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Court of Appeals
Division II
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NO. 52972-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

BARON ASHLEY, JR.,
Appellant.

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

Clark County Cause No. 18-1-01034-9

The Honorable Robert A. Lewis, Judge

BRIEF OF APPELLANT

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ISSUES AND ASSIGNMENTS OF ERROR

1. The warrantless search of Mr. Ashley's recorded phone calls violated his rights under article I, section 7.
2. Mr. Ashley's personal phone calls constituted "private affairs" under article I, section 7.
3. The "institutional security exception" to the warrant requirement did not justify the detective's warrantless search of Mr. Ashley's recorded phone calls.
4. Mr. Ashley did not consent to the detective's warrantless search of his recorded phone calls.
5. Mr. Ashley was prejudiced by the admission of evidence that had been obtained in violation of his article I, section 7 rights.

ISSUE: Article I, section 7 prohibits warrantless searches of private affairs unless one of the few articulated exceptions to the warrant requirement applies. Did the trial court err by admitting recordings of Mr. Ashley's personal phone calls (which he placed from jail) when the recordings were obtained pursuant to a warrantless search, based on a detective's hunch that Mr. Ashley would call his wife in violation of a no-contact order?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Baron Ashley was permitted to contact his wife via phone call even though there was a no-contact order in place. RP 224. After his arrest – for charges of which he was later largely acquitted, -- however, a new order was put in place, which prohibited him from contacting her in any way. RP 283-84.

Detective Sandra Aldridge had a hunch that Mr. Ashley would violate that order by calling his wife from jail. RP 263. So she conducted a search of all phone calls from the jail using Mr. Ashley's account as well as all calls to his wife's number. RP 298-99. The detective did not obtain a warrant prior to conducting that search. RP 263.

Detective Aldridge found and seized recordings of calls, which she alleged had been placed by Mr. Ashley to his wife. RP 297-361. The state charged Mr. Ashley with four counts of felony violation of a no-contact order. CP 150-53.

Mr. Ashley moved to suppress the recordings of his phone calls, arguing that the detective should have been required to obtain a warrant before searching for them. CP 127-44; RP 257-68.

During a hearing on the motion, the detective testified that all phone calls from inmates at the jail are recorded by a company called

Telmate. RP 258. Telmate stores the recordings on an off-site server. RP 372. Jail employees monitor the calls for purposes of “institutional security.” RP 262.

There is a sign next to the phone in the jail, informing inmates that their calls are subject to monitoring. RP 259. The sign does not inform callers that the recordings of the calls can be subject to warrantless search as part of a criminal investigation. RP 259.

Callers also hear a recorded message that calls are “subject to recording and monitoring.” RP 335. But the message does not inform them that the recordings can be searched by the police without a warrant.

The trial court denied Mr. Ashley’s motion to suppress, ruling that it doesn’t “make sense” for inmate calls to be subject to monitoring for institutional security purposes but not for purposes of a criminal investigation. RP 272.

The recordings of the phone calls were admitted at trial and the jury convicted Mr. Ashley of each of the charges. RP 293-361; CP 157-60.

Finding that there had been no violence by Mr. Ashley and that a no-contact order was not necessary to protect his wife from harm, the sentencing judge did order that the no-contact order remain in place following Mr. Ashley’s convictions. RP 594-95.

Mr. Ashley timely appealed. CP 411.

ARGUMENT

THE DETECTIVE VIOLATED MR. ASHLEY’S ARTICLE I, SECTION 7 RIGHTS BY CONDUCTING A WARRANTLESS SEARCH OF HIS RECORDED PHONE CALLS. THOSE RECORDINGS SHOULD HAVE BEEN SUPPRESSED AT TRIAL.

A. Article I, section 7 provides heightened protection for personal phone calls.

Article I, section 7 of the Washington Constitution protects against warrantless searches of a citizen’s “private affairs.” *State v. Jorden*, 160 Wn.2d 121, 126, 156 P.3d 893 (2007); Wash. Const. art. I, sec. 7. Warrantless searches are *per se* unreasonable unless they fall within one of the few recognized exceptions. *Id.* The burden is on the state to demonstrate that one of those exceptions applies to a given case. *State v. Patton*, 167 Wn.2d 379, 386, 219 P.3d 651 (2009).

Article I, section 7 is “qualitatively different” from the Fourth Amendment and provides greater protection because it “is grounded in a broad right to privacy” with “no express limitations.” *State v. Hinton*, 179 Wn.2d 862, 868-877, 319 P.3d 9 (2014) (*citing State v. Chacon Arreola*, 176 Wash.2d 284, 291, 290 P.3d 983 (2012)).

The inquiry under article I, section 7 does not turn on whether a person has a reasonable expectation of privacy. *Id.* The “private affairs” analysis does not limit itself to “protected places” or the subjectively

lowered expectation of privacy brought about by “well publicized advances in surveillance technology.” *Id.* at 870.

Private affairs are “those interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass.” *Jorden*, 160 Wn.2d at 126 (quoting *In re Pers. Restraint of Maxfield*, 133 Wash.2d 332, 339, 945 P.2d 196 (1997) (plurality opinion)). In order to determine whether an interest constitutes a “private affair,” courts look to the “*nature* of the information sought – that is, whether the information obtained via the governmental trespass reveals intimate or discrete details of a person's life.” *Id.* (citing *State v. Jackson*, 150 Wash.2d 251, 262, 76 P.3d 217 (2003); *State v. McKinney*, 148 Wash.2d 20, 29, 60 P.3d 46 (2002); *Maxfield*, 133 Wn.2d at 341; *State v. Young*, 123 Wash.2d 173, 183–84, 867 P.2d 593 (1994); *State v. Boland*, 115 Wash.2d 571, 578, 800 P.2d 1112 (1990)) (emphasis in original).

When the interest involves the gathering of personal information, courts must also consider “the purpose for which the information sought is kept and my whom it is kept.” *Id.* at 127.

The availability of advanced technology may lead to a diminished subjective expectation of privacy, but that “does not resolve whether use of that technology without a warrant violates article I, section 7.” *State v. Jackson*, 150 Wn.2d 251, 259–60, 76 P.3d 217, 222 (2003) (citing *State v.*

Myrick, 102 Wash.2d 506, 511, 688 P.2d 151 (1984); *Young*, 123 Wash.2d at 181–82.

Washington has a “long history of extending strong [article I, section 7] protections to telephonic and other electronic communications.” *Hinton*, 179 Wn.2d at 871. There is also precedent for the police obtaining a warrant to search material that would be available to correction’s officials without a warrant. *See e.g. State v. Puapuaga*, 164 Wn.2d 515, 519, 192 P.3d 360, 362 (2008) (noting that the police got a warrant to search an inmate’s personal documents).

B. Institutional security concerns to not justify warrantless “fishing expeditions” by police officers acting on hunches that evidence a crime may be contained in a recording of a jail phone call.

Mr. Ashley does not claim that the constitution prohibited Telmate from recording his jail calls or prohibited the monitoring of those calls by jail officials. Rather, his claim rests on the contention that the detective violated article I, section 7 by conducting a warrantless search of those recordings – based on a “hunch” – for the express purpose of uncovering evidence of a crime.

Washington courts have long differentiated between the collection of data for a non-police purpose and the subsequent search of that data by the police as part of a criminal investigation. *See e.g. Hinton*, 179 Wn.2d

862; *State v. Jordan*, 160 Wn.2d 121, 128–29, 156 P.3d 893 (2007);
Maxfield, 133 Wn.2d 332; *State v. Miles*, 160 Wn.2d 236, 246, 156 P.3d
864, 869 (2007); *State v. Phillip*, --- Wn. App. ---, --- P.3d ---, 77175-2-I,
2019 WL 3544004 (Wash. Ct. App. Aug. 5, 2019); *Boland*, 115 Wn.2d
571; *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

The *Hinton* court, for example, held that a person does not lose his/her privacy interest in a text message simply by sending it to a third party:

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 I, section 7's protection.

Hinton, 179 Wn.2d at 873.

Likewise, personal information does not move beyond the realm of “private affairs” when a person shares his/her name and whereabouts as part of a motel registry, discloses financial information to bank, places documents in the garbage for collection, gives the phone company the numbers s/he calls, or shares his/her location with a cell phone company. *Jordan*, 160 Wn.2d at 128–29; *Phillip*, --- Wn. App. ---, 77175-2-I, 2019 WL 3544004; *Miles*, 160 Wash.2d at 246; *Maxfield*, 133 Wn.2d 332; *Gunwall*, 106 Wn.2d 54.

In each of these cases, the fact that the information has already been collected or recorded is inapposite to whether the police need a warrant to search it later under article I, section 7. *Id.*

This distinction creates a significant difference between the protection provided by article I, section 7 and that provided by the Fourth Amendment. *See e.g. California v. Greenwood*, 486 U.S. 35, 108 S. Ct. 1625, 100 L. Ed. 2d 30 (1988) (permitting the warrantless search of garbage cans under the Fourth Amendment); *Smith v. Maryland*, 442 U.S. 735, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979) (permitting warrantless use of a “pen register” under the Fourth Amendment).

Article I, section 7 differentiates between the original collection of data and its subsequent search by police even when the information has been initially recorded or collected by a state actor. *Maxfield*, 133 Wn.2d at 338.

In *Maxfield*, the Supreme Court held that the collection of electricity consumption records by the Public Utility District (a state actor) did not mean that the data could be disclosed to law enforcement for purposes of a criminal investigation without a warrant. *Id.*

Similarly, in Mr. Ashley’s case, the facts that his phone calls had already been recorded by Telmate and could (assuming, *arguendo*) have been permissibly monitored by corrections officers are inapposite to

whether the detective should have been required to obtain a warrant and articulate probable cause before conducting a search of those recordings under article I, section 7.

Personal phone calls constitute “private affairs” under article I, section 7.¹ See *Hinton*, 179 Wn.2d at 871. No exception to the warrant requirement permitted the detective to search them in Mr. Ashley’s case.

Division I has held in several cases that no warrant is required in order for corrections officials to record and monitor inmate phone calls, in the interest of institutional security. *State v. Archie*, 148 Wn. App. 198, 204, 199 P.3d 1005 (2009); *State v. Mohamed*, 195 Wn. App. 161, 166, 380 P.3d 603 (2016); *State v. Haq*, 166 Wn. App. 221, 258, 268 P.3d 997 (2012), *as corrected* (Feb. 24, 2012).

Like all exceptions to the warrant requirement, however, this “institutional security exception” must be “narrowly drawn” and limited by the reasons justifying its existence. *Patton*, 167 Wn.2d at 386.

¹ Division I has said that phone calls from jail “are not private affairs deserving of article I, section 7 protection.” *State v. Archie*, 148 Wn. App. 198, 204, 199 P.3d 1005 (2009). The *Archie* court relied on the Washington Supreme Court’s prior decision in *Modica*, in addition to the “institutional security” exception, discussed *infra*. *State v. Modica*, 164 Wn.2d 83, 186 P.3d 1062 (2008). The *Modica* court, however, analyzed the issue only under the Washington Privacy Act, *not* under article I, section 7. *Id.* Division I erred by relying on *Modica* to hold that inmate phone calls fall outside the bounds of the longstanding article I, section 7 protection of personal phone calls. This Court should decline to adopt Division I’s holding in *Archie*.

The detective in Mr. Ashley's case conducted a search of his recorded phone calls, not in the interest of jail security, but because she had a "hunch" that he had violated the new no-contact order. RP 263. Criminal investigations based on hunches are wholly unrelated to institutional security and are exactly the types of searches that the warrant requirement was designed to vitiate.

When narrowly-drawn according to its purpose, the "institutional security exception" to the warrant requirement does not extend to searches for evidence of additional crimes, like the one conducted in Mr. Ashley's case.

As noted above, the article I, section 7 analysis into whether a warrant is required before the police may search stored data also requires consideration of "the purpose for which ... information is kept, and by whom." *Jorden*, 160 Wn.2d at 128.

In this case, Mr. Ashley's recorded phone calls were stored by Telmate on off-site servers. RP 261-62, 372. The information is not stored in plain view, or in any other location qualifying it for some other exception to the warrant requirement. The detective should have been required to establish probable cause and obtain a warrant before conducting the search.

The fact that the “institutional security exception” may have permitted Telmate and jail officials to record and monitor Mr. Ashley’s phone calls is inapposite to whether the detective should have been required to obtain a warrant to search that stored data later. *Jorden*, 160 Wn.2d at 126; *Patton*, 167 Wn.2d at 386. Insofar as Division I has failed to recognize the distinction between the initial recording of jail phone calls and a later police search of those recordings for evidence-collection purposes, this Court should decline to adopt that erroneous reasoning.

The detective violated Mr. Ashley’s rights under article I, section 7 by conducting a warrantless search of his recorded personal phone calls. *Jorden*, 160 Wn.2d at 126; *Hinton*, 179 Wn.2d at 871. The recordings should have been suppressed at Mr. Ashley’s trial. *Id.*

C. Mr. Ashley did not consent to the detective’s search of his recorded personal phone calls.

There was a sign next to the phone in the jail, informing inmates that their phone calls are subject to monitoring. RP 259. But the sign does not inform the inmates that the recordings of the calls could be subjected to warrantless searches by the police and could lead to additional criminal charges. *See RP generally.*

Likewise, a recorded message warned Mr. Ashley that his calls were “subject to recording and monitoring.” RP 335. But the message did

not clarify that the calls, once recorded, could be searched by the police without a warrant. *See* RP 335.

Even if Mr. Ashley consented to the recording of his phone calls by Telmate and their monitoring by jail employees, he did not consent to the warrantless search of those recordings by the detective. The consent exception to the warrant requirement cannot justify the admission of the recorded calls at Mr. Ashley's trial.

Consent to search constitutes an exception to the warrant requirement under article I, section 7. *State v. Thompson*, 151 Wn.2d 793, 803, 92 P.3d 228 (2004). But, in order to establish that the exception applies to a given case, the state must demonstrate that: (1) the consent was given voluntarily, (2) the consenting person had the authority to consent, and (3) the search did not exceed the scope of the consent given. *Id.*

In Mr. Ashley's case, the state cannot demonstrate that the detective's search of his recorded calls did not exceed the scope of any consent that he gave. As discussed above, an individual's consent to have personal data collected, stored, or used for a non-police purpose does not equate with consent to have that data warrantlessly searched by the police as part of a criminal investigation. *Jorden*, 160 Wn.2d at 128–29; *Phillip*, -

-- Wn. App. ---, 77175-2-I, 2019 WL 3544004; *Miles*, 160 Wash.2d at 246; *Maxfield*, 133 Wn.2d 332; *Gunwall*, 106 Wn.2d 54.

Even so, the Division I cases discussed above hold that the consent exception to the warrant requirement permits warrantless searches of personal inmate phone calls by the police as part of a criminal investigation because the inmates were warned that the calls were subject to recording. *See Archie*, 148 Wn. App. at 204; *Haq*, 166 Wn. App. at 258; *Mohamed*, 195 Wn. App. at 167-68.

But Division I fails to adhere to the Supreme Court's mandate to differentiate between consent to the collection of data for a non-police purpose and consent to its subsequent warrantless search by the police. *Jorden*, 160 Wn.2d at 128-29; *Miles*, 160 Wash.2d at 246; *Maxfield*, 133 Wn.2d 332; *Gunwall*, 106 Wn.2d 54. This Court should decline to adopt Division I's holding in *Archie*, *Haq*, and *Mohamed* because it is based on flawed reasoning and a misapplication of Supreme Court precedent.

The detective violated Mr. Ashley's rights under article I, section 7 by conducting a warrantless search of his recorded phone calls, based on a hunch that she would find evidence of a crime. RP 263. Those recordings constituted the state's only evidence that Mr. Ashley had committed the charges offenses. *See RP generally*.

The trial court erred by denying Mr. Ashley's motion to suppress.
Id. Mr. Ashley's convictions must be reversed and the recordings must be suppressed on remand. *Id.*

CONCLUSION

The trial court erred by denying Mr. Ashley's motion to suppress the recordings of his personal phone calls, which were obtained pursuant to an unlawful warrantless search. Mr. Ashley's convictions must be reversed.

Respectfully submitted on September 5, 2019,



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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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

Signed at Seattle, Washington on September 5, 2019.



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