

No. 126435

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF
ILLINOIS,

Plaintiff-Appellee,

v.

LAVAIL D. DAVIS,

Defendant-Appellant.

) On Appeal from the Appellate of
) Illinois, Third District, No. 3-19-
) 0272.
)
) There on Appeal from the Circuit
) Court of the Twenty-First Judicial
) Circuit, Kankakee County, Illinois,
) No. 18 CF 486.
)
) The Honorable
) Clark Erickson,
) Judge Presiding.

**BRIEF OF PLAINTIFF-APPELLEE
PEOPLE OF THE STATE OF ILLINOIS**

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TABLE OF CONTENTS

NATURE OF THE CASE	1
ISSUES PRESENTED FOR REVIEW	1
STATEMENT OF JURISDICTION	2
STATEMENT OF FACTS	2
ARGUMENT	4

POINTS AND AUTHORITIES

720 ILCS 5/14-5	4-5
720 ILCS 5/14-1	4
720 ILCS 5/14-2	4
<i>People v. Gervasi</i> , 89 Ill. 2d 522 (1982).....	5
I. Standards of Review.....	5
<i>People v. Burns</i> , 2016 IL 118973.....	5-6
<i>People v. Hardman</i> , 2017 IL 121453	6
II. The Informant’s Testimony and Video Recording Are Admissible Under Section 14-5.....	6
<i>People v. Burge</i> , 2021 IL 125642.....	6
720 ILCS 5/14-2	6
720 ILCS 5/14-4	6
720 ILCS 5/14-1	6-7
720 ILCS 5/14-3	7-8
<i>People v. Gervasi</i> , 89 Ill. 2d 522 (1982).....	8
720 ILCS 5/14-5	8
A. The informant’s testimony and the silent video recording were not obtained in direct violation of the eavesdropping statute.	9

720 ILCS 5/14-1	9
720 ILCS 5/14-2	9
<i>People v. Gervasi</i> , 89 Ill. 2d 522 (1982)	9
B. The informant’s testimony and the silent video recording were not derived from the improper audio recording.	10
<i>People v. Gervasi</i> , 89 Ill. 2d 522 (1982)	10-14
<i>Wong Sun v. United States</i> , 371 U.S. 471 (1963)	10
<i>People v. Harris</i> , 2020 IL App (3d) 190504	11-12
C. Admission of the informant’s testimony and the video recording do not violate the purpose of the eavesdropping statute.	14
<i>People v Monoson</i> , 75 Ill. App. 3d 1 (1st Dist. 1979)	14
<i>People v. Gervasi</i> , 89 Ill. 2d 522 (1982)	14-15
<i>People v. Burge</i> , 2021 IL 125642	15
<i>People v. LeFlore</i> , 2015 IL 116799	15
<i>Hudson v. Michigan</i> , 547 U.S. 586 (2006)	15
<i>United States v. Davis</i> , 564 U.S. 229 (2011)	15
720 ILCS 5/14-1	15
720 ILCS 5/14-2	15
D. <i>People v. Cunningham</i> is inapposite.	16
<i>People v. Cunningham</i> , 2012 IL App (3d) 100013	16
<i>People v. Nieves</i> , 92 Ill.2d 452 (1982)	16

E. The appellate court did not improperly shift the burden of proof to defendant.....	16
<i>People v. Gervasi</i> , 89 Ill. 2d 522 (1982).....	16-17
Conclusion.....	18
Certificate of Compliance	
Certificate of Filing and Service	

NATURE OF THE CASE

Defendant Lavail Davis was charged with unlawful delivery of a controlled substance. C12.¹ Before trial, defendant filed a motion to suppress a video recording of, and witness testimony regarding, the drug transaction, alleging that they were barred as illegal eavesdropping pursuant to section 14-5 of the Criminal Code (Code) (720 ILCS 5/14-5). C17. The Circuit Court of Kankakee County granted defendant's motion, C22, and the People filed a certificate of impairment and appealed pursuant to Rule 604(a), C36-37. The Illinois Appellate Court, Third District, reversed the circuit court's judgment and held that the video recording and witness testimony did not violate the eavesdropping statute and did not derive from eavesdropping activity and were therefore admissible. A17-20. Defendant appeals that judgment. No question is raised on the pleadings.

ISSUE PRESENTED

Whether section 14-5 of the Code (720 ILCS 5/14-5), which bars admission of an audio recording obtained by unauthorized eavesdropping, also bars the independent testimony of a participant to the conversation and a silent video recording of defendant's actions.

¹ Citations to the common law record, the report of proceedings, defendant's brief, and the appendix to defendant's brief appear as "C__," "R__," "Def. Br. __," and "A__," respectively.

JURISDICTION

Jurisdiction lies under Supreme Court Rules 315 and 612(b)(2). On November 18, 2020, this Court allowed defendant's petition for leave to appeal. *People v. Davis*, No. 126435 (Nov. 18, 2020).

STATEMENT OF FACTS

Defendant was charged with unlawful delivery of a controlled substance after a confidential informant secretly recorded a drug transaction with him. C12; R4-5.

Trial Court Proceedings

Defendant moved to suppress the "audio and video recorded conversation" as illegal eavesdropping, pursuant to 720 ILCS 5/14-5. C17. At a hearing on defendant's motion, the parties agreed to the following pertinent facts. *See* R11-13. Pursuant to section 14-3(g) of the Code (720 ILCS 5/14-3(g)), the Kankakee County State's Attorney validly authorized police officers to secretly record a controlled drug purchase between a confidential informant and an individual other than defendant. R11. As part of the investigation of that targeted individual, the informant stood outside the target's home while wearing a video recording device. R11-12. When it became clear that the target was not present, the informant walked to the porch of a different house where he participated in and recorded the charged drug transaction with defendant. R12-13.

At the hearing on defendant's motion to suppress, the People conceded that the audio portion of the recording was barred under section 14-5, but argued that the video portion of the recording and the informant's testimony regarding the content of the conversation were not barred. R8. The trial court granted defendant's motion and barred the audio portion of the recording as illegal eavesdropping. C22; R35-36. The court further stated that it had reviewed the audio and video recording and noted that the informant and defendant talked prior to drugs being visible. R35-36. Thus, the court excluded the video recording and any testimony by the informant regarding the transaction with defendant as "fruit of the poisonous tree." C22.

The People filed a certificate of impairment and appealed. C36-37.

Appellate Proceedings

On appeal, the People argued that the trial court erroneously barred the video portion of the recording and the informant's testimony. A17. Specifically, the People contended that the video recording and the informant's testimony based upon his personal knowledge were not within the scope of section 14-5 of the Code, and that neither derived from the unauthorized audio recording. *Id.*

The appellate majority held that neither section 14-5 nor the fruit of the poisonous tree doctrine barred admission of the video recording or the informant's testimony because they did not derive from the illegal

eavesdropping. A18. The majority reasoned that the plain language of section 14-5 bars only evidence that results from illegal eavesdropping: either the audio recording itself or evidence that is obtained through the use of the improper recording. *Id.* Because the unauthorized audio recording occurred concurrently with the video recording and the informant's own participation in the transaction, the majority explained, the audio recording was not the source of either the video recording or the informant's potential testimony. *Id.* Accordingly, the appellate court reversed the trial court's judgment and remanded. A20.

ARGUMENT

The parties agree that the audio recording of defendant's transaction with the confidential informant violated the eavesdropping statute and was therefore inadmissible pursuant to section 14-5 of the Code. As the appellate court correctly determined, however, the informant's proposed testimony and the silent video recording did not violate the statute, and their admission thus is not barred by section 14-5.

As explained below, sections 14-1 and 14-2 of the Code proscribe the use of an eavesdropping device to surreptitiously record oral communications without the consent of all parties to a conversation. 720 ILCS 5/14-1; 720 ILCS 5/14-2. The informant's testimony regarding his conversation with defendant is not prohibited by the eavesdropping statute. And the video recording, which captured only defendant's actions during the conversation,

did not record the content of defendant's oral communications. Accordingly, neither violated the eavesdropping statute.

Additionally, neither the informant's testimony nor the video recording was derived from the inadmissible audio recording and, consequently, should not be excluded under section 14-5 as fruit of the poisonous tree. The informant's testimony was derived from his own personal knowledge of the conversation and was therefore admissible under *People v. Gervasi*, 89 Ill. 2d 522 (1982). Similarly, the audio recording did not influence or create the video recording such that the video recording can be said to be derived from the audio recording.

Finally, admission of the informant's testimony and the video recording is not contrary to the purpose of the eavesdropping statute, as neither infringes upon the limited privacy right protected by the statute.

I. Standards of Review

This Court's review is de novo. A trial court's findings of fact when ruling on a motion to suppress may be reversed only if they are against the manifest weight of the evidence. *People v. Burns*, 2016 IL 118973, ¶ 15. However, where, as here, the pertinent facts are undisputed, the trial court's ultimate ruling is a legal issue that is reviewed de novo. *Id.* ¶¶ 15-16.

Defendant incorrectly argues that because the trial court found that he and the informant engaged in a conversation before defendant produced the drugs, the trial court's ultimate holding rests on a factual finding that can be

reversed only if it was “manifestly erroneous.” Def. Br. 10. But none of the facts in this case are in dispute. Indeed, the People have never disputed that defendant and the informant spoke before defendant produced the illegal drugs. So the question before this Court is whether the trial court’s ultimate ruling, applying section 14-5 of the Code to the undisputed facts, was correct. That is a question of law that is reviewed de novo. *Burns*, 2016 IL 118973, ¶¶ 15-16.

Questions of statutory interpretation are also reviewed de novo. *People v. Hardman*, 2017 IL 121453, ¶ 19.

II. The Informant’s Testimony and Video Recording Are Admissible Under Section 14-5.

Both the informant’s prospective testimony regarding the transaction based upon his personal knowledge and the silent video recording are admissible under the plain language of section 14-5. When construing a statute, a court’s primary objective “is to ascertain and give effect to the intent of the legislature and . . . the best indication of that intent is the statutory language itself, giving it its plain and ordinary meaning.” *People v. Burge*, 2021 IL 125642, ¶ 20. Where the statute’s plain language is unambiguous, courts should not resort to aids of statutory construction. *Id.* Additionally, courts “may not depart from a statute’s plain language by reading into it exceptions, limitations, or conditions the legislature did not express.” *Id.*

A violation of the eavesdropping statute occurs, in relevant part, when an individual intentionally uses an eavesdropping device, in a surreptitious manner, to record all or part of a private conversation without the consent of all parties to the private conversation. 720 ILCS 5/14-2(1)-(2); 720 ILCS 5/14-4. Section 14-1 of the Code defines “eavesdropping device” as “any device capable of being used to hear or record oral conversation or intercept, or transcribe electronic communications.” 720 ILCS 5/14-1. It defines “private conversation” as “any oral communication between 2 or more persons . . . when one or more of the parties intended the communication to be of a private nature under circumstances reasonably justifying that expectation.” *Id.*

The statute provides an exemption for law enforcement officers investigating certain crimes, such as delivery of a controlled substance. *See* 720 ILCS 5/14-3. Where there is reasonable cause to believe that recording an individual will produce inculpatory statements concerning a qualifying offense, the eavesdropping statute exempts law enforcement officers who first obtain authorization to record from the State’s Attorney. 720 ILCS 5/14-3(q)(1). To invoke the exception, an officer must make a written or verbal² request to the State’s Attorney, setting forth whatever information the State’s Attorney deems necessary to support the officer’s belief that a

² If the officer makes a verbal request, the State’s Attorney must create a written memorialization of the request. 720 ILCS 5/14-3(q)(2).

specified individual will commit a qualifying crime. 720 ILCS 5/14-3(q)(2). The State's Attorney's approval must be written and, along with the request, be filed with the clerk of the circuit court by the following business day after the eavesdropping is completed. 720 ILCS 5/14-3(q)(3)(d). Any approval must be limited to recordings made by a specified individual working at the direction of law enforcement within 24 hours of the approval. 720 ILCS 5/14-3(q)(3). Additionally, any approval is "subject to review by the Chief Judge or his or her designee as deemed appropriate by the court." *Id.*

Where, as here, the individual recording the conversation is also a party to the conversation, no constitutional rights are implicated. *Gervasi*, 89 Ill. 2d at 527 ("Since one party to the conversations had consented to the monitoring, neither the Federal Constitution, nor the constitution of this State was offended."). However, section 14-5 of the Code bars admission of "[a]ny evidence obtained in violation of" the eavesdropping statute in any civil or criminal trial. 720 ILCS 5/14-5. Section 14-5 also incorporates the "fruit of the poisonous tree" doctrine, and thus precludes use of both the improperly recorded conversations themselves and any evidence derived from any improperly recorded conversations. *See Gervasi*, 89 Ill. 2d at 528-29.

A. The informant's testimony and the silent video recording were not obtained in direct violation of the eavesdropping statute.

The informant's testimony and the video recording do not directly violate the eavesdropping statute.³ The eavesdropping statute bars only the surreptitious recording or interception of an oral or electronic conversation. 720 ILCS 5/14-1; 720 ILCS 5/14-2. The informant's own recollection and recounting of a conversation in which he was a participant, and in which defendant voluntarily engaged, is not eavesdropping. *Gervasi*, 89 Ill. 2d at 531 ("The eavesdropping statute does not protect a wrongdoer's misplaced belief that a person to whom he voluntarily confides will not thereafter properly reveal his wrongdoing."). And defendant conceded below that the video recording, standing alone, did not violate the statute. A18 n1. Defendant was correct: the silent video recording does not capture the content of defendant's oral communication, which would be protected under the statute; it captures only defendant's actions during the conversation, which are not. *See* 720 ILCS 5/14-1. Accordingly, neither the prospective testimony nor the video recording is barred by section 14-5 as a direct violation of the eavesdropping statute.

³ As in the trial and appellate court, the People concede that the audio recording is inadmissible because defendant was not the individual described in the State's Attorney's authorization.

B. The informant's testimony and the silent video recording were not derived from the improper audio recording.

Nor are the informant's testimony or the video recording derived from the improper audio recording.

This Court's opinion in *Gervasi* is instructive. There, police officers and the State's Attorney planned to monitor a phone call between a police officer and the defendant, anticipating that the defendant would offer a bribe. *Gervasi*, 89 Ill. 2d at 524. While the officer and the defendant talked on the phone, a court reporter secretly listened on a modified extension phone and transcribed their conversation. *Id.* The surreptitious use of the extension phone to transcribe the calls was not authorized under the eavesdropping statute. *Id.* at 526-27.

On appeal, this Court considered whether the officer's testimony about the phone calls was barred by the fruit of the poisonous tree doctrine as incorporated through section 14-5 of the Code. *Id.* at 527-32. This Court explained that the doctrine bars only evidence that is derived from a violation of the eavesdropping statute. *Id.* at 528. In other words, challenged evidence is inadmissible only if it was obtained by "exploitation of th[e] illegality." *Id.* (quoting *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963)). The Court held that the officer's testimony regarding the conversations was admissible because it was not derived from any illegal action. *Id.* at 529. Although the officer was part of the investigative team that eavesdropped on the defendant, the officer's personal knowledge of the conversation derived from

his direct participation in the conversation. *Id.* By contrast, the court reporter who transcribed the telephone conversation could not testify because he or she knew the contents of the conversation only through surreptitiously listening in, *i.e.*, through illegal eavesdropping. *See id.* at 527.

Under a straightforward application of *Gervasi*, the informant's prospective testimony in this case is admissible. The informant's knowledge of his conversation with defendant, and therefore his testimony, was not derived from the improper audio recording because he did not learn of the conversation's content through listening to the surreptitiously-made recording. Thus, as in *Gervasi*, the informant's testimony is admissible because it derives from his own personal knowledge, gained as a participant in the conversation with defendant.

In an attempt to distinguish *Gervasi*, defendant and the dissent below echo the reasoning of *People v. Harris*, 2020 IL App (3d) 190504. *See* Def. Br. 15. In *Harris*, decided two months after the appellate court's decision in this case, a separate panel of the Third District also considered section 14-5. There, the People similarly conceded that an audio recording made of a drug transaction by a confidential informant violated the eavesdropping statute, but argued that the contemporaneous video recording and informant's testimony were admissible. *Harris*, 2020 IL App (3d) 190504, ¶ 14. The majority in *Harris* held that section 14-5 required the suppression of both the video and the informant's testimony about the conversation because they

were “part of” the illegal recording activity. *Id.* ¶ 27.⁴ Distinguishing *Gervasi*, the majority reasoned that the officer in that case was permitted to testify because he was not the individual using the eavesdropping device and his conversation was not motivated by the eavesdropping scheme. *See id.* ¶ 30.

But *Harris*, defendant, and the dissent below misapprehend *Gervasi*’s holding. The Court did not bar the court reporter’s testimony as a sanction for the reporter’s actions as the individual in physical control of the eavesdropping device. Indeed, if the Court’s holding in *Gervasi* had relied solely on culpability and motivation, the officer’s testimony would have been equally blameworthy because he was an equal participant in the coordinated plan —by the police, the State’s Attorney, and the court reporter — to eavesdrop on the defendant. *See* 89 Ill. 2d at 524. Instead, the Court recognized, admissibility ultimately turns on how the proposed witness came by his or her knowledge of the evidence. The court reporter’s testimony was barred because he or she knew of the conversation’s contents solely as a result of the use of the eavesdropping device. *Id.* at 527. By contrast, the officer’s testimony was admissible because his knowledge of the conversation’s contents resulted from direct participation in the conversation, notwithstanding that he was a participant in the eavesdropping plan. *Id.* at

⁴ The majority in *Harris* acknowledged that its opinion contradicted the majority opinion in this case. 2020 IL App (3d) 190504, ¶ 28.

529-31. In this case, like the officer in *Gervasi*, although the informant was concurrently involved in the surreptitious recording of the conversation, his knowledge of its contents derived from his participation in the conversation and not from listening to the audio recording or otherwise as a result of the use of the eavesdropping device. Accordingly, the informant's prospective testimony was not derived from the improper eavesdropping and is not barred by section 14-5.

For similar reasons, the video recording did not derive from the improper audio recording: the audio recording did not influence the video recording, and the People did not exploit anything learned from the audio recording when making the video recording. In fact, the audio recording could not have been the cause or source of the video recording because both occurred simultaneously. Consequently, the video recording was not derived from the illegal eavesdropping and is not barred by section 14-5.

Moreover, contrary to defendant's assertion, the People were not required to prove that the informant "would have initiated a drug transaction regardless of whether he had the recording device on his person or not." *See* Def. Br. 12. This Court rejected a similar argument in *Gervasi* and noted that admissibility is not determined by such a "but for" test. 89 Ill. 2d at 528. Indeed, such a rule would lead to absurd results. For instance, if, after a police officer illegally searched a home, he witnessed a murder while driving back to the station, his testimony regarding the murder would not be

inadmissible due to the fact that he would not have been driving in the area had he not conducted the illegal search of the home. The eavesdropping statute does not require this illogical outcome. Rather, under the statute, the relevant question is whether the challenged evidence is *derived from* the illegal activity. *Id.* The illegal activity in this case was not the informant's act of approaching defendant or engaging defendant in voluntary conversation. The only illegal act was the unauthorized recording of defendant's oral communication with the informant. Because neither the informant's testimony nor the video recording derives from the audio recording, both are admissible.

C. Admission of the informant's testimony and the video recording do not violate the purpose of the eavesdropping statute.

Contrary to defendant's suggestion, admission of the informant's testimony and the silent video recording would not be contrary to the purpose of the eavesdropping statute or improperly "reward[]" the People. *See* Def. Br. 9-10. The purpose of the eavesdropping statute is to "prevent unwarranted intrusions into an individual's privacy." *People v Monoson*, 75 Ill. App. 3d 1, 8 (1st Dist. 1979). Again, however, where the individual recording a conversation is a party to the conversation, no constitutional right to privacy is implicated. *Gervasi*, 89 Ill. 2d at 527. Therefore, one must look to the language of the statute itself to determine the extent of its privacy protections. And, when doing so, one must keep in mind that exclusion of evidence "exact[s] a heavy toll on both the judicial system and society at large,

because it almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence, and its bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment.” *People v. LeFlore*, 2015 IL 116799, ¶ 23 (internal quotations omitted). Therefore, exclusion of evidence is a “last resort,” *id.* (quoting *Hudson v. Michigan*, 547 U.S. 586, 591 (2006)), and applied only to the extent that “the deterrent benefits outweigh its heavy costs,” *id.* (citing *United States v. Davis*, 564 U.S. 229, 237 (2011)).

Here, the eavesdropping statute plainly identifies its scope: it protects individuals’ oral and electronic communications from secret recording and interception. *See* 720 ILCS 5/14-1; 720 ILCS 5/14-2. Under the statute, then, defendant’s privacy was not violated by the informant’s act of approaching him and initiating a consensual conversation. And the informant’s recounting of that conversation similarly would implicate no privacy right protected by the statute. *Gervasi*, 89 Ill. 2d at 531. Finally, the silent video recording violated no privacy right under the statute. The video recording depicts only the voluntary actions of defendant during his drug transaction. Those actions were equally visible to the informant and, presumably, to any member of the public who viewed the porch on which defendant was standing. Thus, the only privacy right implicated in the course of defendant’s interaction with the informant was his statutory right not to have his words

secretly recorded. Suppression under the statute therefore is properly cabined to evidence that violated that right: the audio recording.

D. *People v. Cunningham* is inapposite.

People v. Cunningham, 2012 IL App (3d) 100013, cited by defendant, see Def. Br. 8-9, is inapplicable. In *Cunningham*, the appellate court noted that not every violation of the eavesdropping statute requires suppression of an audio recording. 2012 IL App (3d) 100013, ¶ 22. The court then set forth three factors to weigh when determining if a violation is serious enough to require suppression. *Id.* (citing *People v. Nieves*, 92 Ill.2d 452, 458-59 (1982)). Here, the People do not argue that a violation of the eavesdropping statute was too minor to warrant suppression. Indeed, the People concede that the audio recording violated the statute and is inadmissible. The only issue before the Court is whether the informant's prospective testimony and the silent video recording were "obtained in violation of" the statute and, therefore, are also inadmissible. See 720 ILCS 5/14-5. Thus, *Cunningham* is inapposite.

E. The appellate court did not improperly shift the burden of proof to defendant.

Finally, the appellate court did not improperly shift the burden of proof to defendant; defendant simply never met his initial burden of proof. To justify suppression under section 14-5, defendant must establish a primary illegality and show *a connection between* the illegality and the evidence he seeks to suppress as fruit of the poisonous tree. *Gervasi*, 89 Ill. 2d at 532-33.

If, and only if, defendant establishes such a connection does the burden shift to the People to establish by clear and convincing evidence that the challenged evidence comes from an independent source. *Id.* As in *Gervasi*, defendant has failed to show the requisite causal connection between the improper audio recording and the informant's testimony or the silent video recording. *See id.* Regardless, even if the burden had shifted to the People, for the reasons stated above, the undisputed facts clearly show that the informant's prospective testimony and the silent video are not derived from the audio recording, and thus stem from an independent source.

CONCLUSION

This Court should affirm the appellate court's judgment.

April 6, 2021

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 18 pages.

/s/ Nicholas Moeller
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PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to 735 ILCS 5/1-109, the undersigned certifies that the statements set forth in this instrument are true and correct. On April 6, 2021 the foregoing **Plaintiff-Appellee's Brief** was filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, which provided notice to the following registered e-mail addresses:

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