NO. 87669-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JONATHAN NICHOLAS RODEN,

Petitioner.

ON REVIEW FROM THE COURT OF APPEALS, DIVISION TWO

ANSWER TO BRIEF OF AMICUS CURIAE WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS

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A. ARGUMENT

THE ARGUMENT SET FORTH BY THE WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS IS MISGUIDED AND EVINCES A MISCONCEPTION OF THE RIGHT TO PRIVACY.[1]

WAPA claims that text messages are not private communications under the Privacy Act and "[b]y sending a text message Roden assumed the risk that the message would not be private." WAPA's argument fails because it relies on cases that are clearly distinguishable and have no application here. WAPA Brief at 2-5.

In State v. Corliss, 123 Wn.2d 656, 870 P.2d 317 (1994), a detective used the "tilted receiver" method to monitor phone conversations between an informant and Corliss, a marijuana dealer. The detective heard the conversations by having the informant tip the phone receiver. 123 Wn.2d at 658-59. This Court concluded that the informant's act of tilting the phone receiver so the officer could hear the conversation did not violate the Privacy Act because the conversation was not intercepted by a device designed to record or transmit. "[T]he officers did not 'intercept' an otherwise private communication by means of any kind of device.

[1] WAPA states that "it is interested in cases, such as this, that attempt to strike a balance between the effectiveness of police efforts to ensure public safety and the rights of citizens to be secure in their private affairs." WAPA Brief at 1. The Washington Privacy Act, "unlike similar statutes in 38 other states, tips the balance in favor of individual privacy at the expense of law enforcement's ability to gather evidence without a warrant." State v. Christensen, 153 Wn.2d 186, 199, 102 P.3d 789 (2004).

They simply listened, in person, to what they could hear emanating from the telephone." Id. at 662. Unlike in Corliss, Lee did not show Roden's text messages to Detective Sawyer allowing Sawyer to simply see the text messages. Without a warrant, Detective Sawyer used Lee's iPhone, a device designed to record, to search the inbox and intercept Mr. Roden's private text messages.

In In re Marriage of Farr, 87 Wn. App. 177, 940 P.2d 679 (1997), the father left messages for his son on the mother's answering machine. 87 Wn. App. at 180. The Court of Appeals concluded that the father waived any statutory right to privacy by leaving messages on an answering machine. Citing RCW 9.73.030(3), the Court reasoned that a party consents to his communication being recorded when another party has announced "in any reasonably effective manner" that the conversation will be recorded. Pointing out that an answering machine's only function is to record messages and because the father knew his messages were being recorded, he had no reasonable expectation to privacy. Id. at 184. Farr has no application here because Roden is not contending that the recording of his text messages violated his right to privacy and distinguishable from answering machines, an iPhone has multiple functions.

In State v. Wojtyna, 70 Wn. App. 689, 855 P.2d 315 (1993), the police seized a tele-pager pursuant to an arrest of a cocaine dealer. A detective monitoring the pager called Wojtyna after the pager received his incoming call. The detective arranged a cocaine transaction with Wojtyna and arrested him at the meeting. 70 Wn. App. at 691. Focusing on the fact that the detective only obtained Wojtna's phone number, the Court of Appeals determined that "all that was learned from the pager was the telephone number of one party, the party dialing. Discovery of the number did not affect other persons, involve multiple invasions of privacy, or record the exchange of information such as the dialing from one telephone number to another." Id. at 695. The Court concluded that there was no violation of the Privacy Act because "[a] telephone number, unless it is itself communicated, does not constitute a 'communication.' " Id. at 695 (quoting State v. Riley, 121 Wn.2d 22, 33, 846 P.2d 1364 (1993)(use of a "line trap" to trace a phone number does not violate the Privacy Act). Wojtna is clearly distinguishable where Detective Sawyer did much more than merely obtain a phone number which is not a communication. Sawyer conducted a warrantless search of Lee's iPhone and intercepted private text messages Roden sent to Lee.

In State v. Gonzales, 78 Wn. App. 976, 900 P.2d 564 (1995), the police obtained a warrant to search Gonzales's apartment and while

conducting the search, a detective answered the telephone. The caller said that Gonzales was late in delivering cocaine to him. The detective told the caller that Gonzales was busy so his cousin would deliver the cocaine. Upon delivery, the caller was arrested and Gonzales was also arrested and charged with conspiracy to possess cocaine with intent to deliver. 78 Wn. App. at 979. On appeal, Gonzales argued that the detective unlawfully used his telephone to intercept a private communication. The Court of Appeals held that there was no violation of the Privacy Act because the detective did not use a device or intercept a private communication by answering the phone. Id. at 982. Unlike in Gonzales, Detective Sawyer did not just answer Lee's iPhone. Sawyer used the iPhone, a device designed to record, to conduct a warrantless search of the inbox and intercept Roden's private text messages.

Misplacing its reliance on the aforementioned cases, WAPA contends that the trial court correctly found that "a text message is not 'private' because the sender of a message ran the risk that the message would be heard or seen by someone other than the intended recipient." WAPA Brief at 5. To the contrary, this Court rejected a similar argument made by the State in State v. Faford, 128 Wn.2d 476, 910 P.2d 447 (1996), where a third party used a scanner to intercept cordless telephone conversations. 128 Wn.2d at 479. The State argued that because cordless

telephone conversations could be easily intercepted, society does not reasonably expect privacy in those calls. This Court noted that the State's "focus on technological ease ignores the intrusive nature of the interception," emphasizing that "in considering constitutional privacy protection, the mere possibility that intrusion on otherwise private activities is technologically feasible will not strip citizens of their privacy rights." Id. at 485.

WAPA argues further that Detective Sawyer did not intercept Roden's text messages to Lee primarily relying on Commonwealth v. Cruttenden, 54 A.3d 95 (Penn. 2012). WAPA Brief at 7-8, 11. In Cruttenden, state troopers stopped a car for speeding and during a consensual search of the car, they found drugs, a handgun, and a cell phone. A passenger, Michael Amodeo, told a trooper that he had been using the phone to communicate with Stephen Lanier via text messages to sell marijuana to Lanier. With Amodeo's consent to use the phone, the trooper posed as Amodeo and began text-messaging Lanier to arrange a transaction. The trooper arrested Lanier and Jeffrey Cruttenden when they arrived for the meeting. 54 A.3d at 96.

The Pennsylvania Supreme Court concluded that "[b]ecause an officer who directly communicates with another person by text-messaging is not eavesdropping or listening in on a conversation, but is himself

engaging in the communication, and because for the purpose of the Wiretap Act, it is irrelevant that an officer intentionally misrepresents his identity to the person with whom he communicates, we hold that no violation of the Wiretap Act occurred." [2] Id. at 96.

Contrary to WAPA's claim that Cruttenden "mirrors the facts of the present case," the facts here are significantly different. Amodeo allowed the trooper to use the cell phone to initiate the text messaging with Lanier and assisted the trooper in arranging the drug transaction. Id. at 96. Therefore, no interception took place because the trooper was a direct party. In contrast, Lee did not allow Detective Sawyer to use his iPhone to initiate text messaging with Roden. Without consent or a warrant, Sawyer used Lee's iPhone to search the inbox and intercept Roden's private text messages to Lee. Sawyer was not a direct party, but a surreptitious third party who intercepted the text message communication between Roden and Lee, as in Faford, 128 Wn.2d 485-88 and Christensen, 153 Wn.2d at 192-97, where a third party intercepted a telephone communication.

Although Roden is not contending that the recording of his text messages violated the Privacy Act, WAPA urges this Court to reconsider

[2] Notably, the concurrence reasoned that because the trooper was not the "intended recipient," either as himself or through posing as Amodeo, he intercepted the text message communication between Lanier and Amodeo. 54 A.3d at 101.

and overrule the portion of State v. Townsend, 147 Wn.2d 666, 57 P.3d 255 (2002) where this Court "held that [the e-mails and ICQ messages] were 'recorded' on the officer's computer for purposes of the act." WAPA Brief at 16-17. This Court has no reason to do so here where the recording of the text messages is not at issue. Importantly, WAPA does not dispute the relevant portion of Townsend where this Court held that the e-mails and ICQ messages were private communications. 147 Wn.2d at 673-74. Like the e-mails and ICQ messages, Roden's text messages were private communications. The expectation of privacy in text messaging is even greater because while computers are in a home or office, people carry their personal cell phones with them, usually in a pocket or purse. Text messages are therefore private communications because the sender's "subjective intention" that his text message be private is reasonable. Christensen, 153 Wn.2d at 193.

WAPA finally argues that "[n]o search occurred because Roden did not have a reasonable expectation of privacy in a text message sent to a telephone belonging to a third person." WAPA Brief at 17. WAPA cites Washington and federal cases, but its use of "reasonable expectation of privacy" indicates that it is relying on the Fourth Amendment. As this Court explained in State v. Eisfeldt, 163 Wn.2d 628, 634-35, 185 P.3d 580 (2008), "article I, section 7 is unconcerned with the reasonableness of the

search, but instead requires a warrant before any search, reasonable or not." In any event, WAPA fails to provide any meaningful analysis as to how the cases it cites applies here. WAPA Brief at 17-18. Instead, WAPA asserts that "even if a search occurred, Roden lacks automatic standing to contest a search of a phone belonging to a third party." WAPA Brief at 19-20. WAPA's standing argument should not be considered for the first time on review because appellate courts do "not address arguments raised only by amicus." Citizens for Responsible Wildlife Management v. State, 149 Wn.2d 622, 631, 71 P.3d 644 (2003).

B. CONCLUSION

For the reasons stated, WAPA's argument lacks merits and should be rejected. As argued in Roden's supplemental brief, reversal is required because the warrantless search of Lee's iPhone and interception of Roden's private text messages to Lee violated RCW 9.73.030, the Washington Privacy Act; article I, section 7 of the Washington Constitution; and the Fourth Amendment of the United States Constitution.

DATED this 26th day of April, 2013.

Respectfully submitted,

/s/ Valerie Marushige
VALERIE MARUSHIGE
Attorney for Petitioner, Jonathan Nicholas Roden

DECLARATION OF SERVICE

On this day, the undersigned sent by e-mail, the document to which this declaration is attached to: Sean Brittain, Cowlitz County Prosecutor's Office, 312 SW 1st Avenue, Kelso, Washington 98626; Jeremy Morris, Kitsap County Prosecutor's Office, 614 Division Street, MS 35, Port Orchard, Washington 98366; and Susan Storey, King County Prosecutor's Office, 516 Third Avenue, Seattle, Washington 98104.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 26th day of April, 2013 in Kent, Washington.

/s/ Valerie Marushige
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Rec'd 4/26/2013

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Clerk of the Court
Washington Supreme Court

An incomplete answer was previously sent. Please find enclosed petitioner's answer and declaration of service.

Thank you,
Valerie Marushige
Attorney for Petitioner