SUPREME COURT NO. 87669-0
COURT OF APPEALS NO. 41037-1-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JONATHAN NICHOLAS RODEN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR COWLITZ COUNTY

The Honorable James J. Stonier

PETITION FOR REVIEW

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A. IDENTITY OF MOVING PARTY

Petitioner, Jonathan Nicholas Roden, the appellant below, asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

Roden seeks review of the Court of Appeals decision in State v. Jonathan Nicholas Roden, Court of Appeals No. 41037-1-II, filed on June 26, 2012, attached as an appendix.

C. ISSUE PRESENTED FOR REVIEW

This Court has repeatedly held that the "mere possibility that intrusion on otherwise private activities is technologically feasible will not strip citizens of their privacy rights." State v. Christensen, 153 Wn.2d 186, 193, 102 P.3d 789 (2004)(citing State v. Faford, 128 Wn.2d 476, 485, 910 P.2d 447 (1996); State v. Young, 123 Wn.2d 173, 186, 867 P.2d 593 (1994); State v. Myrick, 102 Wn.2d 506, 513-14, 688 P.2d 151 (1984)). Should this Court grant review where the trial court erred in denying Roden's motion to suppress evidence of private text messages that were intercepted by law enforcement in violation of his rights under the Washington Privacy Act; article I, section 7 of the Washington Constitution; and the Fourth Amendment of the United States Constitution?

D. STATEMENT OF THE CASE

The State charged Roden with attempted possession of heroin, a controlled substance. CP 27-28. At trial, the State presented evidence that a detective accessed an iPhone seized from a suspected drug dealer, Daniel Lee, during his arrest. The detective spent five or ten minutes looking at numerous text messages and noticed several messages from Roden asking to buy drugs. 5RP 6-11. Posing as Lee, the detective replied to Roden's text message and engaged in a series of text messages to arrange a drug transaction with Roden. When Roden arrived at a local grocery store for the transaction, the detective arrested him. 5RP 12-13, 18-20. The detective typed out the text messages in his report and had them transcribed as evidence. 5RP 9-11. Roden moved to suppress the evidence but the trial court denied his motion. CP 23-26. On July 14, 2010, the trial court entered an order on stipulated facts, finding Roden guilty of attempted possession of heroin, a controlled substance. 8RP 3-4; CP 29-31.

Roden appealed, arguing that the trial court erred in denying his motion to suppress evidence of the text messages because the detective's warrantless search of the iPhone and interception of private text messages violated his rights under the Washington Privacy Act. A majority of the Court of Appeals affirmed, concluding that "Roden impliedly consented to

the recording and/or interception of the text messages that he sent to the dealer's iPhone." Opinion at 1. The majority held that Roden "had no reasonable expectation of privacy in his text messages," thus, he "impliedly consented to the recording of the text messages that he sent." The majority relied on State v. Townsend, 147 Wn.2d 666, 57 P.3d 255 (2002), which the majority considered "binding precedent." Opinion at 4-8. Judge Van Deren dissented, concluding that Roden did not impliedly consent and the detective's warrantless search of the iPhone leading to the interception of Roden's text messages violated the Washington Privacy Act; article I, section of the Washington Constitution; and the Fourth Amendment of the United States Constitution. Dissent at 15-29.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

RODEN HAD A REASONABLE EXPECTATION OF PRIVACY IN HIS TEXT MESSAGES THEREFORE THE WARRANTLESS SEARCH OF THE iPHONE AND INTERCEPTION OF HIS PRIVATE TEXT MESSAGES VIOLATED THE WASHINGTON PRIVACY ACT, ARTICLE I, SECTION 22 OF THE WASHINGTON CONSTITUTION, AND THE FOURTH AMENDMENT.

This Court should accept review under RAP 13.4(b)(1),(3),(4) because the Court of Appeals decision conflicts with this Court's decision in State v. Townsend; this case involves a significant question of law under the Washington and United States constitutions; and involves the

right to privacy, an issue of substantial public interest which should be determined by this Court.

1. Washington Privacy Act

Washington's Privacy Act, RCW 9.73.030, "is one of the most restrictive in the nation." State v. Faford, 128 Wn.2d 476, 481, 910 P.2d 447 (1996). The Privacy Act requires that "*all* parties to a private communication must consent to its disclosure" which "adds an additional layer of protection." State v. Christensen, 153 Wn.2d 186, 198, 102 P.3d 789 (2004). The Privacy Act "significantly expands the minimum standards of the federal statute and offers a greater degree of protection to Washington citizens." State v. O'Neil, 103 Wn.2d 853, 879, 700 P.2d 711 (1985).

RCW 9.73.030(1)(a) provides in relevant part:

> [I]t shall be unlawful for . . . the state of Washington, its agencies, and political subdivisions to intercept, or record any:
>
> (a) Private communication transmitted by telephone, telegraph, radio, or other device between two or more individuals between points within or without the state by any device electronic or otherwise designed to record and/or transmit said communication, regardless how such device is powered or actuated, without first obtaining the consent of all the participants in the communication.

Evidence obtained in violation of the statute is inadmissible in a criminal case. RCW 9.73.050. In balancing the legitimate needs of law

enforcement to obtain information in criminal investigations against the privacy interests of individuals, the Privacy Act "tips the balance in favor of individual privacy at the expense of law enforcement's ability to gather evidence without a warrant." Christensen, 153 Wn.2d at 199.

Private means "belonging to one's self . . . secret . . . intended only for the persons involved (a conversation) . . . holding a confidential relationship to something . . . a secret message: a private communication . . . secretly: not open or public." State v. Modica, 164 Wn.2d 83, 87-88, 186 P.3d 1062 (2008). A communication is private when parties manifest a subjective intention that it be private and where that expectation is reasonable. Id. at 88 (citing State v. Christensen, 153 Wn.2d 186, 193, 102 P.3d 789 (2004)). Factors bearing on the reasonableness of the privacy expectation include the duration and subject matter of communication; the location of the communication and the potential presence of third parties; and the role of the nonconsenting party and his or her relationship to the consenting party. State v. Clark, 129 Wn.2d 211, 225-27, 916 P.2d 384 (1996).

In 1996, this Court considered State v. Faford, noting that "the privacy protection afforded cordless telephone conversations is a matter of first impression in Washington." 128 Wn.2d at 482. In Faford, a neighbor used a police scanner to eavesdrop on the defendants' cordless telephone

conversations. When the neighbor heard discussions about a marijuana grow operation in their home, he reported them to the police. The police went to the home and discovered a growing operation. The defendants were charged and convicted of cultivating marijuana and conspiracy to cultivate marijuana. Id. at 479-81. On appeal, the defendants argued that evidence of the intercepted phone conversations and the growing operation was obtained in violation of the Privacy Act. Id. at 481.

Focusing on the intent and subjective expectations of the parties to the conversation, this Court concluded that the defendants "clearly intended the information related in their telephone conversations to remain confidential between the parties to the call, regardless of their use of a cordless telephone instead of a conventional telephone." Id. at 484-85. This Court rejected the State's argument that because technology exists to easily intercept cordless telephone conversations, society has no reasonable expectation in those calls, "we have repeatedly emphasized in considering constitutional privacy protections, the mere possibility that intrusion on otherwise private activities is technologically feasible will not strip citizens of their privacy rights." Id. at 845. Concluding that the interception of the defendants' cordless telephone conversations violated the Privacy Act, this Court held that the trial court erred in admitting evidence of the phone conversations and reversed. Id. at 488-89.

Six years later, this Court considered State v. Townsend, 147 Wn.2d 666, 57 P.3d 255 (2002). In Townsend, a detective set up a sting operation by establishing an internet e-mail account and an ICQ chat room account using a screen name of Amber, a fictitious thirteen-year-old girl. Townsend began communicating with Amber, sending e-mails and ICQ messages containing graphic discussions about sexual topics, which the detective stored and recorded. Townsend eventually made arrangements with Amber to meet at a motel to have sex. When Townsend went to the motel room and asked for Amber, the detective arrested him. Townsend was charged and convicted of attempted second degree rape of a child. Id. at 670-71.

On appeal, Townsend argued that his e-mails and ICQ messages to Amber were private communications and therefore unlawfully recorded without his consent in violation of the Privacy Act. Id. at 671-73. This Court held that Townsend's communications to Amber were private given the subject matter of the communications, concluding that "[w]hile interception of these messages was a possibility, we cannot say that Townsend's subjective intention that his communications were private was unreasonable under the circumstances." Id. at 674. This Court reasoned that the "mere possibility that interception of the communication is technologically feasible does not render public a communication that is

otherwise private." Id. (citing State v. Faford, 128 Wn.2d 476, 485, 910 P.2d 447 (1996)).

While holding that the e-mail and ICQ messages were private, this Court affirmed Townsend's conviction, concluding that he impliedly consented to the recording of the messages. This Court determined that as a user of e-mail and ICQ technology, Townsend had to understand that computers are, among other things, a message recording device and consequently he took a risk that his messages might be recorded by the recipient. Id. at 675-79. This Court distinguished the case from Faford "because in *Faford* we were confronted with communications over a cordless telephone that were intercepted by someone who was not a party to the telephone conversations," unlike Faford, the recordings were "undertaken not by a third party, but by a party who was the recipient of the communication." Id. at 678.

Two years later, this Court considered State v. Christensen, where Christensen was a suspect in a robbery. The sheriff alerted the mother of Christensen's then-girlfriend, Lacey Dixon, and asked her to look out for any evidence of the crime. When Christensen called the Dixon home for Lacey, Mrs. Dixon answered the phone and handed the cordless handset to her daughter, who took it upstairs to her bedroom and closed the door. Mrs. Dixon activated the speakerphone function of the cordless phone

system by pressing a button on the base unit. She listened to Christensen admitting his involvement in the robbery and testified at trial as to the substance of the conversation that she overheard. Christensen was convicted of second degree robbery. Christensen, 153 Wn.2d at 190-91.

On appeal, Christensen argued that based on their reasonable expectations and subjective intent, the conversation between him and Lacey was private. The State contended that because Christensen and Lacey knew it was possible that their calls would be monitored, their expectation of privacy was not reasonable despite their subjective intent. Id. at 192-93. This Court recognized "Washington's long-standing tradition of affording great protection to individual privacy." Id. at 198-200. Accordingly, this Court reversed, concluding that "[b]ased on the subjective intentions and reasonable expectations of Christensen and Lacey, their conversation was a private one," emphasizing that the Privacy Act "puts a high value on the privacy of communications." Id. at 200.

Now six years later, and 16 years after Faford, Roden asks this Court to consider his case where law enforcement's warrantless search of an iPhone and interception of his private text messages violated his rights under the Privacy Act. Observing that technology was racing ahead with ever increasing speed, the Faford Court cautioned that the "sustainability of our broad privacy act depends on its flexibility in the face of a

constantly changing technological landscape." Faford, 128 Wn.2d at 485-86. This Court declared, "We will not permit the mere introduction of new communications technology to defeat the traditional expectation of privacy in telephone conversations." Id. at 486. Stating that "[w]e adhere to *Faford*," the Christensen Court reaffirmed that "[w]e must interpret the privacy act in a manner that ensures that the private communications of this state's residents are protected in the face of an ever-changing technological landscape. This must be done so as to ensure that new technologies cannot be used to defeat the traditional expectation of privacy." Christensen, 153 Wn.2d at 197.

Like the cordless telephone conversations in Faford and Christensen and the e-mails and ICQ messages in Townsend, the text messages Roden sent to Lee for the purpose of buying drugs were private communications between himself and Lee. The detective admitted that he was posing as Lee when he was texting with Roden. 5RP 20. It is evident that Roden subjectively intended and expected that his text messages to Lee were private because as in Faford, Townsend, and Christensen, the subject matter of the communication involved illegal activity. The communication was not an inconsequential, nonincriminating telephone conversation with a stranger. See Kadoranian v. Bellingham Police Dep't, 119 Wn.2d 178, 190, 829 P.2d 1061 (1992). Importantly, as this Court

concluded in Faford, Townsend, and Christensen, Roden's subjective intention that the communications were private was reasonable despite the possibility that the text messages could be easily intercepted. "The mere possibility that interception of the communication is technologically feasible does not render public a communication that is otherwise private." Townsend, 147 Wn.2d at 674.

Contrary to this Court's decision in Townsend, the Court of Appeals concluded that "Roden had no reasonable expectation of privacy in his text messages in Lee's phone." Opinion at 8. Furthermore, the Court of Appeals mistakenly relied on Townsend as "binding precedent" to conclude that "Roden impliedly consented to the recording of the text messages that he sent to Lee's iPhone." Opinion at 8. Townsend is clearly distinguishable on this point because as this Court noted, the recordings were made by the party who was the recipient of the communication, not by a third party. Townsend, 147 Wn.2d at 678. Unlike in Townsend, a third party, the detective, intercepted Roden's text messages intended for Lee. Consequently, Roden did not impliedly consent to the detective's interception of his private text messages to Lee.

Although Townsend is distinguishable, as Judge Van Deren pointed out in her dissent, finding that Roden impliedly consented to the detective's search of Lee's iPhone because he knew the iPhone would

record the text messages "reads out of [the Privacy Act] the protections afforded 'any device electronic or otherwise designed to record' private communications." Dissent at 15. "Under the Act, recordings of private communications are protected from police searches absent the issuance of a search warrant, making Roden's knowledge of the fact that [text messages are recorded] in Lee's iPhone irrelevant." Dissent at 15. As Judge Van Deren observed, "the Act is forward-looking and written with a clear anticipation that technology could change, thus its use of the phrase: 'any device electronic or otherwise designed to record and/or transmit said communication regardless how such device is powered or actuated.' " Dissent at 17.

The Act expressly protects private communications transmitted by "telephone, telegraph, radio, or other device." RCW 9.73.030(1)(a). Significantly, the majority omitted "telegraph, radio, or other device" in citing the statute. Opinion at 4. Under this Court's implied consent analysis, "the Act does not apply to telegrams because the sender would impliedly consent to the message being recorded, printed, and easily read by intervening parties." Dissent at 18.

> Reliance on implied consent overlooks the Act's protection of written communications and recordings and allows expansive and unregulated State searches of citizens' phone contacts, without probable cause, without a search warrant, and without actual consent. Under implied consent

> reasoning, a police officer's simple possession of a smartphone is sufficient to imply or infer consent of the communicating parties. This reasoning can easily and dangerously be extended to allow warrantless State searches of any digital device that police come to possess, all contrary to the Act itself.

Dissent at 17.

This Court should grant review because the detective's warrantless search of Lee's iPhone and interception of Roden's private text messages constitutes a violation of the Privacy Act, and the majority's misapprehension of Townsend requires this Court's clarification of Townsend.

2. Washington Constitution, article I, section 7.

Article I, section 7 states, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." This provision protects a person's home and private affairs from warrantless searches. State v. Carter, 151 Wn.2d 118, 125, 85 P.3d 887 (2004). In determining whether a search violated article I, section 7, courts undertake a two-step analysis. State v. Valdez, 61 Wn.2d 761, 772, 224 P.3d 751 (2009). The first step is to determine whether the State has intruded into a person's private affairs. If the State has disturbed a privacy interest, the second step is to determine whether the required authority of law justifies

the intrusion, which is satisfied only by a valid warrant, limited to a few jealously guarded exceptions. Valdez, 167 Wn.2d at 772.

Private affairs are "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass." State v. Athan, 160 Wn.2d 354, 366, 158 P.3d 27 (2007). In determining whether an interest constitutes a private affair, "we look at the historical treatment of the interest being asserted, analogous case law, and statutes and laws supporting the interest asserted." Id. at 366. As argued above, under this Court's decisions in Faford, Townsend, and Christensen, Roden's text messages to Lee were private and likewise constitute a private affair. Furthermore, the Privacy Act establishes that "[t]he State of Washington has a long history of extending strong protections to telephonic and other electronic communications." State v. Gunwall, 106 Wn.2d 54, 66-68, 720 P.2d 808 (1986). In Gunwall, this Court cited the Privacy Act to support its decision that use of a pen register without authority of law violated article I, section 7 of the Washington Constitution. 106 Wn.2d at 66. This Court recognized that the statute "is broad, detailed and extends considerably greater protections to our citizens in this regard than do comparable federal statutes and rulings thereon." Id. Washington's historical treatment of the right to privacy substantiates that text messages are protected as private affairs.

As Judge Van Deren noted in her dissent, in several respects, a person using text messages has a greater privacy interest than a person using a land line telephone or persons engaging in oral conversations. Dissent at 21-22. This Court should grant review because the detective's warrantless search of Lee's iPhone and interception of Roden's text messages to Lee constitutes an intrusion into Roden's private affairs without authority of law in violation of article I, section 7.

3. Fourth Amendment of United States Constitution

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." "A search occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." United States v. Jacobsen, 466 U.S. 109, 113, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984).

In Judge Van Deren's dissent, she discusses two recent United States Supreme Court cases which suggest that the public has a reasonable expectation of privacy in cell phone and text message communications under the Fourth Amendment. See City of Ontario, Cal. v. Quon, ___ U.S. ___, 130 S. Ct. 2619, 177 L. Ed. 2d 216 (2010) and United States v. Jones, ___ U.S. ___, 132 S. Ct. 945, 181 L. Ed. 2d 911 (2012). Dissent at 23-27 (also citing other federal cases). This Court should grant review because

under the Supreme Court's analysis in Quon and Jones, which provides guidance for this Court, the detective's invasive search of Lee's iPhone without a warrant leading to the interception of Roden's private text messages implicates the Fourth Amendment.

4. Issue of Substantial Public Interest

Statistical data on the prevalence of electronic communications reveals that texting has become the predominant form of communication in the digital age. Under the majority's holding, the citizens of Washington have no reasonable expectation of privacy in their electronic communications and impliedly consent to warrantless searches of those communications. This Court should grant review because the fundamental right to privacy is an issue of substantial public interest.

F. CONCLUSION

For the reasons stated, Mr. Roden respectfully requests that this Court grant review.

DATED this 19th day of July, 2012.

Respectfully submitted,

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JONATHAN N. RODEN, Appellant.	No. 41037-1 consolidated with 41047-8-II OPINION PUBLISHED IN PART

PENOYAR, J. — A police detective acquired the iPhone[1] of a suspected drug dealer. The detective looked through the iPhone's contents and replied to a text message from Jonathan Roden stored on the iPhone. Through a series of text messages from the dealer's phone, the detective and Roden arranged to meet for a drug transaction, which led to Roden's conviction of attempted possession of heroin. He appeals this conviction, arguing that the detective violated Washington's privacy act, chapter 9.73 RCW, by intercepting his private text messages to the dealer. Because Roden impliedly consented to the recording and/or interception of the text messages that he sent to the dealer's iPhone, his argument fails.

Additionally, Roden appeals a conviction of possession of heroin arising from a separate incident. He argues that a police officer violated his Washington Constitution article I, section 7 and Fourth Amendment rights by conducting a warrantless search of a zippered bag in his vehicle. Because officer safety reasons justified the warrantless search, this argument also fails. Accordingly, we affirm both of Roden's convictions.

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[1] The iPhone is a "smartphone" with "computer-like capabilities" that enables users to browse the Internet, to send and receive e-mails and text messages, and to take photographs, among many other functions. *See, e.g., In re Synchronoss Sec. Litig.*, 705 F. Supp. 2d 367, 374 (D.N.J. 2010).

FACTS

The State charged Roden in two separate cause numbers with attempted possession of heroin (superior court cause no. 09-1-01153-0) and with possession of heroin (superior court cause no. 10-1-00091-4). Roden stipulated that he committed both crimes. The trial court convicted him at a stipulated facts trial. Roden appeals.

ANALYSIS

I. WASHINGTON'S PRIVACY ACT

Roden argues that the detective's interception of his text messages to a suspected drug dealer violated his rights under Washington's privacy act, chapter 9.73 RCW. He does not raise any constitutional claims with regard to the detective's actions. Because Roden impliedly consented to the recording of these text messages, this argument fails.

A. The Search

On November 3, 2009, when Detective Kevin Sawyer arrived to begin his shift, several officers gave him an iPhone they had seized from Daniel Lee, who had been arrested earlier that day on drug charges.[2] Sawyer spent about 5 or 10 minutes "looking at some of the text messages" on the iPhone; he also looked to see "who had been calling." Report of Proceedings (RP) (Apr. 29, 2010) at 9. Many of the text messages that Lee's iPhone had received and stored were from individuals who were seeking drugs from Lee. A text message from an individual identified as "Z-Jon" read, "I've got a hundred and thirty for the one-sixty I owe you from last night." Clerk's Papers (CP) (41037-1-II) at 24; RP (Apr. 29, 2010) at 11. Posing as Lee, Sawyer

[2] The basis of the officers' seizure of Lee's iPhone (e.g. warrant, search incident to arrest, booking/inventory search) is not clear from the record. Whether Lee's iPhone was lawfully seized is not at issue in this case.

sent Z-Jon a text message reply, asking him if he "needed more." RP (Apr. 29, 2010) at 11. Z-Jon responded:

> Yeah, that would be cool. I still gotta sum [sic], but I could use some more. I prefer to just get a ball,[3] so I'm only payin' one eighty for it, instead of two Ts for two hundred, that way . . . it would be easier for any to get up.

RP (Apr. 29, 2010) at 11.

Eventually, through a series of text messages, Sawyer and Z-Jon agreed to meet at a local grocery store for a drug transaction. From the parking lot, Sawyer sent a text message to Z-Jon, asking him to identify his car. Z-Jon responded that he was in a maroon GMC truck. Sawyer observed the truck in the parking lot and arrested Roden.

Roden moved to suppress "[t]he fact that text messages were exchanged and the content of those messages." CP (41037-1-II) at 10. He asserted that Sawyer had violated RCW 9.73.030(1)(a), a provision of Washington's privacy act, because he had "clearly intercepted a private communication [that] was transmitted by a telephone without first obtaining the consent of Mr. Roden who was one of the participants in the communication." CP (41037-1-II) at 9.

At the suppression hearing, Sawyer testified consistent with the facts above. The trial court denied Roden's suppression motion. The trial court entered the following conclusions of law:

> 3. Under RCW 9.73, there is no reasonable expectation of privacy by a sender from different [sic] cell phone in a cell phone's inbox, just as there is no reasonable expectation of privacy in a text message found in a telephone call message left on an answering machine that could be overheard by anyone.
>
> 4. Washington's Privacy Act is broad; however, there was no violation in this instance. The Defendant's motion to suppress is denied.

CP (41037-1-II) at 25.

[3] A "ball" is "a drug weight" equivalent to approximately 3.5 grams.

B. Roden Impliedly Consented to the Recording of the Text Messages

RCW 9.73.030(1)(a) states, in relevant part:

> [I]t shall be unlawful for any individual . . . or the state of Washington, its agencies, and political subdivisions to intercept, or record any . . . [p]rivate communication transmitted by telephone . . . between two or more individuals between points within or without the state by any device electronic or otherwise designed to record and/or transmit said communication regardless how such device is powered or actuated, without first obtaining the consent of all the participants in the communication.

Any information obtained in violation of RCW 9.73.030(1)(a) is generally inadmissible in a criminal case. *See* RCW 9.73.050.

We engage in a four-pronged analysis to determine whether an individual has violated the Act. *State v. Christensen*, 153 Wn.2d 186, 192, 102 P.3d 789 (2004). There must have been (1) a private communication transmitted by a device, which was (2) intercepted by use of (3) a device designed to record and/or transmit, (4) without the consent of all parties to the private communication. *Christensen*, 153 Wn.2d at 192 (citing RCW 9.73.030).

"[W]hether a particular communication is private is generally a question of fact, but one that may be decided as a question of law if the facts are undisputed." *State v. Townsend*, 147 Wn.2d 666, 673, 57 P.3d 255 (2002). Because the Act does not define "private," our Supreme Court has adopted the dictionary definition: "belonging to one's self . . . secret . . . intended only for the persons involved (a conversation) . . . holding a confidential relationship to something . . . a secret message: a private communication . . . secretly: not open or in public." *Townsend*, 147 Wn.2d at 673 (internal quotation marks omitted) (quoting *Kadoranian v. Bellingham Police Dep't*, 119 Wn.2d 178, 190, 829 P.2d 1061 (1992) (quoting *State v. Forrester*, 21 Wn. App. 855, 861, 587 P.2d 179 (1978) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1969))).

A communication is private when (1) the communicating parties manifest a subjective intention that it be private and (2) that expectation is reasonable. *Christensen*, 153 Wn.2d at 193. Factors bearing on the reasonableness of the privacy expectation include the duration and subject matter of the communication, the location of the communication and the potential presence of third parties, and the role of the nonconsenting party and his or her relationship to the consenting party. *Townsend*, 147 Wn.2d at 673-74. But the mere possibility that interception of the communication is technologically feasible does not render public a communication that is otherwise private. *Townsend*, 147 Wn.2d at 674.

Townsend is instructive with regard to the issues of what constitutes a "private communication" and what constitutes consent. There, police set up a sting operation after receiving tips that Donald Townsend was attempting to use his computer to arrange sexual liaisons with young girls. *Townsend*, 147 Wn.2d at 670. A police detective established an e-mail account with a screen name of "ambergirl87," a fictitious 13-year-old girl. *Townsend*, 147 Wn.2d at 670. Townsend began corresponding with "Amber" via e-mail, asking to meet her and saying that he wanted to "have fun" with her. *Townsend*, 147 Wn.2d at 670. In one e-mail, he asked "Amber" to promise not to "tell anyone about us." *Townsend*, 147 Wn.2d at 670. The detective's computer automatically stored these e-mail messages, which allowed the detective to read the messages at his leisure and to print them for use as evidence at a later time. *Townsend*, 147 Wn.2d at 670.

At Townsend's request, the detective, under the guise of Amber, also set up an ICQ account to communicate with Townsend. *Townsend*, 147 Wn.2d at 670. ICQ is a software chat program that allows users to communicate in writing in real time over the Internet. *Townsend*, 147 Wn.2d at 670-71. The ICQ communications between Townsend and Amber contained

graphic discussions about sexual topics; in two ICQ messages, Townsend told Amber that he wanted to have sex with her. *Townsend*, 147 Wn.2d at 671.

The *Townsend* court held, without distinguishing between the e-mail communications and the ICQ communications, that Townsend's communications to the fictitious child were private for purposes of the Act. 147 Wn.2d at 674. The court explained:

> [I]t is readily apparent from the undisputed facts that Townsend's subjective intention was that his messages to Amber were for her eyes only. That intent is made manifest by Townsend's message to Amber to not "tell anyone about us." In addition, the subject matter of Townsend's communications to Amber strongly suggests that he intended the communications to be private. While interception of these messages was a possibility, we cannot say that Townsend's subjective intention that his communications were private was unreasonable under the circumstances.

Townsend, 147 Wn.2d at 674 (citation omitted).[4]

The *Townsend* court concluded, however, that the detective did not violate the Act because Townsend had impliedly consented to the recording of the e-mail messages and ICQ communications by the detective's computer. *Townsend*, 147 Wn.2d at 676. The court cited *In re Marriage of Farr*, 87 Wn. App. 177, 184, 940 P.2d 679 (1997), for the proposition that "a communicating party will be deemed to have consented to having his or her communication recorded when the party knows that the messages will be recorded." *Townsend*, 147 Wn.2d at 675-76. As the *Townsend* court noted, the *Farr* court held that an individual consented to the recording of his voice messages by leaving a message on an answering machine, the only

[4] The *Townsend* court also clarified that, on the issue of whether a communication is private under the Act, it is not dispositive that the same device was used to communicate and to record the communication: "While one could certainly mount a cogent argument for the proposition that the privacy act should not apply when the recording of a transmission is done in a non-surreptitious way on a device that is also used for communication, the plain language of the statute covers such recording." *Townsend*, 147 Wn.2d at 675 n.2.

function of which is to record messages. 147 Wn.2d at 676 (citing *Farr*, 87 Wn. App. at 184). The *Townsend* court stated that it "entirely agree[d]" with the Court of Appeals's reasoning that:

> A person sends an e-mail message with the expectation that it will be read and perhaps printed by another person. To be available for reading or printing, the message first must be recorded on another computer's memory. Like a person who leaves a message on a telephone answering machine, a person who sends an e-mail message anticipates that it will be recorded. That person thus implicitly consents to having the message recorded on the addressee's computer.[5]

147 Wn.2d at 676 (quoting *State v. Townsend*, 105 Wn. App. 622, 629, 20 P.3d 1027 (2001)).

> In sum, because Townsend, as a user of e-mail had to understand that computers are, among other things, a message recording device and that his e-mail messages would be recorded on the computer of the person to whom the message was sent, he is properly deemed to have consented to the recording of those messages.

Townsend, 147 Wn.2d at 676

Under the implied consent reasoning of the court in *Townsend*, Roden impliedly consented to the recording of his text messages on Lee's iPhone. Roden voluntarily sent the text messages to Lee's iPhone with the expectation that Lee would read them. In doing so, he also anticipated that the iPhone would record and store the incoming messages to allow Lee to read them. Cell phones, like computers, are "message recording device[s]," a fact that Roden must have understood as a user of text messaging technology on cell phones. *See Townsend*, 147 Wn.2d 676. Accordingly, Sawyer did not violate Roden's rights under the Act.[6]

Roden asserts that *Townsend*'s implied consent theory does not apply to the present case. To support this argument, he states:

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[5] The *Townsend* court noted that implied consent was a "closer question" with regard to the ICQ communications. 147 Wn.2d at 676. The court analyzed the nature of the ICQ technology and the relevant terms of the privacy policy before concluding that Townsend had impliedly consented to the recording of the ICQ communications. *Townsend*, 147 Wn.2d at 676-79.

[6] Since the legality of the iPhone's seizure is not at issue, we do not address whether our decision would be different if the seizure was unlawful.

> Unlike in *Townsend*, Detective Sawyer did not save the text messages sent by Roden. Sawyer testified that he saw text messages from Roden and "typed everything out" in his report. Consequently, the evidence was inadmissible because distinguishable from e-mail and ICQ messages, the saving and printing of messages is not inherent in text messaging.

Appellant's Reply Br. at 2-3 (citation omitted). This argument fails. The relevant question is not whether Sawyer saved or printed the messages, but whether Roden understood that the iPhone would record and store the text messages that he sent to Lee. *See Townsend*, 147 Wn.2d at 676. Because, as a user of text message technology, Roden would have had this understanding, we find sufficient evidence to support the trial court's conclusion that Roden had no reasonable expectation of privacy in his text messages in Lee's phone. Thus, Roden impliedly consented to the recording of the text messages that he sent to Lee's iPhone.[7]

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record in accordance with RCW 2.06.040, it is so ordered.

I. WARRANTLESS SEARCH OF RODEN'S VEHICLE

Roden next challenges his conviction for possession of heroin. He argues that an officer violated his Washington Constitution article I, section 7 and Fourth Amendment rights by searching a zippered bag in his car without a warrant. He asserts that the search was not reasonably based on officer safety concerns. We disagree.

[7] The dissent declines to follow *Townsend* but we view it as binding precedent. And we agree with the *Townsend* court that "The legislature may, however, wish to consider amending the statute in light of developments in technology. It is, as the concurrence correctly suggests, 'in the best position to weigh the competing policies.'" *Townsend*, 147 Wn.2d at 675 n.2 (quoting *Townsend*, 147 Wn.2d at 685 (Bridge, J., concurring)).

A. The Stop

At about 9 P.M. on January 26, 2010, Washington State Patrol trooper Phillip Thoma was patrolling an isolated area of the Westside Highway in Cowlitz County. Thoma, who was alone, was travelling in a southbound direction. He observed Roden's car parked on a gravel turnout on the northbound shoulder. It was dark outside, and Roden's vehicle did not have any lights on.

Thoma wanted "to make sure [that the occupant] was okay, wasn't out of gas, having a medical emergency, he didn't need any assistance of any kind." Report of Proceedings (RP) (Apr. 29, 2010) at 69. Thoma made a U-turn, turned on his lights as a traffic safety measure,[8] and pulled up behind Roden's car.

Thoma exited his patrol car and approached the passenger window of the parked car. When Thoma reached the passenger window, he observed Roden, who was in the driver's seat, looking out the driver's side window. It appeared to Thoma that Roden knew of Thoma's presence, looking out the driver's side window for Thoma to approach. While Roden looked out the driver's side window, he "had his right arm reaching back between the two front seats into the back seat . . . making some kind of quick motions with his arm." RP (Apr. 29, 2010) at 70. Thoma could not see Roden's hand or what he was reaching for.

Concerned that Roden was trying to retrieve a weapon, Thoma drew his handgun, pointed it at Roden, and ordered Roden to put his hands up. Roden complied. Thoma asked Roden to step slowly out of the vehicle and keep his hands in view. Thoma used his hand[9] to secure

[8] Roden's car was parked on a "large sweeping curve," and Thoma turned on his lights "to make sure that nobody rear ended us." RP (Apr. 29, 2010) at 69.

[9] Thoma did not handcuff Roden.

Roden's hands behind his back. Thoma then conducted a pat-down search for weapons and discovered two pocket knives in Roden's left front pocket.

At the suppression hearing, Thoma testified as follows:

Q: Did [the discovery of the knives] cause you some concern?
A: Yes.
Q: And why did it cause you concern that you located these knives in his pocket?
A: Well, he's—he's obviously armed, he's got two knives. Well, while they're not—you know, it's not a handgun, or anything like that, it can still cause substantial injury to myself.
Q: Now, at this time, when you located his knives, did you know that . . . those were the items that he was reaching for between the seats?
A: No.
Q: So, potentially, was there something else that was located there?
A: Yes.
Q: Okay. What did you do next, once you located the knives?
A: I asked him to stand in front of his vehicle while I checked the area that he was reaching [into], to make sure he wasn't hiding a weapon, or attempting to retrieve a weapon.
Q: Okay. And did you search that area?
A: Yes, I did.
Q: What did you find?
A: I located a black, zippered pouch that was large enough to conceal a weapon. I felt it, and there was some sort of hard object inside.
Q: Okay. And was that in the general location where he had been reaching?
A: Yes, it was.
Q: Okay. And—and did you look into that bag?
A: Yes, I did.
Q: What did you locate?
A: I found various items of drug paraphernalia. I believe it was three syringes, one of them had some brown liquid inside of it; a scale; a tourniquet; plastic baggies containing brown residue; things of that nature.

RP (Apr. 29, 2010) at 72-73. Based on this discovery, Thoma arrested Roden, and the State charged Roden with possession of heroin.[10]

Roden moved to suppress the drug-related evidence that Thoma discovered in the black zippered pouch. He argued that Thoma did not have "an objectively reasonable concern for [his] safety." Clerk's Papers (CP) (41047-8-II) at 6.

At the suppression hearing, Thoma testified consistent with the facts above. The trial court denied Roden's suppression motion.

The trial court entered the following conclusions of law:

> 1. The Trooper had an objective and reasonable concern for officer safety.
>
> 2. The Trooper took immediate action to ensure his safety.
>
> 3. His actions were reasonable and the scope of his intrusion into the vehicle was limited to the immediate area of the vehicle where he had seen the furtive movements.
>
> 4. Nothing in Trooper Thoma's actions were unreasonable in the context of officer safety and therefore the search was justifiable.
>
> 5. The motion to suppress is denied.

CP (41047-8-II) at 21.

B. Officer Safety Justified the Search

Article I, section 7 of the state constitution provides greater protection to individuals against warrantless searches of their automobiles than the Fourth Amendment. *State v. Glenn*, 140 Wn. App. 627, 633, 166 P.3d 1235 (2007). This is a strict rule with narrowly construed exceptions. *Glenn*, 140 Wn. App. at 633. The State bears the heavy burden of proving that a warrantless search falls within an exception. *Glenn*, 140 Wn. App. at 633.

[10] A violation of RCW 69.50.4013(1); *see also* former RCW 69.50.204(b)(13).

One exception to the warrant requirement allows an officer, during a valid *Terry*[11] stop, to "make a limited search of the passenger compartment to assure a suspect person in the car does not have access to a weapon." *State v. Kennedy*, 107 Wn.2d 1, 13, 726 P.2d 445 (1986). This protective search for officer safety is limited to areas "within the investigatee's immediate control." *Kennedy*, 107 Wn.2d at 12. In such cases, the officer must be able to "point to 'specific and articulable facts' which create an objectively reasonable belief that a suspect is 'armed and presently dangerous.'" *State v. Glossbrener*, 146 Wn.2d 670, 680, 49 P.3d 128 (2002) (quoting *State v. Collins*, 121 Wn.2d 168, 173, 847 P.2d 919 (1993)). We evaluate "the entire circumstances of the traffic stop" to determine whether the search was reasonably based on officer safety concerns. *Glossbrener*, 146 Wn.2d at 679.

"[I]f a suspect [makes] a furtive movement appearing to be concealing a weapon or contraband in the passenger compartment, a protective search is generally allowed." *State v. Chang*, 147 Wn. App. 490, 496, 195 P.3d 1008 (2008) (citing *Kennedy*, 107 Wn.2d at 12). In *Kennedy*, a police officer signaled to the defendant to pull over his vehicle; the officer reasonably suspected that the defendant had committed drug crimes. 107 Wn.2d at 3, 9. After the signal, the officer observed the defendant "lean forward as if to put something under the seat." *Kennedy*, 107 Wn.2d at 3. Our Supreme Court stated that the defendant's "furtive gesture" gave the officer "an objective suspicion that [the defendant] was secreting something under the front seat of the car." *Kennedy*, 107 Wn.2d at 11. Accordingly, the officer's protective search for a weapon under the front seat of the defendant's vehicle was reasonable. *Kennedy*, 107 Wn.2d at 13.

[11] *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

Here, the totality of the circumstances indicates that Thoma had an objectively reasonable belief that Roden was armed and dangerous before Thoma searched the zippered bag. Thoma observed Roden "making . . . . quick motions with his arm" while reaching into the back seat and looking through the driver's side window. RP (Apr. 29, 2010) at 70. Understandably, these actions caused Thoma to be concerned that Roden was reaching for a weapon as Thoma approached the vehicle. During the subsequent pat-down of Roden's person—an action that Roden does not challenge on appeal—Thoma discovered two knives in Roden's pocket that were capable of "caus[ing] substantial injury." RP (Apr. 29, 2010) at 72. Even though it is undisputed that the purpose of Thoma's initial contact with Roden was "community caretaking or courtesy contact to assist the occupant of the vehicle," Roden's furtive movements and possession of weapons on his person justified Thoma's limited search of the immediate area into which Roden had reached for officer safety purposes. CP (41047-8-II) at 21.

Roden suggests that the backseat area was not in his immediate control because he "did not have to get back in his apparently disabled car." Appellant's Br. at 14; Appellant's Reply Br. at 4. The fact that Roden was outside of the vehicle at the time of the search is not dispositive. *See, e.g., State v. Larson*, 88 Wn. App. 849, 856-57, 946 P.2d 1212 (1997) (protective search of defendant's vehicle while defendant was outside of vehicle was reasonable because officer stopped defendant for traffic violation and defendant would have to access vehicle compartment to retrieve license and registration); *see also Glossbrener*, 146 Wn.2d at 679 ("We agree with the reasoning in *Larson* and conclude that *Kennedy* did not limit an officer's ability to search the passenger compartment of a vehicle based on officer safety concerns to only situations in which either the driver or passenger remain in the vehicle."). Thoma testified at the suppression hearing that he planned to allow Roden to leave without further investigation after conducting a

protective search of the area into which Roden had reached. After Thoma released Roden, he would have been free to return to his car and retrieve any weapon before Thoma left the scene. Therefore, concerns for Thoma's safety justified the search and the trial court did not err in denying Roden's motion to suppress.

Affirmed.

Penoyar, J.

I concur:

Worswick, C.J.

VAN DEREN, J. (dissenting in part) — I respectfully dissent on the majority's opinon related to the iPhone[12] search. I would hold that Jonathan Roden did not impliedly consent to Detective Kevin Sawyer's search of Daniel Lee's iPhone and that the police search of Lee's iPhone constituted a violation of the Washington Privacy Act (Act), chapter 9.73 RCW. Additionally, had Roden challenged Sawyer's search of Lee's iPhone on constitutional grounds, I would hold that the search violated article 1, section 7 of the Washington State Constitution and the Fourth Amendment of the United States Constitution. Thus, the evidence gathered as a result of the State's unlawful intrusion should be suppressed.

I. WASHINGTON PRIVACY ACT

The majority rests its finding that Roden impliedly consented to Sawyer's search of Lee's iPhone on the fact that Roden knew that the iPhone "would record and store the text messages that he sent to Lee." Majority at 8. This interpretation of the Act reads out of it the protections afforded "any device electronic or otherwise designed to record" private communications. RCW 9.73.030(1)(a). Under the Act, recordings of private communications are protected from police searches absent the issuance of a search warrant, making Roden's knowledge of the fact that a text message was recorded in Lee's iPhone irrelevant. Because the majority's interpretation of the Act jeopardizes or eliminates the Act's express protections, I dissent from the finding and the majority's holding.

Roden does not contest his convictions based on constitutional challenges under article 1,

[12] *See* majority at 1 n.1.

section 7 of our constitution or the Fourth Amendment.[13] Instead, he focuses on his rights under the statutory law contained in the Act.

The Act provides that:

> [I]t shall be unlawful for . . . the state of Washington, its agencies, and political subdivisions to intercept, or record any:
>
> (a) Private communication transmitted by telephone, *telegraph*, radio, or other device between two or more individuals between points within or without the state *by any device electronic or otherwise designed to record* and/or transmit said communication regardless how such device is powered or actuated, without first obtaining the consent of all the participants in the communication;
>
> (b) Private conversations, by *any device electronic or otherwise designed to record* or transmit such conversation regardless how the device is powered or actuated without first obtaining the consent of all the persons engaged in the conversation.

RCW 9.73.030(1) (emphasis added). Any information obtained in violation of the above sections "shall be inadmissible in any civil or criminal case" in all courts in this state.[14] RCW 9.73.050. The Act must be read to ensure that private conversations are "protected in the face of an ever-changing technological landscape." *State v. Christensen,* 153 Wn.2d 186, 197, 102 P.3d 789 (2004). Additionally, "[I]f any textual ambiguity about the meaning of the statute lingers, it ought to be resolved in favor of giving effect to the legislative intent of the statute," which puts a high value on the privacy of communications. *Christensen*, 153 Wn.2d at 200.

The Act clearly and expressly affords protection to private communications by telephone, radio, telegraph and by any other electronic device. RCW 9.73.030(1). Our statute is one of the

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[13] This appears to be a strategic decision based on Sawyer's search of Lee's iPhone in at least two separate cases. *See also State v. Hinton*, No. 41014-1-II (Wash. Ct. App., argued Dec. 1, 2011). Hinton challenges Sawyer's intrusion in Lee's iPhone under both the state and federal constitutions. Hinton's and Roden's appeals were argued the same day in our court.

[14] Exceptions to this rule include if the person whose rights have been violated in an action brought for damages under RCW 9.73.030 through 9.73.080 gave permission or if the criminal action would jeopardize national security. RCW 9.73.050.

most restrictive privacy acts in the nation because it requires that all parties to a private communication consent to disclosure. *Christensen*, 153 Wn.2d at 198. Indeed, the Act is forward-looking and written with a clear anticipation that technology could change, thus its use of the phrase: "any device electronic or otherwise designed to record and/or transmit said communication regardless how such device is powered or actuated." RCW 9.73.030(1)(a).

II. IMPLIED CONSENT IGNORES EXPRESS STATUTORY LANGUAGE

State v. Townsend, 147 Wn.2d 666, 57 P.3d 255 (2002); *In re Marriage of Farr*, 87 Wn. App. 177, 940 P.2d 679 (1997); and the majority do not acknowledge that the Act protects the communications themselves and also the recording and transmittal of those communications. RCW 9.73.030(1). Thus, the State has been allowed to admit evidence gathered from telephone answering machines, *Farr*, and e-mails, *Townsend.* These decisions abrogate the Act's protection of private communications through the judicially-created implied consent doctrine.

Reliance on implied consent overlooks the Act's protection of written communications and recordings and allows expansive and unregulated State searches of citizens' phone contacts, without probable cause, without a search warrant, and without actual consent. Under implied consent reasoning, a police officer's simple possession of a smartphone is sufficient to imply or infer consent of the communicating parties. This reasoning can easily and dangerously be extended to allow warrantless State searches of any digital device that police come to possess, all contrary to the Act itself. Moreover, that has not been the law in Washington with regard to other computers. *See State v. Grenning*, 142 Wn. App. 518, 532, 174 P.3d 706 (2008) (warrant must specifically authorize search of computer), *aff'd*, 169 Wn.2d 47, 234 P.3d 169 (2010); *State v. Nordlund*, 113 Wn. App. 171, 182, 53 P.3d 520 (2002).

Thus, the trial court should have suppressed the evidence seized as a result of the warrantless search of Lee's iPhone unless one of the narrow exceptions to the warrant requirement applied—none of which are argued here—or unless Roden gave actual consent to State interception of his messages. Accordingly, I would reverse Roden's conviction and would vacate the order denying suppression of the evidence seized from Lee's iPhone.

III. TEXT MESSAGES AND THE PRIVACY ACT

In the new world of digital communications, text messages are most similar to telegrams, which are expressly protected by the Act; but text messages are even more obviously private communications due to their direct communication between the sender and recipient. A telegram, on the other hand, requires the sender to engage an operator of one telegraph machine who sends electrical signals to another telegraph machine in Morse code. The receiving operator decodes the Morse code language, types out the message, and delivers it to the intended recipient. With telegrams, both ends of telegraphic communications include third parties who print and who read the telegram's contents.

Under *Townsend* and the majority's analysis, the Act does not apply to telegrams because the sender would impliedly consent to the message being recorded, printed, and easily read by intervening parties. Yet the Act expressly protects communications transmitted by telegram.

Furthermore, *Townsend* and the majority's analytic framework ignore the protections afforded recorded communications. Inferring consent to search any recorded or printed message is contrary to the Act's underlying and expressed intent. The Act clearly required that if Roden and Lee would not consent to Sawyer's search of Lee's iPhone and his manipulation of the iPhone to locate Roden's text messages, the State would have to acquire authorization from a judge or magistrate for the intrusion into Lee's iPhone, a device "designed to record and/or

transmit said communication."[15] RCW 9.73.030(1)(a). Sawyer did not receive consent from either Lee or from Roden, nor did he receive authorization from a judge or magistrate to open Lee's iPhone and search its contents and begin communicating with Roden.

And here, the police did more than view Roden's communications to Lee. The record establishes that "Sawyer spent about 5 to 10 minutes 'looking at some of the text messages' on [Lee's] iPhone; he also looked to see 'who had been calling.'" Majority at 2 (quoting Report of Proceedings (Apr. 29, 2010) at 9). Then, "[p]osing as Lee, Sawyer sent Z-Jon [(Roden)] a text message reply" and engaged in a series of text messages, eventually setting up a meeting at which Roden was arrested. Majority at 2-3.

Under these circumstances, Roden, who did not intend to communicate with Sawyer, did not consent to Sawyer's search of Lee's iPhone, to Sawyer's use of the phone, or to the use of the iPhone communications against him in criminal proceedings. Resorting to implied consent under the Act simply abrogates citizens' protections from searches that violate our rigorous Act and constitutional privacy rights

Following the majority's analysis, any communication that has a traceable electronic or paper trail will not be protected because consent to disclosure can be implied from the trail. This is clearly contrary to the legislature's intent when it created the Act, which explicitly included protections for telegrams and any device designed to record. The legislature intended to protect private communications regardless of how such communications were transmitted. The Act was not intended or written so that it could be interpreted to abrogate constitutional privacy

[15] A judge or magistrate can "approve the interception, recording, or disclosure of communications or conversations with a nonconsenting party for a reasonable and specified period of time, if there is probable cause to believe that the nonconsenting party has committed, is engaged in, or is about to commit a felony." RCW 9.73.090(2)

protections or to invite its own abrogation based on implied consent when communications are achieved utilizing a protected means of communication.

IV. THE PRIVACY ACT DOES NOT ABROGATE ARTICLE 1, SECTION 7 PROTECTIONS

"'When a party claims both state and federal constitution violations, we turn first to our state constitution.'" *State v. Afana*, 169 Wn.2d 169, 176, 233 P.3d 879 (2010) (quoting *State v. Patton*, 167 Wn.2d 379, 385, 219 P.3d 651 (2009)). Article I, section 7 of our state constitution states, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." In determining whether a search violated article I, section 7, we engage in a two-step analysis. The first step requires us to determine whether the State has intruded into a person's private affairs. *State v. Valdez*, 167 Wn.2d 761, 772, 224 P.3d 751 (2009). "The term 'private affairs' generally means 'those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass.'" *State v. Athan*, 160 Wn.2d 354, 366, 158 P.3d 27 (2007) (quoting *State v. Myrick*, 102 Wn.2d 506, 511, 688 P.2d 151 (1984)). "In determining if an interest constitutes a 'private affair[ ],' we look at the historical treatment of the interest being asserted, analogous case law, and statutes and laws supporting the interest asserted." *Athan*, 160 Wn.2d at 366 (quoting *Myrick*, 102 Wn.2d at 511.) *Townsend* clearly determined that electronic communications were private. 147 Wn.2d at 674. The *Townsend* court stated:

> We hold, as did the Court of Appeals, that Townsend's communications to the fictitious child, Amber, were private. We reach that conclusion because it is readily apparent from the undisputed facts that Townsend's subjective intention was that his messages to Amber were for her eyes only. That intent is manifest by Townsend's message to Amber to not "tell anyone about us." [*Townsend* Clerk's Papers] at 66. In addition, the subject matter of Townsend's communications to Amber strongly suggests that he intended the communications to be private. While interception of these messages was a possibility, we cannot say that

> Townsend's subjective intention that his communications were private was unreasonable under the circumstances.

147 Wn.2d at 674.

Here, as in *Townsend*, it is clear that Roden intended his communications arranging an illegal drug transaction to be private. And, as the *Townsend* court noted, "The mere possibility that interception of the communication is technologically feasible does not render public a communication that is otherwise private." 147 Wn.2d at 674; *see also State v. Faford*, 128 Wn.2d 476, 486, 910 P.2d 447 (1996) ("We will not permit the mere introduction of new communications technology to defeat the traditional expectation of privacy in telephone conversations."). Likewise, the possibility that another person could potentially access Lee's iPhone and read Lee's text messages does not render Roden's private communications public.

Although, by sending a text message to Lee's iPhone, Roden risked Lee exposing his communications to others and risked that his communications would become known to law enforcement through a valid search pursuant to a search warrant, it does not diminish his expectation that his text messages would not be subject to a warrantless search by government agents. *See State v. Eisfeldt*, 163 Wn.2d 628, 637, 185 P.3d 580 (2008) ("[A]rticle I, section 7 protects 'those privacy interests which citizens of this state have held, and should be entitled to hold, safe from *governmental trespass absent a warrant.*'") (emphasis added) (quoting *Myrick*, 102 Wn.2d at 511).

It is worth noting that most mobile phone owners are in immediate possession of their

phones at all times.[16] The fact these portable computer phones, as opposed to a land line telephone, are so closely associated with an individual lends credence to the conclusion that a sender of a text message has a privacy interest that the phone's owner will be the immediate recipient of the message and thus, the sender can expect that the message will remain private absent voluntary action by the phone's owner to disclose the contents of the text message. And, in many respects, the user of text messages has a greater privacy interest in text messages than in oral conversations because oral conversations can be overheard.[17] In contrast to oral conversations, text messages are insulated from the accidental or deliberate eavesdropper unless the eavesdropper possesses the receiving phone.

While it is technically possible for every text message sent from one smartphone to another smartphone to be tracked and viewed by people other than the recipient, this technological ability also does not negate a text message user's privacy interests, particularly from the government's unwarranted prying eye. "'Privacy is not a discrete commodity, possessed absolutely or not at all.'" *United States v. Jones*, __ U.S. __, 132 S. Ct. 945, 947, 181 L. Ed. 2d 911 (2012) (Sotomayor, J., concurring) (quoting *Smith v. Maryland*, 442 U.S. 735, 749, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979) (Marshall, J., dissenting)). As Justice Marshall so eloquently stated in 1979:

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[16] Cell phones are commonly provided by employers so that employees are expected to be checking them throughout the day. Many employers also permit cell phones to be within reach all day so that work lines will not be tied up with personal calls. *See* Br. of Electronic Frontier Foundation et. al. as Amici Curiae in Support of Resp'ts, *City of Ontario, Cal. v. Quon*, No. 08-1332, 2010 WL 1063463, at *16 (U.S. Mar. 23, 2010) (Br. of EFF); *see generally* Katharine M. O'Connor, Note, *:o OMG They Searched My Txts: Unraveling the Search and Seizure of Text Messages*, 2010 U. OF ILL. L. REV. 685.

[17] "The [text message] user seeks to exclude the communication from the uninvited ear by avoiding speaking into the mouthpiece altogether." O'Connor, at 713.

> [B]ut even assuming, as I do not, that individuals "typically know" that a phone company monitors calls for internal reasons, it does not follow that they expect this information to be made available to the public in general or the government in particular. Privacy is not a discrete commodity, possessed absolutely or not at all. Those who disclose certain facts to a bank or phone company for a limited business purpose need not assume that this information will be released to other persons for other purposes. [I]mplicit in the concept of assumption of risk is some notion of choice. . . . [U]nless a person is prepared to forgo use of what for many has become a personal or professional necessity, he cannot help but accept the risk of surveillance. It is idle to speak of "assuming" risks in contexts where, as a practical matter, individuals have no realistic alternative.

Smith, 442 U.S. at 749 (Marshall J., dissenting) (internal footnote and citations omitted).

V. THE PRIVACY ACT DOES NOT ABROGATE THE FOURTH AMENDMENT

The Supreme Court has had recent occasion to address new technology's impact on the foundational privacy right expressed by the Fourth Amendment. Although not directly addressing whether individuals retain a reasonable expectation of privacy in text messages sent to third parties, two recent United States Supreme Court cases suggest that the public has a reasonable expectation of privacy in cell phone and text message communications.

In *City of Ontario, Cal. v. Quon*, __ U.S. __, 130 S. Ct. 2619, 177 L. Ed. 2d 216 (2010), the United States Supreme Court addressed an employee's use of an employer-provided pager. Although recognizing that the case touched "issues of farreaching significance" and discussed "employees' privacy expectations vis-à-vis employer provided technological equipment," the Court declined to address whether Quon had a reasonable expectation of privacy in his text messages. *Quon*, 130 S. Ct. at 2624, 2630. Instead, the *Quon* Court held that, even assuming Quon had a reasonable expectation of privacy, the search of text messages contained on his employer-owned pager for work-related purposes was reasonable. 130 S. Ct. at 2630-31. However, the *Quon* Court strongly suggested that outside the employee-employer context, the public would have a reasonable expectation of privacy in text message communications, noting:

> Cell phone and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification. That might strengthen the case for an expectation of privacy [in the employee-employer context]. On the other hand, the ubiquity of those devices has made them generally affordable, so one could counter that employees who need cell phones or similar devices for personal matters can purchase and pay for their own.

Quon, 130 S. Ct. at 2630.

The *Quon* Court also equated the search of a personal e-mail account or pager with a wiretap of a person's phone line. 130 S. Ct. at 2631. Thus, the Supreme Court in *Quon* strongly suggested that an individual has a reasonable expectation of privacy in text messages under the Fourth Amendment.[18]

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[18] Other courts have found that individuals have a reasonable expectation of privacy in their cell phones and the information contained on their cell phones, including text messages. *See, e.g.*, *United States v. Zavala*, 541 F.3d 562, 577 (5th Cir. 2008) ("[C]ell phones contain a wealth of private information, including emails, text messages, call histories, address books, and subscriber numbers"; thus, defendant had a "reasonable expectation of privacy regarding [the cell phone's contents]."); *United States v. Finley*, 477 F.3d 250, 259 (5th Cir. 2007) (A defendant had reasonable expectation of privacy in the text messages stored on his cell phone because he had possessory interest in the phone and took "normal precautions to maintain his privacy in the phone."); *United States v. Davis*, 787 F.Supp.2d 1165, 1170 (D.Or. 2011) ("A person has a reasonable expectation of privacy in his or her personal cell phone, including call records and text messages."); *United States v. Quintana*, 594 F.Supp.2d 1291, 1299 (M.D. Fla. 2009) ("[A] search warrant is required to search the contents of a cell phone unless an exception to the warrant requirement exists."); *State v. Smith*, 124 Ohio St.3d 163, 169, 920 N.E.2d 949 (2009) (Cell phone users have "a reasonable and justifiable expectation of a higher level of privacy in the information [cell phones] contain" because of their multifunctional uses and ability to store large amounts of private data, including text messages.); *but cf. United States v. Flores-Lopez*, 670 F.3d 803 (7th Cir. 2012) (police officers may conduct a warrantless search of arrestee's cell phone to obtain the cell phone number).

Admittedly, these cases do not address an individual's expectation of privacy in text messages that are communicated to a third party. However, the Sixth Circuit Court of Appeals has held that "the mere *ability* of a third-party intermediary to access the contents of a communication cannot be sufficient to extinguish a reasonable expectation of privacy." *United States v. Warshak*, 631 F.3d 266, 286 (6th Cir. 2010). The *Warshak* court held:

> A subscriber enjoys a reasonable expectation of privacy in the contents of emails "that are stored with, or sent or received through, a commercial [Internet service provider (ISP)]." The government may not compel a commercial ISP to turn over

In *Jones,* the Court held that the installation of a global-positioning-system (GPS) tracking device on a vehicle registered to the respondent's wife constituted a search. 132 S. Ct. at 946. This opinion has been the subject of much discussion and conjecture about how the Supreme Court will interpret the State's use of technology to intrude on individual citizens and their activities.[19]

The majority opinion in *Jones* authored by Justice Scalia first denied the government's contention that no search had occurred since Jones had "no reasonable expectation of privacy" in his vehicle's locations on the public roads, which were visible to all. *Jones*, 132 S. Ct. at 957. The denial of this contention was partially based on the fact that the officers in the case "'did

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> 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 Warshak's emails. Moreover, to the extent that [the Stored Communications Act (SCA), 18 U.S.C. section 2703] purports to permit the government to obtain such emails warrantlessly, the SCA is unconstitutional.

631 F.3d at 288 (quoting *Warshak v. United States*, 490 F.3d 455, 473 (6th Cir. 2007)).

I would hold that the *Warshak* court's rationale in establishing individuals' reasonable expectations of privacy in the contents of their e-mail is equally applicable to cell phone users' expectation of privacy in the contents of their text messages. I would also extend the *Warshak* court's holding to prohibit a warrantless search by government agents of text messages sent to and stored on a third party's cell phone. In my view, a third party's ability to access text messages sent by an individual does not diminish the text message sender's expectation of privacy in his or her text message communications.

[19] *See, e.g.*, Tom Goldstein, *Jones Confounds the Press*, SCOTUSBLOG (Jan. 25, 2012, 11:30 AM), http://www.scotusblog.com/2012/01/jones-confounds-the-press/; Jess Bravin, *Justices Rein in Police on GPA Trackers*, WALL ST. J., Jan. 24, 2012, at A1, *available at* http://online.wsj.com/article/SB10001424052970203806504577178811800873358.html?mod=WSJ_hp_LEFTTopStories; Tom Goldstein, *Reactions to Jones v. United States: The Government Fared Much Better than Everyone Realizes*, SCOTUSBLOG (Jan. 23, 2012, 4:07 PM), http://www.scotusblog.com/2012/01/reactions-to-jones-v-united-states-the-government-fared-much-better-than-everyone-realizes/; Orin Kerr, *What's the Status of the Mosaic Theory after* Jones*?*, THE VOLOKH CONSPIRACY (Jan. 23, 2012, 1:59 PM), http://volokh.com/2012/01/23/whats-the-status-of-the-mosaic-theory-after-jones/; Lyle Denniston, *Opinion Recap: Tight Limit on Police GPS Use*, SCOTUSBLOG (Jan. 23, 2012, 11:58 AM), http://www.scotusblog.com/2012/01/opinion-recap-tight-limit-on-police-gps-use/.

more than conduct a visual inspection of respondent's vehicle.' By attaching the device to the Jeep, officers encroached on a protected area." *Jones*, 132 S. Ct. at 952 (quoting Br. of U.S., 2011 WL 3561881, at *41). The Court has previously recognized that "[p]hysically invasive inspection is simply more intrusive than purely visual inspection." *Bond v. United States*, 529 U.S. 334, 337, 120 S. Ct. 1462, 146 L. Ed. 2d 365 (2000).

Similarly here, Sawyer did more than conduct a visual inspection of Lee's iPhone. As anyone who has seen or used an iPhone knows, looking at text messages and looking to see who has been calling an iPhone requires that the person search the iPhone's list of contacts and messages, as the record reflects happened here. Sawyer engaged in an invasive inspection and then engaged Roden in conversation while posing as Lee.

Justice Sotomayor, in her concurring opinion in *Jones*, emphasized the privacy concerns that new technologies force courts to confront:

> More fundamentally, it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. *E.g.*, *Smith*, 442 U.S. at 742 . . . ; *United States v. Miller*, 425 U.S. 435, 443, 96 S. Ct. 1619, 48 L. Ed. 2d 71 (1976). This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks. People disclose the phone numbers that they dial or text to their cellular providers; the [uniform resource locator]s that they visit and the e-mail addresses with which they correspond to their Internet service providers; and the books, groceries, and medications they purchase to online retailers. Perhaps, as Justice ALITO notes, some people may find the "tradeoff" of privacy for convenience "worthwhile," or come to accept this "diminution of privacy" as "inevitable," and perhaps not. I for one doubt that people would accept without complaint the warrantless disclosure to the Government of a list of every Web site they had visited in the last week, or month, or year. But whatever the societal expectations, they can attain constitutionally protected status only if our Fourth Amendment jurisprudence ceases to treat secrecy as a prerequisite for privacy. I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection.

132 S. Ct. at 957.

I agree with Justice Sotomayer and would hold that such information should not be disentitled to state constitutional protection either. I would hold under both article 1, section 7 and the Fourth Amendment that the State violated Roden's privacy rights and that the fruit of the illegal search of Lee's iPhone should have been suppressed.

VI. THE PREVALENCE OF TEXT MESSAGES REQUIRES A NEW LOOK AT PRIVACY PROTECTIONS

Holding that Roden consented to Sawyer recording his text messages to Lee simply fails to take into account evolving notions of privacy in a society increasingly reliant on electronic forms of communication. For example, in *Quon*, amici curiae in support of respondent Quon presented statistical data on the prevalence of electronic forms of communication to support the argument that society recognizes an expectation of privacy in text messages. The amicus brief states:

> A 2009 survey found that 85% of adults owned a mobile phone. Approximately nine out of ten adults use a mobile phone and one in seven adults owns *only* a mobile phone. Furthermore, 14.5% of American homes received "all or almost all" calls on wireless telephones, even if there also was a landline telephone in the house. Stephen J. Blumberg & Julian Luke, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey*, CDC National Center for Health Statistics, July-December 2008, http:// tiny.cc/cdcnihstats.
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> . . . .
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> Texting, along with the related services for transmitting photos and videos between phones, has become an extremely popular form of communication, with an average of 4.1 billion text messages sent and received in the nation *each day*.
>
> Many Americans today use text messages to convey information that formerly would have been the subject of an oral telephone conversation. According to a 2008 Nielson Mobile survey, U.S. mobile subscribers "sent and received on average 357 text messages per month [in the second quarter of 2008], compared with making and receiving 204 phone calls a month. Marguerite Reardon, *Americans Text More Than They Talk*, CNET, Sept. 22, 2008, http://tiny.cc/CNET.

Br. of Electronic Frontier Foundation et. al. as Amici Curiae in Support of Resp'ts, *Quon*, No. 08-1332, 2010 WL 1063463, at *6-8 (U.S. Mar. 23, 2010) (Br. of EFF) (internal footnotes omitted and one citation omitted).

Statistical data on the prevalence of electronic communications clearly demonstrate that the sending and receiving of text messages on a cell phone, "texting,"[20] has become the predominant form of communication.[21] And American teen-agers, in particular, engage in substantially more text messages per day than phone calls, and certainly more than letters.[22] This emerging data establishes, and courts cannot ignore, a clear shift in Americans' private communications from older forms of postal mail, telephone and face-to-face conversations to text and e-mail messages generated and stored on smartphones. Br. of EFF, 2010 WL 10633463, at *10; *see generally* Katharine M. O'Connor, Note, *:o OMG They Searched My Txts: Unraveling the Search and Seizure of Text Messages*, 2010 U. OF ILL. L. REV. 685, 687-88.

Courts must analyze these new forms of communication within the context of our society's evolving and existing expectations of privacy.[23] As the Supreme Court recognized in *Quon*, "Rapid changes in the dynamics of communication and information transmission are

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[20] Text messaging, also known as short message service (SMS) or "texting," uses cell phones or pagers to send and receive electronic written messages.

[21] Text message use is expected to continue to surge. "One study estimated that there were 5 trillion SMS texts sent worldwide in 2009 and that there will be more than 10 trillion SMS texts sent worldwide in 2013." Br. of EFF, 2010 WL 10633463, at *9.

[22] One study found that American teen-agers sent an average of 3,146 texts per month. Br. of EFF, 2010 WL 10633463, at *9.

[23] Well established case law under the Fourth Amendment provides that a sender of a letter or other sealed package has a reasonable, and legitimate, expectation of privacy in those articles *until* they are delivered to the recipient. *See, e.g., United States v. Jacobsen*, 466 U.S. 109, 114, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984). This doctrine is unworkable in the electronic

evident not just in the technology itself but in what society accepts as proper behavior." 130 S. Ct. at 2629; *see also United States v. Warshak*, 631 F.3d 266, 285 (6th Cir. 2010) ("[T]he Fourth Amendment must keep pace with the inexorable march of technological progress, or its guarantees will wither and perish.") (citing *Kyllo v. United States*, 533 U.S. 27, 34, 121 S. Ct. 2039, 150 L. Ed. 2d 94 (2001)).

Never would our constitutional framers have anticipated that technology would expose citizens to nonconsensual and unexamined State intrusion into their private affairs. Recognizing the prevalence of individual electronic communication on handheld computers, i.e., smartphones, and society's evolving notions of privacy in those communications, I would hold that the officer's warrantless search of Lee's iPhone to obtain Roden's text messages and his address violated Roden's privacy interests absent an exception to the warrant requirement.

Broadly interpreted, the majority's holding provides that all citizens of this state consent to police intrusion of their cell phone communications and that they have no expectation of privacy in any form of electronic communication under either the Privacy Act, or our state or federal constitution. That holding undermines every individual's legitimate privacy interests in communications afforded by evolving and existing technology.[24]

Accordingly, I dissent.

Van Deren, J.
VAN DEREN, J.

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communication context because electronic messages are delivered nearly instantaneously and thus, would leave the sender of electronic communications with no expectation of privacy.

[24] Should this be the law in Washington, every cell phone user—including youth who tend to use these phones without discretion—should necessarily be warned that the State may search their or their friends' cell phones without a legally issued search warrant based on probable cause. This result cannot help but offend constitutional notions of individual protections from unwarranted State intrusion into private affairs.

DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Sean Brittain, Cowlitz County Prosecutor's Office, 312 SW First Avenue, Kelso, Washington 98626.

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

DATED this 19th day of July, 2012 in Kent, Washington.

Valerie Marushige

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