

No. 43907-7-II  
Cowlitz Co. Cause No. 11-1-01136-1

**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

**PAUL A. KENT, SR.,**

Appellant.

---

**BRIEF OF RESPONDENT**

---

SUSAN I. BAUR  
Prosecuting Attorney  
DAVID PHELAN/WSBA #36637  
Deputy Prosecuting Attorney  
Attorney for Respondent

Office and P. O. Address:  
Hall of Justice  
312 S. W. First Avenue  
Kelso, WA 98626  
Telephone: 360/577-3080

**TABLE OF CONTENTS**

**I. ANSWERS TO ASSIGNMENT OF ERROR..... 1**

**II. STATEMENT OF THE CASE..... 1**

**III. ARGUMENT..... 1**

**A. THE TRIAL COURT PROPERLY ADMITTED THE AUDIO WIRE RECORDING..... 1**

**B. THE TRIAL COURT PROPERLY DENIED THE AFFIRMATIVE DEFENSE INSTRUCTION FOR THE ENHANCEMENT..... 4**

**C. THE STATE CONCEDES THE SCRIVENER’S ERROR IN THE JUDGMENT AND SENTENCE ..... 6**

**IV. CONCLUSION ..... 6**

**APPENDIX..... 8**

## TABLE OF AUTHORITIES

### Cases

<i>State v. Braham</i> , 67 Wn.App. 930, 841 P.2d 785 (1992) .....	4
<i>State v. Harvill</i> , 169 Wn.2d 254, 234 P.3d 1166 (2010).....	5
<i>State v. Jimenez</i> , 128 Wn.2d 720, 911 P.2d 1337 (1996) .....	3
<i>State v. Smith</i> , 85 Wn.App. 381, 932 P.2d 717 (1997), <i>review denied</i> 132 Wn.2d 1010, 940 P.2d 655 (1997).....	3, 4

### Statutes

RCW 9.73.230 .....	1, 3, 7
--------------------	---------

## **I. ANSWERS TO ASSIGNMENT OF ERROR**

1. The trial court properly allowed the admission of the audio wire, and even if the admission were erroneous, any such error was harmless.
2. The trial court properly refused to instruct on the affirmative defense regarding the school bus stop enhancement.
3. The State concedes the scrivener's error on the judgment and sentence.

## **II. STATEMENT OF THE CASE**

The Respondent generally accepts the Appellant's recitation of the facts.

## **III. ARGUMENT**

### **A. THE TRIAL COURT PROPERLY ADMITTED THE AUDIO WIRE RECORDING**

The trial court properly admitted the wire recording. Audio recordings of suspected drug transactions are authorized under RCW 9.73.230. The Appellant focuses specifically on RCW 9.73.230(3), which authorizes the interception of communications from persons not named in the authorization if "the persons are brought into the conversation or transaction by the non-consenting party..." In this case, the Appellant was brought into the conversation by Roger Hendrickson, the identified target of the intercept authorization. RP 12. Ms. Cole, the confidential informant, asks Hendrickson where she can get some drugs and Hendrickson directs her to Paul Kent. RP 171. This amounts to Mr. Hendrickson, the target of the investigation bringing the Appellant into the transaction, by a plain reading of the statutory language.

Hendrickson brought the Appellant into the conversation. Cole asked Hendrickson for drugs and he directed her to the appellant. Based on Hendrickson's direction, Cole called the appellant, who then came to Hendrickson's house where he was recorded. He left to get drugs and then came back, delivering drugs to both Hendrickson and Cole. This is a classic example of a middle-man drug transaction and the proximate cause of Kent, who lived in a different location (RP 172), was Hendrickson telling Cole that he would have drugs. There is no need to invoke the rule of lenity, because a plain reading of the statute indicates that where someone is brought into the conversation by the targeted non-consenting party, their voice may be recorded. Nor is it appropriate to invoke the rule of lenity to resolve what is essentially a factual issue, i.e. whether not the non-consenting party brought the third party into the transaction. The audio recording in this case took place in the targeted non-consenting party's home and the appellant was present in the home because the targeted non-consenting party directed the State's informant to him. Hendrickson brought the appellant into the conversation and the audio wire was properly admitted.

Even if the trial court improperly admitted the audio recording, any error was harmless. Admission of the recording at trial, if such admission was erroneous, was not constitutional in magnitude. *State v. Smith*, 85 Wn.App. 381, 932 P.2d 717 (1997), *review denied* 132 Wn.2d 1010, 940 P.2d 655 (1997). Where law enforcement officers made a "genuine effort

to comply with the privacy act and intercept a private conversation pursuant to an RCW 9.73.230 authorization, the admissibility of any information obtained is governed by the specific provisions of RCW 9.73.230(8).” *State v. Jimenez*, 128 Wn.2d 720, 726, 911 P.2d 1337 (1996). In this case, there was NO defect in the authorization, only questions regarding issues that arose subsequent to the informant’s contact with the non-consenting party. Thus, there is no issue with compliance with the statute, since nothing in the record indicates the police officers intended to exceed the scope of their authorization. That puts this case in a posture similar to *Smith*, where the underlying evidence was still admissible, even though the wire recordings themselves were not.

In *Smith*, the trial denied the appellant’s motion to suppress wire recordings because they lacked specificity regarding the location of the prospective transaction. 85 Wn.App. at 386, 932 P.2d 717. Following the trial court’s denial of the motion, the appellant stipulated to facts and a judge found him guilty of two counts of delivery of a controlled substance. *Id.* Ultimately, the wire recordings were suppressed and the court turned to the question of whether the error was harmless. *Id.* at 390. The court in that case considered whether or not, within reasonable probabilities, the outcome of the trial would have been materially affected if the error had not occurred. *Id.* at 391, citing *State v. Braham*, 67 Wn.App. 930, 939, 841 P.2d 785 (1992).

Applying that analysis to the case at the bar, it is clear any error would have been harmless. At trial, detectives testified about seeing Kent come and go from the apartment, consistent with Cole's description of the event. Cole herself testified that it was the appellant that had sold her the narcotics. The audio recording did nothing more than add additional corroboration to Ms. Cole's testimony. Were Ms. Cole not to have testified, the situation would be different, but since the actual witness testified and her testimony was consistent with her previous statements and the testimony of the detectives, there is a reasonable probability that the outcome would have been no different had the audio recordings not been used. This court should affirm the trial court's decision regarding the recordings, or, in the alternative, find any error harmless and affirm the appellant's conviction.

**B. THE TRIAL COURT PROPERLY DENIED THE AFFIRMATIVE DEFENSE INSTRUCTION FOR THE ENHANCEMENT**

The trial court properly denied the defense request for the instruction regarding the affirmative defense to the school bus stop enhancement. Where, as in this case, the trial court denies the request for an affirmative defense instruction for lack of evidentiary support, the trial court's ruling is reviewed for abuse of discretion. *State v. Harvill*, 169 Wn.2d 254, 259 (2010). The trial court did not abuse its discretion and the conviction should be affirmed.

Based on the evidence presented, the defense could not meet the necessary burden of showing a preponderance of the evidence that the conduct occurred entirely within a private residence. For the first transaction, the evidence showed that Roger Hendrickson did not have any drugs and that the appellant was told to get the drugs from Leseburg, another resident of the Columbia Trailer Court. RP 156. Cole even pointed out which of the trailers belonged to Leseburg. RP 156. The evidence presented was that Kent took the money, left the trailer, and then came back with the drugs. RP 156. Based on that evidence, there is no possible interpretation that suggests the transaction occurred entirely within the confines of a private residence. Appellant had to leave the residence to get the drugs. No alternative evidence was presented, and certainly no evidence that supported any other theory of the case. Without additional evidence, the appellant could not have met the burden of preponderance of the evidence that would have warranted the affirmative defense.

For the second transaction, the same arguments apply. The evidence adduced at trial shows that the drugs were NOT in the trailer at the beginning of the transaction and that, due to the actions of the appellant, they were then brought to the trailer. For the second transaction the evidence is even more clear because the appellant was NOT in the trailer when the informant arrived, meaning that he would have had to have brought the drugs with him to the trailer. There is no

alternative scenario that was supported by the evidence. The trial court did not abuse its discretion in finding that there was no evidence to support the affirmative defense and the appellant's conviction should be affirmed.

**C. THE STATE CONCEDES THE SCRIVENER'S ERROR IN THE JUDGMENT AND SENTENCE**

**IV. CONCLUSION**

The trial court properly admitted the wire recording evidence. The trial court correctly found that the non-consenting party, Roger Hendrickson, brought the appellant into the transaction, so that the wire recording was then admissible under RCW 9.73.230(8). Even if the wire recording was not admissible, any error was harmless because the informant, Jeannie Cole, testified, along with the detectives. The outcome of the trial would have been no different.

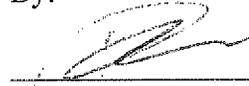
The trial court also properly denied the request for the "entirely within the residence" affirmative defense to the school bus stop enhancement. The evidence as admitted at trial did not support any interpretation that even suggested the drugs originated in the trailer. The only theory supported by any evidence for either transaction was that the appellant brought the drugs to the trailer. The trial court properly denied the appellant's request for the affirmative defense.

The State concedes scrivener's error on the judgment and sentence.

Respectfully submitted this 9<sup>th</sup> day of April, 2013.

SUSAN I. BAUR  
Prosecuting Attorney

By:



---

DAVID L. PHELAN/WSBA # 36637  
Deputy Prosecuting Attorney  
Representing Respondent

## APPENDIX

### RCW 9.73.230

#### **Intercepting, transmitting, or recording conversations concerning controlled substances or commercial sexual abuse of a minor — Conditions — Written reports required — Judicial review — Notice — Admissibility — Penalties.**

(1) As part of a bona fide criminal investigation, the chief law enforcement officer of a law enforcement agency or his or her designee above the rank of first line supervisor may authorize the interception, transmission, or recording of a conversation or communication by officers under the following circumstances:

(a) At least one party to the conversation or communication has consented to the interception, transmission, or recording;

(b) Probable cause exists to believe that the conversation or communication involves:

(i) The unlawful manufacture, delivery, sale, or possession with intent to manufacture, deliver, or sell, controlled substances as defined in chapter 69.50 RCW, or legend drugs as defined in chapter 69.41 RCW, or imitation controlled substances as defined in chapter 69.52 RCW; or

(ii) A party engaging in the commercial sexual abuse of a minor under RCW 9.68A.100, or promoting commercial sexual abuse of a minor under RCW 9.68A.101, or promoting travel for commercial sexual abuse of a minor under RCW 9.68A.102; and

(c) A written report has been completed as required by subsection (2) of this section.

(2) The agency's chief officer or designee authorizing an interception, transmission, or recording under subsection (1) of this section, shall prepare and sign a written report at the time of authorization indicating:

(a) The circumstances that meet the requirements of subsection (1) of this section;

(b) The names of the authorizing and consenting parties, except that in those cases where the consenting party is a confidential informant, the name of the confidential informant need not be divulged;

(c) The names of the officers authorized to intercept, transmit, and record the conversation or communication;

(d) The identity of the particular person or persons, if known, who may have committed or may commit the offense;

(e) The details of the particular offense or offenses that may have been or may be committed and the expected date, location, and approximate time of the conversation or communication; and

(f) Whether there was an attempt to obtain authorization pursuant to RCW 9.73.090(2) and, if there was such an attempt, the outcome of the attempt.

(3) An authorization under this section is valid in all jurisdictions within Washington state and for the interception of communications from additional persons if the persons are brought into the conversation or transaction by the nonconsenting party or if the

nonconsenting party or such additional persons cause or invite the consenting party to enter another jurisdiction.

(4) The recording of any conversation or communication under this section shall be done in such a manner that protects the recording from editing or other alterations.

(5) An authorization made under this section is valid for no more than twenty-four hours from the time it is signed by the authorizing officer, and each authorization shall independently meet all of the requirements of this section. The authorizing officer shall sign the written report required under subsection (2) of this section, certifying the exact date and time of his or her signature. An authorization under this section may be extended not more than twice for an additional consecutive twenty-four hour period based upon the same probable cause regarding the same suspected transaction. Each such extension shall be signed by the authorizing officer.

(6) Within fifteen days after the signing of an authorization that results in any interception, transmission, or recording of a conversation or communication pursuant to this section, the law enforcement agency which made the interception, transmission, or recording shall submit a report including the original authorization under subsection (2) of this section to a judge of a court having jurisdiction which report shall identify (a) the persons, including the consenting party, who participated in the conversation, and (b) the date, location, and approximate time of the conversation.

In those cases where the consenting party is a confidential informant, the name of the confidential informant need not be divulged.

A monthly report shall be filed by the law enforcement agency with the administrator for the courts indicating the number of authorizations granted, the date and time of each authorization, interceptions made, arrests resulting from an interception, and subsequent invalidations.

(7)(a) Within two judicial days of receipt of a report under subsection (6) of this section, the court shall make an ex parte review of the authorization and shall make a determination whether the requirements of subsection (1) of this section were met. Evidence obtained as a result of the interception, transmission, or recording need not be submitted to the court. If the court determines that any of the requirements of subsection (1) of this section were not met, the court shall order that any recording and any copies or transcriptions of the conversation or communication be destroyed. Destruction of recordings, copies, or transcriptions shall be stayed pending any appeal of a finding that the requirements of subsection (1) of this section were not met.

(b) Absent a continuation under (c) of this subsection, six months following a determination under (a) of this subsection that probable cause did not exist, the court shall cause a notice to be mailed to the last known address of any nonconsenting party to the conversation or communication that was the subject of the authorization. The notice shall indicate the date, time, and place of any interception, transmission, or recording made pursuant to the authorization. The notice shall also identify the agency that sought the authorization and shall indicate that a review under (a) of this subsection resulted in a determination that the authorization was made in violation of this section provided that, if the confidential informant was a minor at the time of the recording or an alleged victim of commercial child sexual abuse under RCW 9.68A.100 through 9.68A.102 or 9[A].40.100, no such notice shall be given.

(c) An authorizing agency may obtain six-month extensions to the notice requirement of (b) of this subsection in cases of active, ongoing criminal investigations that might be jeopardized by sending the notice.

(8) In any subsequent judicial proceeding, evidence obtained through the interception or recording of a conversation or communication pursuant to this section shall be admissible only if:

(a) The court finds that the requirements of subsection (1) of this section were met and

the evidence is used in prosecuting an offense listed in subsection (1)(b) of this section; or

(b) The evidence is admitted with the permission of the person whose communication or conversation was intercepted, transmitted, or recorded; or

(c) The evidence is admitted in a prosecution for a "serious violent offense" as defined in RCW 9.94A.030 in which a party who consented to the interception, transmission, or recording was a victim of the offense; or

(d) The evidence is admitted in a civil suit for personal injury or wrongful death arising out of the same incident, in which a party who consented to the interception, transmission, or recording was a victim of a serious violent offense as defined in RCW 9.94A.030.

Nothing in this subsection bars the admission of testimony of a party or eyewitness to the intercepted, transmitted, or recorded conversation or communication when that testimony is unaided by information obtained solely by violation of RCW 9.73.030.

(9) Any determination of invalidity of an authorization under this section shall be reported by the court to the administrative office of the courts.

(10) Any person who intentionally intercepts, transmits, or records or who intentionally authorizes the interception, transmission, or recording of a conversation or communication in violation of this section, is guilty of a class C felony punishable according to chapter 9A.20 RCW.

(11) An authorizing agency is liable for twenty-five thousand dollars in exemplary damages, in addition to any other damages authorized by this chapter or by other law, to a person whose conversation or communication was intercepted, transmitted, or recorded pursuant to an authorization under this section if:

(a) In a review under subsection (7) of this section, or in a suppression of evidence proceeding, it has been determined that the authorization was made without the probable cause required by subsection (1)(b) of this section; and

(b) The authorization was also made without a reasonable suspicion that the conversation or communication would involve the unlawful acts identified in subsection (1)(b) of this section.

**CERTIFICATE OF SERVICE**

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

Ms. Catherine E. Glinski  
Attorney at Law  
P.O. Box 761  
Manchester, WA 98353-0761  
cathyglinski@wavecable.com

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on April 9<sup>th</sup>, 2013.

  
Michelle Sasser  
Michelle Sasser

# COWLITZ COUNTY PROSECUTOR

**April 09, 2013 - 4:55 PM**

## Transmittal Letter

Document Uploaded: 439077-Respondent's Brief.pdf

Case Name: State of Washington v. Paul A. Kent, Sr.

Court of Appeals Case Number: 43907-7

**Is this a Personal Restraint Petition?** Yes  No

### The document being Filed is:

Designation of Clerk's Papers                      Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_

Answer/Reply to Motion: \_\_\_\_

Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: \_\_\_\_\_

### Comments:

No Comments were entered.

Sender Name: Michelle Sasser - Email: [sasserm@co.cowlitz.wa.us](mailto:sasserm@co.cowlitz.wa.us)

A copy of this document has been emailed to the following addresses:  
[cathyglinski@wavecable.com](mailto:cathyglinski@wavecable.com)