QUESTION PRESENTED

Whether the use of audio or visual recording devices on conserved land is permissible under the Rhode Island’s privacy statute R.I.G.L. § 9-1-28.1?

SHORT ANSWER

R.I.G.L. § 11-35-21 and § 12-5.1-1 highly regulate the audio portion of videotape recording, but activities occurring in plain view of the public are not entitled to the protection of R.I.G.L. § 9-1-28.1 for the video portion of videotape recording.

DISCUSSION

Pursuant to R.I.G.L. § 11-35-21 and § 12-5.1-1, willful interception of wire or oral communications is prohibited. The Supreme Court of Rhode Island has held that the audio portion of a videotape recorder an “intercepting device,” subject to regulation under the state wiretap statute. See State v. O’Brien, 774 A.2d 89, 100 (R.I. 2001).

In Rhode Island, the tort of invasion of privacy is purely statutory. Rhode Island’s Privacy Act, R.I.G.L. § 9-1-28.1, is most relevant to rights concerning the visual portion of a videotape recorder. This statute creates a right of privacy to every person in the state “to be secure from unreasonable intrusion upon one’s physical solitude or seclusion.” R.I.G.L. § 9-1-28.1(a)(1).

To establish a cause of action under Rhode Island’s Privacy Act securing the right to be secure from unreasonable intrusion upon one’s physical solitude or seclusion, a plaintiff must demonstrate that the defendant’s intrusion was an invasion of something that is entitled to be private or would be expected to be private, and that the invasion was or is offensive or objectionable to a reasonable person. See R.I.G.L. § 9-1-28.1(a)(1); Liu v. Striuli, 36 F. Supp.2d 452, 479 (R.I. 1999).

In general, “one’s physical solitude or seclusion” has not been interpreted to protect persons who venture “outside his or her house into public view.” Swerdlick v. Koch, 721 A.2d 849, 857 (R.I. 1998) (held no reasonable expectation of privacy for activities taking place outside of residence in a location visible to passersby). A person’s private resident is of the species of something that is entitled to be private or would be expected to be private, within meaning of the privacy statute; however, once the person leaves the seclusion of the home and enters the public domain, the burden is upon the party alleging
an unreasonable intrusion upon his or her physical solitude or seclusion to establish that thrown about his or her person or affairs is an affirmative seclusion sufficient to merit an objective expectation of privacy. See DaPonte v. Ocean State Job Lot, 21 A.3d 248 (R.I. 2011). The plain meaning of the statute does not protect against conduct and activity that occurs in full public view, such as “a work area of a business.” See Swerdlick, 721 A.2d at 857; DaPonte, 21 A.3d at 252.

In determining defendant liability for intrusion upon “one’s physical solitude or seclusion,” Rhode Island courts have looked to the Restatement (Second) Torts for insightful commentary. A “defendant is subject to liability [for intrusion upon seclusion] only when he has intruded into a private place, or has otherwise invaded a private seclusion that the plaintiff has thrown about his person or affairs” and no liability “for observing him or even taking his photograph while he is walking on the public highway, since he is not then in seclusion, and his appearance is public and open to the public eye.” Restatement (Second) Torts, § 652B cmt. C. at 379-80 (1977)). The burden to assert a privacy right is upon the party alleging the intrusion, requiring the party to establish that “it was an invasion of something that is entitled to be private or would be expected to be private,” and “the invasion was or is offensive or objectionable to a reasonable man” in order to recover for violation of this right. R.I.G.L. § 9-1-28.1 (a)(1)(i)(A)-(B).

CONCLUSION

Activities that occur in plain view of the public (visible to any passersby) are not entitled to protection under Rhode Island’s Privacy Act. However, activities within or very close to a residence, or other places of “solitude or seclusion” may be entitled to protection under the statute.

Certainly, areas such as parking lots, trail heads, and most (if not all) public trails are in plain view of the public, visible to any passersby, and, therefore, likely not areas entitled to protection under Rhode Island’s Privacy Act. Therefore, visual recording of activities within these areas would likely not violate the Privacy Act.

Additionally, posting notices on a property where visual recording devices are to be placed would further decrease any reasonable expectation that the property would be a place of “solitude or seclusion.” However, notices may not always be proper or necessary (e.g., visual recording devices to catch illegal dumping, trespassing, or other illegal activity). In instances in which visual recording devices are to be used in an attempt to document illegal activities on conserved land, careful consideration of the Privacy Act should be used. Attempts to document serious illegal activity should be coordinated with legal counsel and/or local or state police.

Audio recording on conserved lands should only be done in situations where there is consent of the parties. Unconsented audio recordings could lead to potential criminal liability under Rhode Island’s state wiretapping statute.