

HOUSE BILL ANALYSIS

HB 2220

Title: An act relating to unauthorized visual surveillance.

Brief Description: Prohibiting unauthorized visual surveillance.

Sponsors: Representatives Constantine, Lambert, O'Brien, Keiser, Rockefeller and Ogden.

HOUSE COMMITTEE ON CRIMINAL JUSTICE AND CORRECTIONS

Staff: Jean Ann Quinn (786-7310) and Anntonette Alberti (786-7117).

Background:

The Fourth Amendment protects people from unwarrantable search and seizure. It governs the circumstances under which visual surveillance is constitutionally permissible. Federal district courts and circuit courts of appeals have unanimously held that video surveillance does not, in and of itself, violate the Fourth Amendment. Courts look to the nature and purpose of the video surveillance to determine whether it violates constitutional protections against unwarrantable search.

Generally, video surveillance does not violate the Fourth Amendment when there is not a reasonable expectation of privacy and the search is reasonable.

Where video surveillance is used in the course of a criminal investigation, the circuit courts have held that courts may issue warrants for silent video surveillance when there is probable cause and the requirements of a four-part test have been satisfied. The test is based upon requirements for wire, oral or electronic communications surveillance. It requires: (1) the judge must find that normal investigative procedures have been tried and have failed, or would likely fail if tried, or are too dangerous; (2) the warrant must contain a description of the type of activity to be taped and the offense to which it relates; (3) the warrant must limit the period of time to the minimum needed to tape the activity, in no case longer than 30 days (though extensions are possible); and (4) the video surveillance must be conducted in a manner to minimize taping of activity that is not subject to the warrant.

No federal court has decided the circumstances under which video surveillance with one party consent is constitutionally permissible. However, the Eighth Circuit has indicated that information gathered from one party consent video surveillance may be admissible

in certain circumstances.

Summary:

A person who, with premeditated intent, observes the private activity of another person, without the consent of the person being observed, is guilty of unauthorized visual surveillance. However, if the circumstances of the observation fall under those outlined in the voyeurism statute, the voyeurism statute applies. Observe– means to watch, photograph, film, or otherwise record or transmit a visual record. Private activity– means an activity about which a person has a reasonable expectation of privacy. It is a gross misdemeanor to engage in unauthorized visual surveillance.

Viewing, photographing or filming by jail or correctional facility personnel for security purposes or during an investigation of alleged misconduct of a person in custody is exempted from the prohibition against unauthorized visual surveillance.

A superior court judge may issue an ex parte order for visual surveillance if an attorney general or county prosecutor makes a verified application proving, among other facts, that: (a) there are reasonable grounds to believe that national security is endangered, that a human life is in danger, that arson is about to be committed, or that a riot is about to be committed; (b) there are reasonable grounds to believe that evidence will be obtained essential to the protection of national security, the preservation of human life, or the prevention of arson or a riot; and (c) there is no other way to obtain the information. An ex parte order may be granted for 15 days and may be extended for 15 additional days. Superior court judges must make annual reports of the authorizations they have made to the Administrator for the Courts. The Chief Justice of the Supreme Court reports annually to the Governor and Legislature on any improvements that can be made to chapter 9.73 RCW. Evidence obtained from unauthorized visual surveillance or for which an ex parte order was issued is inadmissible in court unless the party observed grants permission or the defendant is charged with a crime that would jeopardize national security.

A victim of unauthorized visual surveillance may bring a civil action for damages for injury to business, person, or reputation. The victim may recover actual damages, mental pain and suffering, or liquidated damages of \$100 a day, up to \$1,000, for the period of time the violation occurred, and reasonable attorneys' fees and court costs.

The prohibition against unauthorized visual surveillance does not apply to police, fire, or other emergency personnel when recording incoming calls, or to video recordings made of arrested people before they go to court, if certain criteria are met.

A law enforcement officer may use unauthorized visual surveillance if he or she is a party to the communication or conversation recorded or one party to the communication

consents. However, there must be probable cause to believe the nonconsenting party has, is, or will commit a felony, and a judge or magistrate must give prior approval. The law enforcement officer's application for authorization must contain certain elements. Judges and magistrates must make a report to the Administrator for the Courts within 30 days of making an such an authorization. This type of authorization can be given for seven days, with the possibility to extend for additional seven day periods. The information gained from this type of surveillance is admissible in court. If the communication subject to visual surveillance involves drugs, the judge or magistrate has broader discretion to allow one party consent recordings and can issue authorizations for 14 days, with the option to continue for an additional 14-day period. Within 30 days after conducting the visual surveillance, or after authorization to conduct surveillance has been denied, the judge or magistrate must serve the person subject to surveillance with an inventory of information about the surveillance, unless in an ex parte showing of good cause the judge or magistrate determines serving the inventory should be postponed or dispensed with.

The Legislature has determined that because drugs pose a great threat to society, visual surveillance of illegal drug operations should be conducted, within the parameters of constitutional privacy guarantees. If a consenting party to visual surveillance of drug operations is in danger, police commanders or higher ranking officers may conduct visual surveillance without a judicial authorization to protect the consenting party. The police must keep good records of their reasons and must file a monthly report about such surveillance with the Administrator for the Courts. Information gathered in this way is inadmissible in court and the recording must be destroyed unless there is permission to use the video in a judicial proceeding, or the case is a civil action for personal injury or wrongful death of the consenting party, or the case is a criminal action in which a serious violent crime was perpetrated against the consenting party.

As part of a criminal investigation, the chief officer of a law enforcement agency may authorize visual surveillance if there is one party consent, there is probable cause that illegal drug operations are involved, and a written report, with defined elements, is completed. The authorization is valid throughout the state and can include additional nonconsenting parties. The recording must be made in such a way so that it cannot be edited or altered. The authorization is valid for 24 hours and can be renewed for two 24-hour periods. The chief law enforcement officer must report to the court having jurisdiction over the matter within 15 days of signing an authorization. Within two days, the court must make an ex parte review of the authorization. If probable cause for the recording did not exist, the tape must be destroyed and the subjects of the recording must be informed within six months of the court's determination unless extensions to the six-month period for disclosure are granted. Evidence gathered in this manner is admissible only if gathered correctly or in certain other limited circumstances. A violation of this section is a class C felony. The authorizing agency may also be liable for up to \$25,000 in exemplary damages, in addition to any other

damages, if there was no probable cause nor reasonable suspicion of illegal drug activity.

The attorney general and county prosecutors have concurrent jurisdiction to investigate alleged improper visual surveillance by law enforcement agencies.

Video recordings are available for viewing to defense counsel, upon request, when the video is evidence in a criminal trial.

The owners or lawful possessors of buildings, fenced areas, vehicles, and other such structures are allowed to use unauthorized visual surveillance if the persons being recorded are engaged in criminal activity by virtue of unlawfully entering or remaining in the structure.

In most superior court judicial districts, at least one judge or magistrate must be available at all times for receiving applications for visual surveillance authorizations.

Fiscal Note: Requested on February 24, 1999.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Office of Program Research