

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 793 Interception of Wire, Oral, or Electronic Communications

SPONSOR(S): Criminal Justice Subcommittee, Joseph

TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	10 Y, 3 N, As CS	Frost	Hall
2) Justice Appropriations Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

In Florida, intentionally intercepting an oral communication, commonly known as wiretapping, is generally a third degree felony, with limited exceptions. For example, it is not a crime for a person to intercept an oral communication if:

- All parties to the communication consent to the interception; and
- The person is a law enforcement officer or a person acting under the direction of a law enforcement officer and:
 - He or she is a party to the communication;
 - One of the parties to the communication has given prior consent to such interception and the purpose of such interception is to obtain evidence of a criminal act.
- The person is a child under 18 years of age and:
 - He or she is a party to the communication; and
 - Has reasonable grounds to believe the recording will capture a statement by another party to the communication that the other party intends to commit, is committing, or has committed an unlawful sexual act or act of physical force or violence against the child.

A court may prohibit a person from contacting another person by granting a petition for an injunction or entering a no contact order in a criminal case. Injunctions are available to victims of domestic violence, repeat violence, sexual violence, dating violence, and stalking. Violating a protective injunction is generally a first degree misdemeanor, however, a person with two or more prior convictions for violating an injunction who subsequently commits another violation against the same victim, commits a third degree felony. There may or may not be a criminal case associated with the allegations serving as the basis for an injunction, but even without an injunction, a court may order a criminal defendant to have no contact with a victim. Violating a no contact order may cause revocation of bond, contempt of court charges, violation of probation, or, in the case of domestic violence, additional criminal charges.

An illegally intercepted oral communication cannot be used as evidence in any trial, hearing, or other proceeding. As such, a victim protected under an injunction or court order may not be permitted to intercept and record unlawful contact received from a person whom he or she has obtained an injunction or court order against, and such recording may not be used to evidence a violation of such injunction or court order.

CS/HB 793 makes it lawful for a person to intercept and record a communication he or she receives in violation of an active temporary or final injunction for repeat violence, sexual violence, dating violence, domestic violence, or any other court-imposed prohibition of conduct toward the person. The bill allows a person to provide such a recording only to law enforcement or a court for the limited purpose of proving a violation of an injunction or court order.

The bill may have a positive indeterminate impact on prison and jail beds by expanding the means by which a person may prove a violation of an injunction or other court order prohibiting contact.

The bill provides an effective date of July 1, 2020.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Wiretapping

In Florida, intentionally intercepting¹ an oral communication,² commonly known as wiretapping, is generally a third degree felony,³ with limited exceptions. For example, it is not a crime for a person to intercept an oral communication if:

- All parties to the communication consent to the interception;⁴ and
- The person is a law enforcement officer or a person acting under the direction of a law enforcement officer and:
 - He or she is a party to the communication;
 - One of the parties to the communication has given prior consent to such interception and the purpose of such interception is to obtain evidence of a criminal act.⁵
- The person is a child under 18 years of age and:
 - He or she is a party to the communication; and
 - Has reasonable grounds to believe the recording will capture a statement by another party to the communication that the other party intends to commit, is committing, or has committed an unlawful sexual act or act of physical force or violence against the child.

The penalty for wiretapping may be decreased to a misdemeanor⁶ under the following circumstances:

- The person has no prior wiretapping offenses;
- The wiretapping was not done for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain; and
- The intercepted communication was a radio communication that was not scrambled, encrypted, or transmitted using modulation techniques intended to preserve the privacy of such communication.⁷

An oral communication that is intercepted illegally cannot be used as evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority or political subdivision of the state.⁸ When a communication has been unlawfully intercepted, an aggrieved party may move to suppress the contents of the interception or any evidence derived from it.⁹ However, not all wiretapping is subject to exclusion. Florida only protects oral communications by a person exhibiting an expectation of privacy under circumstances reasonably justifying their expectation of privacy.^{10, 11}

¹ "Intercept" means the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device. S. 934.02, F.S.

² "Oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation and does not mean any public oral communication uttered at a public meeting or any electronic communication. S. 934.02, F.S.

³ A third degree felony is punishable by up to five years imprisonment and a \$5,000 fine. Ss. 775.082 and 775.083, F.S.

⁴ Section 934.03(2)(d), F.S. Eleven states require the consent of all parties involved in a conversation or phone call before the conversation can be recorded. These laws are sometimes referred to as "two-party" consent laws but, technically, require that all parties to a conversation must give consent before the conversation can be recorded. Digital Media Law Project, *Recording Phone Calls and Conversations*, <http://www.dmlp.org/legal-guide/recording-phone-calls-and-conversations> (last visited Feb. 4, 2020).

⁵ S. 934.03(2)(c), F.S.

⁶ Misdemeanors are classified as either first- or second-degree. A first degree misdemeanor is punishable by up to one year in the county jail and a \$1,000 fine. A second degree misdemeanor is punishable by up to 60 days in the county jail and a \$500 fine. Ss. 775.082 and 775.083, F.S.

⁷ S. 934.03(4), F.S.

⁸ S. 934.06, F.S.

⁹ Ss. 934.06 and 934.09(10)(a), F.S.

¹⁰ *State v. Inciarrano*, 473 So. 2d 1272, 1275 (Fla. 1985).

Protective Injunctions

A court may prohibit a person from contacting another person by granting a petition for an injunction or entering a no contact order in a criminal case. Protective injunctions are available under Florida law for victims of the following:

- Domestic violence;¹²
- Repeat violence;¹³
- Sexual violence;¹⁴
- Dating violence;¹⁵ and
- Stalking.¹⁶

A petitioner for one of these types of protective injunctions must allege in a sworn petition that:

- He or she is a victim of domestic violence; repeat, sexual, or dating violence; or stalking; or
- In the case of a petition for a domestic violence injunction, he or she has reasonable cause to believe he or she is in imminent danger of such violence.¹⁷

As soon as possible after the petition is filed, a court must set a hearing to determine whether an immediate and present danger of the violence alleged exists.¹⁸ Upon finding an immediate and present danger, the court may grant an ex parte temporary injunction for 15 days.¹⁹ A court must then set a hearing with notice to the respondent, and after the hearing with notice, may grant protective injunctive relief as it deems proper, including a permanent injunction.²⁰

A protective injunction may prohibit a person from:²¹

- Going to or being within 500 feet of the petitioner's residence, school, place of employment, or other specified place;
- Committing an act of violence against the petitioner;
- Telephoning, contacting, or otherwise communicating with the petitioner; and
- Knowingly and intentionally coming within 100 feet of the petitioner's motor vehicle.

A court may also require a respondent to surrender a firearm, vacate a shared dwelling with the petitioner, or complete a Batterer's Intervention Program.²² Violation of a protective injunction is generally a first degree misdemeanor,²³ however, a person with two or more prior convictions for violating an injunction who subsequently commits another violation against the same victim, commits a third degree felony.²⁴

No Contact Orders

There may or may not be a criminal case associated with the allegations that serve as the basis for an injunction. However, even without an injunction, a court may order no contact in connection with a

¹¹ A person must show that they have a reasonable expectation of privacy under the circumstances, which "depends on one's actual subjective expectation of privacy as well as whether society is prepared to recognize that expectation as reasonable." *State v. Inciarrano*, 473 So. 2d at 1275.

¹² S. 741.30, F.S.

¹³ S. 784.046, F.S.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ S. 784.0485, F.S.

¹⁷ Ss. 741.30(1)(a), 784.046, and 784.0485, F.S.

¹⁸ Ss. 741.30(5)(a), 784.046, and 784.0485, F.S.

¹⁹ *Id.*

²⁰ S. 741.30(6)(a), 784.046, and 784.0485 F.S.

²¹ S. 784.047, F.S.

²² *Id.*; S. 741.30, F.S.

²³ Ss. 741.31, 775.082, 775.083, 784.047, and 784.0487, F.S.

²⁴ *Supra*, note 3.

criminal case as a condition of pretrial release or as part of a convicted person's sentence. This type of no contact order does not require any proactive steps by, or even the cooperation or consent of, a victim. Violating a no contact order may result in revocation of bond, contempt of court charges, violation of probation, or, in the case of domestic violence, additional criminal charges.²⁵ A no contact order only remains in effect, as long as the pretrial release condition or postsentencing period of supervision applies to the defendant. Thus, once the case is closed and the defendant is no longer subject to any terms and conditions of his or her sentence, the no contact order no longer has effect.

Because an illegally intercepted oral communication cannot be used as evidence in any trial, hearing, or other proceeding, a victim protected under an injunction or court order may not be permitted to intercept and record unlawful contact received from a person whom he or she has obtained an injunction or court order against, and such recording may not be used to evidence a violation of such injunction or court order.

Effect of Proposed Changes

CS/HB 793 makes it lawful for a person to intercept and record a communication he or she receives in violation of an active temporary or final injunction for repeat violence, sexual violence, dating violence, domestic violence, or any other court-imposed prohibition of conduct toward the person. The bill allows a person to provide such a recording only to law enforcement or a court for the limited purpose of proving a violation of an injunction or court order.

The bill provides an effective date of July 1, 2020.

B. SECTION DIRECTORY:

Section 1: Amends s. 943.03, F.S., relating to interception and disclosure of wire, oral, or electronic communications prohibited.

Section 2: Provides and effective date of July 1, 2020.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The bill may have a positive indeterminate impact on prison beds by expanding the means by which a person may prove a violation of an injunction or other court order prohibiting contact.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

The bill may have a positive indeterminate impact on jail beds by expanding the means by which a person may prove a violation of an injunction or other court order prohibiting contact.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. The bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 3, 2020, the Criminal Justice Subcommittee adopted an amendment and reported the bill favorably as a committee substitute. The amendment:

- Required a temporary or permanent injunction or court order prohibiting contact to be active for a recording to be lawful.
- Authorized a recording permitted under the bill to be provided only to law enforcement or a court for the limited purpose of proving a violation of an injunction or court order.
- Made other technical, clarifying, and stylistic changes.

This analysis is drafted to the committee substitute as passed by the Criminal Justice Subcommittee.