

STATE OF WISCONSIN

CIRCUIT COURT

MANITOWOC COUNTY

STATE OF WISCONSIN,
Plaintiff,

MANITOWOC COUNTY
STATE OF WISCONSIN
FILED

vs.

DEC 12 2006

Case No. 05 CF 381

STEVEN A. AVERY,

CLERK OF CIRCUIT COURT

Defendant.

**DECISION AND ORDER
ON DEFENDANT'S MOTION TO EXCLUDE JAIL STATEMENTS AND TAPES**

The defendant has filed a motion asking the court to exclude from evidence at trial any recordings of the defendant's conversations with family, friends, and clergy members made while confined in the Calumet County Jail. The defendant does not challenge the legality of making such recordings for security purposes, but contends that allowing the State to utilize the contents of such statements at trial violates the defendant's right to equal protection under the constitutions of the United States and the State of Wisconsin. Avery contends that he is being unlawfully discriminated against on the basis of wealth because, he argues, if he had sufficient resources to post the cash bail set by the court he would not be held in jail and the statements he now makes to others while confined would not be available to the State.

The relevant facts are not disputed. The defendant acknowledges that the State has the right to record statements he makes to others while confined in jail for jail security and safety purposes. The defendant further acknowledges that such statements are

generally admissible at trial unless they run afoul of a constitutional prohibition. For purposes of the defendant's motion, the court assumes that the defendant has made statements to other persons while being held in jail because of his inability to post bail and the State is at least contemplating utilizing some of those statements at trial.

There are a number of problems with the defendant's argument. First, the real classification involved is not the wealth of the individual defendant, but rather the defendant's ability to meet whatever conditions of bail are set by the court. The defendant characterizes the classification involved as one of "wealth" rather than indigence, apparently because he recognizes he is not indigent. The classification involved is not really one's financial means at all, since even a wealthy defendant can be held without bail, and presumably would have the same constitutional argument available to the defendant in this case. The question really boils down to whether the availability to the State of statements recorded for security purposes by a defendant unable to meet conditions of bail set by the court constitutes invidious discrimination.

The defendant cites no cases from Wisconsin or any other jurisdiction in the United States which have accepted his argument. While neither of the parties has cited the court to any case which bears directly on the issue, there is at least one case which has addressed the issue in a closely related context. The facts in United States, ex rel Priest v. Delaware, 268 F. Supp. 242, 243 (D. C. Del. 1967) were as follows:

The petitioner's sole argument in this proceeding is that his inability to post the \$500 bail set by Wilmington Municipal Court on an auto theft charge caused his detention and interrogation on a second charge, for which he was convicted, in violation of the Equal Protection clause of Section 1 of the Fourteenth Amendment to the United States Constitution. The petitioner argues that another person,

similarly charged with one offense, who could post bail, would avoid such further police interrogation. He argues, therefore, that he, as one unable to meet bail requirements, was not given equal protection of the laws with one who could so meet bail.

The district court rejected the defendant's argument:

This question was recently dealt with in *Rigney v. Hendrick*, 355 F.2d 710 (3d Cir. 1965), cert. den. 384 U.S. 975, 86 S. Ct. 1868, 16 L. Ed. 2d 685 (1966). In discussing a problem nearly identical to the one here (subjecting an accused unable to meet bail to a police lineup rather than continued police questioning), the Circuit Court said:

"* * * The final contention of appellants is that they would be denied equal protection of the law if compelled to participate in a lineup because those free on bail cannot be compelled to participate without first being arrested and charged with the specific crimes for which they will be viewed. The Constitution prohibits unequal treatment based upon an unreasonable classification. *Douglas v. People of State of California*, 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963). The Supreme Court there stated:

'* * * [A] State can, consistently with the Fourteenth Amendment, provide for *differences* so long as the result does not amount to a denial of due process or an "invidious discrimination." *Williamson v. Lee Optical [Co.] of Oklahoma*, 348 U.S. 483, 489 [75 S. Ct. 461, 99 L. Ed. 563]; *Griffin v. [People of State of] Illinois*, supra, [351 U.S. 12] p. 18 [76 S. Ct. 585, 100 L. Ed. 891]. *Absolute equality is not required*; lines can be and are drawn and we often sustain them.' * * *" (emphasis supplied)

* * * * *

"We have already held that there is no violation of due process of law in these cases. We have found that the lineup procedure is both reasonable and consistent with the rules of fundamental fairness. Such reasonable methods employed by police for the solution of crime must not be lightly outlawed. As the Supreme Court said in *Ker v. State of California*, 374 U.S. 23, 34, 83 S. Ct. 1623, 1630, 10 L. Ed. 2d 726 (1963), in an analogous situation: '* * * The States are not * * * precluded from developing workable rules governing arrests, searches and seizures to meet "the practical demands of effective criminal investigation and law enforcement" * * *'."

* * * * *

"Here we cannot find an invidious discrimination for the different methods employed by the police in securing the identification of a suspected criminal are made necessary because of the difference in circumstances in which

those free on bail and those detained find themselves. Admittedly, there is a classification between those who can and those who cannot make bail. The Constitution, however, permits such a classification, and any differences here, arise solely because of the inherent characteristics of confinement and cannot constitute invidious discrimination." (emphasis added). Id. at 244.

The district court decision was upheld on appeal in United States, ex rel Priest v. Delaware, 390 F. 2d 150 (3rd Cir. 1968).

The defendant in this case does not allege any improper behavior on the part of the police. There is no allegation that he was forced to make any statements that have been recorded. Only if he voluntarily chooses to make statements that could be useful to the State might he suffer any harm. The fact that his statements are recorded for security purposes is simply a collateral consequence of being held on bail and does not rise to the level of a constitutional violation.

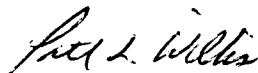
The court would note that any statements the defendant made to clergy while in jail could be subject to additional objections related to privilege and the court does not imply by its decision on this motion that such statements may not be subject to challenge.

ORDER

FOR THE FOREGOING REASONS, the defendant's motion to exclude jail statements and tapes is denied.

Dated this 11th day of December, 2006.

BY THE COURT:



Patrick L. Willis,
Circuit Court Judge