

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

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ORAL ARGUMENT REQUESTED

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ARGUMENT

The Informant's Testimony and Video Recording are not Admissible Under Section 14-5 Because the Informant Violated the Illinois Eavesdropping Statute

There is no dispute that the informant did violate the Illinois Eavesdropping Statute. The part of the Illinois Eavesdropping Statute that defines the admissibility of information in situations where the law is violated specifically states that “[a]ny evidence obtained in violation of this Article is not admissible in any civil or criminal trial.” It does not state any “recording” or “interception” which is how the audio recordings are described throughout the Illinois Eavesdropping Statute. It definitively stated any evidence, which makes it plain and clear that once the statute is violated more than just the audio recording will not be admissible at trial.

The state argued in its brief that the video and informant testimony does not violate the Illinois Eavesdropping Statute. That is contrary to the plain meaning of the statute. The statute plainly states “[a]ny evidence obtained in violation” of the statute “is not admissible in any civil or criminal trial.” There is also no dispute that the informant started recording his conversation with the Defendant prior to any drugs or money being produced on video. Therefore, the informant obtained the evidence of the video and testimony simultaneously as he violated the statute. All the evidence that was obtained by the informant was tainted with the stain of the violation of the statute.

The Admission of The Informant's Testimony and Video From The Illegal Eavesdropping Violates The Purpose of The Illinois Eavesdropping Law

The purpose of including the fruit of the poisonous tree doctrine in the Illinois Eavesdropping Statute is to prevent the unwanted intrusion into the private conversations of citizens. *People v. Harris*, 2020 IL App.3d 190504 ¶ 23 (citing *In re Cook County Grand Jury*, 113 Ill.App.3d 639, 646 (1983)). It is completely illogical to allow an informant, who is working on behalf of the state, to violate the Illinois Eavesdropping Statute blatantly and unequivocally without any sanction to discourage such actions.

**The Appellate Court’s Decision Effectively Shifted the Burden of Proof
From the State to The Defendant When It required Proof From the Defense That the
Informant Would not Have Approached the Defendant But For Having the Recording Device**

The state asserted in its brief that the appellate court did not shift the burden of proof because the “defendant has failed to show the requisite casual connection between the improper audio and the informant’s testimony or silent video recording.”¹ However, this assertion by the state is misplaced since unlike in *Gervasi*, the trial court specifically established the connection. The trial court’s ruling regarding the lack of an independent source specifically established that the defendant met his burden and the burden therefore shifted to the people. Since the state did not present any evidence to establish that the illegally obtained evidence had an independent source, it did not meet its burden. The appellate court’s decision required the defendant to meet a burden again, while ignoring the fact that the state provided no evidence in the trial court to meet its burden. That effectively shifted the burden from the state to the defendant. Since the defendant had already met his burden in the trial court, it was the state’s burden to prove that the informant would not have approached the defendant but for having the recording device.

The Principles Espoused in *People v. Cunningham* are Directly Applicable to the Instant Case

“Suppression is only 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 Ill App (3d) 200013, P. 22 (citing *People v. Ellis*, 122 Ill.App. 3d 900, 904 (1984)). Under the Illinois Eavesdropping Statute, the state is required to provide the name of the target of the recording prior to the recording to qualify for the exemption.² Under the Illinois Eavesdropping Statute the “request for approval shall include whatever information is deemed necessary by the State's Attorney

¹ People’s brief, page 16. The state in its brief cited *People v. Gervasi* to may the assertion regarding the need for a defendant to first establish the causal connection to the illegal recording.

² Paragraph (q) of 720 ILCS 5/14-3.

but **shall include, at a minimum, the following information** about each specified individual whom the law enforcement officer believes will commit a qualified offense.” Emphasis added.

The Illinois Eavesdropping Statute does not allow law enforcement to receive approval without providing “each specified individual” prior to receiving authorization. There is a reason for that requirement. That requirement limits the use of the overhears. It does not allow law enforcement to obfuscate probable cause and violate the privacy of people by randomly recording people in a fishing expedition hoping to catch people violating the law. That is exactly what the informant did in the instant case. He failed to find the actual target and decided to try to find a replacement for the approved target, which is exactly what is forbidden by the Illinois Eavesdropping Statute.

**The Appellate Court Misapplied *People v. Gervasi* Because it Supports
the Suppression of the Informant’s Testimony and Video**

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 made a distinction between the testimony and transcripts prepared by the court reporters, who did not have any knowledge of the defendant prior to using the eavesdropping device and the police officer who did have prior knowledge of the defendant based on previous conversations that were a part of an investigation that began before the use of the eavesdropping device. The Court suppressed all the evidence from the court reporters even though the testimony and basis for the transcripts were obtained simultaneously with the eavesdropping. The central issue for determining whether the evidence was admissible was whether there was a previous source of the information provided during the eavesdropping.

In the instant case there was no previous conversation or investigation or source other than the evidence that was gained due to and while the Illinois Eavesdropping Statute was violated by the informant. The appellant court ignored the Court's reasoning and misapplied the law as illustrated in *People v. Gervasi*.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Bart E. Beals, certify that this reply 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(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 4 pages.

/s/ Bart E. Beals

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NOTICE AND PROOF OF SERVICE

To: Patrick Delfino Staff Attorney State’s Attorney Appellate Prosecutor 602 Columbus Street, Ste 300 Ottawa, Illinois (815) 434-7010 3rddistrict@ilsaap.org	Nicholas Moeller Assistant Attorney General Illinois Attorney General 100 W. Randolph Chicago, Illinois 60601 (312) 814-5643 eserve.criminalappeals@atg.state.il.us
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On April 20, 2021, I served all parties of record electronically in accordance with the Supreme Court Rules by filing a copy of the Reply Brief with the Office of the Clerk of the Supreme Court of Illinois, via electronic filing.

In addition, Jim Rowe, Kankakee State’s Attorney, 450 East Court Street, 3rd Floor, Kankakee, IL 60901, jrowe@k3county.net was sent notification via the electronic filing system. 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.

April 20, 2021

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