

Justices: People have right to privacy in texts

By GENE JOHNSON

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SEATTLE — People have a right to privacy in the text messages they send from their phones, even if they can't know for sure who might be reading them, Washington's Supreme Court held in two related cases Thursday.

In separate 5-4 opinions, the justices overturned two Cowlitz County heroin convictions in cases that hinged on text messages a detective read on someone else's phone.

"People have an expectation of privacy in their text messages," said Hanni Fakhoury, a lawyer with the San Francisco-based Electronic Frontier Foundation, which filed friend-of-the-court briefs in the cases. "People have a right to have those messages delivered without fear of government intrusion or interception, and if the government wants to intrude or intercept them, they have to get a warrant or a wiretap to do so."

The cases arose from the arrest of Daniel Lee in Longview in 2009. After obtaining Lee's cellphone, a detective started going through the text messages on it without a warrant. He found drug-related messages from Jonathan Roden, then responded, set up a drug deal and arrested Roden for attempted heroin possession. The detective also noticed texts coming in from Shawn Daniel Hinton and similarly arrested him.

Writing for the majority in both cases, Justice Steven Gonzalez said the men had an expectation of privacy in the content of their text messages, just as they would have if they sent a sealed letter or made a phone call, and that Washington state residents have an expectation that their text messages won't be read by police without a warrant.

"Text messages can encompass the same intimate subjects as phone calls, sealed letters and other traditional forms of communication that have historically been strongly protected under Washington law," Gonzalez wrote in Hinton's case.

The court struck down Roden's conviction under the state privacy act, which bars police from intercepting in-state private communications without a warrant or the consent of all parties involved. It overturned Hinton's conviction under the privacy protections of the state Constitution.

The U.S. Supreme Court is due to hear arguments in April about whether police are allowed under the U.S. Constitution to search a suspect's cellphone without a warrant, as they did in Lee's case, while making an arrest or soon thereafter. Washington's Constitution is considered to be

more protective of privacy than the federal Fourth Amendment, which prevents unreasonable searches and seizures.

The American Civil Liberties Union of Washington and the Electronic Frontier Foundation were among those who weighed in on behalf of Hinton and Roden, while the Washington Association of Prosecuting Attorneys argued that because of the nature and prevalence of cellphones, people should know that the text messages they are sometimes seen by those besides the intended recipient.

"The sender of a text message has no ability to control what happens with the text once it is delivered," the association wrote.

Furthermore, the prosecutors argued, neither Hinton nor Roden could challenge searches of a phone that doesn't belong to them; the messages were not encrypted; and in Hinton's case, the message simply popped up on Lee's cellphone, where the detective could easily read it.

"Hinton did not have a reasonable expectation of privacy in Lee's cell phone," Justice Jim Johnson wrote in dissent. "He had neither possession nor control of the cell phone, and he did not have the right to exclude others from using it."

But Hinton's lawyer, John A. Hays, said the analogy to the privacy of letters is appropriate. Under state law, he said, it should be clear that police can't grab a sealed envelope out of a recipient's mail box and read it without a warrant.

The sender doesn't lose his or her privacy interest in the letter until the recipient decides to share it with others, he said.

Hays said his client would have been out of luck if Lee had seen the text message from Hinton and shared it with police. Similarly, it would have been OK for the detective to text Hinton to the effect of, "Lee's not here, but I can get you what you need." In that case, Hinton would have known he was texting with a stranger and taking the risk it was a police officer, thus waiving his privacy interest.

"Given the way we communicate nowadays, through cellphones, through text messages and the pervasiveness of that, having a case that states and delineates that we have a privacy interest in the text messages we send to each other is a very important decision," Hays said.

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