SUPREME COURT OF GEORGIA: YOU MAY BE COMMITTING A FELONY IF YOU SECRETLY RECORD A SEX ACT

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On November 2, 2017, the Supreme Court of Georgia of decided *the State v. Cohen*[i], in which the court explained the legal requirements of the Georgia unlawful surveillance statute. The relevant facts of *Cohen,* taken directly from the case, are as follows:

> Mye Brindle worked as a housekeeper and personal assistant to Joe Rogers, who was married. During her employment with Rogers, the two became involved sexually. In June 2012, Brindle hired attorneys David Cohen and John Butters to represent her on a potential claim of sexual harassment. On June 20, 2012, without Rogers' knowledge or consent to be video recorded, Brindle allegedly used a "spy" camera to secretly record video of Rogers naked in his bathroom and bedroom, as well as video of a sexual encounter between Rogers and herself inside his bedroom. The video recording was delivered to attorney Cohen, and Brindle resigned from her position with Rogers. On or about July 16, 2012, Rogers received a demand letter from attorney Cohen relating to the potential sexual harassment claim that he and Butters were prepared to file on Brindle's behalf.
>
> After extensive civil litigation between Rogers and Brindle that is not relevant to the current appeal, on June 17, 2016, Brindle and her attorneys (hereinafter collectively referred to as the "defendants") were charged in the Superior Court of Fulton County with conspiracy to commit extortion under OCGA § 16-8-16 (Count 1), conspiracy to commit unlawful surveillance (Count 2), and conducting unlawful surveillance under OCGA § 16-11-62 (Count 3). Brindle was also charged individually with one additional count of conducting unlawful surveillance under OCGA § 16-11-62 (Count 4). The indictment was largely based on the defendants' prior actions involving an alleged conspiracy to secretly video record and then actually record Rogers in the bathroom and bedroom of his home on June 20, 2012, and then sending Rogers the July 16, 2012 litigation demand letter."[ii]

The defendants filed various motions and ultimately the trial court granted a demurrer (essentially dismissed) Count 1 for extortion and granted a demurrer for Counts 2-4 holding that the statutes were unconstitutionally vague.

The state appealed the grant of demurrer on all of the charges.

The first issue the court examined was whether the trial court properly granted a general demurrer on the conspiracy to commit extortion charge. The legal standard that the court applies is simply to ask

> If all the facts which the indictment charges can be admitted [as true], and still the accused be innocent, the indictment is bad; but if, taking the facts alleged as premises, the guilt of the accused follows as a legal conclusion, the indictment is good.[iii]

In other words, if the defendant admits to all the facts in the indictment, could the accused still be innocent of the charge. If so, the general demurrer is appropriate.

In this case, regarding extortion, the court noted that OCGA 16-8-16(a)(3) states

> A person commits the offense of theft by extortion when he *unlawfully* obtains property of or from another person by *threatening* to . . . [d]isseminate any information tending to subject any person to hatred, contempt, or ridicule or to impair his credit or business repute.[iv]

The court then observed that there was no agreement in this case to *unlawfully* obtain property by *threatening* Rogers. In this case, the alleged threat was to file a lawsuit if a certain settlement was not reached. The court then stated that

> **[A] threat of litigation, by itself , is not unlawful. For this reason, we find that, based on the authority of other courts that have examined similar issues, mere "threats to sue cannot constitute criminal extortion**." United States v. Pendergraft, 297 F3d 1198, 1205 (IV) (A) (1) (11th Cir. 2002). See also Buckley v. Directv, Inc., 276 FSupp2d 1271, 1275-1276 (N.D. Ga. 2003) **("[T]he Court is not aware of any authority holding that a demand to settle a claim before pursuing litigation amounts to extortion. In fact, such demand letters do not fit the legal definition of extortion [under OCGA § 16-8-16 (a)]"**).[v] [emphasis added]

Therefore, the court affirmed the grant of general demurrer on Count 1 of the indictment.

The court then vacated the trial court's hold the statutes at issue in Counts 2-4 were unconstitutionally vague and vacated the demurrer. The court did so because they stated that they will not decide a constitutional question if the case can be decided on other grounds. As such, the court set out to examine whether the facts alleged in the indictments, if true, could show a potential violation of the unlawful surveillance statute at issue.

The statute at issue at the time of the crime (in 2012) is OCGA 16-11-62(2), which states, in part, the following:

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> [i]t shall be unlawful for . . . [a]ny person, through the use of any device, *without the consent of all persons observed*, to *observe, photograph, or record the activities* of another which occur in any *private place and out of public view* [except where certain statutory exceptions contained in subsections (2) (A)-(D) apply].[vi] [emphasis added]

The first part of the above statute at issue was whether the consent of all parties was required in order to video Rogers in his residence. The defendants argued that the exceptions provided include one that allows for video recording as was done in this case if one party consents to the recording. The exception upon which the defendants rely is contained in OCGA 16-11-66(a) and it states

> [n]othing in Code Section 16-11-62 shall prohibit a person from *intercepting a wire*, *oral*, *or electronic communication* where such person is a party to the *communication* or *one of the parties to the communication* has given prior consent to such interception.[vii]

The court then opined that the plain meaning of the words used in the above statute mean that this only applies to communications (such as conversations and electronic conversations), not observations, such as video and photographic surveillance. Specifically, the court stated

> **By its terms, OCGA § 16-11-66 (a) applies to intercepted "communications," such as voices involved in a telephone conversation or an electronic communication to which the intercepting person is a party**. See Fetty v. State, 268 Ga. 365 (3) (489 SE2d 813) (1997); OCGA § 16-11-66 (a). **The statute does not refer to observational surveillance such as video recording or photographing another person's activities, and it does not apply to nullify the clear statutory requirement of OCGA § 16-11-62 (2) that the consent of *all* parties is needed before a person may use any sort of spying device to photograph or video record the activities of another person in a private place and out of the public view.** See Gavin v. State, 292 Ga. App. 402 (664 SE2d 797) (2008) (one-party-consent rule of OCGA § 16-11-66 did not apply to prevent prosecution of defendant for violation of OCGA § 16-11-62 where defendant did not obtain consent of person he video recorded). **OCGA § 16-11-66 (a) only applies to intercepted wire, oral, or electronic *communications*, and does not authorize the creation of any secretly produced photograph or video of *observed activities* without the consent of all persons being photographed or video recorded in a private place and out of the public view.** See Sims v. State, 297 Ga. 401 (2) n.2 (774 SE2d 620) (2015) (recognizing distinction between audible communication in recording that is subject to one-party-consent rule and video recording that is not).[viii] [emphasis added]

Thus, all parties to the video recording are required by statute to consent, and the lack of consent of all parties is a violation of one of the elements of this statute. Since Rogers did not consent, that element was satisfied.

The next element at issue was whether the defendant recorded Rogers in a "private place," which is also required for the statute to apply. First, the court reiterated that

> [P]ursuant to OCGA § 16-11-62 (2), a person may not use any device "to observe, photograph, or record the activities of another which occur in any *private place and out of public view*" without the consent of all persons being observed.[ix] [emphasis added]

The defendants argued that when Rogers invited Brindle into his residence to have sexual relations, it no longer became a "private place" under the statute. At the time of the acts that form the basis of the indictments, OCGA 16-11-60 defined a "private place" as

> [A] place where one is entitled reasonably to expect to be safe from casual or hostile intrusion or surveillance."

First, the court noted that Rogers' residence is a place that he could reasonably expect to be free from "casual or hostile surveillance." Second, the court looked at the Modern Penal Code, from which the statute was derived. Commentaries indicated that private place is similar to a Fourth Amendment "reasonable expectation of privacy." Two elements of a reasonable expectation of privacy require a person to (1) subjectively believe their activities are private, and (2) this belief to be one that society is willing to protect or recognizes as reasonable. The court noted that person does not lose their reasonable expectation of privacy when they invite a family member into their home. While Brindle was not a family member, she was not a mere stranger. The court stated that Brindle and Rogers knew each other to the point where she would be considered "the type of household member" who could be allowed in the house while retaining a reasonable expectation of privacy. Specifically, the court stated

> Brindle may have been the type of household member who could be allowed into Rogers' residence without Rogers or the other members of the household losing their reasonable expectation of privacy in those areas of the home that they intended to remain private. See Moses v. State, 328 Ga. App. 625, 628 (2) (a) (760 SE2d 217) (2014) (**homeowner did not lose reasonable expectation of privacy "by allowing persons such as household residents, family members of residents, or housecleaners access to the house"). Accordingly, even when we use the Fourth Amendment as a guide, the indictment here sufficiently alleges that the video recording took place in a "private place." The fact that the indictment also indicates that these areas were outside of public view is sufficient to satisfy the requirements of OCGA § 16-11-62 (2)**.[x] [emphasis added]

Therefore, the court held that the recordings did take place in a "private place" for the purpose of the statute, and the trial court erred in holding otherwise.

Further, the court held that the statute was not unconstitutionally vague.

As such, the Supreme Court of Georgia affirmed the trial court dismissal of Count 1 as to the extortion, and reversed the dismissal of Counts 2-4.

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[i] S17A1265 (Ga. Decided November 2, 2017)
[ii] Id.
[iii] Id. at 6
[iv] Id. at 11
[v] Id. at 13-14

[vi] Id. at 18
[vii] Id. at 20
[viii] Id. at 21-22
[ix] Id. at 23
[x] Id. at 30

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