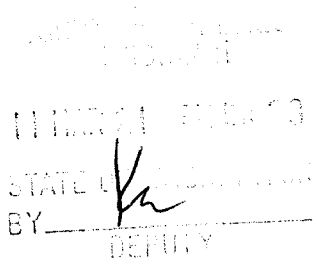

NO. 41014-1-II
Cowlitz County No. 09-1-01154-8

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

SHAWN DANIEL HINTON,

Appellant.

BRIEF OF RESPONDENT

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11-1-01154-8

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Page

Cases

Statutes

Rules

I. RESPONSE TO ASSIGNMENT OF ERROR

1. The Trial Court did not err when it refused to suppress evidence the police obtained through its text message conversation with the Appellant.

II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Did the police officer perform a warrantless search when observing the text messages, sent by the Appellant, which appeared on the screen of a third-party's iPhone?

2. Were the text messages sent by the appellant and observed by the police officer private communications?

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 Appellant. *Id.*

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

spot, the Appellant 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 Appellant 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 Appellant'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 Appellant with attempted drug crimes. CP 32-33. 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 34-36.

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 POLICE OFFICER DID NOT PERFORM A WARRANTLESS SEARCH WHEN HE OBSERVED AND RESPONDED TO A TEXT MESSAGE, SENT BY THE APPELLANT, THAT APPEARED ON A THIRD-PARTY'S IPHONE.

"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*, 12 3 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." *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S.Ct. 1652, 1656 (1984).

In the present matter, the officer did not perform a search, let alone an illegal search. The iPhone is a cell phone that displays its received text messages directly on its screen. Unless the iPhone is password protected or has its screen lock activated, an individual in possession of an iPhone does not have to do anything beyond looking at the screen in order to observe a received text message.

As stated above, the third-party's iPhone was situated on the passenger seat of the officer's patrol vehicle. The officer heard an indicator that the iPhone had received a text message and looked at the iPhone's screen. Without manipulating the iPhone in any manner, the officer observed a text message from the Appellant. The officer did not have to bypass a screen lock or enter a password to access the text message.

The State asserts that there is no need to obtain a search warrant when observing and responding to text messages. This would be akin to requiring a search warrant to engage in telephone conversation with a suspect. Logically, this does not make sense. Reading a text message as it is received on an iPhone is analogous to reading the address label on a piece of mail, which courts in other jurisdictions have concluded is not a

search. *See United States v. Forrester*, 512 F.3d 500, 511 (9th Cir. 2008). To suggest otherwise is to suggest that an officer has performed a search when he reads a message left on a post-it note sitting on a countertop or hears the contents of a voicemail that is played in his vicinity.

Clearly neither of these situations would require a warrant. The Appellant provides no authority that suggests a warrant would be needed to actively engage another in dialogue, whether it be verbally or through other electronic means such as email or text messages. Therefore, logically, it is clear that reading a message displayed on an iPhone screen, without manipulating the iPhone, is not a search and does not require a warrant.

2. THE APPELLANT DID NOT HAVE A LEGITIMATE EXPECTATION OF PRIVACY IN THE TEXT MESSAGES OBSERVED BY THE POLICE 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.

The Appellant attempts to distinguish the present matter from *Wojtyna* by making two assertions. First, the Appellant claims that that pagers differ from cell phones by suggesting that pagers sole function is to receive telephone numbers, while cell phones do a myriad of things. This assertion is fundamentally incorrect. Pagers do receive telephone numbers. They also can receive messages in numeric form. Under the Appellant's assertion, if anything other than an actual telephone number was displayed upon the pager's screen, it would cease to be functioning as a pager. This is illogical. 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.

The Appellant's secondly asserts a reasonable expectation of privacy because he had no way of determining that the person responding was anyone but the intended recipient of his messages. It must 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. Finally, and probably the most telling, the Appellant does not claim that the officer's actions were in violation of RCW 9.73, Washington's Privacy Act.

The Appellant 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 Appellant 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. The court, 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 Appellant ignores this holding and attempts to link recent federal case law in regards to emails to cell phone text messages. The State is not disputing that the contents of emails can be considered private. The cases the Appellant 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 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 these cases dealt with a text message that was observed without accessing the phone. Neither of these cases addressed whether a communication that can be observed by any person within the vicinity of an iPhone is private.

The Court must recognize that this is not a general cell phone case. Instead, this case revolves around the iPhone's method of displaying a text message. This case does not involve a flip-phone, a screen lock, password protection, or entry into an inbox. This case is directly in regards to the officer observing a text message without manipulating the electronic device.

The trial court was correct in following the rationale of *Meriwether* and *Wojtyna* in finding that the Appellant could not assert that his message 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.

VI. CONCLUSIONS

As stated above, the Appellant's appeal should be denied because he did not have a legitimate expectation of privacy in his text messages. The officer did not gain entry into the iPhone; rather, he simply observed a message displayed on the iPhone's screen. Therefore, no warrantless search took place. By communicating through text messages, the Appellant assumed the risk that his messages would be received or observed by someone other than the intended recipient. As a result, no constitutional violations occurred.

Respectfully submitted this 16 day of March, 2011.

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COURT OF APPEALS, STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,	)	**NO. 41014-1-II**
	)	**Cowlitz County No.**
Respondent,	)	**09-1-01154-8**
	)	
vs.	)	**CERTIFICATE OF**
	)	**MAILING**
SHAWN DANIEL HINTON,	)	
	)	
Appellant.	)	
	)	

I, Michelle Sasser, certify and declare:

That on the 17th day of March, 2011, I deposited in the mails of the United States Postal Service, first class mail, a properly stamped and address envelope, containing Respondent's Brief addressed to the following parties:

Court of Appeals
950 Broadway, Suite 300
Tacoma, WA 98402

John Hays
Attorney at Law
1402 Broadway
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 17th day of March, 2011.

Michelle Sasser

Michelle M. Sasser