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Opinion Committee

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Opinion Committee  
Office of the Attorney General  
P.O. Box 12548  
Austin, Texas 78711

FILE # ML-41109-99  
I.D. # 41109

**RE: Article 16.02 of the Texas Penal Code, and Article 18.20 of the Texas Code of Criminal Procedure.**

To the Opinion Committee Chairman:

I request an opinion construing the above captioned statutes. The fact situation giving rise to this request is as follows.

Increasingly, police agencies are equipping their vehicles with dash-mounted video equipment for video taping criminal scenes that occur in front of the police car. These systems typically have the ability to also record conversations within the car. Some can broadcast any conversations that occur within the patrol car so that the officer, several yards away, can hear on his radio what is being said by the occupants. This equipment can be quietly turned on, so that the occupants of the car are unaware that everything they say is being recorded or broadcasted. Additionally, some agencies have opted to simply equip their patrol cars with a hidden tape or mini-disc recorder, which also has the ability to secretly record any conversations that take place in the police car.

A tactic which is evolving, is to place two or three subjects in the back seat of a patrol car equipped with such a radio/recording device, and then to find some excuse to leave the subjects alone in the patrol car, after quietly turning on the device. This is most commonly used during road-side searches of vehicles.

This tactic frequently results in recording conversations in which the subjects discuss where they have hidden contraband in their vehicle, as well as other statements pointing to their knowing participation in a criminal enterprise. Besides being useful in locating hidden contraband, this evidence can also be used in court to prove criminal knowledge and intent.

The radio broadcasting of the subjects conversation can tip-off the searching officer to any plans the subjects in his patrol car may have to attack him when he returns to the patrol car or the presence of weapons they might have on them. Sometimes drug smuggling operations consist of a vehicle hauling the contraband, with a second vehicle following behind, with armed guards or "enforcers." The secret broadcasting of the search subjects' conversations will sometimes reveal this information. In any of these scenarios the broadcast of the subjects' conversation provides significant additional safety to the listening officer.

At least one major police agency (and I suspect there are others as well), however, has refrained from secretly recording or broadcasting the conversations of suspects who are seated in their patrol cars for fear that such an action would violate Art. 16.02 of the Penal Code. That statute makes it a State Jail Felony offense for one who "intentionally intercepts, endeavors to intercept, or procures another person to intercept or endeavor to intercept a wire, oral, or electronic communication . . ." (Texas Penal Code, Art. 16.02 (b) (1).)

If the police agencies which do not allow surreptitious broadcasting and/or recording of suspects in their patrol cars are mistaken, and such broadcasts/recordings do not violate Art. 16.02 of the Texas Penal Code, they are needlessly refraining from using a highly effective tactic in combating crime--one which can provide significant additional protection to the officer in the field, as well as important evidence for the court. On the other hand, if these agencies are correct, and such broadcasts/recordings are in violation of Art. 16.02, then those agencies which engage in such recordings and broadcasts are committing State Jail Felonies every time they use this tactic.

The specific question which arises, then, is this: does the secret recording or radio broadcasting of suspects' conversations, be they arrested and in custody in the back seat of a police vehicle, or be they unarrested, and voluntarily seated in a police vehicle, violate Article 16.02 of the Texas Penal Code, if no one in the car is aware his conversations are being recorded?

My research reveals no Texas appellate court cases or Attorney General Opinions which interpret this aspect of Art. 16.02 of the Texas Penal Code.

Art. 16.02, Texas Penal Code, used the definitions provided by Art. 18.20 of the Texas Code of Criminal Procedure to define "oral communications," and "intercept." Art. 18.20 Tex. C.C.P. defines "oral communications," thusly: ". . . an oral communication uttered by a person exhibiting an expectation that the communication is not subject to interception *under circumstances justifying that expectation*," (emphasis supplied.) Art. 18.20, Sec. 1 (3) defines "Intercept," thusly: ". . . the aural or other acquisition of the contents of a wire, oral, or electronic communication through the use of an electronic, mechanical, or other device."

Whether or not the conversations of suspects, secretly broadcasted or recorded while they sit in a police vehicle are “oral communications,” covered by Art. 18.20, and thus by 16.02 of the Penal Code, turns on the question of whether there is a justifiable expectation of privacy while one is seated in a police vehicle.

My research reveals that Title III of the Omnibus Crime Control and Safe Streets Act, which governs federal wiretaps, as well as several other states’ wiretap statutes, are worded almost identically to the wording in Art. 18.20 Texas Code of Criminal Procedure. I have found several cases from those jurisdictions which interpret that portion of their wiretap statutes, and in every case those courts held that there is no reasonable expectation of privacy for arrested suspects held in custody in a police vehicle. They have likened the back of a squad car in those situations to being a mobile jail. The courts have long held there is no reasonable expectation of privacy in a jail. See *Hudson v. Palmer*, 104 S.Ct. 3194, 82 L.Ed 2d 393 (U.S. Supreme Court 1984); They thus found that conversations under such circumstances were not “oral communications,” which were protected by their wiretap statutes. Many of these cases cite to other jurisdictions’ authority which they claim came to the same conclusion. See *Matter of K.F. v. Oklahoma*, 797 P.2d 1006, (Okla. Ct. Crim. Appls. 1990); *Brown v. Florida*, 349 So.2d 1196, (Fourth Dist. Ct. Appls. of Florida, 1977); *New Mexico v. Lucero*, 628 P.2d 696, (N.M. Ct.Appls., 1981). I have found no case that held that arrested suspects detained in a police car had a reasonable expectation of privacy, such that their conversations were protected from secret recording.

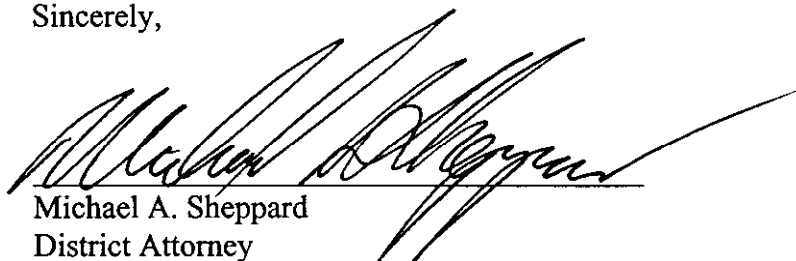
I found several cases that dealt with individuals who were either not suspects at all, or were unarrested suspects, who were seated in a police car while their conversations were secretly recorded. In all cases, the courts held there was no “reasonable expectation of privacy” while sitting in a police vehicle, and therefore their conversations were held to be legally recorded by the police. See *Florida v. Smith*, 641 So.2d 849 (Fla. S.Ct. 1994); *U.S. v. McKinnon*, 985 F.2d 525 (11<sup>th</sup> Cir. 1993); *U.S. v. Clark*, 22 F.3d 799 (8<sup>th</sup> Cir. 1994); *Louisiana v. Hussey*, 469 So.2d 346 ,(La.Ct.App., 1985); *Florida v. Fedorchenko*, 630 So.2d 213 (Fla.App.2 Dist. 1993); *People v. Marland*, 355 N.W.3d 378 (Mich.App. 1984).

I therefore believe that the law is well established that there is no reasonable expectation of privacy in a police vehicle, regardless of whether one is under arrest and in custody, or an invited guest of the police. Because there is no reasonable expectation of privacy in a police vehicle, any conversations held there are not “oral communications,” as defined by Art. 18.20 of the Texas Code of Criminal Procedure. Therefore, surreptitiously recording or broadcasting conversations in a police vehicle does not violate Art. 16.02 of the Texas Penal Code. I strongly urge this Committee to so find, and to issue an opinion instructing the same. It would defy common sense to hold that criminals could consider a police vehicle to be a safe haven for criminal conversations, during which they might discuss where contraband is hidden in their vehicle, or attempt to develop a bogus cover story to mislead police, or might plan to attack a police officer, or might reveal the existence of armed outriders in a second vehicle, and not have these conversations

available to police to protect themselves or to use this evidence against them in court. Police vehicles are publically owned instruments for fighting crime, and no reasonable man would think it a place where such conversations are private, and not subject to broadcasting or recording by police.

I look forward to receiving your opinion at your earliest opportunity. Thank you for your assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael A. Sheppard", written over a horizontal line.

Michael A. Sheppard  
District Attorney  
24<sup>th</sup> Judicial District