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Court of Appeals
Division III
State of Washington
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360466

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES GEARHARD,

Appellant.

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

A. TABLE OF AUTHORITIES.....ii

B. INTRODUCTION.....1

C. ASSIGNMENTS OF ERROR.....1

D. ISSUES RELATED TO ASSIGNMENTS OF ERROR.....1

E. STATEMENT OF THE CASE.....2

F. ARGUMENT.....3

G. CONCLUSION.....9

A. TABLE OF AUTHORITIES

Case Law:

Hall v. Corporation of Catholic Bishops, 80 Wn.2d 797, 498 P.2d 844 (1972).....7

State v. Armenta, 134 Wn.2d 1, 948 P.2d 1280 (1997).....4

State v. Babcock, 168 Wn. App. 598, 279 P.3d 890 (2012).....3, 5

State v. Barnes 157 Wn. App. 1076 (2010).....7, 9

State v. Caliguri, 99 Wn.2d 501, 664 P.2d 466 (1983).....4, 5, 6, 7, 8, 9

State v. Clark, 129 Wn.2d 211, 916 P.2d 384 (1996).....3

State v. Fjermestad, 114 Wn.2d 828, 836, 791 P.2d 897 (1990).....3, 8

State v. Salinas, 121 Wn.2d 689, 693-4, 853 P.2d 439 (1993).....3, 8

State v. Townsend, 147 Wn.2d 666, 57 P.3d 255 (2002).....3

State v. Williams, 94 Wn.2d 531, 617 P.2d 1012 (1980).....3, 4, 5, 6, 7, 8, 9

State v. Wright, 84 Wn.2d 645, 529 P.2d 453 (1974).....7

Statutes:

RCW 9.73.....1, 2, 3, 4, 9

RCW 9.73.030.....1, 2, 3, 4, 5, 6, 7, 8, 9

RCW 9.73.050.....3, 7, 8

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B. INTRODUCTION

Appellant James Gearhard, the Defendant in Klickitat County Superior Court cause number 16-1-00050-1, respectfully requests this Court reverse the June 5, 2017, decision of the Klickitat County Superior Court denying Mr. Gearhard's Motion to Suppress Evidence by finding the evidence admissible. Mr. Gearhard further requests this Court, should the Court rule against him on the first issue, reverse because the Superior Court admitted all evidence associated with the "pretext phone call" at issue in this case, as opposed to only the part of the call that the Superior Court believed fit within the exception of RCW 9.73.030(2)(b).

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C. ASSIGNMENTS OF ERROR

1. The Superior Court erred by denying Mr. Gearhard's Motion to Suppress all evidence associated with the "pretext phone call" conducted by the investigating officer, Detective Anderson, on May 11, 2016, which was recorded without the consent of Mr. Gearhard, who was a party to the call in violation of RCW 9.73.050 and Washington State case law.
2. The Superior Court erred by admitting the all testimony about the "pretext phone call" conducted by the investigating officer, Detective Anderson, on May 11, 2016, which was recorded without the consent of Mr. Gearhard, who was a party to the call, without determining which parts of the call fit within the State's claimed exception of RCW 9.73.030(2)(b).

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D. ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Under Washington's Privacy Act of RCW 9.73, and Washington State case law, should this Court reverse the Superior Court's decision denying Mr. Gearhard's motion to exclude the "pre-text phone call" when: 1) the recording was of a conversation and a communication, 2) Mr. Gearhard had a reasonable expectation of privacy in the conversation/communication, 3) Mr. Gearhard did not consent to the recording, 4) the recording was made in violation of RCW 9.73.030(1), 5) during this

1 conversation/communication Mr. Gearhard allegedly asks JAC to not tell the police about
2 an alleged incident?

- 3 2. Under Washington's Privacy Act of RCW 9.73, and Washington State case law, even if
4 Mr. Gearhard's statement falls within the exception of RCW 9.73.030(2)(b), did the
5 Superior Court error by admitting testimony about the entirety of the conversation as
6 opposed to only the portion of the conversation that falls within this exception when the
7 vast majority of the conversation does not even arguably fall within the exception?

8 **E. STATEMENT OF THE CASE**

9 On May 5, 2016, Sarah Henry called Klickitat County Dispatch to report an alleged Child
10 Molestation against her son, JAC. CP 73.

11 Klickitat County Sheriff's Office Sgt. Anderson interviewed JAC on May 11, 2016. *Id.*
12 Following the interview, Sgt. Anderson decided to do a "phone tip", or "pretext phone call"
13 between JAC and Mr. Gearhard. CP 74. Sgt. Anderson did not get judicial consent to conduct
14 this "pretext phone call". *Id.* Sgt. Anderson recorded this phone call with a recording device
15 which he placed on the table a couple feet from JAC. *Id.* While Sgt. Anderson obtained JAC's
16 consent to record the conversation, Mr. Gearhard was unaware the conversation was being
17 recorded. CP 73-4. During the conversation, Mr. Gearhard "requested that JAC not tell the police
18 of the incident, that he (the defendant) was scared and this could ruin his life and for JAC to 'do
19 this favor for him.'" CP 74.

20 The State subsequently charged Mr. Gearhard with 3rd Degree Child Molestation and
21 Indecent Liberties for the alleged July 3, 2015, incident and Witness Tampering for the May 11,
22 2016, "pretext phone call". CP 76-7.

23 Mr. Gearhard filed a motion to suppress the "pretext phone call" because it violated RCW
24 9.73—Washington State's Privacy Act. Mr. Gearhard CP 6-49. The motion was heard May 15,
25 2017. CP 71-2. The Court entered its Findings of Fact and Conclusions of Law denying Mr.
26 Gearhard's Motion to Suppress on June 5, 2017. CP 73-75.

1 Following the conclusion of the case by finding of guilt at a stipulated bench trial, Mr.
2 Gearhard timely filed this appeal. CP 87.

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4 **F. ARGUMENT**

5 **1. UNDER WASHINGTON'S PRIVACY ACT OF RCW 9.73 AND CASE LAW, THE**
6 **SUPERIOR COURT ERRED WHEN IT DENIED MR. GEARHARD'S MOTION**
7 **TO SUPPRESS THE "PRETEXT PHONE CALL" BECAUSE THE RECORDING**
8 **WAS MADE IN VIOLATION OF RCW 9.73.**

9 Washington State has an extensive history of protecting privacy interests by statute. *State*
10 *v. Clark*, 129 Wn.2d 211, 222, 916 P.2d 384 (1996). Washington's Privacy Act of RCW 9.73
11 conveys this legislative intent for "broad protection of individuals' privacy rights." *State v.*
12 *Babcock*, 168 Wn.App. 598, 604-5, 279 P.3d 890 (1980). The Washington State Legislature is so
13 concerned with individual privacy, that Washington's Privacy Act is one of the most restrictive in
14 the nation and is triggered when a conversation is recorded without the consent of both parties.
15 *State v. Townsend*, 147 Wn.2d 666, 672, 57 P.3d 255 (2002).

16 In addition, a violation of Washington's Privacy Act requires suppression of the unlawful
17 recording along with all evidence associated with the unlawful recording including testimony from
18 any witnesses to the recording. RCW 9.73.050; *State v. Salinas*, 121 Wn.2d 689, 693-4, 853 P.2d
19 439 (1993); *State v. Fjermestad*, 114 Wn.2d 828, 836, 791 P.2d 897 (1990); *See State v. Williams*,
20 94 Wn.2d 531, 534, 617 P.2d 1012 (1980) ("tape recordings obtained in violation of our act are
21 inadmissible in state court proceedings. That act also prohibits testimony about those recorded
22 conversations, when the recording itself is suppressed.")
23

24
25 Washington's Privacy Act, codified in RCW 9.73.030(1), prohibits the recording of any:

- 26 (a) "Private communication transmitted by telephone, telegraph, radio, or other
27 device between two or more individuals between points within or without the
28 state by any device electronic or otherwise designed to record and/or transmit

1 said communication regardless how such device is powered or actuated,
2 without first obtaining the consent of all the participants in the communication.

3 (b) Private conversation, by any device electronic or otherwise designed to record
4 or transmit such conversation regardless how the device is powered or actuated
5 without first obtaining the consent of all the persons engaged in the
6 conversation.”

7 Here, the Superior Court found the recording was of a private conversation and/or
8 communication. CP 74. The Superior Court further concluded that Mr. Gearhard believed the
9 conversation to be a private conversation. *Id.* In addition, the Superior Court concluded that
10 Detective Anderson violated RCW 9.73.030(1). CP 75. The State has not challenged these
11 findings so they are a verity on appeal. *State v. Armenta*, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997).

12 Thus, the Superior Court was legally required to suppress the recording, and all testimony
13 about the unlawfully recorded conversation absent a valid exception.

14 In this case, the only potential exception, and the only exception claimed by the State and
15 considered as viable by the Superior Court, is codified in RCW 9.73.030(2)(b) which states:

16 (2) “[n]otwithstanding subsection (1) of this section, wire communications or
17 conversations... (b) which convey threats of extortion, blackmail, bodily harm, or
18 other unlawful requests or demands... may be recorded with the consent of one party
19 to the conversation.” Here, there is no allegations that Petitioner conveyed any
20 “threats of extortion, blackmail, or bodily harm.” Therefore, the entire basis for
21 admission revolves around what qualifies as “other unlawful requests or demands.”

22 The two seminal cases which address the Privacy Act exception addressed of RCW
23 9.73.030(2)(b) are *State v. Williams*, 94 Wn.2d 531, and *State v. Caliguri*, 99 Wn.2d 501, 664 P.2d
24 466 (1983). While Mr. Williams and Mr. Caliguri had separate appeals, they were co-defendants.
25 *See id.* In *Williams* and *Caliguri*, at issue was a variety of tape recorded conversations between
26 the defendants and other individuals. *Williams* at 535. These conversations were recorded by
27 federal authorities pursuant to the federal wiretap statute, but without judicial approval. *Id.*
28 Despite the legality of the recordings under federal law, the *Williams* court held that Washington’s

1 Privacy Act applies to all electronic evidence the State intends to submit in Washington State court
2 proceedings. *Id* at 534.

3 In addition, the *Williams* and *Caliguri* courts did an in depth analysis into the RCW
4 9.73.030(2)(b) exception at issue here. This analysis is critical because, in Mr. Gearhard's case,
5 the Superior Court admitted all testimony about the recording on the grounds that the phrase "other
6 unlawful requests or demands" from RCW 9.73.030(2)(b) is met by any statement that constitutes
7 a crime. CP 75; RP May 15, 2017 at 25:2-11.

8 This interpretation of RCW 9.73.030(2)(b) by the Superior Court is in direct contradiction
9 to the Washington Supreme Court's analysis in *Williams* and *Caliguri*. For example, in *Williams*
10 the Court reveals that the phrase "unlawful requests or demands" exempts "from the act only
11 communications or conversations 'which convey threats of extortion, blackmail, bodily harm or
12 other unlawful requests or demands,' of a similar nature." *Id* at 548-9. Thus, the phrase "unlawful
13 requests or demands" does not refer to any crime, but only unlawful requests or demands that are
14 similar in nature to "threats of extortion, blackmail, and bodily harm. As the allegation here is not
15 similar to a threat of extortion, blackmail, or bodily harm, the Superior Court erred in its ruling.
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19 Furthermore, careful reading of *Williams* and its progeny reveal that what Courts should
20 look at is whether there is a threat. This interpretation of *Williams* is bolstered by the Supreme
21 Court's decision in *State v. Caliguri* where the Court, in discussing it's *Williams* decision, noted
22 that the "catchall phrase 'unlawful requests or demands' is limited to requests or demands of a
23 nature similar to threats of extortion, blackmail or bodily harm." *Caliguri*, 99 Wn.2d at 507. This
24 holding has been followed more recently in *State v. Babcock*, where the court reiterated that the
25 phrase "unlawful requests or demands" only applies "to communications that convey matters
26 similar to "extortion, blackmail, [or] bodily harm." 168 Wn.App. 598, 608, 279 P.3d 890 (2012).
27
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1 Here, the written order of the Superior Court denying Mr. Gearhard's Motion to Suppress,
2 as drafted by the Attorney representing the State of Washington, states "[t]he defendants
3 statements in this conversation were clearly an 'unlawful request or demand' when he requested
4 JAC not report the incident to the police which would be the crime of Tampering with a Witness
5 in violation of RCW 9.72.120." CP 75. The Superior Court further clarified this conclusion of
6 law in its oral conclusions by stating:
7

8 "It is clear, though, that this request by Mr. Gearhard was a request to essentially
9 commit a crime to not report these acts to law enforcement in this case. I agree that
10 the definition that defined – as discussed in *Williams*, talks about a similar nature,
11 and ***those are all crimes that they were talking about. The main threats of***
12 ***extortion, blackmail or bodily harm are all conveyances of different kinds of***
13 ***potential crimes that could occur and the other request or demands was another***
14 ***request for Mr. – for JAC for the commission of a crime.*** So I'm finding in this
15 case that the exception that is allowed under the threats – the main threats of
16 extortion, blackmail, bodily harm or other unlawful requests or demands allowed
17 for the recording to be -- be conversation or communication between JAC and Mr.
18 Gearhard to be recorded in this case." (emphasis added)

19 RP May 15, 2017 at 25:2-11.

20 Thus, the court made it clear its belief that the exception "other unlawful requests or
21 demands applies to any statement regarding the possible commission of a crime. This was
22 apparently based on the court's belief that the addition of the "similar" requirement by the
23 Washington State Supreme Court only limits the exception to crimes. However, this interpretation
24 is in direct contraction to the explanation given in *Caliguri*.

25 In *Caliguri*, Court stated, "[a]s to RCW 9.73.030(2)(b), we rejected Williams' argument
26 that the exception's reach should be limited to emergency situations but did note that the
27 potentially catchall phrase 'unlawful requests or demands' is limited to requests or demands of a
28 nature similar to threats of extortion, blackmail, or bodily harm." *State v. Caliguri*, 99 Wn.2d 501,
507, 664 P.2d 466 (1983) *citing State v. Williams* at 548.

1 Therefore the Superior Court's conclusion that the "similar" language inserted into the
2 RCW 9.73.030(2)(b) exception includes all crimes is error.

3 The reasoning behind this interpretation is explained in *Williams*.

4 "Defendant Williams furthermore contends that subsection (2)(b) must be limited
5 to emergency situations to avoid undermining the entire privacy act. He points out
6 that the provision exempts from the act "wire communications or conversations ...
7 which convey threats of extortion, blackmail, bodily harm, or other unlawful
8 requests or demands," (RCW 9.73.030(2)), and **argues that an overbroad
9 interpretation of the "catchall" phrase could negate the privacy act protections
10 whenever a conversation relates in any way to unlawful matters. The
11 defendant is certainly correct in asserting that such an overbroad construction
12 of the catchall provision would be inconsistent with the legislative intent
13 underlying the entire privacy act.** The legislature intended to establish
14 protections for individuals' privacy and to require suppression of recordings of **even
15 conversations relating to unlawful matters** if the recordings were obtained in
16 violation of the statutory requirements. RCW 9.73.030, 9.73.050. The exception
17 contained in RCW 9.73.030(2)(b) must be strictly construed to give effect to this
18 legislative intention underlying the general statute. *State v. Wright*, supra at 652,
19 529 P.2d 453; *Hall v. Corporation of Catholic Archbishop*, 80 Wn.2d 797, 801, 498
20 P.2d 844 (1972). **Thus, RCW 9.73.030(2)(b) must be interpreted as exempting
21 from the act only communications or conversations "which convey threats of
22 extortion, blackmail, bodily harm, or other unlawful requests or demands," of
23 a similar nature.** (emphasis added)

24 *State v. Williams*, 94 Wn.2d at 548.

25 Accordingly, the phrase "unlawful requests or demands" does not mean any criminal
26 request or demand as interpreted by the Superior Court here. As *Williams* and *Caliguri* illuminate,
27 the "unlawful request or demand" must be some type of threat that is similar to a threat of extortion,
28 a threat of blackmail or a threat of bodily harm. See *Caliguri* at 507.

29 This interpretation is further supported by *State v. Barnes*, an unpublished opinion where
30 Division 2 found error for Superior Court admitting statements that "did not convey threats". 157
31 Wn.App. 1076, 3 (2010).

1 Thus, what *Williams* and *Caliguri* essentially require is an “or else” for the “unlawful
2 request or demand” clause to apply. Here, because there was no “or else”, or threat of any nature,
3 the Superior Court erred by concluding that RCW 9.73.030(2)(b) applies.

4 Moreover, the State essentially conceded that Mr. Gearhard’s actions did not constitute
5 conduct similar to threats of extortion, blackmail or bodily harm by arguing the Supreme Court
6 was wrong, as opposed to arguing the conduct was similar. RP May 5, 2017 at 22:15-23.
7

8 Therefore, the Superior Court erred when it denied Petitioner’s Motion to Suppress because
9 Mr. Gearhard’s conduct was not similar to “threats of extortion, blackmail, and bodily harm” as
10 defined by the Washington State Supreme Court. Consequently, Mr. Gearhard respectfully
11 requests this Court should reverse and remand to the Superior Court to suppress the unlawful
12 recording and all evidence surrounding the conversation that was unlawfully recorded.
13

14 **2. Under Washington’s Privacy Act of RCW 9.73 and Washington State case law, even**
15 **if Mr. Gearhard’s statement falls within the exception of RCW 9.73.030(2)(b), the**
16 **Superior Court erred by admitting testimony about the entirety of the recorded**
17 **conversation, as opposed to just the portions that fall within the exception.**

18 As previously discussed, Washington’s Privacy Act requires suppression of all evidence
19 obtained in violation of RCW 9.73.030. RCW 9.73.050; *State v. Salinas*, 121 Wn.2d 689, 693-4,
20 853 P.2d 439 (1993); *State v. Fjermestad*, 114 Wn.2d 828, 836, 791 P.2d 897 (1990).

21 This prohibition further requires that all parts of unlawfully recorded conversations, and/or
22 testimony about the unlawfully recorded conversations, that are not related to threats of extortion,
23 blackmail, bodily harm or other similar threats be suppressed. *See State v. Williams*, 94, Wn.2d at
24 549 (The trial court in the Williams case properly suppressed the recordings and testimony
25 concerning the conversations with Williams and his alleged co-conspirator, and correctly ruled
26 admissible those parts of the conversations relating to threats of extortion, blackmail, bodily harm
27 or other unlawful requests of a similar nature.).
28

1 This requirement to partition RCW 9.73 evidence into admissible RCW 9.73.030(2)(b)
2 evidence and that evidence which does not fit within those limited criteria has been followed by
3 Washington Courts since *Williams* and *Caliguri*. See example unpublished opinion *State v.*
4 *Barnes*, 157 Wn.App. 1076 at 3 (2010).

5 Therefore, even if this Court believes that the alleged statement at issue in this case falls
6 within the limited exception of RCW 9.73.030(2)(b), the Superior Court still erred by admitting
7 all evidence about the conversation as opposed to the limited portion that fell within the exception.
8 Thus Mr. Gearhard respectfully request this Court reverse and remand to the Superior Court for
9 determination of which portions of the recorded conversation fall within the RCW 9.73.030(2)(b)
10 exception.
11

12
13 **G. CONCLUSION**

14 For the above reasons Defendant respectfully requests this Court reverse the decisions of
15 the Superior Court denying Mr. Gearhard's Motion to Suppress and admitting the all evidence
16 related to the "pretext phone call" at issue here.
17

18
19 **RESPECTFULLY SUBMITTED** this 18th day of January, 2018.
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22 
23 _____
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27
28

HALL AND GILLILAND PLLC

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