Supreme Court No. 101953-0
(COA No. 82703-1-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

JAMEL ALEXANDER,
Respondent,

v.

STATE OF WASHINGTON,
Petitioner

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SNOHOMISH COUNTY

ANSWER TO PETITION FOR REVIEW

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A. INTRODUCTION

The prosecution's petition for review does not contest the reasons the Court of Appeals ordered a new trial. Instead, it complains it must be given authority to conduct a search that exceeds the warrant's scope, and also asserts the jury may not hear information casting doubt on the reliability of the State's investigation. The Court of Appeals resolved these issues based on settled law. Neither issue merits this Court's review.

B. IDENTITY OF RESPONDENT AND DECISION BELOW

Mr. Alexander asks this Court to deny the prosecution's petition seeking review of a portion of the unpublished Court of Appeals decision, dated April 3, 2023, issued on denial of the prosecution's motion for reconsideration.

C. ISSUES PRESENTED FOR REVIEW

1. The trial court issued a warrant authorizing a search of essentially all data on Mr. Alexander's cell phone but limited this search to a one-week date range. The searching

officer admitted he disregarded the warrant's date range, did not use the available date range filter, and gathered material outside the warrant's scope. Applying settled law, the Court of Appeals ruled the State did not have authority of law to gather evidence beyond what the warrant permitted.

The prosecution misconstrues and confuses this ruling. It proposes a new rule allowing the police to decide when it is reasonable to search private information outside the scope of a warrant. The Court of Appeals followed established principles limiting a search of private affairs to the warrant's plain terms. There is no reason to grant review of the unpublished Court of Appeals decision.

2. The Court of Appeals ruled Mr. Alexander is entitled to probe the thoroughness and reliability of the police investigation by questioning the police about information undermining the State's theory of the case. The prosecution broadly insists the rules of evidence do not permit

impeachment of a police investigation. This unfounded contention is specious and review should be denied.

D. STATEMENT OF THE CASE

The prosecution charged Jamel Alexander with killing Shauna Brune. The State's case rested almost largely on video surveillance evidence showing Mr. Alexander enter a parking lot with Ms. Brune at 9:03 pm, go behind a parked van with her, and then leave the area at 9:34 pm. Ex. 184.

Ms. Brune earned money from prostitution to support herself and her drug addiction. RP 2001, 2946-47, 2950. Mr. Alexander agreed to pay her for a sex act. Ex. 386, p. 11-13, RP 2339-40; Ex. 386, p. 11. Multiple surveillance cameras show he walked away from the area at 9:34 pm and never returned.

A man walking his dog found Ms. Brune's body at 9:20 am on October 12, 2019. RP 1017-188, 1022. This area was known for drug use and commonly littered with trash and needles. RP 1039.

Near Ms. Brune's body, the police found a notebook she used as a diary. RP 1321, 1429-30. Ms. Brune's boyfriend Vernon Butsch confirmed this was her journal. CP 615.

The notebook contained her diary entry dated 10 pm Friday October 11, 2019. CP 568. The other diary entries similarly began with a time and date. CP 564-68. The entry dated "Oct. 11th 19 Friday 10 pm" described events related to other parts of her day, such as seeing Rocky, who "thought I took his shit," and Casey, who was "trying to get my back." CP 568. It complained about her boyfriend "Vernon" for being "a piece of shit." *Id*. Mr. Butsch explained Rocky was her drug dealer and she had recently stolen drugs from Rocky. CP 759.

The apartment complex gave the police full access to its surveillance video, but the police only kept two hours, from 8 to 10 p.m. on October 11, 2019. RP 1595; CP 179-80. All other video from October 11 and 12, 2019, was destroyed and never available to the defense. CP 179-80, 200, 218-20. The video surveillance would have shown people coming and going from

the area where Ms. Brune died during the 12 hours before her body was found. Ex. 184.

At Mr. Alexander's trial, the court ruled Ms. Brune's diary entry was inadmissible for any purpose, including showing the significance of the lost video surveillance evidence. RP 225-30, 1214-21, 2131. The jury never knew the police had information indicating Ms. Brune may have been alive at or after 10 pm. The prosecution argued Mr. Alexander was the last person seen with Ms. Brune and a basic rule of "homicide 101" is that "the last person seen with the victim" is the likely perpetrator. RP 2977.

The prosecution also told the jurors that it gave them every possible bit of information. RP 2973. It said that because this was such an "important case," any time the State had "the option of giving you too little information or too much, we are always going to err on the side of giving you too much information." *Id*. It assured the jury it presented "absolutely everything that we can possibly give you so you can come to a

decision." *Id*. The jury never knew the police had information indicating Ms. Brune may have been alive after 10 p.m.

The police got a warrant to search Mr. Alexander's cell phone for all contacts, images, calls, texts, and usage information from October 11 to 17, 2019. CP 901-02. The detective copied the entire phone and searched all data he could access, regardless of its date. RP 45-46, 52-53.

The Court of Appeals reversed Mr. Alexander's conviction based on several errors that occurred at trial that are not at issue in the prosecution's petition for review. Slip op. at 9-10, 46-47. These errors included the court's exclusion of evidence about a person who admitted her own involvement in causing Ms. Brune's death as well as its admission of a starkly prejudicial video of Mr. Alexander while in the jail. *Id*. These issues are further explained in Mr. Alexander's opening and reply briefs, and the Court of Appeals opinion.

E. ARGUMENT

1. Relying solely on Fourth Amendment law, the prosecution misconstrues the Court of Appeals opinion and disregards established law holding the State may not exceed the plain terms of a search warrant.

A warrant is necessary to search a cell phone. *State v. Phillip*, 9 Wn. App. 2d 464, 480, 452 P.3d 553 (2019), *rev. denied*, 194 Wn.2d 1017 (2020) ("in order to obtain cell phone records the government must get a warrant").

The privacy implications of searching cell phone data apply with "even more force" under article I, section 7 than the Fourth Amendment, because its "primary concern" is protecting an individual's privacy. *Phillip*, 9 Wn. App. 2d at 478. Cell phones are "a 24-hour surveillance tool" constantly collecting and transmitting information about the phone and its user. *State v. Muhammad*, 194 Wn.2d 577, 584, 451 P.3d 1060 (2019).

Compliance with the warrant requirement is necessary because a cell phone contains vast data revealing intimate details. *Carpenter v. United States*, _U.S. _, 138 S. Ct. 2206, 2217, 201 L. Ed. 2d 507 (2018). A cell phone search "expose[s] to the government far *more* than the most exhaustive search of a house," amounting to the "sum of an individual's private life." *Riley v. California*, 573 U.S. 373, 394, 396, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014) (emphasis in original).

Any warrant that authorizes the police to search First Amendment protected speech and associations, such as that contained on a cell phone, must meet standards of "scrupulous exactitude" in its particularity. *State v. Perrone*, 119 Wn.2d 538, 550, 834 P.2d 611 (1992); *see also State v. Denham*, 197 Wn.2d 759, 770 n.6, 489 P.3d 1138 (2021). Exploratory rummaging through electronic devices is never permitted. *State v. Fairley*, 12 Wn. App. 2d 315, 322, 457 P.3d 1150, 1154, *rev. denied*, 195 Wn.2d 1027 (2020); *see also Perrone*, 119 Wn.2d at 545.

There is no dispute that the police officer searching Mr. Alexander's cell phone exceeded the warrant's terms. The warrant explicitly stated, "The date range for the search of the data as sought in this case is for October 11th, 2019 0001 Hrs PST to October 17th, 2019 1600 Hrs." CP 901-02. The trial court ruled, "a good deal of the content [searched] fell outside the purview of the warrant." CP 801.

The prosecution seeks a new rule enabling officers to exceed a warrant's terms if they believe it is reasonable to do so. It premises this argument relies entirely on "[f]ederal Constitutional protections" under the Fourth Amendment. Pet. at 21. The petition for review never mentions the independent requirements of article I, section 7. Pet. at 21-27.

The Court of Appeals rejected this approach. Slip op. at 40-41. It explained that if an officer is unable to conduct the search under the warrant's terms, one available recourse is to ask the court for further permission. Slip op. 40. The Court of Appeals decision is squarely supported by settled law and the

underlying constitutional protections of article I, section 7, mandating the government may not invade a person's private affairs without authority of law.

The prosecution's petition for review should be denied.

2. The Court of Appeals correctly ruled that the defense may impeach the police investigation.

It is well settled that an accused person has the right to expose inadequacies in the police investigation. *Kyles v. Whitley*, 514 U.S. 419, 446, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995). As *Kyles* approvingly noted, discrediting the caliber of the investigation is a "common trial tactic" and is part of the due process rights of the accused. *Id*. (citing *Bowen v. Maynard,* 799 F.2d 593, 613 (10th Cir. 1986)).

The State's petition for review asserts an accused person may not challenge the police investigation, claiming "the adequacy of the investigation is not actually something the jury is called upon to consider." Pet. at 29. This argument is specious. *See, e.g*., *State v. Rehak,* 67 Wn. App. 157, 163, 834

P.2d 651 (1992) (affirming evidentiary rulings where "judge specifically stated that the defense was free to ask questions tending to impeach the State's assertions that the investigation was careful and thorough, and the defense did so."); *see also In re Stenson*, 174 Wn.2d 474, 493, 276 P.3d 286 (2012) (explaining prosecution must reveal information so defense may "impeach[ ] the credibility of the detectives' investigation techniques and show[ ] the extent to which the law enforcement officers mishandled the evidence").

Out of court statements may be introduced at trial when related to "impeachment or [to] the thoroughness of the police investigation." *State v. Roche*, 114 Wn. App. 424, 444, 59 P.3d 682 (2002). Evidence does not need to be substantively admissible to be used for impeachment. *See State v. Greve*, 67 Wn. App. 166, 173, 834 P.2d 656 (1992) (explaining law allows "the use of suppressed evidence for purposes of impeachment").

The Court of Appeals accurately ruled Mr. Alexander may impeach the accuracy and reliability of the police investigation. Slip op. at 22-25. This impeachment includes questioning the investigating officers about information casting doubt on the State's theory of the time of death and showing the significance of the officers' failure to collect video surveillance evidence from the 12 hours before someone noticed Ms. Brune's body. Slip op. at 24-25, 27.

Indeed, the prosecution misled the jurors by assuring them there was no evidence they did not receive. It told the jurors, "So when you go back to the jury room you have *absolutely everything* that we can possibly give you so you can come to a decision." RP 2973 (emphasis added). It told them anytime it had the "option of giving you too little information or too much, we are *always* going to err on the side of giving you too much information." RP 2973 (emphasis added).

The jurors did not know the police had, but did not investigate, information indicating Ms. Brune was alive and

writing in her journal at 10 pm, even though this diary entry showed the significance of the officers' failure to collect any video surveillance after 10 pm.

As the Court of Appeals correctly ruled, the court impermissibly refused to permit Mr. Alexander to elicit important information that cast doubt on the State's investigation. Even the State's petition for review ultimately concedes an accused person may challenge the police investigation as part of the right to present a defense and the diary entry may be pertinent to this challenge. Pet. at 32-33. This issue does not merit review under RAP 13.4(b).

F. CONCLUSION

Mr. Alexander respectfully requests that review be denied pursuant to RAP 13.4(b).

Counsel certifies this document contains 2093 words and complies with RAP 18.17(b).

DATED this 30th day of May 2023.

Respectfully submitted,

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The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the document to which this declaration is affixed/attached, was filed in the **Washington State Supreme Court** under **Case No. 101953-0**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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