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No. 52142-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

BRYAN EARLE GLANT
Appellant.

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

The Honorable Chris Lanese, Judge
Cause No. 16-1-01576-34

BRIEF OF RESPONDENT

Joseph J.A. Jackson
Attorney for Respondent

2000 Lakeridge Drive S.W.
Olympia, Washington 98502
(360) 786-5540

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the trial court properly denied Glant's motion to suppress all texts and emails under the Washington Privacy Act and Article 1, Section 7 of the Washington State Constitution where Glant communicated directly with the undercover officer and implicitly consented to the recording of the messages.
2. Whether the trial court properly denied Glant's motion to dismiss for outrageous government conduct where the Washington State Patrol's Missing and Exploited Task Force sought funding is mandated by the legislature to seek funding and the facts clearly demonstrate that the purpose of operation Net Nanny is "rescu[ing] children who are at risk of sexual exploitation and identify[ing] persons who are seeking to exploit children." CP 484.
3. Whether the trial court properly considered Glant's request for an exceptional sentence based upon his youthfulness during sentencing where the trial judge acknowledged his discretion, considered Glant's youth at the time of sentencing, and denied Glant's request for a downward

sentence in favor of a sentence within standard sentencing range.

B. STATEMENT OF THE CASE.

On September 9, 2016, Bryan Earle Glant answered an online advertisement that Special Investigations Unit Detective McDonald placed while working in an undercover (UC) capacity with the Kitsap County Sheriff's Office on September 8. CP 772, Ex. 1, 1. Detective McDonald was assisting the Washington State Patrol (WSP) – Missing and Exploited Children Task Force (MECTF) by posing as a single mother of three children: a 13-year-old boy, an 11-year-old girl, and a 6-year-old girl. CP 772, Ex. 1, 1. Glant emailed to respond to the Craigslist advertisement on September 9, 2016 at approximately 2:10 pm with, "Hey, I'm interested in what you say you have to offer, let's talk more about it?" CP 772, Ex. 1, 1. This was sent from a Craigslist email address. CP 772, Ex. 1, 1.

Undercover Inspector Knoll was assigned to chat with Glant and responded with, "hey hun.. whats yoru name? i'm looking for soemoen who is honest and not going to play games and looking for a real man who isn't afraid to tell me what he wants. I'm not interested in RolePlay, only someone serious. i'm a single mother

of three young kids, 13, 11, 6 and looking for someone to teach them. this is taboo and not for everyone.” CP 772, Ex. 1, 1. This was sent from a Craigslist email. CP 772, Ex. 1, 1.

The email exchange continued, excerpts from the emails are:

Glant: “My name is Brian, I’m down to earth and know what i what. I want to teach them but I do leave frequently for about 2 months at a time however”

UC: “hi Brian. i’m Hannah. thats okay if you leave frequently that works for us as there are times we aren’t avialble due to me having to work

text me your name and phrase “down to earth” as I know it is you. Text me what you want to teach as i have rules. [###-###-####]”
Id. at 1-2.

Glant began texting the UC from phone number 206-446-8976. Glant’s first text was on September 9, 2016, at approximately 3:14 pm. The following are some excerpts from the text conversations:

Glant: “Down to earth”
“What’re your rules?”

UC: “hey Brian. my rules depends on what you are looking to do with the kids and which ones. this is where your honesty comes into play”

Glant: “tell me about them again”

UC: “i have three, one son and two daughters. my son is 13 and my daughters are 11 and 6”

Glant: "I'm primarily interested in the daughters"

UC: "okay that works. what do you want to do with them. anna is a little more experienced than sam"

Glant: "How so?"

"What i want to do is completely dependent on their comfortability"

UC: "anna has played with toys. tell me what you are interested in doing"

Glant: "Probably use toys with them and introduce some touching and then work towards oral"

UC: "toys would definitely work. touchign would be fine for both of them as well as oral. are you wanting to do that with both girls?"

"i do have some rules as I want to make it fun for all"

Glant: "Yeah sure"

"What are they"

UC: "no pain, no anal and are you wanting to do oral on them or them on you?"

"you good with them?"

Glant: "Both and yeah that's fine. What about like a finger in the bum though?"

UC: "if you promise to bring lube and put lube on your finger, yes you can put one to two fingers in their bum"

Glant: "Ok no problem"

UC: "great so you are okay with bringing lube then"

Glant: "Yeah"

Glant: "what grade are the kids in?"

UC: "they are home schooled but 8th, 6th and 1st"

CP 772, Ex. 1, 2, 6-16 (SIC).

During the text conversation numerous pictures were exchanged between Glant and the UC officer. CP 772, Ex. 1, 21. At one point in the conversation the UC officer instructed Glant to send a picture of himself holding up three fingers and she would take a picture holding up as many as he requested. CP 772, Ex. 1, 21. Glant requested that the undercover officer take a picture holding up four fingers. CP 772, Ex. 1, 21. Those pictures were exchanged. CP 772, Ex. 1, 21.

The conversations continued and Glant decided he would come to the residence on September 11, 2016. CP 772, Ex. 1, 6-16. Through the communication, the UC instructed Glant to go to the 7-11 nearby and take a selfie to prove he was there, then he would be given the address to her residence in Tumwater. CP 772, Ex. 1, 16. That picture was sent. CP 772, Ex. 1, 21. Surveillance units advised they could see Glant at the 7-11. CP 772, Ex. 1, 22. The UC, Inspector Knoll, gave Glant the address to the residence. CP 772, Ex. 1, 16. Glant arrived at the residence at approximately

2:38 pm and the UC opened the door and spoke with Glant. CP 772, Ex. 1, 18. The conversation was consistent with what was planned prior to his arrival. CP 772, Ex. 1, 18. The UC invited Glant inside and told him to remove his shoes and she would go get the girls. CP 772, Ex. 1, 18.

Detective Weinnig emerged from the kitchen area and gave verbal commands to Glant. CP 772, Ex. 1, 25. Detective Weinnig advised Glant that they were the police, he was under arrest, and to show his hands. CP 772, Ex. 1, 25. Detective Weinnig told Glant that he was being audio and video recorded. CP 772, Ex. 1, 25. Glant was ordered to the ground. CP 772, Ex. 1, 25. Special Agent McNeal then placed Glant in handcuffs. CP 772, Ex. 1, 25.

While Glant was being placed in handcuffs, he made the statement, "Is this for real? Dude this is a really big misunderstanding and I am going back to school tomorrow." CP 772, Ex. 1, Video 2, 3:13-16.

Special Agent McNeal conducted a search incident to arrest of Glant. On his person Glant had a cell phone, a set of keys, and a bottle a "Sliquid" natural lubricant. CP 772, Ex. 1, 27. When Inspector Knoll was advised that Glant was in custody, a text

was sent to Glant's phone, which was at approximately 2:44 pm. CP 772, Ex. 1, 23.

Glant was charged with two counts of attempted rape of a child in the first degree. CP 772, Ex. 1, pg. 25. Glant made multiple motions before trial, two of which are relevant to the present appeal.

In a motion heard before the court on June 19, 2017, Glant moved to suppress all text and email messages between himself and the undercover officer. 1 RP 1-48.¹ Glant sought suppression of his incriminating texts and emails alleging that the messages were received by police in violation of RCW Chapter 9.73, the Washington Privacy Act (WPA). 1 RP 1. Glant's motion rests on his claim that he did not consent to the recording of his communications with the undercover officer, and therefore the police violated the Privacy Act and Article 1, Section 7 of the

¹ The verbatim report of proceedings in this matter appears in six volumes. Volume 1, transcribed by Sonya L. Wilcox, contains a hearing on a Motion to Suppress Illegally Intercepted and Recorded Evidence held June 19, 2017 and will be referred to as 1 RP in this brief. Volume 2, transcribed by Sonya L. Wilcox, contains a hearing on a Motion to Compel Discovery that took place on July 10, 2017 and will be referred to as 2 RP in this brief. Volume 3, transcribed by Kathryn A. Beehler, contains a hearing on a Motion to Suppress a Recorded Interrogation and Cellphone Evidence, which took place on June 7, 2017 and will be referred to in this brief as 3 RP. Volume 4, transcribed by Cheri L. Davidson, contains Motion to Dismiss for Outrageous Governmental Conduct held March 28, 2018, and will be referenced herein as 4 RP. Volume 5, transcribed by Cheri L. Davidson, contains the bench trial heard April 23, 2018, and will be referenced in this brief as RP 5. Volume 5, transcribed by Cheri L. Davidson, contains the sentencing hearing held July 17, 2018, and will be referenced herein as 6 RP.

Washington Constitution concerning personal privacy. The trial Court concluded that the messages between Glant and the undercover officer were indeed private and would fall within the scope of protection created by the WPA; however, Glant “implicitly consented” to the recording of the messages because he had “know[ledge] that the communications . . . were preserved beyond the moment of sending on either [by] phone or computer.” 1 RP 43. Because Glant implicitly consented to the recording of the communications, the MECTF was not required to obtain probable cause authorization pursuant to RCW 9.73. 230 or a wiretapping warrant under RCW 9.73.090(2) in order to lawfully receive and record the messages sent the UC. 1 RP 43.

The trial court also held that the police conduct was not in violation of Art. 1, § 7 of the Washington Constitution. 1 RP 45. The Court reasoned that “voluntarily disclosing information to strangers assumes the risk of being deceived as to the identity of one with whom deals.” 1 RP 45. For these reasons, the trial court denied Glant’s Motion to Suppress Illegally Intercepted and Recorded Electronic Communication Evidence.

Glant filed another pretrial motion that was before the court on March 26, 2018 to dismiss the two charges against him based

upon allegations of outrageous government misconduct by the MECTF in violation of his due process rights. 4 RP 10-71. Glant's motion alleged misconduct on the part of the MECTF by soliciting funds from outside entities and inducing Glant to commit an offense without predisposition. CP 322-510. The State's response including attachments was 108 pages in length. State's Response to Defense Motion to Dismiss, Supp CP _____. The State's response included a history of the MECTF. State's Response to Motion to Dismiss, Exhibit A, Supp CP _____.

Attached to Glant's motion were a series of documents indicating that Operation Underground Railroad (OUR) donated funds to contribute to the MECTF Net Nanny operations. CP 371-381. The exhibits implied that the support from OUR funded a July operation that occurred in Spokane, WA. CP 402-408. Glant also included a declaration from Detective Sgt. Carlos Rodriguez, indicating that the purpose of operation Net Nanny is "to rescue children who are at risk of sexual exploitation and identify persons who are seeking to sexually exploit children." CP 484.

Glant's argued that this case involved "law enforcement being bought by a private organization." 4 RP 12. Glant further argued that the State controlled the criminal activity by luring Glant

to commit the offenses. 4 RP 22. The State argued that RCW 13.61.110 permits the Chief of the Washington State Patrol to seek public and private funds to support the task force. 4 RP 51. The State noted that the MECTF standard operating procedure manual indicates that detective sergeants are required to initiate budget and grant requests. 4 RP 54, State's Response to Motion to Dismiss, Exhibit B, Supp CP ___.

The court considered the “totality of the circumstances” concerning this incident and paid specific attention to the factors laid out in State v. Lively, 130 Wn.2d 1, 22, 419 P.3d 436 (1996), when considering the claim of outrageous government misconduct. 4 RP 61. At the outset, the trial court noted that it was “unaware of any authority that approves the use of dismissal under the due process clause for governmental misconduct not related directly to the law enforcement interactions with the defendants at issue.” 4 RP 61. The court weighed every Lively factor and concluded that there was not enough evidence presented sufficient to support “a finding that the conduct of the Washington State Patrol, or anyone involved in this case, amounted to criminal activity or was repugnant to a sense of justice.” 4 RP 68. The trial court denied

Glant's motion. 4 RP 61. Findings of fact and conclusions of law were later entered. CP 714-717.

After Glant's pretrial motions failed, he elected to conduct a bench trial based on stipulated facts. CP 772. At the conclusion of the bench trial, Glant was convicted of two counts of attempted rape of a child in the first degree and was sentenced to 108 months in prison. CP 779. During the sentencing hearing on July 17, 2018, the trial court judge took into consideration "the age of the defendant and his capacity for growth" when imposing the sentence. 6 RP July 17, 2018, 91. Glant filed this appeal on July 17, 2018. CP 789-806. Additional facts appear in the argument section below as necessary.

C. ARGUMENT

1. The trial Court properly denied Glant's motion to suppress emails and text messages that he sent to an undercover law enforcement officer.

Glant's argument before the trial court and again here focused on whether the Missing and Exploited Children's Task Force (MECTF) was required to obtain authorization for recording text messages pursuant to RCW 9.73.230; and whether the messages were intercepted in violation of Art. 1 § 7 of the Washington State Constitution.

The Washington Privacy Act (WPA), prohibits the intercepting and recording of private electronic communications, including email and text messages. RCW Chapter 9.73. There are four prongs the court considers when analyzing alleged violations of the Privacy Act. State v. Christensen, 153 Wn.2d. 186, 192, 102 P.3d 789 (2004) (citing RCW 9.73.030(1)(a)). There must have been (1) a private conversation transmitted by a device that was (2) intercepted or recorded by use of (3) a device designated to record and/or transmit (4) without the consent of all parties to the private communication. Id. Alleged violations of the Privacy Act are reviewed by the court de novo. State v. Kipp, 179 Wn.2d 718, 728, 317 P.3d 1029 (2014). Article 1, Section 7, of the Washington State Constitution permits that “no person shall be disturbed in his private affairs, or his home invaded, without authority of law.”

The communications engaged in by Glant and the MECTF were not protected under the Privacy Act because the conversations between Glant and the undercover officer (1) did not rise to the level of “private,” (2) were not “intercepted” by police but rather were being sent specifically to the officer and recorded by the desired recipient, (3) were recorded on the intended recipient’s computer and phone, (4) and Glant implicitly consented to their

recording given that Glant engaged in communications with the officer via text and email messages. Therefore, Glant's incriminating communications are not within the scope of protection established by the Privacy Act. The trial court properly denied Glant's motion to suppress based upon violation of the WPA.

Furthermore, there was no violation of Article 1, Section 7, of the Washington State Constitution as there was no governmental intrusion on Glant's private affairs. Glant was not targeted, nor were any of the emails or text messages intercepted by law enforcement officials. There was no need for a warrant in order to record and produce the emails and text messages; the content of the messages was readily available by way of the UC that Glant was willingly and eagerly engaging in conversation with. Consent for the other party to a conversation to retain and record the communications is implied when one party reasonably knows emails and messages are inherently recorded for future use or until purposefully deleted by the other party. State v. Townsend, 147 Wn.2d 666, 57 P.3d 255 (2002).

- a. The MECTF was not required to obtain authorization pursuant to RCW 9.73.230 prior to recording the conversations with Glant.

RCW 9.73.230(1) allows the chief law enforcement

officer of a law enforcement agency or his or her designee above the rank of first line supervisor to authorize the interception, transmission, or recording of a conversation or communications by officers when at least one-party consents and probable cause exists to believe that the communication involves certain controlled substance act violations or commercial sexual abuse of a minor. RCW 9.73.230(1)(a) and (b). Glant erroneously argues that such authorization was required in order for the state to record the messages that he sent to law enforcement.

RCW 9.73.230 acts as an exception to the general rule that private communications cannot be intercepted or recorded without the consent of all parties. RCW 9.73.030(1); State v. Salinas, 119 Wn.2d 192, 829 P2d 1068 (1992). Here, Glant did not subjectively intend for his communications to be private, the communications were not intercepted, and even if the communications were both private and intercepted, Glant implicated consented to their recording. Therefore, there was no requirement for authorization pursuant to RCW 9.73.230 because there was no violation of the RCW 9.73.030.

When determining if a communication is “private” the court considers the subjective intention of the parties to the communication. State v. Townsend, 147 Wn.2d at 673. Courts may

“consider other factors bearing on the reasonableness of the participants' expectations, such as the duration and subject matter of the communication; the location of the communication and the presence of potential third parties; and the role of the nonconsenting party and his or her relationship to the consenting party.”

Id. at 673-674. A communication is private (1) when parties manifest a subjective intention that it be private and (2) where that expectation of privacy is reasonable. Kipp, 179 Wn.2d at 729. The intention and reasonableness of expectations of privacy of the participants as manifested by the facts and circumstances of each case controls as to whether a conversation is private. Id. at 729, (citing State v. Clark, 129 Wn.2d 211, 224-7, 916 P.2d 384 (1996)).

In determining if the communications between Glant and the MECTF were “private” under the meaning of the statute, the parties must (1) manifest a subjective intention that it be private and (2) that expectation must be reasonable. In Townsend, the court found that the defendant possessed the subjective intention that the conversation be private. 147 Wn.2d at 675. There, an undercover police officer posed as a 13-year-old girl named “Amber,” the

defendant and “Amber” spoke repeatedly about inappropriate relations, and the defendant made his intentions clear about the nature of their conversations when he communicated to the officer that she “not tell anyone about us.” Id. In the current case, however, throughout three days of emails and text messaging with a complete stranger that Glant knew only via an anonymous online forum, he never manifested any intention that the conversations be made private. Furthermore, Glant sent photos of himself to the undercover officer and consented to the communications being shared with the officer’s purported children. The officer acknowledged that the communications were being shared by saying that she was sharing the photos with her purported children and communicating that her children were engaged in this communication as well. The conversation went as follows:

Glant: “Here’s me rn”

Glant: “And I’ll send some other selfies I took another time too”

UC: “awe you are cute... i showed my girls and they think you are hot”

Glant: “Thanks :)”

Glant: “So yeah I’m a student at scu so that’s why i have to leave for a few months at a time”

UC: "they want to know how old you are they are excited"

Glant: "20"

State's Response to Motion to Suppress, at Exhibit B; Supp CP __.

Glant sent another photo to the officer indicating his subjective intention that the communications be shared with the purported children, while still never expressing any desire that the communications or photos be made private.

UC: "i just showed the girls and they love you pic.. they think you are hot"

Glant: "Thanks :) i cant wait to meet them"

Glant: "Tell them I say hi"

UC: "i did.. they smiled :)"

UC: "the girls want to know what is behind you? sport pads?"

Glant: "Yeah those are my lacrosse gloves"

Id.

Glant never objected to sharing anything about the conversations and never made the slightest suggestion that the conversations were private in nature. In fact, Glant was pleased to have his photos shared. Glant's communications with the officer

were not secret and were certainly not intended only for the persons involved.

In addressing the second prong of whether or not a communication is private, the reasonableness of the expectation of privacy, the Court in Clark, found that, in some cases, a conversation between a person and a stranger on a public street is not protected under the Washington Privacy Act. 129 Wn.2d at 226. The court recognized that individuals selling their wares on a public street to anyone who wished to be a customer, is akin to a store clerk that would be willing to engage in a conversation about a product with any customer who happened by. Id. To this end, the court held that “a conversation between a person and a stranger on a public street about a routine sale of illegal drugs is not private and is not protected under RCW 9.73.” Id. “A person has no reasonable expectation of privacy in a conversation that takes place at a meeting where one who attended could reveal what transpired to others.” State v. Slemmer, 48 Wn.App. 48, 53, 738 P.2d 281 (1987).

Glant clearly had no reasonable expectation of privacy. Glant responded to a *public* advertisement offering “Family Play Time,” equivalent to that of a person and a stranger on a public

street engaging in conversation about the offering of a routine criminal act, which is not private, nor protected by the Privacy Act. The content of these emails and text messages were about sexual acts that would never occur, despite Glant's best efforts. The discussion of sexual acts was communicated to a stranger whom Glant had never met, had no confidential relationship with, and knew of only through a publicly posted Craigslist advertisement. State's Response to Motion to Suppress, Exhibit A and Exhibit B, Supp CP _____. Glant manifested a willingness to engage in a conversation with any person in order to gain access to the minor children. Glant and the officer did not know each other before they started exchanging electronic communications about illicit and illegal acts and Glant was aware of and encouraged that the communications be shared to the third-party children. Glant did not have a subjective expectation of privacy.

Glant's communications were also not "intercepted" within the meaning of RCW 9.73.030. The second and third prong of the Christensen analysis requires that the private conversation be "intercepted or recorded" on "a device designated to record and/or transmit." State v. Christensen, 153 Wn.2d. at 192. While the statute does not define "interception," the Washington Supreme

Court has defined it as to “stop... before arrival ... or interrupt the progress or course.” State v. Roden, 179 Wn.2d 893, 904, 321 P3d 1183 (2014) (citing Webster’s Third New International Dictionary).

The Privacy Act has been around for some time and has not really been brought current with all the forms of communication available today. There are a couple of cases that have addressed the Privacy Act in the context of text messages. Those cases are State v. Roden, 179 Wn.2d 893 and State v. Hinton, 179 Wn.2d 862, 319 P.3d 9 (2014), which are companion cases involving the same set of facts. In both of those cases, the court found the defendants had a privacy interest in the content of their sent messages, even on the recipient’s phone. That holding resulted specifically, however, from the fact that law enforcement read those messages and engaged the defendants in additional text messages after physically seizing the recipient’s cell phone. This qualifies as interception. Roden, 179 Wn.2d at 896; Hinton, 179 Wn.2d at 865..

Both Roden and Hinton relied on the holding of Townsend, in their discussion of whether or not the State had intercepted the messages. 179 Wn.2d at 903-904; 179 Wn.2d at 872-873. Important to both of those cases was the fact that the officer was not the intended recipient of the messages.

In Townsend, the Court said, “instant messages” or “computer chats” exchanged between a defendant and an undercover officer were in fact “private” and “record[ed] by a device” as contemplated by the Privacy Act. Id. at 673-75. But critically important, the Townsend court held the defendant intentionally sent the messages to the undercover officer, therefore the messages were not intercepted in any way. Id. at 678. Furthermore, the court found that the defendant implicitly consented to the recording of his messages, analogizing instant chat messages to email and stating: “in order for e-mail to be useful it must be recorded by the receiving computer.” Id. at 676. Thus, the chat messages were not subject to exclusion under the Privacy Act. That determination was made even though chat messages are more like a telephone conversation, occurring in real time, than email, which is always recorded for later use. Id.

In Roden and Hinton, the Court applied the Privacy Act to text messages, but it distinguished the facts in those cases from the facts in Townsend, noting, Townsend sent his instant chat messages knowing they would be recorded by the recipient’s device, but Roden and Hinton sent text messages that were intercepted by an unintended recipient. Thus, the decision in the

companion cases turned on the issue of interception, not implied consent to record. Specifically, the court stated: "Because we find the privacy act was violated by the interception of the private text messages, we do not address whether they were unlawfully 'recorded' within the meaning of the act." Roden, 179 Wn.2d 904. Glant's messages were received by their intended recipient, they were not intercepted pursuant to the privacy act.

As discussed, Glant implicitly consented to the recording of the text messages and emails that he sent. The fourth and final prong of the Christensen analysis requires that the recording of the private conversation be done without the consent of parties to the private communication. 153 Wn.2d at 192. Under RCW 9.73.030(3), where consent is required,

consent shall be considered obtained whenever one party has announced to all other parties engaged in the communication or conversation, in any reasonably effective manner, that such communication or conversation is about to be recorded or transmitted.

Thus, implied consent is "considered obtained" whenever an individual engages in communications that they know are retained and recorded on the other persons device for future reference. An expressly recorded statement of formal consent, though desirable, is not required. Instead, the mode of communication which the

parties converse might express in a “reasonable and effective manner” an understanding and implicit consent that communications will be recorded.

This Court addressed an analogous set of facts in State v. Racus, where Racus sought the suppression of emails and text messages made between himself and an undercover police officer posing as a female parent seeking others via Craigslist to have sexual contact with her children. 7 Wn.App.2d 287, 433 P.3d 830 (2019). Racus responded to the Craigslist advertisement and “engaged in a series of emails and text messages with [a fictitious mother named] ‘Kristl,’ asking about having sex and asking about her children.” Id. at 291. “After arriving at ‘Kristl’s’ house” to carry out his plan, Racus was arrested.” Id. at 292. He was later charged with attempted first-degree rape of a child and, before trial, filed a motion to suppress his conversations with the undercover officer “based on a lack of consent” or authorization by a superior officer to record communications. Id. His motion was denied by the trial court and a jury found Racus guilty of attempted first degree rape of a child. Id. at 296. He appealed his conviction based upon the trial court’s failure to suppress recorded communications. Id.

This Court found that Racus “had to understand that computers are message recording devices and that his text messages with ‘Kristl’ would be preserved and recorded on a computer.” Id. at 300. “By communicating [via text messages and computer], Racus implicitly consented to his communications being recorded, and thus, the recording of the communications was lawful under RCW 9.73.030(1)(a). Id. This Court found that that the requested suppression of emails and text messages was properly denied by the trial court. Id. The argument that “the trial court erred by failing to suppress recorded communications because [Racus] did not consent to their being recorded under the WPA” failed. Id. at 296. Racus’ use of email and text made it clear to the court that he understood that his texts were being recorded. Racus’s continued use of email and text messages, coupled with his knowledge, signaled his implied consent to the communications’ recording. Id. at 300.

In Racus, the MECTF eventually obtained authorization to record all communications after developing probable cause that Racus may attempt to engage in commercial sexual abuse of a minor. Id. at 296. However, the fact that law enforcement obtained

that authorization did not affect this Court's analysis of the pre-authorization messages. Id. at 299-300.

Glant, as a user of computer and cellphone devices, was aware that his outgoing text messages would be "recorded" by the recipient when his phone was recording the incoming messages from the recipient. Like the defendant in Racus, he "impliedly consented to the communications [between himself and the officer] being recorded, and thus, the recording of the communications was lawful under RCW 9.73.030(1)(a)." Id. at 300. Glant intended for the undercover officer to get his communications, intended for the messages to go to her computer and her phone, and specifically provided her with his phone number to change the mode of communication. Like the defendant in Racus, there was no violation of the privacy act in Glant's case, and law enforcement was not required to get authorization prior to receiving the messages from Glant.

- b. The trial court correctly found that the MECTF receiving messages from Glant did not violate Article 1 § 7 of the Washington State Constitution.

"No person shall be disturbed in his private affairs, or his home

invaded, without authority of law.” Wash.Const. art. 1, §7. As noted above, the actions of the MECTF were lawful pursuant to the Washington Privacy Act. A claimed violation of §7 requires a two-step analysis: “was there a disturbance of one’s private affairs and, if so, was the disturbance authorized by law.” State v. Athan, 160 Wn.2d 354, 365-366, 158 P.3d 27 (2006). In Athan, the State Supreme Court upheld the use of a ruse, where law enforcement posed as a law firm to get the defendant to mail them an envelope which they later removed saliva from to obtain a DNA sample. Id. at 370. The Court specifically addressed State v. Townsend, stating “In upholding his conviction, we found the communications private, but that Townsend impliedly consented to the recording of his private email conversations because it was reasonable to infer Townsend was aware it was possible to record the messages.” Athan, 160 Wn.2d at 370-371.

The Athan Court rejected the article 1, § 7 claim noting that the detective on the letterhead was the intended recipient and concluding “Athan’s private affairs were not disturbed under article 1, section 7.” Id. at 372. For the same reasons as in Townsend, there was no disturbance of Glant’s private affairs in violation of article 1, §7. Glant implicitly consented to the recording of his

messages and consented to the messages being shared to the purported children.

Moreover, a person in Glant's situation, responding to an add that read, "family play time," in the casual encounters section of Craigslist, could not reasonably expect that the message would be held as private. State's Response to Motion to Suppress, Exhibit A, Supp CP___; In Re Pers. Restraint of Hopper, 4 Wn.App. 2d 838, 849, 424 P.3d 228 (2018)(The subjective expectation of privacy was not objectively reasonable when a defendant responded to an ad "any way you want it 19" on Backpage.com).

There was no violation of article 1, §7 in this case. The fact that the State conducted a ruse by posing as a mother who was offering her children for sex does not amount to a Constitutional violation. This is especially true here, where Glant elected to respond to the advertisement and solicit sex with children. The trial court correctly rejected Glant's motion to suppress.

2. The trial court correctly rejected Glant's motion to dismiss alleging outrageous government conduct.

"Outrageous conduct is founded on the principle that the conduct of law enforcement officers and informants may be so outrageous that due process principles would absolutely bar the

government from invoking judicial processes to obtain a conviction.” State v. Lively 130 Wn.2d 1, 19, 921 P.2d 1035 (1996). For police conduct to violate due process, “the conduct must be so shocking that it violates fundamental fairness.” Id. Examples of outrageous conduct include “those cases where the government conduct is so integrally involved in the offense that the government agents direct the crime from the beginning to end, or where the crime is fabricated by the police to obtain a defendant’s conviction, rather than to protect the public from criminal behavior.” Id. at 21.

“Public policy allows for some deceitful conduct and a violation of criminal laws by the police in order to detect and eliminate criminal activity.” Id. at 20. “Dismissal based on outrageous conduct is reserved for only the most egregious circumstances.” Id. In reviewing a claim of outrageous government conduct, the court evaluates the totality of the circumstances. Id. at 21. Factors that a court must consider when determining whether police conduct offends due process are

“whether the police conduct instigated a crime or merely infiltrated ongoing criminal activity, whether the defendant’s reluctance to commit a crime was overcome by pleas of sympathy, promises of excessive profits, or persistent solicitation, whether the government controls the criminal activity or simply allows for the criminal activity to occur, whether the

police motive was to prevent crime or protect the public, and whether the government conduct itself amounted to criminal activity or conduct repugnant to a sense of justice.”

Id. at 22. A trial court’s order on a motion to dismiss on the basis of outrageous governmental misconduct is reviewed “under an abuse of discretion standard.” State v. Athan, 160 Wn.2d at 375. “Abuse of discretion requires the trial court’s decision to be manifestly unreasonable or based on untenable grounds or untenable reasons.” Id. at 375-76 “A trial court abuses its discretion when its decision adopts a view that no reasonable person would take.” State v. Solomon, 3 Wn.App.2d 895, 910, 419 P.3d 436, 444 (2018) (citing State v. Sisouvanh, 175 Wn.2d 607, 623, 290 P.3d 942 (2012)).

Here, the trial court meticulously considered the Lively factors in concluding that Glant had failed to demonstrate outrageous government conduct. 4 RP 61-68. It is clear from the record that the trial court’s conclusion that “the overall police motive was to prevent crime and to protect the public,” was correct. 4 RP 67; CP 484; State’s Response to Motion to Dismiss, Exhibit A, Supp CP __.

Additionally, it is clear that Washington State law authorizes the State Patrol to solicit funds to support the MECTF. RCW 13.61.110. That statute is the governing statute for the MECTF. Section (4) provides that the chief of the state patrol *shall* seek public and private grants and gifts to support the work of the task force. (Emphasis added). Contrary to Glant's argument, there is no provision in the law that prohibits the chief of the state patrol from delegating this authority. In fact, Chapter 7 of the MECTF "IAD standard procedures manual specifically delegates such a duty to detective supervisors stating that the duties of a Task Force Detective Supervisor includes, "initiating budget and grant requests." State's Response to Motion to Dismiss, Exhibit B, Supp CP __.

As argued by the State during the hearing on this issue, to require the chief of the state patrol to handle every task specifically assigned to him by statute without delegation would be absurd. The example that State provided is RCW 43.43.035, which following Glant's logic would require the chief of the state patrol to personally provide security for the governor. 4 RP 53. Neither Detective Sgt. Rodriguez nor the MECTF violated the law by soliciting private donations for funding. Even if there were minor

defects in compliance with funding statutes, the trial court correctly notes that no Washington case has applied the doctrine of outrageous conduct to a funding issue. Even the Kansas case cited by Glant, State v. Berg, 236 Kan. 562, 694 P.2d 427 (1985), does not support Glant's position. In that case, the Supreme Court of Kansas simply held that a Kansas statute allowing a witness to hire their own counsel to assist in the prosecution did not allow that attorney to overrule the county prosecuting attorney's decision to dismiss the case. Id. at 568. Nothing in that decision supports Glant's argument made in this case.

Finally, the record made it clear that the government merely infiltrated the already existing world of child sexual exploitation by putting an ad on Craigslist. It was Glant who responded, and Glant who informed the undercover officer what he wished to do with her daughters. CP 449-460; CP 772; Ex 1. The trial court properly applied the Lively factors and did not abuse its discretion by denying Glant's motion to dismiss.

3. The trial court properly considered Glant's youth during the sentencing hearing.

Glant's sentencing hearing took place on July 17, 2018. 6 RP 91. Glant sought an exceptional sentence below the standard

range based upon his “diminished capacity with youth” and an evaluation performed by Dr. Richard Packard that Glant was “engaging in risk-taking behavior and impulsivity that was attributable to the state of his brain development at the time he committed the offense.” 6 RP 83-84. Dr. Richard Packard, a certified sex offender treatment provider hired by Glant’s attorneys to evaluate Glant, appeared before the court during the sentencing and spoke about his evaluations of Glant. 6 RP 5-65. Dr. Packard met with Mr. Glant 6 times to prepare “a specialized psychological evaluation that is focused on [Glant’s] sexual development characteristics and risks that might be associated in the event of a commission of a sexual offense.” 6 RP 20. Based upon these few encounters with Glant, Dr. Packard expressed an opinion that Glant would be an appropriate candidate for outpatient treatment and that his risk of re-offense was manageable; however, Dr. Packard emphasized that Glant was still in the developmental process. 6 RP 38, 40.

Dr. Packard’s evaluation of Glant focused on generalized deficiencies in adolescent impulse-control. He testified that adolescents “seek out altered states of consciousness- alcohol/substance abuse, sex, novel experiences, things that are

thrill rides” in order to “relat[e] with [their] peers.” 6 RP 17. The prosecutor pushed back on the suggestion that Glant’s actions were the result of age-typical, self-indulgent reaction engaged in by a young man who had just been dumped by his girlfriend and had abused alcohol. See 6 RP 68-69. However, the prosecutor agreed that the court consider the offender’s youth when crafting an appropriate sentence for Glant, stating:

[T]he State is aware that [Glant is seeking] an exceptional sentence below the standard range based on the mitigating factor of youth, and the State is very aware of the new case law that allows the Court to consider youth even past the age of 18. The State encourages the Court to consider that.

6 RP 68.

The trial court judge did in fact take into consideration “the age of the defendant and his capacity for growth” when imposing the sentence. 6 RP 91. The trial court stated that he found the testimony of Dr. Packard to be very helpful and that “the law in [circumstances involving impulsive nature of adolescents] permits [an] exceptional downward sentence in circumstances where those features are linked to the conduct that gave rise to the criminal charges at issue in a given case.” 6 RP 89. The trial court judge specifically acknowledged on the record that “I am considering the

request for an exceptional sentence” and that “I recognize that I have the discretion and judgement and authority to [impose an exceptional sentence] in an appropriate case.” 6 RP 89-90. However, the judge exercised that discretion and made a finding that Glant’s behavior was not “driven by the factors that would justify an exceptional downward sentence.” 6 RP 90. After “weighing all of the information that [was at his] disposal,” the judge imposed a minimum sentence of 108 months which was within the standard range. 6 RP 91.

Generally, a party cannot appeal a standard-range sentence. State v. Brown, 145 Wash. App. 62, 77-78, 184 P.3d 1284, 1291-92 (2008); RCW 9.94A.585(1). “This precept arises from the notion that, so long as the sentence falls within the proper presumptive sentencing ranges set by the legislature, there can be no abuse of discretion as a matter of law as to the sentence’s length.” State v. Ammons, 105 Wn.2d 175, 183, 713 P.2d 719, 718 P.2d 796 (1986)). However, “every defendant is entitled to have an exceptional sentence actually considered.” State v. McFarland, 189 Wash. 2d 47, 56, 399 P.3d 1106, 1110 (2017).

When a defendant challenges the denial of an exceptional sentence, review is limited to whether the sentencing court

categorically refused to impose an exceptional sentence downward under any circumstance or relied on an impermissible basis for refusing to do so. State v. Garcia-Martinez, 88 Wn.2d. 322, 329-30, 944 P.2d 1104 (1997); State v. O'Dell, 183 Wn.2d 680, 697, 358 P.3d 359 (2015). A Court abuses its discretion when it fails to consider a mitigating factor on the mistaken belief it is barred from such consideration. Id.

The record of trial court proceedings makes it incredibly clear that judge properly considered Glant's youthfulness, as required by O'Dell, during sentencing. The trial court judge stated that he found the testimony of Dr. Packard to be very helpful and that "the law in [circumstances involving impulsive nature of adolescents] permits [an] exceptional downward sentence in circumstances where those features are linked to the conduct that gave rise to the criminal charges at issue in a given case." 6 RP 89. The trial court judge specifically acknowledged on the record that "I am considering the request for an exceptional sentence" and that "I recognize that I have the discretion and judgement and authority to [impose an exceptional sentence] in an appropriate case." 6 RP 89-90. However, the judge exercised that discretion and made a finding that Glant's behavior was not "driven by the factors that

would justify an exceptional downward sentence.” 6 RP 90. After “weighing all of the information that [at his] disposal,” the judge imposed a sentence of 108 months which was within the standard range. 6 RP 91.

D. CONCLUSION.

Glant has not demonstrated that the State violated either Article 1, § 7 of the State Constitution or the Washington State Privacy Act. Glant engaged in conversations with an undercover MECTF officer and thereby implicitly consented to the recording of his communications. Glant has failed to meet his burden of demonstrating outrageous government conduct and the record makes clear that the trial court did not abuse its discretion by denying Glant’s motion to dismiss. Finally, the trial court properly exercised its discretion, considered Glant’s youth at the time of sentencing and denied Glant’s request for a downward exceptional sentence. Glant’s conviction and sentence should be affirmed in all regards.

Respectfully submitted this 12th day of June, 2019.



Joseph J.A. Jackson, WSBA# 37306
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the BRIEF OF RESPONDENT on the date below as follows:

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COURT OF APPEALS, DIV II
950 BROADWAY, SUITE 300
TACOMA WA 98402-4454

VIA E-MAIL

TO: SUZANNE LEE ELLIOTT
SUZANNE-ELLIOTT@MSN.COM

MICHAEL D. MCKAY
MIKE.MCKAY@KLGATES.COM

PETER ANTHONY TALEVICH
PETER.TALEVICH@KLGATES.COM

I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 12th day of JUNE, 2019, at Olympia,
Washington.



CYNTHIA WRIGHT, PARALEGAL

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

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