

ROLL CALL TRAINING
FROM NORTH CAROLINA'S 24/7 POLICE
ATTORNEY LAW FIRM

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TOPIC:

THE NORTH CAROLINA ELECTRONICS SURVEILLANCE ACT
ARTICLE 16 OF NCGS 15A

HANDHELD CONCEALABLE AUDIO RECORDERS AND YOU!

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THE SPECIFIC STATUTE:

GS 15A-287

DISCUSSION:

In the mid 1990s a new statute was passed in North Carolina creating Article 16 of Chapter 15A, the **Electronics Surveillance Act**.

While it contains much valuable information directed to a number of specific law enforcement agencies and even to different supervisory levels within those agencies, one section seems to us to clearly apply to you as a law enforcement officer performing routine patrol and investigative duties.

That section is GS 15A-287, *Interception and disclosure of wire, oral, or electronic communications prohibited*.

Section (a) reads as follows:

(a) Except as otherwise specifically provided in this Article, a person is guilty of a Class H felony if, without the consent of at least one party to the communication, the person:

- (1) Willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication.*
- (2) Willfully 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:*
 - a The device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communications; or*
 - b. The device transmits communications by radio, or interferes with the transmission of such communications.*

- (3) *Willfully discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through violation of this Article; or*
- (4) *Willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this Article.*

WHAT FIRST LINE SUPERVISORS SHOULD KNOW:

Now just a quick point or two. First, you need to read this section carefully and have a full understanding of it.

Secondly, **the most important immediate point is this:** if you or officers under your command carry either personal or officially issued hand-held voice recorders, you must be careful where, when and whom you and they record. That means that **if you or your officers are going to record what a victim or suspect says, and are going to do so surreptitiously (secretly) and without the victim's or suspect's consent, you or your officers must be a party to the conversation.** What is being said must be said to you and others in your presence, and you must be in a position to respond to the statements made.

A PARTY TO THE COMMUNICATION:

A **party** is a person concerned or having or taking part in any affair, matter, transaction, or proceeding, considered individually (as from the other party or parties.) As such you and your officers are clearly a party when you respond to an incident or on your own volition seek to investigate a matter you have observed, and are in the presence of witnesses, victims and suspects.

THE LAW:

When you are a party to a conversation, and make an audio recording of it, you may do so without any other party's consent. Your motive may be to ensure a better-written report of the incident, for evidentiary purposes in court, or for your own safety and security (as when alone with a member of the opposite sex.)

So long as you are with another party to a communication and remain a party to that communication, you may let the tape roll. But if you are absent from said conversation for *any* length of time, no matter how small, take the recorder with you or turn it off. You may begin recording whenever you are once again physically present and determine the need to record.

AND HOW IS THIS FOR A BONUS: YOU MAY ALWAYS RECORD ANY CONVERSATION WHEN ALL PARTIES TO THAT CONVERSATION AGREE (ESPECIALLY IN WRITING) THAT THE CONVERSATION MAY BE RECORDED.

And now, let me cite a practical example. Let's say you and another deputy or officer are transporting an arrestee who continues to tell you, unbidden and with no questions on your part, why he committed the crime for which you have arrested him. It is perfectly legal for you or the other officer to secretly turn on a hidden voice recorder and tape all he says. It is okay if one of you exits the vehicle so long as the other remains with the arrestee as a party to the communication. But if you both leave him unattended, you must turn off the recorder or take it with you.

The same would be true if you were transporting the arrestee alone, and you needed to exit the vehicle for a short period of time. As strange as it seems — and I don't make this stuff up — at that point he is the only party to his conversation and you could tape his statements to himself **only** if he consented.

The statute prohibits *any person* from a willful interception of another person's wire, oral or electronic communication. **The crime is a class H felony.** If you did not know before, a felony conviction on your criminal history is generally fatal to law enforcement officer certification.

There are, of course, numerous other criminal acts created by this statute, and you should probably become generally familiar with them. But you are warned to be especially aware of the proper use of the small, hand held voice recorder.

SOMETHING FURTHER:

It may very well be that there are other attorneys with whom you have a relationship (such as a member of your District Attorney's office or in-house counsel in your agency) who may disagree with the advice of this memo. They may point to the fact that it is unreasonable for an arrestee or detainee to believe that he has an "expectation of privacy" in his conversations and communications in a government owned patrol vehicle such that the Fourth Amendment should be understood to protect his communications.

And they may be right, and I might be wrong.

Yes, the arrestee cannot claim his rights were violated by you recording his statements to himself or a co-arrestee while you are absent because those statements are not protected if made where the speaker is in a place the Constitution does not protect. But the cases that hold a patrol vehicle is such a place are now in the minority, and none are from North Carolina courts. And here, in North Carolina, with **GS 15A-287(a)**, he need only say you committed a felony. He need not say you violated his Constitutional rights.

The idea that the Constitution protects places where a person has an "expectation of privacy" comes from a concurring opinion by Justice Harlan in a United States Supreme Court case, *Katz v. US*, decided in 1967. It is good law.

And while the argument can still be made that an arrestee lacks a reasonable expectation of privacy in your patrol car, **GS 15A-287** seems to clearly indicate that you cannot intercept a communication (wire, oral or electronic) unless you are a party to that communication, or the other party or parties consent to the recording, whether in your patrol car, Reece's hot tub, Kevin's office, Greg's house, or even on top of Mount Mitchell. And if you do violate the law, you have committed a felony.

Lawyers often disagree on issues such as this, but at least one Special Deputy Attorney General and the SR&S "think tank" think it far better for you to follow a simple rule: **keep the tape recorder turned off if you are not a party to a communication or conversation.**

And when was the last time you read a sentence with the words "think tank thank" in that order, and they even made sense at the same time?

Coo coo ca-choo, Mrs. Robinson.