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THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

SCOTT EUGENE RIDGLEY,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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I. ISSUES

- A. Did the authorization for the wire intercept meet the requirements of RCW 9.73.230(2)(c)?
- B. Did Ridgley receive effective assistance from his trial counsel during the suppression motion hearing proceedings?

II. STATEMENT OF THE CASE

The Lewis County Joint Narcotics Enforcement Team (JNET) employed the services of a confidential informant, Casey Perkins, to purchase methamphetamine from Scott Ridgley. 3RP¹ 63, 67-68, 105-07, 146. Mr. Perkins agreed to become a confidential informant after being arrested for dealing small amounts of narcotics. 3RP 67. If Mr. Perkins fulfilled his obligations as a confidential informant, he would receive lesser charges of possession of drugs rather than delivery, and avoid prison. RP 68.

Ridgley lives out on a property on Gish Road in Lewis County. RP 76. There are two addresses identified with the property, 517 and 509 Gish Road. *Id.* On May 9, 2017, Mr. Perkins, after going through standard control buy procedures (search of Mr. Perkins and his vehicle), drove himself to 517 Gish Road while being followed by two

¹ The State will reference the verbatim report of proceedings in the same manner as Ridgley did in his opening brief: 1RP (7/11/18), 2RP (11/7/18), 3RP is the continually paginated trial volumes and sentencing proceedings (7/29/19, 7/30/19, 8/29/19).

JNET detectives, Withrow and Holt. 3RP 78-79, 146-49. A surveillance crew composed of other JNET detectives, Schlecht and Haggerty, was already set up to view Mr. Perkins as he drove onto Ridgley's property. 3RP 206-08, 245-50. Mr. Perkins arrived at Ridgley's property, met with Ridgley and purchased an ounce of methamphetamine for \$500. 3RP 108. Mr. Perkins wore a wire that recorded the drug transaction. 3RP 72-73, 83, 111-14. Mr. Perkins left Ridgley's property, drove directly back to the predetermined location, handed over the methamphetamine to Detective Withrow, and standard controlled buy protocols were followed. 3RP 72, 115, 150-52, 210.

Mr. Perkins and JNET detectives did a second controlled buy on Ridgley on May 15, 2017. 3RP 115, 152. Mr. Perkins wore a wire for the second drug transaction. 3RP 116. This time Mr. Perkins purchased an ounce of methamphetamine for \$450 from Ridgley. RP 108, 152-55. Mr. Perkins, again, took the methamphetamine back to Detective Withrow and standard controlled buy protocols were followed. RP 116-17, 154-55.

Officers executed a search warrant on Ridgley's property on May 16. 3RP 155-56, 189, 214, 250-51. Detective Holt, Detective Haggerty, and Community Corrections Officer Curtright arrived at the

property first. 3RP 156, 251. When they arrived Ridgley was out front of the shop. 3RP 156, 251. Detective Holt, Detective Haggerty, and Officer Curtright exited their vehicle, told Ridgley to show his hands, and get on the ground. 3RP 157. Ridgley did not comply. 3RP 157, 252. After taking Ridgley into custody, the residences at 509 and 517 were searched. 3RP 158-63; 215-24.

The officers located a black OtterBox near where Ridgley had been standing outside prior to being taken into custody. 3RP 255. The OtterBox was of interest because Detective Withrow had previously briefed the other officers that it had contained drugs during the course of the investigation. 3RP 256. When the box was opened it was found to contain \$6,000, banded up in stacks, digital scales, and approximately two and half ounces of methamphetamine. 3RP 256-57, 283. There was \$500 of recorded buy money, funds used from the controlled buy, found in the black OtterBox container. 3RP 288.

Officers also located a .22 semiauto pistol at 517 Gish Road. 3RP 260. The pistol had been partially disassembled. *Id.* Detective Haggerty reassembled the pistol, located ammunition in the house, took the pistol out back to an already set up target, and test fired the

pistol. 3RP 260-61. The pistol functioned properly when it was reassembled. *Id.*

The State charged Ridgley with two counts of Delivery of Methamphetamine, one count of Possession of Methamphetamine with the Intent to Deliver, Unlawful Possession of a Firearm in the First Degree, and Maintaining a Premises or Vehicle for Using Controlled Substances. CP 16-19. Ridgley filed a motion to suppress evidence, alleging a violation of the Washington State Privacy Act per RCW 9.73.230. CP 22-62. Ridgley argued the recordings and all evidence obtained as a result of those recordings, including the evidence recovered when officers executed the search warrant, was fruit of the poisonous tree and must be suppressed. CP 22-62; 1RP 3-14, 22-27. The trial court denied the motion. 1RP 27-30. Ridgley filed a supplemental motion to suppress the recordings. CP 64-92. Ridgley argued Chief Nielsen was not part of the team and therefore could not properly authorize the wire intercept. 2RP 3-6. Ridgley also argued all of the officers who were involved were not authorized to intercept and record the communication. 2RP 6-8. The trial court denied Ridgley's supplemental motion to suppress. 2RP 12-14. One set of findings of fact and conclusions of law were entered encompassing both motions. CP 94-96.

Ridgley elected to try his case to a jury. See 3RP. The testimony comports with the facts outlined above. Additionally, Detective Schlecht explained while he was conducting surveillance he watched the controlled buys via a live stream feature on an app on his phone. 3RP 208. Detective Schlecht testified regarding what he saw on the live streamed video on the May 9 controlled buy. 3RP 209. Detective Schlecht described Ridgley scooping items out of a bag and handing a bag to Mr. Perkins. *Id.* The feed for the May 15 buy was choppy and difficult to see due to a poor cell signal. 3RP 213-14. Detective Withrow also testified regarding what he observed from watching the live stream of the intercept. 3RP 81-84.

Ridgley was convicted of all counts except for Unlawful Possession of a Firearm in the First Degree. CP 132-36. Ridgley was sentenced to 45 months in prison. CP 149. Ridgley timely appeals his convictions. CP 155.

The State will supplement the facts as necessary throughout its argument below.

III. ARGUMENT

A. THE WASHINGTON STATE PRIVACY ACT WAS NOT VIOLATED, THEREFORE THE VIDEO AND THE TESTIMONY OBTAINED THROUGH THE WIRE INTERCEPT WAS ADMISSIBLE EVIDENCE IN RIDGLEY'S TRIAL.

Ridgley claims the wire intercepts were improperly obtained due to the authorizations' failure to specifically list each officers name that were authorized to intercept, transmit or record. Appellant's Opening Brief (AOB) 14-30. Ridgely asserts remand and retrial is the correct remedy because the alleged improperly admitted evidence was prejudicial and the trial court must also reconsider the search warrant that was issued after the two wire intercepts were conducted. *Id.* at 32-35. Contrary to Ridgley's arguments, the wire intercepts meet the requirements of RCW 9.73.230, therefore the Washington State Privacy Act was not violated. The trial court's admission of the recordings and the testimony reliant on the recordings was permissible and this Court should affirm Ridgley's convictions.

1. **Standard Of Review.**

This Court employs a de novo review of a motion to suppress evidence pursuant to the Washington State Privacy Act. *State v. Kipp*, 179 Wn.2d 718, 726-29, 317 P.3d 1029 (2014).

2. The Wire Intercept Authorizations Meet The Requirements Of RCW 9.73.230(2)(c).

Washington State has statutorily protected its citizens' right to privacy in their private communications for over 100 years. Chapter 9.73 RCW; Laws of 1967, ch. 93; Laws of 1909, ch. 249, §§ 410, 411. The Privacy Act prohibits one-party consent recordings of private communications unless a specific exception applies. RCW 9.73.030. Communication obtained in violation of the Privacy Act generally are:

inadmissible in any civil or criminal case in all courts of general or limited jurisdiction in this state, except with the permission of the person whose rights have been violated in an action brought for damages under the provisions of RCW 9.73.030 through 9.73.080, or in a criminal action in which the defendant is charged with a crime, the commission of which would jeopardize national security.

RCW 9.73.050.

While Washington State does have one of the most restrictive privacy acts in the United States, there are exceptions contained within the Privacy Act for the allowance of one-party consent. RCW 9.73.030; RCW 9.73.230; *Kipp*, 179 Wn.2d at 724. The self-authorizing wire intercept is a tool for law enforcement to use for the investigation of select crimes included in the exception. RCW 9.73.230. The legislature determined a certain classification of

crimes, those involving the manufacturing, delivery, and sale of controlled substances (and possession with intent to commit those crimes), and crimes involving persons engaging in commercial sexual abuse of minors, necessitated giving law enforcement the ability to do self-authorizing wire intercepts. RCW 9.73.230(1)(b).²

The self-authorizing wire intercept provision has a set of requirements that must be fulfilled for the intercept to be authorized. *Id.* There must be an actual criminal investigation, “the chief law enforcement officer” of the agency “may authorize the interception, transmission, or recording of a conversation or communication by officers under the following circumstances: (a) [a]t least one party” consents to the recording, transmission or interception; “(b) [p]robable cause exists to believe that the conversation or communication involves ... [t]he unlawful manufacture, delivery, sale, or possession with intent to manufacture deliver, or sell controlled substances as defined in chapter 69.50. RCW.” RCW 9.73.230(1)(a)(b).³ An authorization report must be completed. RCW 9.73.230(1)(c), (2).

² The listed controlled substance crimes included are pursuant to chapter 69.50 RCW, or chapter 69.41 RCW (legend drugs), or chapter 69.52 (imitation controlled substances). The listed crimes involving commercial sex abuse of a minor are pursuant to RCW 9.68A.100, RCW 9.68A.101, and RCW 9.68A.102.

³ This is an abbreviated version of subsection (b), as it would apply in Ridgley’s case, rather than all of the crimes specifically listed in this section.

(2) The agency's chief officer or designee authorizing an interception, transmission, or recording under subsection (1) of this section, shall prepare and sign a written report at the time of authorization indicating:

(a) The circumstances that meet the requirements of subsection (1) of this section;

(b) The names of the authorizing and consenting parties, except that in those cases where the consenting party is a confidential informant, the name of the confidential informant need not be divulged;

(c) The names of the officers authorized to intercept, transmit, and record the conversation or communication;

(d) The identity of the particular person or persons, if known, who may have committed or may commit the offense;

(e) The details of the particular offense or offenses that may have been or may be committed and the expected date, location, and approximate time of the conversation or communication; and

(f) Whether there was an attempt to obtain authorization pursuant to RCW 9.73.090(2) and, if there was such an attempt, the outcome of the attempt.

RCW 9.73.230(2). There are additional provisions regarding the period for the recording to be made, judicial review of reports, and the manner for which a recording must be done. RCW 9.73.230. If an officer does not follow all the provisions of RCW 9.73.230, the self-authorizing wire intercept provision has its own exclusionary rule, excluding the recording but allowing unaided testimony of the

evidence obtained but only if certain conditions are met. RCW 9.73.230(8).

The sole intercept issue Ridgley raises is his allegation the officers violated the Privacy Act because the authorization report failed to list each officer's name individually that would be involved in recording, transmitting, or intercepting the communications between Ridgley and Mr. Perkins. AOB 14-30.⁴ Ridgely asserts the trial court erroneously admitted not only the video of the drug transactions but also the officers' testimony that was derived from observing the transactions either via live stream or reviewing the recording after the fact. *Id.* This error, according to Ridgley, was prejudicial and his convictions should be vacated and the matter remanded for a new trial with the exclusion of the recordings and the officers testimony.

Contrary to Ridgley's assertion, the authorizations were sufficient to meet the requirements of RCW 9.73.230(2). Ridgley rests his argument on *State v. Jimenez*, 76 Wn. App. 647, 888 P.2d 744 (1995), *reversed in part by State v. Jimenez*, 128 Wn.2d 720, 911 P.2d 1337 (1996).⁵ In *Jimenez I*, the defendants were subjects

⁴ Ridgley does not raise the other issues he argued in his motions to suppress the intercept, such as the lack of probable cause or that Chief Nielsen did not have jurisdiction to authorize the intercept. CP 22-62, 64-92.

⁵ The State will cite to *State v. Jimenez*, 76 Wn. App. 647 as *Jimenez I*, and *State v. Jimenez*, 128 Wn.2d 720 as *Jimenez II*, for clarity purposes and conformity with Ridgley's briefing.

of an undercover investigation by the Skagit County Interlocal Drug Enforcement Unit. *Jimenez I*, 76 Wn. App. at 649. During the investigation a number of self-authorizing wire intercepts were obtained to record conversations between the undercover officer and the defendants. *Id.* The defendants sought to suppress all of the recordings. *Id.* The trial court found the recordings met the requirements of RCW 9.73.230 and admitted the records and the defendants were found guilty of numerous counts. *Id.* at 649-50.

The defendants argued a number of violations of RCW 9.73.230, but the one of import to Ridgley's matter is the requirement set forth in subsection (2)(c). *Jimenez I*, 76 Wn. App. at 650-51. The defendants asserted the authorization failed identify, with "specificity[,] the identity of the" officer intercepting or recording and therefore, the authorization was invalid. *Id.* at 651. One authorization, for May 19, stated, "Detectives Catlin and Arroyos, and 'any other members of the Skagit County Interlocal Drug Enforcement Unit' were authorized to record." *Id.* Then, an authorization for May 27 "authorized 'members of Skagit County Interlocal Drug Enforcement Unit and/or their representatives.'" *Id.*

The court noted the requirements of RCW 9.73.230 "must be strictly complied with for authorizations to be valid." *Id.*, citing *State*

v. Gonzalez, 71 Wn. App. 715, 718-19, 862 P.2d 598 (1993), *review denied*, 123 Wn.2d 1022 (1994). When reviewing the validity of authorizations pursuant to RCW 9.73.230, technical error are fatal because it is necessary for specific procedural instructions to be followed to limit potential abuse of self-authorized wire intercepts. *Jimenez I*, 76 Wn. App. at 651, *citing Gonzalez*, 71 Wn. App. at 719. Division One then held that [c]atchall phrases such as those used in the May 19 and 27 authorizations will not suffice to meet the specificity required by the statute.” *Jimenez*, 76 Wn. App. at 652. The court did go on to state, “Generally, 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.*

Division One then suppressed all of the evidence, including any testimony from the undercover officer unaided by the recordings. *Id.* at 652-53. The State petitioned for review on the issue of the remedy for a violation of RCW 9.73.230. *Jimenez II*, 128 Wn.2d at 722. The Supreme Court reversed the Court of Appeals on the only issue before it, finding the remedy for a violation of RCW 9.73.230, when the officers acted in good faith, was pursuant to subsection (8), and therefore testimony unaided by the recording was admissible evidence. *Id.* at 725-26. Therefore, while the Supreme Court did

proceed on the presumption there had been a violation of RCW 9.73.230, it was not asked to independently review whether the authorization did not meet the specificity requirement when it listed an officer and used a catch-all phrase. See *Jimenez II*, 128 Wn.2d 720.⁶ Thus, the Supreme Court has not made a determination regarding what degree of specificity is required for RCW 9.73.230(2)(c) for the authorization to be valid.

Division One's reading of RCW 9.73.230(2)(c) is an incorrect interpretation of the provision. While it necessary to construe the specific provisions of the self-authorizing wire intercept statute carefully, the prohibition against a "catch-all" is an inaccurate reading of specificity required in RCW 9.73.230(2)(c) by the court in *Jimenez I*. This Court is not bound by Division One's incorrect interpretation of the requirement and should find that the specificity used in this case sufficiently meets the requirements of statute. *In re Pers. Restraint of Arnold*, 190 Wn.2d 136, 150-54, 410 P.3d 1133 (2018).

The trial court properly admitted the recordings of the drug transactions authorized pursuant to RCW 9.73.230. Both authorizations contained the following language, "OFFICERS

⁶ Footnote 2 states, "The State has not sought review of the Court of Appeals determination that the authorizations did not comply with RCW 9.73.230(2)(c)."

AUTHORIZED TO INTERCEPT, TRANSMIT OR RECORD: Detective Withrow, and/or any other officers participating in this investigation.” CP 43, 49. The authorization for the May 9, 2017, intercept contained a probable cause statement reflecting that Detective Withrow was the officer who instructed Mr. Perkins (CS 224) to purchase methamphetamine from Ridgley on April 18. CP 43-48. The authorization also states, “On May 9th 2017, I instructed CS 224 to attempt another purchase of Methamphetamine from Ridgley at Ridgley’s residence. CP 45. This controlled buy is currently scheduled to occur at approximately 1300 hours.” *Id.* The authorization was then signed on May 9, 2017. CP 47.

The May 15 probable cause contained the same background information from Detective Withrow as the May 9 probable cause statement. CP 49-53. The May 15 authorization included information about how Detective Withrow, writing in the first person, instructed CS 224 to conduct the controlled buy on May 9, how that controlled buy took place on May 9, and the methamphetamine Detective Withrow received from CS 224 as a result of the controlled buy. CP 51. The authorization states, “On May 15th 2017, I instructed CS 224 to conduct another controlled buy of methamphetamine from Ridgley at his residence at 517 Gish Rd. The controlled buy is currently

scheduled to occur at approximately 1300 hours.” *Id.* The authorization was signed on May 15, 2017. CP 53.

Ridgley, bolstered by Division One in *Jimenez I*, reads only subsection (2)(c) in a vacuum, arguing that it must be strictly construed to read each officer who is going to be involved in the intercept must be specifically listed. This is inaccurate. The provision for naming the officers involved in the intercept must be read with overarching provision requiring the preparation of the report. RCW 9.73.230(2). Therefore, it must be read as: “The agency’s chief officer or designee authorizing an interception, transmission, or recording under subsection (1) of this section, shall prepare and sign a report at the time of authorization **indicating**...(c) [t]he names of the officers authorized to intercept, transmit, and record the conversation or communication.” RCW 9.73.230(2) (emphasis added).

Indicate is defined as, “to point out or point to or towards with more or less exactness: show or make known with a fair degree of certainty.” Webster’s Third International Dictionary, 1150 (2002). Indicate does not mean list with exact precision and certainty. The authorization reports in Ridgley’s case state “Detective Withrow and/or any other officers participating in the investigation.” CP 43,

49. The authorization reports further details and makes clear Detective Withrow is running the operation and handling the confidential source. Finally, the probable cause statements on the reports are prepared by Detective Withrow on the same day as the intercept is being authorized for. CP 43-53. There can be no confusion that Detective Withrow is one of the officers who will be involved in the intercept. Detective Withrow is named, as required by the statute. The catch-all provision is allowed, because RCW 9.73.230(2) requires the authorization to indicate, meaning, give the names of the officers with a fair degree of certainty as best known at the time. This was done.

The authorizations strictly comply with RCW 9.73.230. The trial court's determination that the intercept authorizations met the requirements of RCW 9.73.230 was correct. CP 96. The trial court's finding of fact that Chief Neilson authorized the recording of a conversation by Detective Withrow was supported by the two authorizations presented to the trial court. CP 43-53, 95 (finding of fact 1.2). This Court should decline to follow Division One's analysis in *Jimenez I* and find that the statute does not require a specific list of each officer that will be involved in the intercept for the authorization to be valid and catch-all phrases may suffice

dependent on the facts presented. This Court should find the Privacy Act was not violated.

The trial court properly admitted the recordings from the intercepts. The detectives' testimony that was reliant upon their viewing of the intercept was also properly admitted. This Court should find no error in the admission of the recordings or any of the evidence stemming from the recordings, including the testimony and evidence secured from the later executed search warrant. This Court should affirm Ridgley's convictions.

B. RIDGLEY RECEIVED EFFECTIVE ASSISTANCE FROM HIS ATTORNEY DURING THE SUPPRESSION MOTION PROCEEDINGS.

Ridgley argues his trial counsel may potentially be considered ineffective because of a possible ambiguity in his attorney's argument during the suppression hearing. AOB 30-32. Ridgley's argument acknowledges his attorney argued for the suppression of the evidence. Ridgley's attorney was not deficient in his representation, thus Ridgely's claim fails.

1. Standard Of Review.

A claim of ineffective assistance of counsel brought on a direct appeal confines the reviewing court to the record on appeal and extrinsic evidence outside the trial record will not be considered.

State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995)
(citations omitted).

2. Ridgley's Attorney Was Not Ineffective During His Representation Of Ridgley During The Suppression Motion Proceedings.

To prevail on an ineffective assistance of counsel claim Ridgley must show (1) the attorney's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 674 (1984); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The right to effective assistance of counsel extends throughout all proceedings including sentencing. *State v. Calhoun*, 163 Wn. App. 153, 168, 257 P.3d 693 (2011) (internal citations omitted). The presumption is the attorney's conduct was not deficient. *Reichenbach*, 153 Wn.2d at 130, *citing State v. McFarland*, 127 Wn.2d at 335. Deficient performance exists only if counsel's actions were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The Court must evaluate whether given all the facts and circumstances the assistance given was reasonable. *Id.* at 688. There is a sufficient basis to rebut the presumption an attorney's conduct is not deficient "where there is no

conceivable legitimate tactic explaining counsel's performance.”
Reichenbach, 153 Wn.2d at 130.

Ridgley argues competent counsel has a duty to research existing case law. AOB 32, *citing State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009), *citing Strickland*, 466 U.X. at 690-91. The State does not dispute this assertion. The State also does not dispute Ridgley’s assertion that *Jimenez II* had been decided for over two decades and was available to any practitioner who conducted an adequate search. AOB 32, *citing Jimenez II*, 128 Wn.2d 720. The State does dispute that Ridgley’s counsel was deficient in his representation during the suppression matters.

Ridgley cites to a snippet of the first suppression hearing, arguing it appeared counsel potentially failed to clearly identify and present the full scope of all excludable evidence to the trial court. AOB 30-32, citing to 1RP 26. Ridgley fails to acknowledge his counsel’s briefing of the matter that cites to *Jimenez II*. CP 25. Further, Ridgely’s counsel quoted the remedy found in RCW 9.73.230(8) in his briefing, “However, ‘[n]othing 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.” CP 67, *citing* RCW 9.73.230(8) (emphasis added in defense suppression brief).

Therefore, even if Ridgley’s counsel may have been slightly inartful in his oral argument to the trial court, his briefing was clear as to the remedy available and what evidence was admissible. There was no deficient performance and Ridgley cannot meet the necessary burden to show ineffective assistance of counsel. This Court should find Ridgley’s trial attorney provided effective assistance of counsel during the suppression motion and affirm Ridgley’s convictions.

IV. CONCLUSION

There was no violation of the Washington State Privacy Act. The authorization for the wire intercept met the statutory requirements of RCW 9.73.230(2)(c), therefore the recordings and all the evidence stemming from those recordings were properly admitted during Ridgley's trial. Ridgley received effective assistance from his counsel during the suppression motion proceedings. This Court should affirm Ridgley's convictions.

RESPECTFULLY submitted this 10th day of July, 2020.

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