SUPREME COURT NO. 87663-1
C.O.A. No. 41014-1-II
Cowlitz Co. Cause NO. 09-1-01154-8

SUPREME COURT OF STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SHAWN DANIEL HINTON,

Appellant.

RESPONSE TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

The State of Washington, by and through the Cowlitz County Prosecuting Attorney's Office, respectfully requests this Court deny review of the June 26, 2012, published Court of Appeals opinion in *State v. Hinton*, 280 P.3d 476 (2012). This decision upheld the Petitioner's conviction for Attempted Possession of Heroin.

II. ANSWER TO ISSUES PRESENTED FOR REVIEW

1. The decision of the Court of Appeals is not in conflict with a decision of the Supreme Court.

2. The decision of the Court of Appeals is not in conflict with a decision of another decision of the Court of Appeals.

3. The decision of the Court of Appeals does not involve a significant question of law under the Constitution of the State of Washington or of the United States.

4. The decision of the Court of Appeals does not involve an issue of substantial public interest that should be determined by the Supreme Court.

III. STATEMENT OF THE CASE

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. CP 27-28.

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. CP 28.

While Detective Sawyer was in possession of Mr. Lee's iPhone, he engaged in a text message conversation with Jonathan Roden. Detective Sawyer, posing as Mr. Lee, arranged a drug transaction with Mr. Roden, who was later placed under arrest and booked at the Cowlitz County Jail. *Id.* As Detective Sawyer was leaving the jail, he heard Mr. Lee's iPhone make an audible sound, indicating that it had received a text message. At that time, the iPhone was situated on the front passenger seat of Detective Sawyer's vehicle. Detective Sawyer picked up Mr. Lee's iPhone and viewed the message, which stated "Hey whats up dogg can you call me I need to talk to you." The name listed on the screen, along with the text

message, was z-Shawn Henton. The text message was from a person believed to be the Shawn Hinton, the Petitioner. *Id.*

Detective Sawyer, posing as Mr. Lee, engaged in a text message conversation with the Petitioner. During the course of this conversation, Detective Sawyer did not identify himself as law enforcement. None of the Petitioner's text messages indicated that he sought only to converse with Mr. Lee. At no time did the Petitioner ask whom he was text messaging. CP 28-29. Ultimately, Detective Sawyer and the Petitioner agreed to a drug transaction. When contacted at the agreed upon meeting spot, the Petitioner was placed under arrest based on the contents of the text message conversation. CP 29.

On November 6, 2009, the Cowlitz County Prosecutor's Office charged the Petitioner with one count of attempted possession of heroin. CP 1. A motion to suppress was heard by the Cowlitz County Superior Court on April 29, 2010. RP 1-60. The court denied the motion to suppress. RP 60-65. On June 16, 2010, the court entered its findings of fact and conclusions of law. RP 69. The State agrees with the Petitioner's recitation of the court's findings of facts and conclusions of law. On July 15, 2010, the State filed an amended information charging the Petitioner with attempted drug crimes. CP 32-33. On that same date, the Petitioner stipulated to facts sufficient to convict and was found guilty of the crime

charged in the amended information. CP 34-36. The Petitioner filed a timely appeal. On June 26, 2012, Division II of the Court of Appeals affirmed the Superior Court's denial of the Petitioner's motion to suppress.

IV. ARGUMENT

The Court of Appeals properly held that neither article I, section 7 of the Washington Constitution nor the Fourth Amendment to the United States Constitution protect an individual's text messages on a recipient's iPhone and the conviction for attempted possession of heroin should be upheld.

RAP 13.4(b) states that a petition for review will be accepted by the Supreme Court only if one of four conditions are met: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court. Neither in the petition for review nor in the decision from the Court of Appeals are there any issues that would fall under one of the four conditions as outlined by RAP 13.4(b). The Division II Court of Appeals holding in this case is not in conflict with

either the Washington Supreme Court or another division of the Court Appeals in a matter of this nature.

A. Because the Petitioner did not have a legitimate expectation of privacy for sent text messages that were observed on a third party's iPhone, a significant issue of law is not involved.

"The Fourth Amendment, like its Washington counterpart (article 1, § 7), protects a person's legitimate expectation of privacy from invasion by government action if the individual has shown that 'he seeks to preserve [something] as private.'" *State v. Wojtyna*, 70 Wn. App. 689, 693, 855 P.2d 315, 317 (Wn. App. Div. 1, 1993) *review denied,* 123 Wn.2d 1007, 869 P.2d 1084 (1994) (quoting *Katz v. United States,* 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967)). "A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." *U.S. v. Jacobsen*, 466 U.S. 109, 113, 104 S.Ct. 1652, 1656 (1984). "[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)(citing *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 (citing *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. 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. *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.

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."

70 Wn. App. at 697.

In the present matter, the Petitioner cannot claim an expectation of privacy in the text messages he sent to the iPhone that was in the possession of the officer. Sending a message from one cell phone to another is analogous to sending a message to a pager. Both forms of sending messages involve communications sent from one electronic 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. Thus, when a person sends a message, there is no guarantee that the message sent will actually be received by the intended recipient. In sending a text message, the Petitioner assumed the risk that the iPhone would not be in the possession of the intended recipient. Further, the Petitioner also assumed that the recipient would not divulge the information to whoever else may have been present.

The Petitioner attempts to distinguish the present matter from *Wojtyna* by making two assertions. First, the Petitioner claims that pagers differ from cell phones by suggesting that pagers sole function is to receive telephone numbers, while cell phones do multiple functions. This assertion is fundamentally incorrect, however, because while pagers do receive telephone numbers, they also can receive messages, or codes, in numeric form. The Petitioner's reasoning would result in the illogical conclusion that if anything other than an actual telephone number was displayed upon the pager's screen, it would cease to be functioning as a pager. As the Court of Appeals recognized, when a text message is received by an iPhone, the message is displayed on the screen in its entirety. Opinion at 2. 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.

Next, the Petitioner claims that he had a reasonable expectation of privacy because he had no means of determining that the person responding was anyone but the intended recipient of his messages. The record, however, is silent as to whether the Petitioner subjectively thought his messages were private. However, the record does not show that he ever indicated that his messages were not to be disclosed to anyone else, nor does it show that he ever tried to ascertain to whom he was specifically sending his messages.

The Petitioner suggests that *Wojtyna* is distinguishable from the present matter because the defendant there had an actual phone conversation with the officer who received his message. The Petitioner fails to recognize that the defendant in *Wojtyna* sought to characterize the officer's observation of the pager as an illegal search and suppress the evidence therein. Instead, *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, or that the message would not be disclosed to other persons. *Wojtyna*, 70 Wn. App. at 694. Constitutional protections do not extend to an individual's "misplaced trust that the message actually would reach the intended recipient." *Id.*

The Petitioner ignores *Wojtyna's* holding and attempts to link recent federal case law regarding warrantless searches of email to the cell phone text messages at issue here. The cases the Petitioner relies upon all dealt with actual warrantless searches conducted by law enforcement officers. In *United States v. Zavala*, 541 F.3d 562 (5th Cir. 2008), the officers actually went into the defendant's *own* cell phone to acquire evidence. In *United States v. Warshak*, 631 F.3d 266 (6th Cir. 2010), the officers accessed the defendant's ISP to obtain his emails. Both of these cases involve actual searches into private information. As stated above, the present matter does not involve a search. Neither of the cases relied upon by the Petitioner involved a text message that was observed without accessing the phone, or addressed whether a communication that can be observed by any person within the vicinity of an iPhone is private. Consequently, the Petitioner's cases are not on point and fail to provide any meaningful guidance.

This case does not involve a flip-phone, a screen lock, password protection, or entry into an inbox. Instead, this case revolves around the iPhone's method of displaying a text message. Here, the officer observed a text message without manipulating the electronic device.

The Court of Appeals was correct in following the rationale of *Meriwether* and *Wojtyna* in holding that the Petitioner could not assert that

his messages were intended to be confidential. Simply put, because the Petitioner 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 Petitioner 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 no constitutional violation occurred. Therefore, the Petitioner did not have an expectation of privacy in the text messages received by the officer.

B. Despite the growing public use of electronic communications, this case does not present a legal issue of substantial public interest that should be determined by the Supreme Court.

The Court of Appeals was correct in stating that text messages deserve privacy protection similar to protections afforded to letters. Previous case law has firmly established that once a letter is delivered, the sender's expectation of privacy ceases to exist. *United States v. King*, 55 F.3d 1193, 1196 (6th Cir. 1995). This rationale, as recognized by the Court of Appeals, has been extended to emails as well. Opinion at 14 (citing *United States v. Lifshitz*, 369 F.3d 173, 190 (2nd Cir. 2004); *Guest v. Leis*, 255 F.3d 325, 333 (6th Cir 2001); *United States v. Dupree*, 781 F. Supp. 2d 115, 159 (E.D.N.Y 2001)). Once the message is delivered or received, whether it is a letter, postcard, email or text message, the person

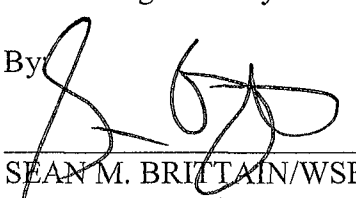
sending that communication no longer retains control over it. As a result, the sender has no ability to control who observes that communication. The expansive use of technology has not altered the well-established principles regarding private communications. Thus, the increase of communication technology has not created a new legal issue of substantial public interest requiring Supreme Court review.

V. CONCLUSION

For the reasons stated above, Petitioner's petition for discretionary review should be denied.

Respectfully submitted this 9 day of August, 2012.

SUSAN I. BAUR
Prosecuting Attorney

By 

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SUPREME COURT FOR STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**NO. 87663-1**
	)	**COA# 41014-1-II**
Respondent,	)	**COWLITZ COUNTY**
	)	**NO: 09-1-01154-8**
	)	
vs.	)	**CERTIFICATE OF**
	)	**MAILING**
SHAWN DANIEL HINTON,	)	
	)	
Petitioner.	)	
	)	

I, Michelle Sasser, certify and declare:

That on the 9th day of August, 2012, I deposited in the mails of the United States Postal Service, first class mail, a properly stamped and address envelope, containing Response to Petition for Review addressed to the following parties:

Supreme Court	Mr. John Hays
Temple of Justice	Attorney at Law
P.O. Box 40929	1402 Broadway
Olympia, WA 98504	Longview, WA 98632

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

Dated this 9th day of August, 2012.

Michelle Sasser

Michelle Sasser