IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-0984-15

WENDEE LONG, Appellant

v.

THE STATE OF TEXAS

ON STATE'S PETITION FOR DISCRETIONARY REVIEW FROM THE EIGHTH COURT OF APPEALS DENTON COUNTY

RICHARDSON, J., filed a dissenting opinion in which ALCALA and WALKER, JJ. joined.

DISSENTING OPINION

Wendee Long instructed her daughter to record Coach Townsend speaking to his high school girls' basketball team. She later disclosed that recording to members of the school board. The majority holds that the recorded locker-room speeches were "oral communications" because Coach Townsend had a reasonable expectation of privacy in those speeches. Based on that conclusion, the majority reverses the Eighth Court of Appeals and

reinstates Long's conviction under Section 16.02, a second degree felony. Respectfully, I disagree with that decision.[1]

A person violates the Texas wiretap statute, committing a felony offense under Section 16.02 of the Texas Penal Code, if she intentionally "procures another person" to intercept an oral communication.[2] An "oral communication" is defined by statute as a communication "uttered by a person exhibiting an expectation that the communication is not subject to interception *under circumstances justifying that expectation*."[3] The Texas wiretap statute is substantially similar to its federal counterpart under 18 U.S.C. §§ 2510-2521.[4] Moreover, when we compare the federal statutory definition of "oral communication," it is almost identical to the Texas statutory definition.[5] This definition of "oral communication"

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[1] The issue before us is one of first impression—that is, with all other factors being equal, does a coach have a greater expectation of privacy than a teacher in a classroom setting simply because he is speaking to students in a locker room? More precisely, if a coach's locker room "half-time pep talk" is recorded without the permission or knowledge of anyone in the locker room, is it a violation of Section 16.02? The Court of Appeals unanimously said no, and I agree.

[2] TEX. PENAL CODE § 16.02(b)(1).

[3] TEX. CODE CRIM. PROC. art. 18.20, § 1(2) (emphasis added).

[4] *Alameda v. State*, 235 S.W.3d 218, 220, 222 (Tex. Crim. App. 2007) (noting that "the federal wiretap statute is substantively the same as the Texas statute").

[5] 18 U.S.C. § 2510(2) 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, but such term does not include any electronic communication." Texas Code of Criminal Procedure art. 18.20 § 1(2) defines "oral communication" as "any oral communication uttered by a person exhibiting an expectation that the communication is not subject to interception under circumstances justifying that expectation. The term does not include any electronic communication."

incorporates the Fourth Amendment's legitimate-expectation-of-privacy standard.[6] But, even if a person has a subjective expectation of privacy in the words they utter to another, if the circumstances surrounding the uttering of that communication do not *justify* that subjective expectation (i.e., society is not willing to recognize that subjective expectation of privacy as objectively reasonable), then the communication is *not* protected from "interception" by Section 16.02.[7]

I disagree with the majority because I do not believe that Coach Townsend's locker-room speeches to his basketball team were "oral communications" as that term is used in Section 16.02(b)(1). The circumstances under which Coach Townsend uttered the locker room speeches did not justify his subjective expectation of privacy.[8] Therefore, I would affirm the court of appeals, which held that Coach Townsend did not have a reasonable expectation of privacy under these circumstances, the recordings were not "oral communications" within the meaning of Section 16.02, and thus Long did not violate Section 16.02(b)(1).[9]

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[6] *Katz v. United States*, 389 U.S. 347, 353 (1967) ("[W]e have expressly held that the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording or oral statements overheard.").

[7] *Smith v. Maryland*, 442 U.S. 735, 740 (1979).

[8] The fact that Wendee Long was not the principal of the school employing Coach Townsend, he was not at her school at the time of the alleged offense, and the fact that her daughter was not on any team coached by Coach Townsend, do not affect my opinion that he still did not have a legitimate expectation of privacy in the communications at issue.

[9] *Long v. State*, 469 S.W.3d 304, 306 (Tex. App.—El Paso 2015).

The determination of whether a person has a reasonable expectation of privacy in his communications "is made on a case-by-case basis and is highly fact determinative."[10] It is therefore necessary to look at the "circumstances" under which Coach Townsend uttered the words that were recorded. To look at the "circumstances," we should consider all of the details surrounding the words that were uttered. No one factor or detail should be viewed in isolation or removed from consideration.

However, the majority places great weight on the fact that Coach Townsend gave his speech to the players in a locker room, emphasizing that locker rooms are private, that Coach Townsend was "legitimately present" in the locker room, and that access to the locker room was restricted. So, reasons the majority, society would therefore regard Coach Townsend's expectation of privacy in the speeches he gave in the locker room as objectively reasonable. But, the half-time speech video clearly reflects that Coach Townsend had no expectation of privacy in what he was saying to the team. When Coach Townsend was giving his half-time speech, the video shows that the door was left wide open,[11] and there appears to have been three other coaches in the room. Coach Townsend was speaking in a loud voice, and he exhibited no body language or vocal inflections that demonstrated any intention to keep the communication private *because* it was being given in a locker room. Yet, the majority was

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[10] *Id*. at 308 (citing *O'Connor v. Ortega*, 480 U.S. 709, 718 (1987), which notes that, given the great variety of work environments in the public sector, whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis).

[11] *Cf Katz*, 389 U.S. at 361 ("The critical fact in this case is that '(o)ne who occupies it, (a telephone booth) shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume' that his conversation is not being intercepted.").

unpersuaded by the appellate court's characterization of the locker room as a "classroom setting."[12] Historical notions of locker-room privacy provided a basis for the majority to distinguish the cases relied on by the court of appeals.

But, the court of appeals's analysis equating the locker room to a classroom under these facts rings true. A high school girls' basketball coach is an Educator with great power to influence and impress upon student athletes the values of teamwork, commitment, integrity, fairness, loyalty, responsibility, accountability, patience, self-discipline, and sportsmanship. This was clearly Coach Townsend's intent when he gave the locker-room speeches. This case does not involve the invasion of Coach Townsend's "innermost secrets."[13] He did not "utter words into the mouthpiece" of a telephone.[14] Rather, at the time that Coach Townsend was uttering the words that were recorded, he was *on the job*. Coach Townsend was providing what he clearly believed to be instructional communications to his players during and immediately after a game. Since a coach does not have a traditional

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[12] *See Roberts v. Houston Indep. Sch. Dist.*, 788 S.W.2d 107, 111 (Tex. App.—Houston [1st Dist.] 1990, writ denied) (a public school teacher has no reasonable expectation of privacy while teaching in a public classroom); *Plock v. Bd. of Educ. of Freeport Sch. Dist. No. 145*, 545 F. Supp.2d 755, 758 (N.D. Ill. 2007) (special education teachers had no reasonable expectation of privacy in communications in their classrooms). In *Evens v. Super. Ct. of L.A. County*, 77 Cal. App. 4th 320 (1999), the court's assessment that a teacher's communications in a classroom are not private was based at least in part on the fact that a teacher should expect "public dissemination" of his or her communications and activities since students usually discuss teacher's communications and activities with their parents, other students, other teachers, and administrators. Thus, realistically, said *Evens*, a teacher's expectation that their communications with students would remain private was unrealistic and thus unreasonable. *Id.* at 324.

[13] *Berger v. State of New York*, 388 U.S. 41, 63 (1967).

[14] *Katz*, 389 U.S. at 352.

classroom within which to educate his student athletes, anywhere that a coach addresses his or her team should be considered their "classroom."

Thus, while the location is an important consideration, it is not the sole consideration.[15] Nevertheless, to the same extent the majority factored in the location of the communication, it devalued the content of the communication. I would hold, however, that the content of the video and audio recordings is the best evidence that Coach Townsend did not have an expectation of privacy. The content of his communication is a very significant part of the "circumstances" surrounding the communication. When Coach Townsend gave his post-game speech, a female coach also spoke to the team. Both coaches's speeches focused solely on the general performance of the players. Nothing about what was said or how it was said gave any indication that Coach Townsend intended the communication to be private. No game strategy was discussed; no team secrets were revealed.[16]

If we are to determine whether Coach Townsend's subjective expectation of privacy in his locker-room communications to the girls' basketball team is one that society is willing to recognize as reasonable, we must look at the totality of the circumstances, and that includes what was said and how it was said. A communication is only an "oral communication" under Section 16.02 if it is uttered by a person "under circumstances" that objectively justify that person's subjective expectation of privacy. Only then is the person's

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[15] *See Katz*, 389 U.S. 347, 351 (noting that the Fourth Amendment protects people not places).

[16] I understand that game secrets are game secrets, but even if this were a situation where a rival had eavesdropped on Coach Townsend's strategy session, that form of reprehensible cheating would likely result in a forfeit of the game or some other similar form of punishment.

expectation of privacy considered objectively reasonable as well as subjectively reasonable.[17] No single factor should be determinative.[18]

As noted above, the content of Coach Townsend's speeches was 100% focused on what he believed was the necessary coaching of his players. Putting it mildly, the gist of his speeches was directed to the players's performance at the game, and emphasis was placed on their commitment to the team and their need for improvement. To the extent that Coach Townsend even had a subjective expectation of privacy, nothing about what he said would support a finding that he was justified in having such an expectation of privacy.

Therefore, considering the totality of the circumstances in this case, I disagree with the majority's conclusion that Coach Townsend's speeches he gave to the girls' basketball team were made under circumstances that justified his subjective expectation of privacy. Because I do not believe that Coach Townsend had a legitimate expectation of privacy in such communications, respectfully, I dissent. Instead, I would affirm the decision of the Eighth Court of Appeals.

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[17] *See Brugmann v. State*, 117 So.3d 39, 48-49 (Fla. App. 3rd Dist. 2013); *see also State v. Inciarrano*, 473 So.2d 1272 (Fla. 1985) (noting that factors to consider may include (1) the location where the communication took place; (2) the manner in which the communication was made; (3) the nature of the communication; (4) the intent of the speaker asserting protection at the time the communication was made; (5) the purpose of the communication; (6) the conduct of the speaker; (7) the number of people present; (8) the contents of the communication).

[18] *State v. Duchow*, 749 N.W.2d 913, 920 (Wis. 2008).