NO. 41014-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

SHAWN D. HINTON,

Petitioner.

PETITION FOR REVIEW

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A. ***IDENTITY OF PETITIONER***

SHAWN D. HINTON asks this court to accept review of the decision designated in Part B of this motion.

B. ***DECISION***

Petitioner seeks review of each and every part of the decision of the Court of Appeals affirming the Cowlitz County Superior Court judgment and sentence. A copy of the Court of Appeals decision is attached.

C. ***ISSUES PRESENTED FOR REVIEW***

> Do the police violate a defendant's right to privacy under Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment, when, without a warrant, they seize a cell phone belonging to the defendant's friend, open and read private text messages the defendant sent to his friend, and then exchange text messages with the defendant pretending to be the defendant's friend?

D. ***STATEMENT OF THE CASE***

By information filed November 6, 2009, the Cowlitz County Prosecutor charged the defendant Shawn Daniel Hinton with one count of attempted possession of heroin. CP 1. These charges arose out of an incident in which the police seized a cell phone belonging to a friend of the defendant and then read text messages on it that the defendant had sent to that friend. CP 7-9. The police then used that cell phone to exchange text messages with the defendant while they pretended to be the defendant's friend. *Id*. The police took these actions without the aid of a warrant and without the permission of

either the defendant or his friend. *Id.* The defendant subsequently filed a motion to suppress, which the court heard on April 29, 2010. RP 1-29. During this motion, the state called the police officer who seized the cell phone as its only witness. *Id.* Following argument, the court denied the motion, later entering the following findings of fact and conclusions of law:

Findings of Fact

> 1. On November 3, 2009, Detective Kevin Sawyer arrived at the Longview Police Department to begin his shift. When Detective Kevin Sawyer arrived for work another officer approached him. The other officer presented Detective Sawyer with Daniel S. Lee's iPhone. Mr. Lee had earlier been arrested and booked on drug related charges. The arresting officers informed Detective Sawyer that Mr. Lee's cell phone had rung numerous times since the time of Mr. Lee's arrest.
>
> 2. Mr. Lee's cell phone is an iPhone. Detective Sawyer is familiar with the iPhone and its functions. A text message is a type out message sent from one phone to another. When an iPhone receives a short text message, the message appears directly on the screen. In order to determine what phone number is associated with which name in an iPhone you can access a "contact" folder. Mr. Lee's iPhone did not have the screen lock function activated.
>
> 3. Detective Sawyer went through Mr. Lee's iPhone, looking through some of the text messages that had been received. At least one of the messages was from an individual who was seeking drugs from Mr Lee.
>
> 4. Detective Sawyer responded to this text message, posing as Daniel Lee, and arranged a drug transaction through a series of text messages back and forth. An individual, Jonathon Roden, was contacted based upon those text messages, was arrested and booked at the Cowlitz County Jail.
>
> 5. As Detective Sawyer was clearing the jail after arresting Mr. Roden, Mr. Lee's iPhone received a text message from a person

believed to be the defendant. The iPhone made an audible sound indicating it had received a new text message. At that time Lee's iPhone was on the front passenger seat of Detective Sawyer's vehicle. Detective Sawyer picked up the phone and viewed the text message. The text was from a z-Shawn Hinton and stated, "Hey whats up dogg can you call me i need to talk to you."

6. Detective Sawyer, again posing as Daniel Lee, responded to the text message, "Can't now. What's up." Detective Sawyer and a person believed to be the Defendant then sent text messages back and forth multiple times and agreed to a drug transaction. At no time during the text massage conversation did Detective Sawyer identify himself as a law enforcement officer or as anyone other than Lee. None of the text messages attributed to the Defendant named an intended recipient, but were, to the best of Detective Sawyer's knowledge, only sent to Daniel Lee's iPhone. At no time did the person believed to be the Defendant ask who he was text messaging.

7. Per the agreement of the text message conversation between Detective Sawyer and the person believed to be the Defendant, Sawyer met with the Defendant in the Safeway Supermarket parking lot, located on 15th Ave in Longview and placed him under arrest based upon the content of the text message conversation.

8. After placing the defendant under arrest he called the phone number associated with z-Shawn Hinton and a phone near the Defendant rang. Detective Sawyer accessed the contacts folder of Daniel Lee's phone to retrieve that phone number, but does not recall when that occurred.

Conclusions of Law

1. Detective Sawyer did not search the iPhone. The text message attributed to the Defendant appeared on the iPhone's screen, Detective Sawyer picked up the iPhone, observed the message, and responded to it.

2. The Defendant does not have automatic standing to contest Detective Sawyer's search of the iPhone because the search was not contemporaneous – the contemplated possession was at a different time and different place than the text messages.

> 3. The Defendant does not have general standing to contest Detective Sawyer's search of the iPhone because the Defendant did not have a reasonable expectation of privacy in the communications. Continuing to send text messages to a cellular phone after getting a responding text from that phone is analogous to continuing a conversation after an unknown third party answers a phone by speaking to the caller.
>
> 4. Under *State v. Wojtyna*, 70 Wn. App. 689 (1993), there is no expectation of privacy in a communication transmitted to a device such as an iPhone. Text messages are an active form of communication. Whoever is sending a text message does not know who is observing the message. The sender of a text message makes an assumption that the message will be received by the person intended. The communication is not rendered private based on that assumption.
>
> 5. Defense's challenge to the search of Lee's iPhone under Article I, Section VII therefore fails.
>
> 6. Under RCW 9.73, there is no reasonable expectation of privacy in a text message found in a cell phone's inbox or in subsequent text messages sent back and forth between two cellular phones, as to persons other than the owner, viewer or possessor of the cell phone in question.
>
> 7. Washington's Privacy Act is broad; however, there was no violation in this instance. The text messages were not unlawfully recorded under 9.73.030 as the sender would know that a text message would be recorded by the receiving cell phone. A text message is discovered, not recorded under RCW 9.73. The Defendant's motion to suppress under RCW 9.73 is denied.

CP 27-30.

Following entry of these findings and conclusions, the defendant stipulated to facts sufficient to convict, and the court found the defendant guilty of the crime charged. CP 34-36. The court then sentenced the defendant within the standard range, after which the defendant filed timely

notice of appeal. CP 38-49, 50. By a two to one published opinion filed June 26, 2012, Division II of the Court of Appeals affirmed the ruling of the Superior Court denying the defendant's motion to suppress. *See* Opinion attached. Petitioner now respectfully requests that this court grant review and reverse the decision of the Court of Appeals.

E. A*RGUMENT WHY REVIEW SHOULD BE ACCEPTED*

Under RAP 13.4(b)(3), this case presents a significant question of law under both Washington Constitution, Article 1, § 7, as well as United States Constitution, Fourth Amendment. In addition, under RAP 13.4(b)(4), this case involves an issue of substantial and compelling public interest that should be determined by this court. The following argument supports these conclusions.

Under Washington Constitution, Article 1, § 7, as well as United States Constitution, Fourth Amendment, warrantless searches are *per se* unreasonable. *State v. Simpson*, 95 Wn.2d 170, 622 P.2d 1199 (1980). As such, the courts of this state will suppress the evidence seized following a warrantless search unless the state meets its burden of proving that the officer's conduct fell within one of the various "jealously and carefully drawn" exceptions to the warrant requirement. R. Utter, *Survey of Washington Search and Seizure Law: 1988 Update*, 11 U.P.S. Law Review 411, 529 (1988). Since warrantless searches and seizures are presumptively

unreasonable, the state bears the burden of proving an exception to the warrant requirement, if the defendant first meets the burden of production of evidence that the defendant had a privacy interest in evidence that was "seized" without aide of a warrant. *State v. Young*, 135 Wn.2d 498, 957 P.2d 681 (1998).

For the purposes of the Fourth Amendment, a "search" occurs when the government infringes upon "an expectation of privacy that society is prepared to consider reasonable." *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984). Thus, in applying the prohibitions found in the Fourth Amendment, two discrete questions arise: "[F]irst, has the [target of the investigation] manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable?" *California v. Ciraolo*, 476 U.S. 207, 211, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986). By contrast, under Article 1, § 7, which is more protective of a person's right to privacy than the Fourth Amendment, the issue is whether or not the state has unreasonably intruded upon privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant. *State v. Cheatam*, 150 Wn.2d 626, 642, 81 P.3d 830 (2003) (quoting *State v. Young*, 123 Wn .2d at 181).

In the case at bar, the trial court and the majority opinion from the Court

of Appeals held that the defendant did not have a privacy interest in the text messages he sent to the cell phone of one of his friends. The court entered this ruling in reliance upon the decision in *State v. Wojtyna*, 70 Wn.App. 689, 855 P.2d 315 (1993). Thus, both the trial court and the Court of Appeals held that the police did not violate the defendant's right to privacy when they (1) read a text message the defendant sent to his friend's cell phone, and (2) when they responded, pretending to be the defendant's friend. As the following explains, the courts' reliance upon the decision in *Wojtyna* was misplaced, and its rulings were in error.

In *Wojtyna*, *supra*, the defendant sent his telephone number to the page of an acquaintance in order to purchase cocaine. Unknown to him, a police officer who had recently arrested that person had seized the pager. When the defendant sent the phone number to the pager, the officer viewed it, made a call to the defendant, and arranged to meet with the defendant to sell him cocaine. When the defendant showed up for the meeting, the officer arrested him, and the state later charged him with attempted possession of cocaine. The defendant unsuccessfully moved to suppress all the evidence the officer obtained when he looked at the pager and saw the defendant's telephone number. Following conviction, the defendant appealed, arguing that the trial court erred when it ruled that he did not have a privacy interest in his telephone number as it appeared on his friend's pager.

On appeal, Division I of the Court of Appeals, relying upon the decision of the Sixth Circuit Court of Appeals in *United States v. Meriwether*, 917 F.2d 955 (6th Cir.1990), held that the defendant did not have a recognizable privacy interest in his telephone number once he transmitted it to a pager. The court held:

> When one transmits a message to a pager, he runs the risk that the message will be received by whomever is in possession of the pager. Unlike the phone conversation where a caller can hear a voice and decide whether to converse, one who sends a message to a pager has no external indicia that the message actually is received by the intended recipient. Accordingly, when a person sends a message to a pager, he runs the risk that either the owner or someone in possession of the pager will disclose the contents of his message. Since the actual confidentiality of a message to a pager is quite uncertain, we decline to protect appellant's misplaced trust that the message actually would reach the intended recipient.

State v. Wojtyna, 70 Wn.App. at 694 (quoting *United States v. Merriwether,* 917 F.2d at 959).

The distinctions between the facts in *Wojtyna* and the facts in the case at bar is twofold. First, in *Wojtyna*, the defendant sent a telephone number to a pager, an electronic device with the sole function of displaying received telephone numbers. By contrast, in the case at bar, the defendant sent a text message to a cell phone, an electronic device used for such purposes as sending and receiving e-mail, sending and receiving text messages, and performing many of the functions of a personal computer. Thus, while there is no reasonable expectation of privacy when sending a telephone number to

a pager, there is a reasonable expectation of privacy when sending a text message to the cell phone.

Second, in *Wojtyna*, the defendant knowingly and voluntarily engaged in a telephone call with a person he knew was a stranger, assuming that the caller was an associate of the friend who owned the pager. In other words, he spoke on the telephone with a stranger, and thereby assumed the risk that the person was not who he claimed he was. By contrast, in the case at bar, the defendant sent a text message to the cell phone of person with whom he was acquainted and reasonably assumed that the person responding with text messages from that cell phone was his friend. He had no way of determining that the person responding was anyone other than the person to whom he sent the message.

As the dissent in this case noted, the use of cell phones and computers to send and receive private communications such as e-mails and text messages has become ubiquitous in society, and most persons using cell phones to perform these functions reasonably believe that they have the same privacy interest in the text messages and e-mails sent and received from their cell phones as they do in text messages and e-mails sent and received from their home computers.[1] Thus, in the case at bar, the defendant had a

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[1]The ubiquity of using electronic methods to communicate important and sensitive information in our society is well illustrated by the fact that the Clerk of this Court has recently contacted the Washington

reasonable expectation of privacy when sending a text message to the cell phone of his friend.

The argument that a person has "an expectation of privacy that society is prepared to consider reasonable" (Fourth Amendment) and "privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant," (Article 1, § 7) in e-mails and text messages sent and received from either a cell phone, a computer, a tablet computer, or any of the other private communication devices commonly used in our society is supported by a number of recent federal decisions. For example, in *United States v. Zavala*, 541 F.3d 562 (5th Cir.2008), the Fifth Circuit Court of Appeals stated as follows on this issue:

> [C]ell phones contain a wealth of private information, including emails, text messages, call histories, address books, and subscriber numbers. [The defendant] had a reasonable expectation of privacy regarding this information.

United States v. Zavala, 541 F.3d at 577.

Similarly, in *United States v. Forrester*, 512 F.3d 500, 511 (9th Cir. 2008), the Ninth Circuit Court of Appeals also held that a person has a privacy interest in the content of e-mail in the same manner that a person has

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State Office of Public Defense and the prosecutors offices within Division II, and requested that all future motions and documents (other than briefs), be "e-filed" only with the court, as opposed to printing and mailing such documents. Unsurprisingly, the clerk communicated these requests by e-mail.

a reasonable privacy interest in physical mail. The court held:

> E-mail, like physical mail, has an outside address "visible" to the third-party carriers that transmit it to its intended location, and also a package of content that the sender presumes will be read only by the intended recipient. The privacy interests in these two forms of communication are identical. The contents may deserve Fourth Amendment protection, but the address and size of the package do not.

United States v. Forrester, 512 F.3d at 511.

Finally, in *United States v. Warshak*, 631 F.3d 266 (6th Cir. 2010) , the Sixth Circuit Court of Appeals performed a lengthy examination on the question whether or not, for the purposes of the Fourth Amendment, a person has a reasonable expectation of privacy in e-mail that a person sends or receives. In this case, the government, without a warrant, went to the defendant's Internet Service Provider (ISP) and obtained thousands of e-mail messages the defendant sent and received. Based in part on this information, the government charged the defendant with a number of counts of mail and bank fraud. He was later convicted on all of the offenses charged after unsuccessfully bringing a suppression motion. The defendant then appealed, arguing in part that the trial court had erred when it refused to suppress the e-mails the government had obtained from his ISP without a warrant. The government responded, arguing in part that the defendant did not have a reasonable expectation of privacy in the e-mails he sent or received, particularly in those stored by his ISP.

In addressing this issue, the court first noted that the use of electronic methods for communicating information in society, such as e-mail, has fast outstripped the old methods of telephone and postal mail. The court noted as follows on this subject.

> Since the advent of email, the telephone call and the letter have waned in importance, and an explosion of Internet-based communication has taken place. People are now able to send sensitive and intimate information, instantaneously, to friends, family, and colleagues half a world away. Lovers exchange sweet nothings, and businessmen swap ambitious plans, all with the click of a mouse button. Commerce has also taken hold in email. Online purchases are often documented in email accounts, and email is frequently used to remind patients and clients of imminent appointments. In short, "account" is an apt word for the conglomeration of stored messages that comprises an email account, as it provides an account of its owner's life. By obtaining access to someone's email, government agents gain the ability to peer deeply into his activities. Much hinges, therefore, on whether the government is permitted to request that a commercial ISP turn over the contents of a subscriber's emails without triggering the machinery of the Fourth Amendment.

United States v. Warshak, 631 F.3d 284.

Given both the pervasive use of electronic methods of communication, as well as both the sensitive nature of that information and the general expectation of privacy in it, the court recognized that the decision whether or not society was willing to recognize an expectation of privacy in such communication was a "question . . . of grave import and enduring consequence" to our society, particularly given the fact that "the Fourth Amendment must keep pace with the inexorable march of technological

progress, or its guarantees will wither and perish." *Warshak,* 631 F.3d 285. *(citing Kyllo v. United States*, 533 U.S. 27, 34, 121S.Ct. 2038, 150 L.Ed.2d 94 (2001)); *see also*, Orin S. Kerr, *Applying the Fourth Amendment to the Internet: A General Approach*, 62 Stan. L.Rev. 1005, 1007 (2010) .

After recognizing the importance of the issue in modern society, the court then drew an analogy between the protections afforded under the Fourth Amendment to both letters and telephone conversations on the one hand, and electronic communications such as e-mails on the other hand. First, the court noted that our cases have long found a reasonable expectation of privacy in both mailed letters as well as telephone conversations, in spite of the fact that letters are usually placed in the hands of the public post office and travel through many hands between the writer and intended recipient, and telephone conversations are made over public and private telephone lines that telephone companies and the government can easily monitor. Based upon the similarities between mail and telephone conversations on the one hand, and electronic communication such as e-mails on the other hand, the court found no reason to treat the latter any different than the former. The court held as follows on this point:

> Given the fundamental similarities between email and traditional forms of communication, it would defy common sense to afford emails lesser Fourth Amendment protection. Email is the technological scion of tangible mail, and it plays an indispensable part in the Information Age. Over the last decade, email has become "so pervasive that some

> persons may consider [it] to be [an] essential means or necessary instrument[ ] for self-expression, even self-identification." It follows that email requires strong protection under the Fourth Amendment; otherwise, the Fourth Amendment would prove an ineffective guardian of private communication, an essential purpose it has long been recognized to serve. As some forms of communication begin to diminish, the Fourth Amendment must recognize and protect nascent ones that arise.

United States v. Warshak, 631 F.3d 285-286 (quoting *City of Ontario v. Quon*, — U.S. —, 130 S.Ct. 2619, 2630, 177 L.Ed.2d 216 (2010)); other citations omitted.

Based upon this logic, the court found no problem in holding that, for the purposes of the Fourth Amendment, the defendant had a reasonable expectation of privacy in the e-mails maintained with his ISP. The court ruled as follows on this issue:

> Accordingly, we hold that a subscriber enjoys a reasonable expectation of privacy in the contents of emails "that are stored with, or sent or received through, a commercial ISP." The government may not compel a commercial ISP to turn over the contents of a subscriber's emails without first obtaining a warrant based on probable cause. Therefore, because they did not obtain a warrant, the government agents violated the Fourth Amendment when they obtained the contents of [the defendant's] emails.

United States v. Warshak, at 289 (citation omitted).

The decision in *Warshak* provides persuasive authority for the proposition that the defendant in the case at bar had a reasonable expectation of privacy in the text messages he sent to his friend's cell phone. First, while a text message is not exactly the same as an e-mail, it is a related form for

electronically transferring confidential information from one specified party to another. Indeed, it carries with it some of the components of a telephone call and some of the components of an e-mail or a letter. On the one hand, many text messages are traded between two private parties as a continuous stream of statements akin to telephone conversation. On the other hand, unlike a telephone conversation, they are typed and recorded and also function as e-mails which are stored and read at the leisure of the recipient. However, the one component that is exactly the same for e-mails, telephone calls, and text messages is that the sender and recipient consider them private communications that are traded between two private parties. One other compelling similarity in the facts from *Warshak* and the facts in the case at bar is that the defendant's private communications in both cases were held on and seized from the electronic equipment of a third party (an ISP in *Warshak* and the defendant's friend cell phone in the case at bar). Thus, in the case at bar, the trial court and the majority from the Court of Appeals erred when they found that the defendant did not have a reasonable expectation of privacy in the text message that he sent to his friend.

Since the defendant did have a reasonable expectation of privacy in the text message he sent to his friend, and since the police officer searched the cell phone to find and read that text message without the aide of a judicially authorized warrant, the trial court erred when it refused to suppress the

evidence that the officer obtained as a direct result of his violation of the defendant's right to privacy under both Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment, and the Court of Appeals erred when it upheld that decision. This evidence included all of the officer's communications with the defendant, as well as the presence of the defendant at the fake drug sale the officer arranged. Absent this evidence, there is no basis upon which to support the defendant's conviction.

Given the compelling and growing public use of and privacy interest in the area of electronic communications, this court should grant review under both RAP 13.4(b)(3) and RAP 13.4(b)(4), reverse the decision of the Court of Appeals, reverse the defendant's conviction, and remand with instructions to grant the defendant's motion to suppress.

F. *CONCLUSION*

For the reasons set out in this motion, this court should accept review of this case and reverse the decision of the Court of Appeal.

Dated this 9th day of July, 2012.

Respectfully submitted,

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