

U.S. v. Paxton et al.

(7th Cir. 2017) __ F.3d __ [2017 WL 655432]

Issue

Did a group of arrestees reasonably believe that their conversation in the back of a police transport van would be private?

Facts

An undercover agent with a joint Chicago PD-ATF task force recruited the five defendants in this case to rob a fictitious member of the Mexican drug cartel. Although the court did not discuss the details of the sting, it explained that its objective was to arrest the men for conspiracy if they freely took part in planning the holdup. The men did so and were about to commit the robbery when members of the task force arrested them.

The agents figured that the men would probably make incriminating statements if they were transported to jail together in a police van so, after arresting them, they loaded them into a police transport van that had been wired for sound and video. The court described the vehicle as a Ford E350 cargo van that had “three compartments separated by metal dividing walls with small (and thick) plexiglass viewing windows.” During the trip, one of the men warned the others that the van was “probably bugged,” but the men nevertheless engaged in a whispered conversation in which they made several incriminating statements—all of which were duly recorded.

Before trial, the defendants filed motions to suppress their statements, claiming they had a reasonable expectation of privacy in the van and therefore the warrantless recording of their statements constituted a violation of the Fourth Amendment. This argument was based, in part, on testimony from the van driver who said that, although he could usually overhear his passengers if they talked in a normal level, he could not hear the defendants. Thus they argued that the combination of their whispering plus the physical layout of the van provided them with a reasonable expectation of conversational privacy. The trial judge bought this specious argument and ordered the defendants’ statements suppressed. The U.S. Attorney appealed to the Seventh Circuit.

Discussion

A violation of the Fourth Amendment can occur only if officers intruded into an area or space in which the defendant could reasonably expect privacy.¹ Consequently, the federal and state courts throughout the country have routinely ruled that officers do not violate the Fourth Amendment when they secretly record the conversations of arrestees inside police *cars*.² Nevertheless, the defendants argued that they could expect privacy in

¹ See *Katz v. United States* (1967) 389 U.S. 347, 252 [“The Government’s activities in electronically listening to and recording the petitioner’s words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a ‘search and seizure’ within the meaning of the Fourth Amendment.”]; *U.S. v. Jacobsen* (1984) 466 U.S. 109, 113 [“A ‘search’ occurs when an expectation of privacy that society is prepared to consider reasonable is infringed.”].

² See, for example, *People v. Loyd* (2002) 27 Cal.4th 997, 1009, fn.14 [“Our decision today allows police officers to monitor conversations in jail as they may monitor conversations in police cars There is no longer a distinction between the two locations regarding an individual’s reasonable expectations of privacy in her communications.”]; *O’Laskey v. Sortino* (1990) 224 Cal.App.3d 241,

a transport van because the “unique compartmentalization of the vehicle’s interior” seemingly prevented the van driver from overhearing them.

The court acknowledged that the “enclosed nature of the detainee compartment in a van like the one used to transport the defendants in this case may cause a detainee to think that he cannot be overheard.” Nevertheless, said the court, any such expectation of privacy would be unreasonable because “[t]he fact that the interior of the van was divided by walls into separate, fully enclosed compartments in no way altered the essential nature of the vehicle” as a “mobile jail cell”—not “a sanctuary for private conversation.” Consequently, the court reversed the trial judge and ruled that “[r]egardless of the particular layout, a police vehicle that is readily identifiable by its markings as such, and which is being used to transport detainees in restraints, does not support an objectively reasonable expectation of conversational privacy.”³

Comment

The court also had some noteworthy things to say about the increasing sophistication and prevalence of secret recording devices, and the effect this may have on prisoners’ privacy expectations. Said the court:

[W]e are fast approaching a day when police interactions with civilians, including detainees, will be recorded from beginning to end, and for a variety of important ends. Police surveillance equipment (including both dashboard cameras and body cameras) has become both cheaper and more effective at a time when the public interest in police conduct, by virtue of certain abuses exposed by citizen cell-phone cameras in addition to police surveillance equipment has skyrocketed. Government, members of the public and detainees share an interest in monitoring the handling of detainees in order to ensure that they are being treated appropriately. POV

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248 “[A] person under arrest, in police custody in a patrol car, whose statements to his cohort are recorded has no reasonable expectation of privacy where it was unlikely he thought he was being placed in the police car for a sight-seeing tour of the city.”]; *U.S. v. Webster* (7th Cir. 2015) 775 Cal.App.4th 897, 903 [court adopts the rule of six other circuits that “there is no objectively reasonable expectation of privacy in a conversation that occurs in a squad car”].

³ Also see *People v. Neely* (1999) 70 Cal.App.4th 767, 790 “[T]he authorities had the right to record conversations in the (sheriff’s) van”].