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NO. 53732-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

SCOTT RIDGLEY,

Appellant.

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

The Honorable Joely A. O'Rourke, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying the defense motion to suppress the interceptions, transmissions and recordings of two conversations between Appellant Scott Ridgley and a confidential informant, Casey Perkins, recorded by the Centralia Police Department by means of a wire intercept; and erred by failing to suppress all testimony reliant upon that evidence. 1RP 27; CP 96.

2. To the extent the trial court's finding suggests the police department's forms authorized only Detective Chad Withrow to make the recordings, the trial court's finding is in error. CP 95 (Finding 1.2).

3. To the extent trial counsel failed to clearly identify all aspect of evidence that must be suppressed, and to the extent this failure contributed to the trial court's erroneous ruling, trial counsel provided ineffective assistance of counsel.

Issues pertaining to assignment of error.

1. The written authorization forms authorize "Detective Withrow and/or any other officers participating in this investigation" to record the conversations between Ridgley and the confidential informant. CP 72, 79. Do the forms fail to comply with Washington's Privacy Act, requiring the authorization form to specify "[t]he names of the officers authorized to intercept, transmit, and record the conversation or

communication[?]" RCW 9.73.230(2)(c). If yes, is suppression of the recordings and all testimony relying on the recordings required?

2. The trial court found the forms "authorized the recording of a conversation by Detective Chad Withrow ..." and made no mention of the form's authorization of other officers. 1RP 95 (Finding 1.2). To the extent this finding omits or fails to recognize that the forms authorized other officers by means of a catch-all phrase, is the finding unsupported by substantial evidence in the record?

3. Trial counsel requested suppression of the recordings and of testimony reliant on the recordings, but failed to orally clarify that the interceptions and transmissions, as well as testimony reliant upon this evidence, must also be excluded. Did this failure of clarity contribute to the trial court's erroneous ruling? If so, did it constitute reversible ineffective assistance of counsel?

4. Where the inadmissible evidence was relied upon to establish probable cause for a later-issued search warrant of Ridgley's property, and where evidence from both the fruits of the warrant and aided by the intercepted, transmitted and recorded conversations was admitted at trial, what is the proper remedy? Remand for reconsideration of the legality of the warrant? Remand for retrial? Or both?

B. STATEMENT OF FACTS

1. Initial Charges & Pleas

The Lewis County Prosecutor's Office charged Appellant Scott Ridgley with five counts, including two counts of delivery of methamphetamine, one count of possession of methamphetamine with intent to deliver, unlawful possession of a firearm, and maintaining premises for drug use. CP 16-18.

Ridgley pleaded not guilty to all counts and the case proceeded to trial by jury. 3RP 314.¹

2. Suppression Motions

The State sought to present evidence from two operations organized by the Centralia Police Department involving undercover drug purchases (a.k.a. controlled buy operations), and the fruits of a follow-up search warrant executed at Ridgley's property. Ridgley moved to suppress two audio/video recordings of alleged drug transactions between himself and a confidential informant, Casey Perkins. CP 70.

Both parties agreed the officers must meet the requirements RCW 9.73.230 in order to conduct a legally authorized wire intercept. CP 64; 1RP 17. The State relied on the authorization forms to argue the State had sufficiently complied with the statute and the recordings were admissible.

¹ This brief refers to the verbatim report of proceedings as follows: 1RP (7/11/18), 2RP (11/7/18), 3RP (7/29/19, 7/30/19, 8/29/19).

1RP 18. Defense counsel argued strict compliance was required, a good faith effort to comply was not enough, the authorization forms were insufficient, and so the recordings must be suppressed. 1RP 25-26. The parties debated several aspects of the forms, including language in both forms that authorized “Detective Withrow, and/or any other officers participating in this investigation” to intercept, transmit or record communications between “Confidential Informant #224,” Ridgley, “and/or any other associates present.” CP 72 (authorization to intercept communications 5/9/17), 79 (authorization for 5/15/17).

Ridgley’s defense counsel argued the recordings themselves must be suppressed, but agreed witnesses could still testify to their memory of the occasion, so long as such testimony was “not relying on those videos.” 1RP 10.

The trial court concluded the requirements of RCW 9.73.230 had been met, and denied Ridgley’s motion to exclude the recordings. 1RP 27; CP 96. At trial, Ridgley made a standing objection to the recordings which was noted by the court. 3RP 12.

3. Jury Trial Evidence

At trial, in addition to the recordings themselves, the State presented testimony of confidential informant Perkins, several officers who conducted the two controlled buy operations and subsequent search

of Ridgley's property, and various items and photos of items discovered in the search. Ridgley did not testify and the defense presented no evidence. 3RP 300, 310.

Officer testimony established the following. Prior to the events of Ridgley's case, Casey Perkins was arrested for drug possession. 3RP 67. In exchange for a reduction in charges, Perkins agreed to serve officers as a confidential informant. 3RP 67-68. Officers organized two "buy" operations wherein they arranged for Perkins to purchase methamphetamine from Ridgley at Ridgley's property. 3RP 70, 72, 76, 146, 206, 245. The property had two buildings: a main residence including an automotive shop both located at 509 Gish Road, and a smaller older residence located at 517 Gish Road. 3RP 74, 76, 218, 255, 260; but see 3RP 221, 228 (Schlecht testifying main residence was 517) also 3RP 218 (Schlecht testifying he believes 509 was the older residence but conceding he had mixed up the building addresses in the past).

The first operation occurred on May 9, 2019, the second on May 15, 2019. 3RP 72. Both operations proceeded in essentially the same manner. 3RP 152. Before each alleged purchase, officers met Perkins at a nearby location. 3RP 147, 152. Officers strip-searched Perkins and also searched his vehicle. 3RP 70, 71, 78, 147. Officers then provided Perkins

with buy money (\$500 for the first operation, and \$450 for the second) and provided him with a recording device. 3RP 73, 78, 148, 187.

Officers in concealed locations observed Perkins drive himself to Ridgley's property. 3RP 76-77. While Perkins was on Ridgley's property, officers continue to observe him. Some officers observed with their own eyes or through binoculars from nearby locations. 208-09, 212, 246, 249. Some officers observed by watching and listening to the signal from Perkins' recording device via an application on their phone or ipad. 3RP 69, 82, 212, 249.

No officers were able to directly view or hear, with their own eyes or ears, any transaction or communication between Ridgley and Perkins. 3RP 82-83 (Withrow testimony), 143 (Holt testifying he lost sight of Perkins), 154 (same), 208-09 (Schlecht testimony), 212 (same), 227-28 (same), 246 (Haggerty observed via binoculars), 249 (Haggerty testifying he lost sight of Perkins upon arrival, saw "Not much" with binoculars, other officers were monitoring via video).

Officers testified that as they watched the video on their phones in real time, but explained the signal could be "inconsistent" because it relied on cell phone coverage. 3RP 89. Officers described the signal as "intermittent" during the first operation and would "cut out, in and out," and it was "very choppy" during the second operation. 3RP 81-82, 213.

One officer testified that during the second operation, he only “could see bits and pieces” and “hear bits and pieces.” 3RP 213 (also testifying video during the second operation “wasn’t as good as the previous one”). However, officers testified that they later downloaded the recordings from the device and were able to watch clearer versions of the recordings. 3RP 81-82, 214.

In both instances, officers then observed Perkins leave the property and drive directly to a pre-arranged meeting location. 3RP 1250, 154. Each time, Perkins then gave officers a quantity of white crystalline powder that later tested positive for methamphetamine. 3RP 150, 154, 282. Both times, officers then searched Perkins and his vehicle again to ensure he had not concealed any drugs or left-over buy money, and discovered none. 3RP 152, 155.

On the basis of information from Perkins and the results of the controlled buy operations, officers then obtained a warrant to search Ridgley’s premises. 3RP 282-81. Specifically, Detective Withrow testified they obtained the warrant in part on the basis of statements from Perkins that Ridgley kept drugs in a black container at the 509 property, that Ridley carried container on his person, and had carried the container from the 509 to the 517 property, and that the container held methamphetamine. 3RP 283.

The day after the second controlled buy operation, several officers executed the search warrant of Ridgley's property. 3RP 282-83. Officers found Ridgley standing outside the shop building. 3RP 251. Officers also observed several other individuals on the property. These individuals included other man named Mr. Hamilton, who was standing outside the shop near to Ridgley. 3RP 251. Ridgley's son Larry Ridgley was found hiding behind a vehicle in the automotive shop of the main residence. 3RP 251. Officers ordered everyone out of the buildings, and a man named Stephen Cobb came out. 3RP 169, 266. Mr. Cobb's identification showed his residence as the 509 address. 3RP 169. Mr. Cobb told officers he was cleaning in the older residence. 3RP 235. Schlecht testified Cobb told officers Cobb was residing at the 509 address, and also testified that he did not know how many bedrooms the 509 address contained. 3RP 240. Two officers testified there were two other people were present at the smaller residence, another male and female present there, but neither officer could identify them, and could not rule out whether one of them was an individual named Terry Malek. 3RP 182, 266.

Officers who searched the premises testified that in the shop-area of the property, they found a black plastic "OtterBox" or Ziploc-style box containing a bag of white crystalline substance weighing approximately

two and a half ounces, a digital scale, and over \$6,000 in cash. 3RP 219, 283, 287, 289. The State crime lab verified the white substance tested positive for methamphetamine. 3RP 285. The cash contained over \$500 in bills matching buy money from both the first and second operations. 3RP 288-89.

Withrow testified that upon arresting and searching Ridgley, officers found his wallet contained a \$10 bill from one of the controlled buys. 3RP 288. His wallet also contained his personal driver's license showing 517 Gish Road as his residence. 3RP 224.

Withrow also testified the items in the box were consistent with drug sales, rather than personal use, because the cash was bundled in a way that was common in the drug world, the scale was indicative of sales, and quantity of methamphetamine was larger than that ordinarily kept for personal use. 3RP 292-93.

Holt testified there was drug paraphernalia "everywhere." 3RP 160. Holt clarified the drug paraphernalia, as well as marijuana and a disassembled firearm were all found in the 509 residence, where Mr. Cobb resided. 3RP 169.

Officers found a disassembled firearm (in three pieces) in a glass case in the main residence. 3RP 191-92, 260-61. Testimony was unclear regarding whether officers had moved other items out of the way in order

to see the firearm or if it was sitting on top of other items. 3RP 162, 191. One officer found ammunition in the house (though it was not clear where), and testified that he had assembled the firearm, loaded it, and test fired it at a target set up outside the house on the property. 3RP 260-62. Officers later learned the firearm was registered with the Washington Department of Licensing to Terry Malek, but they were unable to contact him and did not know if or when the last time was that Mr. Malek was present in the house. 3RP 296.

Casey Perkins testified to the following. He agreed to work with police as a confidential informant after he was charged with drug-related charges resulting from a controlled buy. 3RP 105. In exchange, his charges were reduced. 3RP 105. He corroborated officer testimony that he participated in two controlled buys arranged by officers targeting Ridgley. 3RP 106, 107. He testified that during the controlled buy operations, he had used the buy money provided by officers to purchase one ounce of methamphetamine from Ridgley each time. 3RP 108. He testified that the recordings of the transactions, played for the jury, accurately portrayed events. 3RP 111, 116. He also testified that both times, he purchased drugs from Ridgley in the smaller residence which was Ridgley's house. 3RP 112. He also testified he observed Ridgley take the drugs out of a black plastic container or "OtterBox," that Perkins

handed Ridgley the money directly and Ridgley gave him drugs in return. 3RP 114.

Perkins also testified that he had been to Ridgley's home approximately one week prior, and had seen "probably over 4 ounces" of methamphetamines lying around. 3RP 118. He also claimed to have seen a small-caliber pistol at Ridgley's home, in the open, on the table approximately 4-5 feet away from Ridgley. 3RP 118-19.

Perkins testified that although there was another person present during the first of the operations, he testified he did not know her name. 3RP 114. Perkins also testified that during the second operation, there were a number of other people present on the property, but that none of them were inside the room with Perkins and Ridgley during the transaction. 3RP 126, 128.

Perkins also testified that he had been to Ridgley's house a week prior and had seen over four ounces of methamphetamines and a "small caliber pistol" laying out in the open on a table about four to five feet away from Ridgley. 3RP 118-19.

During cross-examination, Perkins testified that although he had initially testified he had been to Ridgley's house only once before, that was incorrect; he had been there twice before. 3RP 120. He denied that he was the person who brought the pistol to Ridgley's house. 3RP 121.

He also testified he was neither a drug addict nor a drug dealer. 3RP 130. When confronted, he admitted he had been arrested for drug dealing. 3RP 130-31. He claimed he had stopped using methamphetamine, despite not receiving any drug treatment, and claimed to have not used drugs after May 9, 2017. 3RP 132. When asked specifically what his last use date was, he became agitated, evasive, and contradictory, first stating it was before his arrest, and then stating it was after his arrest. 3RP 133. He then accused defense counsel of asking him “pretty weird questions.” 3RP 133.

Schlecht testified there were other people on the property during the controlled buys, including a female who was present in the same room during one of the controlled buys, but that on the basis of the video, although there were other people present who he was sure could hear Perkins, he did not believe Perkins conversed with anyone other than Ridgley. 3RP 230-31.

The State also presented the video recordings of the two purchases which largely corroborated Perkins’ testimony about what occurred during the transactions and corroborated the officers’ testimony regarding what they observed from the videos’ live feed and later playback. 3RP 112, 116; Ex 50 (including both videos); see also 3RP 111 (defense renews objection based on pre-trial issues).

4. Closing Arguments & Verdicts

In closing argument, the State conceded that in light of his deal with the police and various ambiguities and inconsistencies in his testimony, Perkins had both a motive and criminal history that made his testimony against Ridgley suspect. 3RP 325-26. The prosecutor harkened back to conversations with the jury pool during voir dire, and pointed out that several potential jurors had stated under such circumstances they would like to see corroboration. 3RP 325-26. The prosecutor then relied heavily on the video of the controlled buy operations (and on the officers' testimony regarding what they had seen in the video) to argue Perkins' testimony had been corroborated and should be found credible. 3RP 326-27.

In light of the videos, defense counsel expressly declined to argue regarding counts I, II, III or V, and chose only to attack the State's firearm possession charge. 3RP 345 ("I think the evidence was probably pretty clear as far as what went on"), 350. Counsel pointed out the firearm was disassembled, it was unclear whether it was under other items, it was registered to another individual Terry Malek who may have been present that day, given the officers' failure to identify one of the men on the property that day, and it was found in the smaller residence where two

other unidentified people were found, while Ridgley was found outside shop by the main residence that day. 3RP 348-49.

The jury found Ridgley guilty of both counts of methamphetamine delivery (counts I and II), of methamphetamine possession with intent to deliver (count III), and of maintaining a place for drug use (count V), but found him not guilty of first degree unlawful firearm possession (count IV). CP 132-39.

5. Sentence & Appeal

The trial court imposed a prison-based Drug Offender Sentencing Alternative (DOSA) on counts I-III resulting in 45 months of prison followed by 45 months of community custody. CP 149. On count V, the court imposed 9 months of prison followed by 9 months of community custody. CP 149.

Ridgley timely appeals. CP 155.

C. ARGUMENT

THE WASHINGTON PRIVACY ACT REQUIRES REVERSAL FOR SUPPRESSION AND A NEW TRIAL.

The Washington Privacy Act sets forth requirements for admissibility of any communication intercepted, transmitted, or recorded without the consent of both parties. RCW 9.73.030, .050, .230. “[T]he language and the history of RCW 9.73 make it clear the legislature’s primary purpose in enacting these statutes was the protection of the

privacy of individuals from public dissemination, even in the course of a public trial, of illegally obtained information.” State v. Wanrow, 88 Wn.2d 221, 233, 559 P.2d 548, 555 (1977).

Here, officers violated the Act where the police department’s self-authorizing report failed to list the names of all officers expected to participate in the covert recording operation. The trial court erred by admitting the recordings of two conversations between Ridgley and a confidential informant, and also by admitting a substantial amount of key testimony (both by the informant and officers) that relied upon those recordings. Without this evidence, which should have been excluded, only the uncorroborated word of the confidential informant would have tied Ridgley to the transactions, drugs, scale, and a substantial amount of the cash bills discovered in the house that corresponded to the officer’s pre-arrange buy operation bills. To the extent trial counsel failed to clarify the precise contours of the excludable evidence, and to the extent this contributed to the trial court’s erroneous ruling, counsel’s performance was reversible ineffective assistance of counsel. The trial court’s erroneous ruling caused prejudice and require reversal for suppression and a new trial, as well as reconsideration by the trial court of the later-issued warrants that relied upon the inadmissible evidence to establish probable cause.

1. The Privacy Act was violated.

The Act provides the State may not “intercept, or record any ... (b) Private conversation, by any device electronic or otherwise designed to record or transmit such conversation ... without first obtaining the consent of all the persons engaged in the conversation” unless another exception within the Act applies. RCW 9.73.030 (emphasis added).

One such exception when a police officer conducts a bona fide criminal investigation. RCW 9.73.230(1). Such an officer may apply to his or her police chief for authority to intercept, transmit or record a communication covertly, if the conditions and requirements of RCW 9.73.230(1) and (2) are met. RCW 9.73.230(1). For example, the police chief must author a report listing all of the items specified in the statute, contemporaneous with the grant of authority. RCW 9.73.230 (1)(c), (2). Relevant here, the Act requires the authorizing report to specify “[t]he names of the officers authorized to intercept, transmit, and record the conversation or communication.” RCW 9.73.230(2)(c) (emphasis added).

Washington courts have noted that the exception authorized under section .230 amounts to “self-authorized electronic surveillance” because it permits the police department to authorize itself to engage in a covert listening operation, without first applying to the courts for permission. State v. Jimenez (hereinafter “Jimenez I”), 76 Wn. App. 647, 651, 888

P.2d 744 (1995) (quoting State v. Gonzalez, 71 Wn. App. 715, 719, 862 P.2d 598 (1993), review denied, 123 Wn.2d 1022, 875 P.2d 635 (1994)), both overruled on other grounds by State v. Jimenez (hereinafter “Jimenez II”), 128 Wn.2d 720, 726, 911 P.3d 1337 (1996)).

Courts have repeatedly affirmed that in this context, strict compliance is required for the grant of authority to be valid. Jimenez I, 76 Wn. App. at 651 (citing Gonzalez, 71 Wn. App. at 718-19).²

Even “technical errors are fatal to an authorization under” the self-authorizing provision. Jimenez I, 76 Wn. App. at 651 (citing Gonzalez, 71 Wn. App. at 718-19. Moreover, courts have repeatedly explained that in the context of self-authorized surveillance, the “specific procedural instructions of RCW 9.73.230 are necessary to ‘limit abuse[.]’” Jimenez I, 76 Wn. App. at 651 (quoting Gonzalez, 71 Wn.App. at 719).

The question of the specific error that occurred here—failure to specify in the report the names of all officers authorized to intercept, transmit and record the conversations—has already been addressed by a

² As discussed more below, both Jimenez I and Gonzalez were overruled on other grounds by State v. Jimenez (hereinafter “Jimenez II”), 128 Wn.2d 720, 726, 911 P.3d 1337 (interpreting RCW 9.73.050, .230(8)). State v. Costello, 84 Wn. App. 150, 154, 925, P.2d 1296 (1996) (citing Jimenez I, 76 Wn. App. at 651, for proposition that self-authorizing statute must be strictly complied with, and noting Jimenez I was reversed on other grounds by Jimenez II, 128 Wn. 2d 720). However, the holding of Jimenez I regarding the requirement of strict compliance remains good law. Costello, 84 Wn. App. at 154.

Washington court. Jimenez I, 76 Wn. App. at 651. In Jimenez I, an undercover officer who was part of the Skagit County Interlocal Drug Enforcement Unit purchased cocaine from Maria Jimenez. Id. The police department then drafted a series of five self-authorizing reports purporting to grant authority to record conversations between undercover law enforcement and Jimenez. Id. Officers then recorded five conversations, all of which included discussion and execution of drug sales. Id.

Jimenez challenged two reports for failing to specify the names of the officers who were authorized to make the recordings. Id. at 651. The May 19 report authorized Detectives Catlin and Arroyos as well as “any other member of the Skagit County Interlocal Drug Enforcement Unit and/or their representatives.” Id. (quoting report). The May 27 report authorized “Skagit County Interlocal Drug Enforcement Unit and/or their representatives.” Id. (quoting report).

The Jimenez I Court found the self-authorizing provision of the Privacy Act required law enforcement to provide the required information “in a clear and understandable written report.” Id. at 651-52. “Catch-all phrases ... will not suffice to meet the specificity required by the statute.” Id. at 652. However, “if all the required information can be gleaned from the face of the authorization report, including who is authorized and who is acting, the authorization is valid.” Id. at 652. The Court then reviewed

the face of the two reports along with the declarations of probable cause contained as part of those reports to determine whether the names of participating officers was clear. Id.

The May 19 report noted “an undercover detective” would engage in the recorded conversation, and Detective Spevacek was listed as the consenting party. Id. However, the report purported to authorize “any other member of the Skagit County Interlocal Drug Enforcement Unit” to transmit and record the conversations. Id. (emphasis added). Reading both the report and the probable cause declaration as a whole, the Court concluded “the specific persons authorized cannot be determined from the report” and so the authority the report conferred was “invalid.” Id.

The face of the May 27 report listed only a catch-all provision and named no specific officer. Id. The Court noted “the description of probable cause states that Detective Spevacek will be the officer transmitting or recording the conversation.” Id. (emphasis added). The Court then concluded the following, “However, the catch-all authorization in this report likewise renders it unclear who else will be engaged in the recording. This report attempts to authorize not only the entire drug enforcement unit, but also any of its representatives.” Id. Ultimately, the Court found both provisions invalid, and so each conferred no authority under the Privacy Act. Id.

This holding remains good law. After determining a violation occurred, the Court of Jimenez I went on to consider the scope of the Privacy Act’s statutory exclusionary rule. Id. at 652-53. As discussed more below, the Jimenez I Court relied on cases such as State v. Fjermestad, 114 Wn.2d 828, 791 P.2d 897 (1990), State v. Salinas, 121 Wn.2d 689, 853 P.2d 439 (1993), and Gonzalez, 71 Wn. App. 715, to conclude there was “no material difference between no authorization and invalid authorization,” that the general exclusionary provision in section .050 applied, and that officers who were parties to the conversations were precluded from testifying about their direct observations, even if those observations were unaided by the interception, transmission or recording. Id.

In Jimenez II, the Washington Supreme Court reversed the Court of Appeals’ conclusion regarding the scope of the statutory exclusionary remedy. Jimenez II, 128 Wn. 2d at 722, 726. However, the Supreme Court continued to recognize there had been a violation of the Act, and that it required some evidentiary exclusion. Id. at 726 (holding “[a]bsent compliance with [RCW 9.72.230(8)] the intercepted or recorded communication must be suppressed”). Thus, the Court of Appeals’ conclusion—that there had been a violation and that it required some form of statutory exclusion—remained necessary to the Supreme Court’s

holding and still remains good law. Moreover, this reading of the holdings has been validated by subsequent jurisprudence. Costello, 84 Wn. App. at 154 (citing Jimenez I, 76 Wn. App. at 651, for proposition that self-authorizing statute must be strictly complied with, and noting Jimenez I was reversed on other grounds by Jimenez II, 128 Wn. 2d 720).

Applying this still-valid holding to Ridgley's case shows that the reports failed to comply with RCW 9.72.230(8), and so requires some form of statutory exclusion. In Ridgley's case, the self-authorizing reports purported to authorize "Detective Withrow, and/or any other officers participating in this investigation." CP 72, 79. Jimenez I makes clear that the inclusion of the catch-all phrase "and/or any other officers ..." is fatal to the grant of authority. CP 72, 79; Jimenez I, 76 Wn. App. at 652. This is so even if where the statement of probable cause included with the report lists names of additional participating officers; what is required is for the names of all participating officers to be named and for the grant of authority to be limited to those named. Id.

Here, the later-dated probable cause statement mentions the involvement of Detective Holt in a the prior buy operation, but both probable cause statements fail to clarify the names of all officers who were anticipated to be involved in the interception, transmission, and recording of the communications. CP 74, 81. The report must be analyzed by

viewing the four corners of the document (inclusive of the incorporated probable cause statement). See id. at 651-52. However, it should be noted here that while Withrow was the officer who placed the recording device on Perkins, at least two other officers and possible more (none of whom were authorized by name in the reports) ultimately participated in intercepting the communications in real time. 3RP 73 (Withrow), 209 (Detective Schlecht), 248 (Detective Haggerty); see also 3RP 77 (Sergeant Warren participated in surveillance with Schlecth and Haggerty), 264 (Haggerty did not know if other officers in the vehicle were watching the live video on their phones). This shows that the examination of the catch-all phrase is not a purely theoretical exercise here; it had a very real effect on the police surveillance operations.

For the reasons discussed above, this Court must conclude the Privacy Act was violated here, and this violation invalidates any grant of authority to intercept, transmit, or record the conversations and communications between Perkins and Ridgley.

2. The Privacy Act requires exclusion of the transmissions and recordings, as well as any testimony reliant upon them.

A violation of the Privacy Act requires exclusion of evidence. The Act contains two exclusionary provisions, one general and one specific to the requirements of the law enforcement self-authorizing report exception.

The general exclusionary provision of the Privacy Act provides in relevant part, “[a]ny information obtained in violation of RCW 9.73.030 ... shall be inadmissible” RCW 9.73.050. The more specific exclusionary rule is tied to the requirements of the authorizing report as listed in RCW 9.73.230(1)(c) and .230(2), and provides the following in relevant part:

(8) In any subsequent judicial proceeding, evidence obtained through the interception or recording of a conversation or communication pursuant to this section shall be admissible only if:

(a) The court finds that the requirements of subsection (1) of this section were met and the evidence is used in prosecuting an offense listed in subsection (1)(b) of this section

...

Nothing in this subsection bars the admission of testimony of a party or eyewitness to the intercepted, transmitted, or recorded conversation or communication when that testimony is unaided by information obtained solely by violation of RCW 9.73.030.

RCW 9.73.230(8) (emphasis added).³

Washington jurisprudence defines the contours of the statutory exclusionary rule and conclusively settles which pieces of evidence should have been suppressed in Ridgley’s trial.

As noted above, the Washington Supreme Court has held, “Absent compliance with [section .230], the intercepted or recorded

³ The Act also provides exceptions for admissibility where the person who was recorded gives permission, in the prosecution of a “serious violent offense,” or civil cases for personal injury or wrongful death. RCW 9.73.230(8)(b)-(d).

communication itself will be inadmissible.” Jimenez II, 128 Wn.2d at 726. As the Court’s statement makes clear, it is important to note that the Privacy Act applies to all communication or conversation interceptions, transmissions, or recordings. RCW 9.73.030. Thus, the Act requires suppression of the live-streaming video and audio viewed by officers on their apps (which are interceptions and transmissions) as well as the recordings of these transmissions viewed later.

The Privacy Act “also prohibits testimony about those recorded conversations, when the recording itself is suppressed.” State v. Williams, 94 Wn.2d 531, 534, 617 P.2d 1012 (1980). In addition, the Washington Supreme Court has interpreted the phrase “any information” to include not only the words spoken in a conversation, but also “visual observations as well as assertive gestures.” Fjermestad, 114 Wn.2d at 835. Therefore, any testimony regarding the content of the streaming video and recordings must be excluded.

In Ridgley’s case, the issue arose of the effect of the officers’ good faith efforts to comply with the self-authorizing statute. 1RP 19-20. The prosecutor argued to the trial court that all that was required was a “good faith” effort by officers to comply with the requirements of the Privacy Act. 1RP 19-20. The prosecutor reasoned that if there was a good faith effort, then the recordings themselves were inadmissible but officers could

still “testify at to what was contained in that evidence.” 1RP 19-20. The prosecutor reasoned that if there was no good faith effort to comply, “then nothing comes in” meaning “you can’t have the recording, you can’t have anyone who say anything on the recording... includ[ing] the informant.”

1RP 20. The prosecutor relied on Jimenez II, which provides in part:

We hold that where law enforcement officers make a genuine effort to comply with the privacy act and intercept a private conversation pursuant to an RCW 9.73.230 authorization, the admissibility of any information obtained is governed by the specific provisions of RCW 9.73.230(8). Absent compliance with that section, the intercepted or recorded communication itself will be inadmissible. However, the unaided evidence provision in the same section precludes the suppression of any other evidence. State v. Gonzalez is overruled insofar as it is inconsistent with this decision.

Jimenez II, 128 Wn.2d at 726 (emphasis added).

The State may now cite to Jimenez II, and to the block quote above, to argue that this case overrules both Jimenez I and Gonzalez to hold where an officer makes a good faith effort to comply with the self-authorizing statute, the only evidence that must be excluded is the recording itself. It appears the trial court was persuaded by such reasoning, because the court’s findings indicated the reports “authorized the recording of a conversation by Detective Chat Withrow[.]” CP 95 (Finding 1.2). As noted in the above discussion of the reports, to the extent this finding omits any discussion of the invalidating catch-all

provisions, there is not substantial evidence in the record to support this finding and the finding must be stricken and corrected.⁴

The trial court appears to have taken the prosecutor's argument one step further to conclude that the good faith efforts to comply, and the naming of Withrow in the report (regardless of the catch-all provision) was sufficient to actual compliance with the requirements of RCW 9.73.230. CP 96 (Conclusion 2.1). The trial court then concluded that the recordings themselves were admissible at trial. CP 96 (Order 2.1).

Both the prosecutor's reasoning and the trial court's conclusions misconstrue the relevance of "good faith," misread the case law, and overlook controlling language in the relevant statute.

Jimenez II clarifies that the relevance of an officer's good faith attempt to comply is that it distinguishes whether the general or specific exclusionary provision applies. Jimenez II, 128 Wn. 2d at 725-26. If the officers made no effort to comply with the Privacy Act, then the stricter and more general exclusionary provision in RCW 9.73.050 applies. Id. at 726 (citing Fjermestad, 114 Wn. 2d 828; Salinas, 121 Wn.2d 689). That

⁴ A court's factual findings that are challenged on appeal must be stricken where they are not supported by "substantial evidence" in the record. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). "Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding." Id.

provision excludes “[a]ny evidence obtained in violation of RCW 9.73.030[.]” RCW 9.73.050. Washington Courts have consistently held that under this stricter, more general statutory exclusion provision, even the first-hand accounts of participants to the conversation must be excluded if those participants were aware of and contributed to the illegal interception, transmission and recoding of the conversation. Jimenez II, 128 Wn. 2d at 725-26 (citing Fjermestad, 114 Wn.2d 828; Salinas, 121 Wn.2d 689). Jimenez II did not overrules those holdings, and instead distinguished them. Id.

On the other hand, where officers did make a good faith effort to comply with the self-authorizing exception of the Privacy Act, RCW 9.73.230, then the State was governed by the more-specific exclusionary provision provided in that subsection. Jimenez II, 128 Wn.2d at 726 (citing RCW 9.73.230(8)). The Court called this the “unaided evidence provision” section. Id. (citing RCW 9.73.230(8)).

RCW 9.73.230(8) permits the admissibility of “evidence obtained through the interception or recording of a conversation or communication pursuant to this section... only if” the requirements of the self-authorizing provision are met, the participant to the conversation gives permission, or the information is used in a prosecution for a “serious violent offense” or certain types of civil suits, neither of which is relevant here.

The “unaided evidence provision” states in relevant part, “Nothing in this subsection bars the admission of testimony of a party or eyewitness to the intercepted, transmitted, or recorded conversation or communication when that testimony is unaided by information obtained solely by violation of RCW 9.73.030.” Jimenez II, 128 Wn.2d at 726 (“unaided evidence provision”); RCW 9.73.230(8) (emphasis added).

Contrary to the trial court’s ruling, in Jimenez II the Washington Supreme Court did not simply hold that if there is good faith, then everything comes in. Nor did it hold what the trial prosecutor argued, that where there is good faith, only the recording itself need be excluded. Rather, the Court held that where there is good faith, the “unaided evidence provision” applies. Jimenez II, 128 Wn.2d at 726.

This distinction is necessary because in the Jimenez cases, the undercover officers were themselves direct participants in the conversations. Jimenez I, 76 Wn. App. at 649; see also Jimenez II, 128 Wn. 2d at 722. Thus, their testimony as a “party or eyewitness” to the conversations was admissible because it was also “unaided by information obtained solely by violation” of the Privacy Act. RCW 9.73.280(8) (quote); Jimenez II, 128 Wn. 2d at 726.

The Jimenez II Court maintained that even in the face of a good faith effort to comply, the recordings in that case must be excluded; and

the Court never suggested that testimony reliant on such evidence was admissible. See Jimenez II, 128 Wn. 2d at 726. Quite the contrary, the Court merely held that where there was violation and also good faith efforts to comply with the self-authorizing provision, the exclusionary rule of RCW 9.73.280(8) applies. Jimenez II, 128 Wn. 2d at 726

Applying that rule to Ridgley's case, the officers had made a good faith effort to write authorizing reports, and so the more specific RCW 9.73.280(8) applies. Jimenez II holds that even here, the recordings and transmissions must be excluded. Jimenez II, 128 Wn. 2d at 726. In addition, Ridgley's was not a case involving undercover officers. Rather, Perkins, the confidential informant, was the only direct party to the conversations with Ridgley. See 3RP 108 (Perkins' testimony), 112 (same), 114 (same). The officers all listened in on those conversations by means of the interception, transmission, and recording of the conversations. 3RP 82-83, 143, 154, 208-09, 212, 227-28, 246, 249. Thus, all officer testimony regarding the content of the conversations must be excluded under RCW 9.73.280(8) for two reasons: first because such testimony was not by a party or participant to the conversation, and second because it was aided (and based solely upon) the illegal interception, transmission and recording. At trial, in addition to testifying to his own independent recollection of the conversations as a participant in the

conversations, Perkins also presented testimony about the recordings while they were played to the jury. 3RP 111, 116. Under the analysis discussed above, his independent recollection was admission, but his testimony about the recordings requires exclusion. RCW 9.73.280(8).

This Court should hold not only that there was a violation of the Privacy Act, but that all testimony about the content of the conversations must be excluded, except for the parts of Perkins' testimony that were unaided by the illegal recordings. Costello, 84 Wn. App. at 156 (permitting only unaided portion of officer testimony where officer was direct party to conversation and made good faith effort to comply with self-authorizing provision of Privacy Act).

3. Trial counsel potentially provided ineffective assistance of counsel.

During the pre-trial suppression hearing, trial counsel conceded officers had made a good faith attempt to comply with the self-authorizing provision of the Privacy Act. 1RP 25-26. He stated that for this reason, "we are not asking the court to wholly exclude the evidence, just the actual recordings." 1RP 26. He went on to clarify that the evidence should not be "relied upon" and that officers must rely solely on their "memory of the actual events versus what's part of their... review of the evidence that was obtained." 1RP 26. These statements clarify that defense was asking for

the recordings to be excluded, and believed those recordings could not be relied upon, even to refresh the memories of any witness. However, the statements leave it somewhat ambiguous regarding whether officer testimony based upon the intercepted and streamed live feed should also be excluded.

Based upon the analysis discussed above, it is clear these live intercepted and transmitted conversations were also covered by the Act and that evidence (any testimony aided by it) must be excluded just as the recordings must be excluded.

At this point, it is possible defense counsel did not know to what extent the prosecutor would be presenting officer testimony based upon the live intercepted and transmitted video and audio feed. It also became a moot point once the trial court ruled the recordings themselves were admissible. Regardless, to the extent the defense counsel failed to identify and clarify precisely what evidence should be excluded, and to the extent this contributed to the trial court's confusion regarding the proper law and course of action, trial counsel can be faulted for ineffective assistance.

Both the federal and state constitutions guarantee the right to effective representation. U.S. CONST., AMEND. VI; WASH. CONST., ART. 1, § 22. A defendant is denied this right when his attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney

conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)), cert. denied, 510 U.S. 944, 114 S. Ct. 382, 126 L. Ed. 2d 331 (1993). Reasonable attorney conduct includes the duty to research existing case law. State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (citing Strickland, 466 U.S. at 690-91).

Here, Jimenez II has been extant for over two decades, making the analysis discussed above fully accessible by adequate research. See Jimenez II, 128 Wn. 2d 720 (1996). To the extent this Court finds counsel's failure to clearly identify and present the full scope of all excludable evidence to the trial court contributed to the trial court's erroneous ruling, the Court should find ineffective assistance of counsel and reverse on this basis.

4. The trial court's admission of the illegally obtained evidence caused prejudice and requires remand – for a retrial and for reconsideration of the later-issued search warrant.

Where the Privacy Act is violated, and admissible evidence is presented at trial, the proper course is to determine what effect if any the inadmissible evidence had upon the convictions. Jimenez II, 128 Wn.2d at 728.

Where the sufficiency of later-issued warrants is in question, the appropriate remedy is to remand for the trial court to determine whether the warrants were still adequately supported, and if not, whether the fruits of those warrants must also be suppressed. Id. Ridgley's case did involve warrants that were obtained in part on the basis of this inadmissible evidence, and trial counsel moved to exclude the warrants and the fruits of this warrant search in light of the Privacy Act violations. 1RP 27. Similar to the case of Jimenez II, remand for the trial court's renewed consideration of the adequacy of the warrants is an appropriate remedy.

In addition, remand for retrial is appropriate because the erroneous ruling (based upon a mis-application of biding law) caused prejudice to Ridgley's trial. Once the inadmissible evidence is excised, the trial looks very different. Perkins' testimony becomes the only direct evidence of a drug transaction between himself and Ridgley. Perkins' testimony becomes the only evidence tying Ridgley to the black box containing drugs, a scale, and a large bundle of cash (including several hundred in bills provided by officers for the buy operations).

The prosecutor freely admitted Perkins was not the best or most reliable witness. See 3RP 325-26. In closing, he pointed out Perkins' testimony contained concerning ambiguities and lapses in clarity, and also that, as a confidential informant who had cut a deal to reduce his own drug

charges, he had both a concerning criminal history and a motive to tell officers what they wanted to hear. 3RP 325-26. He harkened back to voir dire, pointing out that potential jurors had expressed a desire to see corroboration in such circumstances, and then pointed to the recordings and testimony about the recordings as evidence of corroboration. 3RP 326-27.

Without the inadmissible testimony, and aside from Perkins' questionable testimony, the jury would have indirect evidence that Perkins conducted two drug purchases in the house. This would be based upon officer testimony that Perkins went in with money and came out with drugs, and that the box described by Perkins was then found in the house containing drugs, a scale and over \$500 of the buy money. 3RP 219, 269, 277, 285, 288. However, there was no evidence the box was ever tested for fingerprints or DNA, or was otherwise identified as belonging to or having been handled by Ridgley. Multiple people lived in the houses and were seen on the property both by officers when Ridgley was arrested and by Perkins when he conducted his purchases. 3RP 126, 128 (Perkins' testimony); 3RP 345, 3RP 348-49, 350 (officer testimony); 3RP 169 (Mr. Cobb resided on property). The only buy money found on Ridgley's person was a \$10 bill in his wallet. 3RP 288, 290.

This left many plausible theories open to the jury: that the drug sales were conducted by someone else in the house, that a roommate drug-dealer reimbursed Ridgley with \$10 cash for some innocuous purpose, such as pizza, and that Perkins had lied to pin the drug sales on Ridgley in an effort to tell officers what they wanted to hear, or cover for some other friend living in the house. In short, it is highly probable the jury would have concluded that a drug deal did occur, but that the State had failed to meet its burden of proof that Ridgley had been the dealer. This is not a stretch, in particular given that the jury appears to have found not credible Perkins' testimony that he saw Ridgley with a revolver when it found him not guilty of unlawful firearm possession. See 3RP 118-19 (Perkins testimony); CP 132-39 (not guilty finding).

The prosecutor's closing argument made clear that without the transmissions and recordings (and the testimony and other evidence derivatively aided by it), the case was relatively weak. See 3RP 325-27.

This Court should conclude the trial court's erroneous ruling prejudiced the outcome of Ridgley's trial and requires reversal and remand for a new trial, and remand for reconsideration of the adequacy of the later-issued search warrant reliant upon this inadmissible evidence.

D. CONCLUSION

For the reasons discussed above, the Privacy Act was violated and requires suppression of the intercepted, transmitted, and recorded conversations, as well as any testimony that relied upon or was aided by the live feeds or recordings. The appropriate remedy is reversal and remand for a new trial, with direction for the trial court to reconsider the adequacy of the later issued warrants which relied upon the illegally obtained evidence.

Perkins respectfully requests that this Court reverse his convictions, remand for retrial, and with instruction for reconsideration of the adequacy of the later-issued search warrants.

DATED this 8th day of April, 2020.

Respectfully submitted,

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