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Court of Appeals  
Division II  
State of Washington  
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NO. 53732-0-II

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

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STATE OF WASHINGTON,

Respondent,

v.

SCOTT RIDGLEY,

Appellant.

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

The Honorable Joely A. O'Rourke, Judge

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT

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

The State argues this Court should abandon the reasoning in Jimenez I, and hold that the language in the reports stating “and/or any other officers participating in this investigation” is strict compliance with a statute that requires “[t]he names of the officers.” State v. Jimenez (hereinafter “Jimenez I”), 76 Wn. App. 647, 651, 888 P.2d 744 (1995); CP 72, 79; RCW 9.73.230(2)(c); see Br. Resp. at 15-16. This Court should decline the invitation.

The State’s strained interpretation of the statute ignores the plain language, impermissibly injects additional language, and is not in harmony with other subsections of the statute. This Court should follow its sister Divisions to hold that strict compliance is necessary and where the statute requires “[t]he names of the officers” catch-all provisions such as ‘and/or any other participating officers’ will not suffice. RCW 9.73.230(2)(c).

Washington has no rule of horizontal *stare decisis*. In re Pers. Restraint of Arnold, 190 Wn.2d 136, 154, 410 P.3d 1133 (2018). However, Divisions of the Court of Appeals “should give respectful consideration to the decisions of other divisions,” and the reasoning of other Divisions should be considered “persuasive” authority. Id. at 151,

154. The reasoning of Division One in Jimenez I is persuasive and should be adopted by this Court. Moreover, the reasoning finds support in published cases in Division Three and the Washington Supreme Court.

Division Three has adopted the reasoning in Jimenez I, specifically that the self-authorizing provisions require strict compliance to confer any authority. State v. Costello, 84 Wn. App. 150, 925 P.2d 1296 (1996). In Costello, Division Three considered subsection .210(2)(b), another self-authorizing provision of the Privacy Act statute, based on an officer safety exception. Id. at 154-56. This subsection requires the self-authorizing report to list “the persons, including the consenting party, expected to participate in the conversation or communication, to the extent known.” RCW 9.73.210(2)(b).

The report at issue in Costello listed the name of the suspect and participating officers but omitted any reference to the confidential informant, who officers anticipated would participate in the conversation. Costello, 84 Wn. App. at 152. The Costello Court cited Jimenez I for the proposition “that the self-authorization statutes must be strictly followed for the authorizations to be valid,” and held the report “was invalid due to its lack of specificity.” Id. at 152, 154 (emphasis added) (citing Jimenez I, 76 Wn. App. at 651).

The Costello Court also rejected the application of a statutory exception for officer safety, noting the concerns as stated in the report may have been valid but were “conclusory and inadequate for authorization” and as such did not meet the strict requirements of the statute. Id. at 155.

In State v. Fjermestad, the Washington State Supreme Court engaged in *de novo* statutory interpretation of language defining the scope of the Privacy Act’s exclusionary rule where the recording officer had made no attempt to comply with the authorizing requirements. 114 Wn.2d 828, 830, 834-36, 791 P.2d 897 (1990). The dispute centered on whether the term “[a]ny information” meant that even “visual observations and assertive conduct” must be excluded if they had been recorded and transmitted electronically in violation of the Act. Id. at 835.

In interpreting the scope of the statute, the Court noted it should begin any statutory interpretation by “look[ing] to the plain meaning of the words used in the statute.” Id. The Court also noted “statutes should be construed to effect their purpose and unlikely, absurd or strained consequences should be avoided.” Id. (citing State v. Stannard, 109 Wb.2d 29, 742 P.2d 1244 (1987)). The Court noted the dictionary definition of “any” meant “all” or “the whole amount,” and so concluded the term “any information” included even “visual observations and assertive gestures.” Id. at 835.

The Court further noted the Privacy Act’s purpose was elucidated by its language which “expresses a legislative intent to safeguard the private conversations of citizens from dissemination in any way. The statute reflects a desire to protect individuals from the disclosure of any secret illegally uncovered by law enforcement.” Id. at 836. The Court ultimately felt “bound to interpret the proclamations of the Legislature and not create an exception in the law where there is none.” Id.

Principles of Statutory construction, both generally and as applied by the Washington Supreme Court in Fjermestad to this specific statute, support the reasoning of Jimenez I. Examination of the subsection at issue in Costello also supports the Jimenez I analysis. These cases and principles undermine the State’s strained argument that “indicating” the names of participating officers does not require the report to actually list all the names of the officers. Br. Resp. at 15-16. The State’s reasoning contradicts the plain language of the statute and should be rejected by this Court.

The self-authorizing provision of the statute requires a report “indicating ... (c) [t]he names of the officers authorized to intercept, transmit, and record the conversation or communication.” RCW 9.73.230(2). The State argues that the use of the word “indicating” suggests the statute does not require “exact precision and certainty.” Br.

Resp. at 15 (citing Webster's Third International Dictionary, 1150 (2002)). The State further suggests that the provision of one officer's name is good enough, and the other officers need not have been named. Br. Resp. at 16. The State even goes so far as to define "indicate" as "meaning, give the names of the officers with a fair degree of certainty as best known at the time." Br. Resp. at 16 (emphasis added).

This reasoning is faulty for several reasons. The interpretation ignores the plain language of the Act, which requires "[t]he names of the officers." RCW 9.73.230(2)(c). The statute does not state "the names of the officers with a fair degree of certainty as best known at the time" as reasoned by the State. Br. Resp. at 16 (quote) (emphasis added). Had the Legislature intended to state this, it surely would have. This can be seen from another provision of the Privacy Act, RCW 9.73.210(2)(b), interpreted in Costello, 84 Wn. App. at 154-56. Subsection .210(2)(b) requires the report to state "the persons, including the consenting party, expected to participate in the conversation or communication, to the extent known." RCW 9.73.210(2)(b) (emphasis added). By contrast, subsection .230(2)(c) does not include the phrase "to the extent known." Compare RCW 9.73.210(2)(b) with RCW 9.73.230(2)(c). Rather, the officers must be listed by name, and this requirement is not subject to any similar qualifiers. RCW 9.73.230(2)(c)

The State’s interpretation requires this Court to inject the phrase “to the extent known” into subsection .230(2)(c) of the statute. RCW 9.73.210(2)(b). This Court should decline to do so. Courts are not permitted to add language to a statute, even if the Court disfavors the result. State v. Chester, 133 Wn.2d 15, 21, 940 P.2d 1374 (1997); Duke v. Boyd, 133 Wn.2d 80, 87, 942 P.2d 351 (1997); see also Kilian v. Atkinson, 147 Wn.2d 16, 21, 50 P.3d 638 (2002).

Moreover, provisions of a statute must, whenever possible, be read in harmony with one another. Heinsma v. City of Vancouver, 144 Wn.2d 556, 564, 29 P.3d 709 (2001). By failing to account for the difference in language between subsections .210(2)(b) and .230(c), and by failing to acknowledge that had the Legislature intended to use the phrase here it would have, the State fails to read these provisions in harmony with one another. This Court should reject the State’s arguments.

Moreover, any policy arguments in favor of altering the language of the statute—for example, to no longer require the names of the officers because it is overly burdensome to law enforcement—those arguments are more appropriately addressed to the Legislature, not the Court. Where the plain language is plain, the duty of the courts is to uphold the plain language, not to “question the wisdom of a statute even if the result seems unduly harsh.” Duke, 133 Wn.2d at 87.

This Court should follow the reasoning of its sister Divisions One and Three, as supported by the principles of statutory interpretation set forth by the Washington Supreme Court, to hold that strict compliance is required and the plain language of the statute means what it says. The names of all participating officers must be listed. Where the report failed to do so, it violated the Privacy Act and conferred no authority.

B. CONCLUSION

For the reasons discussed above and in Appellant's opening brief, 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.

Ridgley 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 25th day of August, 2020.

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Respectfully submitted,

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