SUPREME COURT NO. 98591-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

LYNELL DENHAM,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Helen Halpert, Judge

ANSWER TO STATE'S PETITION FOR REVIEW

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A. IDENTITY OF RESPONDENT

Respondent Lynell Denham, the appellant below, asks this Court to deny the State's Petition for Review.

B. COURT OF APPEALS DECISION

The State seeks review of the court of appeals' unpublished decision in State v. Denham, No. 78704-7-I, filed April 27, 2020.

C. STATEMENT OF THE CASE

In an unpublished opinion, the court of appeals held two key pieces of evidence were improperly admitted at Denham's bench trial for second degree burglary and trafficking in stolen property. The court concluded cumulative error resulting from this improperly admitted evidence warranted a new trial: "We cannot conclude that overwhelming evidence of guilt existed for Denham absent these errors." Opinion, 20.

First, the court of appeals held the trial court erred in refusing to suppress Denham's cell phone records, particularly his cell-site location information (CSLI). Opinion, 9-13. The court held "[t]he application for the search warrant for Denham's cell phone records was insufficient as it failed to provide specific information demonstrating a nexus between Denham, the criminal act, the information to be seized and the item to be searched." Opinion, 13. While warrant affidavit established Denham had two cell phones, "it failed to establish that Denham had either of the cell phones in

question in his possession on the night of the burglary." Opinion, 11. The affidavit otherwise contained only "blanket inferences and generalities" about typical cell phone habits, "offer[ing] no specific facts as to Denham or the use of cell phones in the burglary at issue here." Opinion, 12.

Second, the court of appeals held the trial court erroneously admitted Denham's involvement in prior burglaries as evidence of knowledge, where knowledge is not an element of burglary and Denham did not make any issue of knowledge. Opinion, 16-18. The trial court expressly relied on the improper "knowledge" evidence to conclude the State proved Denham's identity as the burglar. Opinion, 17. This was despite the fact that the trial court found the evidence did not meet the stringent test for identity. Opinion, 15. The court of appeals accordingly found the error was not harmless, where the prior bad acts were "the primary evidence that the court used to connect [Denham] to the burglary." Opinion, 18.

D. ARGUMENT WHY REVIEW SHOULD BE DENIED

1. The court of appeals correctly applied the well-established nexus requirement to the warrant for Denham's cell phone records.

The court of appeals decision breaks no new ground. The U.S. Supreme Court in Carpenter v. United States, __U.S. __, 138 S. Ct. 2206, 2219, 201 L. Ed. 2d 507 (2018), held individuals have a reasonable expectation of privacy in their CSLI under the Fourth Amendment. CSLI

"provides an intimate window into a person's life, revealing not only his particular movements, but through them his familial, political, professional, religious, and sexual associations." Id. at 2217. Thus, "[b]efore compelling a wireless carrier to turn over a subscribers CSLI, the Government's obligation is a familiar one—get a warrant." Id. at 2221.

Following Carpenter, seven members of this Court agreed individuals have a constitutional right to privacy under article I, section 7 of the Washington Constitution to both historical and real-time CSLI (cell phone "ping"). State v. Muhammad, 194 Wn.2d 577, 589, 611, 451 P.3d 1060 (2019) (lead opinion). The State therefore needs a "valid warrant" to obtain either, absent a recognized exception to the warrant requirement. Id. at 628 (Gordon McCloud, J., concurring in part and dissenting in part).

In State v. Phillip, __Wn. App. 2d.__, 452 P.3d 553, 559-60 (2019), review denied, 194 Wn.2d 1017 (2020), the court of appeals likewise recognized the right to privacy in CSLI. The Phillip court accordingly applied "the constitutional requirements of a warrant" to CSLI. Id. at 554. "To be constitutionally valid, a warrant must not only be supported by probable cause *but it must also specifically tie the facts known to the State to the specific evidence it seeks to obtain*." Id. at 561 (emphasis added). As noted, this Court denied review in Phillip.

These cases together stand for the unremarkable proposition that the usual warrant requirements apply to CSLI. This Court clearly articulated the warrant requirements in State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). A warrant may issue only on probable cause, which "requires a nexus between criminal activity and the item to be seized." Id. (quoting State v. Goble, 88 Wn. App. 503, 509, 945 P.2d 263 (1997)). There must be specific facts tying the place to be searched to the crime; generalities about the habits of criminals will not suffice. Id. at 147-48.

Generalities are precisely what the State relied on here to obtain the warrant for Denham's cell phone records, including his CSLI. The State glosses over these in its petition for review. State's Petition, 11 (claiming "the probable cause nexus here was not based on the type of frowned-upon language, such as, 'the affiant is aware that persons committing this type of crime generally conceal evidence [place to be searched]'").

Contrary to the State's assertions, the warrant affidavit made only broad, generalized statements about cell phone usage, such as: "Courts have recognized that the majority of Americans possess and use cellular telephones, and that most of those keep the phones within their reach at all times." CP 424. And, like the general habits of drug dealers condemned as insufficient in Thein: "Based on my experience, those involved in criminal enterprises sometimes will use multiple phones in the commission of crimes,

to facilitate criminal activity, and/or to avoid detection by law enforcement." CP 438-39. No specific facts tied criminal activity to Denham's CSLI. Opinion, 11-12.

The State would essentially have this Court carve out an exception to the nexus requirement for cell phone records. In the State's view, a warrant for CSLI should issue so long as there is probable cause to believe the person committed a crime. Never mind specific facts tying criminal activity to the CSLI—it is enough that everyone carries a cell phone nowadays. This is a frightening, and unconstitutional, prospect.

The court of appeals rightly resisted the State's invitation, rejecting the notion that probable cause to believe Denham was engaged in criminal activity was sufficient to search his CSLI. Opinion, 13. The court instead applied the case law discussed above and held "the nexus between the crime and the place or item to be searched is lacking." Opinion, 10. The court reasoned the affidavit contained "precisely the sort of blanket inferences and generalities that, without additional specific facts, our courts have declared insufficient to establish the requisite nexus for the issuance of constitutionally valid search warrants." Opinion, 12.

There is no "unanswered" question of constitutional law here. State's Petition, 8. The court of appeals decision involved straightforward

application of Carpenter, Muhammed, and Thein, along with its own prior decision in Phillip. This Court should deny review of this issue.

2. This Court's review is unnecessary on the ER 404(b) knowledge issue because there is no conflict in the case law and no other review criteria are met.

The trial court excluded Denham's prior involvement in federal bank burglaries as evidence of identity, or modus operandi (MO), concluding it did not meet the stringent test for MO. RP 226. But the court admitted the evidence for Denham's "sophisticated knowledge" of complex burglaries. RP 225-26. The court then relied, in large part, on the so-called knowledge evidence to conclude "Mr. Denham was the burglar."[1] CP 322-23. The court, in turn, relied on Denham's identity as the burglar to conclude he trafficked in stolen property. CP 323.

The court of appeals agreed with Denham's argument on appeal that "the court improperly relied on his knowledge and skills as evidence of the identity of the perpetrator of the burglary." Opinion, 17. The court correctly noted "[k]knowledge is not an element of the burglary charge." Opinion, 16. The court therefore reasoned "it is unclear how the evidence of his

[1] The entirety of Finding of Fact 34 reads: "The evidence showed that someone entered Mallinak Designs without permission, broke and entered with the intent to commit a crime. The Court finds that with Mr. Denham's specialized knowledge and his possession of stolen property very shortly after the crime occurred, it is satisfied that circumstantial evidence establishes that Mr. Denham was the burglar, in violation of RCW 9A.52.030." CP 322-23.

knowledge is necessary, unless it went to identity, when no evidence as to skill was required to prove the crime." Opinion, 16.

The State contends the court of appeals decision is incorrect and, furthermore, is in "direct conflict" with existing case law. State's Petition, 18. The State is wrong.

This Court very clearly held in State v. Powell, 126 Wn.2d 244, 262, 893 P.2d 615 (1995), that prior bad acts are inadmissible to prove intent unless "intent is at issue or when proof of the doing of the charged act does not itself conclusively establish intent." In other words, intent must be an essential element or "essential ingredient" of the crime charged. Id. at 258.

This Court and the court of appeals has applied this rule time and again. See, e.g., State v. Saltarelli, 98 Wn.2d 358, 366, 655 P.2d 697 (1982) (prior assault improperly admitted as evidence of intent where "intent was not an 'essential point which the state was required to establish' in this case" (quoting State v. Goebel, 40 Wn.2d 18, 22, 240 P.2d 251 (1952)); State v. Wilson, 144 Wn. App. 166, 177, 181 P.3d 887 (2008) (same "where intent is not an element of felony murder"); State v. Dewey, 93 Wn. App. 50, 58, 966 P.2d 414 (1998), overruled on other grounds by State v. DeVincentis, 150 Wn.2d 11, 74 P.3d 119 (2003) (same where intent is not an element of third degree rape and "there was no issue of intent").

Knowledge is akin to intent. Like intent, knowledge is a mens rea, i.e., the state of mind necessary for criminal liability. RCW 9A.08.010. As a mens rea, knowledge is not like motive, lustful disposition, or res gestae, as the State advocates in its petition. State's Petition, 16-17. Consistent with Powell, the court of appeals has repeatedly held prior bad acts are admissible to prove knowledge only where knowledge is an element of the crime or otherwise at issue. See, e.g., State v. Bacotgarcia, 59 Wn. App. 815, 821, 801 P.2d 993 (1990) ("It is difficult to comprehend why the defendant's knowledge of promoting prostitution was an 'essential ingredient' of the crime charged since the mere fact that such a crime had been committed would establish knowledge."[2]); State v. Essex, 57 Wn. App. 411, 418, 788 P.2d 589 (1990) (knowledge was a "specific element" of the charged crime); State v. Donald, 68 Wn. App. 543, 547, 844 P.2d 447 (1993) (same).

Knowledge is not an element of burglary. RCW 9A.52.030(1) (entering or remaining unlawfully in a building with intent to commit a crime against a person or property therein). Nor did Denham put knowledge at issue, like asserting he lacked the technical skills or intelligence to carry out the burglary. Opinion, 17. Knowledge was, simply put, not an essential ingredient the State had to prove or disprove. The court of appeals correctly

[2] In other words, the act of promoting prostitution itself conclusively established knowledge, consistent the holding of Powell.

analyzed and applied Powell. Opinion, 16. There is no conflict in the case law. No other criteria for review are met. This Court also deny review of this issue.

E. CONCLUSION

The court of appeals unpublished decision is thorough, well-reasoned, and rests on well-established case law. There is no need for this Court's review. This Court should deny the State's petition.

DATED this 12th day of June, 2020.

Respectfully submitted,

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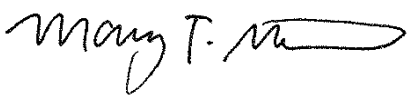

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