NO. 41037-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying appellant's motion to suppress evidence of intercepted text messages.

2. The trial court erred in denying appellant's motion to suppress evidence seized during a warrantless search of appellant's vehicle.

3. The trial court erred in entering conclusions of law 1, 2, 3, 4. CP 25 (Cause No. 09-1-01153-0) and conclusions of law 1, 2, 3, 4, 5. CP 21 (Cause No. 10-1-00091-4).

Issues Pertaining to Assignments of Error

1. Did the trial court err in denying appellant's motion to suppress evidence of private text messages that were intercepted by law enforcement in violation of the Washington Privacy Act?

2. Did the trial court err in denying appellant's motion to suppress evidence of drug paraphernalia seized during a warrantless search of his vehicle following a *Terry* stop in violation of the Fourth Amendment and article I, section 7 of the Washington Constitution?

B. STATEMENT OF THE CASE[1]

On November 9, 2009, the State charged appellant, Jonathan Nicholas Roden, with one count of attempted possession of a controlled substance - heroin under RCW 69.50.4013(1), RCW 9A.28,020(1). CP 1-2 (Cause No. 09-1-01153-0). The State amended the information on July 14, 2010, charging Roden with one count of attempted possession of controlled substance - heroin under RCW 69.50.4013(1), RCW 69.50.407. CP 27-28 (Cause No. 09-1-01153-0). On January 29, 2010, the State charged Roden with one count of possession of a controlled substance - heroin. CP 1-2 (Cause No. 10-1-00091-4).

On April 29, 2010, the trial court held a CrR 3.6 suppression hearing on both of the charges. Detective Kevin Sawyer testified that on November 3, 2009, officers provided him with an iPhone seized from a suspect they arrested for possession of heroin. The officers informed him that the phone was ringing "quite continuously." 5RP 6-7. Sawyer accessed the phone that belonged to Daniel Lee and looked at numerous text messages. He noticed several messages from Roden asking to buy drugs. 5RP 10-11. Sawyer replied to the text messages and arranged a drug transaction with Roden. He did not identify himself so presumably

[1] There are nine volumes of verbatim report of proceedings: 1RP - 11/25/09; 2RP - 01/06/10; 3RP - 02/10/10; 4RP - 03/21/10; 5RP - 04/29/10; 6RP - 05/06/10; 7RP - 06/16/10; 8RP - 07/14/10; 9RP - 07/21/10.

Roden thought he was Lee. 5RP 12-13, 18-20. Sawyer met Roden at a Safeway in Longview where he arrested him. 5RP 12-13. Sawyer documented the text messages between Roden and Lee and had them transcribed as evidence. 5RP 9-11.

Defense counsel argued that evidence of the text messages should be suppressed because Sawyer's interception of the private text messages violated the Washington Privacy Act. 5RP 34-44, 56-58. A co-defendant's counsel argued that the evidence should be suppressed because Sawyer's search of the iPhone violated article I, section 7 of the Washington Constitution. 5RP 44-51, 58-59. The State argued that the defendants did not have standing to assert a constitutional challenge and there was no violation of the Privacy Act because the text messages were not private. 5RP 51-56. The trial court denied the motion to suppress, finding that the defendants lacked standing and that there was no reasonable expectation of privacy implicating the Privacy Act. 5RP 60-63.

Trooper Phil Thoma testified that on January 26, 2010, at about 9 p.m., he passed Roden parked on the shoulder of West Side Highway with his lights off. Thoma "wanted to make sure he was okay" so he turned around, activated his lights, and pulled up behind Roden's car. 5RP 67-69. As Thoma approached the car, he saw Roden looking out the driver's side window and "his right arm reaching back between the two front seats into

the back seat . . . making some kind of quick motions with his arm." 5RP 70. Concerned that Roden might be reaching for a weapon, Thoma drew his gun and ordered him to put his hands up and slowly step out of the car. When Roden complied and got out of the car, Thoma secured his hands behind his back but did not use handcuffs. Thoma conducted a pat down and found two pocket knives in his pants pocket. 5RP 71-72, 77. He had Roden stand in front of his car while he searched the area of the car that Roden was reaching into and found a pouch containing various items of drug paraphernalia. 5RP 73. Sawyer arrested Roden who was compliant and cooperative throughout the incident. 5RP 74-75.

Defense counsel argued that evidence of the drug paraphernalia discovered in Roden's car should be suppressed because Thoma's warrantless search of the car was not objectively reasonable given the fact that he was not conducting a criminal investigation or citing Roden for a traffic violation. 5RP 81-88, 91-93. The State argued that Thoma lawfully searched the car for officer safety concerns because Roden could have been reaching for a weapon when Thoma saw him make furtive movements and therefore the evidence was admissible. 5RP 88-91. The court stated that it had to read some cases and review the testimony, "This is really a close call, really close. So, I'm not going to decide it tonight." 5RP 93-94.

The court entered findings of fact and conclusions of law denying the motions to suppress on June 16, 2010. CP 23-26 (Cause No. 09-1-01153-0); CP 19-22 (Cause No. 10-1-00091-4). On July 14, 2010, the court entered orders on stipulated facts, finding Roden guilty of attempted possession of a controlled substance and possession of a controlled substance. 8RP 3-5; CP 29-31(Cause No. 09-1-01153-0), CP 23-25 (Cause No. 10-1-00091-4). On July 21, 2010, the court imposed concurrent sentences of fifteen days and twenty-five days in confinement and 24 months of community custody. 9RP 7-8; CP 32-43 (Cause No. 09-1-01153-0), CP 19-22 (Cause No. 10-1-00091-4).

Roden filed this timely appeal. CP 44 (Cause No. 09-1-01153-0), CP 38 (Cause No. 10-1-00091-4).

C. ARGUMENT

THE TRIAL COURT ERRED IN DENYING RODEN'S MOTIONS TO SUPPRESS EVIDENCE OF INTERCEPTED TEXT MESSAGES AND EVIDENCE FOUND DURING A WARRANTLESS SEARCH OF HIS CAR.

Reversal is required because the trial court erred in denying Roden's motions to suppress the evidence where the private text messages were intercepted in violation of the Washington Privacy Act and the warrantless search of his car violated his right under the Fourth

Amendment and article I, section 7 of the Washington Constitution which prohibits unreasonable searches and seizures.

A trial court's ruling on a motion to suppress evidence must be affirmed if substantial evidence supports the court's findings of fact, and those findings support the court's conclusions of law. State v. Ross, 106 Wn. App. 876, 880, 26 P.3d 298 (2001). The trial court's conclusions of law are reviewed de novo. Id.

1. The trial court erred in denying Roden's motion to suppress evidence of the text messages because interception of the private messages violated Roden's rights under the 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)(citing State v. O'Neil, 103 Wn.2d 853, 878, 700 P.2d 711 (1985)). The Act prohibits interception or recording of any:

> [p]rivate 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. . . .

RCW 9.73.030(1)(a).

Evidence obtained in violation of the statute is inadmissible in a criminal case. RCW 9.73.050. "The statute reflects a desire to protect

individuals from the disclosure of any secret illegally uncovered by law enforcement." State v. Fjermestad, 114 Wn.2d 828, 836, 791 P.2d 897 (1990). The purpose of the Privacy Act is "to preserve as private those communications intended to be private. Washington has recognized a strong policy of protecting the privacy of its citizens, and introduction of evidence obtained in violation of the statute is prohibited." State v. Baird, 83 Wn. App. 477, 483, 922 P.2d 157 (1996)(citing State v. Clark, 129 Wn.2d 211, 222, 916 P.2d 384 (1996)).

Privacy 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).

In State v. Townsend, 147 Wn.2d 666, 57 P.3d 255 (2002), 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 Washington's Privacy Act. Id. at 671-73. Our State Supreme Court held that Townsend's communications to Amber were private given the subject matter of the communications. The Court concluded 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. The 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.

In State v. 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. Faford, 128 Wn.2d 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 subjective expectations of the parties to the conversation, our State Supreme 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. Concluding that the interception of the defendants' cordless telephone conversations violated the Privacy Act, the Court held that the trial court erred in admitting evidence of the phone conversations and reversed. Id. at 488-89.

Like the cordless telephone conversations in Faford and the e-mails and ICQ messages in Townsend, the text messages sent by Roden to Lee for the purpose of buying drugs were private communications. Sawyer admitted that he was essentially posing as Lee when he was texting with Roden. 5RP 20. It is evident that Roden subjectively intended and expected that his messages were private because as in Faford and Townsend, the subject matter of the communications involved illegal activity. Furthermore, as the Supreme Court concluded in Faford and Townsend, Roden's subjective intention that the communications were

private was reasonable despite the possibility that the text messages could be easily intercepted. "As 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. Faford, 129 Wn.2d at 485.

The trial court therefore erred in denying Roden's motion to suppress, concluding that 1) he did not have a reasonable expectation of privacy in the communication; 2) under State v. Wojtyna, 70 Wn. App. 689, 855 P.2d 315 (1993), there is no expectation of privacy in a communication transmitted to a device such as an iPhone; 3) under the RCW 9.73, there is no reasonable expectation of privacy by a sender from a different cell phone in a text message found in a cell phone's inbox; and 4) there was no violation of Washington's Privacy Act. CP 25 (Cause No. 09-1-01153-0). The trial erroneously relied on Wojtyna, which is clearly distinguishable where the challenged evidence was a telephone number obtained from a pager which is not a private communication and consequently does not implicate the Privacy Act. Wojtyna, 70 Wn. App. at 694-96.

Reversal is required because the interception of private communications without Roden's consent violated his right to privacy under Washington's Privacy Act.

2. The trial court erred in denying Roden's motion to suppress evidence found during a warrantless search of his car because the search was not reasonably based on officer safety concerns.

"The right to be free from searches by government agents is deeply rooted into our nation's history and law, and it is enshrined in our state and national constitutions." State v. Day, 161 Wn.2d 889, 893, 168 P.3d 1865 (2007). The Fourth Amendment of the United States Constitution prohibits unreasonable searches and seizures. Terry v. Ohio, 392 U.S. 1, 16-19, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Article I, section 7 of the Washington Constitution "goes further and requires actual authority of law before the State may disturb the individual's private affairs." Day, 161 at 893. Warrantless searches and seizures are per se unreasonable. However, there are "a few jealously and carefully drawn exceptions to the warrant requirement." State v. Hendrickson, 129 Wn.2d 61, 70, 917 P.2d 563 (1996), State v. Kinzy, 141 Wn.2d 373, 384, 5 P.3d 668 (2000). The State bears the burden of showing that a warrantless search or seizure falls within one of these exceptions. Hendrickson, 129 Wn. 2d at 70. Kinzy, 141 Wn.2d at 384.

A protective search exception to the warrant requirement applies when a valid *Terry* stop includes a vehicle search to ensure officer safety. State v. Kennedy, 107 Wn.2d 1, 12, 726 P.2d 445 (1986); State v. Larson,

88 Wn.App. 849, 853, 946 P.2d 1212 (1997). If a police officer has a reasonable belief that the suspect in a *Terry* stop might be able to obtain weapons from a 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, 195 P.3d 1008 (2008).

In State v. Glossbrener, 146 Wn.2d 670, 49 P.3d 128 (2002), our State Supreme Court concluded that in the context of a protective search of a car based on officer safety concerns, a *Terry* stop and frisk may extend into a car if there is "a reasonable suspicion that the suspect is dangerous and may gain access to a weapon in the vehicle." Id. at 680. The Court applied the standard articulated in Larson, that a "protective search for weapons must be objectively reasonable, though based on the officer's subjective perception of events." Id. at 681.

In Larson, an officer signaled Larson to pull over after he saw Larson speeding on an interstate but Larson kept going and did not slow down. The officer observed Larson leaning forward and making furtive movements toward the floorboard of his truck. After traveling some distance, Larson finally exited the freeway and stopped in a parking lot. The officer directed Larson to get out, patted him down, and looked into the truck and saw drug paraphernalia in a front pocket of the driver's seat.

88 Wn. App. at 851. In discussing Larson, the Supreme Court in Glossbrener placed importance on the fact that "in upholding the search in *Larson*, the court specifically relied on the fact that Larson would have to return to his vehicle to obtain his registration in order to carry out the traffic stop, which in turn would give him access to any weapon he may have concealed inside the truck." 146 Wn.2d at 684.

The Supreme Court further emphasized that in State v. Horrace, 144 Wn.2d 386, 28 P.3d 753 (2001) and State v. Wilkinson, 56 Wn. App. 812, 785 P.2d 1139 (1990), which involved the frisk of a suspect, the officers articulated reasons in addition to the furtive movements for their suspicion that the suspect might be armed and dangerous. Glossbrener, 146 Wn. 2d at 682-83. In Horrace, the traffic stop occurred at around 1:15 a.m. and the officer explained that the passenger could have easily concealed a weapon in his heavy leather jacket with numerous pockets. 144 Wn.2d at 388-89. In Wilkinson, there were three occupants in the car, the driver did not immediately pull over, and the officer was alone knowing that two of the three men had a criminal history. 56 Wn. App. at 813-14.

Here, Trooper Thoma testified that he stopped to see if Roden needed any help when he saw Roden parked on the shoulder of the highway. 5RP 67-69. He had no reason to believe that Roden was armed

and dangerous. 5RP 75. As Thoma approached the car, he saw Roden "reaching back between the two front seats into the back seat . . . making some kind of quick motions with his arm." 5RP 70. Thoma immediately drew his gun and ordered Roden to get out of the car and patted him down. He found two pocket knives in Roden's pants pocket then searched the area of the car that Roden was reaching into and found drug paraphernalia. 5RP 71-73, 77. Roden was compliant and cooperative throughout the incident. 5RP 74-75.

Unlike in Horace and Wilkinson, which involved circumstances beyond furtive movements, the fact that Thoma saw Roden reach quickly into the back seat did not give rise to an objectively reasonable belief that he was armed and dangerous. Roden had not committed a crime or a traffic violation. Nonetheless, Thoma immediately drew his gun without asking Roden any questions. Unlike in Larson, Roden did not have to get back in his apparently disabled car. Furthermore, in light of the fact that Roden was completely cooperative, the warrantless search of his car was not reasonably based on officer safety concerns. Courts should evaluate the entire circumstances in determining whether the search was reasonably based on officer safety concerns. Glossbrener, 146 Wn.2d at 679.

Consequently, the trial court erred in denying Roden's motion to suppress the evidence found in his car, concluding that 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 4) nothing in the trooper's actions were unreasonable in the context of officer safety and therefore the search was justifiable. CP 21 (Cause No. 10-1-00091-4). When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed. State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999).

Reversal is required because the warrantless search of Roden's car violated his right against unreasonable searches and seizures under the Fourth Amendment and article I, section 7 of the Washington Constitution.[2]

[2] "[O]ur constitutionally mandated exclusionary rule saves article I, section 7 from becoming a meaningless promise," and "[e]xclusion provides a remedy for the citizen in question and saves the integrity of the judiciary by not tainting our proceedings by illegally obtained evidence." Ladson, 138 Wn.2d at 359-60.

D. CONCLUSION

For the reasons stated, this Court should reverse Mr. Roden's convictions for attempted possession of a controlled substance and possession of a controlled substance.

DATED this 24th day of February, 2011.

Respectfully submitted,

VALERIE MARUSHIGE
WSBA No. 25851
Attorney for Appellant, Jonathan Nicolas Roden

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 Susan I. Baur, Cowlitz County Prosecutor's Office, 312 SW First Avenue, Kelso, Washington 98626 and Jonathan Nicholas Roden, P.O. Box 201, Bucoda, Washington 98530.

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

DATED this 24th day of February, 2011, in Kent, Washington.

Valerie Marushige

VALERIE MARUSHIGE
Attorney at Law
WSBA No. 25851

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BY DEPUTY

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DATED this 24th day of February, 2011, in Kent, Washington.

Valerie Marushige
VALERIE MARUSHIGE
Attorney at Law
WSBA No. 25851

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STATE OF WASHINGTON
BY ______ DEPUTY