



STATE OF KANSAS

## Office of the Attorney General

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**Curt T. Schneider**  
Attorney General

May 19, 1977

ATTORNEY GENERAL OPINION NO. 77-165

Mr. Randy M. Hendershot  
Assistant County Attorney  
Geary County Courthouse  
Second Floor  
Junction City, Kansas 66441

RE: Criminal Procedure - Search and Seizure - Authorized  
Eavesdropping

SYNOPSIS: A "wire" unit, part of which is attached to the officer's body and which can pick up oral communications in the officer's presence and then be transmitted to a base unit and recorded, is not considered an oral communication within the scope of K.S.A. 22-2514(2) whereby a court order is required.

\* \* \*

Dear Mr. Hendershot:

You inquire whether a "wire" unit, part of which is attached to the officer's body and which can pick up oral communications in the officer's presence and then be transmitted to a base unit and recorded, is considered an oral communication within the scope of K.S.A. 22-2514(2) whereby a court order is required.

K.S.A. 22-2514(2) defines oral communication as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation." If the communication falls within this definition, a court order under K.S.A. 22-2515 is required before the "wire" unit may be utilized. The main inquiry centers upon whether the person who is talking to an undercover officer could have a reasonable expectation of privacy of his communications to the officer.

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The United States Supreme Court in Katz v. United States, 389 U.S. 347 (1967), held that a reasonable expectation of privacy may exist where a person has exhibited an actual (subjective) expectation of privacy and this expectation is one that society is prepared to recognize as "reasonable." The determination must be based upon, first, whether the observed party has manifested an intent to keep his conversation private, and secondly, whether the manner in which the intent was manifested meets an objective standard of reasonableness. See Note, The Reasonable Expectation of Privacy - Katz v. United States, A Postscriptum, 9 Ind. L.Rev. 468, 471 (1976).

Applying this standard, the Court in a subsequent case, United States v. White, 401 U.S. 745 (1971), upheld the admission of testimony by government agents regarding conversations between the accused and an informant which the agents overheard by monitoring the frequency of a radio transmitter concealed on the informant's person. Police eavesdropping on conversations between an accused and an informant by means of a radio transmitter concealed on the informant's person does not violate the Fourth Amendment anymore than does an informant's reporting on or secretly recording the conversations, neither of which is an unlawful search and seizure. The Court further stated:

"For constitutional purposes, no different result is required if the agent instead of immediately transcribing his conversations with the defendant either (1) simultaneously records them with electronic equipment he is carrying on his person, or (2) carries radio equipment which simultaneously transmits the conversation either to recording equipment located elsewhere or to other agents monitoring the transmitter frequency. If the conduct and revelations of an agent operating without electronic equipment do not invade the defendant's constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the same conversation made by the agent or others from transmissions received from the agent to whom the defendant is talking and whose trustworthiness the defendant necessarily risks."

The majority placed little independent significance upon the presence or absence of electronic surveillance in such cases and instead emphasize the risk that the conversation will subsequently be divulged upon the party speaking. In other words, the defendant does

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not have a "justifiable and constitutionally protected expectation that a person with whom he is conversing will not then or later reveal the conversation to the police." United States v. White, Id. at 749. See United States v. Dray, 535 F.2d 130, 133 (1st Cir. 1976), United States v. Gocke, 507 F.2d 820 (8th Cir. 1974); Note, The Reasonable Expectation of Privacy - Katz v. United States, a postscriptum, 9 Ind. L.Rev. 468, 489 (1976).

The cases above were decided upon the definition of "oral communication" that Kansas embodies within K.S.A. 22-2514(2). Therefore, it is the opinion of this office that the "wire" unit you have described would not constitute an oral communication and would not need a court order pursuant to K.S.A. 22-2515.

Yours very truly,



CURT T. SCHNEIDER  
Attorney General

CTS:TWR:BAR:en