No. 126435

IN THE

SUPREME COURT OF ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS)	Appellate Court, Third Judicial
)	District, Case No. 3-19-0272
)	
Respondent – Appellee)	
)	
-vs-)	Twenty-First Circuit, Kankakee.
)	County, IL, Case No. 18 CF 486
LAVAIL DAVIS)	Honorable Clark Erickson
)	Trial Judge Presiding,
Petitioner – Appellant)	

BRIEF AND ARGUMENT FOR PETITIONER-APPELLANT

Bart E. Beals
150 N. Michigan, Suite 2800
Chicago, Illinois 60601
(312) 324-4892
(312) 624-7701 Fax
bealslaw@gmail.com

COUNSEL FOR PETITIONER-APPELLANT

ORAL ARGUMENT REQUESTED

E-FILED
1/27/2021 1:46 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

TABLE OF CONTENTS

Page

POINTS AND AUTHORITIES

I. The Appellate Court Erred by Allowing the Admission of The CI Testimony and Video From The Illegal Eavesdropping Because The Decision Violates The Purpose of Having The Illinois Eavesdropping Law

II. The Appellate Court's Decision Effectively Shifted the Burden of Proof From the State to The Petitioner-Appellant

NATURE OF THE CASE

After a motion to suppress evidence by the defense was granted by the trial court, the State's Attorney office of Kankakee County filed an appeal pursuant to Rule 311(a). The Appellate Court Reversed the trial court's decision. The defense filed an appeal pursuant to Supreme Court Rule 315.

This is an appeal by the defense from the Appellate Court's order by leave from the Supreme Court. No issue is raised challenging the charging instrument.

ISSUES PRESENTED FOR REVIEW

1. Whether the Appellate Court's decision to reverse the trial court's decision is contrary to the purpose of the Illinois Eavesdropping Law?

2. Whether the Appellate Court impermissibly shifted the burden of proof from the state back to the defense?

3. Whether the Appellate Court misapplied the Gervasi case?

STATUTES AND RULES INVOLVED

720 ILCS 5/14-5

Any evidence obtained in violation of this Article is not admissible in any civil or criminal trial, or any administrative or legislative inquiry or proceeding, nor in any grand jury proceedings; provided, however, that so much of the contents of an alleged unlawfully intercepted, overheard or recorded conversation as is clearly relevant, as determined as a matter of law by the court in chambers, to the proof of such allegation may be admitted into evidence in any criminal trial or grand jury proceeding brought against any person charged with violating any provision of this Article. Nothing in this Section bars admission of evidence if all parties to the private conversation or private electronic communication consent to admission of the evidence.

Paragraph (q) of *720 ILCS 5/14-3*

(1) With prior request to and written or verbal approval of the State's Attorney of the county in which the conversation is anticipated to occur, recording or listening with the aid of an eavesdropping device to a conversation in which a law enforcement officer, or any person acting at the direction of a law enforcement officer, is a party to the conversation and has consented to the conversation being intercepted or recorded in the course of an investigation of a qualified offense. The State's Attorney may grant this approval only after determining that reasonable cause exists to believe that inculpatory conversations concerning a qualified offense will occur with a specified individual or individuals within a designated period of time.
(2) Request for approval. To invoke the exception contained in this subsection (q), a law enforcement officer shall make a request for approval to the appropriate State's Attorney. The request may be written or verbal; however, a written memorialization of the request must be made by the State's Attorney. This request for approval shall include whatever information is deemed necessary by the State's Attorney but shall include, at a minimum, the following information about each specified individual whom the law enforcement officer believes will commit a qualified offense:

(A) his or her full or partial name, nickname or alias;

(B) a physical description; or

(C) failing either (A) or (B) of this paragraph (2), any other supporting information known to the law enforcement officer at the time of the request that gives rise to reasonable cause to believe that the specified individual will participate in an inculpatory conversation concerning a qualified offense.

(3) Limitations on approval. Each written approval by the State's Attorney under this subsection (q) shall be limited to:

(A) a recording or interception conducted by a specified law enforcement officer or person acting at the direction of a law enforcement officer.

(B) recording or intercepting conversations with the individuals specified in the request for approval, provided that the verbal approval shall be deemed to include the recording or intercepting of conversations with other individuals, unknown to the law enforcement officer at the time of the request for approval, who are acting in conjunction with or as co-conspirators with the individuals specified in the request for approval in the commission of a qualified offense;

(C) a reasonable period of time but in no event longer than 24 consecutive hours;

(D) the written request for approval, if applicable, or the written memorialization must be filed, along with the written approval, with the circuit clerk of the jurisdiction on the next business day following the expiration of the authorized period of time, and shall be subject to review by the Chief Judge or his or her designee as deemed appropriate by the court.

STATEMENT OF FACTS

Petitioner-Appellant was accused of delivering less than a gram of cocaine to an undercover informant working for the state on August 7, 2018, while on private property. The alleged drug transaction was captured on an audio and video recording in Kankakee County by the confidential informant ("CI") without the permission and knowledge of Petitioner-Appellant and without compliance with the law.

Under the Illinois Eavesdropping Law it is a felony to audio record someone's conversation without their knowledge and consent. The Illinois Eavesdropping Law allows an exemption for drug cases where the law enforcement agency requests and receives permission before the recording of the conversation from the state's attorney office to record the conversation. The procedure requires the law enforcement officer to give facts to the state's attorney to establish probable cause for the recording of a specific person in order to receive prior approval from the state attorney. The request must include the actual individual that is the target of the recording and is good for a twenty-four (24) hour period. In the instant case the Kankakee Metropolitan Enforcement Group ("KAMEG") made the request for someone other than the Petitioner-Appellant but on August 7, 2018, when the confidential informant did not encounter that person, he approached Petitioner-Appellant without authority and permission under the Illinois Eavesdropping Law and illegally recorded Petitioner-Appellant.

Petitioner-Appellant was indicted on one count of delivery of a controlled substance. The state provided the exemption form under the Illinois Eavesdropping Law that demonstrated that they did not have permission to record Petitioner-Appellant's conversation. A motion to suppress was filed and a hearing was held. After the trial court viewed the

audio/video recording it found that there was a conversation between Petitioner-Appellant and the confidential informant "prior to any depiction of drugs on the video" and that "there was conversation that was illegally recorded prior to there being an actual transaction." After considering the evidence, the trial court ruled that there was no independent source and that the state did not meet its burden to prove purged of the taint of illegality. A-14.

The trial court granted the motion to suppress and suppressed the audio/video and undercover informant's testimony. A-6. The state filed a motion to reconsider and the trial court denied the motion. A-7. The state appealed the decision. A-3. The Appellate Court reversed the trial court's decision but appeared to reverse its own decision weeks after its decision in the instant case. A-15.

ARGUMENT

I. The Appellate Court Erred By Allowing the Admission of The CI Testimony and Video From The Illegal Eavesdropping Because The Decision Violates The Purpose of The Illinois Eavesdropping Law

Standard of Review

Issues that involve questions of law are reviewed de novo. *People v. Smith*, 2016 119659 ¶ 15. Issues that involve questions of fact are reversed only by a showing that the ruling was against the manifest weight of the evidence. *People v. Braggs*, 209 Ill.2d 492, 505 (2003).

The Plain Meaning of the Illinois Eavesdropping Law Bars Evidence in Violation of the Law

The provision under the Illinois Eavesdropping law that expressly addresses admissibility of evidence states:

> **Any evidence obtained in violation of this Article is not admissible in any civil or criminal trial**, or any administrative or legislative inquiry or proceeding, nor in any grand jury proceedings; provided, however, that so much of the contents of an alleged unlawfully intercepted, overheard or recorded conversation as is clearly relevant, as determined as a matter of law by the court in chambers, to the proof of such allegation may be admitted into evidence in any criminal trial or grand jury proceeding brought against any person charged with violating any provision of this Article. Nothing in this Section bars admission of evidence if all parties to the private conversation or private electronic communication consent to admission of the evidence. *720 ILCS 5/14-5* (Emphasis added)
> Paragraph (q) of *720 ILCS 5/14-3*, which establishes the exemption for law enforcement

officers to eavesdrop states:

> **(1)** With prior request to and written or verbal approval of the State's Attorney of the county in which the conversation is anticipated to occur, recording or listening with the aid of an eavesdropping device to a **conversation** in which a law enforcement officer, or any person acting at the direction of a law enforcement officer, is a party to the **conversation** and has consented to
> the **conversation** being **intercepted or recorded** in the course of an investigation of a qualified offense. The State's Attorney may grant this approval only after determining that reasonable
> cause exists to believe that inculpatory **conversations** concerning a qualified offense will occur with a specified individual or individuals within a designated period of time.
> **(2)** Request for approval. To invoke the exception contained in this subsection (q), a law enforcement officer shall make a request for approval to the appropriate State's Attorney. The request may be written or verbal; however, a written memorialization of the request must be made by the State's Attorney. This request for approval shall include whatever information is deemed necessary by the State's Attorney but shall include, at a minimum, the following information about each specified individual whom the law enforcement officer believes will commit a qualified offense:
> **(A)** his or her full or partial name, nickname or alias;
> **(B)** a physical description; or
> **(C)** failing either (A) or (B) of this paragraph (2), any other supporting information known to the law enforcement officer at the time of the request that gives rise to reasonable cause to believe that the specified individual will participate in an inculpatory conversation concerning a qualified offense.
> **(3)** Limitations on approval. Each written approval by the State's Attorney under this subsection (q) shall be limited to:
> **(A) a recording or interception** conducted by a specified law enforcement officer or person acting at the direction of a law enforcement officer;
> **(B) recording or intercepting conversations** with the individuals specified in the request for approval, provided that the verbal approval shall be deemed to include the recording or intercepting of conversations with other individuals, unknown to the law enforcement officer at the time of the request for approval, who are acting in conjunction with or as co-conspirators with the individuals specified in the request for approval in the commission of a qualified offense;

> **(C)** a reasonable period of time but in no event longer than 24 consecutive hours;
> **(D)** the written request for approval, if applicable, or the written memorialization must be filed, along with the written approval, with the circuit clerk of the jurisdiction on the next business day following the expiration of the authorized period of time, and shall be subject to review by the Chief Judge or his or her designee as deemed appropriate by the court.
> Emphasis Add

"The primary rule of statutory construction is to give effect to the true intent of the legislature, which is best determined from the statutory language itself without resorting to other aids of construction." *People v. Brindley*, 2017 Ill.App.5th 160189, P. 28 (citing *Illinois Graphics Co. v. Nickum, 159 Ill. 2d 469, 479, 639 N.E.2d 1282, 203 Ill. Dec. 463 (1994)*). The plain language of the Illinois Eavesdropping Law requires the suppression of any evidence that is derived from the violation of its provisions. The Illinois Eavesdropping Law specifically and unequivocally states that "[a]ny evidence obtained in violation of this Article is not admissible in any civil or criminal trial."[1] It does not state any "recording" or "interception" which is how the audio recordings are described throughout the Illinois Eavesdropping Law and particularly in paragraph (q) of Section 14-3 of the Illinois Eavesdropping law. It definitively states, "any evidence," which makes it plain and clear that in the evident that the law was violated more than the just the audio recording or interception will not be admissible at trial. If the legislature had intended to limit the scope of the information that will be inadmissible to just the audio recordings, then it would have used the same language regarding the recordings as it used throughout the entire statute.

"'The fundamental purpose of the eavesdropping statutes is to prohibit unauthorized eavesdropping and the use of evidence gained by such eavesdropping.'" *People v. Harris*, 2020 IL App.3d 190504 ¶ 23 (citing *In re Cook County Grand Jury*, 113 Ill.App.3d 639, 646 (1983)).

[1] *720 ILCS 5/14-5*

"'The spirit and purpose of the [Illinois] [E]avesdropping [S]tatute are not only to ensure that all eavesdropping is subject to judicial supervision but to prevent unwarranted intrusions into an individual's privacy.'" *Id*. (quoting *People v. Monoson*, 75 Ill. App. 3d 1, 8, 393 N.E.2d 1239, 30 Ill. Dec. 892 (1979)). Suppression is required if there is a failure to satisfy one of the statutory requirements and that failure substantially implicates the legislative intent of limiting eavesdropping devices. *People v. Cunningham*, 2012 IL App (3d) 100013, ¶ 22. Factors used to determine whether suppression is warranted are whether: "(1) the particular safeguard is a central safeguard in the legislative scheme to prevent abuses; (2) the purpose the particular procedure was designed to accomplish has been satisfied in spite of the error; and (3) the statutory requirement was deliberately ignored and, if so, whether the government gained a tactical advantage." *Id*. (citing *People v. Nieves*, 92 Ill. 2d 452, 458-59, 442 N.E.2d 228, 65 Ill. Dec. 917 (1982)).

"[A]llowing the State to present video evidence and/or testimony of the transaction would violate the purpose of the eavesdropping statute, which is 'to prevent unwarranted intrusions into an individual's privacy.'" *People v. Harris*, 2020 Ill.App (3d) 190504 ¶ 32 (quoting *People v Monoson*, 75 Ill.App.3d 1, 8 (1979)). There is no dispute that the CI, an actor for KAMEG, violated the Illinois Eavesdropping Law. The suppression of the CI testimony and video evidence fits all the factors listed in *Cunningham*. Factor one: under the Illinois Eavesdropping Law the law enforcement agency is required to give the name of the individual they believe is about to commit the offense prior to receiving approval by the state's attorney's office. This is to

prevent law enforcement from randomly recording people in hopes of finding evidence of a crime. That is what effectively occurred in the instant case.[2] The prior approval was for another individual that had no connection to the Petitioner-Appellant. When the CI could not find the approved target, the CI approached the Petitioner-Appellant and started talking to him. This is a central safeguard in the law to prevent this exact behavior by law enforcement. Factor two: the purpose of requiring the name of the target of the investigation prior to receiving approval was to prevent law enforcement from randomly violating the privacy of people. This procedure was not satisfied despite the error. Once the error was discovered by KAMEG they could have discarded the transaction and refused to seek charges for the Petitioner-Appellant due to the error. Instead, they doubled down and went forward with the illegally gained evidence. Factor three: the violation by the CI was deliberately ignored and the state gained an advantage by receiving evidence against the Petitioner-Appellant based on the violation. The CI knew that the Petitioner-Appellant was not the target of the investigation and he approached the Petitioner-Appellant anyway; by doing so gained illegally obtained evidence against the Petitioner-Appellant. The instant case does not involve a minor or technical violation of the Illinois Eavesdropping Law. It is an example of a blatant and wanton disregard for the law.

The instant case involves an admitted violation of the Illinois Eavesdropping Law. It is completely contrary to the purpose of the Illinois Eavesdropping Law to allow the state to be rewarded by only suppressing the audio portion of the undercover recording. The reason to have an exclusionary rule is to give an incentive to law enforcement to adhere to the law. However,

[2] The trial court stated that the "confidential source was sent out with the target authorized and. Frankly, ended up, from what I can tell, just wondering around, apparently unable to find the target and selected another person." A-14.

by only suppressing the audio portion of the recording it effectively puts law enforcement in a position of "nothing to lose" because at best they may get away with it and at worse only the audio portion of the recording will be suppressed. This would make the exclusionary rule that is a part of the law toothless and irrelevant.

II. The Appellate Court's Decision Effectively Shifted the Burden of Proof From the State to The Petitioner-Appellant

On appeal from a denial of a motion to suppress evidence where the motion involves factual findings, a reviewing court will not overturn those findings unless they are manifestly erroneous. *People v. Calgaro, 348 Ill. App. 3d 297, 299-300, 809 N.E.2d 758, 284 Ill. Dec. 192 (2004)*. If there are no facts in dispute, the trial court's suppression ruling turns solely on legal issues, which are reviewed *de novo. Id. at 300*. The "proper test to be applied" is " '[w]hether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' " (Internal quotation marks omitted.) *United States v. Wade, 388 U.S. 218, 241, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967)* (quoting *Wong Sun, 371 U.S. at 488*).

The trial court ruled that there was no independent source or investigation in the instant case. (A-12-13). The trial court ruled after hearing and reviewing all the evidence that was presented by both sides. A-14. After reviewing the evidence the trial court made a factual finding that the evidence was not free of the taint of illegal activity by the CI and there was no independent source or investigation. A-12-14. The trial court's decision was based on the fact that the confidential informant illegally recorded the conversation prior to the appearance of any drugs. The trial court ruled as an issue of fact that the evidence was not obtained means

sufficiently distinguishable to be purged from of the primary taint. A-14. The state did not present any evidence to establish that illegally obtained evidence had an independent source. A-12-14. There is nothing in the record to demonstrate that the trial court's finding was against the manifest weight of the evidence. The timing of when the drugs were produced in relation to when the CI started recording the conversation with the interaction between the CI and Petitioner-Appellant was not purged of the primary taint because it was intertwined with the taint of illegal recording.

The facts of this case indicate that there was no independent source of investigation due to several factors that include the fact that the CI wandered around randomly looking for someone to record after he could not find the intended target. A-14. Unlike the factors listed in established caselaw, the instant case does not demonstrate an independent source or investigation. Petitioner-Appellant was not the target of the investigation. (A-5). There is no indication that KAMEG knew about Petitioner-Appellant, intended to approach Petitioner-Appellant, or was already investigating Petitioner-Appellant prior to when their confidential informant approached and illegally eavesdropped on Petitioner-Appellant conversation. (A-5). The confidential informant approached Petitioner-Appellant, started speaking to him, and recorded their conversation illegally prior to any drugs being produced on video. (A-14). The illegally recorded conversation led to the production of drugs on video and potential testimony regarding a drug transaction with Petitioner-Appellant. (A-14). There is no attenuation from the illegal activity for either the video or the confidential informant's testimony.

The Appellate Court effectively manufactured an independent source by shifting the burden of proof from the state to the Petitioner-Appellant when it required the Petitioner-Appellant to prove that the CI would not have approached the Petitioner-Appellant but for having the recording device. It was the state's burden to prove that the CI would have initiated a drug transaction regardless of whether he had the recording device on his person or not. The state did not present that evidence to the trial court. The state did not provide any evidence to demonstrate that the illegally obtained evidence by the CI was from an independent source and free of taint of the illegal activity. Since the defense established that there was an illegal activity as to how the audio, video, and potential testimony of the CI were obtained, the burden shifted to the state to show that there was an independent source and that the evidence obtained was free from the taint of the illegal activity. *People v. Wilson*, 60 Ill.2d 235, 238 (1975). The state never presented any evidence to meet that burden. The trial court ruled that there was no independent source. A-14. In *People v. Wilson*, 60 Ill. 2d 235, 238 (1975), the Illinois Supreme Court stated:

> "If an accused establishes the 'primary illegality' and shows a connection between the illegality and what are alleged to be the fruits of the illegality, the prosecution will have the burden of establishing by clear and convincing evidence that the challenged evidence has come from an independent source."

Once the primary illegality was established by the defense, the burden shifted to the state to demonstrate with clear and convincing evidence that an independent source for the video and CI testimony existed. The state never presented any evidence to meet that burden. It was the state's burden to demonstrate that the CI would have approached the Defendant and purchased

drugs even if he did not have the recording device on him. The state never presented testimony from either the CI or any member of the KAMEG team that worked with the CI to establish that the CI would have approached the Petitioner-Appellant regardless of whether he had the recording device. Furthermore, the state never presented any evidence that the CI knew the Petitioner-Appellant or had transactions with the Petitioner-Appellant prior to the incident in the instant case. None of that information was presented by the state.

The video evidence and the CI testimony was not independently obtained from the taint of the illegal eavesdropping by the CI. Illinois Courts have consistently excluded evidence that was discovered by illegal or unconstitutional law enforcement activity. See *People v. Albea,* 2 Ill. 2d 317, 323, 118 N.E.2d 277, 280 (1954)(where the Illinois Supreme Court **excluded such witness testimony when the identity of the witness was discovered concurrently with the illegal search**)(emphasis added); *People v. Gonzalez,* 268 Ill. App. 3d 224, 230, 643 N.E.2d 1295, 1299, 205 Ill. Dec. 688 (1994)(where the court suppressed a witness's testimony when his identity was obtained as a result of defendant's illegally obtained confession). "If the proposed evidence would not have been uncovered but for the police misconduct, the attenuation doctrine comes into play." *Illinois v. Kluppelberg*, 257 Ill.App.3d 516, 529 (1st Dist. 1993).

The state did not meet its burden to prove by clear and convincing evidence that there was an independent source for the CI testimony and video. The state gained the identity of the Petitioner-Appellant along with the information regarding the transaction from the instant case based on the illegal recording by the CI. The state did not meet its burden to prove that the

knowledge that was the basis of the CI's testimony and the video would have been uncovered but for the illegal activity by the CI. The state did not meet its burden and that burden should not have been shifted back to the Petitioner-Appellant by assuming that the CI may have had a conversation with the Defendant regardless of whether he had a recording device on his person.

The Appellate Court Misapplied the Gervasi Case

People v. Gervasi Supports the Suppression of the CI Testimony and Video

The Appellate Court misapplied *People v. Gervasi*.[3] In *Gervasi*, the court reporters used a device to eavesdrop on the defendants. The police officer did not. The Court in *Gervasi* suppressed the court reporters' testimony and transcripts of the conversation between the police officer and the defendant that was prepared by the court reporters based on eavesdropping. The Court allowed the police officers to testify because the officer had previous conversations with the defendants, prior knowledge of the investigation, and prior knowledge of the identity of the defendants prior to the eavesdropping, which satisfied the factors for attenuation whereas the court reporters' testimony and transcripts did not.[4] The CI's testimony and video evidence in the instant case are analogous to the court reporters' testimony and transcripts from *Gervasi*. Whereas the police officer's testimony is distinguishable from the instant case.

The police officer's testimony was attenuated from the taint of the illegal recording whereas there was little to no attenuation for the court reporters' testimony and transcripts; just like there is no attenuation for the CI's testimony and video evidence in the instant case. The standard for attenuation is whether the evidence that was discovered by illegal or unconstitutional

[3] 89 Ill.2d 532 (1982).

[4] A significant factor in establishing attenuation and independent source is by demonstrating knowledge of the witness prior to any illegal police conduct. *People v. Kluppelberg*, 257 Ill.App.3d 516, 529 (1st Dist. 1993).

means was gained "by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *People v. Gervasi*, 89 Ill,2d 522, 528 (1982)(citing *Wong Sun v. United States*, 371 U.S. 471, 489 (1963)). The Court in *Gervasi* ruled that the conversation between the officer and the defendant "was motivated independently of the eavesdropping and that there was no connection between the conversation and the eavesdropping." *People v. Gervasi*, 89 Ill.2d 522, 532 (1982). Whereas the Court in Gervasi suppressed the court reporters' testimony and the transcripts from the officer's conversation with the defendant.

The officer's testimony in the *Gervasi* case is distinguishable from the instant case for two reasons. First, the police officer did not eavesdrop, and the officer had prior knowledge of the offense and investigation prior to the eavesdropping, which satisfied the factors in determining independent source. Second, in *Gervasi* the trial court did not address whether there was an independent source for the court reporter transcripts and the officer's testimony. In the instant case the trial court made it clear that there was not an independent source for the video evidence and CI testimony.[5] The trial court made a factual finding that the eavesdropping started before any drugs were produced by the Petitioner-Appellant or money tendered to the CI.[6] The eavesdropping occurred as the CI approached the Petitioner-Appellant and inquired as to illegal activity prior to knowing if the Petitioner-Appellant was selling any drugs. The state presented no evidence that the CI would have approached the Petitioner-Appellant regardless of whether he had a recording device on his person.

[5] The trial explained why the state did not meet its burden to show that the evidence was obtained by means sufficient to purge of the primary taint when the trial court found that "the words spoken and the display of the alleged drugs occurred only after the initiation of the illegal eavesdropping." A-14.
[6] A-14.

In *Gervasi*, the illegal recording devices were not used by the police officer it was used by the court reporters. The officer had knowledge of the contents of the phone conversation prior to the illegal recording of the conversations, therefore the knowledge was not derived by the illegally recorded conversations. The eavesdroppers were the reporters, and their testimony and transcripts were suppressed. In the instant case the CI used the eavesdropping device. The CI had no prior knowledge of whether the Petitioner-Appellant had been selling drugs or conducting any illegal activity.[7] The CI learned of the illegal activity as the CI broke the law and eavesdropped on the Petitioner-Appellant.

CONCLUSION

For the foregoing reasons, Lavail Davis, Petitioner-Appellant, respectfully requests that this Court reverse the Appellate Court's order.

Respectfully submitted,

/s/ Bart E. Beals
Bart E. Beals
Attorney at Law
150 N. Michigan, Suite 2800
Chicago, IL 60601
(312) 324-4892
(312) 624-7701 Fax
bealslaw@gmail.com

COUNSEL FOR PETITIOINER-APPELLANT

[7] The trial court reviewed the audio and video of the alleged transaction and stated that the "confidential source was sent out with one target authorized and frankly ended up, from what I can tell, just wondering (sic) around, apparently unable to find the target and selected another person." A-14.

CERTIFICATE OF COMPLIANCE

I, Bart E. Beals, certify that this brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this brief, excluding pages containing the Rule 341(d) cover, the Rule 341 (b)(1) table of contents and (h)(1) 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 is 16 pages.

/s/ Bart E. Beals

APPENDIX TO THE BRIEF

Lavail Davis No. 126435

E-FILED
1/27/2021 1:46 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

AN APPEAL TO THE APPELLATE COURT OF ILLINOIS
THIRD JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE TWENTY-FIRST JUDICIAL CIRCUIT
KANKAKEE COUNTY, KANKAKEE

Appellate Court No: 3-19-0272
Circuit Court No: 2018 CF 000486
Trial Judge: CLARK ERICKSON

THE PEOPLE OF THE STATE OF ILLINOIS
PLAINTIFF/PETITIONER

VS

LAVAIL D DAVIS
DEFENDANT/RESPONDENT

COMMON LAW RECORD-TABLE OF CONTENTS

Page 1 of 1

REPORT OF PROCEEDINGS-TABLE OF CONTENTS

A-2

IN THE CIRCUIT COURT OF KANKAKEE COUNTY, ILLINOIS
APPEAL TO THE APPELLATE COURT OF ILLINOIS, THIRD DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff

vs.

LAVAIL DAVIS
Defendant

Case No. 18 CF 486

NOTICE OF APPEAL

An appeal is taken from the order of judgement described below.

1) Court to which appeal is taken: Third District, Illinois Appellate Court.

2) Name and address of Appellant: People of the State of Illinois, through their attorney, Jim Rowe, State's Attorney, 450 E. Court St. 3rd Fl., Kankakee, IL, 60901. Email: jrowe@k3county.net Name and address of trial counsel: Assistant State's Attorney Clyde Guilamo, 450 E. Court St. 3rd Fl., Kankakee, IL, 60901. Email: cguilamo@k3county.net

3) Name and address of appellant's attorney on appeal: Office of the Appellate Prosecutor. 628 Columbus, Suite 300, Ottawa, IL, 61350. Email: maustill@ilassp.org

4) Date of judgment or order: March 5, 2019 Granting of Defendant's Motion to Suppress; together with April 12, 2019 denying the State's Motion to Reconsider.

5) Nature of Appeal: Interlocutory Appeal Regarding Trial Court's Granting of Defendant's Motion to Suppress pursuant to 720 ILCS 5/14-5.

James Rowe
State's Attorney.

Clyde Guilamo

By: Clyde Guilamo, Assistant State's Attorney

A-3

C36

IN THE CIRCUIT COURT OF KANKAKEE COUNTY, ILLINOIS
APPEAL TO THE APPELLATE COURT OF ILLINOIS, THIRD DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff

vs.

LAVAIL DAVIS
Defendant

Case No. 18 CF 486

CERTIFICATION OF IMPAIRMENT

Now Comes the People of the State of Illinois, by James Rowe, State's Attorney, through his assistant, Clyde Guilamo, and states as follows:

That the granting of the Defendant's Motion to Suppress Statements pursuant to 720 ILCS 5/14-5 and denying the State's Motion to Reconsider substantially impairs the prosecution of the Defendant.

Respectfully Submitted,

Clyde Guilamo
Assistant State's Attorney

CERTIFICATION

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in the instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

Clyde Guilamo
Assistant State's Attorney

SUBSCRIBED and SWORN TO before me
this 10th day of May, 2019.

Notary Public

OFFICIAL SEAL
DANIELLE KONIK
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 05/08/2020

C37

A-4

IN THE TWENTY-FIRST JUDICIAL CIRCUIT COURT, ILLINOIS

The People of the State of Illinois

Plaintiff,

v.

Lavail Davis

Defendant.

Case No. 18 CF 486

MOTION TO SUPPRESS EVIDENCE

NOW COMES the Defendant, Lavail Davis, by and through his attorney, Bart E. Beals, pursuant to *720 ILCS 5/14-5*, and moves this Court to suppress the audio and video recorded conversation from August 7, 2018 by 17CS003 and in support thereof states as follows:

1. An alleged conversation regarding an alleged drug transaction was recorded by 17CS003 on August 7, 2018 in the county of Kankakee.

2. According to the police report a 24-hour qualified overhear was "utilized.".

3. Mr. Davis was not the subject of the eavesdropping exemption application.

4. There is no evidence that Mr. Davis was working for or with the subject of the exemption.

WHEREFORE, the Defendant prays this Court will suppress the recording.

Name: Bart E. Beals
Address: 150 N. Michigan Ave., Suite 2800
City/Zip: Chicago, Illinois 60601
Telephone: (312) 324-4892

C17

A-5

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE TWENTY-FIRST JUDICIAL CIRCUIT
KANKAKEE COUNTY

FILED
MAR 05 2019
Sandra M Cesar
CIRCUIT COURT CLERK

People
Plaintiff(s)

vs

Case No. 18 CF 486

Lavail Davis
Defendant(s)

COURT ORDER

IT IS HEREBY ORDERED

that the Defense motion to Suppress is granted. The video and transaction shall be excluded as fruit of the posionous tree.

Dated March 5, 2019

Entered: Chad S C
(Judge)

C22

A-6

IN THE CIRCUIT COURT FOR THE TWENTY FIRST JUDICIAL CIRCUIT
KANKAKEE COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff	)	
vs.	)	Case No. 18 CF 486
LAVAIL DAVIS Defendant	)	

MOTION TO RECONSIDER DEFENDANT'S MOTION TO SUPPRESS

NOW COMES Assistant State's Attorney Clyde Guilamo, on behalf of the People of the State of Illinois, pursuant to People v. Mosley, 63, Ill. App. 3d 437 (5th Dist. 1978), and represents to the Court as follows:

1) Defendant filed a motion to suppress based on a violation of the eavesdropping statute 720 ILCS 5/14-5.

2) On March 5, 2019, this Court suppressed the audio and video recording taken in this case pursuant to the motion.

3) This Court further suppressed any testimony regarding anything that was reflected in the video after the initial conversation between the confidential source and Defendant under the Fruit of the Poisonous Tree Doctrine.

ARGUMENT

A. The Court should not have barred the confidential source from testifying to his/her conversation and transaction with Defendant as the confidential source's personal knowledge is not the fruit of the poisonous tree.

The State respectfully requests that this Court reconsider its decision to bar the confidential source from testifying to his/her conversation and transaction with Defendant in this case. In support of this request, the State cites People v. Mosley, 63 Ill. App. 3d 437 (5th Dist. 1978). In that case, the trial court suppressed two tape recordings as violations of the eavesdropping statute and further

A-7

C23

suppressed any testimony of any person concerning the conversations contained in the tape recording. Id. at 439. The appellate court, in reversing the trial court's decision, noted "that under the doctrine of the 'fruit of the poisonous tree' ... the testimony of the [witness who took part in the conversation] would have been admissible even if the tape recordings were properly suppressed." Id. at 444. The court further opined that "this doctrine is to prevent the admission of evidence 'obtained from or as a consequence of lawless official acts, not evidence obtained from an 'independent source.'" Id. The witness' personal knowledge of the conversation with the defendant was independent from the tape recordings of that conversation. Id.

In our case, the confidential source's personal knowledge is an independent source from the recordings that were made in this case. Thus, this Court should allow the confidential source to testify from his/her personal knowledge.

Further support allowing a witness to testify from personal knowledge comes from People v. Babolcsay, 368 Ill. App. 3d 712, 715 (2d. Dist. 2006). In that case, the trial court barred a portion of an officer's testimony as a violation of the eavesdropping statute. Id. at 714. The appellate court, however, reversed the trial court's ruling "to suppress testimony of the officer regarding his communications with defendant while the recording took place." Id. at 716. In so doing, the court reaffirmed the holding in Mosley that the "fruit-of-the-poisonous-tree doctrine is meant to prevent the admission of evidence obtained as a result of illegal conduct, not evidence obtained from an independent source." Id. at 715. Once again, the personal knowledge of the witness who engaged in the conversation is an independent source from the recording of that conversation. Stated differently, "[t]he videotaping activity did not lead to the officer's conversation; rather, the videotaping was meant to memorialize a conversation that would have occurred regardless." Id. at 716.

B. The Court should not have barred the video that depict actions by Defendant as video recording of Defendant's actions are not covered by the eavesdropping statute.

The State respectfully requests that this Court reconsider its decision to bar the video of Defendant's actions as the eavesdropping statute does not apply to the videotaping of actions. In support thereof, the State cites multiple sections of the Eavesdropping statute, which clearly distinguish videos from audio recordings. Section 720 ILCS 5/14-3 covers the kinds of recordings that are exempt from the Eavesdropping statute. In subsection h, an exception to the statute is made for "[r]ecordings made simultaneously with the use of an in-car video camera recording[.]" 720 ILCS 5/14-3(h). If the eavesdropping statute were meant to exclude video, the above provision would make no sense (i.e. video recordings would be exempt if the video recording were made simultaneously with a video recording).

The same absurd result would result under subsection h-10. In that subsection, an exception to the statute is made for "[r]ecordings made simultaneously with a video camera recording during the use of a taser or similar weapon or device by a peace officer[.]" 720 ILCS 5/14-3(h-10). Once again, if video recordings were the target of this statute, this exception would make no sense (i.e. video recordings made simultaneously with video recordings).

This distinction between audio and video recordings was specially mentioned in Justice Cook's concurrence in People v. Brock, 2012 Il. App. (4th) 100945 (4th Dist. 2012). In his concurrence, the Justice noted that the video recording was admissible, but an audio recording would have been inadmissible under the Eavesdropping Statute. Id. at *P20-1).

Further support for the State's position is found in People v. Meyer, 402 Ill. App. 3d 1089 (4th Dist. 2010). In that case, a confidential informant went into the defendant's trailer with a video-recording camera. Id. at 1090-1. The video captured the defendant holding pills and a firearm. Id.

A-9

C25

The defendant was found guilty and filed an appeal claiming that his trial counsel was ineffective because he failed to move to suppress the video. Id. The Court, in upholding the conviction, found that the defendant "had no constitutionally protected privacy interest in any activity that [the CI] viewed in his home." Id. at 1093. The "fourth amendment does not protect against 'a wrongdoer's misplace belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.'" Id. at 1092. Thus, "any motion to suppress the video . . . would have failed, [and] defendant's counsel's decision not to challenge the video on constitutional grounds was not deficient. Moreover, no prejudice arose because the video would not have been suppressed." Id. at 1093.

Further support is found in United States v. Robinson, 2012 U.S. Dist. Lexis 120591. In that case, a defendant filed a pre-trial motion to suppress the video recordings obtained during a confidential source's two separate purchases of crack cocaine from the defendant. Id. at *1. One of the basis for suppressing the video was arguments by defendant as a violation of the federal eavesdropping statute. Id. at *3. The court, in denying the defendant's motion, held that the federal eavesdropping statute "applies only to communications and does not apply to video surveillance at all." Id.

CONCLUSION

WHEREFORE, the People of the State of Illinois respectfully request that the Court:

1) Reconsider its March 5, 2019 ruling;
2) Deny Defendant's motion to suppress;
3) Allow the confidential informant to testify as to all matters from his/her personal knowledge;
4) Allow the State to admit the video recording depicting Defendant's actions; and/or
5) Any other relief this Court deems just.

Clyde Lindano
Assistant State's Attorney

A-10

C26

AFFIDAVIT

The undersigned states that the information in the motion to continue is true and correct to the best of his knowledge and belief and is not done for purposes of undue delay.

Clyde Stinson
Assistant State's Attorney

A-11

C27

THE COURT: All right. Let's bring in Lavail Davis. Well, this is Lavail Davis. This is 18-CF-486, 18-CF-462 and 17-CF-622 and it's -- we're here, I guess, in part on the defendant's -- or the State's motion to reconsider defendant's motion to suppress.

MR. BEALS: That's correct, Your Honor. So we -- we had arguments, I think, last week and so we were here for --

THE COURT: I -- I'm ready to announce my decision on this. I had a chance to -- I don't have a written decision so we can do it by docket entry, but I'll put in the record my reasoning, I think.

The -- I had a chance to review the cases cited by Mr. Guilamo, who I have to give credit for his enthusiasm in this case. The -- but nonetheless the -- of the cases that he cited, People vs. Brock, involved a video only and I -- but the whole camera. People vs. Meyer involved a video only. Now, there was no issue in either Meyer or Brock of any eavesdrop.

U. S. vs. Robinson, I guess, is

interesting, but it's -- it's a Federal case and the -- I think it involved -- I think it involved video only.

This particular case that is the subject of the motion to reconsider involved a eavesdrop order obtained under the Illinois eavesdrop law and, oh, by -- oh, People vs. Meyer involved video only. So I don't feel that those cases are really on point.

The issue is whether or not a violation of the eavesdrop statute in Illinois requires, in this particular case, suppression of not only the audio, but also the -- the video component of the audio-video recording, as well as the testimony of the CS, who was wearing the eavesdrop.

And I would note in -- begin in People vs. Satek, cited by the defense, that quote from page -- well, relating to headnote 6, when the defendant has established a primary illegality and shows its connection to what are alleged to be fruits of the illegality, the burden then shifts to the prosecution to establish that the challenged evidence was

And I don't think there's any question here that the recording of Mr. Davis was come at by exploitation of an illegality. I mean this -- this confidential source was sent out with one target authorized and, frankly, ended up, from what I can tell, just wondering around, apparently unable to find the target and selected another person. That recording is illegal and the -- that then falls to the State in terms of the burden to show or establish that the challenged evidence was obtained by means sufficiently distinguishable to be purged of that primary taint and I don't think that's happened in this case. The -- the words spoken and the display of alleged drugs occurred only after the initiation of an illegal eavesdrop.

The -- so I'm going to deny the motion to reconsider the defendant's motion to suppress. So the CS is not -- the CS is prohibited from testifying in this particular case under my earlier ruling.

MR. REEDY: Okay.

THE COURT: The State, I suppose, certainly

2020 IL App (3d) 190272

Opinion filed June 5, 2020

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2020

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, v. LAVAIL D. DAVIS, Defendant-Appellee.	)	Appeal from the Circuit Court of the 21st Judicial Circuit, Kankakee County, Illinois. Appeal No. 3-19-0272 Circuit No. 18-CF-486 Honorable Clark E. Erickson, Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court, with opinion.
Justice Holdridge concurred in the judgment and opinion.
Presiding Justice Lytton dissented, with opinion.

OPINION

¶ 1 The State appeals the trial court's order suppressing the recording of a drug transaction between defendant, Lavail D. Davis, and a confidential informant (CI). The State also challenges the suppression of the CI's in-person testimony regarding the transaction. We reverse and remand.

¶ 2 I. BACKGROUND

¶ 3 The State charged defendant with unlawful delivery of a controlled substance. 720 ILCS 570/401(d) (West 2018). The charges stem from a drug transaction that a CI surreptitiously recorded with an audio and video recording device hidden on his person.

¶ 4 Defendant filed a motion to suppress evidence. The motion alleged that the audio and video recording constituted illegal eavesdropping. According to defendant, the police obtained an overhear authorization to record a specific targeted individual. The authorization did not name defendant as the target. Therefore, the CI illegally recorded the conversation he had with defendant. Defendant further argued that the CI's in-person testimony should also be suppressed as the fruit of a poisonous tree.

¶ 5 The parties did not present any evidence at the hearing on defendant's motion to suppress. However, the uncontested evidence is as follows. The Kankakee Area Metropolitan Enforcement Group (KAMEG) received an overhear authorization from the state's attorney. The authorization provided for the recording of a controlled drug purchase between the CI and a specific individual targeted for selling narcotics. The CI previously purchased drugs from the target and arranged for another purchase. The authorization did not name defendant as the person to be recorded. The CI wore a hidden device, which recorded both audio and video. When the CI went to the target's home to make the purchase, he could not locate the target. The CI left and walked to a different location nearby. The CI conducted a drug transaction with defendant. The purchase occurred on the exterior of a house. The State had no evidence that defendant and the target of the investigation acted in concert.

¶ 6 The parties agreed that the audio portion of the video recording of the drug transaction violated the eavesdropping statute because the audio recording of the conversation did not fall within the scope of the authorized overhear. Specifically, the authorization provided for the recording of the targeted individual, not defendant. Nevertheless, the State contended that the video recording and the confidential informant's testimony were admissible, as they were not barred under the eavesdropping statute.

¶ 7 Ultimately, the trial court found that the recording constituted illegal eavesdropping. The court suppressed both the audio and video portion of the recording. The court also barred the CI's testimony as to personally observing and receiving the drugs from defendant as the fruit of a poisonous tree.

¶ 8 The State filed a certificate of impairment pursuant to Illinois Supreme Court Rule 604(a) (eff. July 1, 2017), and this appeal follows.

¶ 9 II. ANALYSIS

¶ 10 At the outset, the parties agree that the audio portion of the recording constituted illegal eavesdropping and should be suppressed since it did not fall within the scope of the overhear authorization. The State contends the trial court should not have suppressed the video (without audio) and the CI's in-person testimony. Specifically, the State contends that neither the video nor the CI's personal knowledge derived from the illegal audio recording. Consequently, the State contends that this evidence is not barred at trial. Resolving this question requires us to interpret section 14-5 of the Criminal Code of 2012 (720 ILCS 5/14-5 (West 2012)). Section 14-5 bars the admission of evidence obtained in violation of the eavesdropping statute. *Id.* Our review is *de novo*. See *People v. Luedemann*, 222 Ill. 2d 530, 542 (2006).

¶ 11 The primary rule of statutory construction is to give effect to the true intent of the legislature, which is best determined from the statutory language itself. *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 479 (1994). When statutory language is clear and unambiguous, it must be given effect without resort to other aids of interpretation. *Village of Chatham v. County of Sangamon*, 216 Ill. 2d 402, 429 (2005). Unambiguous statutes must be enforced as enacted, and a court cannot depart from their plain language by reading into them exceptions, limitations, or

A-17

conditions that conflict with the expressed legislative intent. *Franz v. Calaco Development Corp.*, 352 Ill. App. 3d 1129, 1150 (2004).

¶ 12 The clear and unambiguous language of section 14-5 provides that "[a]ny evidence obtained in violation of this Article is not admissible in any civil or criminal trial ***." 720 ILCS 5/14-5 (West 2018)). The key to inadmissibility under section 14-5 is that the evidence must be obtained as a result of illegal eavesdropping activity. That is, either the evidence itself is an illegal recording of a conversation, or the illegal eavesdropping led investigators to inculpatory evidence. Upon review, we find the trial court erred in suppressing the video recording and the CI's in-person testimony since the evidence did not derive from a violation of the eavesdropping statute.

¶ 13 Under the plain language of section 14-5, the trial court correctly found the audio recording inadmissible on the basis that the audio recording itself constituted illegal eavesdropping. However, the prohibition does not extend to the video portion of the recording or the CI's personal knowledge of the drug transaction. This evidence derived independently from the illegal eavesdropping. The CI participated in the conversation. He did not eavesdrop. The dissent speculates that the CI would not have had a conversation with defendant but for the illegal audiotaping. This is pure fantasy unsupported by the record. In addition, the video recorded simultaneously with the audio recording.[1] In other words, neither the CI's personal knowledge nor the video recording resulted from the illegal eavesdropping. Therefore, section 14-5 does not bar the admission of the video recording or the CI's in-person testimony. There is no need to consider the application of the fruit-of-a-poisonous-tree doctrine, as this evidence did not derive from illegal eavesdropping.

[1]We note that defendant only argued that section 14-5 barred the video portion of the recording. Defendant made no argument that the video recording standing alone should be barred under any other basis. In fact, defense counsel conceded that, if the video recording were made without audio, it would have been admissible.

¶ 14 Our conclusion is supported by our supreme court's decision in *People v. Gervasi*, 89 Ill. 2d 522 (1982). In *Gervasi*, the supreme court considered the admissibility of transcripts and in-person testimony of overheard conversations. *Id.* Investigators suspected defendant of bribery. *Id.* at 524. Defendant made several telephone calls to the investigators. *Id.* at 524-25. Court reporters transcribed each telephone conversation while listening on an extension phone that had its speaking element removed. *Id.* Defendant also spoke to investigators several times in person. *Id.* at 525. On two of the face-to-face discussions, a court reporter transcribed the conversation without the aid of an eavesdropping device. *Id.*

¶ 15 On review, the supreme court first found that the extension phone with the speaking element removed constituted an eavesdropping device. *Id.* at 526-27. Therefore, the court found that the court reporters eavesdropped on defendant's telephone calls. *Id.* at 527. The supreme court found the court reporters' testimony and transcriptions were inadmissible as to the telephone conversations. *Id.* By contrast, the court held that the investigators that spoke to defendant over the phone could testify to the contents of the conversation. *Id.* at 531. The court found that the investigators did not eavesdrop but acted as a party to the conversation. *Id.* Therefore, the court held that the officers' knowledge of the conversation did not derive from illegal eavesdropping. As to the face-to-face conversations, the supreme court found the officers' and court reporters' testimony as well as the transcriptions admissible, as the evidence was obtained without the use of an eavesdropping device. *Id.* at 533-34.

¶ 16 Like the investigators in *Gervasi*, the CI in this case did not eavesdrop. Rather, the CI acted as a party to the conversation. Therefore, the CI's in-person testimony is admissible under *Gervasi*. In addition, the video recording did not derive from eavesdropping activity. In other words, the audio eavesdropping did not lead the CI or police to the drug transaction. Rather, the CI made the

A-19

video recording at the same time as the audio recording. The video is independent of the eavesdropping and, therefore, admissible.

¶ 17 III. CONCLUSION

¶ 18 For the foregoing reasons, we reverse and remand the judgment of the circuit court of Kankakee County.

¶ 19 Reversed and remanded.

¶ 20 PRESIDING JUSTICE LYTTON, dissenting:

¶ 21 I dissent. I disagree with the majority's determination that the video portion of the illegal recording and the testimony of the CI are independent of the government's illegal activities. I would affirm the trial court's order granting defendant's motion to suppress.

¶ 22 The eavesdropping statute provides: "Any evidence obtained in violation of this Article is not admissible in any civil or criminal trial ***." 720 ILCS 5/14-5 (West 2018). This provision is "the legislature's express adoption of the 'fruit of the poisonous tree' doctrine." *In re Marriage of Almquist*, 299 Ill. App. 3d 732, 737 (1998) (citing *People v. Maslowsky*, 34 Ill. 2d 456, 464-65 (1966)). "Under the 'fruit of the poisonous tree' doctrine, an unlawful search taints not only the evidence obtained from the search, but also evidence derivative of the search." *Id.* (citing *Wong Sun v. United States*, 371 U.S. 471 (1963)).

¶ 23 The statute's exclusionary rule applies to information derived from a process initiated by an unlawful act but does not extend to evidence obtained from an independent source. *People v. Seehausen*, 193 Ill. App. 3d 754, 761 (1990). If knowledge of facts is gained from an independent source, those facts may be proven like any other evidence, but knowledge gained by the government's wrongdoing is inadmissible. *Wong Sun*, 371 U.S. at 485. The "proper test to be applied" is " ' "[w]hether, granting establishment of the primary illegality, the evidence to which

A-20

instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." ' " *United States v. Wade*, 388 U.S. 218, 241 (1967) (quoting *Wong Sun*, 371 U.S. at 488).

¶ 24 The independent source doctrine applies to "evidence acquired in a fashion untainted by the illegal evidence-gathering activity." *Murray v. United States*, 487 U.S. 533, 537-38 (1988). Where an illegal government activity "has given investigators knowledge of facts x and y, but fact z has been learned by other means, fact z can be said to be admissible because derived from an 'independent source.' " *Id.* at 538. The doctrine applies where a lawful seizure is genuinely independent of a tainted one. *Id.* at 542.

¶ 25 The independent source doctrine allows admission of evidence that has been discovered by means wholly independent of unlawful activity. *Nix v. Williams*, 467 U.S. 431, 443 (1984); see also *United States v. San Martin*, 469 F.2d 5, 8 (2d Cir. 1972) (independent source must be entirely separate from illegal eavesdropping); *Simmons v. United States*, 354 F. Supp. 1383, app. C 1394 (N.D.N.Y. 1973) (evidence obtained from an "independent source" cannot be obtained from or as a consequence of lawless official acts). There must not be any connection between the government's illegal conduct and the State's proof. See *Nardone v. United States*, 308 U.S. 338, 341 (1939); *People v. Porcelli*, 25 Ill. App. 3d 145, 150 (1974).

¶ 26 Evidence should be suppressed where "the initial illegality 'led *directly* to any of the evidence actually used against the defendant at trial.' " (Emphasis in original.) *United States v. Smith*, 155 F.3d 1051, 1061 (9th Cir. 1998) (quoting *United States v. Carsello*, 578 F.2d 199, 203 (7th Cir. 1978)). Independent, untainted sources of evidence include testimony from witnesses who acted voluntarily, free from coercion and not part of the illegal government activity. See *United States ex rel. Conroy v. Bombard*, 426 F. Supp. 97, 106 (S.D.N.Y. 1976); see also *State v.*

A-21

Pierson, 248 N.W.2d 48, 53 (S.D. 1976) (evidence of drugs found from individuals cleaning motel room with no relation to illegal wiretap); *People v. Mendez*, 268 N.E.2d 778, 782 (N.Y. 1971) (surveillance leading to a witness was source of information independent of illegal wiretap).

¶ 27 "The fundamental purpose of *** eavesdropping statutes is to prohibit unauthorized eavesdropping and the use of evidence gained by such eavesdropping." *In re Cook County Grand Jury*, 113 Ill. App. 3d 639, 646 (1983). "The spirit and purpose of the [Illinois] eavesdropping statute are not only to ensure that all eavesdropping is subject to judicial supervision but to prevent unwarranted intrusions into an individual's privacy." *People v. Monoson*, 75 Ill. App. 3d 1, 8 (1979). Suppression of illegally recorded evidence is required "where there is a failure to satisfy any of the statutory requirements that directly and substantially implement the legislative intent to limit the use of overhears." *People v. Cunningham*, 2012 IL App (3d) 100013, ¶ 22.

¶ 28 Courts in several states have ruled that video and/or testimonial evidence must be suppressed where, as here, it is connected to an illegal recording. See *Commonwealth v. Dunnavant*, 107 A.3d 29, 31 (Pa. 2014) (*per curiam*); *State v. Lo*, 675 P.2d 754, 760 (Haw. 1983); *State v. Williams*, 617 P.2d 1012, 1019 (Wash. 1980) (*en banc*); *State v. Mullens*, 650 S.E.2d 169, 190 (W. Va. 2007); *People v. Dezek*, 308 N.W.2d 652, 657 (Mich. Ct. App. 1981) (*per curiam*). In *State v. Williams*, 617 P.2d at 1019, the Washington Supreme Court held that, where a police officer and civilian informant knowingly took part in the illegal recording of a conversation with the defendant, the State was prohibited from admitting into evidence the recordings of the conversation as well as the testimony of the officer and informant who participated in the conversation. The court found that suppression of the testimony of the officer and informant was necessary to accomplish the purpose of the state's privacy act, which was " 'protection of the privacy of individuals from public dissemination, even in the course of a public trial, of illegally

A-22

obtained information.' " (Emphasis omitted.) *Id.* (quoting *State v. Wanrow*, 559 P.2d 548, 555 (Wash. 1977) (*en banc*)).

¶ 29 In this state, courts have uniformly held that testimony about an illegally recorded conversation is admissible only if the presence of the illegal recording did not lead to the conversation about which the testimony is sought to be introduced. See *Gervasi*, 89 Ill. 2d at 530 (testimony of officers admissible where it was not "induced or influenced by the eavesdropping"); *People v. Babolcsay*, 368 Ill. App. 3d 712, 716 (2006) (officer's testimony admissible because "videotaping activity did not lead to the officer's conversation"); *People v. Mosley*, 63 Ill. App. 3d 437, 444 (1978) (officer's testimony about conversations with defendant admissible because conversations "would have occurred even if [the officer] had not received approval to carry a recorder on his person"); *Porcelli*, 25 Ill. App. 3d at 150 (officer could testify about conversation with defendant because officer "did not telephone [defendant] just so that a recording could be made").

¶ 30 Here, the majority found that the video portion of the illegally intercepted message and testimony from the CI were "independent sources" of evidence. This conclusion is not supported by the law or the record. In this case, the video portion of the recording was part of, not separate from, the illegal recording. Additionally, testimony from the CI is not separate from the illegal recording because the informant was responsible for the illegal recording and would not have engaged in any conversation with defendant but for the presence of the recording equipment. Both the video portion of the recording and the CI's testimony are tainted by the illegal activity and, thus, inadmissible.

¶ 31 The majority's decision is contrary to the statute's purposes of protecting the privacy of individuals. The unwarranted intrusion of an individual's privacy can only be remedied by

A-23

suppression of all evidence connected to an unlawful eavesdropping recording, including all portions of the recording and testimony regarding the contents of the recording. See *Williams*, 617 P.2d at 1019; see also *Wong Sun*, 371 U.S. at 485 ("[T]estimony as to matters observed during an unlawful invasion has been excluded in order to enforce the basic constitutional policies."). By allowing admission of the video portion of the recording and testimony from the CI, the majority is not protecting the privacy of individuals or discouraging illegal government activity.

¶ 32 The majority relies on *Gervasi* to support its decision. However, *Gervasi* is distinguishable. In *Gervasi*, our supreme court ruled that, where court reporters used illegal recording devices to listen to and transcribe telephone calls between the defendant and police officers, the testimony of the officers who took part in the conversations was admissible. See 89 Ill. 2d at 528-31. The court stated:

> "The officers' knowledge of and [their] testimony concerning the contents of the phone conversations in our case were completely independent of the illegal eavesdropping. Therefore, there is no indication that the testimony of these officers was in any way induced or influenced by the eavesdropping. Here the officers were the actual participants in the conversations. Their knowledge of what was said was not derived from any illegal action. They spoke directly with the defendants, and most of the conversations were initiated by the defendants and none of them were the result of illegal eavesdropping. The officers were the participants in the conversations and were not the eavesdroppers." *Id.* at 530.

¶ 33 The court ruled that the officers' testimony as to the telephone conversations should not be suppressed because "[t]he officers did not surreptitiously obtain information from the defendants." *Id.* at 531. Because the officers' knowledge was not derived from the court reporters' illegal

A-24

eavesdropping activities, the officers' testimony did not violate the eavesdropping statute. *Id.* at 529.

¶ 34 Unlike the officers in *Gervasi*, the CI in this case "surreptitiously recorded" defendant. See *supra* ¶ 3. Therefore, *Gervasi* does not apply. Here, the conversation between the CI and defendant was a direct result of illegal recording. If the CI had not been equipped with the recording equipment, he would not have attempted to engage in a drug transaction with defendant. Unlike the conversations the police officers testified to in *Gervasi*, which were motivated independently of and with no connection to the eavesdropping, the CI's contact with defendant was motivated entirely by the illegal recording equipment. Thus, any and all evidence obtained therefrom, including video of the transaction and the CI's testimony about his transaction with defendant, should be suppressed.

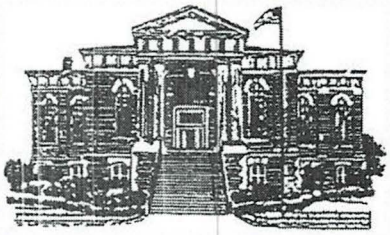
¶ 35 The majority's decision in this case is contrary to the statute, as well as the spirit and purpose of the statute. I would affirm the trial court's order suppressing all portions of the illegal recording as well as the CI's testimony regarding his conversation with defendant.

A-25

No. 3-19-0272

Cite as:	*People v. Davis*, 2020 IL App (3d) 190272
Decision Under Review:	Appeal from the Circuit Court of Kankakee County, No. 18-CF-486; the Hon. Clark E. Erickson, Judge, presiding.
Attorneys for Appellant:	Jim Rowe, State's Attorney, of Kankakee (Patrick Delfino, Thomas D. Arado, and Mark A. Austill, of State's Attorneys Appellate Prosecutor's Office, of counsel), for the People.
Attorneys for Appellee:	Bart E. Beals, of Beals Law Firm, of Chicago, for appellee.

STATE OF ILLINOIS
THIRD DISTRICT APPELLATE COURT



Matthew G. Butler
Clerk of the Court
815-434-5050

1004 Columbus Street
Ottawa, Illinois 61350
TDD 815-434-5068

July 21, 2020

Bart E. Beals
Bart Beals Law Firm
150 N. Michigan Avenue
Suite 2800
Chicago, IL 60601-7586

RE: People v. Davis, Lavail D.
General No.: 3-19-0272
County: Kankakee County
Trial Court No: 18CF486

The court has this day, July 21, 2020, entered the following order in the above entitled case:

Appellee's Petition for Rehearing is DENIED.

Justices Schmidt and Holdridge concur in the denial. Justice Lytton would grant the petition.

Matthew G. Butler
Clerk of the Appellate Court

c: James Richard Rowe, II
Mark Allan Austill

A-27

IN THE
SUPREME COURT OF ILLINOIS
No. 126435

THE PEOPLE OF THE STATE OF ILLINOIS	)	Appellate Court,
	)	Third Judicial
	)	District, Case No. 3-19-0272
Respondent – Appellee	)	
-vs-	)	Twenty-First Circuit
	)	Kankakee. County, IL,
	)	Case No. 18 CF 486
LAVAIL DAVIS,	)	Honorable Clark Erickson
	)	Trial Judge Presiding,
Petitioner – Appellant	)	

NOTICE AND PROOF OF SERVICE

To: Mark Austill
Staff Attorney
State's Attorneys Appellate Prosecutor
602 Columbus St., Suite 300
Ottawa, Illinois
815-434-7010
maustill@ilsaap.org

Michael Glick
Illinois Attorney General
100 West Randolph Street
Chicago, IL 60601
(312) 814-3000
mglick@atg.state.il.us

On January 27, 2021, I served all parties of record electronically in accordance with the Illinois Supreme Court Rules by filing a copy of the Brief with the Office of the Clerk of the Supreme Court of Illinois, via electronic filing.

In addition, a copy of the Brief was emailed to Mark Austill at maustill@ilsaap.org, Michael Glick of the Illinois Attorney General's Office at mglick@atg.state.il.us, and Jim Rowe at jrowe@k3county.net. I deposited in a U.S. mailbox with proper prepaid postage to the Petitioner-Appellant Lavail Davis at 507 W. Mertens, Kankakee, Illinois 60901.

Under the penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he believes the same to be true.

January 27, 2021

/s/ Bart E. Beals
150 N. Michigan, Suite 2800
Chicago, IL 60601
(312) 324-4892

E-FILED
1/27/2021 1:46 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK