

No. 29313-1-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

DANIEL A. ROSS,

Defendant/Appellant.

Brief of Appellant

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A. ASSIGNMENT OF ERROR

The trial court erred in admitting into evidence recordings of telephone conversations between Mr. Ross and his wife.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Did the DOC investigator improperly record phone conversations between Mr. Ross and his wife and improperly provide CD's and phone logs of those recordings to a CPS worker in violation of RCW 9.73.030(1)(a) and RCW 9.73.095?

C. STATEMENT OF THE CASE

In 2008, a restraining order was entered between Mr. Ross and his wife, Karen. Child Protective Services (CPS) had also removed their child from their home. RP 3-4. Despite the restraining order, Karen set up a telephone account so Mr. Ross could call her from prison. RP 82. Karen told the CPS worker about Mr. Ross telephoning her after the CPS worker threatened to put her daughter up for adoption unless she stopped having contact with Mr. Ross. RP 81.

To ensure compliance with the no-contact provision, the CPS worker contacted a department of corrections (DOC) investigator and requested that he monitor and record any calls from Mr. Ross to his wife. RP 5. The CPS worker subsequently submitted a formal request. She

eventually received CD's of phone calls between Mr. Ross and his wife and a copy of the phone logs of those conversations, which she turned over to the police. RP 6, 48-49. Formal charges were subsequently filed against Mr. Ross. CP 1-3.

Mr. Ross moved to suppress the CD recordings, arguing the conversations were improperly recorded and the CD's were improperly released to the CPS worker. CP 4-11; RP 18-20. The Court denied the motion. RP 21-24. Mr. Ross was subsequently charged, tried and convicted by a jury of ten counts of violation of a restraining order. CP 39-40. This appeal followed. CP 51

D. ARGUMENT

The DOC investigator improperly recorded phone conversations between Mr. Ross and his wife and provided CD's and phone logs of those recordings to a CPS worker in violation of RCW 9.73.030(1)(a) and RCW 9.73.095.

Article I, section 7 of the Washington Constitution provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." State v. Archie, 148 Wn. App. 198, 201, 199

P.3d 1005 (2009).¹ Whether undisputed facts constitute a violation of that constitutional provision is a question of law appellate courts review de novo. State v. Rankin, 151 Wn.2d 689, 694, 92 P.3d 202 (2004). "Private affairs" are "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from government trespass." State v. Myrick, 102 Wn.2d 506, 510-11, 688 P.2d 151 (1984).

In determining whether a privacy interest merits article I, section 7 protection, our courts consider several central questions: whether the information obtained via the governmental trespass reveals "intimate or discrete" details of a person's life, what expectation of privacy a person has in the information sought, and whether there are historical protections afforded to the perceived interest. State v. Jorden, 160 Wn.2d 121, 126-27, 156 P.3d 893 (2007). Also relevant are the purpose for which the information is acquired and by whom it is kept. Id. The analysis is not limited to a subjective expectation of privacy in modern times with modern technology. City of Seattle v. McCready, 123 Wn.2d 260, 270,

¹ The Archie court noted that the law is settled that the privacy protections provided by article I, section 7 are qualitatively different from, and in some cases broader than, those provided by the Fourth Amendment. Archie, 148 Wn.App. at 201 (FN 3), 199 P.3d 1005 (citing City of Seattle v. McCready, 123 Wn.2d 260, 267, 868 P.2d 134 (1994) (citing State v. Gunwall, 106 Wn.2d 54, 65, 720 P.2d 808 (1986))). Consequently, it is unnecessary to engage in a Gunwall analysis to determine whether a claim under article I, section 7 warrants an inquiry on independent state grounds. Id. (citing McNabb v. Dept. of Corrections, 163 Wn.2d 393, 399-400, 180 P.3d 1257 (2008)).

868 P.2d 134 (1994). It also does not rest solely on the legitimacy of a subjective expectation of privacy. Myrick, 102 Wn.2d at 513, 688 P.2d 151.

Washington has a long history of extending strong protections to telephonic communications. Archie, 148 Wn. App. at 202, 199 P.3d 1005 (citing State v. Gunwall, 106 Wn.2d 54, 66, 720 P.2d 808 (1986)). The privacy act, chapter 9.73 RCW, prohibits intercepting or recording a private communication transmitted by telephone unless all parties to the communication consent. RCW 9.73.030(1)(a). A communication is private under the act when (1) the parties have a subjective expectation that it is private, and (2) that expectation is objectively reasonable. State v. Christensen, 153 Wn.2d 186, 193, 102 P.3d 789 (2004).

Clearly the Privacy Act is a legitimate evidentiary rule. Its purpose is straightforward: to preserve as private those communications intended to be private. State v. Baird, 83 Wn. App. 477, 483, 922 P.2d 157 (1996). Washington has recognized a strong policy of protecting the privacy of its citizens, and introduction of evidence obtained in violation of the statutes is prohibited. Id. (citing State v. Clark, 129 Wn.2d 211, 222, 916 P.2d 384 (1996); Peninsula Counseling Center v. Rahm, 105 Wn.2d 929, 933-35, 719 P.2d 926 (1986)).

Any information obtained in violation of RCW 9.73.030 is inadmissible in any civil or criminal case. RCW 9.73.050. The purpose underlying these statutes is to protect privacy and prevent dissemination of illegally obtained information. State v. Fjermestad, 114 Wn.2d 828, 834, 791 P.2d 897 (1990); State v. Flora, 68 Wn. App. 802, 807, 845 P.2d 1355 (1992). These strong protections do not, however, invariably apply in detention settings. Archie, 148 Wn. App. at, 202, 199 P.3d 1005

Telephone calls from inmates in state correctional facilities may be intercepted, recorded, or divulged by the department of corrections, provided that the department of corrections adheres to the certain procedures and restrictions. Archie, 148 Wn. App. at 202, 199 P.3d 1005. One of these restrictions is that calls be operator announcement type calls, in which the recipient is notified that the call is from a prison inmate and will be recorded and may be monitored. Archie, 148 Wn. App. at 203, 199 P.3d 1005; RCW 9.73.095(2)(b).

In State v. Modica, 164 Wn.2d 83, 186 P.3d 1062 (2008), the Washington Supreme Court held that recording a jail inmate's calls to his grandmother did not violate the privacy act, where signs were posted near the telephones warning that calls would be recorded, a message informed both Modica and his grandmother that the call would be recorded, and the

grandmother was required to press three in order to accept the call.

Modica, 164 Wn.2d at 88, 186 P.3d 1062. The court concluded that any subjective expectation of privacy was not objectively reasonable under these circumstances. Id. However, even if the State is able to show the presence of one or more of these factors, recording the phone conversations may still violate the privacy act as the Modica Court warned:

[W]e caution that we have not held, and do not hold today, that a conversation is not private simply because the participants know it will or might be recorded or intercepted. Intercepting or recording telephone calls violates the privacy act except under narrow circumstances, and we will generally presume that conversations between two parties are intended to be private. Signs 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, 186 P.3d 1062.

The Modica dissent went even further:

Clearly, conversations between a man and his grandmother are intended to be private. Like the conversations at issue in State v. Faford, 128 Wash.2d 476, 910 P.2d 447 (1996), Modica's conversations with his grandmother were intended to remain confidential. The conversations were not "inconsequential, nonincriminating telephone conversation[s] with a stranger," which the court has held "lacked the expectation of privacy necessary to trigger the privacy act." Id. at 484-85, 910 P.2d 447 (citations omitted) That Modica and his grandmother knew the call may be monitored does not make Modica's expectation that the conversation was private unreasonable. As we have previously stated, "[t]he mere possibility that interception of the communication is technologically feasible does not render public a

communication that is otherwise private." State v. Townsend, 147 Wash.2d 666, 674, 57 P.3d 255 (2002)

Modica, 164 Wn.2d at 92-93, 186 P.3d 1062 (Sanders, J., dissenting).

Here, the conversations at issue were between a husband and wife. As in Modica, they were intended to be private communications. The fact that the parties knew the calls might be monitored does not render the expectation of privacy unreasonable. Therefore, the recordings should not have been admitted.

A second restriction under RCW 9.73.095 provides how and when recorded calls from inmates may be divulged by the department of corrections:

The department of corrections shall adhere to the following procedures and restrictions when intercepting, recording, or divulging any telephone calls from an offender or resident of a state correctional facility as provided for by this section . . . :

The contents of any intercepted and recorded conversation shall be divulged only as is necessary to safeguard the orderly operation of the correctional facility, in response to a court order, or in the prosecution or investigation of any crime.

RCW 9.73.095(3)(b).

Herein, there was no evidence that divulgence of the phone calls by DOC was necessary to safeguard the orderly operation of the correctional facility. Likewise, the divulgence was not in response to a court order.

The only remaining justification for divulging the contents of the recorded phone calls would be for the prosecution or investigation of a crime.

But criminal prosecutions or investigation implicitly involves law enforcement agencies, not social workers. The DOC investigator violated the provisions of RCW 9.73.095(3)(b) by providing copies of the CD's and phone logs to the CPS worker rather than law enforcement.

Therefore, for this additional reason, the recordings should not have been admitted.

E. CONCLUSION

For the reasons stated, the convictions should be reversed.

Respectfully submitted April 25, 2011.



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