

State v. Duchow
310 Wis.2d 1; 749 N.W.2d 913 (WI 2008)

Opinion

PATIENCE DRAKE ROGGENSACK, J.

The dispositive issue in this appeal is whether Duchow's tape-recorded statements were "oral communication" as defined in Wis. Stat. § 968.27(12), a part of the Electronic Surveillance Control Law. We conclude that the statements were not "oral communication" because Duchow had no reasonable expectation of privacy in the statements. Because the statements are not "oral communication," they do not fall within the scope of the Electronic Surveillance Control Law; and therefore, the Electronic Surveillance Control Law provides no basis for suppression. Accordingly, we reverse the decision of the court of appeals.

I. BACKGROUND

Duchow, a former public school bus driver,¹ was charged in a criminal complaint with one count of physical abuse of a child, contrary to Wis. Stat. § 948.03(2)(b), and one count of disorderly conduct, contrary to Wis. Stat. § 947.01, as a result of his alleged statements and acts while driving Jacob M. to and from school on April 29, 2003.

<p>¹ Duchow's employer suspended him from duty after the State filed the complaint against him. The circuit court judge subsequently ordered that, while the case is pending, Duchow is prohibited from driving any bus with children aboard.</p>
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Jacob's parents suspected something was amiss on the school bus. They feared Jacob's bus driver, whom they knew was Duchow, might be verbally or physically abusing him. As a result of their concern, Jacob's parents placed a voice-activated recorder in Jacob's backpack before he boarded the school bus on April 29, 2003. Jacob's parents listened to the tape when Jacob returned home from school that day. The tape recorded Duchow making the following statements to Jacob:

- "Stop before I beat the living hell out of you."
- "You'd better get your damn legs in now."
- "Do I have to tape your mouth shut because you know I will."
- "Do you want another one of these?"
- "I'm gonna slap the hell out of you."
- "Do you want me to come back there and smack you?"

The sound of what Jacob's parents believed to be a slap was also recorded. Jacob's parents played the tape before a Milwaukee Police Officer, who investigated the matter. The officer visited Duchow's home and conducted brief interviews with him on three occasions. According to the complaint, during these interviews, Duchow admitted that he had threatened Jacob.

Duchow described the threats he had made as threatening to have Jacob removed from the bus, threatening to slap Jacob, and threatening to tape Jacob's mouth shut. Duchow further admitted that on April 29, 2003 he slapped Jacob twice in the face with an open hand.

Duchow pled guilty to physical abuse of a child and the State dismissed the disorderly conduct charge. Judgment was entered convicting Duchow of physical abuse of a child. Duchow appealed.

We employed reasoning from federal decisions in the past in interpreting the Electronic Surveillance Control Law. In *Smith*, 149 Wis.2d at 95 n. 4, 438 N.W.2d 571, we relied on federal law in deciding that the term, “oral communication,” in Wis. Stat. § 968.27(12) is to be understood as applying to those statements made only under circumstances in which the speaker has a reasonable expectation of privacy (concluding that § 968.27(12) is a “particularized statutory codification of the [F]ourth [A]mendment right.”). In *Smith*, we held that the communication at issue, a cordless telephone conversation, did not constitute an “oral communication” as defined by the Electronic Surveillance Control Law because “objectively there could be no reasonable expectation of privacy” in the speech. *Id.* at 105, 438 N.W.2d 571 (emphasis added).

Reasonable expectation of privacy

An individual has a reasonable expectation of privacy when he or she has both (1) an actual subjective expectation of privacy in the speech, and (2) a subjective expectation that is one that society is willing to recognize as reasonable. *State v. Bruski*, 2007 WI 25, 23, 299 Wis.2d 177, 727 N.W.2d 503; accord *Bond v. United States*, 529 U.S. 334, 120 S.Ct. 1462, 146 L.Ed.2d 365 (2000); *Smith v. Maryland*, 442 U.S. 735, 740, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979); *Katz*, 389 U.S. at 361, 88 S.Ct. 507 (Harlan, J., concurring). Because the parties agree that Duchow has exhibited a subjective expectation of privacy in his speech to Jacob, we focus on whether Duchow’s expectation is one society is willing to recognize as reasonable.

This second component reflects that protections from unreasonable searches and seizures, as described in the Fourth Amendment of the federal constitution as well as Article I, § 11 of the state constitution, must be determined by reference to the “ ‘scope of privacy that a free people legitimately may expect.’ ” *State v. Whitrock*, 161 Wis.2d 960, 973, 468 N.W.2d 696 (1991) (quoting *Rakas v. Illinois*, 439 U.S. 128, 151, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978)). “A reasonable expectation is one [that] is constitutionally ‘justifiable.’ ” *Id.* at 974, 468 N.W.2d 696 (citation omitted). No single factor is determinative in resolving whether one has a reasonable expectation of privacy; rather, we investigate the totality of the circumstances to resolve the question. *Id.* at 973–74, 468 N.W.2d 696.

Recognizing that the law requires an examination of the totality of the circumstances in determining whether an individual has a reasonable expectation of privacy, courts have identified a non-exclusive list of factors to discern whether an individual’s expectation of privacy in his or her oral statements is objectively reasonable. The factors include the following: (1) the volume of the statements; (2) the proximity of other individuals to the speaker, or the potential for others to overhear the speaker; (3) the potential for the communications to be reported; (4) the actions taken by the speaker to ensure his or her privacy; (5) the need to employ technological enhancements for one to hear the speaker’s statements; and (6) the place or location where the statements are made. See, e.g., *Kee*, 247 F.3d at 213–15.

The relevant factors will vary, depending on the facts each case presents. Here, we conclude that the place or location where the statements were made and the potential for the statements to be reported are the most significant factors.²

In identifying these two factors as most relevant, we do not diminish the importance of the remaining factors in other contexts. However, they are of less relative importance under the facts presented here. Nonetheless, many of these factors cut against Duchow. First, the volume of Duchow's statements is relatively less important because Duchow and Jacob were the only individuals on the school bus when Duchow made the statements at issue. Although there is no evidence that others were present to overhear Duchow's statements, Duchow may fairly be said to have shouted at Jacob.

Second, the record does not indicate that Duchow took any specific measures to ensure that his statements remained private. Finally, although an electronic device recorded Duchow's statements, nothing in the record indicates that any "technological enhancements" were needed to do so.

We begin by considering the place where Duchow spoke. Duchow and Jacob were on a public school bus being operated to transport children to school. Duchow was an employee of the school district and Jacob was a grade school pupil. Courts have held that an individual-employee's expectation of privacy is diminished in places that the individual shares with others, as compared with places retained for his or her exclusive use. *Plock v. Bd. of Educ. of Freeport Sch. Dist.* No. 145, 545 F.Supp.2d 755 (N.D.Ill.2007); see also, *State v. McLellan*, 144 N.H. 602, 744 A.2d 611 (1999) (holding that school janitor did not have a reasonable expectation of privacy in public school classroom, as it was open to students and staff and was not his "personal space").

In *Plock*, a group of teachers filed suit against their school district after the district proposed installing audio and video recording equipment in classrooms as a result of allegations that students were being abused. *Plock*, 545 F.Supp.2d at 755-56. The court held that the teachers did not have a reasonable expectation of privacy in their classrooms. *Id.* at 758. It reasoned as follows:

A classroom in a public school is not the private property of any teacher. A classroom is a public space in which government employees communicate with members of the public. There is nothing private about communications which take place in such a setting. Any expectations of privacy concerning communications taking place in ... classrooms such as those subject to the proposed audio monitoring in this case are inherently unreasonable and beyond the protection of the Fourth Amendment. *Id.*

School bus drivers endure a similarly diminished expectation of privacy inside the school buses they operate. *Goodwin v. Moyer*, 549 F.Supp.2d 621, No. 3:CV-05-781, 2006 WL 839342 (M.D.Pa.2006). In *Goodwin*, a school bus driver sued various school district officials, claiming that the installation of a video camera on his school bus invaded his privacy. *Id.* at 625-26, 2006 WL 839342 at 1-2. The court held that the presence of a video camera did not violate the bus driver's reasonable expectation of privacy. *Id.* at 633, 2006 WL 839342 at 9. In so holding, the court reasoned that society, as well as the government, retains an interest in ensuring that the children and the bus driver alike are protected from "misdeeds" against each other. *Id.* In addition, the camera presented a minor intrusion because a school bus is not a private space; rather, it is a "public conveyance" in which the bus driver is "surrounded by others and in view of the public through the bus's windows." *Id.*

We are persuaded by the reasoning of *Plock* and *Goodwin*: (1) The bus Duchow operated was not his personal space; nor did it become his personal property because he operated it; (2) the bus was being operated to convey public school students when the statements were made; (3) Jacob was a public school student; and (4) the bus had windows through which Duchow and Jacob could be seen.

The totality of the circumstances here includes more than a public place; it also includes statements that are likely to be reported because they are threats to injure the person to whom the statement was made.

A person's reasonable expectation of privacy is compromised when he or she knowingly exposes statements to others, rather than keeping them to himself or herself. *Longoria*, 177 F.3d at 1182 (citing *Katz*, 389 U.S. at 361, 88 S.Ct. 507 (Harlan, J., concurring)). Moreover, a subjective expectation of privacy is not reasonable when the words spoken are ones the hearer is likely to report, such as threats to injure the person to whom the statement was made. *Id.* at 1183; see also, *United States v. White*, 401 U.S. 745, 752, 91 S.Ct. 1122, 28 L.Ed.2d 453 (1971) ("Inescapably, one contemplating illegal activities must realize and risk that his companions may be reporting to the police.")

Our review of the totality of the circumstances presented here leads us to conclude that Duchow had no reasonable expectation in the privacy of his threats and abuse of Jacob on the school bus. The school bus was public property, being operated for a public purpose. The statements Duchow seeks to protect were threats directed at a child while the child was being transported to school. Because Duchow threatened Jacob, Duchow engaged in speech that was likely to be reported. Duchow assumed the risk of disclosure. Accordingly, we conclude that Duchow's abusive speech had no reasonable expectation of privacy attendant to it. Therefore, his threats to Jacob are not "oral communication" within the meaning of Wis. Stat. § 968.27(12).