Training Key® #451

Surreptitious Monitoring of Suspects' Conversations

If conducted properly, the conversation of suspects can be surreptitiously monitored and recorded by officers and evidence thus developed can be used in subsequent criminal proceedings. Officers should be aware of the availability of this investigatory technique as well as the limitations on its use.

Introduction

One of the more valuable investigatory tools made available to police officers by the courts in recent years is the surreptitious monitoring of conversations involving persons suspected of criminal acts. Surreptitious monitoring of such conversations may produce evidence that is extremely damaging to the persons concerned, and, if the monitoring is conducted under the proper circumstances, this evidence may be admissible in a court of law.

Many law enforcement officers are under the impression that this type of monitoring is improper or illegal, and the results inadmissible unless the monitoring is conducted under a warrant. Therefore, many of these same agencies, by custom or formal policy prohibit or discourage the use of this investigative practice. But, in doing so, they may unnecessarily restrict officers and prevent the use of a valuable investigative technique, as recent court decisions have made it clear that if certain guidelines are observed, evidence produced by warrantless monitoring is perfectly acceptable.[1] This *Training Key* examines the legal challenges that are often made against the use of this type of monitoring and reviews the procedures that officers should follow to render these challenges ineffective.

Types of Surreptitiously-Monitored Statements

Although the possible factual situations are almost unlimited, the cases dealing with surreptitious monitoring or recording of suspects' conversations have usually involved one of three typical scenarios:

• Conversations between suspects seated in a police vehicle. In this situation, two or more persons who have been arrested or otherwise detained are placed in a police vehicle. Officers then move away from the vehicle, ostensibly to continue the investigation of the matter for which the suspects are being held, but a tape recorder or other monitoring device is left in the vehicle. The suspects then engage in a conversation during which incriminating statements are made; these statements are overheard and/or recorded for later use as evidence against the suspects.

• Conversations in an interrogation room in a police station. Here, the suspect is typically left alone in an interrogation room with a relative, friend, or suspected accomplice. Thinking that the conversation is not being overheard, the suspect makes statements to another person(s) regarding the offense.

• Conversations in a jail cell with persons who are, or who are believed by the suspect to be, fellow prisoners. Jail inmates can become quite talkative when they think that their statements are being made only to fellow inmates. Here, two sub-scenarios may occur:

a. The police place an undercover agent or informant in the cell to overhear statements by the suspect; and/or
b. A listening device is concealed in or near the cell so that conversations can be monitored by police located nearby.[2] In each of these scenarios the evidence thus obtained has been held admissible by the courts. For example:

In *Stanley* v. *Wainwright*[3] two robbery suspects were arrested and placed in the back seat of a police vehicle. Officers then moved away from the vehicle. However, one of the officers left a tape recorder operating on the front seat while the arrestees were left unattended. Thinking themselves safe in doing so, the suspects discussed the situation between themselves, making statements that incriminated them. These statements, duly recorded by the tape recorder on the front seat, were held to be admissible as evidence against the suspects.

In *Ahmad A.* v. *Superior Court*,[4] a juvenile was arrested for murder. At the police station, the defendant was, at his request, permitted to talk with his mother in an interrogation room with no officers present. During this conversation the suspect made incriminating statements. These statements were recorded and used in evidence against the defendant. The California court upheld the admissibility of the evidence.

In *Illinois* v. *Perkins*,[5] a murder suspect was being held in jail on an unrelated charge. An undercover officer was placed in the cell and during the course of conversations the undercover officer asked him if he had ever killed anyone. The suspect responded with an admission of the murder which was the subject of the investigation. Evidence of this statement was held to be admissible.

When surreptitiously-monitored and/or recorded statements are offered in court, the defense may challenge the admissibility of the evidence upon several grounds. Only if the prosecution can overcome each of these challenges will the evidence be admissible.[6]

Fourth Amendment Challenges

The defendant may contend that the statement was monitored in violation of the defendant's Fourth Amendment rights. For example, the contention may be that the monitoring/recording constituted a "seizure" in violation of the defendant's right of privacy.

In order for this defense to succeed, the defendant has to show that the "seized" conversation took place in a location where there was a "reasonable expectation of privacy." In a line of decisions dating back to *Katz* v. *United States*,[7] — a 1967 case involving electronic surveillance of a telephone booth — the U.S. Supreme Court has held that such conversations are protected if, at the time of the conversation, the defendant had an expectation of privacy that was both subjectively and objectively reasonable. Thus, the monitored conversation is admissible unless the evidence shows not only that the defendant personally believed that the conversation was private, but also that this expectation of privacy was objectively reasonable.

Where the conversation occurs in an area under police control, such as in a patrol car, in the interrogation room of a police station or in a jail cell, the courts have held that there is no reasonable expectation of privacy in such locations.[8] The emphasis here is on the term reasonable expectation. Even though the defendant may have subjectively believed (or may have contended that he or she believed) that the conversation was private and would not be overheard, if that belief was not objectively reasonable the evidence is admissible. As with any type of search or seizure, the Fourth Amendment does not apply to police activities in areas where there is no reasonable expectation of privacy.[9]

It has been contended by some defendants that, in spite of the fact that the monitored conversation occurred in a police car or police station, the defendants had a reasonable expectation of privacy in conversations that occurred prior to the time that they were actually placed under arrest. Under this argument, monitoring would be permissible even in a police car or a police station only after the persons targeted had been formally arrested. The courts have generally rejected this contention, finding no distinction between arrestees and persons not yet placed under arrest. Neither are considered to have any reasonable expectation of privacy in police vehicles or interrogation rooms.[10]

Note, however, that although persons in police vehicles or police stations normally have no reasonable expectation of privacy in such locations, this may be altered if the police give the suspect some reason to believe that their conversations will be private and unmonitored. Thus, if any monitoring is contemplated in any location, whether in a patrol car, an interrogation room, a jail cell, or anywhere else, police must scrupulously avoid making any representation to the suspects that the location is private or that their conversation will be unmonitored. If any form of direct or indirect assurance of privacy is given, the suspects' subsequent belief that their conversation is private will be conclusively presumed by the courts to be objectively reasonable, and any monitoring performed contrary to that expectation will be a violation of the suspects' Fourth Amendment rights.

Fifth Amendment Challenges

Perhaps more common than Fourth Amendment challenges is the claim that conversations being overheard are the product of unlawful custodial interrogation, and that the monitoring is therefore violative of the Fifth Amendment and/or the *Miranda* rule.

Of the various types of challenges discussed in this article, the Fifth Amendment defense is perhaps the easiest for the prosecution to refute, for the courts have typically rejected such contentions. These courts have pointed out that the *Miranda* rule was formulated to protect persons who might feel compelled to make statements due to the pressures of a custodial interrogation. As police officers should be aware, the *Miranda* rule does not apply to interviews conducted in non-custodial situations, nor does it apply when the police conduct does not constitute an interrogation. Without "official compulsion," there is no compulsory self-incrimination, and no need for, or applicability of, the *Miranda* rule.

Following this line of reasoning, most of the courts that have considered the question of surreptitious monitoring have concluded that as long as the suspects are not aware that police officers are present or within hearing distance, there is no "custodial interrogation," and that the *Miranda* rule therefore does not apply in these situations.

For example, in all of the scenarios described above, the suspects were not aware that any police officer or informant was listening. Because the suspects were not aware of any police presence, there was no official compulsion to speak, Therefore, no *Miranda* warnings were required and the statements uttered were considered to be made voluntarily. Consequently, the monitoring that produces evidence of these statements does not violate the Fifth Amendment or the *Miranda* rule.[11]

Sixth Amendment Challenges

The most complex challenge to evidence obtained by surreptitious monitoring is the contention that such monitoring violates a defendant's Sixth Amendment right to counsel. This right, which is sometimes less familiar to police officers than the Fifth Amendment (*Miranda*) right to counsel, may be explained as follows:

Sixth Amendment Right to Counsel v. Fifth Amendment Right to Counsel. The discussion in the preceding section of

this article deals with the Fifth Amendment or "*Miranda*" right to counsel. However, the Sixth Amendment right to counsel differs from the Fifth Amendment (*Miranda*) right to counsel, and one may apply in situations where other the other does not. The Fifth Amendment (*Miranda*) right to counsel attaches to any person subjected to a "custodial interrogation." By contrast, the Sixth Amendment right to counsel attaches only when the case against the suspect has reached a so-called "critical stage."[12] This "critical stage" is reached when formal charges have been filed (such as by indictment or information), or when "adversarial judicial proceedings" have begun.[13] However, until a "critical stage" has been reached, there is no Sixth Amendment right to counsel, and surreptitious monitoring of a suspect's conversations prior to this point will not violate that right.

Sixth-Amendment Right to Counsel in Police Car and Interrogation Room Monitoring Scenarios. Since the Sixth Amendment right to counsel only attaches when formal judicial proceedings have been begun against a defendant, Sixth Amendment issues will normally not arise in situations in which a person is still only a suspect and has not formally been charged with a crime. Thus, for example, where suspects are placed in a police car pending further investigation, or are in an interrogation room at the police station, there is usually no Sixth Amendment right to counsel and thus no Sixth-Amendment objection to monitoring. Although these situations are "custodial" for Fifth Amendment *Miranda* purposes, they usually do not involve the Sixth Amendment because normally such suspects have not yet been formally charged.

Sixth-Amendment Right to Counsel in Jail Monitoring Scenarios. The Sixth Amendment right to counsel is more likely to come into play in surreptitiously-monitored cases where the monitoring occurs in a jail cell or police lockup. Since persons are not normally incarcerated unless formal charges have been filed, care must be taken that jail-cell/lockup monitoring does not violate the target's Sixth Amendment right to counsel.

The Sixth Amendment Right to Counsel and the "Unrelated Charge." The Sixth Amendment right to counsel is "charge-specific," meaning that a defendant has a Sixth Amendment right to counsel only as to the specific crime or crimes with which he has been formally charged.[14] Thus, a suspect may have a Sixth Amendment right to counsel in respect to one criminal matter, but have no such right with regard to another crime. This may be of great significance in cell-monitoring situations. Although the target may have been charged with one crime, this does not preclude monitoring of conversations regarding another suspected, unrelated crime which is under investigation but with which the suspect has not yet been formally charged. For example, the defendant might be in jail on a charge of robbery, but be suspected of involvement in a murder unrelated to the robbery charge. In that situation, the Sixth Amendment would not bar monitoring of conversations regarding the unrelated murder unless and until formal proceedings on the murder charge had been instituted against the suspect.

Monitoring of Suspects in Sixth Amendment Situations: "Elicitation" vs. "Listening Post." Even if the Sixth Amendment right to counsel has attached to the suspect as to the same crime that is the subject of the monitored conversation, the Sixth Amendment is not violated as long as the monitoring is merely a passive listening-in upon statements not elicited from the suspect by police action. However, if an informant or undercover officer placed in a cell actively elicits statements from a suspect about a charge to which the Sixth Amendment right to counsel has attached, this is a violation and the evidence thus obtained and is inadmissible.[15] If the informant or undercover agent does not actively elicit incriminating statements from the suspect, but merely listens to whatever the suspect chooses to say, the informant or officer is merely a "listening post," and the information derived from the suspect's unsolicited statements is admissible against the suspect.[16]

Under this rationale, electronic monitoring of a suspect's jail-cell conversations would not violate the Sixth Amendment, even though the evidence obtained relates to a charge to which the suspect's Sixth Amendment rights have otherwise attached. To suppress such evidence, the defendant would have to "demonstrate that the police ... took some action, beyond mere listening, that was designed deliberately to elicit incriminating remarks."[17]

Sixth Amendment Summary. In short, police may monitor a suspect's conversations without violating the Sixth Amendment if:

a. no formal charges have been filed regarding the crime which is the object of the monitoring; or if
b. the police activity is limited to passive listening, with no active elicitation by a police informant or undercover officer.

Monitoring Under Federal and State Statutes

A defendant may challenge evidence obtained by surreptitious monitoring on the grounds that the monitoring and/or recording violated one or more state or federal statutes.

Federal Law: The Omnibus Crime Control and Safe Streets Act. Title III of the federal Omnibus Crime Control and Safe Streets Act[18] governs the interception of oral conversations by electronic or mechanical means. Protected communications may be intercepted only following the issuance of a warrant. However, the statute protects only conversations in which there is a reasonable expectation of privacy, a determination made under the Fourth Amendment analysis discussed earlier. Since, as noted earlier, the courts have generally found no such reasonable expectation of privacy in conversations conducted in police vehicles, police stations, or jail cells, monitoring of the type of conversation covered by this article will not normally violate Title III.[19]

State Law. The laws of individual states may differ from the provisions of Title III. In some states, monitoring which is permissible under both federal constitutional decisions and Title III of the Omnibus Crime Control and Safe Streets Act may be prohibited by state statute. In addition, a state constitution or state appellate court decisions may prohibit monitoring that would be otherwise permissible under the U.S. Constitution and federal statutes and cases.

Therefore, before any law enforcement agency undertakes electronic or mechanical monitoring of suspects' conversations, the department concerned should consult with local legal advisors to determine whether the proposed monitoring will violate the state constitution or the statutes or ordinances of that jurisdiction.

Summary

The following generalizations may be made regarding the monitoring of suspects' conversations.

1. Police may conduct surreptitious monitoring of a suspect's conversations without violating the Fourth Amendment or federal electronic surveillance law as long as the conversation is conducted in a location in which the suspect being monitored has no reasonable expectation of privacy.
2. Police may conduct surreptitious monitoring of a suspect's conversations without violating the Fifth Amendment as long as the conversation is conducted under circumstances that do not amount to a "custodial interrogation" — that is, there are no police officers or agents present, or the suspect is not aware that any persons present are police officers or agents.
3. Police may conduct surreptitious monitoring of a suspect's conversations without violating the suspect's Sixth Amendment rights provided that
   a. the suspect has not been formally charged on the offense that is the subject of the monitoring, or,
   b. if the suspect has been formally charged as to the of fense that is the subject of the monitoring, the monitoring is conducted as passive listening only, with no attempt being made by police officers or informants to elicit statements from the suspect.

Again, it must be emphasized that state law may prohibit activity that is permissible under the U.S. Constitution, federal case law, and federal statutes. Therefore, local legal advisors should be consulted before any monitoring is conducted to ascertain whether state or local law prohibits the proposed activity.

Endnotes

[1] The conclusions stated in this article refer to principles accepted by the federal courts and by numerous state courts. However, as will be noted later in the article, state or local law may affect the admissibility of this type of evidence in some jurisdictions.

[2] Often, of course, these occur together, as where electronic monitoring is used while the undercover agent or informant is in the cell.

[3] *Stanley* v. *Wainwright*, 604 F.2d 379 (5th Cir. 1979).

[4] *Ahmad A.* v. *Superior Court* 263 Ca. Rptr. 747 (Cal. Appi 1989), cert. denied, 11 S.Ct. 102 (1991).

[5] *Illinois* v. *Perkins*, 110 S.Ct. 2394 (1990).

[6] See also *Kuhlmann* v. *Wilson*, 477 U.S. 436 (1986).

[7] *Katz* v. *United States*, 389 U.S. 347 (1967).

[8] See, e.g., *Stanley* v. *Wainwright*, 604 F.2d 379 (5th Cir. 1979) (police car); *United States* v. *McKinnon*, 985 F.2d 525 (11th Cir. 1993) (police car); *Ahmad A.* v. *Superior Court*, 263 Cal. Rptr 747 (Cal. App. 1989) (interrogation room); *United States* v. *Harrelson*, 754 F.2d 1153 (5th Cir. 1985) (jail).

[9] When making a Fourth Amendment challenge to monitored evidence, the defendant will, of course, contend that he or she subjectively believed that the conversation was private. Even if the court believes such a contention, this is insufficient to cause suppression of the evidence if the belief was an unreasonable one. See, e.g., *United States* v. *Harrelson*, 754 F.2d 1153 (5th Cir. 1985) (expectation of privacy during jail visit unreasonable).

[10] See *United States* v. *McKinnon*, 985 F.2d 525 01th Cir. 1993).

[11] See *Illinois* v. *Perkins*, 110 S.Ct. 2394 (1990); *Stanley* v. *Wainwright*, 604 F.2d 379 (5th Cir. 1979). This result may be altered if, prior to the monitoring, the suspect has invoked the *Miranda* right to remain silent, or the *Miranda* right to counsel. Officers conducting monitoring of conversations following an assertion of either of the *Miranda* rights by the suspect may expect the suspect to contend that this previous assertion of the *Miranda* rights made the monitoring improper. In *Illinois* v. *Perkins*, referred to above, there was no claim that the defendant had previously invoked his fifth amendment right to counsel or to remain silent; whether any such invocation of rights would have affected the outcome of that case is unclear.

[12] See *Massiah* v. *United States*, 377 U.S. 201 (1964).

[13] See *Massiah* v. *United States*, 377 U.S. 201 (1964).

[14] *Hoffa* v. *United States*, 377 U.S. 201 (1964).

[15] See *United States* v. *Henry*, 447 U.S. 264 (1980). See also *Maine* v. *Moulton*, 474 U.S. 159 (1985).

[16] See, e.g., *Kuhlmann* v. *Wilson*, 477 U.S. 436 (1986).

[17] *Kuhlmann* v. *Wilson*, 477 U.S. 436, 459 (1986).

[18] 18 U.S.C. §§2510 et seq.

[19] In addition, Title III is generally inapplicable to situations in which the monitoring and/or recording of a conversation is conducted with the consent of one of the conversants. See, e.g., *United States* v. *Laetividal-Gonzalez*, 939 F.2d 1455 (11th Cir. 1991); *United States* v. *Pratt*, 913 F.2d 982 (1st Cir. 1990); *United States* v. *Caceres*, 440 U.S. 741 (1979). This principle may defeat a Title III statutory challenge in monitoring situations in which a police informant or undercover officer has been a party to the monitored conversation. (Note: This exception may not be recognized by state law. Consult local legal advisors.) In addition, where notice has been given to the conversants that conversations may be monitored, persons making statements subsequent to the giving of the notice may be held to have consented to the monitoring. See, e.g., *United States* v. *Willoughby*, 860 F.2d 15 (2d Cir. 1988) (jail inmates' use of jail telephones known to be monitored constituted consent to have such conversations monitored).

Acknowledgement

This *Training Key*® was prepared by Charles Friend, an attorney and law enforcement consultant based in Williamsburg, Virginia.

questions

The following questions are based on material in this *Training Key*®. Select the best answers.

1. Which of the following is not a legitimate legal challenge to the use of surreptitious recording of suspect statements.

(a) Illegal "seizure" in violation of the suspect's right of privacy under the Fourth Amendment.
(b) Violation of equal protection of the law under the Fourteenth Amendment.
(c) Unlawful custodial interrogation violative of the Fifth Amendment.
(d) Violation of the defendant's right to counsel under the Sixth Amendment.

2. Which of the following statements is false?

(a) The Fifth Amendment right to counsel pertains to Miranda rights under custodial interrogation.
(b) The Sixth Amendment right to counsel pertains to rights to counsel after formal charges have been filed against a suspect.
(c) Suspects have a right to privacy in statements made in a patrol car when officers are not present.
(d) All of the above.

3. Which of the following statements is false?

(a) Officers may use incriminating statements of suspects even though the suspects have been informed that they are in a private location or their conversations are not monitored.
(b) If a suspect is charged with one crime, this does not preclude his being monitored for statements regarding another yet uncharged crime.
(c) If an informant passively listens-in on statements made by an incarcerated suspect that incriminates him in the offense for which he has been charged, that statement may be used as evidence.
(d) State law varies with regard to the admissibility of surreptitiously recorded statements.

answers

1. (b) The equal protection clause of the Fourteenth Amendment does not bear upon surreptitious recording of suspect statements.
2. (c) Suspects have no reasonable expectation of privacy in a patrol vehicle.
3. (a) Officer statements that lead suspects to believe they are in a state of privacy may negate the use of subsequent surreptitiously recorded incriminating statements which they may make.

have you read...?

"Interrogations and Confessions After *Minnick*," *Training Key*® #410, International Association of Chiefs of Police, Alexandria, VA.

This document provides details on legally acceptable procedures for interrogating suspects and recording statements and confessions.