

FILED
Court of Appeals
Division II
State of Washington
9/25/2019 2:59 PM

No. 52142-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

BRYAN EARLE GLANT,

Appellant.

REPLY BRIEF OF APPELLANT

Suzanne Lee Elliott, WSBA # 12634
SUZANNE LEE ELLIOTT LAW
1300 Hoge Building
705 Second Avenue
Seattle, WA 98104
(206) 623-0291
suzanne-elliott@msn.com

Michael D. McKay, WSBA # 7040
Peter A. Talevich, WSBA # 42644
K&L GATES LLP
925 Fourth Avenue, Suite 2900
Seattle, WA 98104
mike.mckay@klgates.com
peter.talevich@klgates.com

Attorneys for Appellant Bryan Earle Glant

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I. INTRODUCTION

In this case, the State used a vague advertisement to lure callers into discussing child sexual abuse. This project, dubbed “Net Nanny,” did not use real children and no missing or exploited children were “rescued.” The State Patrol picked the number of fictional children and their fictional ages in order to maximize the seriousness of the charges and the jail time a defendant would receive if convicted.

The State contends “the record made it clear that the government merely infiltrated the already existing world of child sexual exploitation by putting an ad on Craigslist.” Brief of State of Washington (“State’s Br.”) at 32. While there are persons involved in the sexual exploitation of real children on the internet, the Net Nanny stings were not designed to infiltrate that world. Instead, this was just a virtue testing scheme—that is, a sting designed to test the law-abiding nature of whomever answered the Craigslist posting. The Washington State Patrol [WSP] did not target anyone in particular when conducting this sting. It did not suspect or have knowledge of Glant’s (or anyone else’s) participation in criminal activity. The Net Nanny operations were fishing expeditions designed to ensnare any person who answered a post clearly submitted by an adult woman. Once someone responded, the law enforcement officers (masquerading as the woman who posted) would manipulate the caller into a conversation about child sexual abuse.

Glant has no prior convictions, nor was there any proof he was involved in some wider, undefined “network of child exploitation.” Moreover, it does not appear that a single missing or exploited child was ever rescued in any Net Nanny sting. But for WSP stage-managing the entire operation with funds from a private organization named Operation Underground Railroad [OUR], there is no indication Glant would have ever committed a crime.

Further, in executing this sting, WSP violated both the letter and the spirit of the Washington Privacy Act [WPA]. The State in its brief does not provide any cogent legal reasons why this Court should condone the State’s illegal activity and validate these general forays into the population at large, funded by private parties, to randomly test the law-abiding nature of the citizens of this state.

The Court should reverse Glant’s conviction due to the State’s violations of the WPA and Washington Constitution, and because the State committed outrageous government misconduct. At minimum, the Court should remand for resentencing.

II. ARGUMENT

A. THE STATE'S ARGUMENT THAT WSP WAS NOT REQUIRED TO COMPLY WITH RCW 9.73.230 IS PREMISED ON AN INCORRECT STATEMENT OF FACT AND CONTAINS NO REASONED RESPONSE TO GLANT'S ARGUMENT.

In his Opening Brief, Glant argued that all of his text messages should have been suppressed by the trial court because the police failed to obtain a one-party consent order in violation of RCW 9.73.230(ii). The trial court did not conduct much of a legal analysis. But Glant's briefing included a careful examination of the statute's history and the rules of statutory construction that apply. On the other hand, in response to Glant's argument (and throughout the first 19 pages of the State's brief), the State argues that Glant's text messages were not private. This argument fails because the trial court made both a finding of fact and conclusion of law that the conversations were private. CP 718-719¹; *State v. Townsend*, 147 Wn.2d 666, 673, 57 P.3d 255 (2002) (whether a particular communication is private is generally a question of fact).

RAP 2.4(a) states that if the respondent wishes to seek review of some portion of the trial court's decision, it must file a timely notice of cross-appeal or

¹ Finding of Fact 1: "The defendant engaged in private communications via e-mailing and text messaging with an undercover officer posing as a fictitious mother." CP 718.

Conclusion of Law 2: "The communications of the defendant with the fictitious mother were private communications. CP 719.

demonstrate review is “demanded by the necessities of the case.” Further, RAP 10.3 provides that a party must provide “a separate and concise statement of each error a party contends was made by the trial court.” The State did not cross-appeal and challenge the finding that the conversations were private.

Further, the State failed to assign error to Finding of Fact 2 (or Conclusion of Law 1). The failure to assign error to a finding of fact is likewise fatal to any argument premised on the State’s assertion that the conversations were not private. Moreover, had the State properly assigned error attacking the sufficiency of the evidence to support the trial court’s findings, such an assignment could not be addressed unless it was supported by evidence and citations to the record. *In re Lint*, 135 Wn.2d 518, 532, 957 P.2d 755 (1998).

These failures prevent this Court from accepting any argument based upon this misapprehension of the record. In essence, the State is seeking “affirmative relief” because it is asking this Court to reverse the trial court’s finding of fact. *See In re Doyle*, 93 Wn. App. 120, 127, 966 P.2d 1279 (1998) (a notice of cross appeal “is essential if the respondent seeks affirmative relief as distinguished from arguing additional grounds for review.”). This Court may not do so in this case because the State has not complied with the rules or demonstrated any error on the part of the trial judge.

By making this fatal error, the State fails to meaningfully challenge Glant’s assertion that an authorization under RCW 9.73.230(ii) was required

before intercepting or recording his texts. The State's entire response to Glant's argument regarding RCW 9.73.230 is premised on the State's failure to acknowledge the trial court's finding that the text conversation was private. As a result, the State fails to provide any reasoned rebuttal to Glant's argument that the State Patrol must seek an authorization as soon as it becomes aware that it has probable cause to believe there is a basis to record the conversation.

Moreover, the State has no response to Glant's statutory construction argument which demonstrated that the concept of "implied consent," which was engrafted by inference by the Washington Supreme Court, was limited by the amendment to RCW 9.73.230(ii). *See* Brief of Appellant ("Opening Br.") at 12-18.

It is true that Glant was not ultimately charged with commercial sexual abuse of a child. But during Glant's chat with the fictitious mother, he agreed to assist one of the fictitious children with her soccer. CP 457. He later told the arresting officer that he was going to teach the children soccer "for money and then also I thought that the mom wanted sexual relations with me." CP 18. Thus, WSP had probable cause to believe that Glant was attempting to engage in commercial sexual abuse of a minor. That the prosecutor chose to file more serious charges is irrelevant. WSP's actions can only be judged by what the investigators knew when the fictitious mother began chatting with Glant. Any other conclusion would render the exception meaningless. The prosecutor could

simply choose another charge not referenced in the statute in order to avoid its application. Moreover, during the Thurston County Net Nanny Sting, some of those arrested *were* charged with violations of RCW 9.68A.100-102. CP 145.²

This Court should hold that as soon as WSP believed it had probable cause to believe that Glant was discussing child sexual abuse with any exchange of services, it was required to see an authorization under RCW 9.73.230(ii). Absent that requirement, law enforcement can continue to record unsuspecting citizens without complying with oversight requirements of RCW 9.73.230(ii).

B. THE STATE’S ARGUMENT THAT NO OUTRAGEOUS GOVERNMENT MISCONDUCT TOOK PLACE IS UNCONVINCING.

The State—while doing little to defend WSP’s collaboration with a private organization in carrying out Net Nanny stings—argues that the trial court “meticulously considered the [*State v.*] *Lively* factors” in denying Glant’s motion to dismiss for outrageous government misconduct. State’s Br. at 29. To the contrary, the trial court misapplied *Lively* and erred in denying Glant’s motion.

² The State Patrol was not ignorant of the requirement. In other Net Nanny stings, the State Patrol obtained authorizations under RCW 9.73.230(ii) even though the defendant was ultimately not convicted of a commercial sexual abuse charge. *See, e.g., State v. Racus*, -- Wn. App. --, 433 P.3d 830, 837, *review denied*, 193 Wn.2d 1014, 441 P.3d 828 (2019).

First, the trial court erred in reasoning that dismissal was not appropriate because no Washington court “has applied the doctrine [of outrageous government misconduct] to a funding issue.” *See* State’s Br. at 31. This statement only highlights the unprecedented and disturbing role that a private organization played in funding Net Nanny operations. That no court has had occasion to address this improper type of arrangement makes it no more acceptable and no less outrageous. Here, the record established that 1) the State Patrol used funds from a private organization, OUR, personally solicited by Detective Sargent Carlos Rodriguez [Rodriguez] who directed the funds to his project; 2) Rodriguez and other members of the Patrol benefited from this arrangement because they *personally* received funds dedicated solely to the Thurston County Net Nanny sting including overtime pay;³ 3) OUR received a benefit by publicizing its relationship with WSP (with WSP’s assistance) in order to solicit even more donations (<http://ourrescue.org/blog/human-trafficking-washington-net-nanny/>)⁴; 4) the crime was fabricated by the police who

³ The total bill for this sting was \$32,000 and two officers split \$7,500.00 in overtime pay. CP 428.

⁴ For more examples of the benefits solicited by OUR, see:

- CP 412, an email from OUR to WSP seeking video of a Net Nanny arrest “that we can use.”
- CP 416, an email exchange between WSP and Q13 Fox regarding a story about Net Nanny stings, including Rodriguez’ effort to put the reporter in touch with OUR. He writes that OUR is “a big supporter of what we do. Without their

controlled it from beginning to end, including picking the number and ages of the fictitious children so as to maximize any sentence; and 5) the sting was a virtue-testing exercise and not a targeted investigation into identifiable ongoing criminal conduct. As pointed out in Glant’s Opening Brief, these facts lead to a necessary finding in his favor on all four *Lively* factors. Opening Br. at 25-29.

Second, although the State suggests that WSP did nothing wrong by allowing Rodriguez to solicit and accept donations, it (and the trial court) are wrong as a matter of law. The plain language of RCW 13.60.110(4) allows only the WSP Chief to seek contributions to MECTF, and there exist sound policy reasons for the Legislature to have imposed this requirement. See Opening Br. at 23-24. Neither RCW 43.43.035 (relied on by the State)⁵ nor RCW 70.77.250

support the two operations we did would not have happened.” He noted that OUR personnel would make themselves available for an “in-person interview.”

- CP 421-22, an email from Rodriguez to OUR writing: “For a small amount of time your helped turn my Task Force of two into a task force of 30.” Rodriguez also writes that the success of his task force was “directly related” to OUR’s financial contributions and “there is absolutely no way we would have made the number of arrests without your support.”

⁵ RCW 43.43.035 provides that “The chief of the Washington state patrol is directed to provide security and protection for the governor, the governor’s family, and the lieutenant governor to the extent and in the manner the governor and the chief of the Washington state patrol deem adequate and appropriate. In the same manner the chief of the Washington State patrol is directed to provide security and protection for the governor-elect from the time of the November election.” Nothing in this statute requires, as the State argues, that the WSP chief “personally provide security for the governor.”

(relied on by the trial court but not defended by the State) alter this plain meaning. Rodriguez therefore violated the law in seeking and accepting donations from OUR.

Glant has provided a lengthy argument supporting his claim that WSP engaged in outrageous governmental misconduct during this sting. Opening Br. at 18-30. Because the State has failed to rebut any of those arguments, this Court should hold that the trial court erred when it concluded that there was no outrageous misconduct. Glant's conviction should be reversed with instructions to dismiss the case.

C. THE STATE FAILS TO PROVIDE A REASONED ANALYSIS OF *STATE V. HINTON*⁶ AND *STATE V. RODEN*.⁷

The State's argument on this issue is not clear. On one hand, the State appears to be renewing the argument that the conversations were not private. On the other hand, the State seems to argue that Glant "impliedly consented" to the recording of the conversations. As Glant argues above and in his Opening Brief, both of these arguments fail.

The Washington State Supreme Court has abandoned the notion of "implied consent" in the context of text messages in *Hinton* and *Roden*. The facts

⁶ 179 Wn.2d 862, 319 P.3d 9 (2014).

⁷ 179 Wn.2d 893, 321 P.3d 1183 (2014).

here are on all fours with the facts in *Hinton*. Shawn Hinton sent text messages to a phone that belonged to Daniel Lee. 179 Wn.2d at 865-66. Unbeknownst to Hinton, the phone had been seized by the police. *Id.* at 866. A police detective read text messages on a cell phone police seized from Lee, who had been arrested for possession of heroin. *Id.* The detective read an incoming text message from Hinton, responded to it posing as Lee, and arranged a drug deal. *Id.* The Court wrote:

Unlike a phone call, where a caller hears the recipient's voice and has the opportunity to detect deception, there was no indication that anyone other than Lee possessed the phone, and Hinton reasonably believed he was disclosing information to his known contact. The disclosure of information to a stranger, Detective Sawyer, cannot be considered voluntary.

Id. at 876. Under the State's reasoning, any police officer could use subterfuge to intercept and record any text message from any suspect during an investigation. Most modern telephone technology provides a texting function that can be recorded and retained. Under the trial judge's ruling, anyone who uses a phone with a text function has impliedly consented to government interception of their private emails.

Applying the notion of implied consent to the facts here is clearly not what the drafters of the WPA intended. The statute contains a specific provision for one-party consent. The statute provides a mechanism for law enforcement to obtain authorization for one-party consent if there is probable cause to believe

that the nonconsenting party has committed, is engaged in, or is about to commit a felony. Approving the notion of implied consent renders this portion of the statute superfluous and it significantly undermines the strict protections of the WPA.

In *Hinton* the Court concluded that forcing citizens to assume the risk that they are exchanging information with an undercover police detective who is recording and saving their text messages tips the balance too far in favor of law enforcement at the expense of the right to privacy. *See id.* at 871-72. This Court should reach the same conclusion and find that the text messages should have been suppressed.

Moreover, *State v. Athan*, 160 Wn.2d 354, 158 P.3d 27 (2007), is of little help to the State. The basis of the Court's holding was that "there is no inherent privacy interest in saliva." *Id.* at 367. The Court went on to conclude that the police could use a ruse to obtain that saliva. But given that there is no privacy interest in saliva, it did not matter whether the letter with the saliva went to the intended recipient or not. Anyone could have taken the letter and tested the saliva.

Here, the WPA and the cases decided pursuant to the Act make it clear that, unlike the saliva at issue in *Athan*, a citizen has a privacy interest in his conversations by phone, text and email conversations. Opening Br. at 30-41. The trial court here properly concluded that Glant had a privacy interest in his texts

with the undercover agent. In light of that finding, any interception by WSP required a warrant.

D. THE TRIAL COURT ERRED IN FAILING TO IMPOSE AN EXCEPTIONAL SENTENCE DOWNWARD.

The State recognizes that this Court may review the denial of an exceptional sentence and vacate the sentence when the trial court “relied on an impermissible basis for refusing to” impose an exceptional sentence downward. State’s Br. at 35 (citing *State v. Garcia-Martinez*, 88 Wn. App. 322, 329-30, 944 P.2d 1104 (1997); *State v. O’Dell*, 183 Wn.2d 680, 697, 358 P.3d 359 (2016)). But the trial court relied on such an impermissible basis in declining to impose a below-guidelines sentence: it misread the holding from *O’Dell* and prior cases on diminished culpability for youthful offenders, and imposed a nexus-test that is inconsistent with *O’Dell*.

By requiring that Glant’s youthfulness be “linked to the conduct that gave rise to the criminal charges at issue in a given case,” RP (7-17-2018) at 89, the trial court “relied on an impermissible basis” for denying an exceptional sentence. *O’Dell* contains no requirement that, in order to qualify for an exceptional sentence, the defendant establish such a link. Instead, the *O’Dell* Court pointed out that youthfulness contributed to a reduced capacity for risk and consequence assessment, tendency toward antisocial behavior, susceptibility to peer pressure, *and* impulse control—not just the last. *See* 183 Wn.2d at 692. Such a requirement

is also inconsistent with the more recent U.S. Supreme Court cases on youthfulness discussed in Glant’s Opening Brief. *See* Op. Br. at 45-46. In *Graham*,⁸ *Roper*,⁹ *Miller*,¹⁰ and *Montgomery v. Louisiana*,¹¹ each of which discussed the diminished culpability of youthful offenders, the requirement to take youthfulness into account is *categorical*—not dependent on whether impulsivity alone caused the crime. The requirement imposed by *O’Dell* is no different, and the trial court erred in requiring that Glant have acted impulsively in order to qualify for an exceptional sentence.¹²

Failure to properly consider Glant’s youthfulness as a mitigating factor led the trial court to impose an unjust sentence.¹³ As a result of WSP’s tactics in creating two fictional children, Glant was sentenced based upon a range of 90 -

⁸ *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010).

⁹ *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005).

¹⁰ *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

¹¹ 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016).

¹² The trial court also misapplied its own misguided test. *See* Opening Br. at 47. Any suggestion that “the length of time involved in the actions in this case . . . breaks the impulsivity chain,” RP (7-17-2018) at 90, ignored that undercover detective’s exploitation of Glant’s impulsivity by pressuring him, CP 454, 458 (“[A]re you really going to come over or flake out on us?”), and flattering him with compliments and interest in his personal activities, CP 455-59.

¹³ This is particularly true here where there was no actual victim and the State formulated the sting to obtain the maximum sentence possible, including lifetime post-sentence supervision.

120 months to life in prison. RP (7-17-2018) at 90. The trial court then imposed a standard sentence on the higher end of that range (108 months to life), the exact same that would be received by a defendant of the age of 30, or 40, or 50. This shows *no* consideration of youthfulness. At a minimum, the trial court's sentence should be vacated and Glant should be resentenced in a manner that *meaningfully* accounts for his youthfulness.

E. THE STATE'S BRIEF CONTAINS MISREPRESENTATIONS ABOUT THE RECORD.

Other misstatements in the State's brief call into question its reliability.

At page 13, the State asserts that Glant "eagerly" engaged in conversations with the undercover agent. There is no citation to the record for this statement and the evidence does not support the use of this adjective. The text exchanges took place over three days and the undercover officer twice reinitiated contact with Glant after he did not reconnect with her. CP 450-459.

At page 27, the State asserts that "Glant elected to respond to the advertisement and solicit sex with children." State's Br. at 27. This statement misrepresents the facts. The State Patrol's advertisement had no explicit reference to sex with children. CP 35. That topic was introduced by the police officer masquerading as an adult woman after Glant called. CP 450.

At page 32, the State writes, "Dr. Packard's evaluation of Glant focused on generalized deficiencies in adolescent impulse control." State's Br. at 32. This

is incorrect. As the State acknowledges on the same page, Dr. Packard met with Glant six times and prepared a report that focused on the specifics of *Glant's* development and maturity. State's Br. at 32. Dr. Packard testified at length about Glant's own actions in terms of his youthfulness, and how these actions affected his conduct. RP (7-17-2018) at 28-41.

At page 9, the State writes that Glant "implied" that support from OUR funded the Net Nanny stings. Glant has not implied that, he has asserted it as a matter of fact. The undisputed evidence is that OUR did fund the Net Nanny Stings at the request of Rodriguez, and Rodriguez personally benefitted from those funds. *See* CP 412, 421-22, 428. The State did not present any evidence to the contrary.

III. CONCLUSION

Based upon Glant's argument in this and his Opening Brief, this Court should reverse Glant's conviction and sentence and remand for further proceedings.

DATED this 25th day of September, 2019.

Respectfully submitted,

/s/ Suzanne Lee Elliott
Suzanne Lee Elliott, WSBA #12634
Attorney for Bryan Glant

/s/ Michael D. McKay
Michael D. McKay, WSBA #7040

Peter A. Talevich, WSBA #42644
Attorneys for Bryan Glant

CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by email where indicated and First-Class United States Mail, postage prepaid, one copy of this brief on the following:

Joseph James Anthony Jackson
Via email: Jacksoj@co.Thurston.wa.us
Thurston County Prosecutor's Office
2000 Lakeridge Dr. SW Bldg 2
Olympia WA 98502-6045

Mr. Bryan Glant
#407451
Coyote Ridge CC
P.O. 769
Connell, WA 99326.

September 25, 2019
Date

/s/ Suzanne Lee Elliott
Suzanne Lee Elliott

LAW OFFICE OF SUZANNE LEE ELLIOTT

September 25, 2019 - 2:59 PM

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Appellate Court Case Title: State of Washington, Respondent v Bryan Earle Glant, Appellant
Superior Court Case Number: 16-1-01576-3

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