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

REPLY BRIEF OF APPELLANT

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RM 6-21-11

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A. ARGUMENT IN REPLY

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 SEARCH OF HIS CAR VIOLATED HIS CONSTITUTIONAL RIGHT AGAINST WARRANTLESS SEARCHES AND SEIZURES.

1. The trial court erred in admitting evidence of the text messages because interception of the private messages violated the Washington Privacy Act.

The State argues that Roden "did not have an expectation of privacy in the text messages received by the officer," mistakenly relying on State v. Wojtyna, 70 Wn. App. 689, 855 P.2d 315 (1993) which is clearly distinguishable. Brief of Respondent 7-11. Contrary to the State's argument, unlike text messages, a telephone number obtained from a pager is not a private communication. In Wojtyna, Division One of this Court likened the case to State v. Riley, 121 Wn.2d 22, 846 P.2d 1365 (1993), which involved a "line trap" placed by the phone company tracing Riley's "hacking activity" to his home. The Washington Supreme Court observed that the tracer discovered nothing more than Riley's phone number and determined that a phone number, unless it is itself communicated, does not constitute a communication. The Court concluded that discovering Riley's phone number via a tracer did not implicate the Washington

Privacy Act. Wojtyna, 70 Wn. App. at 694-95 citing Riley, 121 Wn.2d at 33-34. Following Riley, the Wojtyna Court concluded there was no violation of the Washington Privacy Act because "all that was learned from the pager was the telephone number of one party, the party dialing." 70 Wn. App. at 695.

The State argues further that Roden consented to his text messages being recorded misapprehending the holding in State v. Townsend, 147 Wn.2d 666, 57 P.3d 255 (2002). Brief of Respondent at 11-13. Townsend argued that a police officer's recording and printing of his private e-mail and ICQ communications violated the Washington Privacy Act, thus rendering evidence of the communications inadmissible. Id. at 671. The Washington Supreme Court resolved whether the officer violated the Privacy Act "when he saved and printed" e-mail and ICQ messages between Townsend and a fictitious child. Id. at 669. The Court concluded that the Privacy Act was not violated because although the communications were private, Townsend impliedly consented to the recordings because "the saving of messages is inherent in e-mail and ICQ messaging." Id. at 675-78. 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. 5RP 9-11. 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.

Reversal is required because the interception of private communications without Roden's consent violated the Washington Privacy Act. State v. Faford, 128 Wn.2d 476, 488-89, 910 P.2d 447 (1996); State v. Townsend, 147 Wn.2d at 674.

2. The trial court erred in admitting evidence seized during a warrantless search of Roden's car because the search was not reasonably based on officer safety concerns.

The State argues that the warrantless search of Roden's car was "validly based on legitimate and reasonable officer safety concerns," misplacing its reliance on State v. Kennedy, 107 Wn.2d 1, 726 P.2d 445 (1986) and State v. Larson, 88 Wn. App. 849, 946 P.2d 1212 (1997) which are distinguishable.

In Kennedy, the officer had reason to believe that Kennedy just purchased some marijuana, saw Kennedy lean forward and put something underneath the car seat, and Kennedy had a passenger in his car. Kennedy, 107 Wn.2d at 3-4. The Washington Supreme Court concluded that the limited search of the car was reasonable because any companion in the car presents a danger to the officer where the front seat of the car is in immediate control of a passenger seated next to the driver. Id. at 12.

Furthermore, Kennedy is not controlling to the extent that it relied on State v. Stroud, 106 Wn.2d 144, 720 P.2d 436 (1986) which was overruled by State v. Valdez, 167 Wn.2d 761, 224 P.3d 751 (2009). Kennedy, 107 Wn.2d at 11-13. In Larson, the officer stopped Larson to cite him for speeding and saw him making furtive movements as if placing a weapon under the seat. Larson, 88 Wn. App. at 856. Division One of this Court concluded that the warrantless search of Larson's truck was objectively reasonable where in order to carry out the traffic stop, the officer would have to let Larson to return to his truck to get necessary documents. "Because Larson would then have had access to any weapon he might have concealed inside before getting out, the protective search to discover such a weapon was not unreasonably intrusive." Id. at 857.

Unlike in Kennedy or Larson, Roden did not have a passenger in his car, he did not have to get back into his apparently disabled car, and he was not suspected of a crime or a traffic violation. Importantly, the record reflects that Roden was completely cooperative:

> Q. Officer, you didn't have any information about Mr. Roden prior to exiting your vehicle and walking to his; did you?
>
> A. No, sir.
>
> Q. So, you didn't run his registration, or anything like that?
>
> A. I called his registration out, just as a general practice, but I didn't receive a registration return on it, no.

Q. Okay. So, you would agree, he was not known to be armed and dangerous to you?

A. No, not to me.

Q. Okay. And you would agree that from start to finish, he was not hostile?

A. No, he was not.

Q. Not aggressive?

A. No.

Q. Compliant?

A. Correct, yes.

5RP 75.

Reversal is required because the warrantless search of Roden's car was not reasonably based on officer safety concerns and violated his rights under the Fourth Amendment and article I, section 7 of the Washington Constitution.

C. CONCLUSION

For the reasons stated here and in appellant's brief, this Court should reverse Mr. Roden's convictions.

DATED this 21st day of June, 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 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 21st day of June 2011, in Kent, Washington.

Valerie Marushige

VALERIE MARUSHIGE
Attorney at Law
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