

73299-4

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Court of Appeals
Division I
State of Washington

73299-4
NO. 73299-4-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

KEITH THOMAS BLAIR,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE SUSAN J. CRAIGHEAD

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. <u>ISSUE PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. PROCEDURAL FACTS.....	1
2. SUBSTANTIVE FACTS.....	2
C. <u>ARGUMENT</u>	5
1. THE TRIAL COURT PROPERLY DETERMINED THAT THE RECORDING OF BLAIR'S JAIL CALL TO HIS WIFE DID NOT VIOLATE THE PRIVACY ACT.....	5
a. Blair's Call To His Wife Was Not Private.....	6
i. Blair had no subjective expectation of privacy.....	6
ii. Any expectation of privacy was objectively unreasonable.....	7
b. Blair Consented To The Recording Of His Call.....	12
D. <u>CONCLUSION</u>	14

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Wolfe v. United States, 291 U.S. 7,
54 S. Ct. 279, 78 L. Ed. 617 (1934)..... 11

Washington State:

Dietz v. Doe, 131 Wn.2d 835,
935 P.2d 511 (1997)..... 11

In re Marriage of Farr, 87 Wn. App. 177,
940 P.2d 679 (1997)..... 8, 12

In re Marriage of Rideout, 150 Wn.2d 337,
77 P.3d 1174 (2003)..... 6

State v. Archie, 148 Wn. App. 198,
199 P.3d 1005 (2009)..... 9, 13

State v. Blair, 173 Wn. App. 1026 (2013)..... 2

State v. Christensen, 153 Wn.2d 186,
102 P.3d 789 (2004)..... 5

State v. Haq, 166 Wn. App. 221,
268 P.3d 997 (2012)..... 7, 9

State v. Kipp, 179 Wn.2d 718,
317 P.3d 1029 (2014)..... 5, 6

State v. Modica, 136 Wn. App. 434,
149 P.3d 446 (2006), aff'd,
164 Wn.2d 83, 186 P.3d 1062 (2008)..... 4, 7, 8, 9, 10, 12, 13

State v. Pejsa, 75 Wn. App. 139,
876 P.2d 963 (1994)..... 8

<u>State v. Smyth</u> , 7 Wn. App. 50, 499 P.2d 63 (1972).....	11
<u>State v. Thorne</u> , 43 Wn.2d 47, 260 P.2d 331 (1953).....	10
<u>State v. Townsend</u> , 147 Wn.2d 666, 57 P.3d 255 (2002).....	12

Statutes

Washington State:

RCW 5.60.060.....	3, 4, 9, 10, 12
RCW 9.73.030.....	3, 5, 12
RCW 9.73.050.....	5
RCW 9.73.095.....	10

Other Authorities

Privacy Act	1, 3, 4, 5, 7, 8, 9, 10, 12, 13
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A. ISSUE PRESENTED

1. The recording of a telephone call violates Washington's Privacy Act if the parties have a reasonable expectation of privacy in the call and do not both consent to the recording. Here, the incarcerated defendant and his wife were both warned at the beginning of the defendant's call from the King County Jail that the call would be monitored and recorded, they both pressed a button to accept that condition, and their statements during the call indicate that they had no subjective expectation of privacy. Did the trial court correctly determine that the jail's recording of the call did not violate the Privacy Act?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The State charged the defendant, Keith Thomas Blair, with conspiracy to commit possession with intent to deliver marijuana and attempted introduction of contraband in the second degree. 1CP¹ 1-2. A jury found him guilty of conspiracy but not guilty of attempting to introduce contraband. 2CP 103-04. The trial court granted Blair's motion for arrest of judgment, finding that the

¹ This brief will follow Blair's convention of referring to the clerk's papers originally designated under Supreme Court No. 91395-1 as 1CP, and referring to the clerk's papers designated under Court of Appeals No. 73299-4-1 as 2CP. See Brief of Appellant at 1 n.1.

evidence was insufficient to support a conviction for conspiracy, and vacated and dismissed that charge. 1CP 25-26; 5RP 299-300. The State appealed, and this Court reversed the arrest of judgment. State v. Blair, 173 Wn. App. 1026 (2013). On remand, the trial court sentenced Blair to two months of confinement, concurrent with his sentences in other cases. 1CP 65. Blair timely appealed. 1CP 72.

2. SUBSTANTIVE FACTS.

The King County Jail's telephone system allows inmates to place calls to individuals outside the jail, but a pre-recorded message warns each inmate caller and the recipient of each call that all telephone calls using the system are recorded. 2CP 142. Both the inmate and the recipient of the call must indicate that he or she accepts this condition on the use of the jail telephone system by pressing a number on the telephone; if either the inmate or the recipient declines, the call is not completed and not recorded. 2CP 142.

One of the key pieces of evidence against Blair was a recorded phone call that he placed to his wife, Rachel Dunham, while he was incarcerated in the King County Jail in February 2011.

5RP² 52-54; CP 143. During the call, Blair directed Dunham to bring “green,” a code word for marijuana, to the jail entrance at 5:30 p.m. the next day and deliver it to an inmate named Chris who was being temporarily released. Ex. 2, 8;³ 5RP 24, 39-40, 76. When Dunham expressed confusion about what it was that Blair had instructed her to shred and conceal in a condom, Blair replied, “Forty,” a term used in the context of controlled substances to denote \$40 worth of a substance. Ex. 8 at 7; 5RP 76. Throughout the call, Blair avoided explicitly mentioning any controlled substance, and when Dunham commented at one point that “we should not discuss” what they were talking about, Blair replied, “Yeah, I know.” Ex. 8 at 9.

Prior to trial, Blair moved to suppress the recorded jail call on the grounds that the recording of the jail call violated RCW 9.73.030, Washington’s Privacy Act, and RCW 5.60.060(1), the marital privilege in witness testimony, among other grounds. 2CP 1-2. The State opposed the motion, arguing that the

² This brief will use same system used by Blair in referencing the report of proceedings as follows: 1RP (August 31, 2011), 2RP (September 1, 2011), 3RP (September 6, 2011), 4RP (September 8, 2011), 5RP (two consecutively paginated volumes covering September 12-15 & 30, 2011 – transferred from 67874-4-I), and 6RP (January 28, 2015).

³ As noted in the Brief of Appellant, Exhibit 8’s transcript of the call is incomplete. A more complete transcript, which includes Blair’s reference to “green,” is set out in the Brief of Appellant. See Brief of Appellant at 3.

Washington Supreme Court has already determined that the King County Jail's call recording system does not violate the Privacy Act because all parties are clearly informed that the call will be recorded, and thus there is no reasonable expectation of privacy. 2CP 34-35. The State also argued that the recording did not violate RCW 5.60.060(1) because that statute protects only against testimony by a spouse during the marriage or about communications during the marriage that were actually made confidentially, without being overheard by a third party. 2CP 37.

The trial court denied the motion to suppress the jail call. 2CP 145; 3RP 121-25. It concluded that, under State v. Modica,⁴ the recording of the jail call did not violate the Privacy Act because Blair and Dunham had no reasonable expectation of privacy. 2CP 144. The trial court also concluded that the jail call was not protected by RCW 5.60.060's spousal privilege because it consisted of statements in furtherance of a conspiracy. 2CP 144-45. The recording of the jail call was thereafter admitted at trial. 5RP 29.

⁴ State v. Modica, 164 Wn.2d 83, 87-90, 186 P.3d 1062 (2008).

C. **ARGUMENT**

1. THE TRIAL COURT PROPERLY DETERMINED THAT THE RECORDING OF BLAIR'S JAIL CALL TO HIS WIFE DID NOT VIOLATE THE PRIVACY ACT.

Blair contends that the court erred in admitting a recorded phone call that he placed to his wife from the King County Jail, on the theory that the recording of the call violated the Privacy Act. This claim should be rejected. The call was not private because Blair and his wife had no reasonable expectation of privacy in a call from jail that they knew was recorded; furthermore, Blair and his wife both consented to the recording. The Privacy Act was therefore not violated and the trial court properly admitted the call.

Washington's Privacy Act generally prohibits intercepting or recording a private communication transmitted by telephone unless all parties consent. RCW 9.73.030(1). A recording made in violation of the Act is inadmissible at trial in a criminal case. RCW 9.73.050. A communication is private under the Act when the parties have a subjective expectation that it is private, and that expectation is objectively reasonable. State v. Christensen, 153 Wn.2d 186, 193, 102 P.3d 789 (2004). Where the facts are undisputed, as they are here, appellate courts review de novo whether a communication was private. State v. Kipp, 179 Wn.2d

718, 728, 317 P.3d 1029 (2014). This Court may uphold the trial court's ruling on any grounds that are supported by the record. In re Marriage of Rideout, 150 Wn.2d 337, 358, 77 P.3d 1174 (2003).

a. Blair's Call To His Wife Was Not Private.

The recorded call from Blair to his wife was not private because Blair's statements during the call demonstrate that he had no subjective expectation of privacy, and because, as the trial court correctly determined, any expectation of privacy would be unreasonable under the circumstances.

i. Blair had no subjective expectation of privacy.

At the beginning of the call, Blair acknowledged the warning that the call would be recorded and monitored by pressing a button. 2CP 142-43; Ex. 8 at 1. His statements during the call also indicate that he was aware that the call was being recorded and monitored, as Blair spoke in code throughout the call in order to avoid explicitly referring to illegal drugs. Ex. 8 at 7-9; 5RP 76. Had Blair believed that his conversation with his wife was private, there would have been no need to use indirect terms like "green" and "forty" to refer to the substance he wanted Dunham to bring to the jail. Ex. 2; Ex. 8 at 9. Even when Dunham repeatedly expressed confusion about what Blair wanted her to shred and put in a condom, Blair

refused to give explicit instructions, and instead used code. Ex. 8 at 9.

Blair further demonstrated his awareness of the lack of privacy when he agreed with Dunham's comment that "we should not discuss" what Blair was asking her to do. Ex. 8 at 9. Because the warning at the beginning of the call and Blair's own statements during the call demonstrate that Blair did not have a subjective expectation of privacy, the call was not private within the meaning of the Privacy Act, and the Act was therefore not violated by the jail's recording of the call.

- ii. Any expectation of privacy was objectively unreasonable.

The Washington Supreme Court has already determined that the automatic recording of calls made by inmates in the King County Jail does not violate the Privacy Act because the inmates have no objectively reasonable expectation of privacy in the calls. State v. Modica, 164 Wn.2d 83, 88, 186 P.3d 1062 (2008). This is because inmates have a reduced expectation of privacy and because all callers and recipients are warned that the calls are being recorded. Id. at 88; State v. Haq, 166 Wn. App. 221, 260, 268 P.3d 997 (2012).

While the Modica court acknowledged that the private nature of a call is not eliminated by the mere possibility that a call might be recorded or intercepted, as is the case with all calls from cordless telephones, Modica, 164 Wn.2d at 88-89, its holding is consistent with prior decisions repeatedly holding that there is not a Privacy Act violation when a person knows that his or her conversation will be recorded and chooses to speak anyway. E.g., In re Marriage of Farr, 87 Wn. App. 177, 184, 940 P.2d 679 (1997) (Privacy Act not violated by recording of message left on answering machine, the only function of which is to record messages); State v. Pejsa, 75 Wn. App. 139, 150, 876 P.2d 963 (1994) (no violation where police negotiator told defendant that he was recording the conversation). Here, Blair was in custody at the same jail as Modica, and acknowledged a nearly identical warning that the call would be recorded and monitored. Modica therefore controls, and the trial court correctly determined that Blair could have no reasonable expectation of privacy.

Blair attempts to distinguish Modica on the basis that Blair's call was to his wife, arguing that the marital privilege in RCW 5.60.060(1) gives inmates a reasonable expectation of privacy in calls to their spouses. Brief of Appellant at 16-19. He relies on the Modic court's comment, made after determining that there was no reasonable expectation of privacy, that Modica's calls "were not to his lawyer or otherwise privileged." Modica, 164 Wn.2d at 89. This argument is unavailing, as the Modica court's reference to the absence of privilege is dicta,⁵ and neither the Privacy Act nor the marital privilege prohibits the clearly-disclosed recording of jail calls between spouses.

The Privacy Act specifically recognizes and preserves the attorney-client privilege and priest-penitent privilege by prohibiting the recording of calls by DOC inmates to their attorneys and members of the clergy in the section otherwise allowing the recording of DOC inmate calls; however, there is no such

⁵ This reference to the absence of any privilege is dicta because the communications at issue in Modica were between an inmate and his grandmother, and there was no suggestion that they were subject to any privilege. Further, the Modica court's conclusion that there was no reasonable expectation of privacy in the jail calls precedes the quoted language, and the court arrived at that conclusion without reference to the absence of privilege. Nor have any of the several Court of Appeals decisions that rely on and interpret Modica referred to the absence of privilege as a basis for finding no reasonable expectation of privacy in jail calls. See Hag, 166 Wn. App. at 260; State v. Archie, 148 Wn. App. 198, 203-04, 199 P.3d 1005 (2009).

expression of legislative intent to preserve inmates' marital privilege during phone calls.⁶ See RCW 9.73.095(4). The Modica court's reference to the potential for a reasonable expectation of privacy on a call that is to the inmate's attorney "or otherwise privileged" would thus appear to be, at most, an acknowledgement that there are some types of jail calls where recording would not be permitted, in which a reasonable expectation of privacy might exist. However, nothing in Modica or the Privacy Act suggests that jail calls between spouses may not be recorded.

The marital privilege exists only in RCW 5.60.060(1), which contains two privileges: (1) testimonial privilege, which prevents a spouse from testifying against the other spouse without the other spouse's consent, and (2) confidential communications privilege, which protects confidential communications made between spouses during the marriage. RCW 5.60.060(1); State v. Thorne, 43 Wn.2d 47, 55, 260 P.2d 331 (1953). It is the latter that is at issue in this case.

⁶ Although the Privacy Act does not specifically address the recording of calls from county jails, the special treatment of attorney-client and priest-penitent calls from DOC facilities reflects a general legislative intent to treat those calls differently than calls between spouses.

The party asserting the existence of a privilege has the burden of proving the existence of the privileged relationship and that the information sought fell within the privilege. Dietz v. Doe, 131 Wn.2d 835, 844, 935 P.2d 511 (1997). When spousal communication occurs with the knowledge that its content will also be received by a third party, the communication is not privileged because it was not made in confidence. Wolfle v. United States, 291 U.S. 7, 14, 54 S. Ct. 279, 78 L. Ed. 617 (1934) (marital privilege does not bar stenographer from testifying about contents of letter between spouses that was dictated to the stenographer). Accordingly, a jailhouse letter to an inmate's spouse, sent with the knowledge that all outgoing mail will be read by jail personnel, is not protected by marital privilege. State v. Smyth, 7 Wn. App. 50, 53, 499 P.2d 63 (1972).

Blair is positioned almost identically to Smyth. Like Smyth, Blair made statements to his wife with full knowledge that his statements were being monitored by the jail.⁷ His call was thus not

⁷ Blair argues that while he was warned that his call would be recorded, "there was no warning that the call will actually be listened to." Brief of Appellant at 15. The attempted distinction is unsupported by the record, as the warning message used the same grammatical structure regarding both recording and monitoring, stating that the call is "subject to monitoring and recording." Ex. 8 at 1. Furthermore, because the evidence he moved to exclude was the recording itself, it was the propriety of the recording that was most relevant.

a confidential communication, and therefore was not privileged under RCW 5.60.060(1). Because Blair has failed to establish the existence of any privilege that would create a reasonable expectation of privacy in his jail call despite the explicit warning that the call would be monitored and recorded, the Privacy Act was not violated, and the trial court properly admitted the recording.

b. Blair Consented To The Recording Of His Call.

Even if Blair had possessed a reasonable expectation of privacy in the contents of his jail call, the Privacy Act was not violated because Blair and Dunham expressly consented to the recording. The recording of private conversations does not violate the Privacy Act when all the participants consent to such recording. RCW 9.73.030(1)(a), (b). "A party to a conversation is deemed to have consented to having his or her communication recorded when the person knows that the recording is taking place." 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); accord 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); Farr, 87 Wn. App. at 184 (caller deemed to have

consented to the recording of message left on answering machine). Although our Supreme Court found it unnecessary to reach the question of consent in Modica, this Court has since held that a participant in a call from the King County Jail “expressly consented to recording when she pressed or dialed three to continue the call after the recorded warning.” State v. Archie, 148 Wn. App. 198, 204, 199 P.3d 1005 (2009).

Both Blair and Dunham heard the recorded message alerting them to the fact that the calls were being recorded, and each chose to press a button on his or her respective phone to accept that condition on the use of the jail phone system. CP 142-43. They therefore each consented to the recording. Modica, 136 Wn. App. at 450; Archie, 148 Wn. App. at 204.

Because the trial court correctly concluded that Blair had no reasonable expectation of privacy in his jail call to his wife, and because he and his wife each consented to the recording of the call, no violation of the Privacy Act occurred, and the trial court properly admitted the recording in Blair’s trial.

D. **CONCLUSION**

For all of the foregoing reasons, the State respectfully asks this Court to affirm Blair's conviction.

DATED this 5th day of December, 2015.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Casey Grannis, the attorney for the appellant, at Grannisc@nwattorney.net, containing a copy of the BRIEF OF RESPONDENT, in State v. Keith Thomas Blair, Cause No. 73299-4, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 8th day of December, 2015.

U Brame

Name:

Done in Seattle, Washington