

Legislative Analysis



PROHIBITED SURVEILLANCE/PHOTOGRAPHY

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Senate Bill 918 as passed by the Senate

Sponsor: Sen. Alan Sanborn

House Committee: Criminal Justice

Senate Committee: Judiciary

First Analysis (5-27-04)

BRIEF SUMMARY: The bill would prohibit surveilling and photographing another individual under certain circumstances and prohibit the distribution of any recording, photograph, or visual image made of that individual.

FISCAL IMPACT: Depending on how the bill affected felony convictions and sentencing, it could increase state or local correctional costs. State costs of felony probation supervision are approximately \$1,800 per year, while appropriated costs of prison incarceration are approximately \$28,000 per year. The cost of any jail term imposed would be borne by the county; jail costs vary from county to county.

THE APPARENT PROBLEM:

Michigan law prohibits the unauthorized installation of devices in private places for the purpose of observing, photographing, or eavesdropping upon unsuspecting persons; a violation is a two-year felony. House Bill 5692, which was recently passed by the Senate but not yet ordered enrolled, would expand this provision to include devices placed or used in a private place, increase the penalty for a second offense, and create a higher penalty for distributing, disseminating, or transmitting any recording, photograph, or visual image that was taken while violating this provision of law.

However, Michigan law does not yet explicitly prohibit using the newer mobile devices, such as camera phones and miniature cameras, to capture images of people in a state of undress in school or health club locker rooms or slipping the lens up the skirts of passersby to take pictures, nor does it prohibit the transmission of those images to others. Unfortunately, as the ownership and use of these devices proliferate, so does the risk of abuse. Already Michigan prosecutors have had difficulty fitting existing state law to crimes such as the incident in which a man placed a small video recorder in a gym-type bag and walked down the street swinging the bag seemingly in a random manner; in reality, he was swinging the camera in such a manner as to videotape glimpses under the skirts of passing women. As the camera was neither "installed" nor being used in a "private place", prosecutors were forced to charge him with a much lower misdemeanor offense.

Some schools and health clubs have already banned camera phones and other small recording devices from school grounds and club locker rooms, but many feel that due to

the high risk of abuse, state law should be changed to appropriately punish those who would use technology to invade the privacy of others.

THE CONTENT OF THE BILL:

The bill would add a new section to the Michigan Penal Code to prohibit a person from doing any of the following:

- Surveilling another individual clad only in undergarments, another individual's unclad genitalia or buttocks, or a female individual's unclad breasts under circumstances in which the individual would have a reasonable expectation of privacy.
- Photographing, or otherwise capturing or recording, the visual image of the undergarments worn by another individual, another individual's unclad genitalia or buttocks, or a female individual's unclad breasts under circumstances in which the individual would have a reasonable expectation of privacy.
- Distributing, disseminating, or transmitting for access by any other person a recording, photograph, or visual image that the person knew or had reason to know was obtained in violation of the bill.

"Surveil" would mean "to secretly observe the activities of another person for the purpose of spying upon and invading the privacy of the person observed".

A first-time surveilling violation would be a felony punishable by up to two years' imprisonment and/or a maximum fine of \$2,000. A second or subsequent surveilling violation would be punishable by up to five years and/or \$5,000. A violation that involved photographing, or otherwise capturing or recording a visual image, or distributing, disseminating, or transmitting would be punishable by up to five years and/or \$5,000.

A person could still be charged with, convicted of, or punished for any other violation of law committed by that person while violating or attempting to violate the bill's prohibitions. In addition, security monitoring in a residence that was conducted by or at the direction of the owner or principal occupant of that residence unless conducted for a lewd or lascivious purpose would not be prohibited.

The bill would take effect on September 1, 2004. The bill is tie-barred to House Bill 5692, which would expand the prohibition against installing a device for observing, photographing, or eavesdropping without the consent of a person entitled to privacy.

MCL 750.539j

ARGUMENTS:

For:

Michigan's laws have not kept pace with technological advances in the area of telecommunication devices such as camera phones and miniature cameras. As a result, prosecutors may be hard-pressed to find a punishment that fits the crime of using these newer devices to see or record people showering or changing in locker rooms and dressing rooms, or to prosecute those who would stick these devices under bathroom stall doors or up women's skirts on public streets.

The bill would provide a remedy by expanding the penal code to include devices that are not installed, such as hand-held camcorders (or camcorders hidden in gym bags, etc.), digital and other small cameras, camera phones, and so forth. Also, the bill would include incidents that occurred not in traditionally private places (e.g., bedrooms, bathrooms, and changing rooms) but in public places such as on the street or when using public transportation, if the act involved photographing, recording, transmitting, etc. images of a person's undergarments or private areas without authorization. In so doing, Michigan will be proactive in creating penalties to both deter such behaviors and also to appropriately punish offenders.

Response:

The bill does not define "reasonable expectation of privacy"; therefore, there may be a problem in enforcing the proposed changes. Some may argue that there is no expectation of privacy when in a public place, where others may argue that a person does indeed have a "reasonable expectation of privacy" regarding his or her undergarments or certain body parts. Without a definition, some feel it may be up to a court's interpretation when a case comes to trial.

POSITIONS:

The Michigan State Police supports the bill. (5-26-04)

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