

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

STATE OF FLORIDA,

CASE NO.: 48-2008-CF-15606-O

Plaintiff,

DIVISION: 99

vs.

CASEY MARIE ANTHONY,

Defendant.
_____ /

**ORDER DENYING MOTION FOR PROTECTIVE ORDER REGARDING A
TELEPHONE RECORDING OF ROBIN LUNCEFORD**

THIS MATTER came before the Court in Chambers on the Defendant's Motion for Protective Order Regarding a Telephone Recording of Robin Lunceford, filed on July 15, 2010, and Supplemental Motion filed on July 23, 2010. After carefully considering the Motion, arguments of counsel, and the law, the Court finds and determines as follows:

Counsel for the defense has filed a Motion for Protective Order, pursuant to Florida Rule of Criminal Procedure 3.220(1)(1), seeking to exempt from discovery two phone calls placed from Robin Lunceford, an inmate incarcerated in Lowell Correctional Institution, that were recorded by prison officials. In support thereof, counsel claims that these calls constitute privileged attorney work product. He further contends that the recordings of the calls are violative of Section 934.03, Florida Statutes, which provides that it is a crime to willfully intercept oral communications. For the reasons set forth *infra*, the Court disagrees.

First, the recordings of the phone calls by prison officials do not constitute counsel's work product. Attorney work product is generally defined as "[p]ersonal views

of the attorneys as to how and when to present evidence, his evaluation of its relative importance, his knowledge of which witness will give certain testimony, personal notes and records as to witnesses, jurors, legal citations, proposed arguments, jury instructions, diagrams and charts he may refer to at trial for his convenience, but not to be used as evidence.” *Bishop v. Polles*, 872 So.2d 272, 274 (Fla. 2d DCA 2004) (quoting *Surf Drugs, Inc. v. Vermette*, 236 So.2d 108, 112 (Fla.1970)).

Moreover, the “work product” privilege or doctrine protects ***documents and papers of an attorney or a party prepared in anticipation of litigation***. (Emphasis added). Indeed, the privilege generally attaches to materials that a lawyer gathers or assembles or directs a third-party to collect in preparation for trial. As such, counsel may not lay claim to the statements of Robin Lunceford as his work product because it is inarguable that he did not “produce” the recordings of the calls at issue; the prison did. Since the recordings were made by the prison in accordance with its procedures, they constitute public records. The Court is confident that counsel for the defense is now familiar with the dictates of Florida’s Public Records Act. *See Order Denying Motion to Seal Jail Visitation Logs filed June 7, 2010*.

Furthermore, Florida Rule of Criminal Procedure 3.220(g)(1), exempts disclosure of legal research or of records, correspondence, reports or memoranda, ***to the extent that they contain the opinions, theories, or conclusions of the prosecuting or defense attorney, or members of their legal staffs***. (Emphasis added). Opinion work product is an absolute, or nearly absolute, privilege and involves a lawyer's impressions, conclusions, opinion, and theories of his or her client's case. *Horning-Keating v. State*, 777 So. 2d 438 (Fla. 5th DCA 2001).

After reviewing the contents of the calls *in camera*, the Court finds no evidence of counsel's mental impressions of the case present in the recordings. To the contrary, the calls consist solely of Robin Lunceford's factual allegations regarding her contact with fellow inmate Maya Derkovic. Thus, the contents of the recordings do not contain any protected opinion work product of counsel exempt from discovery pursuant to Rule 3.220(g)(1).

Counsel also claims that Section 934.03, Florida Statutes, precludes the State from reviewing the contents of the calls. This contention has been previously considered and rejected by the Florida Supreme Court. In *State v. Smith*, 641 So. 2d 849 (Fla. 1994) the court held that in order to fall within the ambit of Chapter 934, an oral communication must be "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." § 934.02(2), Fla. Stat. (1991) (emphasis added).

Thus, for an oral conversation to be protected under Section 934.03, the speaker must have an actual subjective expectation of privacy, along with a societal recognition that the expectation is reasonable. *State v. Inciarrano*, 473 So.2d 1272 (Fla. 1985).

It has been consistently held by Florida courts that there is no reasonable expectation of privacy in a telephone communication from jail where the inmate is warned that all calls are monitored or recorded. *See McWatters v. State*, 2010 WL 958069 (Fla. 2010); *Jackson v. State*, 18 So. 3d 1016 (Fla. 2009). This principle is equally applicable to counsel's claim. At the beginning of the call, counsel is warned by an

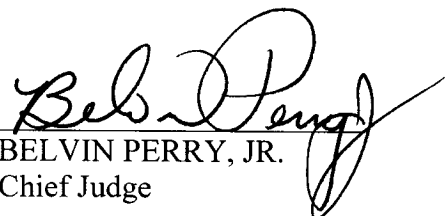
automated message that the call was being placed from a correctional institution and was subject to monitoring and recording. This admonition is then immediately followed by a prompt to press "1" to accept or "2" to decline the call. Immediately thereafter, the call is accepted and counsel can be heard in the recording to answer.

Thus, there is no reason for counsel to believe that his call would be exempted from this warning. To the contrary, counsel's affirmative act of pressing "1" to accept the call from an inmate in a correctional facility after being expressly warned that the calls were subject to monitoring and recording demonstrated his consent. *See United States v. Green*, 842 F. Supp. 68 (W.D.N.Y. 1994).

In addition, counsel was warned by Robin Lunsford herself that the call was subject to recording. Critically, she advises counsel of this fact before he makes any statements in response. Therefore, the Court finds that there is simply no reasonable expectation of privacy where counsel is warned by both the automated messaging system and the witness that the calls are monitored and recorded. Accordingly, the interception of these conversations would not be prohibited by Chapter 943, Florida Statutes.

Based upon the foregoing, the Defendant's Motion for Protective Order Regarding a Telephone Recording of Robin Luncford is DENIED.

DONE AND ORDERED in chambers at Orlando, Orange County, Florida, this
2nd day of August 2010.

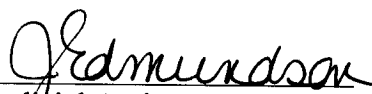

BELVIN PERRY, JR.
Chief Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished by U.S. Mail or hand delivery this 2nd day of August, 2010

to:

- Linda Drane Burdick, Jeffrey L. Ashton, and Frank George, Assistant State Attorneys, Office of the State Attorney, 415 North Orange Avenue, Orlando, Florida 32801;
- Jose Baez, Esquire, The Baez Law Firm, 522 Simpson Road, Kissimmee, Florida 34744;


Judicial Assistant