**NO. 41037-1-II**
**Cowlitz County No. 10-1-00091-4 & 09-1-01153-0**

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,**

**DIVISION II**

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**JONATHAN NICHOLAS RODEN,**

**Appellant.**

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# BRIEF OF RESPONDENT

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2. The Trial Court did not err when it refused to suppress evidence the police obtained during an officer safety search of the Appellant's vehicle.

## II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Were the text messages sent by the Appellant and observed by the police officer private communications?

2. Did the police violate the Appellant's right to privacy under the Washington Privacy Act when viewing text messages sent by the Appellant to a third party's iPhone?

3. Did the police officer have a valid officer safety concern when he performed a search of the Appellant's vehicle?

## III. STATEMENT OF THE CASE

### A. Text message case (cause #09-1-01153-0)

On November 3, 2009, Longview Police Detective Kevin Sawyer arrived at the Longview Police Department to begin his shift. When he arrived, he was given an iPhone that had been confiscated by another officer pursuant to the earlier arrest of Daniel S. Lee. Detective Sawyer was informed that Mr. Lee had been arrested and booked on drug related charges and his iPhone had rung numerous times since his arrest. 5RP 6-7.

An iPhone is a cell phone. When an iPhone receives a text message, which is a typed out message sent from one cell phone to another, it displays the message directly on the screen. The phone itself does not need to be accessed or manipulated in order to view the text message. Detective Sawyer, who is familiar with iPhones and their functions, observed that Mr. Lee's iPhone did not have the screen lock function activated. 5RP 7-9.

While Detective Sawyer was in possession of Mr. Lee's iPhone, he examined the message inbox and located numerous text messages that referenced drug transactions. 5RP 9. Some of these text messages were from Jonathan Roden, the Appellant. 5RP 9-11. Detective Sawyer, posing as Mr. Lee, responded to the Appellant's text messages and arranged a drug transaction with the Appellant. 5RP 11-12. At no time during the conversation did the Appellant's text messages specifically reference "Daniel Lee." 5RP 12. At no time during the conversation did the Appellant indicate that he wanted the conversation to remain private. *Id.* Detective Sawyer and the Appellant agreed to meet at the Safeway parking lot on 15th Ave in Longview, Washington. RP 13. The Appellant was placed under arrest based on the contents of the text message conversation. *Id.*

On November 6, 2009, the Cowlitz County Prosecutor's Office charged the Appellant with one count of attempted possession of heroin. CP 1-2. A motion to suppress was heard by the Cowlitz County Superior Court on April 29, 2010. 5RP 3-63. The court denied the motion to suppress. 5RP 60-63. On June 16, 2010, the court entered its findings of fact and conclusions of law. CP 23-26. On July 15, 2010, the State filed an amended information charging the Appellant with attempted drug crimes. CP 27-28. On that same date, the Appellant stipulated to facts sufficient to convict and was found guilty of the crime charged in the amended information. CP 29-31.

**B. Vehicle search case (cause #10-1-00091-4)**

On January 26, 2010, Trooper Phil Thoma of the Washington State Patrol was routine patrol on Westside Highway. 5RP 67-68. Trooper Thoma was not accompanied by anyone else. 5RP 68. Westside Highway is an isolated stretch of road, not near the center of town. *Id.* At the time Trooper Thoma was on patrol, it was in the 9:00 pm in evening and dark. *Id.* While patrolling Westside Highway, Trooper Thoma observed a vehicle parked on the northbound shoulder on a gravel turnout. 5RP 69. Trooper Thoma noticed that the parked vehicle had no lights on. *Id.*

Trooper Thoma pulled in behind the vehicle to check if he could be of assistance to the vehicle's occupants, which is part of his duties as a

Washington State Patrol Trooper. *Id.* Since he had been traveling southbound on Westside Highway, Trooper Thoma conducted a u-turn, activated his emergency lights, and pulled in behind the vehicle. *Id.* Trooper Thoma activated his emergency lights as a means to warn oncoming traffic of his patrol vehicle's location. *Id.*

Trooper Thoma approached the vehicle and went to make contact with the vehicle on the passenger side, which was away from traffic and thereby the safer side to be on. 5RP 69-70. He observed the driver, and only occupant, later identified as the Appellant, expecting to be contacted at the driver's side window due to his head facing towards the driver's side window. Trooper Thoma also observed the Appellant's arm between the two front seats, making some kind of quick motion towards the back seat of the vehicle. 5RP 70. Trooper Thoma could not observe what the Appellant was reaching for or attempting to hide, which caused him concern. 5RP 70-71.

Trooper Thoma drew his firearm and ordered the Appellant to show his hands. The Appellant was complied with this request. Then, upon being told to do so, the Appellant exited the vehicle. 5RP 71. Based on the furtive movements, Trooper Thoma conducted a pat-down of the Appellant's person and located two pocket knives. 5RP 72. Not knowing whether these knives were the items the Appellant had been reaching for,

Trooper Thoma had the Appellant stand at the front of his vehicle while he checked the area of the Appellant's vehicle that he had been reaching into. 5RP 72-73. Trooper Thoma located a black zippered pouch that was large enough to conceal a weapon. Inside of the pouch, Trooper Thoma observed numerous items of drug paraphernalia and what he recognized as heroin. 5RP 73. The Appellant was then arrested for possession of heroin.

On January 29, 2010, the Cowlitz County Prosecutor's Office charged the Appellant with one count of possession of heroin. CP 1-2. A motion to suppress was heard by the Cowlitz County Superior Court on April 29, 2010. 5RP 66-93. On May 6, 2010, the court entered its ruling and denied the motion to suppress. 6RP 3-6. On June 16, 2010, the court entered its findings of fact and conclusions of law. CP 19-22. On July 15, 2010, the Appellant stipulated to facts sufficient to convict and was found guilty of the crime charged in the original information. CP 23-25.

## IV. STANDARD OF REVIEW

Rule of Appellate Procedure 10.3(g) states that a separate assignment of error must be made for each finding of fact a party contends is improper. "[C]hallenged findings entered after a suppression hearing that are supported by substantial evidence are binding, and, where the findings are unchallenged, they are verities on appeal." *State v. O'Neill*,

148 Wn.2d. 564, 571, 62 P.3d 489, 494 (2003). "Substantial evidence [of a finding] exists where there is a sufficient quantity of evidence in the record to persuade a fair-minding rational person of the truth of the finding." *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313, 315 (1994). If there is substantial evidence to support the findings, the Court will not substitute its own findings for those of the trial court, even though it might have made different or contrary findings, were it the trier of fact. *See Interstate Hosts, Inc. v. Airport Concessions, Inc.*, 71 Wn.2d 487, 489-90, 429 P.2d 245, 247 (1967). Conclusions of Law pertaining to a suppression motion are reviewed de novo. *See State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722, 725 (1999).

## V. ARGUMENTS

### 1. THE WASHINGTON PRIVACY ACT WAS NOT VIOLATED.

Under Washington's Privacy Act, it is unlawful 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 conversation, 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. The court essentially looks at two things. First, was the communication private? Second, did the parties consent to the intercept or recording of the communication? Here, the Appellant's text messages were not private communications; therefore, no violation of the Washington Privacy Act occurred. In the alternative, even if the Appellant's text messages are deemed to be private, he impliedly consented to their recording; therefore, no violation of the Washington Privacy Act occurred.

a. The Appellant did not have a legitimate expectation of privacy in the text messages observed by the officer.

"[T]he question of whether a particular communication is private is generally a question of fact..." *State v. Townsend*, 147 Wn.2d 666, 673, 57 P.3d 255, 259 (2002). "In deciding whether a particular conversation is private, we consider the subjective intentions of the parties to a conversation." *State v. Clark*, 129 Wn.2d 211, 225-27, 916 P.2d 384, 392-93 (1996)(*following State v. Faford,* 128 Wn.2d 476, 910 P.2d 447 (1996)). "We also look to other factors bearing upon the reasonable

expectations and intent of the participants." *Clark*, 129 Wn.2d at 225. One factor the Court will look to is the "[r]ole of the non-consenting party and his or her relationship to the consenting party." *Id.* at 226. "A communication is not private where anyone may turn out to be the recipient of the information or the recipient may disclose the information." *Id.* at 227 (*following Wojtyna,* 70 Wn. App. at 695-96). "[T]he Court 'consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.'" *Wojtyna*, 70 Wn. App. at 694 (*quoting United States v. Meriwether*, 917 F.2d 955, 959 (6th Cir. 1990); *Smith v. Maryland*, 442 U.S. 735, 743-44, 99 S.Ct. 2577, 2582 (1979)).

In *Wojtyna*, police officers seized a pager pursuant to the arrest of a drug dealer. *Wojtyna*, 70 Wn. App. at 690. While in police possession, the pager continuously received incoming calls. A detective called one of the numbers and arranged a drug transaction and meeting with the defendant. The defendant was arrested for attempted possession of cocaine. *Id.* The trial court denied the defendant's motion to suppress, concluding that the police did not violate Washington's Privacy Act, RCW 9.73, because no communication was intercepted. *Id.*

In denying the defendant's appeal, the Court of Appeals relied upon the *Meriwether* court's rationale:

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

*Meriwether*, 917 F.2d at 959. The *Wojtyna* court also concluded that the defendant could not show that he intended to preserve his message as private:

> By transmitting his number to a pager, Wojtyna has 'run the risk' that it would be received by whoever is in possession or that the owner or someone in possession would disclose the contents. The confidentiality of the transmission was uncertain and there is no reason to find that it was intended to be "private."

*Wojtyna*, 70 Wn. App. at 697.

In the present matter, the Appellant cannot claim any expectation of privacy in the text messages he sent to the iPhone the officer was in possession of. Sending a message from one cell phone to another is analogous to sending a message to a pager. Both involved communications sent from one device to another and can be received by any member of the public who happens to be in possession or in the

vicinity of the receiving device. There is no guarantee that the message sent will actually be received by the intended recipient. In sending a text message, the Appellant assumed the risk that the iPhone would not be in the possession of the intended recipient. Further, the Appellant also assumed that the recipient would not divulge the information to whoever else may be present. It must also be noted that nowhere in the record does it indicate that the Appellant subjectively thought his messages were private. The record does not show that he ever indicated that his messages were not to be disclosed to anyone else. The record does not show that he ever tried to ascertain whom he was specifically sending his messages to.

The Appellant attempts to distinguish the present matter from *Wojtyna* by simply stating that a telephone number obtained from a pager is not a private communication. The Appellant does not offer any basis for distinguishing a pager's function from that of an iPhone's text message function. Pagers are more than a device that simply receives phone numbers. Pagers do receive telephone numbers; they also can receive messages in numeric form. Furthermore, the pager's display screen operates essentially the same as an iPhone when a text message is received – the message is displayed upon the screen for all eyes to see.

Secondly, the Appellant fails to recognize that the defendant in *Wojtyna*, following *Meriwether*, concluded that no constitutional violation

occurred because the defendant had no means of knowing who was actually in possession of the pager, whether the intended recipient actually received the message, and that the message would not be disclosed to other persons. *Wojtyna*, 70 Wn. App. at 694. The *Wojtyna* court never distinguished or attempted to distinguish a telephone number on a pager from a message being sent from one party to another. Instead, they treated those as the same thing: a message that was sent.

The trial court was correct in following the rationale of *Meriwether* and *Wojtyna* in finding that the Appellant could not assert that his messages were intended to be confidential. Simply put, because the Appellant could not be certain who in fact was receiving his messages, he assumed the risk that they were being received by someone other than the intended recipient. Further, the Appellant also assumed the risk that these messages could be divulged to or observed by other parties that may be present. These cannot be considered private messages, and therefore no constitutional violation occurred. Therefore, the Appellant did not have an expectation of privacy in the text messages received by the officer.

b. <u>The Appellant consented to his text messages being recorded; therefore, no violation of the Washington Privacy Act occurred.</u>

Assuming for argument's sake that the court determines that the Appellant's communications were private, the Washington Privacy Act still was not violated when the police officer observed and responded to the Appellant's text messages. The Appellant's heavy reliance upon the *Townsend* case is misplaced. The *Townsend* court did conclude that the defendant's subjective intent was to keep him communications private. *Townsend*, 147 Wn.2d at 674. However, the court did not cease its examination and conclude that a violation of the Washington Privacy Act occurred. Instead, the court further looked at whether the defendant consented to the recording of the communications. *Id.* at 675.

The court began its analysis by recognizing that "it is not it is not unlawful to record a communication on a device where the "consent of all the participants in the communication" has been obtained. *Id.* (*quoting* RCW 9.73.030(1)(a)). "A party is deemed to have consented to a communication being recorded when another party has announced in an effective manner that the conversation would be recorded." *Id.* (*quoting* RCW 9.73.030(3)). "In addition, 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. *Id.* at 675-76 (*following In re Marriage of Farr,* 87 Wn. App. 177, 184, 940 P.2d 679 (1997), *review denied,* 134 Wn.2d 1014, 958 P.2d 316 (1998)).

The *Townsend* court ultimately concluded that the defendant impliedly consented to his emails being recorded. They recognized that a computer is "among other things, a message recording device." *Townsend*, 147 Wn.2d at 676. The Court further determined that the defendant was fully aware that the recipient's computer would record his email messages. *Id.* Based on these conclusions, the Court held that the defendant consented to the recording of those messages.

Here, the Appellant simply argues the first conclusion reached by the *Townsend* court, that the text messages were subjectively private. The Appellant ignores the fact that the defendant in *Townsend* consented to the recording of his messages because he knew they would be recorded. The present matter is no different. The Appellant, as a user of text messaging systems, is well aware that a recipient's cell phone will record the message that it receives. Based on this knowledge, no violation of the Washington Privacy Act occurred.

## 2. THE POLICE OFFICER HAD A VALID OFFICER SAFETY CONCERN; THEREFORE, HIS SEARCH OF THE APPELLANT'S VEHICLE WAS LAWFUL.

Article I, Section 7 of the Washington Constitution allows "an officer to make a limited search of the passenger compartment to assure a suspect person in the car does not have access to a weapon within the suspect's or passenger's area of control." *State v. Kennedy*, 107 Wn.2d 1,

13 (1986). "If a police officer has a reasonable belief that the suspect in a *Terry* stop might be able to obtain weapons from the vehicle, the officer may search the vehicle without a warrant to secure his own safety, limited to those areas in which a weapon may be placed or hidden." *State v. Chang*, 147 Wn. App. 490, 495 (2008) (following *State v. Holbrook*, 33 Wn. App. 692, 696 (1983). "[A] court should evaluate the entire circumstances of the traffic stop in determining whether the search was reasonably based on officer safety concerns." *State v. Glossbrenner*, 146 Wn.2d 670, 679 (2002). An example of a valid officer safety concern occurs when a suspect making a furtive movement appears to be concealing a weapon or contraband. See *Kennedy*, 107 Wn.2d at 12; *State v. Larson*, 88 Wn. App. 849, 857 (1997).

In *Kennedy*, the police officer initiated a traffic stop because he suspected the defendant had just engaged in a drug transaction. *Id.* at 3. Upon stopping the vehicle, the officer observed the defendant lean forward towards the front seat. *Id.* The officer asked the defendant to get out of the vehicle, and the defendant complied. *Id.* The officer reached under seat and found a bag of marijuana. *Id* at 4. The defendant was charged with possession of marijuana. He moved to suppress the marijuana seized from the car, which was denied by the trial court. *Id.* The Court of Appeals upheld the defendant's conviction. *Id.*

In upholding the search, the Washington Supreme Court stated:

> The same concerns that justifies the frisk under a Fourth Amendment analysis, possible danger to the officer, justifies it under article 1, section 7. First, when an officer stops a person, even if just to question him, the officer, may under certain circumstances, frisk the suspect as a matter of self protection

*Id.* at 10-11. The Court further stated that the permitted search based on officer safety is far more limited than that based on an arrest: "a *Terry* stop does not present the same dangers to the police officer or to evidence of a crime." *Id.* at 12. "The scope of the search should be sufficient to assure the officer's safety. This means that the officer may search for weapons within the investigatee's immediate control." *Id.*

A search of a vehicle based on officer safety concern is valid even when the driver vehicle is outside of the vehicle and there are no passengers inside. See *Larson.* In *Larson*, while initiating a traffic stop of a speeding vehicle, the police officer observed the defendant lean forward and make movements towards the floorboard of his vehicle. *Larson,* 88 Wn. App. at 851. Upon stopping the vehicle, the officer ordered the defendant out of the vehicle. *Id.* The officer realized that in order for the traffic stop to proceed, the defendant would have to access his vehicle again to retrieve his registration. *Id.* at 857. Before allowing the defendant to enter his vehicle, the officer stuck his head through the open

door to visibly inspect the vehicle to ensure no weapons were accessible. *Id.* at 851. The officer then discovered drug paraphernalia. *Id.*

In upholding the officer's search, the Washington Supreme Court recognized that the officer's concern for his safety was objectively reasonable. *Id.* at 857. The officer observed the defendant's furtive movements prior to the traffic stop and realized that the defendant would have to reenter his vehicle in order for the traffic stop to proceed. *Id.* Therefore, the defendant would have access to any weapons that he may have concealed. *Id.* "[T]he purpose of such a search is 'to discover whether the suspect's furtive gesture hid a weapon.'" *Id.* (*quoting Kennedy* 146 Wn.2d at 12).

In the present matter, the officer's search of the Appellant's vehicle was validly based on legitimate and reasonable officer safety concerns. There is no doubt that the initial contact was social. The officer was attempting to contact the Appellant to determine if he was in need of assistance. Upon approaching the passenger side window of the vehicle, the officer observed the Appellant looking out of the driver's side window, obviously expecting to contact the officer on the driver's side. The officer observed the Appellant reach into the back seat with his right arm.

At this point, based on the Appellant's furtive movements, the officer is justifiably concerned that the Appellant could be attempting to

hide or retrieve a weapon. The officer, recognizing the potential danger of the situation, drew his firearm and ordered the Appellant to exit the vehicle. A pat-down of the Appellant's person revealed that he was armed with two knives. Not knowing whether these were the weapons the Appellant was reaching for or attempting to hide, the officer then searched the area he observed the Appellant reach for. The officer located a black zippered pouch, which he believed to be big enough to contain a weapon. Upon searching the pouch for a possible weapon, the officer discovered the evidence that was sought to be suppressed.

Nothing in the above listed facts goes beyond what previous courts have deemed appropriate. Following the rationale of the *Kennedy* and *Larson* courts, the officer's articulable reason for being concerned with his safety is valid and legitimate. Upon making contact with the Appellant, he immediately notices quick furtive gestures to the rear of the vehicle. These gestures could have been an attempt at reaching for a knife (which the Appellant was found in possession of) or a firearm. The point is the officer had no way of knowing what the Appellant was doing or reaching for. Due to that, his personal safety was put into question.

It cannot be ignored that once the office does a pat-down of the Appellant's person, he locates two knives in his pocket. Were these the items the Appellant was reaching for? Or were there additional items in

the Appellant's pocket that he managed to hide in the vehicle? These are questions that the officer must answer to ensure his safety. It also cannot be ignored that the Appellant would have access to his vehicle after his contact with the officer was concluded. Was the officer supposed to simply allow the Appellant to have access to whatever he was attempting to hide or retrieve and turn his back on him?

The Appellant argues that courts should evaluate the entire circumstances in determining whether a search was reasonably based upon officer safety concerns. The Trial Court did examine the entire circumstance. It considered the fact that this contact took place late at night, on a remote highway, and with no other officers around. The court considered that the Appellant was reaching in a furtive manner towards the back of his vehicle as he approached. The court recognized that the officer immediately took action to remove the Appellant from his vehicle. The court also recognized that the officer located two knives on the Appellant's person after he was detained. The court considered that because the Appellant had not committed a law violation, he would be allowed to reenter his vehicle and have access to whatever he possibly hid. Finally, the court determined that the officer limited his search to the exact location the Appellant had been reaching.

Based upon the above stated facts, clearly the officer's had a valid officer safety concern. Therefore, his search of the Appellant's vehicle was justified.

## VI. CONCLUSIONS

As stated above, the Appellant's appeal should be denied. No violation of the Washington Privacy Act occurred because the Appellant's text messages were not private communications. Even if the text messages are considered private, the Appellant consented to their recording. In the second matter, the officer had a reasonable and valid office safety concern due to the Appellant's furtive movements. Therefore, he was justified in searching the area in the vehicle the Appellant was seen reaching towards. As a result, no constitutional violations occurred.

Respectfully submitted this 29 day of April, 2011.

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Prosecuting Attorney

By _____
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**COURT OF APPEALS, STATE OF WASHINGTON**
**DIVISION II**

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|---|---|
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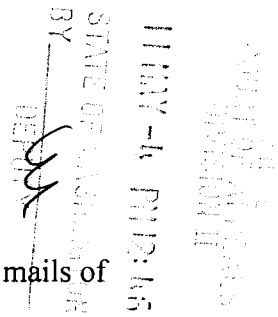
| ) | **MAILING** |
| **JONATHAN NICHOLAS RODEN)** | |
| ) | |
| **Appellant.** ) | |
| ) | |



I, Michelle Sasser, certify and declare:

That on the 2nd day of May, 2011, I deposited in the mails of the United States Postal Service, first class mail, a properly stamped and address envelope, containing Brief of Respondent addressed to the following parties;

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

Dated this 2nd day of May, 2011.

Michelle Sasser
Michelle Sasser