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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 35362-1-III

(consolidated with No. 35363-0-III)

STATE OF WASHINGTON, Appellant,

v.

BRADLEY LEITH MERSON, Respondent.

APPELLANT'S SUPPLEMENTAL BRIEF

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I. INTRODUCTION

After briefing was completed in this case, the court stayed the appeal and remanded the matter to the trial court to enter findings of fact and conclusions of law in support of its ruling admitting text messages recovered from a warrantless search of a Samsung telephone Merson gave to K.F. to communicate privately with him. Merson now submits this Supplemental Brief to address the findings of fact and conclusions of law.

II. SUPPLEMENTAL ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 4: Finding of Fact no. 11 is unsupported by substantial evidence.

III. ISSUES PERTAINING TO SUPPLEMENTAL ASSIGNMENTS OF ERROR

ISSUE NO. 1: Whether, when the State produced neither a signed consent to search form nor testimony that police obtained affirmative consent to search the Samsung phone, the trial court erred in finding such consent was given.

IV. STATEMENT OF THE CASE

Merson relies upon the Statement of the Case originally set forth in his Appellant's Brief at pages 3-7, in addition to the following facts:

K.F. turned over to police an iPhone that was given to her by her parents, as well as a Samsung phone given to her by Merson. I RP 29. Because the iPhone was owned mutually by the family, police obtained signed consent-to-search forms for the iPhone signed by both parents. I RP 30. They did not obtain a signed consent form as to the Samsung phone. I RP 30. Additionally, the detective who obtained the phones never testified that K.F. or her parents gave consent to search the Samsung phone; he merely stated that K.F. and her parents knew the Samsung phone would be searched and did not express any hesitation, reluctance, or objection to it. I RP 32, 55. K.F. testified at the pretrial hearing and stated that the responding officer took the Samsung phone that Merson had given her, but the State never asked whether she or her parents had consented to allow police to search it. I RP 145.

V. ARGUMENT

The primary issue in this case is not whether Merson had a reasonable expectation of privacy in the cellular phone device that he gave to K.F. to communicate with him, but whether he had a privacy interest in the messages sent between them that police recovered by searching the phone. Because the trial court's findings of fact and conclusions of law fail to establish that Merson abandoned his interest in preserving the privacy of the messages, and because the finding of fact that K.F. and her

parents consented to the search of the Samsung phone is not supported by the evidence, the trial court's ruling does not support a conclusion that the search for the messages was lawful.

A. Finding of fact no. 11, which states that K.F. and her parents consented to a search of the Samsung phone, is unsupported by substantial evidence.

In reviewing a trial court's ruling on a motion to suppress evidence, the reviewing court accepts unchallenged findings of fact as verities on appeal and reviews challenged findings for substantial evidence. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Substantial evidence supports the finding when "there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding." *Id.* at 644.

The State bears the burden of establishing facts that support an exception to the warrant requirement. *State v. Schultz*, 170 Wn.2d 746, 756-57, 761, 248 P.3d 484 (2011). Acquiescence to an illegal search by failing to object does not establish consent. *Id.* at 761-62; *see also State v. Weller*, 185 Wn. App. 913, 922 n. 6, 344 P.3d 695, *review denied*, 183 Wn.2d 1010 (2015). In a similar case, where the State's testimony established only that the defendant "did not appear to have any problem

with the search,” the evidence was insufficient to support the trial court’s finding that the search was consensual. *State v. Russell*, 180 Wn.2d 860, 872, 330 P.3d 151 (2014) (internal quotations omitted).

Here, finding of fact no. 11 states, “Later, K.F. and her parents consented to a Yakima Police Department forensic examination of both phones.” Supp. CP 440. But this finding is unsupported by the testimony and exhibits proffered by the State at the suppression hearing. Although police obtained express written consent to search K.F.’s iPhone, no such documentation was obtained as to the Samsung phone. Moreover, despite calling both the officer who recovered the phones and K.F. to testify at the pretrial suppression hearing, none of the State’s witnesses testified that K.F. or her parents actually consented to the search of the Samsung phone. Although the State elicited testimony that both K.F. and her parents acquiesced in the search by failing to voice any objection to it, mere acquiescence does not establish affirmative consent to act. *Schultz*, 170 Wn.2d at 756-57.

Because finding of fact no. 11 is not supported by substantial evidence, consent cannot justify the warrantless search. *Russell*, 180 Wn.2d at 872.

B. Merson retained a constitutionally-protected privacy interest in the text messages he sent to K.F., and the State failed to establish an exception to the warrant requirement.

The court must start from the standpoint that the Washington Constitution's article I, section 7 provides greater protection from police intrusion than the Fourth Amendment to the U.S. Constitution. *State v. Hinton*, 179 Wn.2d 862, 868, 319 P.3d 9 (2014). Where the Fourth Amendment concerns itself with reasonable expectations of privacy, article I, section 7 protects "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant." *Id.* (quoting *State v. Myrick*, 102 Wn.2d 506, 511, 688 P.2d 151 (1984)).

Washington has afforded its citizens some of the strongest protections against interception of private communications in the country in its Privacy Act. *See* RCW 9.73.030; *Hinton*, 179 Wn.2d at 871. Under this standard, intercepting private communications between individuals requires the consent of all participants in the conversation, not merely one of them. RCW 9.73.030(1)(a). When private communications are obtained by police without all of the required consents, they are inadmissible as evidence in court. RCW 9.73.050. Although a violation

of the Privacy Act provides a statutory, rather than a constitutional, basis to suppress evidence, the Act is strong evidence that private communications are the type of private affair that the citizens, through their legislative representatives, have recognized as deserving protection. *See State v. Cunningham*, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980).

Thus, while some courts have held that senders of text messages have no expectation of privacy in the message received on another's phone, Washington's Supreme Court has reached a contrary result. *Compare, e.g., State v. Tentoni*, 871 N.W.2d 285, 286-87 (Wis. 2015) ("Tentoni does not have an objectively reasonable expectation of privacy as he relinquished any claim to privacy in the text messages delivered to Wilson's phone."); *Hinton*, 179 Wn.2d at 873 ("Just as subjecting a letter to potential interception while in transit does not extinguish a sender's privacy interest in its contents, neither does subjecting a text communication to the possibility of exposure on someone else's phone."). In *Hinton*, the Supreme Court held that the sender of a text message retained a privacy interest in the message such that police required a warrant to read them on the recipient's phone. 179 Wn.2d at 877. That principle applies in the present case, and renders largely irrelevant whether Merson relinquished property and/or possessory interests in the phone when he gave it to K.F.

In reaching this conclusion, the *Hinton* Court acknowledged there is always a risk that the person to whom communications are made may reveal them to others, including the police. *Id.* at 874. However, the Court refused to convert the risk of discovery into a sanction of government intrusion. *Id.* Had the recipient of the messages in *Hinton* voluntarily shared them with police, likely a different outcome would have resulted. *See id.* (“*Hinton* certainly assumed the risk that Lee would betray him to the police, but Lee did not consent to the officer’s conduct.”).

Here, the trial court’s legal conclusions erroneously conflate a possessory or property interest in the cell phone with a privacy interest in the messages contained on the phone. But, under *Hinton*, a sender has a privacy interest in the messages he sends that can be viewed on another person’s phone. Merson’s lack of possession of the phone does not mean that his privacy interests are abandoned upon hitting “send.”

Because Merson has a privacy interest in the text messages sent to K.F.’s phone, the State bore the burden of proving that police obtained the messages either by the authority of a warrant, or under an exception to the warrant requirement. As discussed above, the State failed to prove that K.F. consented to police obtaining the messages when it only showed that

she acquiesced in the search without objecting. Consequently, the State's heavy burden to justify the search has not been met, and the messages should have been suppressed.

VI. CONCLUSION

For the foregoing reasons, Merson respectfully requests that the court REVERSE his conviction for communicating with a minor for immoral purposes.

RESPECTFULLY SUBMITTED this 3 day of February, 2019.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 8 day of February, 2019 in Kennewick, Washington.



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