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

STATE OF WASHINGTON,

Respondent,

v.

BRYAN EARLE GLANT,

Petitioner.

PETITION FOR REVIEW TO THE WASHINGTON STATE SUPREME COURT

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I. IDENTITY OF PETITIONER AND INTRODUCTION

Petitioner Bryan Earle Glant, through undersigned counsel, seeks review of Division II's opinion affirming his conviction and sentence for two counts of attempted rape of a child.

Police with the Washington State Patrol [WSP] arrested Glant as part of a series of stings they call "Net Nanny." Since 2015, these operations have led to at least 182 arrests.[1] Because the police control the story and can organize the scheme to require the most severe sentences, the detectives normally pose as an adult woman having at least two fictitious children with one under the age of 13.[2] By the WSP's own admission, it could not conduct Net Nanny operations without substantial donations from the private organization Operation Underground

[1] *See* Elena Gardner, *Spokane County 'Net Nanny' operation leads to arrest of 9 sexual predators*, KXLY (June 4, 2018), https://www.kxly.com/news/spokane-county-net-nanny-operation-leads-to-arrest-of-9-sexual-predators/749300170.

[2] Many of the convictions have been appealed and decided. *State v. Carson*, No. 36057-1-III, 2018 WL 4770896 (Wash. Ct. App. Oct. 2, 2018) (2 children, one age 11); *State v. Racus*, No. 49755-7-II, 2018 WL 5281416 (Wash. Ct. App. Oct. 23, 2018) (2 children, one under 11); *State v. Chapman*, No. 50089-2-II, 2019 WL 325668 (Wash. Ct. App. Jan. 23, 2019) (2 children, one under 11); *State v. Best*, No. 76457-8-I, 2018 WL 1907968 (Wash. Ct. App. Apr. 23, 2018), review denied, 192 Wn.2d 1002, 430 P.3d 259 (2018) (3 children, one under 11); *State v. Jacobson*, No. 49887-1-II, 2018 WL 2215888 (Wash. Ct. App. May 15, 2018), *review denied*, 192 Wn.2d 1005, 430 P.3d 247 (2018) (3 children, one under 11); *State v. Persell*, No. 52236-5-II, 2020 WL 1867050 (Wash. Ct. App. Apr. 14, 2020); *State v. Borseth*, No. 36230-2-III, 2020 WL 2182269, at *3 (Wash. Ct. App. May 5, 2020). Additional cases have not been decided yet. *State v. Bilgi*, 53464-9-II (Wash. Ct. App. Aug. 21, 2019); *State v. Bertolacci*, 53320-1-II (Wash. Ct. App. Mar. 29, 2019); *State v. Lien*, 54146-7-II (Wash. Ct. App. Dec. 20, 2019); *State v. Arbogast*, 36250-7-III (Wash. Ct. App. Aug. 8, 2018); *State v. Majeed*, 36591-3-II (Wash. Ct. App. Feb. 8, 2019); *State v. Gong*, 54516-1-II (Wash. Ct. App. Apr. 3, 2020); *State v. Canter*, 80409-0-I (Wash. Ct. App. Aug. 20, 2019); *State v. Zimmerman*, 81032-4-I (Wash. Ct. App. Feb 20, 2018).

Railroad [OUR]. OUR's willingness to fund the police for each operation depends on the number of arrests made and WSP's ability to grant OUR special privileges around the stings. The detective seeking the donations personally received significant overtime pay from this same source of funds. Despite the important legal and constitutional questions that arise from this arrangement, the WSP has no intention of ending it, and the lower courts have uniformly condoned it. Only this Court can address the significant due process and public policy issues that arise when a public police function is privately funded and where such contributions result in direct financial gain to the police who solicit those funds.

Glant's petition raises two important issues meriting this Court's review under RAP 13.4(b). First, the petition asks (as a matter of first impression) whether under this Court's authority prohibiting outrageous government misconduct, OUR's relationship with the police through funding specific Net Nanny stings required the trial court to dismiss all charges against Glant. *See State v. Lively*, 130 Wn.2d 1, 19, 921 P.2d 1035 (1996). Second, the petition asks the Court to address whether the Washington Privacy Act's [Privacy Act] common law exception for a defendant who grants "implied consent" to record text messages based solely on the defendant's presumed knowledge that text messages are usually stored on the recipient's device remains viable in light of statutory amendments to the Privacy Act and technological advances. *See State v. Townsend*, 147 Wn.2d 666, 57 P.3d 255 (2002).

II. COURT OF APPEALS DECISION

The Court of Appeals issued a published decision in *State v. Glant* on June 16, 2020. See Appendix to Petition ("App.") 1.

III. ISSUES PRESENTED FOR REVIEW

1. Does private funding of a specific police operation that financially benefited the officer who solicited the private funding and the private entity who gained valuable publicity and enhanced its own ability to attract donations by its association with the WSP constitute outrageous government misconduct in a manner that denied Glant his constitutional right to due process of law?

2. Should this Court accept review to revisit *State v. Townsend,* 147 Wn.2d 666, 57 P.3d 255 (2002), which held that the Washington Privacy Act does not apply when a defendant impliedly consents to recording of text messages?

IV. STATEMENT OF THE CASE

In 1999 the Legislature created the Missing and Exploited Children's Task Force [the task force] within the WSP to "address the problem of missing children, whether those children have been abducted by a stranger, are missing due to custodial interference, or are classified as runaways." RCW 13.60.100. The same act provides "[t]he chief of the state patrol shall seek public and private grants and gifts to support the work of the task force." RCW 13.60.110(4).

Years after its creation, the task force transitioned to performing sting operations it called "Net Nanny" using undercover officers, purportedly to locate

those seeking to abuse children. The architect of Net Nanny, Detective Sergeant Carlos Rodriguez ("Rodriguez"), acknowledged that Net Nanny operations "don't involve actually [sic] children." CP 359.

About a year before the task force arrested Glant in a Net Nanny sting, the task force began a "partnership" with OUR. CP 361. OUR is a non-governmental agency founded and run by a private citizen, Tim Ballard. *See About Us*, OUR, https://ourrescue.org/about (last visited July 13, 2020). It donated nearly $20,000 for Net Nanny 1, CP 366, $30,000 for Net Nanny 2, CP 369, and $10,000 for Net Nanny 5, CP 373-75. Requests to fund specific Net Nanny operations came not from WSP's chief, as the statute requires, but from Rodriguez. CP 381; *see* RCW 13.60.110(4). Rodriguez and his colleagues acknowledged that Net Nanny operations could not take place without OUR's funding. CP 384-390, 392.

In addition to serving as the point man by soliciting OUR's donations, without any statutory authority, Rodriguez participated personally in the operations and obtained overtime pay himself.[3] In the Thurston County sting at issue here, Rodriguez and another member billed 105 hours of overtime. CP 428.

[3] For example, in *State v. Chapman*, 2019 WL 325668, *2-4 (Wash. Ct. App. Jan. 23, 2019) (unpublished), Rodriguez posed as a woman named Shannon who pressured the defendant for days to perform sex acts with her daughters and, as a final inducement, offered to herself engage in a particular sex act with the defendant. A panel reversed the resulting conviction because the trial court had not offered an entrapment defense based upon Rodriguez' conduct. *Id.* at *6.

From 2012 through January 2017, Rodriguez collected $21,718.96 in overtime, including $15,479.11 in 2016 alone, when petitioner was arrested. CP 352-54.[4]

While Rodriguez and his colleagues received overtime pay from OUR, OUR sought publicity in return. In response to one donation request from Rodriguez, OUR demanded a commitment from WSP "that we will be able to do joint press releases and media appearances after this operation." CP 375. OUR's stated reason was to use these arrests to secure more donations. *Id.* While asking for a $30,000 donation in advance of an operation, Rodriguez divulged the planned location and duration of the sting. CP 381. Before another, and while again soliciting a donation, Rodriguez provided budget and logistical information, including an unredacted document which was later provided to petitioner's counsel in redacted form. CP 395-400.[5] OUR requested that WSP provide it arrest video for marketing. CP 412. While Rodriguez may not have acceded to this request, he did contact a local television reporter on OUR's behalf and asked her to cover the organization because a Net Nanny operation "would

[4] Det. Sgt. Rodriguez also appears to have reaped another professional benefit. He recently retired from the WSP and accepted a position as Domestic Operations Coordinator at OUR. *See Carlos Rodriguez*, LinkedIn, https://www.linkedin.com/in/carlos-rodriguez-862519195/detail/background-image (last visited July 13, 2020).

[5] That Rodriguez saw fit to divulge this confidential information to OUR before the operation, when the defendant received a redacted version after the operation in response to a public records request, shows the extent of the special privileges OUR received from law enforcement.

not have happened" without OUR's financial support. CP 381, 416; *see also* CP 402-03.

OUR's partnership with the task force significantly expanded the scope of Net Nanny operations, increased the number of arrests, and personally enriched task force members. WSP officers bragged about the ease of the arrests, noting that they had arrested suspects who would have plea bargains starting at 10 years in prison, and "[m]athematically," each arrest only costs $2,500. CP 369-70. Rodriguez thanked OUR for "help[ing] turn [his] Task Force of two into a task force of 30," and stated that "[t]here is absolutely no way we would have made the number of arrests without your support." CP 421-22.

Against this backdrop, in September 2016, the task force set up a trap house in Tumwater and posted a Craigslist ad identified as "W4M," meaning "woman seeking man." CP 35. It referenced "family play time" and other vague references to family relationships, and asked the reader to contact the poster. *Id.* Glant, then 20 years old, responded to undercover detective McDonald, who posed as "Hannah." CP 51, 537. McDonald did not seek Glant's consent to record his text messages or email, nor did she seek a search warrant or one-way authorization to record such messages under the Privacy Act.

On September 9, 10, and 11, McDonald turned the discussion to sex acts with her supposed, actually fictitious, daughters. CP 450-60. Over these three days the detective flattered the young man with compliments ("you are cute") and

feigned interest in his personal activities. CP 455-59. Concerned at one point that Glant would not fall into the trap, McDonald on September 10 asked Glant, "[A]re you really going to come over or flake on us?" CP 458. When Glant arrived at the trap house, he was arrested. In his post-arrest interview, he asserted that he was interested in the fictional mother and not her children. CP 770, 772.

The Thurston County Superior Court denied Glant's motion to suppress his text messages under the Privacy Act and the state constitution, holding that Glant had impliedly consented to their recording. CP 718. The court denied Glant's later motion to dismiss his case for outrageous government misconduct due to OUR's relationship with the task force, concluding in part that "[t]here is no authority that approves the use of a dismissal under the due process clause for governmental misconduct that is not related directly to the law enforcement interactions with the defendant at issue." CP 715, Conclusion of Law 4.

The Court tried Glant pursuant to stipulated facts, convicted him, and sentenced him to 108 months to life in prison. CP 779. Division II affirmed and, upon motion by the State, ordered publication of its opinion on June 16, 2020.

IV. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Whether the constitution permits a private organization to fund specific police operations, and whether the Privacy Act should be read to include an "implied consent" exception alongside the express consent requirement in the

statute, both raise substantial issues of public importance as set forth below. This Court's review is warranted under RAP 13.4(b)(1), (3), and (4).

The State's most recent filing underscores the need for this Court's review of the flawed Court of Appeals' opinion. The opinion was initially unpublished. The State moved to publish and wrote that "the Washington State Patrol has conducted several 'Net Nanny' operations around the State and is likely to continue to do so." State's Mot. to Publish at 2. According to the State's motion, representatives of the prosecutor's offices in King, Lewis, Clallam, Benton, Kittitas, Spokane, and Thurston County and an assistant attorney general urged publication for two reasons. First, "[s]tatewide the issues considered by the court in its opinion arise frequently and publication of the court's opinion would provide welcome guidance." *Id*. at 3. Second, issues involving the "proactive investigation of online sexual predation of children are of general public interest and import." *Id*.

A. THE COURT SHOULD REVIEW THE ISSUE OF WHETHER PRIVATE FUNDING OF SPECIFIC LAW ENFORCEMENT OPERATIONS CONSTITUTES OUTRAGEOUS GOVERNMENT MISCONDUCT.

Over two decades ago, this Court recognized that the conduct of law enforcement could be "so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." *State v. Lively*, 130 Wn.2d 1, 19, 921 P.2d 1035 (1996); *see also*

State v. Solomon, 3 Wn. App. 2d 895, 909-10, 419 P.3d 436 (2018) (affirming dismissal of attempted rape charge for outrageous government misconduct). This Court should review Glant's conviction and hold that private funding of specific law enforcement operations is repugnant to due process. Only this Court's intervention can correct law enforcement's acceptance of this illegal practice.

OUR's relationship with the task force is a manifestation of "patriotic philanthropy," or the use of private donations for a governmental function. Margaret H. Lemos & Guy-Uriel Charles, *Patriotic Philanthropy? Financing the State with Gifts to Government*, 106 Cal. L. Rev. 1129, 1135 (2018). This Court has never addressed the extent to which private citizens or organizations can influence law enforcement policies without violating defendants' constitutional rights.

The question is of immediate importance for many reasons. Gifts like OUR's circumvent or skew the normal processes of democratic decision-making by circumventing the transparency in the state budgeting process. *Id.* at 1178. Transparent debate of the private entities' policy goals is also missing from this arrangement. While some courts have addressed the general dangers of private citizens' involvement in law enforcement, *see State v. Berg*, 236 Kan. 562, 694 P.2d 427 (1985) (holding that private attorney could not force prosecution over objection of county prosecutor despite statute allowing this), this Court has neither condoned nor banned private funding of specific police operations.

This case presents a clear example of the danger of private funding of law enforcement, at least that directed at specific initiatives and types of enforcement. Net Nanny stings have led to a clear quid pro quo between law enforcement and OUR.[6] The task force through Rodriguez solicited donations from OUR for the express purpose of funding officer overtime so that Net Nanny operations could occur. The task force used this funding to ramp up its Net Nanny operations and pay overtime to the very person who were seeking the donations. By making more arrests, the task force validated the financial investment made by OUR and created an incentive to arrest as many people as possible. In return, OUR sought and largely received special privileges not available to the public or even defendants in those cases. The moral hazard created by this arrangement is obvious.

While private funding of law enforcement like the gifts made by OUR has only recently garnered academic attention, its implications are far reaching and should be addressed now by this Court. In the post-pandemic world, there will

[6] As Lemos and Charles point out, the private funding issue can arise in other situations - even funding for equipment purchases - that bypass normal budget procedures raise serious issues. They describe a private donation of $360,000 that allowed Baltimore to purchase aerial surveillance that blanketed the city. Had taxpayer dollars been involved, the transaction would have required approval by the city's five-member Board of Estimates. *Id.* at 1132-33. The private funding arrangement remained a secret until it was exposed in a Bloomberg article in August 2016. Its use then caused significant public outrage. Christopher Mims, *When Battlefield Surveillance Comes To Your Town*, Wall Street Journal (Aug. 3, 2019), https://www.wsj.com/articles/when-battlefield-surveillance-comes-to-your-town-11564805394.

undoubtedly be a significant reduction in law enforcement budgets around the state and greater interest in private funding of law enforcement. Absent this Court's review, significant questions will continue to arise. A wealthy private donor could devote resources to an operation directed at arresting protestors who interrupt specific businesses and traffic. An organization dissatisfied with immigration enforcement could fund raids seeking to arrest those in the country without documentation, and condition further funding on the number of successful detentions the police achieve. There are few limits on the scenarios one can imagine if private funding of specific law enforcement operations is acceptable, and the danger that such funding will influence the conduct of law enforcement in a manner not in keeping with the general public's priorities is apparent.

To be sure, this Court has an existing framework for addressing allegations of outrageous government misconduct under *Lively*, 130 Wn.2d at 19. This test calls for the trial court to apply a multifactor test based on all circumstances of the law enforcement action. *Id.*[7] When making his arguments in

[7] These factors are (i) whether government conduct instigated the crime or merely infiltrated ongoing criminal activity, (ii) whether the defendant's reluctance to commit a crime was overcome by pleas of sympathy, promises of excessive profits, or persistent solicitation, (iii) whether the government controls the criminal activity or simply allows it to occur, (iv) whether law enforcement's motive was to prevent crime or protect the public, and (v) whether the government's conduct itself amounted to criminal activity or conduct repugnant to a sense of justice. *Id.*

the Court of Appeals, Glant addressed both the *Lively* factors and the sui generis issue of private funding of law enforcement stings. The Court of Appeals rejected both arguments. App. at 11-16.

The decision below demonstrates that the *Lively* factors provide limited guidance for evaluating the propriety of the relationship between OUR and WSP. *Lively* involved a drug addict who was aggressively coerced to abandon her rehabilitation and commit drug-related crimes by an informant. Thus, the *Lively* factors utilized to evaluate the misconduct under those facts is similar to an entrapment defense inquiry.

The misconduct here is both different from and broader than the entrapment-like conduct at issue in *Lively*. Here the focus is not just on what happened between Glant and the arresting officers, but also on the arrangement between OUR and those officers. The *Lively* factors do not fully address the public policy concerns in that relationship. Thus, this Court must address whether the funding of these particular operations by OUR, standing alone, is outrageous and violates due process. It should not leave it to the lower courts to apply a misconduct analysis that does not address the different nature of governmental misconduct at issue here. This issue is one of significant public importance warranting this Court's review.

B. THIS COURT SHOULD ACCEPT REVIEW AND OVERRULE *STATE V. TOWNSEND* BECAUSE IT IS INCORRECT, HARMFUL AND ITS FACTUAL AND LEGAL UNDERPINNINGS HAVE CHANGED.

The Privacy Act is one of the most restrictive privacy acts in the nation. *State v. O'Neill*, 103 Wn.2d 853, 878, 700 P.2d 711 (1985) (Dore, J., concurring in part and dissenting in part). The plain language of the Privacy Act prohibits interception or recording of any private communication transmitted by "device" without the obtaining the consent of all participants in the communication. *State v. Faford*, 128 Wn. 2d 476, 481, 910 P.2d 447 (1996).

In *State v. Townsend*, 147 Wn.2d 666, 676, 57 P.3d 255 (2002), however, this Court held that implied consent to record or intercept an electronic message renders the Privacy Act inapplicable. Consequently, the Court of Appeals held that because Glant "had to understand that computers and phones are message recording devices and that his e-mails and text messages with Hannah would be preserved," he had impliedly consented to their recording. App. at 8 (citing *State v. Racus*, 7 Wn. App. 2d 287, 299-300, 433 P.3d 830, review denied, 193 Wn.2d 1014 (2019)).

The Privacy Act, however, clearly sets forth an *express* consent requirement. RCW 9.73.030(3). Based upon *Townsend*, however, the lower courts, in most of the cases listed in footnote 1, *supra*, have uniformly used the decision in *Townsend* to permit law enforcement to record these conversations

and use them to support charges related to attempted illegal sexual abuse of children. This application of *Townsend* to text messages means that police officers in this state can avoid the application of the Privacy Act in any situation where they use text messaging with a citizen.

In *Townsend*, this Court construed the Privacy Act to include the concept of "implied consent" despite the unambiguous statutory language requiring express consent. 147 Wn.2d at 679. There, a Spokane police officer acted on a tip that Townsend was using his home computer to seek sexual encounters with young girls. *Id.* at 670. The police launched an investigation and a detective, masquerading as a child, exchanged communications with Townsend and saved and printed e-mail and real time client-to-client ICQ messages between them. *Id.* at 670-71. This Court held that Townsend's conversation with the fictitious child was "private" and was "recorded" by a "device." *Id*. at 674-75. Nonetheless, this Court held that "because Townsend, as a user of e-mail had to understand that computers are, among other things, a message recording device and that his e-mail messages would be recorded on the computer of the person to whom the message was sent, he is properly deemed to have consented to the recording of those messages. *Id*. 676.[8]

[8] One justice dissented and wrote:

> The majority engrafts by *inference* an unstated consent exception to Washington's Privacy Act ("one of the most restrictive in the nation," majority

This Court should reexamine and overrule *Townsend* because it is incorrect and harmful and its legal underpinnings have changed or "disappeared altogether." *State v. Pierce*, 195 Wn.2d 230, 240, 455 P.3d 647 (2020).

First, *Townsend* was incorrect because the decision violates well-accepted rules of statutory construction. As this Court has held: "If a statute is unambiguous, its meaning must be derived from the wording of the statute itself. A statute that is clear on its face is not subject to judicial interpretation." *State v. Chapman*, 140 Wn.2d 436, 450, 998 P.2d 282 (2000) (footnotes omitted). The plain, unambiguous language of the Privacy Act requires express consent which is deemed obtained when "one party has *announced to all other parties* engaged in the communication or conversation, in any reasonably effective manner, that such communication or conversation is about to be recorded or transmitted." RCW 9.73.030(3) (emphasis added). But the *Townsend* Court simply rewrote the statute to add an additional implied consent doctrine that finds no support in the

> at 259); and then *implies* consent to satisfy the inferred exception (majority at 260). Inference plus implication equals loss of privacy.
>
> ….
> Although the majority refuses to be bound by our holding previously expressed in *State v. Faford*, 128 Wash.2d 476, 485, 910 P.2d 447 (1996) that "the mere possibility that intrusion on otherwise private activities is technologically feasible" does not equate to consent for that to happen (majority at 261), it does not overrule *Faford.* Nor does it convincingly distinguish it by merely attempting to differentiate between recording by the intended recipient and recording by a third person. I see no such distinction in the statute. The statute prohibits recording by either.

Id. 685-86 (Sanders, J., dissenting) (emphasis in original).

text of the Privacy Act. To do so was incorrect, because the Court may not "rewrite statutes to express what [it thinks] the law should be," even where "the results appear unduly harsh." *State v. Groom*, 133 Wn.2d 679, 689, 947 P.2d 240 (1997). When deciding *Townsend*, this Court did not even address settled principles of statutory construction. *Townsend*, 147 Wn.2d at 676-77.

In adding an implied consent doctrine to the statute, the Court bypassed the proper place for debating this issue – the Legislature. This Court should overrule *Townsend* so that the Legislature can consider the complex question of how to balance the citizens' expectation of privacy with the needs of law enforcement when conducting a ruse. While the Legislature may decide that law enforcement is permitted to use some deception, "[e]xperience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent . . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." *Chandler v. Miller*, 520 U.S. 305, 322, 117 S. Ct. 1295, 137 L.Ed.2d 513 (1997) (quoting *Olmstead v. United States*, 277 U.S. 438, 479, 48 S. Ct. 564, 72 L. Ed. 944 (1928) (Brandeis, J., dissenting)). The Legislature is the proper place to consider the two complicated and competing interests at stake here: the reasonable expectation of privacy in text communications and when the needs of law enforcement trump that expectation of privacy.

Second, even if *Townsend* was correct when decided, the Legislature later amended the Privacy Act, broadened its exceptions in to include one-party consent in child sexual abuse investigations, and at the same time declined to codify the implied consent requirement. When the Court decided *Townsend* in 2002, the Legislature had not granted the police the power to issue one-party consent authorizations for child sex investigations. Then in 2011, the Legislature adopted a one-party consent exception for investigations of a party engaging in the commercial sexual abuse of a minor under RCW 9.68A.100, promoting commercial sexual abuse of a minor under RCW 9.68A.101, or promoting travel for commercial sexual abuse of a minor under RCW 9.68A.102. This amendment included the procedural safeguards already in place for one-party consent in drug cases. Those safeguards include the requirement that the recording be authorized by a superior officer, time limits on an authorization, mandates for reporting, and post-recording review by a judge. *Id.*

The Legislature is presumed to know the existing state of the case law in those areas in which it is legislating. *State v. Fenter*, 89 Wn.2d 57, 62, 569 P.2d 67 (1977). Thus, the Legislature can be presumed to have known the concept of implied consent had been read into the statute by this Court. Rather than relying on that concept and amending the statute to provide for "implied consent," the Legislature made it incredibly easy for the police to have their supervisors sign an authorization in exchanges for compliance with the procedural safeguards. The

Privacy Act's amendments make little sense if implied consent removes the protections of the act, because (at least insofar as written messages are concerned) there would rarely be a need to obtain one-party consent. And here, inexplicably, the police failed to obtain such an order to record Glant's private text messages. This Court should address whether *Townsend* remains viable in light of the 2011 Privacy Act amendments.

Third, the concept of implied consent had a far more limited reach in 2002. Since then, the use of texting has increased exponentially. The iPhone was introduced in 2007. By 2017 about three-quarters of U.S. adults (77%) said they owned a smartphone, up from 35% in 2011, making the smartphone one of the most quickly adopted consumer technologies in recent history.[9] Many people now use texting as an alternative to telephone calls. Whenever police use this now-common form of communication in a sting, all Privacy Act protection is lost because *all* persons "should know" that text messages and emails are recorded by a device.

Fourth, the Court's *Townsend* decision is harmful and deserving of this Court's review because of its substantial public importance. By holding that the Privacy Act does not apply to text messages, the Court of Appeals renders the

[9] Andrew Perrin, *10 Facts About Smartphones As The iPhone Turns 10*, Pew Research Center (June 28, 2017), https://www.pewresearch.org/fact-tank/2017/06/28/10-facts-about-smartphones/.

entire one-party consent authorization under RCW 9.73.230 irrelevant. When the police are not required to comply with the one-party consent authorization procedure, the police can evade the significant procedural safeguards in the statute including time limits on an authorization, mandates for reporting, and post-recording review by a judge. Application of the concept of implied consent ignores the Legislature's intention to protect citizen's right to privacy, carefully monitor the police, and reduce the risks of permitting the police to improperly intercept or record private conversations.

This Court should accept review and reexamine *Townsend*'s implied consent holding.

V. CONCLUSION

For the reasons stated in this petition, Glant respectfully asks that the Court grant review, hold that private funding of specific law enforcement operations offends due process, and hold that the Privacy Act contains no implied consent exception.

RESPECTFULLY SUBMITTED this 14th day of July 2020.

_/s/Suzanne Lee Elliott

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I hereby certify that on the date listed below, I served by email where indicated and First-Class United States Mail, postage prepaid, one copy of this brief on the following:

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465 P.3d 382
Court of Appeals of Washington, Division 2.

STATE of Washington, Respondent,
v.
Bryan Earle GLANT , Appellant.

No. 52142-3-II
|
Filed April 14, 2020
|
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Synopsis

Background: Defendant was convicted in the Superior Court, Thurston County, No. 16-1-01576-3, Chris Lanese, J., of two counts of attempted first degree rape of a child arising from an online sting operation. Defendant appealed.

Holdings: The Court of Appeals, Worswick, J., held that:

defendant impliedly consented to the recording of his private e-mail and text messages to undercover officer;

the recording of defendant's e-mail and text messages did not constitute a warrantless search into his private affairs, in violation of the Washington Constitution;

the alleged misconduct of police department in acquiring funds to conduct undercover internet sting operations to investigate sex crimes involving children did not constitute outrageous government conduct that violated defendant's due process rights; and

evidence supported finding that there was not a direct link between the funding provided to police by non-profit organization and the arrest of defendant, such as would require dismissal of the charges against defendant based on outrageous government conduct.

Affirmed.

Procedural Posture(s): Appellate Review; Pre-Trial Hearing Motion.

Appeal from Thurston Superior Court, Docket No: 16-1-01576-3, Honorable Christopher Lanese, Judge.

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PUBLISHED OPINION

Worswick , J.

¶1 Bryan Earle Glant appeals his convictions for two counts of attempted first degree rape of a child arising from an online sting operation. [1] Before trial, Glant moved to suppress his e-mail and text messages and moved to dismiss the case based on outrageous government conduct. The trial court denied both motions. The trial court found Glant guilty of both counts of attempted first degree rape of a child and sentenced Glant within the standard range.

¶2 On appeal, Glant argues that the trial court erred when it denied his motion to suppress and motion to dismiss. Glant also argues that the trial court abused its discretion when it imposed a standard range sentence.

¶3 We hold that the trial court did not err when it denied Glant's motion to suppress and motion to dismiss. Further, we hold that Glant cannot appeal his standard range sentence. Thus, we affirm.

FACTS

¶4 The Washington State Patrol Missing and Exploited Children Task Force (MECTF) investigates sex crimes against children. RCW 13.60.110. Many MECTF investigations involve the internet and are dubbed "Net Nanny" operations. Sergeant Carlos Rodriguez manages MECTF and oversees its undercover operations.

¶5 RCW 13.60.110(4) states, "The chief of the state patrol shall seek public and private grants and gifts to support the work of the task force." MECTF receives donations from private citizens and organizations. One such donor

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is Operation Underground Railroad (O.U.R.). O.U.R. has contributed tens of thousands of dollars to support various Net Nanny operations across the State. Following each Net Nanny operation, the Washington State Patrol issues a press release. Some of these press releases acknowledge O.U.R.'s support of the Net Nanny operation. E-mails show that Sergeant Rodriguez coordinated the financial donations from O.U.R. on behalf of MECTF. Sergeant Rodriguez collected overtime pay while conducting Net Nanny operations.

¶6 In September 2016, MECTF conducted a Net Nanny operation in Thurston County. As part of the undercover operation, MECTF posted an advertisement on the Casual Encounters section of Craigslist. "Family Play Time!?!?—w4m," the advertisement stated, "Mommy/daughter, Daddy/daughter, Daddy/son, Mommy/son. ... you get the drift. If you know what I'm talking about hit me up we'll chat more about what I have to offer you." Clerk's Papers (CP) at 772-73.

¶7 Glant responded to the advertisement by e-mail. Glant then began texting with a person whom he believed was Hannah, a mother of three children. "Hannah" [2] told Glant that her son was 13 years old and her daughters were 6 and 11 years old. Glant stated he was "primarily interested in the daughters." CP at 773. Glant stated that he wanted to "use some toys with them and introduce some touching and then work towards oral." CP at 773. Hannah stated that her rules were "no pain, no anal." CP at 773. She asked Glant if he wanted to perform oral on the daughters or if he wanted the daughters to perform oral on him. Glant agreed to the rules and stated that he wanted both methods of oral. Glant asked, "What about like a finger in the bum though?" CP at 773. Hannah responded that this was acceptable if Glant brought lubricant. [3]

¶8 Glant drove from Mercer Island to Thurston County to meet Hannah and her daughters. When Glant arrived at the apartment, he had a bottle of lubricant in his pocket. Law enforcement officers arrested Glant, and the State charged him with two counts of attempted first degree rape of a child. Glant was 20 years old.

¶9 Glant made two pretrial motions. First, Glant moved to suppress his e-mails and text messages based on the Washington Privacy Act (WPA), chapter 9.73 RCW, and article I, section 7 of the Washington Constitution. The trial court found that the e-mail and text message communications between Glant and Hannah were private, that the messages were recorded on the devices used to communicate the messages, and that Glant impliedly consented to the recording because Glant knew that these messages would be preserved. The trial court also found that Glant voluntarily disclosed information to the intended recipient. Consequently, the trial court ruled that law enforcement officers did not violate the WPA or article I, section 7 of the Washington Constitution, and denied Glant's motion to suppress.

¶10 Second, Glant moved to dismiss his case based on outrageous government conduct. Glant alleged financial wrongdoing in managing and funding MECTF's Net Nanny operations. Specifically, Glant argued that law enforcement officers' conduct toward Glant in the sting, along with this financial arrangement with O.U.R., amounted to outrageous government conduct which violated Glant's right to due process. Glant argued that the Net Nanny operations were improperly funded through an alliance with O.U.R. Glant argued that this arrangement violated the law because Sergeant Rodriguez solicited donations instead of the WSP chief. Glant alleged that Sergeant Rodriguez solicited donations from O.U.R. for the purpose of funding officer overtime pay that resulted from the Net Nanny operations. Glant argued that the relationship between MECTF, WSP, and O.U.R. caused MECTF to generate more arrests and push the individuals targeted by the stings into more severe crimes that MECTF then used to solicit higher O.U.R. donations.

¶11 The trial court entered detailed findings of fact and conclusions of law regarding the motion to dismiss. The trial court concluded that the motion involved two issues: (1) the alleged misconduct regarding MECTF's acquisition of funds and how that acquisition was connected to Glant's charges, and (2) the nature of the interactions between Hannah and Glant. The trial court examined these issues in the totality of the circumstances and weighed all *Lively* [4] factors. The trial court denied Glant's motion to dismiss for outrageous government conduct.

¶12 The case was tried to the bench based on stipulated facts. The trial court found Glant guilty of both counts of attempted first degree rape of a child.

¶13 At sentencing, Glant sought an exceptional downward sentence based on his youth. Dr. Richard Packard, a certified sex offender treatment provider, testified regarding the impact of Glant's youth on his decision-making abilities and impulsivity. The trial court considered Dr. Packard's testimony "helpful." Verbatim Report of Proceedings (VRP) (July 17, 2018) at 89. However, the trial court stated, "I am explicitly noting that I am considering the request for an

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exceptional sentence. I recognize that I have the discretion and judgment and authority to do that in an appropriate case. I am not finding that it is appropriate in this case." VRP (July 17, 2018) at 89-90. The trial court imposed a sentence of 108 months to life, a sentence within the standard range.

¶14 Glant appeals his convictions and his sentence.

ANALYSIS

I. MOTION TO SUPPRESS

¶15 Glant argues that the trial court erred when it denied his motion to suppress his e-mail and text messages because an interception or recording authorization was required prior to intercepting Glant's messages, and that the interception of these messages violated the WPA and article I, section 7 of the Washington Constitution. We disagree.

¶16 When reviewing a suppression order, we consider whether substantial evidence supports the trial court's findings of fact and whether those findings of fact support the conclusions of law. *State v. Garvin*, 166 Wash.2d 242, 249, 207 P.3d 1266 (2009). Substantial evidence exists when a fair-minded person is persuaded of the truth of the stated premise. *Garvin*, 166 Wash.2d at. 249, 207 P.3d 1266 . On a motion to suppress, we review a trial court's conclusions of law de novo. *State v. Baird*, 187 Wash.2d 210, 218, 386 P.3d 239 (2016). We review questions of law de novo. *State v. Kipp*, 179 Wash.2d 718, 726, 317 P.3d 1029 (2014).

A. *Washington Privacy Act*

¶17 Glant argues that the trial court erred when it denied his motion to suppress because law enforcement officers violated his right to privacy under the WPA. Specifically, he argues that an interception or recording authorization was required before intercepting or recording his messages to Hannah. Glant also argues that he did not impliedly consent to the recording of his messages. We hold that law enforcement officers did not violate Glant's right to privacy under the WPA.

¶18 The WPA prohibits a person or agency from obtaining communications between individuals if (1) a private communication transmitted by a device was (2) recorded or intercepted by (3) a recording or transmittal device (4) without the consent of all parties. RCW 9.73.030; *State v. Townsend*, 147 Wash.2d 666, 672-73, 57 P.3d 255 (2002). Private communications include conversations transmitted through telephones, computers, and other devices that are designed to record or transmit communication. RCW 9.73.030(1)(a); *Townsend*, 147 Wash.2d at 672, 57 P.3d 255 . A person consents when they explicitly announce their intention to engage in the communication. RCW 9.73.030(3). A person also consents by choosing to communicate through a device in which the person knows the information will be recorded. *State v. Racus*, 7 Wash. App. 2d 287, 299-300, 433 P.3d 830, *review denied* , 193 Wash.2d 1014, 441 P.3d 828 (2019). When a person sends e-mail or text messages they do so with the understanding that the messages would be available to the receiving party for reading or printing. *Racus*, 7 Wash. App. 2d at 299, 433 P.3d 830 .

¶19 In *State v. Racus* , we recently held that a defendant provided implied consent regarding e-mail and text conversations because he understood that these messages would be recorded. 7 Wash. App. 2d at 299-300, 433 P.3d 830 . Thus, law enforcement officers did not violate the WPA even though the conversations were private and obtained without authorization. 7 Wash. App. 2d at 299-300, 433 P.3d 830 .

¶20 In *Racus* , a detective posted an advertisement on Craigslist, posing as a fictitious mother seeking individuals to engage in sexual activities with her children. 7 Wash. App. 2d at 291, 433 P.3d 830 . The detective tracked any responses to the advertisement through Google Hangouts software. 7 Wash. App. 2d at 291, 433 P.3d 830 . Racus responded to the advertisement and engaged in a series of e-mails and text messages with the fictitious mother, inquiring about sexual activities with her children. 7 Wash. App. 2d at 291, 433 P.3d 830 . Although the detective did not have authorization during some of his communication with the defendant, we reasoned that authorization was not required because the defendant provided implied consent. 7 Wash. App. 2d at 299-300, 433 P.3d 830 . The defendant chose to communicate with the detective through e-mail and text messages, understanding that the messages would be available to the receiving party for recording, and therefore, we held that the defendant impliedly consented to his communications being recorded. 7 Wash. App. 2d at 300, 433 P.3d 830 .

¶21 Here, the trial court found that although the e-mail and text message communications between Glant and Hannah were private, Glant impliedly consented to the recording because the messages were recorded on the devices used to communicate the messages, and that Glant knew that these

messages would be preserved. [5] *See* *Racus*, 7 Wash. App. 2d at 299, 433 P.3d 830 . As a result, the trial court ruled that no authorization was required, and that the law enforcement officers did not violate the WPA.

¶22 Because Glant impliedly consented to the communications he had with Hannah, all parties consented to the recording. *Racus*, 7 Wash. App. 2d at 300, 433 P.3d 830 . Specifically, Glant had to understand that computers and phones are message recording devices and that his e-mails and text messages with Hannah would be preserved. *Racus*, 7 Wash. App. 2d at 300, 433 P.3d 830 . As a result, law enforcement officers did not violate Glant's right to privacy under the WPA when it recorded Glant's e-mail and text messages. Thus, we hold that the trial court did not err when it denied Glant's motion to suppress on WPA grounds.

¶23 Glant argues that implied consent does not apply here, or if it does, he did not impliedly consent. Glant argues that RCW 9.73.230 requires either Glant's consent, or an authorization to retain the e-mail and text message conversations. [6] Glant argues that RCW 9.73.230 applies to all "child sex cases." Br. of Appellant at 16. Specifically, Glant contends that the WPA presumes that consent by all parties is required and that "[t]he concept of 'implied consent' does not overcome this presumption." Br. of Appellant at 16. He asserts that when the legislature enacted the one-party consent exception for RCW 9.73.230, the legislature intended to entirely replace the theory of implied consent.

¶24 As a general rule, the WPA prohibits recording without the consent of all parties. RCW 9.73.030. Under the one-party consent exception in RCW 9.73.230, law enforcement agencies may intercept or record conversations with authorization when a person is suspected of committing or promoting commercial sexual abuse of a minor after obtaining consent from only one party. RCW 9.73.230(1)(b)(ii). Commercial sexual abuse of a minor is defined as a person who provides or agrees to provide something of value to the minor in exchange for sexual conduct with the minor. RCW 9.68A.100(1)(a), (b).

¶25 Here, Glant argues that his actions implicated RCW 9.73.230, but RCW 9.73.230 is not applicable. RCW 9.73.230 is an exception to the general rule, allowing recording without the consent of all parties if certain requirements are met. But all parties consented here. Therefore, neither RCW 9.73.230 nor the general rule apply. Glant appears to argue that RCW 9.73.230 adds requirements to the general rule, but he is mistaken. When Glant sent messages to Hannah, there were no interceptions or transmissions, rather, the messages were recorded and the parties consented to this recording. Moreover, even if RCW 9.73.230 did apply, the record does not support that commercial sexual abuse of a minor was at issue in this case.

B. *Article I, Section 7 of the Washington Constitution*

¶26 Glant also moved to suppress his e-mail and text messages based on his right to privacy under article I, section 7 of the Washington Constitution. On appeal, Glant argues that the recording of his e-mail and text messages was an unconstitutional warrantless search into his private affairs. We disagree.

¶27 Grounded in a broad right to privacy, article I, section 7 protects citizens from governmental intrusion into their private affairs without legal authority. *State v. Hinton*, 179 Wash.2d 862, 868, 319 P.3d 9 (2014). We conduct a two-step inquiry: (1) was there a governmental intrusion into one's private affairs, and (2) if so, was that intrusion authorized by law. *State v. Athan*, 160 Wash.2d 354, 366, 158 P.3d 27 (2007).

¶28 E-mails and text messages are private communications. *State v. Roden*, 179 Wash.2d 893, 900, 321 P.3d 1183 (2014). However, when a person voluntarily communicates with a stranger, that person assumes the risk that that the conversation will not be confidential. *State v. Goucher*, 124 Wash.2d 778, 786-87, 881 P.2d 210 (1994).

¶29 In *Goucher* , Goucher called the house of his drug dealer while law enforcement officers were searching the house pursuant to a warrant. 124 Wash.2d at 780-81, 881 P.2d 210 . A detective answered, and Goucher asked if he could come over to buy drugs. 124 Wash.2d at 781, 881 P.2d 210 . Because Goucher did not attempt to conceal his desire to buy drugs from a stranger, Goucher accepted the risk that his drug purchase would not be confidential. 124 Wash.2d at 786-87, 881 P.2d 210 . Our Supreme Court held, "We do not see how the conversation between the Defendant and the detective constituted an unreasonable intrusion into the Defendant's private affairs and thus we find no violation of the state constitution in this case." 124 Wash.2d at 787, 881 P.2d 210 .

¶30 Here, Glant argues that his messages were private communications that were unlawfully viewed by law enforcement officers. But, the trial court found that Glant

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voluntarily sent the messages to Hannah as the intended receiver.

¶31 Glant went on Craigslist and replied to a stranger's advertisement. Glant exchanged messages with a law enforcement officer, under the belief that he was communicating with Hannah, a stranger to him. Glant did not have a reasonable expectation of privacy in the messages he sent to Hannah. Moreover, Glant assumed the risk that his conversations would not be confidential. *Goucher*, 124 Wash.2d at 786-87, 881 P.2d 210 . We hold that the trial court did not err when it denied Glant's motion to suppress.

II. MOTION TO DISMISS

¶32 Glant argues that the trial court erred when it denied his motion to dismiss for outrageous government conduct. We hold that the trial court did not abuse its discretion when it denied Glant's motion.

A. *Outrageous Government Conduct Legal Principles*

¶33 The concept of outrageous conduct is founded on the principle that "the conduct of law enforcement officers ... may be 'so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.' " *State v. Lively*, 130 Wash.2d 1, 19, 921 P.2d 1035 (1996) (quoting *United States v. Russell*, 411 U.S. 423, 431-32, 93 S. Ct. 1637, 36 L. Ed. 2d 366 (1973)). We review whether the trial court erred in denying a motion to dismiss based on outrageous government misconduct for an abuse of discretion. *Athan*, 160 Wash.2d at 375-76, 158 P.3d 27 . A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. *Athan*, 160 Wash.2d at 375-76, 158 P.3d 27 . When a trial court adopts a view that no reasonable person would take, then it has abused its discretion. *State v. Solomon*, 3 Wash. App. 2d 895, 910, 419 P.3d 436 (2018).

¶34 To determine whether government conduct violated due process, a trial court must assess the conduct based on the totality of the circumstances. *Lively*, 130 Wash.2d at 21, 921 P.2d 1035 . Government conduct is outrageous and violates due process only when the conduct is so shocking that it violates fundamental fairness and the universal sense of fairness. *Lively*, 130 Wash.2d at 19, 921 P.2d 1035 . "Public policy allows for some deceitful conduct and violation of criminal laws by the police in order to detect and eliminate criminal activity." *Lively*, 130 Wash.2d at 20, 921 P.2d 1035 . Proper law enforcement objectives, preventing crime and apprehending violators, must drive law enforcement officers' conduct, not encouraging or participating in sheer lawlessness. *Lively*, 130 Wash.2d at 21, 921 P.2d 1035 . Dismissal based on outrageous government conduct is reserved for only the most egregious circumstances. *Lively*, 130 Wash.2d at 20, 921 P.2d 1035 .

¶35 In evaluating whether government conduct violated due process, courts consider several factors, including: (1) "whether the police conduct instigated a crime or merely infiltrated ongoing criminal activity"; (2) "whether the defendant's reluctance to commit a crime was overcome by pleas of sympathy, promises of excessive profits, or persistent solicitation"; (3) "whether the government controls the criminal activity or simply allows for the criminal activity to occur"; (4) "whether the police motive was to prevent crime or protect the public"; and (5) "whether the government conduct itself amounted to criminal activity or conduct 'repugnant to a sense of justice.' " *Lively*, 130 Wash.2d at 22, 921 P.2d 1035 (citations omitted) (quoting *People v. Isaacson*, 44 N.Y.2d 511, 521, 406 N.Y.S.2d 714, 378 N.E.2d 78 (1978)).

B. *Glant's Motion To Dismiss for Outrageous Government Conduct*

¶36 Glant moved to dismiss for outrageous government misconduct. In denying the motion, the trial court made detailed findings and conclusions. The trial court concluded that the motion was based on two issues: (1) the alleged misconduct regarding MECTF's acquisition of funds and how that acquisition was connected to Glant's charges and (2) the nature of the interactions between law enforcement and Glant. The trial court examined these issues in the totality of the circumstances and weighed all *Lively* factors. On appeal, Glant contests the trial court's conclusions and examination of each *Lively* factor.

1. *Private Involvement in Law Enforcement*

¶37 Glant cites a Kansas case, *State v. Berg*, 236 Kan. 562, 694 P.2d 427 (1985), to generally argue the trial court failed to consider the "*sui generis*, improper nature of private involvement in law enforcement." Br. of Appellant at 23. We disagree.

¶38 *State v. Berg* addressed a Kansas statute that allowed for a complaining witness to hire private counsel as associate

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counsel to the prosecutor to assist in the criminal proceeding. 236 Kan. at 563, 694 P.2d 427 . Jerry Berg, a complaining witness in a case against his ex-wife, hired private counsel to assist in the prosecution. 236 Kan. at 563, 694 P.2d 427 . But, after further investigation, the prosecutor moved to dismiss the charges. 236 Kan. at 563, 694 P.2d 427 . Over the objections of private counsel, the trial court dismissed the case. 236 Kan. at 563-64. The court held that private counsel could not overrule the prosecutor's decision to dismiss the charges, stating that a prosecutor must be independent. 236 Kan. at 566-68, 694 P.2d 427 . Here, Glant argues, without elaborating, that "[t]he same must be true of police officers as well." Br. of Appellant at 23. But, *Berg* does not support Glant's argument that private funding for certain law enforcement directives are improper by their very nature. *Berg* holds that private associate counsel assisting in prosecution cannot overrule the decisions of the prosecutor. 236 Kan. at 566-68, 694 P.2d 427 . Here, nothing in the record shows that O.U.R. was attempting to overrule or commandeer the Net Nanny operations over the objections of MECTF. We hold that the trial court did not err in this regard.

2. *Direct Link to Glant's Arrest*

¶39 Glant also argues that the trial court erred when it concluded that there was not a "direct link" between the O.U.R. funding and Glant's arrest. Br. of Appellant at 24. We hold that the trial court did not err.

¶40 The trial court concluded, "There is no authority that approves the use of a dismissal under the due process clause for governmental misconduct that is not related directly to the law enforcement interactions with the defendants at issue." CP at 715. It elaborated that funding that supports law enforcement services "do[es] not create a direct enough link" to the law enforcement actions specifically related to Glant's arrest to support dismissal for outrageous government conduct. CP at 715. Here, Glant argues that, but for O.U.R.'s funding, the operation leading to Glant's arrest would not have occurred. But the funding of MECTF here is attenuated from Glant's arrest. O.U.R.'s funding, along with donations from individuals, generally supported the Net Nanny operations. O.U.R. did not direct MECTF to target Glant or control the details of MECTF's operation. O.U.R. merely acted as a funding source. We hold that the trial court did not err when determining that there was not a direct link between O.U.R.'s funding and Glant's arrest.

3. Lively *Factors*

¶41 Glant also argues that application of the *Lively* factors shows that there was outrageous government misconduct. We disagree.

¶42 Regarding the first *Lively* factor, whether police conduct instigated the crime or infiltrated ongoing activity, the trial court concluded the factor was neutral because little evidence in the record provided specific information about the "landscape of Craigslist" at the time of the sting. CP at 715. Explaining the phrase "landscape of Craigslist," the trial court stated that Craigslist might be a meeting place for consenting adults, or Craigslist might be "fraught with criminal misconduct." VRP (March 26, 2018) at 63-64. Because the record lacked sufficient evidence regarding this, the trial court found that the first factor was neutral. Here, Glant argues that there was no ongoing criminal activity and that law enforcement officers instigated the crime by posting the advertisement. But, the advertisement was not aimed at Glant. Glant's response was voluntary and spontaneous. Additionally, the record does not provide information regarding the level of criminal activity on Craigslist at the time of this Net Nanny operation. We hold that the trial court did not err when it concluded that the first factor was neutral.

¶43 The trial court concluded the second factor, whether Glant's reluctance to commit a crime was overcome by pleas or solicitation, favored the State. Although the trial court recognized that Glant exhibited some reluctance in his messages, it found that the messages as a whole showed that Glant was not reluctant to commit a crime and that his will was not overcome by persistent pleas or solicitations. Here, Glant argues that he expressed reluctance during the conversations and that law enforcement reinitiated conversations, flattered Glant with compliments, and feigned interest in his personal activities. However, Glant initiated the conversation by responding to the advertisement. Glant then steered the conversation toward sexual topics regarding the daughters. Glant did not hesitate when expressing his sexual desires or agreeing to Hannah's rules. Glant drove from Mercer Island to Thurston County with lubricant to meet Hannah and the daughters. We hold that the trial court did not err when it concluded that the second factor favored the State.

¶44 The trial court concluded the third factor, whether the government controls the criminal activity or simply allows it to occur, was neutral because, like the first factor, the record lacked information. Here, Glant argues that "MECTF controlled every detail of the 'crime.' " Br. of Appellant at 26.

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Specifically, Glant argues that Hannah "made sure to mention a child young enough to trigger the first-degree rape of a child statute" and discussed multiple children so that Glant's crimes would be punished more severely. Br. of Appellant at 26. But Glant was told of three children and only discussed sexual activity regarding the two daughters. Glant controlled which children he made sexually explicit comments about. We hold that the trial court did not err when it concluded that the third factor was neutral.

¶45 For the fourth factor, whether or not the police motive was to prevent crime or protect the public, the trial court concluded this factor strongly favored the State. The trial court examined RCW 13.60.110, which specifically allows for the solicitation of private funds for the MECTF, and RCW 9A.68.020, which prohibits public employees from requesting unlawful compensation. The trial court concluded that neither statute was violated for this operation. Nonetheless, the trial court stated that "even if there were technical violations of RCW 13.60.110 or RCW 9A.68.020, or another statute, the Court still finds that overall the police motive was to prevent crime and protect the public." CP at 716.

¶46 Glant argues that as a result of Net Nanny arrests, Sergeant Rodriguez personally collected over $16,000 of overtime in 2016, that most of those arrested were not criminals before answering the advertisement, and few, if any, children have been rescued from exploitation. He also argues that Sergeant Rodriguez violated RCW 13.60.110 because the delegation of funding duties was improper. Additionally, Glant argues that MECTF's relationship with O.U.R. actually prevented law enforcement officers from protecting the public. But, RCW 13.60.110 specifically allows for private funding for MECTF's goal of rooting out potential sexual abusers of children. Simply because private supporters help to fund a program does not mean that that program no longer aims to protect the public or prevent crime. We hold that the trial court did not err when it concluded that the fourth factor favored the State.

¶47 The trial court concluded the fifth factor, whether the government conduct itself amounted to criminal activity or conduct that is repugnant to a sense of justice, favored the State. The trial court concluded that no law enforcement officer violated the law or acted in a way that was repugnant to justice. The trial court concluded, "Even if there were [sic] criminal activity in this case, it is not sufficient to justify a dismissal given the standards that apply." CP at 717. Here, Glant argues that police conduct amounted to criminal activity because it "offered up fictitious children for sexual assault," violated the WPA, and violated RCW 13.60.110. Br. of Appellant at 28. However, to the extent law enforcement officers violated the law with the specific facts of the undercover operation, it was to protect the public and prevent crime against actual children. Additionally, RCW 13.60.110 is not a criminal statute and law enforcement officers did not violate the WPA. We hold that the trial court did not err when it concluded that the fifth factor favored the State.

¶48 The trial court concluded that regardless of any violation of the law or criminal activity by police officers, Glant's motion to dismiss was denied because he did not show that law enforcement officers participated in outrageous conduct. The trial court did not adopt a view that no reasonable judge would take. The record does not show whether law enforcement's operation instigated a crime or infiltrated ongoing criminal activity. Glant was not reluctant to commit a crime and his will was not overcome by persistent pleas or solicitations. Government's motive was to protect the public and prevent crime, and law enforcement officers did not act in a manner repugnant to a sense of justice. Because a reasonable judge could have adopted the view of the trial court, we hold that the trial court did not abuse its discretion when denying Glant's motion to dismiss.

III. SENTENCING

¶49 Glant argues that "the trial court abused its discretion by rejecting the testimony of Dr. Packard" regarding Glant's impulsivity and immaturity. Br. of Appellant at 47. Glant argues that the trial court abused its discretion when it concluded that the span of time regarding Glant's actions "broke the chain" of Glant's impulsivity. Br. of Appellant at 47. We hold that Glant cannot appeal his standard range sentence.

¶50 Although no defendant is entitled to an exceptional downward sentence, every defendant is entitled to ask the sentencing court to consider such a sentence and to have it actually considered. *State v. Grayson*, 154 Wash.2d 333, 342, 111 P.3d 1183 (2005). The SRA provides a defendant an opportunity to raise his youth for the purpose of requesting an exceptional sentence downward. *In re Pers. Restraint of Light-Roth*, 191 Wash.2d 328, 336, 422 P.3d 444 (2018). Additionally, the SRA provides the trial court with the ability

to exercise its discretion in considering youth as a mitigating factor. *Pers. Restraint of Light-Roth*, 191 Wash.2d at 336, 422 P.3d 444 . However, "age is not a per se mitigating factor" that automatically entitles young defendants to an exceptional sentence downward. *State v. O'Dell*, 183 Wash.2d 680, 695, 358 P.3d 359 (2015) (plurality opinion).

¶51 In general, a party cannot appeal a sentence within the standard range. *State v. Brown*, 145 Wash. App. 62, 77, 184 P.3d 1284 (2008); RCW 9.94A.585(1). [7] The rationale is that a trial court that imposes a sentence within the range set by the legislature cannot abuse its discretion as to the length of the sentence as a matter of law. *Brown*, 145 Wash. App. at 78, 184 P.3d 1284 . However, a defendant may appeal a standard range sentence when a trial court has refused to exercise its discretion or relies on an impermissible basis for its refusal to impose an exceptional sentence downward. *State v. McFarland*, 189 Wash.2d 47, 56, 399 P.3d 1106 (2017) (plurality opinion). It is error for a trial court to categorically refuse to impose an exceptional sentence downward or to mistakenly believe that it does not have such discretion. *McFarland*, 189 Wash.2d at 56, 399 P.3d 1106 .

¶52 Here, RCW 9.94A.585(1) prevents Glant from appealing his standard range sentence. The trial court stated, "I am explicitly noting that I am considering the request for an exceptional sentence. I recognize that I have the discretion and judgment and authority to do that in an appropriate case. I am not finding that it is appropriate in this case." VRP (July 17, 2018) at 89-90. The trial court stated that Dr. Packard's testimony was "helpful" and considered Glant's youthfulness before imposing the standard range sentence. VRP (July 17, 2018) at 89-91. The trial court did not refuse to exercise its discretion or mistakenly believe it lacked discretion to deviate from the standard range. Thus, we hold that Glant cannot appeal his standard range sentence.

¶53 We affirm.

We concur:

Lee, C.J.

Melnick, J.

All Citations

465 P.3d 382

Footnotes

1 RCW 9A.44.073; RCW 9A.28.020.

2 We use the law enforcement officer's undercover persona for clarity.

3 Glant's and Hannah's messages occurred over three days. Hannah reinitiated contact with Glant the second day with a greeting of "hey hun ... good afternoon ... how are things?" CP at 454. After the pair arranged a time to meet on the second day, Hannah reinitiated contact on the third day. Over the course of their conversations, Hannah expressed interest in Glant's hobbies and complimented his looks.

4 *State v. Lively*, 130 Wash.2d 1, 921 P.2d 1035 (1996).

5 To the extent the State argues that the e-mail and text messages were not private, we note that the trial court made a finding that the communications were private. The State did not file a cross-appeal to challenge this finding. We treat unchallenged findings as verities on appeal. *State v. Kinzy*, 141 Wash.2d 373, 382, 5 P.3d 668 (2000).

6 In relevant part, RCW 9.73.230 states:

(1) As part of a bona fide criminal investigation, the chief law enforcement officer of a law enforcement agency ... may authorize the interception, transmission, or recording of a conversation or communication by officers under the following circumstances:

(a) At least one party to the conversation or communication has consented to the interception, transmission, or recording;

(b) Probable cause exists to believe that the conversation or communication involves:

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....

(ii) A party engaging in the commercial sexual abuse of a minor under RCW 9.68A.100, or promoting commercial sexual abuse of a minor under RCW 9.68A.101, or promoting travel for commercial sexual abuse of a minor under RCW 9.68A.102; and

(c) A written report has been completed ....

7 RCW 9.94A.585 (1) provides, "A sentence within the standard sentence range, under RCW 9.94A.510 or 9.94A.517, for an offense shall not be appealed."

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