

NO. 45531-5-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

RYAN MICHAEL O'BRIEN

and

MICHAEL DUANE ELMORE, APPELLANTS

Appeal from the Superior Court of Pierce County
The Honorable Ronald E. Culpepper

No. 13-1-00877-9

BRIEF OF APPELLANT

MARK LINDQUIST
Prosecuting Attorney

By
BRIAN WASANKARI
Deputy Prosecuting Attorney
WSB # 28945

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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A. ASSIGNMENTS OF ERROR.

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2. The trial court erred in finding, in conclusion of law 3, that all audio and visual evidence obtained by the recoding of O'Brien should be suppressed.
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B. ISSUE PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the trial court erred in ruling that recording Defendant O'Brien violated RCW 9.73 where that recording was authorized by a valid order issued pursuant to RCW 9A.73.090(2), which allowed for the recording of conversations between detectives, unrelated suspects, and others "inadvertently present," and Defendant had made himself inadvertently present.

C. STATEMENT OF THE CASE.

1. Procedure

On February 25, 2013, Ryan Michael O'Brien was charged by information with first degree trafficking in stolen property in counts I and IV, unlawful possession of a stolen vehicle in count II, and unlawful possession of a stolen vehicle in count III. CP (O'Brien) 1-3, 4-5.

On March 1, 2013, Michael Duane Elmore was charged by information with three counts of first degree taking a motor vehicle without permission in counts I through III and three counts of theft of a motor vehicle in counts IV through VI. CP (Elmore) 1-4, 5-6.

On April 16, 2013, the State filed an amended information in Elmore's case, which added three counts of first degree trafficking in stolen property as counts VII through IX. CP (Elmore) 7-10.

Finally, on May 8, 2013, the State filed an amended information in O'Brien's case, which added three counts of first degree taking a motor vehicle without permission as counts VI through VIII. CP 6-9. This amended information did not list a count V. CP 6-9.

On June 7, 2013, the State filed motions to join the Elmore and O'Brien cases, along with those of three co-defendants, for trial. CP (Elmore) 15-23; CP (O'Brien) 10-18. The court granted those motions on June 19, 2013. CP 24-25 (Elmore); CP (O'Brien) 19-20.

Defendant Elmore moved to dismiss for a violation of CrR 3.3, but that motion was denied. RP (10/31/2013) 72-104. The court heard motions in limine. RP (10/31/13) 126-46¹.

On October 30, 2013, Defendant O'Brien filed a motion to suppress an apparent recording of him and another on January 22, 2013 and any evidence obtained as a result, because he argued that this recording violated the privacy act, RCW 9.73. CP (O'Brien) 21-31. Defendant Elmore joined in that motion on October 31, 2013. CP (Elmore) 26-38.

The court heard this motion the same day, taking the testimony of Pierce County Sheriff's Detective Shawn Darby and the sworn statements of the assigned deputy prosecutor. RP (10/31/2013) 4-69.

After hearing argument, RP (11/04/13) 3-17, the trial court found that the privacy "act was violated by the act of the officer's recording of ELMORE and O'BRIEN," and thus, ruled that "the evidence of the recording, including the officers['] observations and communications with the defendants, and all evidence subsequently obtained as a result of the unlawful recording of the defendants, is hereby suppressed." CP 58-69 (Elmore); CP 51-62 (O'Brien); Appendix A; RP (11/04/2013) 18-22.

¹ There are three separately-paginated volumes of the report of proceedings. Citations thereto are made in the following format: RP [Date of Proceeding] Page Number(s).

The court held that “[t]he practical effect of [its] rulings is to terminate the ability of the State to go forward with the cases against defendants ELMORE and O’BRIEN,” CP 58-69 (Elmore), CP 51-62 (O’Brien), and dismissed both cases without prejudice. CP (Elmore) 54-55; CP (O’Brien) 36-37; Appendix A; RP (11/04/2013) 18-22.

On November 4, 2013, the State filed a timely notice of appeal. CP (O’Brien) 39-42; CP (Elmore) 32-35.

2. Facts

In the summer of 2012, law enforcement officers from various agents formed the Auto Crimes Enforcement Task Force to conduct an undercover sting operation titled “Shiny Penny.” CP (Elmore) 58; CP (O’Brien) 51; RP (10/31/13) 11-12. The purpose of the operation was to investigate and arrest people involved in trafficking in stolen automobiles. CP (Elmore) 58; CP (O’Brien) 51; RP (10/31/13) 12.

The task force thereafter occupied a building located at 1010 S 30th Street in Tacoma, Washington, making it appear to be a legitimate business, titled “Shiny Penny Liquidators.” CP (Elmore) 59; CP (O’Brien) 52; Exhibit 4; RP (10/31/13) 12-13.

“Shiny Penny” was ostensibly a storage locker liquidation and vehicle repossession company. Exhibit 4. However, officers “put word out

on the streets [that] the business was interested in buying stolen vehicles,” and shortly after the operation began, people started selling stolen vehicles to the undercover officers there. CP (Elmore) 59; CP (O’Brien) 52; RP (10/31/13) 12, 50-51.

The business itself was not actually open to the public. RP (10/31/13) 12-13. Because of staffing limitations, the task force could not “staff the building and hold normal business hours.” RP (10/31/13) 21. Instead, the operation worked on “an appointment basis” by which officers made appointments with suspects who contacted them to sell stolen property. RP (10/31/13) 21-22. The officers would then open the shop specifically for these suspects to conduct their transactions. RP (10/31/13) 21-22. At all other times, when no transactions were scheduled, the shop was closed and secure. RP (10/31/13) 22.

In this manner, between October or November 2013, and January 2014, the operation purchased 23 to 24 stolen vehicles, at a rate of about two per week from “various individuals.” RP (10/31/13) 14. Detective Darby, who was among the personnel assigned to the task force, clarified that these purchases were made from different people. RP (10/31/13) 14.

Among those people were Harrie Chan and Samnang Reuy, from whom detectives had, over the course of several months, purchased stolen property, including cars and firearms. RP (10/31/13) 16-17. Reuy was a

“documented member of the LOC or Loc’d Out Crips criminal street gang in Pierce County, Washington,” and “Chan [wa]s closely associated with Reuy in local report databases.” Exhibit 4. See RP (10/31/13) 16-17.

On January 16, 2013 at about 10:00 a.m., Harrie Chan called Detective Ducommun and told him that he had four firearms and an apparently stolen Honda Civic to sell. Exhibit 4. Chan agreed to meet Ducommun at the Shiny Penny store. Exhibit 4.

Washington State Patrol Detective Brandie Penney, who was assigned to the task force, then filed an application for judicial authorization pursuant to RCW 9.73.090 to intercept and record conversations between task force members and Chan, Reuy, and others who may be inadvertently present at that transaction. Exhibit 4; RP (10/31/13) 17-20.

According to that application, Detectives Darby, Ducommun, and Lofland, who were all involved in the undercover operation, consented to the proposed recording. Exhibit 4.

A Pierce County superior court judge reviewed the application and, at 11:55 a.m. on January 16, 2013, issued an authorization to

[i]ntercept, transmit, and record by any device or instrument the communication and conversations between Detective Darby, Ducommun, Lofland, and Samnang Reuy and Harrie Oh Chan; ***and those inadvertently present***, originating from an active undercover/covert auto theft

investigation/operation in the City of Tacoma County of
Pierce, Washington.

Exhibit 4 (emphasis added). The authorization was effective from “12:00
PM on January 16, 2013,” and was to “terminate upon the interception and
recording of all communication and conversations described above... or in
any event upon the passage of Seven (7) days from the effective date.”

Exhibit 4; RP (10/31/13) 20. Seven days from the effective date was
January 23, 2013 at 12:00 p.m. RP (10/31/13) 20. *See* Exhibit 4.

The “meeting between Harrie Chan and the undercover officers
was expected to occur during the afternoon of January 22, 2013.” CP
(Elmore) 60; CP (O’Brien) 53. *See* RP (10/31/13) 21-22. No one else was
expected to be there at the time. *See* RP (10/31/13) 22.

Around noon on January 22, 2013 Nicholas Woody stopped by the
Shiny Penny store unannounced and told undercover officers that he had
some stolen vehicles to sell. CP (Elmore) 59; CP (O’Brien) 52. Woody
and the officers agreed on a price of \$700 for the vehicles and Woody
agreed to return to the shop at a later time to complete the transaction. CP
(Elmore) 59-60; CP (O’Brien) 52-53. However, no specific time was
agreed upon for Woody’s return or the transaction. CP (Elmore) 60; CP
(O’Brien) 53.

Later that afternoon, and just minutes before Chan's expected arrival at the shop, Detective DuCommun attached and activated a hidden recording device on his clothing in anticipation of the transaction with Chan. RP (10/31/13) 27-28; CP (Elmore) 60-61; CP (O'Brien) 53-54.

However, just moments prior to Chan's expected arrival, Woody unexpectedly came to the shop accompanied by Defendant O'Brien. RP (10/31/13) 25-26, 29, 49; CP (Elmore) 60; CP (O'Brien) 53. They brought a Kia SUV and a Ford Explorer into the shop area of the building. RP (10/31/13) 29.

Detective Ducommun, who was wearing the recording device, could not remove it or turn it off without alerting Woody and O'Brien. CP (Elmore) 61; CP (O'Brien) 54; RP (10/31/13) 46, 53-54. Therefore, officers "conducted business with W[ooldy] and O['Brien] and the conversations between them w[ere] apparently recorded." CP (Elmore) 61; CP (O'Brien) 54.

As Chan arrived at the shop, Woody and O'Brien were leaving. CP (Elmore) 61; CP (O'Brien) 54; RP (10/31/13) 30. The officers then conducted the transaction with Chan. CP (Elmore) 61; CP (O'Brien) 54.

After Chan left the shop, officers were concerned that "they had potentially recorded conversations between W[ooldy] and O['Brien] without prior judicial approval," and sealed the wire, placed it a "secure

property storage facility,” and “never listened to any portion of it.” CP (Elmore) 61; CP (O’Brien) 54; RP (10/31/13) 33.

On January 23, 2013, Woody contacted undercover detectives by telephone before coming to Shiny Penny to sell a Ford Explorer and Chevrolet Blazer. CP (Elmore) 62; CP (O’Brien) 55; RP (10/31/13) 34.

Detectives were thus able to obtain judicial authorization to record conversations between officers, Woody, and third parties associated with this transaction. CP (Elmore) 62; CP (O’Brien) 55; RP (10/31/13) 34-45; Exhibit 5, 8.

D. ARGUMENT.

1. THE TRIAL COURT ERRED IN RULING THAT RECORDING O’BRIEN VIOLATED RCW 9.73 BECAUSE THAT RECORDING WAS AUTHORIZED BY AN ORDER PROPERLY ISSUED PURSUANT TO RCW 9.73.090(2), WHICH ALLOWED FOR THE RECORDING OF CONVERSATIONS BETWEEN DETECTIVES, SUSPECTS, AND THOSE “INADVERTENTLY PRESENT” AND DEFENDANT O’BRIEN HAD MADE HIMSELF INADVERTENTLY PRESENT.

Where one party consents, recording a private conversation does not violate the fourth amendment to the federal constitution or article I, section 7 of the Washington State Constitution. *U.S. v. White*, 401 U.S. 745, 751-52, 91 S. Ct. 1122, 28 L. Ed. 2d 453 (1971); *State v. Salinas*,

119 Wn.2d 192, 197, 829 P.2d 1068 (1992); *State v. Clark*, 129 Wn.2d 211, 221, 916 P.2d 384 (1996).

However, Washington’s privacy act, RCW 9.73, “prohibits anyone not operating under a court order from intercepting or recording certain communications without the consent of all parties.” *State v. Roden*, ___ Wn.2d ___, ___ P.3d ___ (2014)(WL 766681).

Specifically, it renders unlawful the electronic interception or recording of any

[p]rivate conversation, by any device electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or actuated without first obtaining the consent of all the persons engaged in the conversation.

RCW 9.73.030(1)(b); *State v. Salinas*, 121 Wn.2d 689, 692, 853 P.2d 439 (1993).

“In determining whether a communication is private, [appellate courts] consider the subjective intention of the parties and may also consider other factors that bear on the reasonableness of the participants' expectations, such as the duration and subject matter of the communication, the location of the communication, and the presence of potential third parties.” *State v. Roden*, ___ Wn.2d ___, ___ P.3d ___ (2014)(WL 766681). (Citing *State v. Townsend*, 147 Wn.2d 666, 673–74, 57 P.3d 255 (2002) (citing *State v. Clark*, 129 Wn.2d 211, 225–27, 916

P.2d 384 (1996))). Courts “will generally presume that conversations between two parties are intended to be private.” *Id.* (citing *State v. Modica*, 164 Wn.2d 83, 89, 186 P.3d 1062 (2008)).

“Any information obtained in violation of RCW 9.73.030... shall be inadmissible in any civil or criminal case in all courts of general or limited jurisdiction in this state.” RCW 9.73.050.

Indeed, when officers violate RCW 9.73.030, RCW 9.73.050 requires that “any evidence obtained, including simultaneous visual observation and assertive gestures, is inadmissible in a criminal trial.” *State v. Fjermestad*, 114 Wn.2d 828, 836, 791 P.2d 897 (1990).

However, “[t]he act also provides exceptions to [the RCW 9.73.030] prohibition.” *Salinas*, 121 Wn.2d at 692, and the general exclusionary rule of RCW 9.73.050. Among those exceptions, the act provides, in relevant part, that

[i]t shall not be unlawful for a law enforcement officer acting in the performance of the officer's official duties to intercept, record, or disclose an oral communication or conversation where the officer is a party to the communication or conversation or one of the parties to the communication or conversation has given prior consent to the interception, recording, or disclosure: PROVIDED, That prior to the interception, transmission, or recording the officer shall obtain written or telephonic authorization from a judge or magistrate, who shall approve the interception, recording, or disclosure of communications or conversations with a nonconsenting party for a reasonable and specified period of time, if there is probable cause to

believe that the nonconsenting party has committed, is engaged in, or is about to commit a felony

RCW 9.73.090(2).

The Washington State Supreme Court has held that

the duration of an electronic interception should not be longer than necessary under the facts of the particular case; where one-time surveillance fulfills the needs of the investigation being conducted, that is all that should be authorized or conducted; and *where a course of conduct is likely to embrace multiple parties and extend over a period of time, the order authorizing electronic eavesdropping may properly authorize proportionally longer surveillance, up to the statutory maximum. That statutory maximum in one party consent situations is 7 days.*

State v. O'Neill, 103 Wn.2d 853, 700 P.2d 711 (1985) (citing RCW 9.73.090(4)) (footnotes omitted; emphasis added). *See* RCW 9.73.090(4) (providing that authorizations issued under this subsection “shall be effective for not more than seven days.”).

RCW 9.73.130 sets for the required contents of an application for authorization under RCW 9.73.090(2).

“A judge issuing an intercept order has considerable discretion to determine whether the statutory safeguards have been satisfied,” and courts “do not review the sufficiency of the application de novo.” *State v. Porter*, 98 Wn. App. 631, 634, 990 P.2d 460 (1999). Rather, appellate

courts “will affirm if the facts set forth in the application are minimally adequate to support the determination.” *Id.*

Moreover, a court’s order authorizing recording under RCW 9.73.090 should be evaluated “in a reasonable common sense manner, rather than hypertechnically.” *See State v. O’Neill*, 103 Wn.2d 853, 723, 700 P.2d 711 (1985).

In the present case, the trial court, in its findings of undisputed facts, found that “the ‘Shiny Penny’ undercover officers had received judicial approval for a hidden wire to be worn on January 22, 2013 in anticipation of a contact with a suspect named Harrie Chan.” CP (O’Brien) 53; CP (Elmore) 60. Specifically, the superior court issued an order under RCW 9.73.090(2) authorizing them to

record by any device or instrument the communication and conversations between Detective Darby, Ducommun, Lofland, and Samnang Reuy and Harrie Oh Chan; ***and those inadvertently present, originating from an active undercover/covert auto theft investigation/operation in the city of Tacoma***

Exhibit 4 (emphasis added).

The application for that authorization made clear that the “active undercover/covert auto theft investigation/operation” from which the conversations would originate was the Shiny Penny Liquidators store located at 1010 30th St in Tacoma, Washington. Exhibit 4.

The order was, by its terms, effective from January 16 through January 23, 2013 at 12:00 p.m. Exhibit 4.

Given that order, officers had valid authorization under RCW 9.73.090(2) to record their conversations with Chan at the Shiny Penny store on January 22, 2013.

However, that order also authorized them to record “those inadvertently present” at that time at the Shiny Penny store. Exhibit 4.

While the order did not define the term “inadvertently,” Exhibit 4, the word itself has been defined as “unintentionally.” *See Webster’s Third New International Dictionary of the English Language* (2002) (defining “inadvertent” as, *inter alia*, “2: UNINTENTIONAL.” Cf. *State v. Fjermestad*, 114 Wn.2d 828, 835, 791 P.2d 897 (1990) (citing *State v. Olson*, 47 Wn. App. 514, 516-17, 735 P.2d 1362 (1987) (“[a] nontechnical statutory term may be given its dictionary meaning”)).

In this case, O’Brien made himself inadvertently present just after officers began recording in anticipation of Chan’s imminent arrival to conduct the sale of the stolen goods.

According to the testimony of Detective Darby, the Shiny Penny store was generally closed to the public, unless the task force scheduled an appointment with a suspect for the purchase of stolen goods. RP (10/31/13) 12-13, 21-22. Only when such an appointment was made,

would officers open the shop for these specific suspects to conduct their scheduled transactions. RP (10/31/13) 21-22.

The task force made such an appointment for Chan to come in to the Shiny Penny store and sell four firearms and an apparently stolen Honda Civic on the afternoon of January 22, 2013. CP (Elmore) 60; CP (O'Brien) 53. *See* RP (10/31/13) 21-23; Exhibit 4. No one else was expected to be there at the time. *See* RP (10/31/13) 22-23.

On the afternoon of January 22, minutes before Chan's expected arrival, Detective DuCommun attached and activated the recording device in anticipation of the transaction with Chan. RP (10/31/13) 27-28; CP (Elmore) 60-61; CP (O'Brien) 53-54.

However, just moments later, and minutes before Chan's expected arrival, Woody and O'Brien came into the shop unannounced. RP (10/31/13) 25-26, 29; CP (Elmore) 60; CP (O'Brien) 53.

While it is true that officers apparently recorded their conversation with Woody and O'Brien, it is equally true that they had no intention of doing so, or for that matter, of Woody or O'Brien even being present in the building at the time. *See* RP (10/31/2013) 22-23.

Officers had made no specific appointment with Woody and had no prior knowledge of O'Brien. RP (10/31/2013) 22-26. In other words,

they had no intention of either of these men being present in the shop at the time of the recording.

Thus, when Woody and O'Brien "suddenly arrived," RP (10/31/2013) 26, they made themselves "inadvertently present" just after the recording of the impending conversation with Chan had commenced.

Because the superior court had previously issued a lawful order pursuant to RCW 9.73.090(2), authorizing task force members to record... their conversations with "Samnang Reuy and Harrie Oh Chan; and those inadvertently present," Exhibit 4, task force members were authorized to record O'Brien on the afternoon of January 22, 2013.

Hence, this recording did not violate RCW 9.73.030, and the court erred in concluding otherwise in its conclusion of law 1, and in suppressing "[a]ll audio and visual evidence obtained" and "any testimony regarding verbal communications, observations and mannerisms of the defendants" in conclusions of law 3 and 4. CP (O'Brien) 56; CP (Elmore) 63.

Therefore, these rulings should be reversed.

E. CONCLUSION.

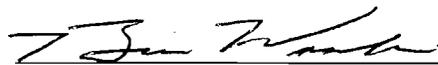
Defendant O'Brien made himself inadvertently present at the time of the January 22, 2013 recording. Because the valid order issued pursuant

to RCW 9A.73.090(2) allowed for the recording of conversations between detectives, unrelated suspects, and others “inadvertently present,” it allowed for the recording of O’Brien.

Therefore, the trial court erred in ruling that this recording violated RCW 9.73, and its rulings suppressing evidence and dismissing without prejudice should be reversed.

DATED: March 27, 2014

MARK LINDQUIST
Pierce County
Prosecuting Attorney

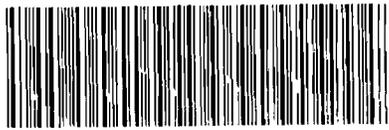

BRIAN WASANKARI
Deputy Prosecuting Attorney
WSB # 28945

Certificate of Service:

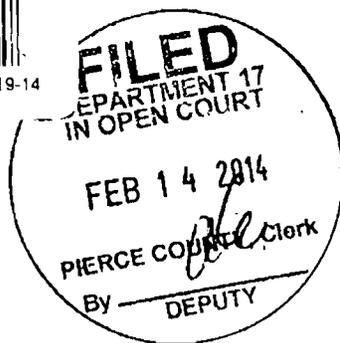
The undersigned certifies that on this day she delivered by ~~US Mail~~ ^{Uxale} or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.


Date: 3/27/14 Signature: Johnson

APPENDIX A



13-1-00877-9 42062849 FNCL 02-19-14



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 13-1-00877-9
13-1-00803-5

vs.

MICHAEL DUANE ELMORE,
RYAN MICHAEL OBRIEN,

Defendant.

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER RE. CrR 3.6
HEARING

THIS MATTER having come on for hearing before the honorable Ronald Culpepper on the 30th day of October, 2013, and the court having ruled orally that evidence should be suppressed because law enforcement tape-recorded defendant MICHAEL DUANE ELMORE in violation of the privacy act, RCW 9.73, now, therefore, the court sets forth the following Findings of Fact and Conclusions of Law as to its ruling.

UNDISPUTED FACTS

1. Beginning in the summer of 2012, an auto task force consisting of law enforcement officers from various local agencies conducted an undercover sting operation titled "Shiny Penny" whose purpose was to investigate and arrest individuals involved in trafficking in stolen automobiles;

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2. "Shiny Penny" was set up to appear as a legitimate store-front business and law enforcement, in an undercover capacity, put word out on the streets the business was interested in buying stolen vehicles;
 3. The "Shiny Penny" store front building, located on 30th St. S., in Tacoma, was equipped with video surveillance cameras and the undercover officers interacting with suspects obtained judicial wire orders to record the suspects' conversations with them;
 4. Shortly after the undercover operation began, various individuals began selling the undercover officers stolen vehicles;
 5. On January 5, 2013, a female (BRIANNA HUDSON) came to the "Shiny Penny" shop to sell a stolen vehicle; she was accompanied by a male who was introduced to officers only by the name of "WOODY;"
 6. "WOODY" was later determined to be an individual by the name of NICHOLAS WOODY;
 7. On January 22, 2013, sometime around noon, WOODY stopped by the "Shiny Penny" storefront unannounced;
 8. Undercover officers were able to see WOODY approach the shop on foot via video surveillance cameras and the officers were able to quickly get "in character" before interacting with WOODY;
 9. WOODY told undercover officers he had some stolen vehicles to sell;
 10. The undercover officers made an appointment with WOODY to return with the vehicles;

11. The undercover officers told WOODY they would give him \$650 for the Kia and WOODY countered with an offer of \$700, which was agreed upon;
12. Detective Darby testified the officers knew Mr. WOODY was coming to the storefront to sell them vehicles and had made an appointment with him to do so;
13. No hidden wire or other recording device was worn during this initial interaction on January 22, 2013 between WOODY and the undercover officers;
14. No specific time was agreed upon for WOODY's return and WOODY then left the shop;
15. Regarding a separate suspect and prior to January 22, 2013, the "Shiny Penny" undercover officers had received judicial approval for a hidden wire to be worn on January 22, 2103 in anticipation of a contact with a suspect named HARRIE CHAN;
16. The January 22, 2013 meeting between HARRIE CHAN and the undercover officers was expected to occur during the afternoon of January 22, 2013;
17. On January 22, 2013, just minutes before HARRIE CHAN's expected arrival, WOODY again showed up unannounced at the "Shiny Penny" undercover shop;
18. Detective Darby declined to say where the wire was located and indicated he did not want to discuss how it functions for "security reasons."
19. WOODY arrived at the shop accompanied by a person who would later be identified as the defendant, RYAN OBRIEN;
20. At the time of WOODY and OBRIEN's arrival, an undercover officer had already attached and activated the hidden wire under his clothing in anticipation of HARRIE CHAN's arrival;

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21. The officer wearing the hidden wire testified to the effect that the wire could not be removed from under his clothing or that the recording device could not be turned off without WOODY and O'BRIEN's becoming suspicious or aware of its presence;

22. The undercover officers then conducted business with WOODY and O'BRIEN and the conversations between them and the officers was apparently recorded;

23. As WOODY and O'BRIEN drove off, HARRIE CHAN was arriving to sell a stolen vehicle to the undercover officers;

24. The officers then conducted the sale with HARRIE CHAN;

25. During the interaction with HARRIE CHAN, the same officer with the wire was present and had not sought to take off the wire or turn the recording off;

26. After HARRIE CHAN left the shop, officers recognized they had potentially recorded conversations between WOODY and O'BRIEN without prior judicial approval, therefore a decision was made to seal the wire and never listen to any part of it, including the portion of the recording that potentially captured the conversations with HARRIE CHAN;

27. The undercover officers then sealed the wire and placed it into the secure property storage facility located in the basement of the County City Building and they have never listened to any portion of it;

28. No part of the tape recording from the wire in place on the officer's person on January 22, 2013, was ever accessed or provided to defense in discovery during the pendency of this case;

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29. On January 23, 2013, WOODY contacted the undercover officers by phone before coming to the shop that same day to sell the Ford Explorer and Chevy Blazer;
 30. Before his arrival, undercover officers were able to obtain a judicial wire that authorized the tape-recording of conversations between the officers, WOODY and third parties associated with WOODY's transactions;
 31. Shortly after receiving the judicial authority for the wire, WOODY and OBRIEN arrived in the Ford Explorer and Chevy Blazer (WOODY driving the Explorer and OBRIEN driving the Blazer);
 32. On October 1, 2013, the first day of trial, the defense for ELMORE and OBRIEN filed a motion to suppress all evidence obtained as a result of a claimed violation of RCW 9.73.030 (privacy act statute) because they contended the inadvertent recording of WOODY and OBRIEN's conversations, occurring on January 22, 2013, violated the privacy act;
 33. A subsequent evidentiary hearing ensued and at the conclusion of the hearing WOODY and OBRIEN argued that all the evidence in the case should be suppressed because the officers obtained information during the illegal recording of the defendants that led them to other evidence ("fruit of the poisonous tree");
 34. This court specifically found there was not a "good faith" exception, on the part of the officers, to the privacy acts' prohibition on admissibility of evidence obtained in violation of the privacy act.

78 2/20/2014 00030

DISPUTED FACTS

There are no disputed facts.

CONCLUSIONS AS TO DISPUTED FACTS

N/A

CONCLUSIONS AS TO ADMISSIBILITY

1. RCW 9.73.050 governs admissibility of intercepted communications into evidence in a criminal proceeding, and states as follows:

Any information obtained in violation of RCW 9.73.030 or pursuant to any order issued under the provisions of RCW 9.73.040 shall be inadmissible in any civil or criminal case in all courts of general or limited jurisdiction in this state, except with the permission of the person whose rights have been violated in an action brought for damages under the provisions of RCW 9.73.030 through 9.73.080, or in a criminal action in which the defendant is charged with a crime, the commission of which would jeopardize national security.

This act was violated by the act of the officer's recording of ELMORE and O BRIEN.

Because there is not a "good faith" exception, on the part of the officers in this case, to the prohibition on admissibility of evidence obtained in violation of the privacy act, the evidence of the recording, including the officers observations and communications with the defendants, and all evidence subsequently obtained as a result of the unlawful recording of the defendants, is hereby suppressed.

2. There is no "good faith" exception to the violation of the state Privacy Act, RCW 9.73.

3. All audio and visual evidence obtained by the unlawful interception of recording must be suppressed because of the Privacy Act violation.

4. Additionally, any testimony regarding verbal communications, observations and mannerisms of the defendants must also be suppressed.

15000 2/20/2014 00031

79 2/20/2014 00:33

Angela Edwards

From: John Cain [jcainjd11@comcast.net]
Sent: Wednesday, February 12, 2014 11:34 AM
To: Angela Edwards
Cc: Gregory Greer; Vanessa C. Martin
Subject: Re: Elmore Obrien draft.. amended spacing on last page starting w/ "disputed facts"

You have my permission to file.

John

On Feb 12, 2014, at 10:59 AM, Angela Edwards <aedward@co.pierce.wa.us> wrote:

> You're welcome.
> Once all of you have reviewed and approved via response to my e-mail I can file it based on the e-mail affirmations or you all can come sign.. just let me know.

> Angie

>

> ANGELA EDWARDS | Judicial Assistant to Judge Ronald E. Culpepper | Pierce County Superior Court | Dept. #17 | 930 Tacoma Avenue South, Room 334, Tacoma, WA 98402 | Phone: (253) 798-6640 | Fax: (253) 798-7214 | Email: aedward@co.pierce.wa.us

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> -----Original Message-----

> From: John Cain [<mailto:jcainjd11@comcast.net>]

> Sent: Wednesday, February 12, 2014 10:47 AM

> To: Angela Edwards

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> Subject: Re: Elmore Obrien draft.. amended spacing on last page starting w/ "disputed facts"

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> Hi Angie,

>

> Thank you for sending this. Are you going to file it? Would you like me to come by and sign off it?

> I can come by today or in the morning.

>

> John

> On Feb 12, 2014, at 10:25 AM, Angela Edwards <aedward@co.pierce.wa.us> wrote:

>

>>

>> <elmore obrien fof col 2.doc>

>

>

00034
78 2/20/2014

Angela Edwards

From: Gregory Greer
Sent: Wednesday, February 12, 2014 1:02 PM
To: Angela Edwards
Subject: RE: Elmore Obrien draft.. amended spacing on last page starting w/ "disputed facts"

Thank you, Angie. You may indicate on my signature block "approved for entry via e-mail." Thanks.

From: Angela Edwards
Sent: Wednesday, February 12, 2014 10:26 AM
To: Gregory Greer; 'Vanessa C. Martin'; John Cain; John Cain
Subject: Elmore Obrien draft.. amended spacing on last page starting w/ "disputed facts"

79 2/20/2014 00035

Angela Edwards

From: Vanessa C. Martin [vanessamartinlaw@comcast.net]
Sent: Thursday, February 13, 2014 5:19 PM
To: Angela Edwards
Cc: Gregory Greer; John Cain; John Cain
Subject: Re: Elmore Obrien draft.. amended spacing on last page starting w/ "disputed facts"

I have the following suggestions:

1. On #32 it says the first day of trial was Oct 1. I believe it was actually Oct 31 and I filed the motion on Oct 30. I also don't agree that the recording was inadvertent. (see #2 below)
2. #17 - Detective Darby testified they had made an appointment with Woody for the time that he arrived that the violation took place. They knew he was coming. It was not "unannounced." I argued that on Pages 15 and 16 in the transcript we received of the argument from Ms. Johnson. It went undisputed at that time and I reference that I specifically asked Detective Darby that when he testified, which occurred right before the argument. It's a relatively small point and I don't think it affects the analysis but I don't think it's accurate to say Mr. woody showed up "unannounced" or that they didn't know he was coming.
3. Finally - #30 - I would like it to reference that the judicial wire affidavit that gave permission to record on January 23 contained a detailed account of the January 22 interaction that was deemed to be a violation of the Privacy Act (and I think part of the fruit of the poisonous tree analysis).

That's my...well, more than 2.cents.

V

Regards,

Vanessa
Law Offices of Vanessa C. Martin
1425 Broadway #412
Seattle, WA 98122
Office: (206) 325-8792
Cell: (206) 387-8234
Fax: (206) 260-8999
vanessamartinlaw@comcast.net

On Feb 12, 2014, at 10:25 AM, Angela Edwards wrote:

<elmore obrien fof col 2.doc>

78 2/20/2014 00:00

Angela Edwards

From: John Cain [jcainjd11@comcast.net]
Sent: Thursday, February 13, 2014 6:19 PM
To: Angela Edwards
Cc: Vanessa C. Martin; Gregory Greer
Subject: Re: Have you had a chance to review ELMORE/OBRIEN FOF/COL I e-mailed to you yet ?

Perhaps if the court simply scratched out that there were no disputed facts the issues would be solved. In my version there was no statement that there were no disputed facts.

John

On Feb 13, 2014, at 3:32 PM, Angela Edwards <aedward@co.pierce.wa.us> wrote:

> Ok great. Will wait to hear from you tomorrow before end of workday.
> Thx.

> ANGELA EDWARDS | Judicial Assistant to Judge Ronald E. Culpepper | Pierce County Superior Court | Dept. #17 | 930 Tacoma Avenue South, Room 334, Tacoma, WA 98402 | Phone: (253) 798-6640 | Fax: (253) 798-7214 | Email: aedward@co.pierce.wa.us

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> From: Vanessa C. Martin [<mailto:vanessamartinlaw@comcast.net>]

> Sent: Thursday, February 13, 2014 3:07 PM

> To: Angela Edwards

> Subject: Re: Have you had a chance to review ELMORE/OBRIEN FOF/COL I e-mailed to you yet ?

> I haven't yet. I'm so sorry. I've been swamped. I will this evening.

> Vanessa
> Law Offices of Vanessa C. Martin
> 1425 Broadway #412
> Seattle, WA 98122
> (206) 325-8792
> Fax: (206) 260-8999
> VanessaMartinLaw@comcast.net

> Sent from my iPhone

> On Feb 13, 2014, at 11:08 AM, Angela Edwards <aedward@co.pierce.wa.us> wrote:

> ANGELA EDWARDS | Judicial Assistant to Judge Ronald E. Culpepper | Pierce County Superior Court | Dept. #17 | 930 Tacoma Avenue South, Room 334, Tacoma, WA 98402 | Phone: (253) 798-6640 | Fax: (253) 798-7214 | Email: aedward@co.pierce.wa.us

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Angela Edwards

From: Angela Edwards
Sent: Friday, February 14, 2014 4:19 PM
To: 'John Cain'
Cc: Vanessa C. Martin; Gregory Greer
Subject: RE: Have you had a chance to review ELMORE/OBRIEN FOF/COL I e-mailed to you yet?

The fof/col will be entered as drafted by Judge Culpepper. I will file them on Monday. I will also attach our e-mail communications.

ANGELA EDWARDS | Judicial Assistant to Judge Ronald E. Culpepper | Pierce County Superior Court | Dept. #17 | 930 Tacoma Avenue South, Room 334, Tacoma, WA 98402 | Phone: (253) 798-6640 | Fax: (253) 798-7214 | Email: aedward@co.pierce.wa.us

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Cc: Vanessa C. Martin; Gregory Greer
Subject: Re: Have you had a chance to review ELMORE/OBRIEN FOF/COL I e-mailed to you yet ?

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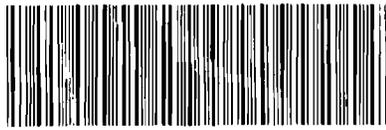
>
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> **Sent:** Thursday, February 13, 2014 3:07 PM
> **To:** Angela Edwards
> **Subject:** Re: Have you had a chance to review ELMORE/OBRIEN FOF/COL I e-mailed to you yet ?

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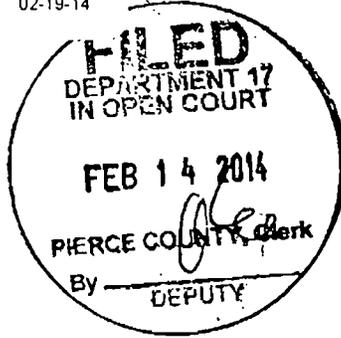
>
> Vanessa
> Law Offices of Vanessa C. Martin
> 1425 Broadway #412
> Seattle, WA 98122
> (206) 325-8792
> Fax: (206) 260-8999
> VanessaMartinLaw@comcast.net

>
> Sent from my iPhone

78 2/20/2014 00037



13-1-00803-5 42082638 FNFLC 02-19-14



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 13-1-00877-9

13-1-00803-5 ✓

vs.

MICHAEL DUANE ELMORE,
RYAN MICHAEL OBRIEN,

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER RE. CrR 3.6
HEARING

Defendant.

THIS MATTER having come on for hearing before the honorable Ronald Culpepper on the 30th day of October, 2013, and the court having ruled orally that evidence should be suppressed because law enforcement tape-recorded defendant MICHAEL DUANE ELMORE in violation of the privacy act, RCW 9.73, now, therefore, the court sets forth the following Findings of Fact and Conclusions of Law as to its ruling.

UNDISPUTED FACTS

1. Beginning in the summer of 2012, an auto task force consisting of law enforcement officers from various local agencies conducted an undercover sting operation titled "Shiny Penny" whose purpose was to investigate and arrest individuals involved in trafficking in stolen automobiles;

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2. "Shiny Penny" was set up to appear as a legitimate store-front business and law enforcement, in an undercover capacity, put word out on the streets the business was interested in buying stolen vehicles;
3. The "Shiny Penny" store front building, located on 30th St. S., in Tacoma, was equipped with video surveillance cameras and the undercover officers interacting with suspects obtained judicial wire orders to record the suspects' conversations with them;
4. Shortly after the undercover operation began, various individuals began selling the undercover officers stolen vehicles;
5. On January 5, 2013, a female (BRIANNA HUDSON) came to the "Shiny Penny" shop to sell a stolen vehicle; she was accompanied by a male who was introduced to officers only by the name of "WOODY;"
6. "WOODY" was later determined to be an individual by the name of NICHOLAS WOODY;
7. On January 22, 2013, sometime around noon, WOODY stopped by the "Shiny Penny" storefront unannounced;
8. Undercover officers were able to see WOODY approach the shop on foot via video surveillance cameras and the officers were able to quickly get "in character" before interacting with WOODY;
9. WOODY told undercover officers he had some stolen vehicles to sell;
10. The undercover officers made an appointment with WOODY to return with the vehicles;

79 2/20/2014 00016

11. The undercover officers told WOODY they would give him \$650 for the Kia and WOODY countered with an offer of \$700, which was agreed upon;
12. Detective Darby testified the officers knew Mr. WOODY was coming to the storefront to sell them vehicles and had made an appointment with him to do so;
13. No hidden wire or other recording device was worn during this initial interaction on January 22, 2013 between WOODY and the undercover officers;
14. No specific time was agreed upon for WOODY's return and WOODY then left the shop;
15. Regarding a separate suspect and prior to January 22, 2013, the "Shiny Penny" undercover officers had received judicial approval for a hidden wire to be worn on January 22, 2103 in anticipation of a contact with a suspect named HARRIE CHAN;
16. The January 22, 2013 meeting between HARRIE CHAN and the undercover officers was expected to occur during the afternoon of January 22, 2013;
17. On January 22, 2013, just minutes before HARRIE CHAN's expected arrival, WOODY again showed up unannounced at the "Shiny Penny" undercover shop;
18. Detective Darby declined to say where the wire was located and indicated he did not want to discuss how it functions for "security reasons."
19. WOODY arrived at the shop accompanied by a person who would later be identified as the defendant, RYAN OBRIEN;
20. At the time of WOODY and OBRIEN's arrival, an undercover officer had already attached and activated the hidden wire under his clothing in anticipation of HARRIE CHAN's arrival;

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- 21. The officer wearing the hidden wire testified to the effect that the wire could not be removed from under his clothing or that the recording device could not be turned off without WOODY and O'BRIEN's becoming suspicious or aware of its presence;
- 22. The undercover officers then conducted business with WOODY and O'BRIEN and the conversations between them and the officers was apparently recorded;
- 23. As WOODY and O'BRIEN drove off, HARRIE CHAN was arriving to sell a stolen vehicle to the undercover officers;
- 24. The officers then conducted the sale with HARRIE CHAN;
- 25. During the interaction with HARRIE CHAN, the same officer with the wire was present and had not sought to take off the wire or turn the recording off;
- 26. After HARRIE CHAN left the shop, officers recognized they had potentially recorded conversations between WOODY and O'BRIEN without prior judicial approval, therefore a decision was made to seal the wire and never listen to any part of it, including the portion of the recording that potentially captured the conversations with HARRIE CHAN;
- 27. The undercover officers then sealed the wire and placed it into the secure property storage facility located in the basement of the County City Building and they have never listened to any portion of it;
- 28. No part of the tape recording from the wire in place on the officer's person on January 22, 2013, was ever accessed or provided to defense in discovery during the pendency of this case;

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- 29. On January 23, 2013, WOODY contacted the undercover officers by phone before coming to the shop that same day to sell the Ford Explorer and Chevy Blazer;
- 30. Before his arrival, undercover officers were able to obtain a judicial wire that authorized the tape-recording of conversations between the officers, WOODY and third parties associated with WOODY's transactions;
- 31. Shortly after receiving the judicial authority for the wire, WOODY and OBRIEN arrived in the Ford Explorer and Chevy Blazer (WOODY driving the Explorer and OBRIEN driving the Blazer);
- 32. On October 1, 2013, the first day of trial, the defense for ELMORE and OBRIEN filed a motion to suppress all evidence obtained as a result of a claimed violation of RCW 9.73.030 (privacy act statute) because they contended the inadvertent recording of WOODY and OBRIEN's conversations, occurring on January 22, 2013, violated the privacy act;
- 33. A subsequent evidentiary hearing ensued and at the conclusion of the hearing WOODY and OBRIEN argued that all the evidence in the case should be suppressed because the officers obtained information during the illegal recording of the defendants that led them to other evidence ("fruit of the poisonous tree");
- 34. This court specifically found there was not a "good faith" exception, on the part of the officers, to the privacy acts' prohibition on admissibility of evidence obtained in violation of the privacy act.

DISPUTED FACTS

There are no disputed facts.

CONCLUSIONS AS TO DISPUTED FACTS

N/A

CONCLUSIONS AS TO ADMISSIBILITY

1. RCW 9.73.050 governs admissibility of intercepted communications into evidence in a criminal proceeding, and states as follows:

Any information obtained in violation of RCW 9.73.030 or pursuant to any order issued under the provisions of RCW 9.73.040 shall be inadmissible in any civil or criminal case in all courts of general or limited jurisdiction in this state, except with the permission of the person whose rights have been violated in an action brought for damages under the provisions of RCW 9.73.030 through 9.73.080, or in a criminal action in which the defendant is charged with a crime, the commission of which would jeopardize national security.

This act was violated by the act of the officer's recording of ELMORE and OBRIEN.

Because there is not a "good faith" exception, on the part of the officers in this case, to the prohibition on admissibility of evidence obtained in violation of the privacy act, the evidence of the recording, including the officers observations and communications with the defendants, and all evidence subsequently obtained as a result of the unlawful recording of the defendants, is hereby suppressed.

2. There is no "good faith" exception to the violation of the state Privacy Act, RCW 9.73.

3. All audio and visual evidence obtained by the unlawful interception of recording must be suppressed because of the Privacy Act violation.

4. Additionally, any testimony regarding verbal communications, observations and mannerisms of the defendants must also be suppressed.

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5. The practical effect of the Court's rulings is to terminate the ability of the State to go forward with the cases against defendants ELMORE and OBRIEN.

DONE IN OPEN COURT this 14 day of February, 2014.

Ronald Culpepper
RONALD CULPEPPER, JUDGE

Presented by:

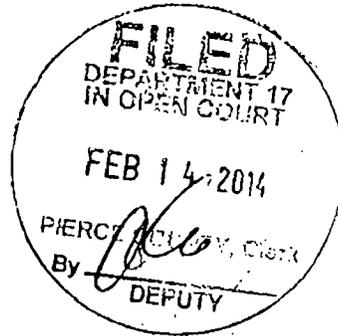
GREGORY L. GREER
Deputy Prosecuting Attorney
WSB# 22936

Approved as to Form:

VANNESSA MARTIN
Attorney for Defendant OBRIEN
WSB#

JOHN CAIN
Attorney for Defendant ELMORE
WSB#

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Angela Edwards

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>> <elmore obrien fof col 2.doc>

>

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78 2/20/2014 00022

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79 2/20/2014 00023

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Angela Edwards

From: John Cain [jcainjd11@comcast.net]
Sent: Thursday, February 13, 2014 6:19 PM
To: Angela Edwards
Cc: Vanessa C. Martin; Gregory Greer
Subject: Re: Have you had a chance to review ELMORE/OBRIEN FOF/COL I e-mailed to you yet ?

Perhaps if the court simply scratched out that there were no disputed facts the issues would be solved. In my version there was no statement that there were no disputed facts.
John

On Feb 13, 2014, at 3:32 PM, Angela Edwards <aedward@co.pierce.wa.us> wrote:

> Ok great. Will wait to hear from you tomorrow before end of workday.
> Thx.
>
> ANGELA EDWARDS | Judicial Assistant to Judge Ronald E. Culpepper | Pierce County Superior Court | Dept. #17 | 930 Tacoma Avenue South, Room 334, Tacoma, WA 98402 | Phone: (253) 798-6640 | Fax: (253) 798-7214 | Email: aedward@co.pierce.wa.us
>
> IMPORTANT: In order to avoid inappropriate ex parte contact, you are hereby directed to forward this communication to all other counsel/parties not already copied on this email.
>
> From: Vanessa C. Martin [<mailto:vanessamartinlaw@comcast.net>]
> Sent: Thursday, February 13, 2014 3:07 PM
> To: Angela Edwards
> Subject: Re: Have you had a chance to review ELMORE/OBRIEN FOF/COL I e-mailed to you yet ?
>
> I haven't yet. I'm so sorry. I've been swamped. I will this evening.
>
> Vanessa
> Law Offices of Vanessa C. Martin
> 1425 Broadway #412
> Seattle, WA 98122
> (206) 325-8792
> Fax: (206) 260-8999
> VanessaMartinLaw@comcast.net
>
> Sent from my iPhone
>
> On Feb 13, 2014, at 11:08 AM, Angela Edwards <aedward@co.pierce.wa.us> wrote:
>
>
>
> ANGELA EDWARDS | Judicial Assistant to Judge Ronald E. Culpepper | Pierce County Superior Court | Dept. #17 | 930 Tacoma Avenue South, Room 334, Tacoma, WA 98402 | Phone: (253) 798-6640 | Fax: (253) 798-7214 | Email: aedward@co.pierce.wa.us
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79 2/20/2014 00024

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78 2/20/2014 0000

Angela Edwards

From: Angela Edwards
Sent: Friday, February 14, 2014 4:19 PM
To: 'John Cain'
Cc: Vanessa C. Martin; Gregory Greer
Subject: RE: Have you had a chance to review ELMORE/OBRIEN FOF/COL I e-mailed to you yet?

The fof/col will be entered as drafted by Judge Culpepper. I will file them on Monday. I will also attach our e-mail communications.

ANGELA EDWARDS | Judicial Assistant to Judge Ronald E. Culpepper | Pierce County Superior Court | Dept. #17 | 930 Tacoma Avenue South, Room 334, Tacoma, WA 98402 | Phone: (253) 798-6640 | Fax: (253) 798-7214 | Email: aedward@co.pierce.wa.us

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-----Original Message-----

From: John Cain [<mailto:jcainjd11@comcast.net>]
Sent: Thursday, February 13, 2014 6:19 PM
To: Angela Edwards
Cc: Vanessa C. Martin; Gregory Greer
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> ANGELA EDWARDS | Judicial Assistant to Judge Ronald E. Culpepper | Pierce County Superior Court | Dept. #17 | 930 Tacoma Avenue South, Room 334, Tacoma, WA 98402 | Phone: (253) 798-6640 | Fax: (253) 798-7214 | Email: aedward@co.pierce.wa.us

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> **From:** Vanessa C. Martin [<mailto:vanessamartinlaw@comcast.net>]

> **Sent:** Thursday, February 13, 2014 3:07 PM

> **To:** Angela Edwards

> **Subject:** Re: Have you had a chance to review ELMORE/OBRIEN FOF/COL I e-mailed to you yet ?

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> Vanessa

> Law Offices of Vanessa C. Martin

> 1425 Broadway #412

> Seattle, WA 98122

> (206) 325-8792

> Fax: (206) 260-8999

> VanessaMartinLaw@comcast.net

>

> Sent from my iPhone

PIERCE COUNTY PROSECUTOR

March 27, 2014 - 3:14 PM

Transmittal Letter

Document Uploaded: 455315-Appellant's Brief.pdf

Case Name: State v. Michael Elmore & Ryan
O&&#35;39&#59;Brien

Court of Appeals Case Number: 45531-5

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Heather M Johnson - Email: hjohns2@co.pierce.wa.us

A copy of this document has been emailed to the following addresses:

vanessamartinlaw@comcast.net

SCCArtorney@yahoo.com