

LEGISLATIVE BILL 179

Approved by the Governor April 11, 2008

Introduced by Lathrop, 12.

FOR AN ACT relating to criminal procedure; to require electronic recording of custodial interrogations as prescribed; to define terms; to require jury instructions for failure to comply; to provide exceptions; and to address inaudible portions of recordings.

Be it enacted by the people of the State of Nebraska,

Section 1. The Legislature finds that to electronically record statements made during a custodial interrogation is an effective way to document a free, knowing, voluntary, and intelligent waiver of a person's right to remain silent, to agree to answer questions, to decide to have an attorney present during such questioning, and to decide to have an attorney provided to such person if he or she cannot afford an attorney, as provided by the Constitution of the United States and the Constitution of Nebraska. Providing a record of the statement made during a custodial interrogation and any waiver of constitutional rights will reduce speculation and claims that may arise as to the content of the statement. Such a record of the content of the statement will aid law enforcement officers in analyzing and rejecting untruthful statements and will aid the factfinder in determining whether a statement was freely, knowingly, voluntarily, and intelligently made.

Sec. 2. For purposes of sections 1 to 8 of this act:

(1) Custodial interrogation has the meaning prescribed to it under the Fourth and Fifth Amendments to the Constitution of the United States and Article I, sections 3 and 7, of the Constitution of Nebraska, as interpreted by the United States Supreme Court and the Nebraska Supreme Court;

(2) Electronically record means to record using an audio recording device, a digital recording device, or a video recording device;

(3) Place of detention means a police station, sheriff's office, troop headquarters, courthouse, county attorney's office, juvenile or adult correctional or holding facility, community correctional center, or building under the permanent control of law enforcement at which the person is in custody pursuant to the authority of a law enforcement officer; and

(4) Reasonable exception means circumstances in which:

(a) A statement was made when it was not practicable to electronically record the statement;

(b) Equipment to electronically record the statement could not be reasonably obtained;

(c) The person in custody refused to have the statement electronically recorded;

(d) The equipment used to electronically record the statement malfunctioned; or

(e) The law enforcement officer conducting the statement reasonably believed that the crime for which the person was taken into custody was not a crime described in subsection (2) of section 3 of this act.

Sec. 3. (1) All statements relating to crimes described in subsection (2) of this section and statements regarding rights described in section 1 of this act or the waiver of such rights made during a custodial interrogation at a place of detention that are described in subsection (2) of this section shall be electronically recorded.

(2) Statements subject to subsection (1) of this section are those statements relating to:

(a) Crimes resulting in death or felonies involving (i) sexual assault, (ii) kidnapping, (iii) child abuse, or (iv) strangulation; or

(b) Offenses being investigated as part of the same course of conduct as the offenses described in subdivision (a) of this subsection.

Sec. 4. Except as otherwise provided in sections 5 to 7 of this act, if a law enforcement officer fails to comply with section 3 of this act, a court shall instruct the jury that they may draw an adverse inference for the law enforcement officer's failure to comply with such section.

Sec. 5. (1) If a defendant testifies contrary to his or her statement made during a custodial interrogation at a place of detention which was not electronically recorded, such statement may be used for the purpose of impeachment if it is shown that the statement was freely, knowingly, voluntarily, and intelligently made.

(2) A jury instruction shall not be required if the prosecution proves, by a preponderance of the evidence, that there is a reasonable exception for there not being an electronic recording.

Sec. 6. If a law enforcement officer fails to comply with section 3 of this act, such failure shall not bar the use of any evidence derived from such statement if the court determines that the evidence is otherwise admissible.

Sec. 7. Any statement made during a custodial interrogation shall be admissible against such person in a criminal proceeding in this state if:

(1) The statement was obtained in another state and was obtained in compliance with the laws of that state; or

(2) The statement was obtained by a federal law enforcement officer in this state or another state, was obtained in compliance with the laws of the United States, and was not taken by a federal law enforcement officer in an attempt to circumvent sections 1 to 8 of this act.

Sec. 8. The existence of inaudible portions of an electronic recording, which are not the result of bad faith by a law enforcement officer to produce an inaudible result, standing alone, shall not render a statement out of compliance with section 3 of this act.