

State high court upholds privacy rights on text messages, tosses out 2 drug convictions

Police can't intercept text messages without consent or a warrant, according to parallel rulings handed down by the state Supreme Court on Thursday. The rulings are part of a broader, national trend upholding privacy rights for cellphones and the content stored on them.

By [Sara Jean Green](#)

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In two separate but parallel 5-4 decisions, the state Supreme Court ruled Thursday that text messages are private and protected from warrantless searches by police, even when a sender can't be sure who reads a text after it is sent.

The rulings are part of a broader, national trend upholding privacy rights for cellphones and the content stored on them.

The decisions revolve around the arrest of two Cowlitz County men in 2009 by Longview police after a third man, Daniel Lee, was arrested for possession of heroin. Police seized Lee's cellphone and without his consent, a detective read incoming messages on the phone from [Shawn Hinton](#) and [Jonathan Roden](#) — and then, posing as Lee, arranged to meet the men to sell them drugs.

When Hinton and Roden each showed up at the meet location, they were arrested and charged with attempted possession of heroin. Both were convicted.

Writing both opinions for the majority, Justice Steven González said the state constitution — which provides broader privacy protections than the federal Fourth Amendment — “protects citizens from governmental intrusion into their private affairs without the authority of law.”

Text messages, he wrote, “can encompass the same intimate subjects as phone calls, sealed letters, and other traditional forms of communication that have historically been protected under Washington law.”

And even though text-message technology made Hinton's communication to Lee “more vulnerable to invasion,” González wrote, “technological advancements do not extinguish privacy interests that Washington citizens are entitled to hold.”

As a result of Thursday's majority ruling, the justices overturned Hinton's and Roden's convictions.

In the court's dissenting opinion, Justice James Johnson said "the majority goes too far" by extending privacy rights to a text message received on a third party's cellphone. Johnson wrote in the Hinton opinion that Hinton didn't have possession or control of Lee's cellphone, didn't have a right to exclude others from using it, and once his text was delivered, didn't have control over who viewed it.

"Hinton assumed the risk that, once sent, the message would no longer be kept private," wrote Johnson, who was joined in his dissent by Justices Susan Owens, Charles Wiggins and Barbara Madsen.

Not so, wrote González, noting there wouldn't have been a problem if Lee had voluntarily shared the content of Hinton's text message with the Longview detective. Justices Charles Johnson, Debra Stephens, Mary Fairhurst and Sheryl Gordon McCloud concurred.

"Hinton certainly assumed the risk Lee would betray him to the police, but Lee did not consent to the officer's conduct," the majority opinion says. "... But that risk should not be automatically transposed into an assumed risk of intrusion by the government."

Hanni Fakhoury, a staff attorney for the San Francisco-based Electronic Frontier Foundation, said Thursday's ruling by Washington's Supreme Court is part of a broader, national trend "going towards protecting the phone and bringing privacy protections to the contents of the phone."

Fakhoury wrote amicus briefs in both Washington cases, as well as several other cases across the country.

On Wednesday, Fakhoury said the Texas Court of Criminal Appeals ruled that a defendant "still had an expectation of privacy" on his cellphone, even though he was in jail and didn't have physical control of the phone.

Last week, the Massachusetts Supreme Judicial Court ruled that cellphone providers can't just turn over to police without a warrant the locations where a cellphone connected to a cell tower. The New Jersey Supreme Court made a similar ruling last summer, Fakhoury said.

Fakhoury expects that the Rhode Island Supreme Court — which has a pending case dealing with text messages intercepted by police in a homicide investigation — will look closely at the Washington opinion.

According to The Associated Press, 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.

Consider a low-tech analogy: "Just because a letter is sitting in your mailbox doesn't mean the cops get to open it," Fakhoury said. "The Washington court said there shouldn't be a difference" between privacy protections on mail, phone calls and text messages.

A person's privacy interest isn't "surrendered once you hit send on your phone," he said.

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