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NO. 51180-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,
Respondent,

v.

ANTHONY PARKER,
Appellant.

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

The Honorable Leila Mills, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by concluding that Parker lacks standing to challenge the initial seizure of Holliday's cell phone on April 4, 2013.

2. The trial court erred by failing to suppress the text messages taken from Holliday's cell phone as the product of an illegal seizure.

3. The trial court erred by failing to suppress the evidence taken from Holliday's cell phone as the warrant authorizing the search of her phone lacked constitutionally required particularity.

Issues Presented on Appeal

1. Did the trial court err by concluding that Parker lacked standing to challenge the initial seizure of Holliday's cell phone when it only analyzed the issue under the doctrine of automatic standing?

2. Did the trial court err by failing to suppress the text messages taken from Holliday's cell phone when they are the product of an illegal seizure?

3. Did the trial court err by finding the search warrant for

Holliday's cell phone sufficient when it lacks particularity as to what evidence is to be seized from the phone?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

A jury convicted Anthony Dewayne Parker of multiple felony counts following a trial in Kitsap County Superior Court. CP 17-19. Parker appealed his conviction and sentence to the Washington State Court of Appeals, and filed a Personal Restraint Petition (PRP) that was consolidated with the direct appeal. CP 20-21. Parker's direct appeal resulted in the judgment and sentence being affirmed. CP 20.

However, the Court of Appeals remanded one claim in Parker's PRP to the trial court for a reference hearing and fact finding on the issue of whether evidence admitted at his trial was the product of an illegal search and seizure of another person's cell phone in light of the Washington Supreme Court's decision in *State v. Hinton*.¹ CP 46-47. The trial court held a reference hearing on January 30, 2017 and presented findings of fact to the Court of Appeals. CP 246-48. The Court of Appeals issued another order on March 31, 2017 directing the trial court to determine the merits of

¹ *State v. Hinton*, 179 Wn.2d 862, 319 P.3d 9 (2014)

Parker's claim and enter conclusions of law pursuant to RAP 16.12. CP 441. The trial court denied Parker relief following the reference hearing. CP 443. Parker filed a timely notice of appeal. CP 445.

2. SUBSTANTIVE FACTS

During 2013, the Bremerton Police Department opened an investigation into Anthony Dewayne Parker. CP 269. During that investigation, detectives identified Johanna Holliday as one of Parker's associates. CP 269-270. On April 4, 2013 detectives detained Holliday after observing her engage in a suspected drug transaction. CP 272-73. During the detention, detectives retrieved Holliday's purse and cell phone from the vehicle she had been riding in. CP 273. Holliday identified the phone as belonging to her and the detective called the number she provided to confirm that it did in fact belong to her. CP 273.

The detectives released Holliday after she agreed to come to an interview the next day and discuss her dealings with Parker. CP 273. Holliday was not arrested for her involvement in the suspected drug transaction. CP 241, 248. Detectives planned to wait until Holliday appeared for the interview to ask for consent to search her phone. CP 241-42. Despite not arresting Holliday or gaining her

consent to keep the phone, detectives maintained possession of her cell phone after releasing her. CP 273.

Holliday did not appear for the interview on April 5 and the detectives sought and acquired a search warrant for the ZTE phone taken from Holliday during the traffic stop on April 4. CP 273; 283-85. Text messages seized as a product of this search warrant were admitted as evidence during Parker's trial. CP 247. These messages were also used as evidence in support of a subsequent search warrant for a second phone seized from Holliday during a sting operation on April 11. CP 291-92. The second warrant was issued on April 23, 2013 and allowed investigators to seize copies of additional text messages between Parker and Holliday that were later admitted at trial. CP 247.

The warrants permitted seizure of everything on both phones.

All information stored on the above-described cellular phone that can be extracted through a forensic examination, or other means including, but not limited to images, videos, contacts, conspirator phone numbers/addresses, text messages, email messages, ledgers, financial transaction information, electronic documents, or any other stored information relating to human trafficking, promoting prostitution and/or prostitution.

CP 349, 351.

C. ARGUMENT

1. THE TRIAL COURT ERRED BY CONCLUDING THAT PARKER LACKED STANDING TO CHALLENGE THE UNLAWFUL SEIZURE OF HOLLIDAY'S PHONE.

The trial court summarily dismissed Parker's arguments regarding his standing to challenge the initial seizure of Holliday's phone in its conclusions of law and only analyzed the issue under the doctrine of automatic standing. CP 442. Conclusions of law are reviewed *de novo*. *In re Cross*, 180 Wn.2d 664, 681, 327 P.3d 660 (2014). Parker need not rely on automatic standing to challenge the seizure at issue in this case. Furthermore, the seizure of Holliday's cell phone was done without the authority of law required under art. I, § 7 of the Washington State Constitution as no warrant was issued for the seizure of her phone and no exception to the warrant requirement applies.

- a. The seizure of Holliday's phone was unlawful as it was not done incident to arrest, pursuant to a warrant or under an exigent circumstance.

Both the Fourth Amendment to the United States Constitution and art. I, § 7 protect Washington citizens from

unreasonable searches and seizures. U.S. Const. Amend. IV; art. I, § 7. Art I, § 7 provides defendants with even greater protections than the Fourth Amendment. *State v. Reeder*, 184 Wn.2d 805, 813-14, 365 P.3d 1243 (2015).

“Under article I, section 7 a search occurs when the government disturbs ‘those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.’” *Hinton*, 179 Wn.2d at 868 (citation omitted). This privacy right protects citizens from governmental intrusion into their private affairs without “the authority of law”. *State v. Chacon Arreola*, 176 Wn.2d 284, 291, 290 P.3d 983 (2012).

The “authority of law” required by art. I, § 7 is a valid warrant unless the state shows that the search or seizure falls within one of the “jealously guarded and carefully drawn exceptions to the warrant requirement.” *State v. Ortega*, 177 Wn.2d 116, 122, 297 P.3d 57 (2013) (police may not arrest, search and seize drugs on a person suspected of committing a misdemeanor outside the officer’s presence); RCW 10.31.100.

“Under article 1, section 7, a lawful custodial arrest is a

constitutionally required prerequisite to any search incident to arrest.” *State v. O’Neill*, 148 Wn.2d 564, 585, 62 P.3d 489 (2003). The arrest provides the “authority of law” required to search or seize under art. I, § 7. *O’Neill*, 148 Wn.2d at 585. To search absent lawful arrest, the state must establish one of the jealously guarded exceptions to the warrant requirement- none of which exist in Parker’s case.

The seizure in this case was unlawful because no lawful arrest preceded the police taking and retaining possession of Holliday’s cell phone, and there were no exigent circumstances. Furthermore, Holliday’s detention was for suspected drug related activity unrelated to a prostitution or trafficking investigation. Police seized Holliday’s cell phone on April 4, 2013 after observing her engage in a suspected drug transaction. CP 272. Detectives found a Percocet pill in Holliday’s purse, but she was not arrested. CP 241.

Even though Holliday was not arrested, police legally retained possession of the cell phone after releasing her. CP 273. There is no evidence in the record that Holliday consented to the police keeping her phone. In fact, the detective specifically noted

that he was hoping to secure Holliday's consent to search the phone *the following day* at the meeting he set with her. CP 273. Finally, the record does not contain any evidence that a warrant was issued for the seizure of the cell phone, and it was only after Holliday failed to appear for an interview on April 5 that detectives sought a search warrant.

Furthermore, contrary to law, the evidence acquired from the warrantless search of the first phone was used by police to establish probable cause for a subsequent warrant issued on April 23, 2013 for Holiday's second cell phone. CP 248. Since Holliday was never arrested, the police did not have any lawful authority to search or seize her phone. Accordingly, anything seized from the phone is the fruit of an unlawful search which must be suppressed. *Ortega*, 177 Wn.2d at 121-22; *State v. Parker*, 139 Wn.2d 486, 497, 987 P.2d 73 (1999).

- b. Parker has standing to challenge the seizure of Holliday's cell phone as it contained private text messages he sent to her.

A defendant may challenge a search or seizure if he or she has a privacy interest in the area searched or the property seized. *State v. Goucher*, 124 Wn.2d 778, 787, 881 P.2d 210 (1994).

Washington citizens have a privacy interest in their text message conversations. *Hinton*, 179 Wn.2d at 877. This privacy interest remains even after the text messages are transmitted to another device the sender does not control. *Hinton*, 179 Wn.2d at 873. “[T]he mere fact that an individual shares information with another party and does not control the area from which that information is accessed does not place it outside the realm of article I, section 7’s protection.” *Hinton*, 179 Wn.2d at 873.

In the context of this case, Parker has standing to challenge the initial seizure of Holliday’s cell phone because the police seized the text messages in which Parker retained his privacy interest even after they were sent to Holliday. *Id.* “A seizure of property occurs when there is some meaningful interference with an individual’s possessory interests in that property.” *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984).

The seizure was a meaningful interference in Parker’s possessory interest in the text messages when the police seized and searched Holliday’s phone. *Jacobsen*, 466 U.S. at 113; *Hinton*, 179 Wn.2d at 873, 877.

“Given the realities of modern life, the mere fact that an individual shares information with another party and does not control the area from which that information is accessed does not place it outside the realm of article 1, section 7’s protection.” *Hinton*, 179 Wn.2d at 873. In *Hinton*, the police posed as Lee, the cell phone owner, and sent a message to Hinton. Hinton reasonably believed he was replying to his “known contact”. *Hinton*, 179 Wn.2d at 876-77.

Here too, when the police seized Holliday’s phone, the police interfered with Holliday’s possession of the device *and* its contents. Thus, the seizure of the phone also constituted a seizure of those messages Parker retained a privacy interest in under *Hinton*. By seizing Holliday’s phone, the police intruded in an area where Parker had an established privacy interest, therefore he has standing to challenge the illegal seizure of Holliday’s cell phone. *Hinton*, 179 Wn.2d at 869 n. 2; 873-74.

c. Remedy.

Evidence seized illegally must be suppressed under the exclusionary rule. *State v. Gaines*, 154 Wn.2d 711, 716-17, 116 P.3d 993 (2005) (*citing State v. Ladson*, 138 Wn.2d 343, 359, 979

P.2d 833 (1999)). Furthermore, other evidence derived from the illegal search or seizure is subject to suppression under the “fruit of the poisonous tree” doctrine. *Gaines*, 154 Wn.2d 716-17.

In this case, Holliday’s phone was seized illegally on April 4, 2013. Based on this illegal seizure, the police could not use information taken from the phone to search the phone further or to obtain another warrant for a second derived from the illegal search of the first phone. CP 291. Because the initial seizure of the phone was illegal, all of the fruits of that seizure were illegal. This court should vacate Parker’s convictions and dismiss the charges because they are based on evidence that was illegally seized and is fruit of the poisonous tree.

2. THE TRIAL COURT ERRED IN CONCLUDING THAT THE WARRANT AUTHORIZING THE SEIZURE OF TEXT MESSAGES FROM HOLLIDAY’S CELL PHONE WAS SUFFICIENTLY PARTICULAR AS TO THE EVIDENCE TO BE SEIZED.

a. Standard of Review.

“Whether a warrant meets the particularity requirement of the Fourth Amendment is reviewed de novo.” *State v. Temple*, 170 Wn. App. 156, 162, 285 P.3d 149 (2012). “[A] warrant may not be

issued unless probable cause is properly established and the scope of the search is set out with particularity.” *State v. McKee*, ___ Wn. App. ___, 413 P.3d 1049, 1055 (2018) (citing *Kentucky v. King*, 563 U.S. 452, 459, 131 S.Ct. 1849, 179 L.Ed.2d 865 (2011)). A warrant must be sufficiently particular that nothing is left to the discretion of the officer in executing the warrant. *Id.* (citing *Marron v. United States*, 275 U.S. 192, 196, 48 S.Ct. 74, 72 L.Ed.2d 231 (1927)).

“The advent of devices such as cell phones that store vast amounts of personal information makes the particularity requirement of the Fourth Amendment that much more important.” *McKee*, 413 P.3d at 1056. “A warrant that implicates materials protected by the First Amendment requires a heightened degree of particularity.” *McKee*, 413 P.3d at 1056 (citing *State v. Perrone*, 119 Wn.2d 538, 545, 834 P.2d 611 (1992)). “The particularity requirement in such cases must be “accorded the most scrupulous exactitude.” *McKee*, 413 P.3d at 1056 (citing *Stanford v. Texas*, 379 U.S. 476, 483, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965)).

- b. The warrants authorizing the searches of Holliday’s cell phones lack constitutionally required particularity.

In *McKee*, Division One of this Court recently examined

the particularity requirement in regards to warrants authorizing the search of cell phones. In *McKee*, police were seeking evidence related to the crimes of sexual exploitation of a minor and dealing in depictions of minors engaged in sexually explicit conduct on the defendant's cell phone. *McKee*, 413 P.3d at 1053. The warrant listed the crimes being investigated and their accompanying statutes. *McKee*, 413 P.3d at 1053. The warrant then described what evidence was authorized to be seized:

The warrant allowed the police to obtain everything from the cell phone without limitation:

'Images, video, documents, text messages, contacts, audio recordings, call logs, calendars, notes, tasks, data/[I]nternet usage, any and all identifying data, and any other electronic data from the cell phone showing evidence of the above listed crimes.'

McKee, 413 P.3d at 1053. On appeal, *McKee* challenged the warrant on grounds that it lacked particularity. The Court of Appeals agreed and reversed his convictions. *McKee*, 413 P.3d at 1059.

The Court in *McKee* held that the warrant in that case was invalid as "the 'Items Wanted' portion of the warrant was overbroad and allowed the police to search and seize lawful data when the warrant could have been made more particular." *McKee*, 413 P.3d

at 1057. In analyzing the level of particularity required for the warrant to be valid, the Court considered “whether the warrant could have been more specific considering the information known to police officers at the time the warrant was issued.” *McKee*, 413 P.3d at 1058 (*citing Perrone*, 119 Wn.2d at 553). The Court held that warrant was lacking in particularity because it “allowed the police to search general categories of data on the cell phone with no objective standard or guidance to the police executing the warrant.” *McKee*, 413 P.3d at 1058-59.

The warrants in Parker’s case suffer from the same flaws that rendered the warrant in *McKee* invalid. The warrant in this case like the warrant in *McKee*, authorized police to search everything on the cell phone without limitation:

All information stored on the above-described cellular phone that can be extracted through a forensic examination, or other means including, but not limited to images, videos, contacts, conspirator phone numbers/addresses, text messages, email messages, ledgers, financial transaction information, electronic documents, or any other stored information relating to human trafficking, promoting prostitution and/or prostitution.

CP 349, 351. The second search warrant issued on April 23, 2013 contains identical language. CP 361-62.

Indistinguishable to the warrant in *McKee* that lacked sufficient particularity, the warrants in Parker's case too lacked the necessary particularity to authorize a lawful search of Holliday's phones. The warrants fail to identify Parker as the suspect being investigated and authorize the police to seize data completely unrelated to any conversation between Holliday and Parker, including conversations with other individuals.

The scope of the warrant could easily have been limited to only include communications between Holliday and Parker. The failure to do so impermissibly leaves the scope of the warrant up to the discretion of officers. As in *McKee*, the warrants here provide insufficient particularity as to what is to be seized. Although the warrants cite the crimes being investigated, that alone is not sufficient to narrow the warrants to the point the particularity requirement is satisfied. *McKee*, 413 P.3d at 1057 (citing *State v. Besola*, 184 Wn.2d 605, 359 P.3d 799 (2015)).

Furthermore, many of the materials mentioned in the warrants are subject to First Amendment protections such as text messages, email messages, images, and videos. Given that these materials are included in the items to be seized, the state must

satisfy heightened particularity requirements. *McKee*, 413 P.3d at 1056 (citing *Perrone*, 119 Wn.2d at 545). The deficiencies in the warrants outlined above would be insufficient to satisfy the particularity requirement even without heightened scrutiny applied to materials implicating First Amendment rights because the warrant failed to establish any limits on the scope of materials authorized to search on Holliday's phones. *McKee*, 413 P.3d at 1058-59. Both warrants are insufficiently particular and unconstitutional. *McKee*, 413 P.3d at 1059 (quoting *Groh v. Ramirez*, 540 U.S. 551, 559, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004)).

c. Remedy.

When the language of the search warrant leaves to the police discretion regarding the items to be seized, it violates the particularity requirement of the Fourth Amendment. *McKee*, 413 P.3d at 1059. The remedy for an unlawful search without particularity requires suppression because the search violates the particularity requirement of the Fourth Amendment. *Id.*

D. CONCLUSION

Mr. Parker respectfully requests this Court reverse and remand for suppression of the evidence and dismissal of the charges. The initial seizure of Holliday's cell phone on April 4, 2013 was unlawful because it was done without a warrant and was not incident to a lawful arrest. For this reason, any evidence seized from that phone should be fruit of the poisonous tree and admitting it was error. *Hinton*, 179 Wn.2d at 882.

Furthermore, the evidence acquired from that phone was illegally used by police to establish probable cause for a subsequent warrant issued on April 23, 2013 for Holliday's second cell phone. The warrants for both phones were unconstitutionally overbroad in violation of the particularity requirement. For this reason as well, this Court must reverse and remand for suppression of the evidence and dismissal of the charges.

DATED this 7th day of May 2018.

Respectfully submitted,



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I, Lise Ellner, a person over the age of 18 years of age, served the Kitsap County Prosecutor's Office kcpa@co.kitsap.wa.us and Anthony Parker/DOC#776122, Stafford Creek Corrections Center 191 Constantine Way, Aberdeen, WA 98520 a true copy of the document to which this certificate is affixed on May 7, 2018. Service was made by electronically to the prosecutor and Anthony Parker by depositing in the mails of the United States of America, properly stamped and addressed.



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LAW OFFICES OF LISE ELLNER

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