IN THE COURT OF APPEALS OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE MICHELLE LEAVITT, DISTRICT JUDGE,
Respondents,
and
MARSHAN BOWDEN,
Real Party in Interest.

No. 69011

ORDER GRANTING PETITION

This original petition for a writ of mandamus or, in the alternative, prohibition challenges an order of the district court granting a motion in limine.[1]

Real party in interest Marshan Bowden moved the district court to exclude portions of a conversation between himself and Majunique Brown that was recorded while they were in the back of an Arizona Highway Patrol vehicle. Bowden asserted, because neither he nor Brown consented to the recording of their conversation, those portions of their conversation that occurred when Trooper Odegard was not in the patrol

[1]Because mandamus, rather than prohibition, constitutes the proper vehicle for challenging the ruling at issue here, we deny the State's alternative request for a writ of prohibition. *See* NRS 34.320 (noting that prohibition relief is available to address proceedings in excess of a tribunal's jurisdiction).

vehicle with them were obtained in violation of Arizona Revised Statute (ARS) 13-3005(A)(2), which prohibits the intentional interception of a wire, electronic, or oral communication without the consent of at least one party to the communication. Relying on *Mclellan v. State*, 124 Nev. 263, 268, 182 P.3d 106, 110 (2008), Bowden argued that those portions of his conversation with Brown were not admissible under NRS 48.077 because they were not legally intercepted under Arizona law.[2]

The State opposed Bowden's motion and argued ARS 13-3005(A)(2) was inapplicable. In the opposition and at the hearing on the motion, the State argued, among other things, that ARS 13-3005(A)(2) was inapplicable because Bowden did not have a reasonable expectation of privacy while in the back of the patrol vehicle. The State cited *State v. Hauss*, 688 P.2d 1051, 1056 (Ariz. Ct. App. 1984), in support of this argument, asserting *Hauss* added an element that requires an individual to have a reasonable expectation of privacy for ARS 13-3005(A)(2) to be applicable.

Bowden countered that a reasonable expectation of privacy analysis was not a relevant inquiry because, rather than asking the district court to suppress evidence as a result of a constitutional violation, he was asking the court to make an evidentiary ruling based on a statute. And, at the hearing, Bowden distinguished his case from *Hauss*, explaining, in *Hauss*, there was a Fourth Amendment claim as well as a statutory claim. Bowden informed the district court Hauss' Fourth Amendment claim was rejected because he did not have a reasonable

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[2]We note NRS 48.077 is a statute that affirmatively provides for the admission of evidence and it is not a statutory exclusionary rule.

expectation of privacy. Bowden further informed the district court the Arizona statute did not apply in *Hauss* because there was one-party consent in that case.

The district court decided it did not need to do a Fourth Amendment analysis, found that the portions of Bowden's conversation where Trooper Odegard was not present were illegally intercepted under ARS 13-3005, and granted the motion in limine. This petition followed.

Because the State cannot appeal the district court's order, *see State v. Shade*, 110 Nev. 57, 63, 867 P.2d 393, 396 (1994) ("There is no statute or rule which provides for an appeal from an order of the district court granting a motion in limine to exclude evidence."), and because relief is warranted to control a manifest abuse of discretion, we elect to exercise our discretion and consider the petition. *See* NRS 34.160 (providing that a writ of mandamus may issue to compel a performance of act which law requires "as a duty resulting from an office, trust or station); NRS 34.170 (providing that a writ of mandamus will issue "where there is not a plain, speedy and adequate remedy in the ordinary course of law"); *Pan v. Eighth Judicial Dist. Ct.*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004) (observing petitioner bears the burden of demonstrating this court's intervention by way of extraordinary relief is warranted); *Poulos v. Eighth Judicial Dist. Ct.*, 98 Nev. 453, 455, 652 P.2d 1177, 1178 (1982) (observing mandamus is an extraordinary remedy, and it is within this court's discretion to determine if petition will be considered); *Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981) (mandamus available to control a manifest abuse or arbitrary or capricious exercise of discretion).

The State contends the district court manifestly abused its discretion by granting the motion in limine because it did not consider whether Bowden had a reasonable expectation of privacy when deciding that ARS 13-3005(A)(2) was applicable. The State asserts *Hauss* requires consideration of the parties' reasonable expectation of privacy when deciding whether ARS 13-3005 is applicable.

Bowden asserts ARS 13-3005(A)(2) "does not contemplate whether or not the victims of an illegal recording are reasonable in their belief that they were or were not being recorded" and, because he did not argue a Fourth Amendment violation took place, a reasonable expectation of privacy analysis does not apply. Bowden does not address the State's argument that *Hauss* requires the district court to consider a parties' reasonable expectation of privacy when determining whether ARS 13-3005 is applicable.

Because the communication at issue was intercepted in Arizona, Arizona laws governing intercepted communications apply when deciding whether the communication is admissible under NRS 48.077. *Mclellan*, 124 Nev. at 268, 182 P3d at 110 (holding an intercepted communication is admissible under NRS 48.077 if the communication was legally intercepted in the jurisdiction where the communication was made).

ARS 13-3005(A)(2) provides:

> A. Except as provided in this section and § 13-3012, a person is guilty of a class 5 felony who either:
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> . . .
>
> 2. Intentionally intercepts a conversation or discussion at which he is not present, or aids, authorizes, employs, procures or permits another

> to so do, without the consent of a party to such conversation or discussion.

On its face, ARS 13-3005(A)(2) does not require consideration of the parties' reasonable expectation of privacy when deciding whether it is applicable. However, in *Hauss*, the Arizona Court of Appeals specifically addressed the applicability of ARS 13-3005(A)(2) and rejected Hauss' contention that a tape recorded conversation should not have been admitted at trial because the officers violated ARS 13-3005. 688 P.2d at 1056. Contrary to Bowden's representations to the district court, the *Hauss* court did not conclude ARS 13-3005(A)(2) was inapplicable because one party consented to the recording in that case. Rather, the *Hauss* court specifically held: "The rationale of the *Hearst* case applies equally here. There being no reasonable expectation of privacy in the setting which existed, the statute was inapplicable." *Id.* (referencing *United States v. Hearst*, 563 F.2d 1331 (9th Cir. 1977)). In so holding, the *Hauss* court added an element that must be considered when determining whether ARS 13-3005(A)(2) is applicable, specifically, whether there was a reasonable expectation of privacy in the setting which existed at the time of the conversation. Additionally, by referencing *Hearst* it appears the *Hauss* court applied the same standard for determining "reasonable expectation of privacy" as is employed in Fourth Amendment cases.

Hauss has not been overruled. Although we recognize ARS 13-3005(A)(2) has been modified since the *Hauss* court considered the statute, those modifications did not significantly alter the conduct prohibited and they do not appear to have altered the holding in *Hauss* that in order for ARS 13-3005(A)(2) to be applicable a person must have a reasonable expectation of privacy in the setting which existed at the time of the conversation.

The record clearly demonstrates the district court did not consider whether Bowden had a reasonable expectation of privacy before determining ARS 13-3005(A)(2) was applicable. We therefore conclude the district court manifestly abused its discretion by failing to determine whether Bowden and Brown had a reasonable expectation of privacy at the time of their conversation when deciding their conversation was illegally intercepted under ARS 13-3005(A)(2). *See State v. Eighth Judicial Dist. Ct. (Armstrong)*, 127 Nev. 927, 932, 267 P.3d 777, 780 (2011) ("A manifest abuse of discretion is '[a] clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule.'" (alteration in original) (citation omitted)).

The State asks this court to find Bowden did not have a reasonable expectation of privacy while in the back of the patrol vehicle and direct the district court to admit the conversation between Bowden and Brown. The State asserts Bowden did not have a reasonable expectation of privacy when he was in the back of Trooper Odegard's patrol vehicle "because a reasonable person would recognize the very real possibility that audio and visual recording equipment are present." The State also asserts Bowden conceded "below that he did not have a reasonable expectation of privacy in his conversation with Brown."

Bowden argues "the content of the conversation between [him and Brown] shows that neither [of them] actually exhibited 'an expectation that the communication [was] not subject to interception.'" He asserts their belief that their conversation was not being recorded "was objectively justified because they were not being interrogated in a police station, there was not a camera trained on them, and there was no other

indication that placed them on notice they would be recorded while talking to one another while being detained for a traffic offense."

As noted above, it appears the *Hauss* court applied the same standard for determining "reasonable expectation of privacy" when deciding whether ARS 13-3005(A)(2) applies as is employed in Fourth Amendment cases. In a Fourth Amendment analysis,

> [a] court must answer two questions to determine the existence of a legitimate expectation of privacy. "The first is whether the individual, by his conduct, has 'exhibited an actual (subjective) expectation of privacy'" in the place that was the subject of the search. *Smith v. Maryland*, 442 U.S. 735, 740, 99 S. Ct. 2577, 61 L.Ed.2d 220 (1979) (quoting *Katz v. United States*, 389 U.S. 347, 361, 88 S. Ct. 507, 19 L.Ed.2d 576 (1967)). "The second question is whether the individual's subjective expectation of privacy is 'one that society is prepared to recognize as 'reasonable'.'" *Id.*

State v. Adams, 5 P.3d 903, 906 (Ariz. Ct. App. 2000), *as amended* (May 12, 2000). The second question is an objective determination, which is reviewed de novo, and looks at whether the subjective expectation of privacy is one that society is prepared to recognize as reasonable. *State v. Allen*, 166 P.3d 111, 114-15 (Ariz. Ct. App. 2007). In determining whether a suspect's objective expectation of privacy is reasonable, a court considers the totality of the circumstances. *Adams*, 5 P.3d at 907.

To determine whether ARS 13-3005(A)(2) is applicable, the issue this court must decide is whether a person has an objectively reasonable expectation of privacy while inside a patrol vehicle. Arizona has not addressed this issue. However, several federal circuit courts have addressed the issue and all have concluded that for the purposes of the Fourth Amendment there is no expectation of privacy that society is

prepared to recognize as reasonable.[3] When deciding there is no objectively reasonable expectation of privacy while in a police vehicle, the courts have often focused on the fact a police vehicle often functions as a trooper's office, *United States v. Clark*, 22 F.3d 799, 801 (8th Cir. 1994),

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[3]*See United States v. Webster*, 775 F.3d 897, 904 (7th Cir. 2015) (holding that "[g]iven the nature of the [squad car] and the visible presence of electronics capable of transmitting any internal conversations, the expectation that a conversation within the vehicle is private is not an expectation that society would recognize to be reasonable"); *United States v. Dunbar*, 553 F.3d 48, 57 (1st Cir. 2009) (holding back of police car was not a place where the defendant and his wife could reasonably expect to communicate in private, and therefore officer did not violate statute governing the interception of oral communications when he recorded defendant's incriminating conversation with his wife, which took place while officer searched defendant's stopped automobile, without their knowledge); *United States v. Turner*, 209 F.3d 1198, 1200-01 (10th Cir. 2000) (Reasoning that "in addition to the status of the police vehicle, the practical realities of the situation should be apparent to occupants. Patrol cars bristle with electronics, including microphones to a dispatcher, possible video recording with audio pickup, and other electronic recording devices." And holding a defendant did not have an objective expectation of privacy while in the back of a police vehicle, even where the defendant was not in custody or being threatened with arrest and where the officer deliberately represented the car as a safe haven.); *United States v. Clark*, 22 F.3d 799, 801-02 (8th Cir. 1994) (holding "that a person does not have a reasonable or legitimate expectation of privacy in statements made to a companion while seated in a police car," reasoning a police car "is essentially the trooper's office," "[t]he general public has no reason to frequent the back seat of a patrol car, or to believe that it is a sanctuary for private discussions" and "[a] police car is not the kind of public place, like a phone booth where a person should be able to reasonably expect that his conversation will not be monitored." (internal citation omitted)); *United States v. McKinnon*, 985 F.2d 525, 528 (11th Cir. 1993) (holding defendant "did not have a reasonable or justifiable expectation of privacy for conversations he held while seated in the back seat area of a police car").

and the fact police cars often have numerous electronics in them capable of transmitting and recording conversations, *United States v. Webster*, 775 F.3d 897, 904 (7th Cir. 2015); *United States v. Turner*, 209 F.3d 1198, 1201 (10th Cir. 2000).

We agree with the reasoning of the federal courts with respect to this issue and hold, as a general rule, a person does not have an objectively reasonable expectation of privacy while in a patrol vehicle.

Here, even assuming Bowden had a subjective expectation of privacy, under the totality of the circumstances presented, we conclude that his subjective expectation of privacy is not one that society is prepared to recognize as reasonable. After both Bowden and Brown had been in the back of the patrol vehicle for approximately twenty minutes, Trooper Odegard said "Don't whisper back there because the camera picks it up." Moreover, we note, in his reply to the State's opposition filed below, Bowden conceded that under the facts presented in this case the Fourth Amendment was not violated.

We conclude the district court manifestly abused its discretion by failing to determine whether Bowden and Brown had a reasonable expectation of privacy when deciding their conversation was illegally intercepted under ARS 13-3005(A)(2). Because we conclude Bowden did not have an objectively reasonable expectation of privacy while in the back of the patrol vehicle, we further conclude ARS 13-3005(A)(2) was inapplicable. Finally, we conclude, because Bowden's conversation was lawfully intercepted, the conversation is admissible under NRS 48.077, *see Mclellan*, 124 Nev. at 268, 182 P.3d at 110, and the district court erred by granting the motion in limine. Therefore, we

ORDER the petition GRANTED AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF MANDAMUS instructing the district court to vacate the order granting the motion in limine.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Silver

cc: Hon. Michelle Leavitt, District Judge
Attorney General/Carson City
Clark County District Attorney
Cofer & Geller, LLC
Eighth District Court Clerk