NO. 87669-0
Cowlitz Co. Cause NO. 10-1-00091-4/09-1-01153-0

SUPREME COURT OF STATE OF WASHINGTON

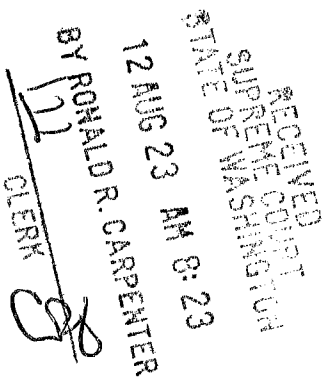
STATE OF WASHINGTON,

Respondent,

v.

JONATHAN NICHOLAS RODEN,

Petitioner.



ANSWER TO PETITION FOR REVIEW

SUSAN I. BAUR
Prosecuting Attorney
SEAN BRITTAIN/WSBA #36804
Deputy Prosecuting Attorney
Attorney for Respondent

Office and P. O. Address:
Hall of Justice
312 S. W. First Avenue
Kelso, WA 98626
Telephone: 360/577-3080

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

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 opinion of the Court of Appeals opinion in *State v. Roden*, 279 P.3d 461 (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. 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. 5RP 7-9. 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. *Id.*

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 Petitioner. 5RP 9-11. Detective Sawyer, posing as Mr. Lee, responded to the Petitioner's text messages and arranged a drug transaction. 5RP 11-12. At no time during the conversation did the Petitioner's text messages specifically reference "Daniel Lee" nor did the Petitioner ever indicate that he wanted the conversation to remain private. 5RP 12. Detective Sawyer and the

Petitioner agreed to meet at the Safeway parking lot on 15th Ave in Longview, Washington. 5RP 13. After arriving at that location, the Petitioner 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 Petitioner 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 Petitioner with Attempted Drug Crimes. CP 27-28. On that same date, the parties entered stipulated facts sufficient and the Petitioner was found guilty of the crime charged in the amended information. CP 29-31. 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 WHEN AN INDIVIDUAL SENDS A TEXT MESSAGE TO AN IPHONE, THAT INDIVIDUAL IMPLIEDLY CONSENTS TO THE RECORDING AND STORING OF THAT MESSAGE; THUS, WASHINGTON'S PRIVACY ACT IS NOT VIOLATED AND THE CONVICTION FOR ATTEMPTED POSSESSION OF HEROIN SHOULD BE UPHELD.

RAP 13.4(b) states that a petition for review will only 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 any decisions either the Washington Supreme Court or another division of the Court Appeals.

A. Because the Petitioner impliedly consented to the recording of his sent text messages, a significant issue of law is not involved.

Under Washington's Privacy Act, RCW 9.73, 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: (1) whether the communication private, and (2) did the parties consent to the interception or recording of the communication.

"[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 *State v. Wojtyna*, 70 Wn. App. 689, 695-96, 855 P.2d 315, 317 (Wn. App. Div. 1, 1993) *review denied,* 123 Wn.2d 1007, 869 P.2d 1084 (1994)). "[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)).

Wojtyna specifically addressed whether the act of observing of a message received by a pager, previously seized by police officers, was in violation of Washington's Privacy Act. In determining the messages were not private *Wojtyna* adopted *Meriweather*'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 696. Based upon these conclusions, *Wojtyna* specifically held that Washington's Privacy Act was not violated. *Id.*

In *Townsend,* the court determined that the defendant's subjective intent was to keep his communications private; however, the court also concluded that he impliedly consented to the recording of his communications, and thus held that no violation of the Washington Privacy Act occurred. *Townsend*, 147 Wn.2d at 674-75. The court began its analysis by recognizing that "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 court 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.

The Petitioner's reliance upon *Townsend* is misplaced because Washington's Privacy Act was not violated when the police officer observed and responded to the Petitioner's text messages. The Petitioner sent a series of text messages from his own cell phone to a third party's iPhone. The Petitioner may have intended these text messages to be private communications; however, his intention is not determinate on whether these messages are actually private. As stated above, the court

has been, and should remain, disinclined to offer privacy protections to information that a person voluntaril y turns over to third parties. *See Wojtyna*, 70 Wn. App. at 694. Here, that is precisely what happened when the Petitioner sent the text messages at issue. The Petitioner had no ability to know who received his messages, nor did he have the ability to control who received his messages. Therefore, based on that uncertainty, his text messages to a third party's iPhone cannot be considered private.

Furthermore, as the Court of Appeals correctly recognized, "[c]ell phones, *like computers*, are 'message recording device[s].'" *Id.* (emphasis added)(quoting *Townsend*, 147 Wn.2d at 676). The Petitioner, as a user of text messaging systems, is, or should be, well aware that a recipient's cell phone records the messages that it receives. Opinion at 7. Based on this knowledge, the Petitioner impliedly consented to his text messages being recorded within the recipient's iPhone; thus, no violation of the Washington Privacy Act occurred.

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 legislature enacted Washington's Privacy Act to protect our private communications. On the other hand, the expansive use of technology has not altered the well-established principles regarding

private communications. As the *Townsend* court and Court of Appeals recognized, the legislature is "in the best position to weigh competing policies." Opinion at 8, n.7 (quoting *Townsend*, 147 Wn.2d at 675). 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 20 day of August, 2012.

SUSAN I. BAUR
Prosecuting Attorney

By: _____

SEAN M. BRITTAIN/WSBA #36804
Deputy Prosecuting Attorney
Representing Respondent