

No. 45531-5-II
45236-6-II
(Consolidated Case)

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Appellant,

vs.

MICHAEL DUANE ELMORE,

Respondent.

On Appeal from the Pierce County Superior Court
Cause No. 13-1-00877-9
The Honorable Ronald Culpepper, Judge

BRIEF OF RESPONDENT MICHAEL DUANE ELMORE

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I. ASSIGNMENTS OF ERROR

1. The trial court erred when it entered finding of fact number 14 because it is not supported by substantial evidence.
2. The trial court erred when it entered finding of fact number 17 because it is not supported by substantial evidence.

II. ISSUES PRESENTED

1. Are the trial court's findings of fact number 14 and 17 supported by substantial evidence and if not, should they be disregarded on appeal? (Respondent's Assignments of Error 1 & 2)
2. Were Nicholas Woody and Ryan O'Brien "inadvertently present" while recording devices were activated, when Woody and undercover detectives had agreed to a second meeting and where the undercover detectives were expecting Woody to arrive for the second meeting within 30 minutes? (Appellant's Assignment of Error 1)
3. Does a judicial wiretap order that allows for the recording of conversations between undercover detectives and specifically identified and named suspects and "those inadvertently present," allow for the recording of any individual who contacts the undercover detectives during the effective

period of the wiretap order? (Appellant's Assignment of Error

1)

4. Did the trial court correctly rule that undercover detectives violated the Privacy Act when they recorded a conversation with Nicholas Woody and Ryan O'Brien, and that any evidence gathered during and as a result of that conversation must be suppressed? (Appellant's Assignments of Error 2 & 3)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Pursuant to RAP 10.3(b), Respondent Michael Elmore accepts the recitation of the procedural history set forth in the State's Opening Brief of Appellant at 2-4.

B. SUBSTANTIVE FACTS

Except for the State's reliance on certain findings of fact challenged by Respondent Michael Elmore (as discussed below), Elmore accepts the recitation of the facts set forth in the State's Opening Brief of Appellant at 4-9. RAP 10.3(b).

In addition, Detective Kenneth Viehmann testified that officers obtained and executed a search warrant at a specific residence as a result of information gathered during initial interactions with Nicholas

Woody and Ryan O'Brien. (10/30/13 RP 29, 31)¹ One of the individuals arrested during the execution of the warrant implicated Elmore as a participant in one of the auto theft incidents. (10/30/13 RP 32, 34-35) Elmore was then contacted, arrested, questioned, and eventually charged in connection with the theft and sale of stolen automobiles. (10/31/13 RP 29, 30, 44, 45; CP 5-6, 7-10)

After the trial court granted the motion to suppress, the prosecutor informed the court that no evidence against Elmore had been gathered independent of the improper recordings. (11/04/13 RP 21) Thus, without the evidence gathered as a direct result of the improperly recorded conversation, there is no evidence tying Elmore to the crimes. (11/04/13 RP 21)

IV. ARGUMENT & AUTHORITIES

A. REVIEW OF TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

The State does not assign error to any of the trial court's findings of fact. Unchallenged findings of fact are verities on appeal. RAP 10.3(g); State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

Elmore challenges the trial court's findings of fact 14 and 17. The reviewing court determines whether substantial evidence

¹ The transcript will be referred to by the date of the proceeding.

supports the trial court's challenged findings of fact. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999) (citing Hill, 123 Wn.2d at 647). "A trial court's erroneous determination of facts, unsupported by substantial evidence, will not be binding on appeal." Hill, 123 Wn.2d at 647.

In this case, the trial court entered the following findings of fact:

14. No specific time was agreed upon for WOODY's return and WOODY then left the shop;
- ...
17. On January 22, 2013, just minutes before HARRIE CHAN's expected arrival, WOODY again showed up unannounced at the "Shiny Penny" undercover shop[.]

(CP 60) These findings are contrary to the testimony given by Detective Shaun Darby, who stated that he and Woody agreed that Woody would come back to the shop with the stolen cars, and that Woody said he would be back in 30 minutes. (10/31/13 RP 28) Detective Darby also testified that Woody's return was a "planned meet" and that he knew Woody could be arriving at any time. (10/31/13 RP 47) Therefore, a specific timeframe for Woody's return was discussed and agreed upon, and Woody's return was not "unannounced." Because Detective Darby's testimony directly contradicts these two findings of fact, they are not binding on appeal.

The trial court's conclusions of law are reviewed *de novo*. Mendez, 137 Wn.2d at 214 (citing State v. Johnson, 128 Wn.2d 431, 443, 909 P.2d 293 (1996)).

B. THE TRIAL COURT CORRECTLY CONCLUDED THAT THE RECORDING OF NICHOLAS WOODY AND RYAN O'BRIEN VIOLATED THE WASHINGTON PRIVACY ACT.

The Washington Privacy Act prohibits the recording of any private conversation without the consent of all parties to the conversation. RCW 9.73.030(1)(b).² But the statute does allow electronic eavesdropping upon oral communications or conversations when authorized by the court, and with the consent of one party to the conversation. State v. O'Neill, 103 Wn.2d 853, 863, 700 P.2d 711 (1985). Specifically, RCW 9.73.090(2) provides:

It shall not be unlawful for a law enforcement officer acting in the performance of the officer's official duties to intercept, record, or disclose an oral communication or conversation where the officer is a party to the communication ... *Provided*, That prior to the interception, transmission, or recording the officer shall obtain written or telephonic authorization from a judge

² The statute provides, in relevant part:

(1) Except as otherwise provided in this chapter, it shall be unlawful for any individual, partnership, corporation, association, or the state of Washington, its agencies, and political subdivisions to intercept, or record any:

...

(b) Private conversation, by any device electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or actuated without first obtaining the consent of all the persons engaged in the conversation.

RCW 9.73.030.

or magistrate, who shall approve the interception, recording, or disclosure of communications or conversations with a nonconsenting party ... if there is probable cause to believe that the nonconsenting party has committed, is engaged in, or is about to commit a felony[.]

In this case, the undercover officers obtained judicial authorization to:

[i]ntercept, transmit, and record by any device or instrument the communication and conversations between Detective Darby, Ducommun, Lofland, and Samnang Reuy, Harrie Oh Chan; and those inadvertently present, originating from an active undercover/covert auto theft investigation/operation in the City of Tacoma County of Pierce, Washington.

(Exh. 4)

The State argues that Woody and O'Brien made themselves "inadvertently present," and therefore the recording of the conversation between the officers and the two men was authorized under the judicial warrant and Privacy Act. (Opening Brf. of Appellant at 14-16)

The State is incorrect. Finding of fact 10, which the State does not challenge, states that the "undercover officers made an appointment with WOODY to return with the vehicles[.]" (CP 59, capitalization in original). At the hearing, Detective Darby testified that Woody's first visit was unexpected (and not recorded), but that

he and Woody “agreed that he could bring the cars that he wanted to sell or wished to sell down to the shop to take a look at. [Woody] stated that he would be back in approximately 30 minutes with the vehicles[.]” (10/31/13 RP 22, 28, 47) Detective Darby acknowledged that when Woody returned, it was a “planned meet” and Woody’s return was expected. (10/31/13 RP 47)

It was therefore entirely foreseeable that Woody’s return could overlap with Harrie Chan’s presence at the shop. Accordingly, Woody’s and O’Brien’s presence during the period of time when the recording device was activated was not “inadvertent” because it was both expected and agreed-upon.

Furthermore, a common sense reading of the judicial wiretap order in this case leads to the conclusion that the language “those inadvertently present” means those inadvertently present during conversations between Detectives and Chan and Samnang Reuy. But the State seems to be promoting an interpretation of the “those inadvertently present” language as authorizing the recording of conversations with any person, known or unknown, who arrives without an appointment during the seven days when the wiretap order was in effect. But such a broad interpretation is not supported by the Privacy Act statute or case law.

Under the statute, in order to obtain judicial authorization, the requesting party must provide a sworn, written statement containing:

detailed information, which includes . . . [a] particular statement of the facts relied upon by the applicant to justify his belief that an authorization should be issued, including . . . [t]he identity of the particular person, if known, committing the offense and whose communications or conversations are to be recorded[.]

RCW 9.73.130(3). This section has been interpreted as requiring less particularity than is necessary under constitutional probable cause principles. “That is not to say, however, that a judge may authorize a ‘roving commission’ to randomly record conversations with any nonconsenting party. The Act contains sufficient safeguards to protect against such unfettered discretion in the hands of the recording party and against the issuance of authorizations to record in the absence of proper circumstances.” State v. D.J.W., 76 Wn. App. 135, 145, 882 P.2d 1199 (1994).

To comply with the purpose and limitations of the Privacy Act, the judicial authorization order should not be read as a blanket authorization to record anyone who entered the undercover auto shop. Rather, the words “those inadvertently present” must be read to allow only recording of conversations with persons inadvertently present during conversations with Chan and Reuy.

Accordingly, the trial court was correct when it ruled that the judicial authorization order did not permit the detectives to record their conversation with Woody and O'Brien, and that the recording violated the terms of the Privacy Act. (CP 63; 11/04/13 RP 18-19) The trial court also correctly ruled that any information gathered as a result of that conversation was tainted and must be suppressed. (CP 63; 11/04/13 RP 18-19)

That is because RCW 9.73.050 prohibits the admission of any information obtained in violation of RCW 9.73.030.³ This prohibition includes all information obtained during the time the illegal recording took place, whether or not that information was obtained with the aid of the recording. State v. Salinas, 121 Wn.2d 689, 697, 853 P.2d 439 (1993); State v. Fjermestad, 114 Wn.2d 828, 836, 791 P.2d 897 (1990) (“Since the police acted in violation of RCW 9.73 we must exclude any information obtained by them while they were violating the statute.”).

The legislature’s primary purpose in enacting these statutes was to protect the privacy of individuals by prohibiting public dissemination of illegally obtained information. State v. Cramer, 35

³ “Any information obtained in violation of RCW 9.73.030 . . . shall be inadmissible in any civil or criminal case in all courts of general or limited jurisdiction in this state[.]” RCW 9.73.050.

Wn. App. 462, 464-65, 667 P.2d 143 (1983) (citing State v. Wanrow, 88 Wn.2d 221, 233, 559 P.2d 548 (1977)). “To further this purpose, exclusion of both the illegal recording and testimony as to its contents is required.” Cramer, 35 Wn. App. at 465 (citing State v. Williams, 94 Wn.2d 531, 543, 617 P.2d 1012 (1980)).⁴ The Act does not make exception for officers acting in good faith or who inadvertently violate the statute. RCW 9.73.050.

Accordingly, the trial court correctly concluded that there is no “good faith” exception that would excuse the improper recording of the conversation and render the recording admissible in this case. (11/04/13 RP 18; CP 63) And the trial court correctly ruled that any information gathered during and as a result of the illegally recorded conversation must be suppressed. (11/04/13 RP 18-19; CP 63)

V. CONCLUSION

The language in the judicial authorization order allowing detectives to record conversations with “those inadvertently present” permits the recording of conversations with “those inadvertently

⁴ “The statute precludes the use of illegally obtained information ‘in any civil or criminal case’-whether it is the criminal prosecution of the participant in the conversation, or the prosecution of his codefendant.” Williams, 94 Wn. 2d at 545. As a result, Elmore has automatic standing to object to evidence obtained in violation of Washington’s Privacy Act, including conversations to which he was not a party. State v. Porter, 98 Wn. App. 631, 634, 990 P.2d 460, 462 (1999); Williams, 94 Wn.2d at 546.

present” during conversations with Chan and Reuy only. It does not allow recording of conversations with anyone inadvertently present at any time during the effective period of the wiretap order. Furthermore, Woody and O’Brien were not “inadvertently present” because Woody’s return to the shop was expected and planned. Therefore, the recording of the conversation between detectives and Woody and O’Brien was not authorized by the judicial order and violated Washington’s Privacy Act. The trial court correctly ruled that any information gathered during and as a result of that recorded conversation must be suppressed.

DATED: May 12, 2014



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CERTIFICATE OF MAILING

I certify that on 05/12/2014, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Michael D. Elmore, DOC#708612, Washington Corrections Center, P.O. Box 900, Shelton, WA 98584.



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