

73299-4

FILED
January 7, 2017
Court of Appeals
Division I
State of Washington

73299-4

COA NO. 73299-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

KEITH BLAIR,

Appellant.

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

The Honorable Susan J. Craighead, Judge

REPLY BRIEF OF APPELLANT

CASEY GRANNIS
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ARGUMENT IN REPLY</u>	1
1. THE JAIL CALL WAS ADMITTED IN VIOLATION OF THE PRIVACY ACT	1
a. The jail call between husband and wife was a private communication protected by the Privacy Act.....	1
b. Blair did not consent to the recording.....	2
B. <u>CONCLUSION</u>	7

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>Berger v. Sonneland</u> , 144 Wn.2d 91, 26 P.3d 257 (2001).....	3
<u>Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. 1</u> , 124 Wn.2d 816, 881 P.2d 986 (1994).....	5
<u>Grisby v. Herzog</u> , __ Wn. App. __, 362 P.3d 763 (2015).....	4
<u>In re Detention of Cross</u> , 99 Wn.2d 373, 662 P.2d 828 (1983).....	2
<u>In re Marriage of Farr</u> , 87 Wn. App. 177, 940 P.2d 679 (1997).....	4
<u>Kilian v. Atkinson</u> , 147 Wn.2d 16, 50 P.3d 638 (2002).....	3
<u>State v. Archie</u> , 148 Wn. App. 198, 199 P.3d 1005 (2009).....	5
<u>State v. Corliss</u> , 123 Wn.2d 656, 870 P.2d 317 (1994).....	5
<u>State v. J.P.</u> , 149 Wn.2d 444, 69 P.3d 318 (2003).....	3
<u>State v. Modica</u> , 164 Wn.2d 83, 186 P.3d 1062 (2008).....	1, 6
<u>State v. Modica</u> , 136 Wn. App. 434, 149 P.3d 446 (2006), <u>aff'd</u> , 164 Wn.2d 83, 186 P.3d 1062 (2008).....	3, 4
<u>State v. O'Neill</u> , 148 Wn.2d 564, 62 P.3d 489 (2003).....	6

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Roggenkamp,
153 Wn.2d 614, 106 P.3d 196 (2005)..... 3

State v. Townsend,
147 Wn.2d 666, 57 P.3d 255 (2002)..... 4

FEDERAL CASES

Bumper v. North Carolina,
391 U.S. 543, 88 S. Ct. 1788, 20 L. Ed. 2d 797 (1968)..... 6

OTHER AUTHORITIES

Black's Law Dictionary (8th ed. 2004). 6

Privacy Act 1, 2, 5, 6

RCW 9.73.030(1)(a), (b)..... 2

RCW 9.73.030(3)..... 2-4

Wash. Const. art. I § 7 5

A. ARGUMENT IN REPLY

1. THE JAIL CALL WAS ADMITTED IN VIOLATION OF THE PRIVACY ACT.

a. The jail call between husband and wife was a private communication protected by the Privacy Act.

The State argues Blair knew his jail call was subject to recording and so he had no reasonable expectation of privacy under the Privacy Act. Brief of Respondent (BOR) at 5-11. The Supreme Court in Modica, however, expressly repudiated the notion that a conversation ceases to be private simply because the participants know it will be recorded. State v. Modica, 164 Wn.2d 83, 88, 186 P.3d 1062 (2008). The Court recognized "[s]igns or automated recordings that calls may be recorded or monitored do not, in themselves, defeat a reasonable expectation of privacy." Modica, 164 Wn.2d at 89.

Why did Modica lack a reasonable expectation in the privacy of his jail calls? The Court gave us the answer: "because Modica was in jail, because of the need for jail security, *and because Modica's calls were not to his lawyer or otherwise privileged*, we conclude he had no reasonable expectation of privacy." Id. (emphasis added). That is not dicta, as claimed by the State. That is the Court's holding.

The call between Blair and his wife was privileged for the reasons set forth in the opening brief. Blair therefore had a reasonable expectation of privacy in that call and it should have been suppressed.

The State does not argue there is a crime-fraud exception to the marital privilege in Washington, thereby conceding the point. See In re Detention of Cross, 99 Wn.2d 373, 379, 662 P.2d 828 (1983) ("by failing to argue this point, respondents appear to concede it.").

b. Blair did not consent to the recording.

The State alternatively argues Blair consented to the recording of his jail call. BOR at 12-13. Blair disagrees.

Under the Privacy Act, "the consent of all the persons engaged in the conversation" needs to be obtained before a private communication can be recorded. RCW 9.73.030(1)(a), (b). RCW 9.73.030(3) provides "consent shall be considered obtained whenever 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[.]"

There were two parties engaged in the conversation: Blair and his wife, Dunham. Neither one of them announced to the other that the conversation would be recorded. The notification that the conversation

would be recorded was made by the jail, which was not a party "engaged" in the conversation.

Under the plain language of the statute, the consent requirement was not satisfied here. "If a statute is clear on its face, its meaning is to be derived from the language of the statute alone." Kilian v. Atkinson, 147 Wn.2d 16, 20, 50 P.3d 638 (2002). Courts must assume the legislature means exactly what it says. Berger v. Sonneland, 144 Wn.2d 91, 105, 26 P.3d 257 (2001). Interpreting RCW 9.73.030(3) to mean an entity not engaged in the communication with the parties can provide consent through notification renders the language "whenever one party has announced to all other parties engaged in the communication or conversation" superfluous. Each word in a statute must be accorded meaning, with no word or phrase rendered superfluous. State v. Roggenkamp, 153 Wn.2d 614, 624-25, 106 P.3d 196 (2005); State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

The Court of Appeals decision in State v. Modica, 136 Wn. App. 434, 449-50, 149 P.3d 446 (2006), aff'd, 164 Wn.2d 83, 186 P.3d 1062 (2008), insofar as it holds otherwise on the issue of consent, is wrongly decided because it disregards the plain language of what consent means under the statute. The Court of Appeals decision in Modica is not controlling on this Court. This Court can disagree with a prior decision

within the same division. Grisby v. Herzog, Wn. App. ___, 362 P.3d 763, 772-75 (2015).

The Court of Appeals in Modica relied on non-jail cases where one party engaged in the communication gave notice of the recording through a medium that has no purpose but to record the communication. See State v. Townsend, 147 Wn.2d 666, 675, 57 P.3d 255 (2002) (party deemed to have consented to the recording of e-mail messages because he knew such messages would be automatically recorded on the recipient's computer); In re Marriage of Farr, 87 Wn. App. 177, 184, 940 P.2d 679 (1997) (party deemed to have consented to the recording of message when he left the message on an answering machine, the only function of which is to record messages). In Townsend and Farr, one of the parties to the communication gave the requisite notice and so consent was established.

That is not the case with a jail call such as the one at issue here. As explained, for consent to exist under the statute, a party engaged in the communication must be the one to notify the other party that the communication will be recorded: "whenever one party has announced to all other parties engaged in the communication or conversation" that it will be recorded. RCW 9.73.030(3). The jail is not a party engaged in the communication and so its notification that the communication will be

recorded does not qualify as consent under the plain language of the statute.

Blair does not raise an article I, section 7 challenge, but the State cites the article I, section 7 case of State v. Archie, 148 Wn. App. 198, 204, 199 P.3d 1005 (2009) on the issue of consent. BOR at 13. Archie is inapposite because Blair's case is not an article I, section 7 case. But even if Archie is relevant, it suffers from a similar problem.

Archie observed "where one participant in a conversation has consented, the recording does not violate article I, section 7." Archie, 148 Wn. App. at 204. It cites State v. Corliss, 123 Wn.2d 656, 663-64, 870 P.2d 317 (1994) for the proposition, but Corliss involved an informant — a party engaged in the communication with the defendant — that consented to allow the police officers to overhear his conversations with the defendant. Corliss, 123 Wn.2d at 663-64.

That is different than an outside entity to the communication announcing the communication will be recorded. That outside entity — the jail in this case — is not a party to the conversation under the Privacy Act and so cannot impose consent on the parties that are actually engaged in the communication. Archie does not address the statutory argument raised by Blair. See Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. 1, 124 Wn.2d 816, 824, 881 P.2d 986 (1994) ("In cases where a legal theory is

not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised."). But to the extent the State seeks to apply its constitutional reasoning to the statutory context, it fails under the canons of statutory construction.

Further, there can be no true consent when there is no choice but to consent. The Supreme Court in Modica, while not deciding the issue of consent in the context of the Privacy Act, acknowledged the argument that jailed inmates find themselves in an inherently coercive situation. Modica, 164 Wn.2d at 90 n.2. Inmates do not have the option of using an untapped telephone or not having their calls recorded, regardless of whether the inmate has been charged with a crime, is held on a petty or serious offense, is there for public safety reasons, or simply is too poor to afford minimal bail. Id.

Consent means "[a]greement, approval, or permission as to some act or purpose, esp. given voluntarily by a competent person." Black's Law Dictionary 323 (8th ed. 2004). Where intrusion into an otherwise private matter is involved, purported consent to the intrusion does not truly exist if coerced: "Where there is coercion there cannot be consent." Bumper v. North Carolina, 391 U.S. 543, 550, 88 S. Ct. 1788, 20 L. Ed. 2d 797 (1968). To be valid, consent must be freely and voluntarily given. State v. O'Neill, 148 Wn.2d 564, 588, 62 P.3d 489 (2003).

Blair did not freely give his consent to have his jail conversations recorded and listened to by the authorities. Blair was constrained by the circumstances in which he found himself. To communicate with others, including spouses and other family members, use of the jail telephone is often the only practical means available to inmates, especially in light of limited jail visitation schedules. Inmates in that situation have no choice but to submit to the recorded call system. That is not voluntary consent. Blair did not consent to the destruction of his privacy interest.

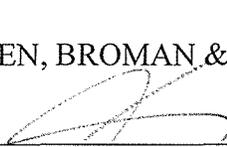
B. CONCLUSION

For the reasons stated above and in the opening brief, Blair requests reversal of the conviction.

DATED this 7th day of January 2016.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 73299-4-1
)	
KEITH BLAIR,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 7TH DAY OF JANUARY 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] KEITH BLAIR
DOC NO. 345896
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN, WA 98520

SIGNED IN SEATTLE WASHINGTON, THIS 7TH DAY OF JANUARY 2016.

X *Patrick Mayovsky*