

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Judiciary

BILL: SB 1802

INTRODUCER: Senator Pizzo

SUBJECT: Interception of Wire, Oral, or Electronic Communications Made in Violation of Protective Orders

DATE: March 12, 2021

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|-------------|----------------|-----------|---------------------------|
| 1. | <u>Bond</u> | <u>Cibula</u> | <u>JU</u> | <u>Pre-meeting</u> |
| 2. | _____ | _____ | <u>CJ</u> | _____ |
| 3. | _____ | _____ | <u>RC</u> | _____ |

I. Summary:

SB 1802 provides that it is lawful for a person who is protected by an injunction for repeat violence, sexual violence, dating violence, domestic violence, or any other court-imposed prohibition of conduct toward the person, to intercept and record a wire, oral, or electronic communication received in violation of the injunction or order. Therefore, the bill creates an exception to the general prohibition against interceptions of wire, oral, or electronic communications without the consent of all parties.

Absent this exception, such recording is proscribed and is not admissible in evidence in a civil or criminal proceeding. The recording, authorized by the bill, may only be used for the purpose of proving violation of the injunction or order.

The bill is effective July 1, 2021.

II. Present Situation:

Definitions of Relevant Terms

Section 934.02(3), F.S., defines “intercept” as the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device.

Section 934.02(2), F.S., defines “oral communication” as any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation and does not mean any public oral communication uttered at a public meeting or any electronic communication.

A protective injunction prohibiting repeat violence, sexual violence, or dating violence is authorized and governed by s. 784.046, F.S., which defines the following terms:

- “Repeat violence” means two incidents of violence or stalking committed by the respondent, one of which must have been within 6 months of the filing of the petition, which are directed against the petitioner or the petitioner’s immediate family member.
- “Sexual violence” means, regardless of whether criminal charges based on the incident were filed, reduced, or dismissed by the state attorney, any one incident of:
 - Sexual battery, as defined in chapter 794;
 - A lewd or lascivious act, as defined in chapter 800, committed upon or in the presence of a person younger than 16 years of age; luring or enticing a child, as described in chapter 787;
 - Sexual performance by a child, as described in chapter 827; or
 - Any other forcible felony wherein a sexual act is committed or attempted.
- “Dating violence” does not include violence in a casual acquaintanceship or violence between individuals who only have engaged in ordinary fraternization in a business or social context. It means violence between individuals who have or have had a continuing and significant relationship of a romantic or intimate nature. The existence of such a relationship is determined based on the consideration of the following factors:
 - 1. A dating relationship must have existed within the past 6 months;
 - 2. The nature of the relationship must have been characterized by the expectation of affection or sexual involvement between the parties; and
 - 3. The frequency and type of interaction between the persons involved in the relationship must have included that the persons have been involved over time and on a continuous basis during the course of the relationship.

A protective injunction prohibiting domestic violence is authorized and governed by s. 741.30, F.S. The term “domestic violence” means any assault, aggravated assault, battery, aggravated battery, sexual assault, sexual battery, stalking, aggravated stalking, kidnapping, false imprisonment, or any criminal offense resulting in physical injury or death of one family or household member by another family or household member.¹

Interception of Oral Communications

Paragraphs (1)(a) and (4)(a) of s. 934.03, F.S., make it a third degree felony² to intentionally intercept an oral communication. The statute provides for a number of exceptions to this general prohibition.³ For example, it is lawful under ss. 934.03-934.09, F.S.,⁴ for:

- An investigative or law enforcement officer or a person acting under the direction of an investigative or law enforcement officer to intercept an oral communication if such person is

¹ Section 741.28(2), F.S.

² A third degree felony is punishable by up to 5 years in state prison, a fine of up to \$5,000, or both. Sections 775.082 and 775.083, F.S. However, if total sentence points scored under the Criminal Punishment Code are 22 points or fewer, the court must impose a nonstate prison sanction, unless the court makes written findings that this sanction could present a danger to the public. Section 775.082(10), F.S.

³ Section 934.02(2)(a)-(k), F.S.

⁴ These laws respectively relate to: interception and disclosure of wire, oral, and electronic communications; manufacture of communication-intercepting devices; confiscation of those devices; authorization of an interception; authorization for disclosure and use of an intercepted communication; and the procedure for interception.

a party to the communication or one of the parties to the communication has given prior consent to the interception and the purpose of such interception is to obtain evidence of a criminal act;⁵ and

- A person to intercept an oral communication when all of the parties to the communication have given prior consent to such interception.⁶

The contents of an intercepted communication and evidence derived from the contents may not be received in evidence in court proceedings and other specified proceedings if the disclosure of the information would violate ch. 934, F.S. (i.e., creating a statutory exclusionary rule):

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the state, or a political subdivision thereof, if the disclosure of that information would be in violation of this chapter. The prohibition of use as evidence provided in this section does not apply in cases of prosecution for criminal interception in violation of the provisions of this chapter.⁷

McDade v. State

In *McDade v. State*,⁸ the Florida Supreme Court (Court) held that it was an error to receive in evidence at McDade's criminal trial recordings that his stepdaughter surreptitiously made when she was 16 years-old. The recordings, which recorded conversations between McDade and his stepdaughter in McDade's bedroom, were introduced at McDade's trial for various crimes involving sexual abuse of his stepdaughter. The recorded conversations included statements by McDade that supported his stepdaughter's testimony at trial that McDade had sexually abused her. McDade had objected to their introduction.

The question before the Court was whether a recording of solicitation and confirmation of child sexual abuse surreptitiously made by the child victim in the accused's bedroom falls within the proscription of ch. 934, F.S. The Court determined that this was a question of statutory interpretation. The Court found that none of the exceptions in s. 934.03, F.S., to the general prohibition in that statute against interception of oral communications called "for the interception of conversations based on one's status as the victim of a crime."⁹ Further, the Court determined that the facts regarding the conversations and the recording of those conversations indicated the recordings were prohibited and inadmissible under ch. 934, F.S.:

[U]nder the definition of oral communication provided by section 934.02(2), Florida Statutes (2010), McDade's conversations with his stepdaughter in his bedroom are oral communications. The facts related to the recorded conversations support the conclusion that McDade's statements were "uttered by a person

⁵ Section 934.03(2)(c), F.S.

⁶ Section 934.03(2)(d), F.S.

⁷ Section 934.06, F.S.

⁸ 154 So.3d 292 (Fla. 2014).

⁹ *McDade* at 297.

exhibiting an expectation that [his] communication [was] not subject to interception” and that McDade made those statements “under circumstances justifying” his expectation that his statements would not be recorded. § 934.02(2), Fla. Stat. (2010). The recordings were made surreptitiously. McDade did not consent to the conversations being recorded, and none of the other exceptions listed in section 934.03(2) apply. The recordings, therefore, were prohibited. Because the recordings impermissibly intercepted oral communications, the recordings are inadmissible under section 934.06, Florida Statutes (2010).¹⁰

At the conclusion of its analysis, the Court stated:

It may well be that a compelling case can be made for an exception from chapter 934’s statutory exclusionary rule for recordings that provide evidence of criminal activity -or at least certain types of criminal activities. But the adoption of such an exception is a matter for the Legislature. It is not within the province of the courts to create such an exception by ignoring the plain import of the statutory text.¹¹

While the Legislature has addressed *McDade* directly by enactment of s. 934.03(2)(k), F.S., a similar concern exists with persons protected by an injunction or court order who would be able to record evidence of violations of those injunctions or orders but for the application of ss. 934.03, and 934.06, F.S.

III. Effect of Proposed Changes:

The bill creates a new exception in s. 934.03, F.S., to the general prohibition in that statute against interception of wire, oral, or electronic communications. The bill provides that it is lawful for a person who is protected under an active temporary or final injunction for repeat violence, sexual violence, or dating violence under s. 784.046; domestic violence under s. 741.30; or any other court-imposed prohibition of conduct toward the person to intercept and record a wire, oral, or electronic communication received in violation of such injunction or court order.

¹⁰ *McDade* at 298. The Court obtained jurisdiction when it agreed to consider a question (which the Court rephrased) that had been certified by the Second District Court of Appeal (“Second District”) in *McDade v. State*, 114 So.2d 465 (Fla. 2d DCA 2013). In that case, the Second District rejected McDade’s argument that the trial court should have suppressed the recordings under the exclusionary rule in s. 934.06, F.S. The Second District determined that the statutory proscription on recording oral communications only applied “where the person uttering the communication has a reasonable expectation of privacy under the circumstances,” *McDade*, 114 So.2d at 470, and determined that McDade did not have a reasonable expectation of privacy. The Second District relied on a prior Florida Supreme Court case, *State v. Inciarrano*, 473 So.2d 1272 (Fla. 1985), which involved a victim recording. The Court rejected the Second District’s application of *Inciarrano*. It found the circumstances in *Inciarrano* were “starkly different” from the circumstances in the case presented. *McDade* at 298. Further, *Inciarrano* was “not based on a general rule that utterances associated with criminal activity are by virtue of that association necessarily uttered in circumstances that make unjustified any expectation that the utterances will not be intercepted” and could not “be used as a basis for the decision reached by the Second District, which turns on McDade’s status as a person engaged in crimes involving the sexual abuse of child.” *McDade* at 299.

¹¹ *McDade* at 299.

A recording authorized by this bill may only be provided to a law enforcement agency or a court for the purpose of evidencing a violation of an injunction or court order and may not be otherwise disseminated or shared.

As a result of this exception, any recording will not be proscribed and the exclusionary rule in s. 934.06, F.S., will not prohibit the recording from being received in evidence in a civil or criminal proceeding.

The bill takes effect July 1, 2021.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The bill does not require counties or municipalities to spend funds or limit their authority to raise revenue or receive state-shared revenues as specified in article VII, section 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 934.03, Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.