No. 32058-8-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

CASEY D. PEPPIN,

Defendant/Appellant.

Appellant's Brief

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A. ASSIGNMENT OF ERROR

The trial court erred in failing to grant Mr. Peppin's motion to suppress evidence that was the product of an illegal search.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Was the remote warrantless search of Mr. Peppin's computer by law enforcement's use of enhanced peer-to-peer software illegal under the Fourth amendment and Article I, section 7?

C. STATEMENT OF THE CASE

On December 29, 2011, Detective Brian Cestnik was searching the internet using the Gnutella Network, a file-sharing network, to try to find people who were possessing or sharing child pornography over the internet in Spokane. RP[1] 14, 45-46. Peer-to-peer file sharing (P2P) is a growing phenomenon on the internet that allows direct connection between computers so people can share files such as movies or music. A user can download P2P software from the internet. P2P software allows a user to obtain files by opening the P2P software on the user's computer and conducting a search for files that are being shared on the network with others running compatible P2P software. 6-13-13 RP 5-9, RP 16-17.

[1] "RP" refers to the verbatim report of proceeding of the trial and sentencing reported by Terri Cochran. Citations to any other proceeding will specify the date followed by "RP."

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Law enforcement has an enhanced version of P2P software not available to the general public that allows police to reach across the entire Gnutella Network regardless of what interface is being used. Police can get IP addresses and target specific computers. Police can then search by "hash value," a unique identifier or fingerprint of a specific file. 6-13-13 RP 3-17. "Round-up Version 1.5.3" was the specific software used in this case. 6-13-13 RP 17, RP 43. "Roundup" was specifically designed for law enforcement. It automatically tracks shared folders and creates an Excell spreadsheet showing time of browsing, IP address, file names and types of files. It can narrow geographic boundaries to show only IP addresses of pornography sharers in the state of Washington or even just Spokane. RP 43-44.

On December 29, 2011, the detective typed in several search terms which are common among people sharing child pornography using the Gnutella Network. The detective noticed that an IP address linked to Spokane showed up under the search term "pthc." The detective checked the IP address using two different internet search engines and confirmed the IP address was in Spokane and showed the internet provider as Qwest Communications. RP 46-47, 54. The detective was able to connect directly to the target computer with an active browser. The detective was

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then able to view the contents of a shared folder. There appeared to be four files which contained child pornography. The detective was able to successfully download three of these files. RP 51-53.

The detective subsequently obtained a search warrant which was given to Qwest Communications. That warrant allowed the detective to obtain the name and address of the person associated with the IP address of the target computer. That individual was Casey Peppin. RP 54-57.

Mr. Peppin moved to suppress all evidence seized as a result of Detective Cestnik's Gnutella Network search as the product of an illegal search and seizure in violation of the Fourth Amendment and article 1 section 7 of the Washington State Constitution. CP 2-9. The Court denied the motion finding there was not a reasonable expectation of privacy with peer-to-peer networking and there is not a violation when police conduct an investigation using the peer-to-peer network. 6-13-13 RP 26-30. Mr. Peppin was subsequently convicted by the Court of three counts of first degree possession of depictions of a minor engaged in sexually explicit conduct. CP 126-27. This appeal followed. CP 145.

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D. ARGUMENT

The remote warrantless search of Mr. Peppin's computer by law enforcement's use of enhanced peer-to-peer software was illegal under the Fourth amendment and Article I, section 7.

The Fourth Amendment prohibits "unreasonable searches and seizures", but allows reasonable warrantless searches and seizures. U.S. Const. Amend. IV; *State v. Morse*, 156 Wn.2d 1, 9, 123 P.3d 832(2005). The Fourth Amendment provides the minimum protection against warrantless searches and seizures. *State v. Carter*, 151 Wn.2d 118, 125, 85 P.3d 887 (2004). The Washington Constitution generally provides broader protection under article 1 section 7, and any evaluation of privacy in Washington begins under this provision. *Id*. The Washington Constitution provides that "[n]o person shall be disturbed in his private affairs or his home invaded, without authority of law." Wash. Const. art I, § 7. An unlawful search occurs when the State unreasonably intrudes in a person's private affairs. *Carter*, 151 Wn.2d at 125.

The relevant inquiry under the Washington State Constitution in determining whether there has been a search is whether the State has unreasonably intruded into the person's private affairs. *State v. Young*, 123 Wn.2d 173, 181, 867 P.2d 593 (1994). If no search occurs, then article 1

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section 7 is not implicated. However, if the police or other governmental agent conducts a search, then article 1 section 7 is implicated and the search must be conducted pursuant to a warrant or fall into a recognized exception. *Id*.

When presented with arguments under both the federal and state constitutions, the court should review the state constitutional arguments first. *State v. Surge*, 160 Wn.2d 65, 70, 156 P.3d 208 (2007). It is well established that article 1 section 7 quantitatively differs from the Fourth Amendment and provides greater protection. *Id*. Accordingly, an analysis under *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), is unnecessary to establish that the court should undertake an independent state constitutional analysis. *Surge*, 160 Wn.2d at 70-71.

The language of article 1 section 7 requires a two-part analysis. The first part requires a determination of whether a governmental action constituted a disturbance into one's private affairs. *Surge*, 160 Wn.2d at 71. If a valid privacy interest is disturbed, the second step asks whether the authority of law justifies the intrusion. *Id*. In general terms authority of law requires a warrant. *Id*.

In the present case, law enforcement connected to the defendant's files stored in his computer through the internet by using an enhanced

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version of peer-to-peer software not available to the general public. 6-13-13 RP 17, RP 43-44. Such conduct represents an intrusion into Mr. Peppin's private affairs. The private affairs inquiry focuses on those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant. *Surge*, 160 Wn.2d at 71. A computer can contain a person's records, reflections, or conversations. A search of a computer also has First Amendment implications that may collide with Fourth Amendment concerns. *State v. Nordlund*, 113 Wn. App. 171, 182, 53 P.3d 520 (2002), review denied 149 Wn.2d 1005 (2003). Under a Fourth Amendment analysis a search warrant for a computer is generally given greater scrutiny. *Id*. Thus, there can be no doubt a warrant is required to search a computer. There is also no dispute that on December 29, 2011, the detective accessed material on Mr. Peppin's computer without a warrant. This action constituted a governmental intrusion.

The fact that the officer did not physically enter Mr. Peppin's home and access his computer to obtain the information should not make any difference. Under article 1 section 7, as well as the Fourth Amendment, a person's home can be invaded even though there is no physical entrance into the house. *Young*, 123 Wn.2d at 185. What the detective did was no

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different than actually entering Mr. Peppin's home, turning on his computer and reviewing files in the computer.

The trial court found there was not a violation when police conducted the investigation using the peer-to-peer network. 6-13-13 RP 26-30. This might be true where police make use of the same software available to the general public. However, here the police used an enhanced version of peer-to-peer software not available to the general public that allowed police to reach across the entire Gnutella Network regardless of what interface is being used. The detective was able to get IP addresses and target specific computers. He was also able to search by "hash value," enabling him to identify or fingerprint a specific file. 6-13-13 RP 3-17. The "Round-up Version 1.5.3" used in this case was specifically designed for law enforcement. It automatically tracked Mr. Peppin's shared folders and created an Excell spreadsheet showing time of browsing, his IP address, file names and types of files. It also allowed the detective to narrow geographic boundaries to show only IP addresses of pornography sharers in just Spokane. 6-13-13 RP 17, RP 43-44.

The software available to the general public does not have these capabilities. A member of the general public would not be able to track these shared folders to Mr. Peppin. Therefore, the conduct by the police

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using their more sophisticated software available only to them far exceeds any lowered expectation of privacy by Mr. Peppin's use of peer-to-peer networking. The detective's acts constituted an illegal governmental intrusion.

To adopt the trial court's position would be the equivalent of allowing a defense to a trespass or burglary when the owner of a house leaves the door unlocked. A trespasser or burglar could then claim he or she had consent by virtue of the unlocked door. But, as we well know, this is not the case. The contents of one's home does not become public by virtue of the fact that anybody could access the items because the owner did not lock the door. Certainly, the police would still need a warrant even if the door was unlocked. The same should be true when the police access the files on a computer without a warrant.

When the police accessed Mr. Peppin's computer they figuratively entered the curtilage of his property. If an officer with legitimate business enters an area of the curtilage which is open to the public and views something from a lawful vantage point it is not a search if it is in open view. *State v. Ross*, 141 Wn.2d 304, 312-13, 4 P.3d 130 (2000). However, the videos herein were not in open view. Mr. Peppin's computer had to be accessed and his files downloaded to see them. Essentially the

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police crossed the electronic threshold of his home so they could view the materials. It is one thing to use information gathered from the network. It is quite another to search the contents of a privately owned computer.

In *State v. Garbaccio*, 151 Wn. App. 716, 214 P.3d 168 (2009), the police were able to determine that a known video of child pornography was available for download from Garbaccio's computer by examining the video file's SHA–1 value, a lengthy alphanumeric code unique to each computer file available for transmission over file-sharing networks, such as Gnutella. 151 Wn. App. at 721, fn. 2. But the police did not actually download the file before getting a warrant. 151 Wn. App. at 722.

By contrast, in the case at hand the police went too far. Detective Cestnik went ahead and downloaded the file without a warrant. RP 52. This was a warrantless search. Warrantless searches are per se unreasonable unless they fall into an exception. *State v. Parker*, 139 Wn.2d 486, 496, 987 P.2d 73 (1999). Here there was no exception.

The search herein was also illegal under the Fourth Amendment. In *United States v. Jones*, __ U.S. __ , 132 S.Ct. 945, 181 l.Ed. 911 (2012), a vehicle used by the defendant had a GPS tracking device attached to it while parked in a public parking lot and the government tracked its

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movements. 132 S.Ct. at 948. The majority held this was a search under the Fourth Amendment under a trespass theory, thus expanding the "reasonable expectation of privacy" standard enunciated in *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). 132 S.Ct. at 949-51.

The situation herein is indistinguishable from *Jones*. Certainly, the remote entry by the police into Mr. Peppin's computer is no less an intrusion than attaching a GPS device to a vehicle as occurred in *Jones*. Therefore, this government intrusion was also a warrantless search and seizure under the Fourth Amendment.

In summation, the search authorized by the search warrant was tainted by the initial illegality of the warrantless search of Mr. Peppin's computer using "Round-up Version 1.5.3" and the subsequent downloading of files from his computer. The detective's acts constituted an illegal governmental intrusion. Mr. Peppin's use of peer-to-peer networking does not make that intrusion any less illegal. Evidence tainted by exploitation of the initial illegality must also be suppressed. *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). Therefore, all evidence obtained in this case as a result of the initial illegal search must be suppressed.

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E. CONCLUSION

For the reasons stated the convictions should be reversed and the case dismissed.

Respectfully submitted May 14, 2014,

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PROOF OF SERVICE

I, David N. Gasch, do hereby certify under penalty of perjury that on May 14, 2014, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of Appellant's Brief:

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June 27, 2014

Renee S. Townsley, Clerk/Administrator
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RE: State v. Casey D. Peppin, No. 32058-8-III

Dear Ms. Townsley:

As permitted by RAP 10.8, Appellant cites as additional authority: *Riley v. California*, __U.S.__, No. 13-132 (June 25, 2014).

Sincerely,

_____
s/David N. Gasch

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I, David N. Gasch, do hereby certify under penalty of perjury that on June 27, 2014, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of Appellant's letter citing additional authority:

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June 27, 2014 - 11:05 AM

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