No. 98778-5
COA No. 52142-3-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BRYAN EARLE GLANT,

Appellant.

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

The Honorable Chris Lanese, Judge
Cause No. 16-1-01576-34

ANSWER TO PETITION FOR REVIEW

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether this Court should accept review of the Court of Appeals' decision that the trial court did not abuse its discretion by finding that private funding donations to the Washington State Patrol Missing and Exploited Children's Task Force did not provide a basis for dismissal based on outrageous government conduct.

2. Whether this Court should accept review of the Court of Appeals' finding that the trial court did not err by denying a motion to suppress evidence based on the Washington Privacy Act because Glant implicitly consented to recording of his text and email communications by the intended recipient, consistent with prior precedent of this Court that is neither incorrect or harmful.

B. STATEMENT OF THE CASE.

As a result of his attempts to solicit children for sexual encounters during a "Net Nanny" sting operation conducted by the WSP's Missing and Exploited Children Task Force (METCF), Bryan Earle Glant was charged with two counts of attempted rape of a child in the first degree.

Prior to trial, in a motion heard before the trial court on June 19, 2017, Glant moved to suppress all text and email messages

between himself and the undercover officer. 1 RP 1-48.[1] Glant sought suppression of his incriminating texts and emails alleging that the messages were received by police in violation of RCW Chapter 9.73, the Washington Privacy Act (WPA). 1 RP 1. Glant's motion was based on his claim that he did not consent to the recording of his communications with the undercover officer and therefore, the police violated the Privacy Act and Article 1, § 7 of the Washington Constitution concerning personal privacy.

The trial Court concluded that the messages between Glant and the undercover officer were indeed private and would fall within the scope of protection created by the WPA; however, Glant "implicitly consented" to the recording of the messages because he had "know[ledge] that the communications . . . were preserved beyond the moment of sending on either [by] phone or computer." 1

[1] The verbatim report of proceedings in this matter appears in six volumes. Volume 1, transcribed by Sonya L. Wilcox, contains a hearing on a Motion to Suppress Illegally Intercepted and Recorded Evidence held June 19, 2017 and will be referred to as 1 RP in this brief. Volume 2, transcribed by Sonya L. Wilcox, contains a hearing on a Motion to Compel Discovery that took place on July 10, 2017 and will be referred to as 2 RP in this brief. Volume 3, transcribed by Kathryn A. Beehler, contains a hearing on a Motion to Suppress a Recorded Interrogation and Cellphone Evidence, which took place on June 7, 2017 and will be referred to in this brief as 3 RP. Volume 4, transcribed by Cheri L. Davidson, contains a hearing on a Motion to Dismiss for Outrageous Governmental Conduct held March 28, 2018, and will be referenced herein as 4 RP. Volume 5, transcribed by Cheri L. Davidson, contains the bench trial heard April 23, 2018, and will be referenced in this brief as RP 5. Volume 5, transcribed by Cheri L. Davidson, contains the sentencing hearing held July 17, 2018, and will be referenced herein as 6 RP.

RP 43. Because Glant implicitly consented to the recording of the communications, the MECTF was not required to obtain probable cause authorization pursuant to RCW 9.73.230 or a wiretapping warrant under RCW 9.73.090(2) in order to lawfully receive and record the messages sent to the undercover officer. 1 RP 43.

The trial court also held that the police conduct was not in violation of Art. 1, § 7 of the Washington Constitution. 1 RP 45. The Court reasoned that "voluntarily disclosing information to strangers assumes the risk of being deceived as to the identity of one with whom deals." 1 RP 45.

Glant filed another pretrial motion that was before the court on March 26, 2018, to dismiss the two charges against him based upon allegations of outrageous government misconduct by the MECTF in violation of his due process rights. 4 RP 10-71. The court considered the "totality of the circumstances" concerning this incident and paid specific attention to the factors laid out in State v. Lively, 130 Wn.2d 1, 22, 419 P.3d 436 (1996), when considering the claim of outrageous government misconduct. 4 RP 61. The court weighed every Lively factor and concluded that there was not enough evidence presented sufficient to support "a finding that the conduct of the Washington State Patrol, or anyone involved in this

case, amounted to criminal activity or was repugnant to a sense of justice." 4 RP 68.

After Glant's pretrial motions failed, he elected to conduct a bench trial based on stipulated facts. CP 772. At the conclusion of the bench trial, Glant was convicted of two counts of attempted rape of a child in the first degree and was sentenced to 108 months in prison. CP 779. During the sentencing hearing on July 17, 2018, the trial court judge took into consideration "the age of the defendant and his capacity for growth" when imposing the sentence. 6 RP July 17, 2018, 91.

On appeal, Division II of the Court of Appeals found that the trial court did not err in denying the motion to suppress and the motion to dismiss. The Court of Appeals' decision noted that "because Glant impliedly consented to the communications he had with Hannah, all parties consented to the recording," in finding that the trial court did not err in denying Glant's motion to suppress based on the privacy act. State v. Glant, 13 Wn. App.2d 356, 366, 465 P.3d 382 (2020). The Court of Appeals' decision, applied correctly, considered the factors set forth by this Court in denying Glant's motion to dismiss for outrageous government conduct. *Id*. at 369-375.

C. ARGUMENT.

This Court will accept review when the decision of the Court of Appeals conflicts with a decision of the Supreme Court, RAP 13.4(b)(1), conflicts with another decision of the Court of Appeals, RAP 13.4(b)(2), raises a significant question of law under the Washington or the United States Constitutions, RAP 13.4(b)(3), or involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(4). The decision at issue does not conflict with decisions of the Supreme Court and other decisions of the Court of Appeals, as detailed below. Glant has not demonstrated a compelling reason for this Court to accept review.

1. The trial court and the Court of Appeals correctly followed the test for outrageous government misconduct that this Court set forth in *State v. Lively*, 130 Wn.2d 1, 921 P.2d 1035 (1996), to find that outside funding sources for the missing and exploited children's task force did not constitute outrageous government misconduct.

The Court of Appeals analyzed the issue of outside funding raised by Glant pursuant to the guidelines that this Court set forth in State v. Lively. State v. Glant, 13 Wn.App.2d at 370-375. The trial court further noted that RCW 13.60.110 specifically authorizes the

MECTF to collect private funding to support its goal of rooting out potential sexual abusers of children. *Id*. at 374-375.

A trial court's order on a motion to dismiss on the basis of outrageous governmental misconduct is reviewed "under an abuse of discretion standard." State v. Athan, 160 Wn.2d at 375. "Abuse of discretion requires the trial court's decision to be manifestly unreasonable or based on untenable grounds or untenable reasons." *Id*. at 375-76 "A trial court abuses its discretion when its decision adopts a view that no reasonable person would take." State v. Solomon, 3 Wn. App.2d 895, 910, 419 P.3d 436, 444 (2018) (citing State v. Sisouvanh, 175 Wn.2d 607, 623, 290 P.3d 942 (2012)).

The Court of Appeals properly applied the correct standard of review to the decision of the trial court on Glant's motion to dismiss. It is clear that Washington State law authorizes the State Patrol to solicit funds to support the MECTF. RCW 13.61.110. That statute is the governing statute for the MECTF. Section (4) provides that the chief of the state patrol *shall* seek public and private grants and gifts to support the work of the task force. (Emphasis added). Contrary to Glant's argument at the Court of Appeals, there is no provision in the law that prohibits the chief of the state patrol from

delegating this authority. In fact, Chapter 7 of the MECTF IAD standard procedures manual specifically delegates such a duty to detective supervisors stating that the duties of a Task Force Detective Supervisor include "initiating budget and grant requests." CP 935-939.

As argued by the State during the hearing on this issue, to require the chief of the state patrol to handle every task specifically assigned to him by statute without delegation would be absurd. The example that the State provided is RCW 43.43.035, which following Glant's logic would require the chief of the state patrol to personally provide security for the governor. 4 RP 53. Neither Detective Sgt. Rodriguez nor the MECTF violated the law by soliciting private donations for funding. Even if there were minor defects in compliance with funding statutes, the trial court correctly noted that no Washington case has applied the doctrine of outrageous conduct to a funding issue.

The Kansas case that Glant continues to rely upon, State v. Berg, 236 Kan. 562, 694 P.2d 427 (1985), does not support Glant's position. In that case, the Supreme Court of Kansas simply held that a Kansas statute allowing a witness to hire their own counsel to assist in the prosecution did not allow that attorney to overrule the

county prosecuting attorney's decision to dismiss the case. *Id*. at 568. Nothing in that decision supports Glant's argument made in this case.

It was Glant, who responded to the advertisement and Glant who informed the undercover officer what he wished to do with her daughters. CP 449-460; CP 772; Ex 1. The trial court properly applied the Lively factors and did not abuse its discretion by denying Glant's motion to dismiss. The Court of Appeals properly applied the correct standard of review and the decision is consistent with RCW 13.61.110, which is indicative of public policy authorizing private grants for funding the State Patrol. As the Court of Appeals noted, "nothing in the record shows that O.U.R. was attempting to overrule or commandeer the Net Nanny operations over the objections of the MECTF." Glant, 13 Wn. App.2d at 371.

While Glant's argument regarding outside funding as a basis for outrageous government conduct differed from previous interpretations of the concept, this Court provided the proper foundations for consideration in Lively, which were followed by both the trial court and the Court of Appeals. "The funding of MECTF here is attenuated from Glant's arrest." Glant. 12 Wn. App.2d at

372. Glant has provided no compelling reason why this Court should accept review on this issue.

2. *State v. Townsend*, 147 Wn.2d 666, 676, 57 P.3d 255 (2002), is neither incorrect nor harmful and this Court should not entertain Glant's request to overrule it.

In State v. Townsend, 147 Wn.2d 666, 676, 57 P.3d 255 (2002), this Court held that in the context of the privacy act, a person may impliedly consent to the recording within the meaning of the privacy act. This Court stated, "a communicating party will be deemed to have consented to having his or her communication recorded when the party knows the messages will be recorded." *Id*. at 675-676. The rationale of the Court was:

> Because Townsend, as a user of e-mail had to understand that computers are, among other things, a message recording device and that his e-mail messages would be recorded on the computer of the person to whom the message was sent, he is properly deemed to have consented to the recording of those messages.

Id. at 676. This Court concluded that "the saving of messages is inherent in an e-mail and ICQ messaging" and that through his use of such communication mechanisms, Townsend had impliedly consented to the recording of such messages. *Id*. at 678.

Glant argues that the decision of this Court was incorrect based on RCW 9.73.030(3), which states, where consent by all

parties is required, "consent shall be considered obtained whenever one party has announced to all other parties engaged in the communication or conversation, *in any reasonably effective manner*, that such communication is about to be recorded." (emphasis added). The doctrine of implied consent adopted by this Court in Townsend is consistent with that of the privacy act. The choice of medium, text messages or email, effectively announces to all parties that the conversation will be recorded because that is how the medium works. Like leaving a message on an answering machine, people in modern society who chose to utilize text messaging are aware that the message will be recorded. *See* In re Marriage of Farr, 87 Wn. App. 177, 184, 940 P.2d 679 (1997); State v. Smith, 189 Wn.2d 655, 665, 405 P.3d 997 (2017).

Glant's argument that an expressed announcement that the message would be recorded needs to be given with every message would be an absurd result. Such a requirement would cause numerous innocent actors who utilize text messaging daily to be in violation of the privacy act. People who use text messages, including Mr. Glant, are aware that the act of sending a message causes it to be recorded on both the sending and receiving phone. The rationale in Townsend remains sound and has been repeatedly

adopted by this Court. State v. Smith, 189 Wn.2d 655; State v. Roden, 179 Wn.2d 893, 321 P.3d 1183 (2014); State v. Hinton, 179 Wn.2d 862, 319 P.3d 9 (2014). The Court of Appeals has applied the rule to text messages, stating, "when a person sends e-mail or text messages, they do so with the understanding that the messages would be available to the receiving party for reading or printing." State v. Raucus, 7 Wn. App.2d 287, 299-300, 433 P.3d 380, *review denied*, 193 Wn.2d 1014 (2019).

The legislature has not amended the privacy act in response to Townsend. This Court presumes the "legislature is familiar with judicial interpretations of statutes," and the lack of an amendment to remove the doctrine of implied consent is indicative that the doctrine is consistent with the statute. State v. Ervin, 169 Wn.2d 815, 239 P.3d 354 (2010) (absent an indication it intended to overrule a particular interpretation, amendments are presumed to be consistent with previous judicial decisions). RCW 9.73.030 has not been amended since 1986 and it appears that no effort has been made by the legislature to remove implied consent based on the Townsend decision.

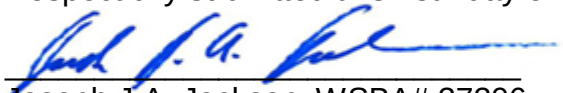
In this case, Glant sent messages to his intended recipient with the knowledge that text messages are recorded on the

recipient's phone. While he did not know that the recipient was a law enforcement officer, he voluntarily sent the messages to the intended recipient. He has neither demonstrated that implied consent pursuant to the Townsend decision is incorrect, nor has he demonstrated that it is harmful. There is no reason why this Court should accept review.

D. CONCLUSION.

For the reasons stated herein, the State respectfully requests that this Court deny the petition for review. Glant has provided no compelling reason for which this Court should accept review.

Respectfully submitted this 13th day of August, 2020.



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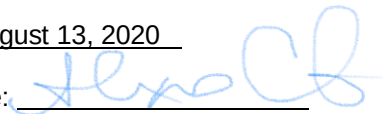
DECLARATION OF SERVICE

I hereby certify that on the date indicated below I electronically filed the foregoing document with the Clerk of the Court using the Appellate Courts' Portal utilized by the Washington State Supreme Court, for Washington, which will provide service of this document to the attorneys of record.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: August 13, 2020

Signature: 

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