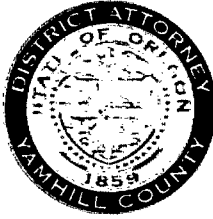


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Prosecution Declined Memo

From: Arild B Doerge
To: Alexander Linstad, Yamhill County Sheriff's Office
Cc:
RE: State v. Carey Ray Martell
Incident No.: 22003416

Charge(s):
Interception of Communications

I have reviewed your report in the above referenced matter. Unlawful Interception of Communications under ORS 165.540(1)(C) generally prohibits the "obtain[ing] or attempt to obtain the whole or any part of a conversation by means of any device, contrivance, machine or apparatus, whether electrical, mechanical, manual or otherwise, if not all participants in the conversation are specifically informed that their conversation is being obtained." However, there are numerous exceptions to this general prohibition. Notably, ORS 165.540(6) provides that the general prohibition of subsection (1)(C) "do[es] not apply to persons who intercept or attempt to intercept with an unconcealed recording device the oral communications that are part of any . . . (a) [p]ublic or semipublic meetings such as hearings before governmental or quasi-governmental bodies, trials, press conferences, public speeches, rallies and sporting or other events . . . or (c) [p]rivate meetings or conferences if all others involved knew or reasonably should have known that the recording was being made."

Facts:

In this case, the following facts are not in dispute. Mr. Martell, a private citizen-journalist who operates an online news website known as the "Yamhill Advocate," attended a public panel discussion regarding a Newberg school-based health center and associated policy issues. At this meeting, Mr. Martell engaged in critical questioning of, among others, Newberg City Councilwoman Elise Yarnell; Mr. Martell and Ms. Yarnell have a history of political disputes, especially related to their political advocacy on social media sites. Immediately after the conclusion of the formal panel discussion and Q&A session, while participants were still in the room milling about and conversing, Ms. Yarnell and Mr. Martell (along with others in the room) engaged in conversation about their political

differences and some of the critical questions that Mr. Martell had just posed to Ms. Yarnell. Using his smart phone in his jacket pocket, Mr. Martell recorded the conversation. Mr. Martell freely admits to recording the conversation and posted it on his YouTube account along with his commentary. Ms. Yarnell maintains that she was unaware that Mr. Martell was recording the conversation.

Mr. Martell claims that Ms. Yarnell was the person who approached him and engaged him in conversation with "at least five people" also listening to the conversation and "around 30 people in the room . . . still at the event space talking about the Wellness Center (which the panel was about) and networking with one another and asking followup questions of public officials who were on the panel." Likewise, Mr. Martell claims that his "smart phone video recorder which I had recording from my coat pocket . . . is [contained in] a very large phone case and is what I would regard as noticeable from my jacket pocket from my left breast." Mr. Martell also points out that there was an NDPD police officer wearing a body camera nearby in addition to prominent video/audio recording equipment that was just used to livestream and record the meeting. Mr. Martell also points out that Ms. Yarnell's "questions to me [were] and extension of the same questions she asked me during the panel event itself, where she criticized the same articles she then discussed during the followup conversation at the event space."

Legal Analysis:

Mr. Martell's recording clearly falls within the general prohibition of ORS 165.540(1)(C) as he never gave specific notice to Ms. Yarnell that he was recording; however, the issue is whether any of the exceptions in ORS 165.540(6) apply. The first question is whether Mr. Martell's recording device was "unconcealed." Mr. Martell maintains that his phone/case is quite large and would have been noticeable from the pocket in which was carrying it at the time, and there is no other evidence to contradict this fact. Likewise, upon viewing of the video recording of the conversation posted on YouTube by Mr. Martell, it is apparent that the camera lens is in view of direct light at least a few times during the recording, giving credence to Mr. Martell's contention that the large phone/case would have been visible at the time he was recording.

The second issue is whether the recording occurred during a "public or semipublic" meeting as described in ORS 165.540(6)(a). The public forum event at issue in this case certainly falls within this description. It is at least arguable that the formal meeting itself had concluded by the time Mr. Martell made his recording of the conversation, however, this is an extremely tenuous argument given the factors that Mr. Martell points out about the conversation occurring immediately after the recorded panel discussion while the participants were still in the room networking and having follow-up discussions of the panel discussion topics. Even though the formal panel discussion had concluded, the participants were mostly all still in the room conversing about the topics of the panel discussion and general networking/conversation; on any reasonable interpretation of the statute, this was still a "public or semipublic meeting" at the point at which Mr. Martell made the recording. At the very least, there is certainly a reasonable doubt as to whether it was such a meeting.

Finally, even if granted for the sake of argument that they were not at a "public or semipublic" meeting as described in ORS 165.540(6)(a), the state cannot prove beyond a reasonable doubt that this situation was not a "[p]rivate meeting[] or conference[]" at which the participants of the conversation at issue "knew or reasonably should have known that the recording was being made" per ORS 165.540(6)(c). As Mr. Martell points

out, not only was this a recorded and livestreamed event with other prominent recording equipment visible in the room, but the state has no evidence to contest Mr. Martell's assertion that his recording device was "quite large and would have been noticeable" in the manner and position he was carrying it. Similarly, Ms. Yarnell is well aware of Mr. Martell's journalistic activities and prior writings about her personally; and given the nature of the public panel discussion event and circumstances surrounding the conversation, the state cannot prove beyond a reasonable doubt that the participants of the conversation should not have reasonably known that the recording was being made.

Conclusion:

Therefore, because Mr. Martell's conduct most likely falls within two separate exceptions to the prohibition on the interception of conversations, the state cannot pursue prosecution in this case. The state cannot prove beyond a reasonable doubt that (1) Mr. Martell concealed his recording device, (2) the recording occurred at a public or semipublic meeting, nor (3) even if granted that it was a private meeting, that the participants in the conversation should not have reasonably known that Mr. Martell was recording.

Evidence in this case can be released.



Arild B Doerge
Deputy District Attorney
Yamhill County
December 22, 2022



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