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

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

STATE OF WASHINGTON, Respondent

v.

BARON DEL ASHLEY JR, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.18-1-01034-9

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

I. Ashley's jail calls were not "private affairs" under article I, section 7 of the Washington constitution.

II. Detective Aldridge did not need a search warrant to listen to Ashley's phone calls

STATEMENT OF THE CASE

On April 4, 2018, Baron Ashley, Jr. (hereafter 'Ashley') appeared in the Superior Court of the State of Washington in Clark County and was issued a Domestic Violence No Contact Order in connection to the case of State of Washington vs. Baron Del Ashley Jr., Clark County Cause No. 18-1-00974-0. RP 283. The no-contact order prohibited Ashley from having any contact whatsoever with his wife, Lorrie M. Brookshire (also known as Lorrie Ashley), including by telephone. RP 284. At the hearing, Ashley refused to sign the no-contact order and the judge explained to him that the order would remain in effect whether he signed it or not. RP 287.

Telephones are available to inmates at the Clark County jail. *See* RP 259. There are signs near the phone informing the inmates that their calls will be recorded and subject to monitoring. RP 259. When they initiate a phone call from the jail, there is a pre-recorded message warning both the caller and the recipient that the phone call is being recorded and could be subject to monitoring. RP 298-99. These phone calls are recorded

for police purposes including, but not limited to, institutional security. RP 265-66. Telmate stores these recorded phone calls in an off-site server that can be accessed online by law enforcement via a username and password. RP 296. Detective Sandra Aldridge of the Vancouver Police Department determined Ashley made telephone calls to Lorrie Ashley on the dates of April 4th, 5th, 7th, and 8th. RP 322-99. These calls were the basis of the charges against Ashley; the jury convicted him of all four counts of no-contact order violations. RP 461.

ARGUMENT

I. Ashley's jail calls were not "private affairs" under article I, section 7 of the Washington constitution.

Ashley argues that police conducted a warrantless search of his private affairs by accessing the recorded jail phone calls Ashley made to his wife from the Clark County jail. Recorded telephone calls from the county jail are not "private affairs" and therefore no search occurred when the detective accessed the recordings. Ashley's claim fails.

Article I, section 7 of the Washington constitution protects citizens from governmental intrusion into their private affairs without authority of law. *State v. Chacon Arreola,* 176 Wash.2d 284, 291, 290 P.3d 983 (2012). A person's private affairs are "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from

governmental trespass absent a warrant." *State v. Myrick,* 102 Wash.2d 506, 511, 688 P.2d 151 (1984). To determine whether governmental conduct intrudes on a private affair, this Court looks at whether the information obtained reveals "intimate or discrete details" of a person's life, whether there is an expectation of privacy in the information, and whether there are historical protections afforded to the perceived interest. *State v. Jorden,* 160 Wash.2d 121, 126-27, 156 P.3d 893 (2007).

In this case, although the information obtained from Mr. Ashley's phone calls might have contained "intimate or discrete details" of his personal life, there are no historical protections afforded to jail calls and he had no expectation of privacy in the conversations because he consented to have his calls recorded and monitored by law enforcement.

a. There are no historical protections afforded to jail phone calls.

Inmates have a reduced expectation of privacy. *State v. Campbell,* 103 Wash.2d 1, 23, 691 P.2d 929 (1984). Jail calls are not "private" as defined by Washington's privacy act when they are not privileged communications (such as communication between an inmate and his attorney) and the caller and the receiver are both warned that the conversation will be recorded and monitored. *State v. Modica,* 164 Wash.2d 83, 186 P.3d 1062 (2008). Washington's privacy act is one of the

most restrictive surveillance laws ever promulgated. *State v. O'Neill,* 103 Wn.2d 853, 878, 700 P.2d 711, 724 (1985).

If the Washington Supreme Court has ruled that jail calls are not "private" under one of the most restrictive surveillance laws ever promulgated, then jail calls are not "private affairs" under article I, section 7. Division I of this Court applied this logic when they ruled that jail calls are not "private affairs" deserving of article I, section 7 protection. *State v. Archie,* 148 Wash.App. 198, 199 P.3d 1005 (2009); *State v. Mohamed,* 195 Wash.App. 161, 380 P.3d 603 (2016); *State v. Haq,* 166 Wash.App. 221, 258-59, 268 P.3d 997 (2012). The Court in *Archie* reasoned that because the defendant knew his calls were being recorded and monitored by law enforcement, there was no reasonable expectation of privacy and therefore, the phone calls were not "private affairs." *Id.* at 204. Division I continued to hold that jail calls are not "private affairs" deserving of article I, section 7 protection in both *Mohamed* and *Haq*. Furthermore, the defendants in *Modica*, *Archie,* and *Haq* had all violated no-contact orders in their jail phone calls just like Ashley did.

Due to these holdings, it is clear that there are no historical protections to jail phone calls when they are not privileged communications and there are warnings that such calls will be subject to recording and monitoring by law enforcement. Here, because the

communication was not privileged and there were adequate warnings both in the form of a sign near the phones and an audio recording warning both Ashley and Ms. Brookshire that the phone calls would be subject to recording and monitoring, there are no article I, section 7 protections afforded to Ashley's conversations with Ms. Brookshire.

b. Ashley had no reasonable expectation of privacy in his phone calls because he consented to have his calls recorded and monitored by law enforcement.

When Ashley made phone calls from the jail, there were signs near the phone informing him that his calls would be recorded and subject to monitoring. RP 259. When he initiated the phone calls through the Telmate system, there was a pre-recorded message warning both Ashley and the recipient of his call that the conversation would be recorded and subject to monitoring. RP 298-99.

Ashley claims that due to these warnings he may have consented to have his phone calls recorded and monitored by "jail employees" for the "non-police purpose" of "institutional security," but he did not consent to a search of those recordings by the police for police purposes. However, it is common knowledge that the "jail employees" who work at the Clark County Jail are law enforcement officers employed by the Clark County Sheriff's Office. If "jail employees" are Clark County Sherriff's deputies,

then the "institutional security" of Clark County Jail is a "police purpose." That is, the purpose of officer safety.

> The jail records all inmate calls because jail authorities cannot know in advance which calls may contain information pertaining to plans of escape, tampering with witnesses, and other potential breaches of security. Thus, the need for jail security is a generalized rationale.

Mohamed, 195 Wash. App. at 165, 380 P.3d at 606. Therefore, when Mr. Ashley consented to have "jail employees" listen to his calls, he consented to have the police listen to his calls.

Furthermore, Ashley had the subjective intent to consent to the police searching his phone calls for criminal activity. Consent must be freely and voluntarily given and cannot be the result of coercion or duress. *McNear v. Rhay,* 65 Wn.2d 530, 398 P.2d 732 (1965). Whether a person voluntarily consents to a search is a question of fact to be determined from the totality of the circumstances. *Schneckloth v. Bustamonte,* 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). Here, because Ashley was warned both with signs near the phone and with an audio message during the phone call that the conversation would be recorded and subject to monitoring, he consented to have the police search his phone calls for criminal activity. His consent is further supported by the fact that Ashley and Ms. Brookshire called each other "cuddy" (a nickname for cousin) during the phone calls even though they are husband and wife. RP 387.

The use of nicknames is evidence that they were trying to conceal their relationship and Ms. Brookshire's identity because they knew the police would listen to the phone call.

II. Detective Aldridge did not need a search warrant to listen to Ashley's phone calls

Generally, warrantless searches and seizures are per se unreasonable and are in violation of the Article I, Section 7 of the Washington State Constitution unless they fall under one of the few exceptions to the warrant requirement. *State v. Duncan*, 146 Wn.2d 166, 171, 43 P.3d 513 (2002). One of the exceptions to the warrant requirement is the "plain view" doctrine. *State v. Daughtery,* 94 Wash.2d 263, 267, 616 P.2d 649 (1980). Under the plain view doctrine, an officer must: (1) have prior justification for the intrusion; (2) inadvertently discover the incriminating evidence; and (3) immediately recognize the criminal activity. *State v. Kennedy,* 107 Wash.2d 1, 13, 726 P.2d 445 (1986). If the police can listen to Ashley's jail phone calls for the purpose of institutional security, then when they discovered he had committed another crime while listening to those calls, the newly discovered criminal activity would fall under the "plain view" exception to the warrant requirement.

Even if Ashley's criminal conduct was not discovered "inadvertently" while the police where listening to his calls for institutional security purposes, institutional security is not the only justification for the state recording an inmate's phone call. Under RCW 9.73.095, which establishes the guidelines for recording and divulging inmate's phone calls, subsection (3)(b) states: "The contents of any intercepted and recorded conversation shall be divulged only as is necessary to safeguard the orderly operation of the correctional facility, in response to a court order, or in the prosecution *or investigation of any crime*." (Emphasis added). From this language it appears that the legislature recognized that the investigation of *any* criminal activity can be a justification for recording inmate phone calls.

Ashley stipulates that it was okay for Telmate to record the phone calls, but argues it was not okay for Detective Aldridge to search those calls for criminal activity. Ashley cites many cases to support his argument that the police must obtain a warrant to search for information that has already been recorded and stored: *State v. Hinton,* 179 Wn.App. 862, 868-77, 319 P.3d 9 (2014); *State v. Jorden,* 160 Wn.2d 121, 128-29, 156 P.3d 893 (2007); *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); *State v. Boland,* 115

Wash.2d 571, 578, 800 P.2d 112 (1990); *State v. Gunwall,* 106 Wn.2d 54, 720 P.2d 808 (1986). Including one case where a state actor had collected information that was later searched by the police: *In re Pers. Restraint of Maxfield,* 133 Wash.2d 332, 339, 945 P.2d 196 (1997). However, none of the cases cited by Ashley address the issue of whether a law enforcement officer must obtain a warrant to search through information obtained by another law enforcement agency.

Essentially, Ashley is asking the Court to require the police to get a warrant any time they want to look at records that are in the custody of another law enforcement agency. Such a ruling would set a dangerous precedent and is contrary to the wishes of Congress. In 2004, Congress established an "information sharing environment" amongst law enforcement agencies to encourage the free flow of national security data as part of the Terrorism Prevention Act. *Intelligence Reform and Terrorism Prevention Act of 2004,* Pub. L. No. 108-458, § 1016(b), 118 Stat. 3638, 3665-66. Here, because the information was shared amongst law enforcement agencies, there was no need to obtain a search warrant before Detective Aldridge listened to Ashley's jail phone calls.

CONCLUSION

For the reasons stated above, this Court should uphold Mr. Ashley's convictions.

DATED this 18th day of November, 2019.

Respectfully submitted:

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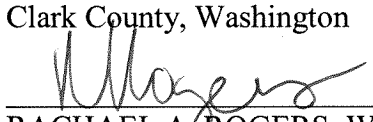
By: 

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