

FILED  
November 20, 2015  
Court of Appeals  
Division III  
State of Washington

NO. 32623-3-III

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**COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION III**

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**STATE OF WASHINGTON,**

**Respondent –  
Cross-Appellant,**

**v.**

**STEPHEN ROY SANDBERG,**

**Appellant –  
Cross-Respondent.**

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**BRIEF OF RESPONDENT – CROSS-APPELLANT**

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**I. ASSIGNMENTS OF ERROR**

**A. Defendant's Assignment of Error**

The trial court erred in failing to suppress the results of the search of the defendant's building where they did not address the medical marijuana act in their search warrant.

**B. State's Assignment of Error**

The trial court erred in suppressing the recorded conversation and testimony about that conversation between a confidential informant, the defendant and an undercover officer.

**II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

**A. Issues Pertaining to Defendant's Assignments of Error.**

1. Did the 2011 amendments to the medical marijuana act require officers to provide evidence that the defendant was violating the act to meet the probable cause standard for a warrant?

2. Did the affidavit of probable cause provide evidence that the defendant was not complying with the medical marijuana act?

**B. Issues Pertaining to State's Assignments of Error.**

1. Did the court correctly conclude the recorded conversation was private when there was a third party present, the defendant and officers were strangers to one another, the defendant was

unaware of the illegality of the subject matter of the conversation and the subject matter was illegal?

2. Did the court err in failing to find a good faith exception to the privacy act when the officers came to a natural magistrate for authorization rather than a supervisory officer?

### **III. STATEMENT OF THE CASE**

On June 7, 2012 Det. Messer of the Grant County Sherriff's Office met with a new confidential informant (CI). CP 16. The CI advised he was aware of marijuana grow operation north of Moses Lake run by Stephen Sandberg. *Id.* The CI described an operation growing more than 60 plants, consisting of 20 growing plants and more than 40 starter plants. The CI stated that Sandberg was not a medical marijuana provider for the CI, and that Sandberg was distributing his product in the Spokane area. *Id.* Det. Messer verified the CI's tip by driving by Sandberg's home and observing buildings as described by the CI. CP 17. He checked power records and confirmed power usage consistent with a marijuana grow operation. CP 17. He also confirmed Sandberg was associated with the residence. CP 17-18. Two other detectives, Jason Mitchell and Chris Lafferty, approached the shop and smelled marijuana. CP 18. The CI indicated he would be willing to give his name to the magistrate. *Id.* He also was in good contact with the detectives, held a steady job and has

several children. *Id.* Based on the above information Det. Messer obtained a search warrant to search Sandberg's shop on June 12, 2012. CP 19.

Also on June 12 Det. Messer obtained an order from a superior court judge authorizing recording of communications during a buy to be conducted by a detective and the CI. CP 23. Detective Lloyd and the CI executed the controlled buy the following day, June 13. In one room Sandberg had large plants, and in another he had approximately 24 smaller plants. CP 35. Sandberg described the sophistication of his grow operation. CP 36. He also showed Det. Lloyd and the CI a shotgun he had purchased to protect his grow. *Id.* The CI asked Sandberg if he could borrow the shotgun, and Sandberg allowed him to take it. *Id.*

On June 14 members of the Interagency Narcotics Enforcement Team executed the search warrant of Sandberg's residence. CP 30. They found nine large plants and 24 starter plants, as well as a sophisticated grow operation. CP 31-32.

The State charged Sandberg with delivery of marijuana for a delivery made during Det. Lloyd and the CI's visit, manufacture of marijuana and possession of more than 40 grams of marijuana. Sandberg moved to suppress the search warrant and the recorded statements. CP 7-13, 49-59. The State conceded that the recording itself should be

suppressed, as there was an error made in the application for the permission to record. However the State argued Det. Lloyd should be able to testify to the conversation, and the search warrant should be upheld. CP 65-77. In a memorandum opinion the court upheld the search warrant, but suppressed both the recording and any testimony related to the recorded conversation. CP 101-103. Pursuant to the court's decision the State amended the information to dismiss the delivery count. CP 127-128. The case proceeded to trial and Sandberg was convicted on both remaining counts. CP 171, 173.

Sandberg appeals the trial court's denial of his motion to suppress the search warrant. The State cross appeals the suppression of testimony about the conversation between Det. Lloyd, the CI and Sandberg.<sup>1</sup>

#### **IV. ARGUMENT**

##### **A. Defendant's Appeal**

##### ***1. The search warrant was not required to refute an affirmative defense of medical marijuana.***

The appellant relies on the changes in the medical marijuana statute in 2011 to overrule the holding in *State v. Fry*, 168 Wn.2d 1, 6, 228 P.3d 1 (2010), that medical marijuana is an affirmative defense that does not negate probable cause. However, the appellant's theory was recently

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<sup>1</sup> The State also cross appealed the trial court hearing a motion to dismiss at the close of State's evidence. The State withdraws the cross appeal on that issue in this case.

rejected by the Washington Supreme Court in *State v. Reis*, 183 Wn.2d 197, 351 P.3d 127 (2015). In *Reis* the Supreme Court held that because compliance with RCW 69.51A.040 is impossible, medical marijuana remains an affirmative defense, and it was not required for the search warrant affidavit to reject compliance with the medical marijuana statute. Therefore the search warrant was valid, even though it did not discuss medical marijuana.

**2. *Even if medical marijuana was relevant, the search warrant contained information that Sandberg was violating the law.***

The search warrant was applied for and issued based on the CI's statement, along with supporting evidence. According to the CI there were over 60 plants growing in Sandberg's shop. CP 16. This was the information in the warrant affidavit. RCW 69.51A.085 limits collective gardens to 45 plants. Thus the affidavit of probable cause contains information that Sandberg was violating the medical marijuana act. The officers learned the day after obtaining the search warrant, but before executing it, that Sandberg may have had fewer plants than originally believed, although it was unclear if there were less than 45. CP 12.

Under certain circumstances officers must return to the issuing magistrate if they discover information that may negate probable cause. *State v. Maddox*, 152 Wn.2d 499, 506, 98 P.3d 1199 (2004). However,

Washington has adopted the *Franks* standard. *Id. Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). Under the *Franks* standard the warrant will be upheld unless the officer intentionally or recklessly excluded material information from the warrant. *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985).

The controlling law at the time of the warrant was *State v. Fry*, 168 Wn.2d 1, 6, 228 P.3d 1 (2010), which held that information on medical marijuana was irrelevant to probable cause. Given that it was impossible to comply with the 2011 changes to the statute, the officers had no way of knowing that the omission would be material to the search warrant, and therefore did not intentionally or recklessly disregard the fact that there might be fewer plants in the shop. Therefore, even if medical marijuana was relevant, the search warrant would still stand because the affidavit contained information that Sandberg was violating the medical marijuana law, and the officers did not knowingly or recklessly disregard material facts to the contrary.

The court's ruling that the search warrant was valid, and the convictions based upon that ruling, should be upheld.

## **B. State's Cross Appeal**

The State cross appeals the trial court's suppression of Det. Lloyd's testimony about the delivery of marijuana and the associated observed actions and collected evidence. The State did not dispute that the actual recording of the conversation between Det. Lloyd, the CI and Sandberg should be suppressed. The State now believes that concession was in error, but the analysis is the same, the conversation was not private, and the recording was obtained in good faith.

### ***1. Standard of review and background law.***

The protections of the privacy act apply to private communications or conversations. This court has repeatedly observed that “[w]hether a particular conversation is private is a question of fact, but where the facts are undisputed and reasonable minds could not differ, the issue may be determined as a matter of law.” Questions of law are reviewed de novo.

*State v. Kipp*, 179 Wn.2d 718, 726, 317 P.3d 1029 (2014) (Internal citations omitted).

In *State v. Fjermestad*, 114 Wn.2d 828, 791 P.2d 897 (1990), the Supreme Court held that any aspect of a conversation recorded or transmitted in violation of the privacy act would be suppressed, not just the recording or transmission itself. However, *Fjermestad's* holding has been limited to private conversations where the police did not make a good faith effort to comply with the law. *Lewis v. Dep't of Licensing*, 157

Wn.2d 446, 139 P.3d 1078 (2006) (private conversations), and *State v. Jimenez*, 128 Wn.2d 720, 911 P.2d 1337 (1996) (good faith compliance). Because the conversation was not private and the police made a good faith effort to comply with the law both of the limitations to *Fjermestad* apply. *State v. Grant*, 9 Wn. App. 260, 511 P.2d 1013 (1973), “determined that the privacy act does not apply to excluding the testimony of a police officer who participates in an illegally transmitted or recorded conversation when that officer is unaware of the illegality.” *Fjermestad*, 114 Wn.2d at 834.

It should be noted that there was no constitutional challenge to the sufficiency of the authorization to record, either under U.S. Cons’t Amend IV or Wash Cons’t Art. 1 § 7. One party consent is sufficient under both. *Kipp*, 179 Wn.2d at 725-26. Instead this is a statutory issue under the privacy act. RCW 9.73.

**2. *The conversation was not private within the meaning of the privacy act.***

The privacy act, by its terms, only applies to private conversations. *Lewis*, 157 Wn.2d at 458. In *State v. Modica*, 136 Wn. App. 434, 447-48, 149 P.3d 446 (2006) (*affirm’d* by 164 Wn.2d 83, 186 P.3d 1062 (2008)), the Court of Appeals laid out the test for determining if the conversation was to be considered a private one.

A communication is private within the meaning of the privacy act only when (1) the parties to the communication manifest a subjective intention that it be private and (2) where that expectation of privacy is reasonable.

Factors bearing on the reasonableness of the expectation of privacy include the duration and subject matter of the communication, the location of the communication and the potential presence of third parties, and the role of the nonconsenting party and his or her relationship to the consenting party. In general, the presence of another person during the conversation means that the matter is neither secret nor confidential.

*Id.* (Internal citations omitted).

The trial court incorporated its written decision into its findings of fact and conclusions of law. CP 204. The State assigns error to the following mixed finding of fact and conclusion of law in the court's written decision as unsupported by the record and in the law:

[T]he duration and subject matter of the conversation, that is illegal activity, the location of the conversation, the Defendant's private property, the nature and relationship of the persons present at the conversation and their relationship to the consenting party all indicate the Defendant had a reasonable subjective expectation of privacy.

CP 102-103. The State also assigns error to related finding of fact 2.10.

CP 205.

The indications are that this was not a private conversation. There was a third party present besides Detective Lloyd and the defendant, specifically the CI. This alone almost conclusively defeats the contention

this was a private conversation. In addition Detective Lloyd was a stranger to the defendant, introduced by the CI, who was there to simply conduct a business transaction, not to discuss private details of their lives with the defendant.

The finding that the nature of the conversation, illegal activity, supports a finding of a private conversation fails on two grounds. The finding is premised on the logical inference that those who are engaged in activity they *know* is illegal usually wish to keep their conversations private in order to keep from getting caught. This is a reasonable inference about a subjective expectation of privacy. However, there is nothing in the record that supports the notion that Sandberg knew his activities were illegal. His assertions throughout, both to the officers and the court, were his activities fell under the medical marijuana statute and were legal. RP 30. Therefore the illegal nature of the act cannot weigh towards the subjective expectation of privacy.

Also, while engaging in illegal activity, knowing it was illegal, may well result in a subjective expectation of privacy; the fact that the activity is illegal means that society is not prepared to recognize a legitimate expectation of privacy in it. “The expectation that certain facts will not come to the attention of the authorities is not the same as an interest in privacy that society is prepared to consider reasonable.” *Illinois*

v. *Caballes*, 543 U.S. 405, 125 S. Ct. 834, 160 L. Ed. 2d 842 (2005). Art. 1 Sec. 7 is grounded in the right to privacy. *State v. Chacon Arreola*, 176 Wn.2d 284, 291, 290 P.3d 983 (2012). There is no legitimate right to privacy in illegal activity.

While the conversation did occur at the defendant's home, all other factors point to a non-private conversation. Simply put, there was no reasonable expectation that the conversation was a private one, thus the recording and the testimony about it should not have been suppressed.

In the lower court the State argued that the remedy was suppression of the recording, but not of the testimony about the conversation. This was based on a misreading of *Lewis*. Because the privacy act did not apply, there should have been no suppression at all.

**3. *The Court should recognize a good faith exception to the authorization requirement under the privacy act.***

The trial court expressly found that the officers acted in good faith in seeking the authorization to record under the privacy act. CP 102. RCW 9.73.050 provides that information obtained in violation of an order allowing recording shall not be admissible. In this case the recording was not obtained in violation of the order. It was the order itself that was incorrect.

In *Jiminez* the court recognized that good faith compliance with the privacy act, particularly in drug manufacturing cases, was sufficient to preclude suppression of evidence other than the recording itself. *Jiminez* involved a recording under RCW 9.73.230, which authorizes agencies to record conversations regarding controlled substances based on approval from a supervisory officer. The court ruled, under subsection 8, that while the recording was suppressed, because the officers attempted to comply with the correct procedures in good faith, the actual conversation was not, and the officers could testify to it.

The case at bar is slightly different than *Jiminez*, but not in a substantial way. The authorization to record Mr. Sandberg was sought and granted under RCW 9.73.090(2), which requires a judge's authorization for the recorded communication. This procedure is more protective of an individual's rights than RCW 9.73.230, which does not require a review of a neutral magistrate. While there is no good faith exception to the warrant requirement under Wash Cons't Art 1 § 7, this case turns on the privacy act, not the State Constitution. In *Fjermestad* the court interpreted the privacy act to conclude the legislature meant that all information collected during a recorded conversation should be suppressed. Clearly the legislature did not mean the suppression should be total when the officers attempted to comply in good faith with the

requirements of the privacy act, or they never would have passed RCW 9.73.230. In order to avoid the absurd result that more information would be suppressed when the police follow the more protective procedure for individual rights, the court must recognize a good faith exception under the privacy act when the police submit a judicial authorization in good faith and have it signed by a detached magistrate, as was done here.

In *State v. Grant*, 9 Wn. App. 260, 511 P.2d 1013 (1973), the court did not suppress evidence of a conversation testified to by a detective who was unaware of the illegal recordings of his colleagues. While Det. Lloyd was aware of the recording in this case, he, in good faith, believed the recording was legal. Unlike *Fjermestad* the officers had an authorization issued under the privacy act, it was just deficient. There is nothing to be gained by suppressing the entire conversation, while there is a societal loss when information is suppressed. The point of the exclusionary rule is to deter law enforcement from violating rights, not to grant a windfall to defendants. Assuming the conversation was private, the proper scope of the exclusion is only the recording itself, not the officer's testimony about the conversation.

## **V. CONCLUSION**

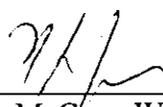
*Reis* dictates that the trial court's decision to deny the defendant's motion to suppress the search warrant was correct. The trial court should

be reversed, however, on the ruling suppressing Det. Lloyd's testimony about the conversation with Sandberg and the CI, as well as the recording itself. The recording was done in good faith, and in order to not dissuade officers from choosing the more protective procedure of obtaining a natural magistrate's approval to record, the court must recognize a good faith exception in the privacy act when officers use a neutral magistrate. In addition the conversation was not private, so the court's ruling suppressing evidence should be reversed and the case remanded back to the trial court for further proceedings.

Dated this 20<sup>th</sup> day of November 2015.

Respectfully submitted:

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STEPHEN ROY SANDBERG,	)	DECLARATION OF SERVICE
	)	
Appellant-	)	
Cross-Respondent.	)	
	)	

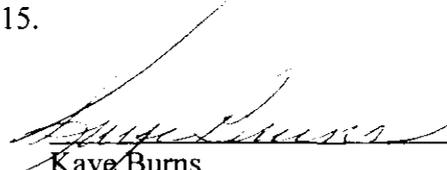
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Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I served a copy of the Brief of Respondent-Cross-Appellant in this matter by e-mail on the following party, receipt confirmed, pursuant to the parties' agreement:

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Dated: November 20, 2015.

  
Kaye Burns