72713-3

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Court of Appeals
Division I
State of Washington

NO. 72713-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ZAKARIA AWEIS DERE,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. AMENDED ASSIGNMENT OF ERROR

1. The trial court erred in finding that appellant Dere consented to the five recordings introduced into evidence.

B. ISSUES PERTAINING TO AMENDED ASSIGNMENT OF ERROR

1. The Washington State Privacy Act, RCW 9.73, *et seq.*, was violated by the admission of recorded jail calls since there was no proper consent.

2. The defendant's right to privacy under Article 1 § 7 of the Washington Constitution and the Fourth Amendment to the U.S. Constitution was violated by the unconsented admission of the recorded jail calls.

3. The defendant's right to be free of unreasonable searches under Article 1 § 7 of the Washington Constitution and the Fourth Amendment to the U.S. Constitution was violated by unconsented the admission of recorded jail calls.

C. ARGUMENT

I. DEFENDANT RAISED ALL OF THE STATUTORY AND CONSTITUTIONAL ARGUMENTS IN THE TRIAL COURT AND THIS COURT SHOULD REVIEW THESE ISSUES *DE NOVO*.

Respondent's assertion that our arguments that the recorded jail calls violate the Washington Privacy Act, art. 1, §7 and the Fourth Amendment

were not preserved for review is not based on the record. (Respondent's Brief at p. 13.) In fact, Dere's trial counsel filed a motion to suppress under CrR 3.6 and his brief raised all three of these issues. CP 205 – 219. Trial counsel also argued that both the Privacy Act and the Constitutional warrant requirement were violated by the admission of the phone calls to Dere, incorporating his brief. RP 618-21. These issues were properly preserved for appeal despite the State's claims. (Resp. Br. at pp. 20 and 23.) Issues involving statutory interpretation and constitutional claims are reviewed *de novo* by courts of appeal. *State v. Gresham*, 173 Wn.2d 405, 419, 269 P.3d 207 (2012); *State v. Powell*, 181 Wn. App. 716, 726, 326 P.3d 859 (2014).

II. THERE WAS NO PROPER CONSENT TO THE RECORDING AND USE AT TRIAL OF DERE'S CONVERSATION.

The trial court erred in finding that Dere consented to the recording because he presumably pressed the number "1." RP 622. The Findings of Fact attached to the State's brief should be stricken from the record pursuant to the Motion to Strike filed previously. As noted in that Motion, those Findings were entered on February 12, 2015, almost three months after the appeal was filed on November 14, 2014. CP 373. Under RAP 7.2 the trial court did not have "authority to act," thereby invalidating those Findings.

Under the strict requirements of the Washington Privacy Act and article 1

§ 7, consent normally requires more than accepting a telephone call. After all, it is certainly possible that Dere was in his own home, when these calls were received. When someone is in the privacy of their residence, warnings under *State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998) are required to validate a consent search of the home. And even if not in the home, the trial court should have applied a totality of the circumstances test to determine if the consent was valid. Some of the factors considered are "(1) the education and intelligence of the consenting person; (2) whether *Miranda* warnings, if applicable, were given prior to consent; and (3) whether the consenting person was advised of his right not to consent." *State v. Ruem*, 179 Wn.2d 195, 207, 313 P.3d 1156 (2013). In addition, there are at least three requirements for a "constitutional consent": "One gives consent to a search when (1) that person gives such consent voluntarily, (2) that person has authority to grant such consent, and (3) the search does not exceed the scope of the consent. *Id*. We require consent to be both meaningful and informed." *State v. Cates*, 183 Wn.2d 531, 548-549, 354 P.3d 832 (2015). citing *State v. Schultz*, 170 Wn.2d 746, 750, 754, 248 P.3d 484 (2011)(mere acquiescence to an officer's entry is not consent.) Except for the presumption that Dere heard and understood the automated recording, there was no totality analysis nor any mention of the three factors in *Cates* above.

As the seminal case that opened the door to jail calls observed: "Signs or automated recordings that calls may be recorded or monitored do not, in themselves, defeat a reasonable expectation of privacy." *State v. Modica*, 164 Wn.2d 83, 89, 186 P.3 1062 (2008). After all, anyone who has called an insurance company, major corporation, bank, or any tech support person invariably hears an automated recording such as 'this call may be recorded for quality assurance.' People tune out such recordings and proceed with the call because they have no choice. Ruling that acceptance of such calls is a "meaningful and informed" voluntary consent to the use of these calls for all purposes severely undercuts Washington's well developed constitutional law of consent.

Although Dere was once an inmate and a current codefendant, he was as free as any defendant's mother who has no way to talk to her son without being tape recorded. We don't think the Supreme Court ruled or intended to include *Modica's* mothers' words as a potential source of incriminating evidence against her. To be sure, by pressing number "1," the recipient of a jail call is not voluntarily and knowingly consenting to a wholesale search of their end of the conversation for information incriminating them in matters irrelevant to jail security. The search and seizure in this case clearly goes

beyond the scope of any consent created by pressing "1."

The original purported reason for opening the door to recorded jail calls was "because of the need for jail security." *Modica,, supra*, at p. 89. In the eight years since *Modica,* the security rationale has long been totally eclipsed by the State's trolling of these calls for incriminating evidence. Across this State, prosecutors and law enforcement are scrutinizing all jail calls and frequently provide them on the eve of trial. Three of the recorded calls (9/10/14, 9/12/14 and 9/16/14) in Dere's case occurred during the joint trial of Dere and Mohammed Ali before Dere was severed out for a separate trial. 'Security' is a pretext now for the wholesale invasion of privacy, given the overwhelming use of these calls as evidence in criminal cases and not for security purposes.

III. POSSESSION OF RECORDED CALLS BY THE JAIL FOR SECURITY PURPOSES DOES NOT EXCUSE LAW ENFORCEMENT FROM SEEKING COURT REVIEW.

The State argues that there is no authority to support our argument that there should have been some judicial review before the prosecutor could obtain the recordings from the jail as to Dere, the non-inmate. As was argued in the trial court, RP 618, the "warrantless seizure" and "privacy violation" are implicated by use of these tapes against the free speaker. The wholesale examination

of incarcerated defendants' conversations by the police and prosecution and their subsequent seizure and use at trial against non-inmates without any neutral magistrate involved is a body blow to the greater protections that article 1 § 7 provides. To be sure, the federal case law, including *United States v. Willoughby*, 860 F.2d 15 (2nd Cir. 1988) does not purport to interpret Washington's Constitution.

Rather, Washington Courts interpret article 1 § 7 more protectively than the federal courts interpret the Fourth Amendment. *State v. Patton*, 167 Wn.2d 379, 391, 219 P.3d 651(2009)(narrowing *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 1718-19, 173 L. Ed. 2d 485 (2009) by holding a search incident to arrest must involve either a safety risk or an immediate risk that evidence of the crime of arrest could be concealed or destroyed); *State v. Brock*, 184 Wn.2d 148, 153, 355 P.3d 1118 (2015)("Article I, section 7 of the Washington State Constitution provides for broad privacy protections for individuals and generally prohibits unreasonable police invasions into personal affairs.")

Ironically in arguing that no warrant was necessary, the State cited

State v. Puapuaga, 164 Wn.2d 515, 192 P.3d 360 (2008). There, Western State Hospital staff found incriminating evidence among the defendant's personal items, while he was there on a competency evaluation. Once alerted to that, the prosecutor obtained *ex parte* authority to seize the property, similar to obtaining a search warrant. Here, as in many cases, the jail phone calls, which are ostensibly recorded for security purposes, have devolved into a fertile source of incriminating evidence for prosecution and police. All they have to do is request any and all calls of a particular defendant to fish for evidence—not for security purposes but to improve their case—without ever bothering to make an *ex parte* application showing need or relevance. RP 1534. Apparently the jail can also do a search based on "a specific phone number." RP 1534. In other words, without further ado, police and prosecutors can structure the search around the recipient's phone number.

The State also cited *State v. Cheatam*, 150 Wn.2d 626, 81 P.3d 830 (2003), where the defendant was booked in jail and had his personal effects, including his shoes, taken from him, inventoried, and stored in the jail's property room. Although the Supreme Court

held that an arrestee has no reasonable expectation of privacy in personal items once they have been viewed by state officials, the actual seizure was valid as an inventory search, an exception to the warrant requirement. Dere's case diverges from *Cheatam* on several points. One is that the recordings were used against someone whose conversation was not seized via legitimate exception to the warrant requirement. Rather, Dere's end of the conversation was seized during a massive evidentiary examination of all the jail calls of the incarcerated defendant. Secondly, Dere was not the arrestee like Cheatam was. And third, the physical objects seized from Cheatam are different from the content of a conversation.

So doesn't Dere retain the same right to privacy under article 1 § 7 as any Washingtonian? The State seems to think that since *State v. Archie*, 148 Wn. App. 198, 199 P.3d 1005 (2009) rejected an article 1 § 7 claim by an inmate, Dere is in the same boat if he talks to an inmate. That is an extension of the law not contemplated by the logic of *Archie* or any other case. Since the cases all analyze the balance of privacy with "institutional security and preserving internal order and discipline," *Archie* at p. 204, it has to be different for a

non-inmate.

IV THE WARRANTLESS SEARCH AND SEIZURE OF THE JAIL CALLS WAS NOT REASONABLE UNDER THE FOURTH AMENDMENT.

The Fourth Amendment, as currently interpreted, no longer provides cover for these unreasonable wholesale searches. Normally searches undertaken by law enforcement officials to discover evidence of criminal wrongdoing require judicial review. *Riley v. California*, 573 U.S. ___, 134 S. Ct. 2473, 2482, 189 L. Ed. 2d 430 (2014). Here this was not an inadvertent discovery by jail officials perusing the calls for security purposes, but a search for evidence unrelated to security. This is an important distinction because there must be some balancing of privacy interests v. law enforcement exigencies. As *Riley v. California, supra*, at 2488, observed:

> The fact that an arrestee has diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely. Not every search "is acceptable solely because a person is in custody." Maryland v. King, 569 U. S. ___, ___, 133 S. Ct. 1958, 1979, 186 L. Ed. 2d 1, 30 (2013). To the contrary, when "privacy-related concerns are weighty enough" a "search may require a warrant, notwithstanding the diminished expectations of privacy of the arrestee." *Ibid*.

The privacy interest applies even more to a non-inmate.

For example, in *Illinois v. McArthur*, 531 U.S. 326, 121 S. Ct. 946, 148 L. Ed. 2d 838 (2001) the police had probable cause to believe defendant's home contained unlawful drugs and that the drugs might be destroyed before they could return with a warrant. So they restrained the defendant until a warrant was obtained. The Supreme Court upheld the two hour, warrantless restraint on the defendant. In doing so, it explained that courts must "balance the privacy-related and law enforcement-related concerns to determine if the intrusion was reasonable." *Illinois v. McArthur, supra*, 531 U.S. at, 331.

Here, there was no balancing between the initial justifiable seizure of the jail calls and their later scrutiny for evidence of non-security related crimes. There was not even a two hour delay as in *Illinois v. McArthur* to get a warrant. In fact the wide open availability of these calls is analogous to prohibited exploratory searches during the plain view exception to the warrant requirement. That is, "the "plain view" doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges." *Coolidge v. New*

Hampshire, 403 U.S. 443, 466, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971). Yet that is precisely what happened here. It starts with an officer who has a right to monitor jail calls without a warrant for security purposes. But then after that exercise is done, the volume of recorded calls is turned over to another agency to explore those calls one by one "until something incriminating at last emerges."

In *Arizona v. Hicks*, 480 U.S. 321, 107 S. Ct. 1149, 94 L. Ed. 2d 347 (1987) the police were lawfully present in the defendant's apartment in response to a shooting, and while there, saw potentially stolen electronic equipment. Then an officer moved a turntable to read and record serial numbers that established it was stolen. The Supreme Court held that the minimal movement of the equipment was a search beyond plain view and, without probable cause, the evidence must be suppressed. The doctrine applied there is that a "warrantless search must be 'strictly circumscribed by the exigencies which justify its initiation." *Arizona v. Hicks, supra* , 107 S. Ct. at 1152.

The analogy to plain view holds. The exigency is jail security. Thus any search of those calls must be 'strictly

circumscribed' by security needs. Searches that go beyond the 'exigencies' violate the doctrine of *Arizona v. Hicks.* The search of these recorded jail calls went way beyond security. Notwithstanding the State's argument that "the actual content of the calls recorded does not define the constitutional protection provided," (Respondent's Brief at p. 28) the discovery and use of non-security related content by law enforcement against a free speaker falls squarely within the prohibitions articulated by the Supreme Court.

What is more, although "the content of the calls was already recorded and in the hands of the jail," (Resp.'s Brief at 29) their data was not scrutinized in the same way or as thoroughly as the prosecutor or law enforcement must have to glean incriminating information for Dere's case. That places the search for the incriminating nature of the conversation squarely within the invasive search invalidated in *Riley v. California*, 573 U.S. ___, 134 S. Ct. 2473, 2489, 189 L. Ed. 2d 430 (2014)("Cell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person.") Finally, the validity of the 'consent' to recording and monitoring of the jail calls was originally based on

security needs. That undermines the voluntariness of any consent when the consenter is not fully informed how limitless that consent turns out to be.

V. THE DEFENDANT WAS DENIED AN OPPORTUNITY TO CONFRONT AND CROSS EXAMINE THE WITNESS WHO PURPORTEDLY GOT THE LICENSE PLATE NUMBER OF THE CADILLAC.

There was no testimony at trial from an eyewitness identifying the plate number of the Cadillac that Dere climbed into after his alleged involvement in the robbery. The State agreed that information came from a Mr. Jama, who never appeared in court. RP 428-434, 611. Instead it was cleverly admitted through Officer Medlock who first testified that Abdulkadir described a white or silver Cadillac. RP 1260. And immediately after that description, he testified that Abdulkadir gave him a license number. RP 1260. Although Medlock was not asked for the precise number, it was blatantly obvious that Abdulkadir gave him the correct number. That number was marched in front of the jury in other forms of testimony: Detective Litsjo's testimony that he arrested Dere in a Cadillac with plate number AKE8954, RP 1103-04; and that he was looking for Dere's Cadillac with that plate number, RP 1110; that Dere's

Cadillac was registered with that plate number, Exh. 94, RP 1300; and that a search of a Cadillac with that plate number produced two identification documents in Dere's name. RP1317. There is no other reason Detective Litsjo would be looking for a Cadillac with that plate number but for Abdulkadir's alleged identification of that precise plate.

There was no testimony at trial that the plate number was derived from a search of the records using Zakaria Dere's name. In fact, when the registration of the Cadillac was introduced, this question was asked:

"Q. I want to talk about some of vehicles involved. As part of being a detective, were you aware of a reported description of a vehicle that allegedly fled the scene?

A. Yes.

Q. Have you seen or -- the certified vehicle registration for a silver Cadillac?

A. Yes, I did." The registration was then introduced. RP 1300. There is no hiding the fact that the entire string of evidence regarding the identification of the Cadillac with plate number AKE8954 related back to the fiction that Abdulkadir himself gave the police the correct

plate number. And yet the witness who allegedly provided that number never had to testify.

This violated Dere's right to confront and cross examine witnesses under the 6th Amendment and article 1 § 22, as was argued in the trial court. RP 439; CP 76. *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004); *State v. Jasper*, 174 Wn.2d 96, 271 P.3d 876 (2012)(introduction of certification records implicates right to confrontation.)

D. CONCLUSION

For the reasons argued above and in our opening brief, this case should be remanded for a new trial due to the violations of the Washington Privacy Act, art. I, § 7, and the Fourth Amendment, the admission of hearsay and the violation of Dere's constitutional right to confront and cross examine the witnesses against him.

DATED this 2nd day of February, 2016.

Respectfully submitted,

_____s/_____
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