

⁵ Citing *People v. Loyd* (2002) 27 Cal.4th 997, 1015 [conc. opn. of Moreno, J.].