No. 47726-2-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

CLABON TERREL BERNIARD,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 10-1-01904-1
The Honorable Thomas Larkin, Judge

REPLY BRIEF OF APPELLANT

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A. THERE ARE NO VALID ALTERNATIVE GROUNDS FOR SUPPRESSION OF THE ILLEGALLY OBTAINED CELLULAR TELEPHONE RECORDS.

In its Brief of Respondent, the State apparently agrees that the trial court should not have relied on the good faith or inevitable discovery doctrines when it refused to suppress the cellular telephone records. (See Brief of Resp. at 7-8) The State argues that the trial court should still be affirmed because the warrant was supported by probable cause (Brief of Resp. at 8-12) and because Berniard did not have standing to challenge the warrant (Brief of Resp. at 12-22).

A search warrant must be based on a finding of probable cause. State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). Probable cause exists when the application for the search warrant sets forth "facts and circumstances sufficient to establish a reasonable inference that the defendant is involved in criminal activity and that evidence of the criminal activity can be found at the place to be searched." State v. Atchley, 142 Wn. App. 147, 161, 173 P.3d 323 (2007). A nexus between the item to be seized and the place to be searched must exist at the time the warrant is issued. State v. Goble, 88 Wn. App. 503, 509, 945 P.2d 263 (1997).

In this case, the facts presented to the issuing magistrate failed to make the required nexus. The affidavit did not connect the suspects with the specific telephone numbers, and failed to indicate why law enforcement believed the records from those specific accounts would contain information that was relevant to the investigation of the robbery/homicide.

Second, Berniard did have standing to challenge the warrant because he has a privacy interest in the cellular telephone records of the phone he used during the relevant time period. Under article I, section 7 of the Washington Constitution, a search occurs when the government disturbs "those privacy interests which citizens of this state *have held, and should be entitled to hold,* safe from governmental trespass absent a warrant." State v. Myrick, 102 Wn.2d 506, 511, 688 P.2d 151 (1984) (emphasis added). Our State Supreme Court has recognized privacy interests in telephone records. *See, e.g.,* State v. Gunwall, 106 Wn.2d 54, 67, 720 P.2d 808 (1986) (finding that "'[a] telephone is a necessary component of modern life'" and "'[t]he concomitant disclosure'" to the telephone company of the numbers dialed by the telephone subscriber "'does not alter the caller's expectation of privacy'" (quoting People v. Sporleder, 666 P.2d 135, 141 (Colo.1983))).

The State relies on several Federal cases, including United States v. Skinner, 690 F.3d 772 (6th Cir. 2012), to argue that users of anonymous prepaid cellular phones have no expectation of privacy in information connected with their phones. (Brief of Resp. at 12-22) But those cases are distinguishable for several reasons, and do not support such a broad rule.

First, article 1, section 7 of the Washington State Constitution provides greater privacy protections than does the Fourth Amendment in the area of telephone records. See Gunwall, 106 Wn.2d at 64-68. Secondly, Skinner and the other cases cited by the State were not concerned with any privacy interest in records showing calls made to and from prepaid telephones. Rather, those cases addressed whether an individual has a privacy interest in the data revealing the location of the phone when it is in use. In finding that there is no privacy interest in the location information, the Skinner court notes:

> There is no Fourth Amendment violation because Skinner did not have a reasonable expectation of privacy in the data given off by his voluntarily procured pay-as-you-go cell phone. If a tool used to transport contraband gives off a signal that can be tracked for location, certainly the police can track the signal. The law cannot be that a criminal is entitled to rely on the expected untrackability of his tools. Otherwise, dogs could not be used to track a fugitive if the fugitive did

> not know that the dog hounds had his scent. A getaway car could not be identified and followed based on the license plate number if the driver reasonably thought he had gotten away unseen. The recent nature of cell phone location technology does not change this. If it did, then technology would help criminals but not the police. It follows that Skinner had no expectation of privacy in the context of this case, just as the driver of a getaway car has no expectation of privacy in the particular combination of colors of the car's paint.

Skinner, 690 F.3d at 777 (footnote omitted). The court reasoned that, under the Fourth Amendment, one's location when using a cellular phone is not private because that information is shared in other ways with the general public.

However, telephone company records, showing exactly who a user called and received calls from, are viewed quite differently:

> We agree with the reasoning of the Colorado Supreme Court in another recent independent state constitutional grounds case:
>
> > "A telephone is a necessary component of modern life. It is a personal and business necessity indispensable to one's ability to effectively communicate in today's complex society. When a telephone call is made, it is as if two people are having a conversation in the privacy of the home or office, locations entitled to protection under ... the Colorado Constitution. The concomitant disclosure to the telephone company, for internal business purposes, of the numbers dialed by the telephone subscriber does not alter the caller's expectation of privacy and transpose it into an assumed risk of disclosure to the government.

Gunwall, 106 Wn.2d at 67 (quoting People v. Sporleder, 666 P.2d 135, 141 (Colo. 1983)). Thus, while information about where a person is when he or she uses a cellular phone may not be private, information about who the user contacts *is* private.

Finally, the State seems to argue that only criminals use prepaid cellular telephones and therefore users of such phones should not be entitled to any privacy protections. (Brief of Resp. at 22) But there are many non-criminal reasons why a person might use a pre-paid telephone: to avoid roaming charges during a temporary stay away from home; as an emergency-use only phone for a child or elderly person; to avoid committing to a long-term service contract; or because they cannot afford the high cost of purchasing a cellular telephone and the expense of monthly access and service fees. Furthermore, the State connected Berniard to the 504 number through the hundreds of calls placed between that phone and numbers associated with Berniard's family and girlfriend. (2TRP8 225-26; Exh. P163) Clearly, Berniard was using the 504 number for primarily personal reasons, and not purely to advance criminal activities. This Court should reject a rule that only those who choose to subscribe to cellular telephone service, or who can afford

the costs of associated with purchasing and subscribing to cellular telephone service, are deserving of privacy. *See e.g.* United States v. Caraballo, 963 F. Supp. 2d 341, 357 (D. Vt. 2013) (disagreeing with Skinner, and noting that "it should not matter under the Fourth Amendment whether a cell phone is prepaid or postpaid as that fact has nothing to do with the user's expectations of privacy.")

Washington courts have found that cellular telephone users have an expectation that information about who they call and who they receive calls from will be kept private from government intrusion. It should be irrelevant whether the telephone is prepaid or on a service contract. Berniard established that he had an expectation of privacy in the records for the prepaid phone he used during the relevant time periods. Berniard therefore had standing to challenge the warrant used to obtain the records. The warrant, however, did not contain sufficient facts to show that the records of the listed telephone numbers were connected to the crimes being investigated. The State has failed to establish alternative grounds for affirming the trial court, and this Court should reverse the trial court's decision to allow the records to be introduced at trial.

B. HIGASHI'S STATEMENTS TO FORD WERE NOT ADMISSIBLE EITHER AS CO-CONSPIRATOR STATEMENTS OR AS STATEMENTS AGAINST PENAL INTEREST.

As argued in detail in the Opening Brief, Higashi's statements to Ford were not admissible as co-conspirator statements because a conspiracy involving Berniard no longer existed and because Higashi's statements did not further the robbery conspiracy. The State contends that Higashi's statements were alternatively admissible as statements against penal interest under ER 804(b)(4). (Brief of Resp. at 28) That rule provides that "[a] statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability … that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true" is not excluded by the hearsay rule[.]

However, this hearsay exception only applies if the declarant is "unavailable as a witness." ER 804(b). "Unless the declarant is legally unavailable, the defendant's right to confront accusers is paramount to the State's need for the hearsay testimony." State v. Dictado, 102 Wn.2d 277, 287, 687 P.2d 172, 179 (1984).

The State, without any citation to the record, claims that

Higashi was unavailable "because he could still invoke 5th Amendment protection and he refused to cooperate." (Brief of Resp. at 28) But the State did not call Higashi at trial and made no attempt to question him as a witness. As a result, there is no way to know whether Higashi would have actually invoked his Fifth Amendment right against self-incrimination or whether he would have actually refused to testify.

Furthermore, a person is only unavailable as a witness "on the ground of privilege" if they are "exempted by ruling of the court[.]" ER 804(a)(1). The trial court never ruled that Higashi was "exempted by reason of privilege." And it is doubtful that Higashi even was privileged from testifying, as he had already been convicted and his direct appeal was completed before Berniard's trial.[1] *See* State v. Ruiz, 176 Wn. App. 623, 636, 309 P.3d 700 (2013) ("[w]hen a person has been convicted of a crime and there is no longer any possibility of appeal, the Fifth Amendment privilege no longer exists because there is no potential jeopardy for testifying"); 1 MCCORMICK ON EVIDENCE § 121 at 527 (Kenneth S. Broun ed., 6th ed.2006) ("absent some specific showing that collateral attack is likely to succeed, most

[1] See State v. Higashi, 171 Wn. App. 1015 (2012).

courts treat finality of conviction as unqualifiedly removing the risk of incrimination").

A witness is also unavailable "when [he or] she persists in refusing to testify about the subject matter of [the] statement despite a court order to do so." State v. Floreck, 111 Wn. App. 135, 139, 43 P.3d 1264 (2002); ER 804(a)(2). But there was no court order directing Higashi to testify, and therefore no refusal to testify "despite a court order."

Because the State fails to show that Higashi would have been unavailable as a witness at trial, the State cannot show that his statements to Ford could have been admitted as statements against penal interest.

C. ANY FUTURE REQUEST FOR APPELLATE COSTS SHOULD BE DENIED[2]

Under RCW 10.73.160 and RAP Title 14, this Court may order a criminal defendant to pay the costs of an unsuccessful appeal. RAP 14.2 provides, in relevant part:

> A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on

[2] Recently, in State v. Sinclair, Division 1 concluded "that it is appropriate for this court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellant's brief." 192 Wn. App. 380, 389-90, 367 P.3d 612 (2016). Berniard is including an argument regarding appellate costs in this brief in the event that this Court agrees with Division 1's interpretation of RAP 14.2.

> review, unless the appellate court directs otherwise in its decision terminating review.

But imposition of costs is not automatic even if a party establishes that they were the "substantially prevailing party" on review. State v. Nolan, 141 Wn.2d 620, 628, 8 P.3d 300 (2000). In Nolan, our highest Court made it clear that the imposition of costs on appeal is "a matter of discretion for the appellate court," which may "decline to order costs at all," even if there is a "substantially prevailing party." Nolan, 141 Wn.2d at 628.

In fact, the Nolan Court specifically rejected the idea that imposition of costs should occur in every case, regardless of whether the proponent meets the requirements of being the "substantially prevailing party" on review. 141 Wn.2d at 628. Rather, the Court held that the authority to award costs of appeal "is permissive," so that it is up to the appellate court to decide, in an exercise of its discretion, whether to impose costs even when the party seeking costs establishes that they are the "substantially prevailing party" on review. Nolan, 141 Wn.2d at 628.

Should the State substantially prevail in Berniard's case, this Court should exercise its discretion and decline to award any appellate costs that the State may request. Berniard will be

incarcerated for the remainder of his life, and already owes at least $7,919.22 in previously ordered LFOs and restitution. (CP 329, 331) And the trial court declined to order any non-mandatory LFOs at sentencing. (CP 129, 130; 12/03/15 RP 378, 382) There was no evidence below, and no evidence on appeal, that Berniard has or will have the ability to repay additional appellate costs.

Furthermore, the trial court found that Berniard is indigent and entitled to appellate review at public expense. (CP 352-53) This Court should therefore presume that he remains indigent because the Rules of Appellate Procedure establish a presumption of continued indigency throughout review:

> A party and counsel for the party who has been granted an order of indigency must bring to the attention of the trial court any significant improvement during review in the financial condition of the party. The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent.

RAP 15.2(f).

In State v. Sinclair, Division 1 declined to impose appellate costs on a defendant who had previously been found indigent, noting:

> The procedure for obtaining an order of indigency is set forth in RAP Title 15, and the determination is entrusted

> to the trial court judge, whose finding of indigency we will respect unless we are shown good cause not to do so. Here, the trial court made findings that support the order of indigency.... We have before us no trial court order finding that Sinclair's financial condition has improved or is likely to improve. ... We therefore presume Sinclair remains indigent.

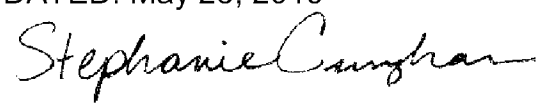
192 Wn. App. 380, 393, 367 P.3d 612 (2016); see also State v. Blazina, 182 Wn.2d 827, 839, 344 P.3d 680 (2015) ("if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs").

Similarly, there has been no evidence presented to this Court, and no finding by the trial court, that Berniard's financial situation has improved or is likely to improve. Berniard is presumably still indigent, and this Court should decline to impose any appellate costs that the State may request.

II. CONCLUSION

This Court should find that the cellular telephone records and Higashi's statements to Ford were admitted in error, and that the error was not harmless. For all the reasons argued above and in the Opening Brief of Appellant, Berniard's convictions should be reversed and his case remanded for a new trial. This court should also decline any future request to impose appellate costs.

DATED: May 23, 2016



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