71155-5

71155-5

No. 71155-5-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

RYAN FIROVED,

Appellant.

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

The Honorable Douglass North

BRIEF OF APPELLANT

THOMAS M. KUMMEROW
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
PM 4:45

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

C. STATEMENT OF THE CASE 2

D. ARGUMENT 5

1. THE POLICE VIOLATED THE PRIVACY ACT WHEN THEY FAILED TO SCRUPULOUSLY COMPLY WITH THE REQUIREMENTS OF THE PRIVACY ACT 5

a. The application for interception of phone calls must show that normal investigative procedures have been tried and failed or reasonably appear to be unlikely to succeed if tried or are too dangerous to employ 5

b. The application was deficient in that it failed to establish any need for the interception of Mr. Firoved's phone calls. 7

c. The remedy for violations of the Privacy Act is suppression of the ill-gotten statements. 10

d. The error in failing to suppress the recordings obtained as a result of the illegal intercept was not harmless. 11

2. THE TRIAL COURT ERRED IN FAILING TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW AS REQUIRED BY CrR 3.6 12

E. CONCLUSION 14

<u>TABLE OF AUTHORITIES</u>

WASHINGTON CASES

State v. Cisneros, 63 Wn.App. 724, 821 P.2d 1262 (1992) 7

State v. Christensen, 153 Wn.2d 186, 102 P.3d 789 (2004) 11

State v. Constance, 154 Wn.App. 861, 226 P.3d 231 (2010)............. 5, 7

State v. Gonzalez, 71 Wn.App. 715, 862 P.2d 598 (1993)..................... 6

State v. Head, 136 Wn.2d 619, 964 P.2d 1187 (1998)................... 12, 13

State v. Johnson, 125 Wn.App. 443, 105 P.3d 85 (2005) 7

State v. Johnson, 173 Wn.2d 895, 270 P.3d 591 (2012) 9

State v. Kichinko, 26 Wn.App. 304, 613 P.2d 792 (1980) 7

State v. Krall, 125 Wn.2d 146, 881 P.2d 1040 (1994)......................... 12

State v. Manning, 81 Wn.App. 714, 915 P.2d 1162 (1996) 9

State v. McGary, 37 Wn.App. 856, 683 P.2d 1125 (1984) 12

State v. Patel, 170 Wn.2d 476, 242 P.3d 856 (2010) 9

State v. Platz, 33 Wn.App. 345, 655 P.2d 710 (1982)............................ 7

State v. Porter, 98 Wn.App. 631, 990 P.2d 460 (1999) 6, 7, 10

State v. Townsend, 147 Wn.2d 666, 57 P.3d 255(2002) 9

State v. Williams, 94 Wn.2d 531, 617 P.2d 1012 (1980) 6

STATUTES

RCW 9.73.030 5

RCW 9.73.050 .... 6, 10

RCW 9.73.090 5

RCW 9.73.130 .... 6, 7, 9, 10

RULES

CrR 3.6 .... passim

A. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to suppress the recordings of three phone calls that were intercepted by the police in violation of the Privacy Act.

2. The trial court erred in failing to enter written findings of fact and conclusions of law as required by CrR 3.6(b).

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Privacy Act bars any interception of, among other things, private phone calls. The Act allows an exception where the police obtain a court order authorizing the interception. As part of the application for the court order, the police must show why, in this particular case, other investigative methods had been tried and failed, were unlikely to succeed, or would be too dangerous to employ. Here, despite an innumerable number of text messages between Mr. Firoved and Ms. Piper detailing their most private sexual fantasies and thoughts, the police opined that relying on text messages alone was insufficient proof of a criminal offense. Did the trial court err in failing to suppress the phone calls where the police routinely rely on text messaging or email to prove attempted child sex offenses, and the

parties here sent very detailed text messages expressing their most intimate thoughts and fantasies?

2. CrR 3.6(b) requires the trial court enter written findings of fact and conclusions of law following an evidentiary hearing on a motion to suppress. In the instant case, the court held an evidentiary hearing and determined contested facts, but failed to enter written findings of fact and conclusions of law following the hearing. Does the failure to enter written findings of fact and conclusions of law require remand for entry of the required findings?

C. STATEMENT OF THE CASE

In 2006, Ryan Firoved and Kristen Piper met on an America Online (AOL) chatroom. 10/3/2013RP 40, 10/8/2013RP 102. The two eventually met in-person several weeks later at a Quality Food Center (QFC) in Redmond. 10/3/2013RP 41, 10/8/2013RP 102. This meeting was originally to just introduce themselves, but the two ended up having sex. 10/3/2013RP 42, 10/8/2013RP 102. This began an eight year on-again, off-again relationship based primarily upon sex. 10/3/2013RP 42-61, 10/8/2013RP 103-04. During this period, the two text messaged each other countless times. 10/8/2013RP 89. There were

11,585 contacts between Mr. Firoved and Ms. Piper from February to June 2012. 10/8/2013RP 50.

During his relationship with Ms. Piper, Mr. Firoved married, and had sexual liaisons with several other women. 10/8/2013RP 105. Ms. Piper was aware Mr. Firoved was married, but neither she nor Mr. Firoved's wife knew of these other women. *Id.*

In 2012, according to Ms. Piper, Mr. Firoved disclosed that he liked things that were "taboo." 10/3/2013RP 66. Again, according to Ms. Piper, Mr. Firoved disclosed to her two incidents involving his sexual transgressions with girls under age 12. 10/3/2013RP 66-67. Ms. Piper claimed to be "shocked," but she continued to see Mr. Firoved and continued to have sex with him. 10/3/2013RP 68.

Mr. Firoved testified he and Ms. Piper engaged in role-playing, where he told her about molesting young girls, which excited Ms. Piper. 10/8/2013RP 113-16. Mr. Firoved stated that Ms. Piper brought up the subject of Mr. Firoved molesting her daughter, who was 10 years old at the time. 10/8/2013RP 105. Mr. Firoved continued this conversation and led Ms. Piper on because it pleasured the two of them. 10/8/2013RP 116. Mr. Firoved had no intention of following through on engaging in sex with Ms. Piper's daughter. 10/8/2013RP 127.

According to Ms. Piper, Mr. Firoved brought up the topic of his having sex with her daughter and continued to bring up the subject. 10/3/2013RP 75-76. Ms. Piper claimed she finally relented and agreed to set up a date for Mr. Firoved to have sex with her daughter. 10/3/2013RP 76, 102-04. When she began to believe Mr. Firoved was serious, Ms. Piper claimed only then did she go to the police and agree to assist in the investigation of Mr. Firoved. 10/3/2013RP 104-07.

On June 25, 2012, Ms. Piper went to the Kirkland Police Department. 9/30/2013RP 107-8, 118. Ms. Piper gave the police copies of the text messages between herself and Mr. Firoved. 9/30/2013RP 120, 131. Officer Allan O'Neill sought and obtained a court order to intercept Mr. Firoved's phone calls to Ms. Piper. 9/30/2013RP 129. O'Neill recorded two phone calls on July 3, 2013. 9/30/2013RP 133-35. With the assistance of Ms. Piper, O'Neill set up a meeting on July 5, 2012, with Mr. Firoved at a hotel in Kirkland. 9/30/2013RP 137. O'Neill recorded Ms. Piper's phone call to Mr. Firoved setting up this meeting. 9/30/2013RP 135. Mr. Firoved was arrested as he knocked on the hotel room door. 9/30/2013RP 140.

Mr. Firoved was charged with a count of attempted first degree child rape. CP 72-73. Prior to trial, Mr. Firoved moved to suppress the

recordings of three phone calls that were intercepted pursuant to the court order. CP 39-71. The court held an evidentiary hearing on the CrR 3.6 motion and subsequently denied it. 9/30/2013RP 64. The court has yet to file written findings of fact and conclusions of law following the CrR 3.6 hearing.

D. ARGUMENT

1. THE POLICE VIOLATED THE PRIVACY ACT WHEN THEY FAILED TO SCRUPULOUSLY COMPLY WITH THE REQUIREMENTS OF THE PRIVACY ACT

a. The application for interception of phone calls must show that normal investigative procedures have been tried and failed or reasonably appear to be unlikely to succeed if tried or are too dangerous to employ. Washington's Privacy Act, chapter 9.73 RCW, prohibits the interception and recording of private communications and conversations without the consent of all parties. RCW 9.73.030(1)(a); *State v. Constance,* 154 Wn.App. 861, 877, 226 P.3d 231 (2010). Exceptions exist, however, and the police may intercept and record communications if one party consents, if there is probable cause to believe the nonconsenting party has committed a felony, *and* if a judge authorizes interception and recording. RCW 9 .73.090(2); *Constance,* 154 Wn.App. at 878. Recordings obtained in violation of the state

privacy act are inadmissible in state court proceedings. RCW 9.73.050; *State v. Williams,* 94 Wn.2d 531, 534, 617 P.2d 1012 (1980).

The act creates an exception to the mutual consent requirement for police investigating a felony, provided certain conditions are met. RCW 9.73.090(2); *State v. Porter*, 98 Wn.App. 631, 635, 990 P.2d 460 (1999). This exception applies, however, only if police first make a particularized showing of need. RCW 9.73.130(3)(f); *Porter,* 98 Wn.App. at 635, *citing State v. Gonzalez,* 71 Wn.App. 715, 719, 862 P.2d 598 (1993). Once the need for an intercept is established, the authorization application affidavit must describe with particularity the persons and places subject to the intercept. RCW 9.73.130(3)(a), (d); *Porter*, 98 Wn.App. at 635.

An application for court approval to intercept and record communications must satisfy the requirements of RCW 9.73.130. The application must contain a statement of the facts justifying interception and recording, including a statement of probable cause, detailed information concerning the offense, the need to intercept and record, and under subsection (3)(f),

> [a] particular statement of facts showing that other normal investigative procedures with respect to the offense have been tried and have failed or reasonably

> appear to be unlikely to succeed if tried or to be too dangerous to employ[.]

RCW 9.73.130; *Constance,* 154 Wn.App. at 878-79.

RCW 9.73.130(3)(f) requires "something less than a showing of absolute necessity to record to acquire or preserve evidence." *State v. Platz,* 33 Wn.App. 345, 349, 655 P.2d 710 (1982), *citing State v. Kichinko,* 26 Wn.App. 304, 311, 613 P.2d 792 (1980). In determining whether to authorize the interception and recording of communications, the judge "has considerable discretion to determine whether the statutory safeguards have been satisfied." *State v. Johnson,* 125 Wn.App. 443, 455, 105 P.3d 85 (2005), *citing State v. Cisneros,* 63 Wn.App. 724, 728-29, 821 P.2d 1262 (1992). The application must contain a "particular statement of facts showing that other normal investigative procedures with respect to the offense have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ[.]" RCW 9.73.130(3)(f). "Police need not make a showing of absolute necessity; the need requirement is interpreted in a 'common sense fashion.'" *Porter*, 98 Wn.App. at 635, *quoting Platz,* 33 Wn.App. at 349-50.

b. The application was deficient in that it failed to establish any need for the interception of Mr. Firoved's phone calls.

Mr. Firoved and Ms. Piper communicated at length by text message throughout their off and on relationship. During the four months prior to Mr. Firoved's arrest, the two shared over 11, 000 contacts. 10/8/2013RP 50. The two shared extremely intimate thoughts and feelings in these text messages; the term "no filter" coming to mind. The application for the court approval of phone intercepts failed to justify why these voluminous text messages were not sufficient and why oral communication was sought.

The application by Officer O'Neill stressed the need for oral communication:

> The actual content, tone, inflection, speech patterns, and volume of the suspects and cooperating witnesses' own voices . . . will be critical to a determination of the suspect's actual plan and intentions regarding the above-described crimes . . . The delivery is at least as important as the words themselves in determining whether the suspect genuinely intends to commit the felony crimes that were first suggested and requested by the suspect.
> . . .
> This detective has reviewed Firoved's text messages to Piper. Likely because Firoved is careful in his text messages, they standing alone, do not adequately flesh out Firoved's intended felony rape of a child.

CP 62-63.

There are two problems with this claim. First, the police routinely rely on only written communication in establishing child sex

offenses. *See e.g., State v. Patel*, 170 Wn.2d 476, 478-79, 242 P.3d 856 (2010)(in attempted second degree rape of a child investigation, police detective playing role of under age 16 girl communicated with defendant solely on-line), *disapproved on other grounds*, *State v. Johnson*, 173 Wn.2d 895, 904, 270 P.3d 591 (2012); *State v. Townsend,* 147 Wn.2d 666, 670-71, 57 P.3d 255(2002) (in another attempted second degree rape of a child case, police detective posing as a fictitious 13 year old girl communicated with the defendant only by computer email and instant messaging). This justification appears to be boilerplate language that does little to elucidate to the court the reasons why, in this case, interception of phone calls was necessary. *State v. Manning,* 81 Wn.App. 714, 720, 915 P.2d 1162 (1996)("Boilerplate is antithetical to the statute's particularity requirement set forth in RCW 9.73.130(3)(f)." Further, this justification for the intercept approval "merely support[ed] the truism that having a recording to play at trial is advantageous to the State in obtaining a conviction." *Id.*

Second, O'Neill's claim belies the nature of Mr. Firoved and Ms. Piper's relationship. A quick perusal of the vast number of text messages between the two shows the two shared a vast amount of their feelings, wants, and wishes. Further, O'Neill's application is full of text

messages between Mr. Firoved and Ms. Piper that constitute the vast amount of the factual basis for the intercept application. CP 51-54. O'Neill relates the details of the text conversations between Mr. Firoved and Ms. Piper, then confirms the exact details of the conversations by "receiv[ing] and review[ing] the text messages summarized above." CP 53. This vast amount of information counters O'Neill's claim that text messages alone were insufficient.

O'Neill's application was deficient and failed to comply with the strict dictates of RCW 9.73.130.

c. The remedy for violations of the Privacy Act is suppression of the ill-gotten statements. Any information gained from an illegal interception of private communications must be suppressed and ruled inadmissible at trial. RCW 9.73.050; *Porter,* 98 Wn.App. at 634-35("Failure to comply with the statutory safeguards requires exclusion of evidence illegally obtained."). Since the police failed to strictly follow the requirements of RCW 9.73.130(3)(f), the recordings of the three phone calls must be suppressed.

d. The error in failing to suppress the recordings obtained as a result of the illegal intercept was not harmless. The failure to suppress evidence obtained in violation of the Privacy Act "is prejudicial unless, within reasonable probability, the erroneous admission of the evidence did not materially affect the outcome of the trial." *State v. Christensen*, 153 Wn.2d 186, 200, 102 P.3d 789 (2004).

The three phone calls intercepted pursuant to the court authorization played a significant part in the State's case. CP Supp ___, Sub No. 81, Exhibit 22. The phone calls were where Ms. Piper allegedly instructed Mr. Firoved when and where the meeting was to take place. 10/2/2013RP 131. The State played the phone calls for the jury in closing argument and focused the argument on the contents of these phone calls for the purpose of establishing Mr. Firoved's intent. 10/9/2013RP 23-25 ("That is not just sex talk. That is not just fantasy. That is putting the wheels in motion for what his plan is on Thursday."). Given the importance the State placed on these phone recordings, the error in failing to suppress the recordings was not a harmless error. Mr. Firoved is entitled to reversal of his conviction.

2. THE TRIAL COURT ERRED IN FAILING TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW AS REQUIRED BY CrR 3.6

The court held a hearing on Mr. Firoved's motion to suppress pursuant to CrR 3.6 on September 26, 2013. CP 4-15. Written findings of fact and conclusions of law as required by CrR 3.6, have never been entered.

CrR 3.6(b) requires:

> If an evidentiary hearing is conducted, at its conclusion the court *shall* enter written findings of fact and conclusions of law.

(Emphasis added.) The primary purpose in requiring findings and conclusions is to enable an appellate court to review the questions raised on appeal. *State v. McGary,* 37 Wn.App. 856, 861, 683 P.2d 1125 (1984).

The term "shall" indicates a mandatory duty on the trial court. *State v. Krall,* 125 Wn.2d 146, 148, 881 P.2d 1040 (1994). And the importance of written findings and conclusions was reinforced by the Supreme Court decision *State v. Head,* 136 Wn.2d 619, 964 P.2d 1187 (1998). *Head* held that the defendant is not required to speculate as to all possible theories that the trial court might have relied upon before presenting his appellate argument. *Head*, 136 Wn.2d at 624. Nor is the

appellate court required to address all conceivable grounds that might have formed the basis of the court's ruling. *Id.* The Court noted:

> A trial court's oral opinion and memorandum opinion are no more than oral expressions of the court's informal opinion at the time rendered. An oral opinion "has no final or binding effect unless formally incorporated into the findings, conclusions, and judgment."

Head, 136 Wn.2d at 622, *quoting State v. Dailey,* 93 Wn.2d 454, 458-59, 610 P.2d 357 (1980).

The *Head* Court determined that in adult bench trials where written findings and conclusions are not filed, remand for entry of findings is the appropriate remedy. *Head,* 136 Wn.2d at 622. But, at the hearing on remand, no additional evidence may be taken as the findings and conclusions are based solely on the evidence already taken. *Head,* 136 Wn.2d at 625.

> We hold that the failure to enter written findings of fact and conclusions of law as required by CrR 6.1 (d) requires remand for entry of written findings and conclusions. An appellate court should not have to comb an oral ruling to determine whether appropriate "findings" have been made, nor should a defendant be forced to interpret an oral ruling in order to appeal his or her conviction.

Head, 136 Wn.2d at 624. The same rationale applies equally to findings required pursuant to CrR 3.6(b).

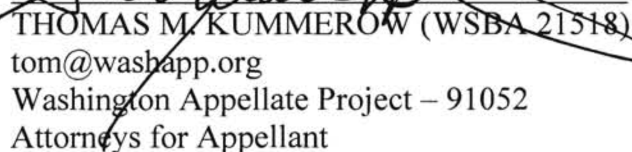
Here, the court has never entered the required written findings of fact and conclusions of law following the CrR 3.6 hearing. Accordingly, this Court must remand Mr. Firoved's matter for the entry of the CrR 3.6 findings.

E. CONCLUSION

For the reasons stated, Mr. Firoved asks this Court to suppress the evidence illegally obtained through the phone calls. Alternatively, Mr. Firoved asks this Court to remand to the trial court for the entry of written findings of fact and conclusions of law following the CrR 3.6 hearing.

DATED this 31st day of May 2014.

Respectfully submitted,



THOMAS M. KUMMEROW (WSBA 21518)
tom@washapp.org
Washington Appellate Project – 91052
Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 71155-5-I
v.	)	
	)	
RYAN FIROVED,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF MAY, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY __________
[X] RYAN FIROVED 813476 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99326	(X) ( ) ( )	U.S. MAIL HAND DELIVERY __________

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 MAY 30 PM 4:46

SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF MAY, 2014.

X

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710