

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE BOARD OF TEACHING

In the Matter of the Proposed
Revocation of the Teaching
License of Lawrence A.
Dibble, III

**ORDER ON MOTION
FOR DISMISSAL**

The above-entitled matter came on before Administrative Law Judge (ALJ) George A. Beck pursuant to Lawrence A. Dibble, III's motion for dismissal. Mr. Dibble filed his motion on December 27, 1996. The Executive Director filed a memorandum in opposition to the motion on January 10, 1997. Mr. Dibble filed a reply memorandum on January 17, 1997. Oral argument was heard on January 21, 1997, whereupon the record closed.

Phillip J. Trobaugh and Ann Zewiske, Attorneys at Law, Mansfield & Tanick, 1560 International Centre, 900 Second Avenue South, Minneapolis, Minnesota, 55402-3383, appeared on behalf of Lawrence Dibble, III.

Bernard Johnson, Assistant Attorney General, 1200 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota, 55101-2130, appeared on behalf of the Executive Director for the Board of Teaching.

Based upon the Memoranda filed by the parties, all of the filings in this case, and for reasons set out in the Memorandum which follows:

IT IS HEREBY ORDERED:

1. That the recording of the cordless telephone conversation involving Lawrence Dibble is inadmissible in this proceeding for any purpose.
2. That Lawrence Dibble's motion to dismiss the disciplinary proceedings against him is DENIED.

Dated this ___ day of February, 1997.

GEORGE A. BECK
Administrative Law Judge

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MEMORANDUM

The Executive Director of the Minnesota Board of Teaching has brought disciplinary action against Lawrence Dibble III's (hereinafter "Dibble") right to apply for a teaching license in the State of Minnesota based on Dibble's alleged improper relationship with a female student. Dibble filed this motion to dismiss the disciplinary proceedings on the grounds that the Board's evidence was gathered in violation of his constitutional rights and the Minnesota Privacy of Communications Act, Minn. Stat. § 626A.11, subd. 1. Specifically, Dibble alleges that the evidence against him must be suppressed because it stems from an illegally intercepted and recorded cordless telephone conversation he had with the female student.

Dibble was employed as a licensed teacher by Independent School District No. 11 (Anoka-Hennepin) at Champlin Park High School during the 1994-1995 school year. On April 27, 1995, a School District employee using a scanning device intercepted a cordless telephone conversation between Dibble and a female student. Based on the content of the cordless telephone conversation, the School District employee reported concerns about Dibble to the Principal of Champlin Park High School. Over the next two days, the School District employee monitored the cordless phone frequencies on his scanner. The employee eventually intercepted and recorded another cordless telephone conversation between Dibble and the female student. Neither the student nor Dibble consented to having their conversation intercepted and recorded.

The School District investigated Dibble and in May of 1995 suspended him based on allegations of an improper relationship with the student. Dibble's contract as a probationary teacher was not renewed by the School District. Pursuant to Minn. Stat. § 125.09, subd. 4, the School District reported to the Board of Teaching that Dibble was being placed on paid leave of absence due to alleged immoral conduct. The Board requested the Minnesota Attorney General's Office to conduct an investigation. An authorization form was sent to Independent School District No. 11 asking the parents of the student to contact the Attorney General's Office. On January 31, 1996, the student notified the Board that she was unwilling to cooperate with the investigation of Dibble. (Dibble Exhibit 4.) On February 13, 1996, Dibble's attorney advised the Board that the taping of Dibble's telephone conversation was illegal. (Dibble Exhibit 5.)

On May 17, 1996, the Board informed Dibble that due to insufficient evidence it would not be taking disciplinary action against his teaching license at that time. (Dibble Exhibit 6.) On August 6, 1996, the student contacted the Attorney General's Office and indicated that she was now willing to cooperate with the investigation of Dibble. On August 8, 1996, the student met with Assistant Attorney General Bernard Johnson and told him that she and Dibble engaged in sexual contact commencing in February of 1995. The Board informed Dibble on September 30, 1996, that it was going to proceed with disciplinary action based on new evidence obtained directly from the student. (Dibble Exhibit 7.)

Dibble maintains that the student's testimony which the Executive Director seeks to introduce as evidence was obtained through or resulted from the illegally intercepted

cordless telephone conversation. According to Dibble, had the interception and recording of his cordless telephone conversation not occurred, there would have been no indication of any alleged improper relationship between himself and the student and nothing to investigate. Therefore, Dibble argues that the student's testimony is inadmissible pursuant to Minn. Stat. § 626A.11, subd. 1, and cannot be used by the Executive Director for any purpose in the disciplinary hearing. Dibble's arguments in support of his motion to dismiss are based on both statutory and constitutional grounds.

The Executive Director concedes that Dibble's cordless telephone conversation was intercepted in violation of Minn. Stat. § 626A.02 and that the recording or content of the conversation cannot be used by the Board in its case in chief. However, the Executive Director argues that the student's subsequent testimony was obtained independently and did not evolve from the cordless phone conversation. The Executive Director asserts that in exclusionary rule cases, courts recognize the "independent source" doctrine which allows evidence to be admitted if it is derived from a source independent of the unlawful conduct. According to the Executive Director, other faculty members observed questionable conduct between Dibble and the student and raised concerns about the nature of their relationship prior to the interception of their cordless telephone conversation. In addition, the student plans to testify about conduct that occurred prior to the recorded conversation. The Board contends that it did not even receive the tape of the illegally intercepted conversation until July of 1995. By that time, the Board staff was already investigating Dibble based on the School District's report of his suspension and other faculty's concerns. The Board staff argues that its investigation and the student's testimony is independent of the unlawful tape recording.

Statutory Exclusion Sanction

The Minnesota Privacy of Communications Act, Minn. Stat. chap. 626A, was enacted in 1969 in response to the passage of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 211, codified at 18 U.S.C.A., §§ 2510 to 2520. State v. Monsrud, 337 N.W.2d 652, 655 (Minn. 1983). The Federal provisions were prompted by efforts to formulate statutory rules which would implement the Fourth Amendment's prohibition against unreasonable searches and seizures as suggested by the United States Supreme Court in Berger v. New York, 388 U.S. 41, 87 S.Ct. 1873 (1967). State v. Frink, 206 N.W.2d 664, 665 (Minn. 1973). The federal statute permits states to enact electronic surveillance statutes which may be more restrictive, but not less so, than the federal act. Id. at 669. Both the state and federal acts are basically criminal laws enacted to protect privacy of communications and to deter unlawful conduct by punishing unauthorized interceptions. Id. at 665.

Minn. Stat. § 626A.11, subd. 1, provides that evidence obtained by any act of intercepting wire, oral, or electronic communications, in violation of 626A.02, and "all evidence obtained through or resulting from" information obtained by any such act, shall be inadmissible for any purpose in any action, proceeding or hearing. Minn. Stat. § 626A.02 makes it an offense for any person who:

- (a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, electronic, or oral communication;

(b) intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when ...

(ii) such device transmits communications by radio, or interferes with the transmission of such communication;

(c) intentionally discloses, or endeavors to disclose, to any person the contents of any wire, electronic, or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire, electronic, or oral communication in violation of this subdivision; or

(d) intentionally uses, or endeavors to use, the contents of any wire, electronic, or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire, electronic, or oral communication in violation of this subdivision; shall be punished as provided in subdivision 4, or shall be subject to suit as provided in subdivision 5.

Id., subd. 1.

Minnesota's wiretapping statutes are nearly identical to the federal wiretapping statutes. Copeland v. Hubbard Broadcasting, Inc., 526 N.W.2d 402, 406 (Minn. App. 1995). Like Minn. Stat. § 626A.11, the Omnibus Crime Control and Safe Streets Act provides that no part of the contents of an unlawfully intercepted communication and "no evidence derived therefrom" may be received in evidence if the disclosure of that information would be in violation of Title III. 18 U.S.C. § 2515. Few Minnesota cases discuss or interpret the Minnesota Privacy of Communications Act or the suppression sanction found in Minn. Stat. § 626A.11. However, the corresponding Federal Act with its similarly broad suppression sanction has received scrutiny. While there is some uncertainty as to whether the federal law applies to cordless telephone communications^[1], case law analyzing the exclusionary provision of 18 U.S.C. § 2515 is still instructive. Frink, 206 N.W.2d at 669.

The suppression sanctions under both the Federal and Minnesota statutes are based on the Fourth Amendment to the United States Constitution. The Federal Fourth Amendment and Article I of the Minnesota Constitution, proscribe unreasonable searches and seizures by the government of persons. U.S. Const. Amend. IV; Minn. Const. Art I, § 10. The Fourth Amendment exclusionary rule requires suppression of evidence obtained through illegal means. E.g., Nardone v. U.S., 308 U.S. 338, 60 S.Ct. 266 (1939); State v. Jensen, 349 N.W.2d 317 (Minn. App. 1984). The purpose of the Fourth Amendment exclusionary rule is to deter government agencies from engaging in illegal conduct as a means of obtaining evidence. In Frink, 206 N.W.2d at 674, the Minnesota Supreme Court explained that the Minnesota Privacy of Communications Act is "designed to give effect to the Fourth Amendment and not to erode it."

An integral component of the Fourth Amendment exclusionary rule is the "Fruit of the Poisonous Tree" doctrine. This doctrine provides that any evidence or "fruit" derived from the illegally obtained evidence must also be excluded. Nardone, 308 U.S. at 340-41. Both Minn. Stat. § 626A.11 and 18 U.S.C. § 2515 have incorporated this doctrine into their evidentiary sanctions by rendering inadmissible all evidence obtained through

or resulting from the illegally intercepted communication. In interpreting 18 U.S.C. § 2515, courts have extended the suppression sanction to live testimony of a witness whose identity is discovered through an illegal interception. In Washburn v. State, 310 A.2d 176, 184 (Md. Ct. Spec. App. 1973), the court held that unless the government can establish that the identity of the witness originated from a source independent of the illegal interception, the witness' testimony must be excluded.

Whether or not to suppress evidence obtained in violation of a statute or rule is "a quintessentially judicial issue." State v. Mitjans, 408 N.W.2d 824, 830 (Minn. 1987). Minn. Stat. § 626A.11, subd. 1, specifically requires suppression of evidence obtained by any act of intercepting communications in violation of 626A.02. However, while the exclusion of the recorded cordless telephone conversation is required, the testimony of the student will be suppressed as fruit of the unlawfully intercepted conversation only if the testimony is found not to be independent of, or to have "resulted from", the illegally obtained communication. State v. Fakler, 503 N.W.2d 783, 788 (Minn. 1993).

State Action

The exclusionary rule under the Federal Fourth and Fifth Amendments proscribes only government action and does not preclude the state from using the fruits of illegal searches and seizures by private citizens. United States v. Jacobsen, 466 U.S. 109, 113-118, 104 S.Ct. 1652, 1656-1659 (1984). Cases implementing the exclusionary rule under the Fourth or Fifth Amendment "begin with the premise that the challenged evidence is in some sense the product of illegal government activity." United States v. Crews, 445 U.S. 463, 471, 100 S.Ct. 1244, 1250 (1980). Based on this, the Executive Director argues that initially the Judge must determine whether any state or government action was involved in the illegal recording of the phone conversation. The Executive Director contends that she did not intercept Dibble's conversation or otherwise engage in unlawful conduct. Rather, a private citizen, who happens to be a School District employee, decided on his own initiative to intercept and record Dibble's cordless phone conversations. The Executive Director maintains that she did not direct the employee to record the conversation, and she only investigated the matter once she received the School District's mandatory report regarding Dibble's suspension.

However, unlike the exclusionary rule based on the Fourth and Fifth Amendments, statutory suppression sanctions apply to both private and government action. In this respect, the statutory exclusionary remedies found in Minn. Stat. § 626A.11 and 18 U.S.C § 2515 are broader than that provided by the Fourth and Fifth Amendments. In Gelbard v. United States, 408 U.S. 41, 51, 92 S.Ct. 2357, 2363 (1972), the high court explained that the suppression sanction of § 2515 was designed "not only to protect the privacy of communications, but also to ensure that the courts do not become partners to illegal conduct; the evidentiary prohibition was enacted to protect the integrity of court and administrative proceedings." Given these express congressional goals, several courts have rejected arguments by government bodies that the suppression sanction of § 2515 should not apply when the government is merely an innocent recipient, rather than the procurer, of an illegally intercepted communication. See, United States v. Vest, 813 F.2d 477 (1st Cir. 1987); People v. Otto, 2 Cal.4th 1088, 831 P.2d 1178 (Cal. 1992).

In Vest, the Court of Appeals held that there was no exception to the requirement of 18 U.S.C. § 2515 that illegally intercepted communications be excluded from evidence where the government was an innocent recipient of communication illegally intercepted by private party. Id. at 481. Likewise, in United States v. Phillips, 540 F.2d 319, 327 n.5 (8th Cir. 1976), cert. denied, 429 U.S. 1000, 97 S.Ct. 530 (1976), the court rejected the government's threshold claim that 18 U.S.C. § 2515 did not apply where the government was merely the innocent recipient of a conversation recorded by a private detective who was not acting under color of law. The court explained that while the Fourth and Fifth Amendments proscribe only government action, § 2515 is a specific statutory directive that conversations intercepted by private parties are not admissible in any official proceeding. Id. As the California Supreme Court explained in Otto, the use of tainted evidence illegally intercepted by a private party should not be countenanced any more than the use of evidence procured by the government through illegal means. Otto, 2 Cal.4th at 1113.

The Judge finds that, like 18 U.S.C. § 2515, the evidentiary sanction of Minn. Stat. § 626A.11, subd. 1 applies to the unlawful interception of communications by both private parties and government bodies. Nothing in the statutory language of Minn. Stat. ch. 626A limits the evidentiary sanction to only government action. In addition, the School District employee has admitted that he intentionally monitored and intercepted Dibble's cordless phone conversations. In a written statement, the employee explained that when School District officials failed to remove Dibble from the classroom: "I decided to audio tape any conversations I came across that weekend." (Dibble Exhibit 1.) Given this, the School District employee could not be found to have been acting "inadvertently" in order to trigger the statutory exception of Minn. Stat. § 626A.02, subd. 2(g). Alternatively, the fact that the person who intercepted Dibble's conversation is a public employee of the School District and informed School District authorities of his interception of Dibble's conversations lends support to a finding that the employee was acting as an agent of the School District. Therefore, the Judge finds that the evidentiary sanction of Minn. Stat. § 626A.11, subd. 1 applies to the School District employee's intentional interception of Dibble's cordless phone conversation.

Application of Exclusionary Rule to Administrative Proceeding

Another preliminary matter to be addressed is the applicability of the exclusionary rule to administrative proceedings. The exclusionary rule under the Fourth and Fifth Amendments has been found to apply only to administrative proceedings that are "quasi-criminal" in that they provide for punishment such as the forfeiture of property or the loss of public employment. See, Savina Home Industries, Inc. v. Secretary of Labor, 594 F.2d 1358, 1363 (10th Cir. 1979). In Minnesota State Patrol Troopers Ass'n on Behalf of Pince v. State, Dep't of Public Safety, 437 N.W.2d 670 (Minn. App. 1989), rev. denied (May 24, 1989), the Minnesota Court of Appeals held that illegally obtained evidence could not be used against a state trooper in an arbitration hearing regarding his employment termination. The court emphasized the deterrence function of the exclusionary rule and stated: "[W]e cannot allow one government agency to use the fruits of unlawful conduct by another branch of the same agency..." Id. at 676.

It is not clear whether the exclusionary rule under the Fourth or Fifth Amendments would apply in an administrative disciplinary matter as it did in the

administrative employment termination proceeding in Pince.^[2] However, unlike Pince and the cases cited above, the disciplinary matter at hand involves the unlawful interception of a telephone conversation where a specific statutory evidentiary sanction applies. Minn. Stat. § 626A.11, subd. 1 provides that all evidence obtained in violation of Minn. Stat. § 626A.02 is inadmissible “for any purpose in any action”. (Emphasis supplied.) Here the language of the statute clearly and unambiguously states that evidence obtained in violation of ch. 626A shall not be used in any action. Accordingly, the Judge finds that the suppression sanction of Minn. Stat. § 626A.11 applies to the disciplinary proceeding in this matter.

Independent Source Theory

As the Executive Director points out, an exception to the exclusionary rule of the Fourth and Fifth Amendments is evidence obtained from a source independent of the governmental violation. Murray v. United States, 487 U.S. 533 (1988); Nix v. Williams, 467 U.S. 431 (1984); State v. Fakler, 503 N.W.2d 783, 788 (Minn. 1993). That is, if the government can show that the evidence it seeks to admit was discovered by means wholly independent of the illegal activity, the evidence may be admitted under the independent source doctrine. Id. Analogous to the constitutional independent source doctrine, the evidentiary sanction of 18 U.S.C. § 2515 will not be invoked where the evidence sought to be admitted was obtained independent of, and therefore did not “derive from”, the illegal interception. Williams v. Poulos, 11 F.3d 271, 286 (1st Cir. 1993). Likewise, the student’s testimony in the instant matter will not be subject to exclusion under Minn. Stat. § 626A.11, subd. 1, if the Executive Director can demonstrate that her testimony was obtained independent of or did not “result from” the illegally intercepted conversation.

On May 31, 1995, the Executive Director of the Board of Teaching commenced her investigation based on the School District’s report, pursuant to Minn. Stat. § 125.09, subd. 4, that Dibble had been placed on paid leave of absence as a result of immoral conduct. As part of the investigation, counsel for the Board learned that two teachers at Champlin Park High School expressed concerns to School District officials and to Dibble himself about the nature of Dibble’s relationship with the female student. (Johnson Affidavit at 6.) These concerns were expressed prior to the interception of Dibble’s conversation. In fact, when the School District employee who intercepted the telephone conversation informed the principal of Champlin Park High School that he had reason to believe a teacher was “romantically involved” with a student, the principal correctly guessed the identity of the teacher and student involved. (Dibble Exhibit 1.) According to the School District employee, the principal explained that “they [School District officials] had spoken to Larry [Dibble] about this in the past and at the time thought it was something less involved than what [the employee] was claiming.” (Dibble Exhibit 1.)

In addition, when the School District initially notified the Board of Teaching of Dibble’s suspension, it did not provide the Board with the tape of the illegally intercepted telephone conversation. Based on the report of Dibble’s suspension, the Board requested the Attorney General’s Office conduct an investigation, pursuant to Minn. Stat. § 214.10. The investigation was conducted independent of the tape. As part of the investigation, and pursuant to Minn. Stat. § 125.04, subd. 9, an authorization form

was sent to Independent School District No. 11 asking the parents of the student to contact the Attorney General's Office. The student was initially unwilling to cooperate in the investigation of Dibble. (Dibble Exhibit 4.) Only after the passage of several months, did the student change her mind and contact the Attorney General's Office. This change of heart by the student coming almost a year after she was initially contacted by the Attorney General's Office lends further support to a finding that her testimony is the result of her own free will, in response to the Board's investigation and independent of the illegally intercepted conversation.

The Judge finds that the Executive Director has presented sufficient evidence that both the student's identity and testimony originated from a source independent of the illegally intercepted cordless telephone conversation. Therefore the Student's testimony is not subject to suppression as evidence "obtained through or resulting from" the illegally intercepted cordless telephone conversation under Minn. Stat. § 626A.11, subd.1.

Impeachment

While the Executive Director agrees that she may not use the contents of the illegally intercepted telephone conversation in her case in chief pursuant to Minn. Stat. § 626A.11, subd. 1, the Executive Director contends that she may use the tape for possible impeachment purposes. As stated above, Minn. Stat. § 626A.11 provides that evidence obtained in violation of 626A.02 shall be inadmissible "for any purpose in any action, proceeding, or hearing." Similarly, 18 U.S.C. § 2515 provides that no part of the contents of illegally intercepted communications shall be received in evidence. However, despite the unequivocal nature of the federal statutory language, some courts have allowed the government to disclose and use the contents of illegally intercepted communications in order to impeach testifying criminal defendants. See, United States v. Vest, 813 F.2d 477, 484 (1st Cir. 1987); United States v. Caron, 474 F.2d 506, 508 (5th Cir. 1973).

In so doing, these courts have relied upon a passage in the legislative history of Title III which indicates a congressional desire to incorporate the impeachment exception of "search and seizure law" into the Title III framework. See, Williams v. Poulos, 11 F.3d 271, 287 (1st Cir. 1993); citing Caron, 474 F.2d at 510 (interpreting the meaning of S.Rep. No. 1097, 90th Cong., 2d Sess. at 96, reprinted in 1968 U.S.C.C.A.N. 2112, 2184-85).^[3] However, federal courts have declined to recognize an impeachment exception to § 2515 in civil proceedings citing the overriding concern for the protection of privacy which Title III sets out and the fact that § 2515, by its terms, allows for no exceptions. Poulos, 11 F.3d at 287; citing Anthony v. United States, 667 F.2d 870, 879 (10th Cir. 1981) and U.S. v. Wuliger, 981 F.2d 1497, 1506 (6th Cir. 1992). Given the explicit language of Minn. Stat. § 626A.11, subd. 1 which requires that any evidence obtained by the illegal interception of communications be inadmissible "for any purpose in any action" (emphasis supplied), the ALJ finds that the Board may not use the illegally intercepted cordless telephone conversation for any purpose in the disciplinary hearing, including possible impeachment purposes.

Therefore, the ALJ concludes that the interception of Dibble's cordless telephone conversation violated Minn. Stat. § 626A.02 and is inadmissible in the disciplinary action

for any purpose including possible impeachment purposes pursuant to Minn. Stat. § 626A.11, subd. 1. The ALJ believes that this ruling appropriately accomplishes the privacy protection and deterrence objectives of Chapter 626A. The ALJ further finds that the student's testimony was obtained independent of and did not result from the illegally intercepted cordless telephone conversation. Accordingly, the suppression sanction of Minn. Stat. § 626A.11, subd. 1 does not apply and the student's testimony will be admissible in the disciplinary hearing. Dibble's motion to dismiss the disciplinary proceeding is denied.

G.A.B.

^[1] 18 U.S.C. § 2510 was amended in 1994 and the provision excluding cordless telephones from the definition of "wire communication" was stricken. However, unlike Minnesota law, the Federal Act does not specifically cover radio signals from cordless telephones. Case law prior to the 1994 amendment held that the Act did not cover cordless telephones and that users of cordless telephones did not have a justifiable expectation of privacy. See, Tyler v. Berodt, 877 F.2d 705 (8th Cir. 1989).

^[2] In Razatos v. Colorado Supreme Court, 746 F.2d 1429 (10th Cir. 1984), for example, the Tenth Circuit Court of Appeals refused to apply the exclusionary rule to an attorney discipline hearing. The Court explained that disciplinary hearings are sui generis and parties are not entitled to the "full panoply of rights afforded to an accused in a criminal case." Id. at 1435. Furthermore, the court emphasized the state's interest in regulating "officers of the courts". Id.

^[3] In criminal law, evidence obtained in violation of the Fourth Amendment can be used for the limited purpose of attacking a testifying criminal defendant's credibility. Walder v. United States, 347 U.S. 62, 65, 74 S.Ct. 354, 356 (1954).