

FILED

AUG 01 2011

**COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____**

NO. 293131

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

DANIEL ANTHONY-NORRIS ROSS

Petitioner.

BRIEF OF RESPONDENT

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RESPONSE TO APPELLANT'S ASSIGNMENT OF ERROR

- I. The trial court did not err by admitting into evidence the recorded telephone conversations between Daniel Ross and Karen Ross where there was no violation of the Washington State Privacy Act.**

- II. There was no Constitutional error in recording and using the telephone conversations from the prison.**

STATEMENT OF FACTS¹

Daniel Ross and Karen Ross were married in September 2007. (RP 74) Their relationship was characterized as violent and unsafe. (RP 75) CPS ended up involved with the family, and Marti Miller, the caseworker for CPS tried to work with both parents to figure out the best plan for the child. (RP 61) Mr. Ross ended up with several convictions for violating no contact orders against Karen. (RP 55-58) Ms. Miller testified that among her duties as a child protective services investigator she was to investigate child protective referrals, which often includes assisting officers with investigation of crimes. (RP 2) Besides her Bachelor and Masters degrees, Ms. Miller had to have mandatory training in investigation with Children and Family Services. (RP 2-3) She was aware of the existing no contact order prohibiting Mr. Ross from contacting Karen, and aware that by Fall of 2008, Mr. Ross had been sent to prison. (RP 4)

¹The Report of Proceedings encompasses both the pre-trial hearing, at which the admissibility of the phone conversations was the issue, and the trial where the recordings were played. The Statement of Facts pulls from both, as did defendant's brief, so that the Court has a full and complete picture of the facts. Pages 1 through 24 were from the Pre-trial hearing.

Ms. Miller then worked with Karen, and one of the stipulations for reunification with the child, who had been removed from the home, was that Karen Ross not have contact with Mr. Ross from prison or anywhere. (RP 3) When Ms. Miller found out from Karen that she was still in contact with Daniel, in violation of Daniel's No Contact order, she contacted the Department of Corrections to see if they could monitor or stop future contact. (RP 4) She eventually reached Jeffery Ellison, who was a Correctional Investigator at the Washington State Department of Corrections. (RP 5) He has been an investigator for over six years. (RP 39)

Mr. Ellison is responsible for monitoring the behaviors of offenders in the DOC system, looking for criminal behavior. (RP 39) He testified that his office is in charge of the phone system. (RP 42) All offenders in the DOC system come to his center in Shelton to be processed before they are sent out to the rest of the facilities. (RP 40) Mr. Ross was at Shelton. (RP 40) After receiving the call from Ms. Miller, he verified that there was a no contact order prohibiting Mr. Ross from having contact with Karen Ross. (RP 41) Mr. Ellison then did locate telephone calls to Karen Ross from the phone system, though they appeared to have been made deceptively by using another offender's pin number. (RP 43) Mr. Ellison investigated further to see if it was in fact Mr. Ross, instead of the other inmate making the calls. (RP 44) He was able to determine that it

appeared to be Mr. Ross instead of the other inmate making the calls. (RP 44)

Mr. Ellison provided a phone system written record showing the date and time and duration of the phone calls. (RP 45) Ms. Miller requested copies of the phone calls so that she could verify who the parties were and then turn it over to law enforcement for criminal investigation. (RP 66-67) She specifically told Mr. Ellison she would be forwarding it to the appropriate police department for potential criminal charges. (RP 5)

Mr. Ellison downloaded the calls between Daniel and Karen Ross to a disk. (RP 48) He indicated that he investigates to see if inmates are doing what they are not supposed to be doing, so he can do disciplinary action. (RP 51) He testified that he does not release phone calls to anyone outside of law enforcement or other state agencies who are working on cases of criminal activity. (RP 52) He verified that Ms. Miller was explicitly seeking the calls for prosecuting Mr. Ross for violating no contact orders. (RP 52-53) He sent the calls to Marty Miller for the purpose of possible prosecution of the crime. (RP 49)

Ms. Miller received the cd, verified the voices, and contacted the Ellensburg Police Department, who assigned Detective Jason Brunk to take over the investigation. (RP 67) Mr. Ellison was also in contact with Detective Brunk on the investigation. (RP 50)

Detective Brunk testified that he received some cds from Ms. Miller and began his

investigation of the no contact order violation. (RP 9, 89) He said he had worked on a criminal case previously regarding the family, and had worked hand in hand with Ms. Miller on it, so he wasn't surprised to get additional cd's. (RP 10) Detective Brunk also was familiar with the no contact order, and verified it was still in place, so he listened to the calls to determine if criminal violations had occurred. (RP 10-12) He recognized the voices, and he listened to enough of the content (referencing their daughter and being married, etc.) to be sure he could identify the defendant even without voice recognition, so there wouldn't be any question, and there would be strong evidence that it was Daniel Ross speaking with Karen Ross. (RP 92-93) In fact, Detective Brunk also had some correspondence with Mr. Ellison to get another copy of the cd so he could get it to the prosecutor's office for the case. (RP 94) Mr. Ross was charged with 10 counts of Felony Violation of a No Contact Order, occurring in November and December of 2008. (CP 1-3)

There was also testimony about the calls themselves. Mr. Ellison and Detective Brunk both testified that each call began with a recording advising the parties that the call was being recorded and monitored, and offering the receiving party the option of accepting or not accepting the phone call. (RP 11, 42) Karen Ross also testified that sometimes she

would accept the call and sometimes she wouldn't. (RP 79) She had assisted Daniel in setting up the account so he could call her. She said she understood he used another inmate's DOC number to hopefully make it look like it was somebody else calling her number. (RP 77-78) Sometimes he had another inmate who would say his name into the phone so Daniel Ross wouldn't have to. (RP 79)

Karen was divorced from Daniel by Spring of 2009. (RP 81)

The calls were played for the jury several times, and Ms. Miller and Karen Ross identified the voices of Daniel and Karen Ross for the jury. (RP 67-70, 79-81)

Mr. Ross was convicted of 10 counts of felony violation of a no contact order. (CP 39-40)

ARGUMENT

- I. The trial court did not err by admitting into evidence the recorded telephone conversations between Daniel Ross and Karen Ross where there was no violation of the Washington State Privacy Act.**

RCW Title 9, Chapter 73 codifies the laws regarding the interception of

communications in Washington State. RCW 9.73.030 specifically discusses recording of conversations. Subsection (1) provides that private communications should not be recorded or intercepted without consent of all parties. The statute also provides that when one party has announced that the conversation is being recorded, that consent is considered obtained. See RCW 9.73.030(3). Other subsections of the statute and subsequent statutes give exceptions to the above rules. RCW 9.73.050 directs that any information in violation of 9.73.030 is inadmissible in any civil or criminal case in all courts of general or limited jurisdiction in this state (with exceptions that don't apply).

But RCW 9.73.095 explicitly holds as follows:

“(1) RCW 9.73.030 through 9.73.080 and 9.73.260 shall not apply to employees of the department of corrections in the following instances: Intercepting, recording, or divulging any telephone calls from an offender or resident of a state correctional facility; or intercepting, recording, or divulging any monitored nontelephonic conversations in offender living units, cells, rooms, dormitories, and common spaces where offenders may be present. For the purposes of this section, "state correctional facility" means a facility that is under the control and authority of the department of corrections, and used for the incarceration, treatment, or rehabilitation of convicted felons.”

RCW 9.73.095(1)

Thus, the statutes prohibiting the recording of conversations and also the statute prohibiting using the information in other court cases simply do not apply to this

situation. Mr. Ross was incarcerated in a DOC state correctional facility at Shelton. (RP 40) DOC state correctional facilities are exempted from the Privacy Act requirements.

In *State v. Modica*, 164 Wn.2d. 83 (2008), the Washington Supreme Court held that even jail conversations, where the parties were told it was being recorded, do not fall under the Privacy Act. Specifically, the Court held, “However, 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.” *Modica* at 89. Even the dissent in *Modica*, which felt that the jail conversations shouldn’t be exempted from the Privacy Act, made the following argument: “...we must hold the legislature, in excluding state prisons from the privacy act, intended to include other correctional facilities.” *Modica* at 93 It was accepted from the beginning that State Correctional Facilities are simply not governed under the Washington Privacy Act.

Moreover, there was no violation of the rules for State facilities, set out in RCW 9.73.095. The strictures of RCW 9.73.095 (2)(b) were followed:

“(b) The calls shall be "operator announcement" type calls. The operator shall notify the receiver of the call that the call is coming from a prison offender, and that it will be recorded and may be monitored.” RCW 9.73.095(2) (b)

The calls all had the recorded warning played in the beginning that they were being recorded. (RP 42, 11) They all then had the ability for the party receiving the call to opt out of the call and decline the call. (RP 11, 46-47, 78) In each of the calls charged in the information, Ms. Ross accepted the call. (RP 79-81) Under this statute and under the general rules of the privacy act, there was no reasonable expectation of privacy in the calls.

It is not reasonable to say, as defense implies, that *Modica* somehow suggests that because the conversations were between husband and wife, that there was a reasonable expectation of privacy, when the telephone system warned them that they were being recorded. The Court in *Modica* was merely careful to restrict its holding to incarceration situations. Mr. Ross was incarcerated. Even if RCW 9.73.095 had not exempted DOC facilities out, the policy considerations of *Modica* would hold true for Ross as well.

There was also no violation of the sharing provisions of RCW 9.73.095. The statute directs the Department of Corrections:

“(3) 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...

(b) 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)

In this case, the conversation was divulged because its very existence was a crime. It was a Violation of a No Contact Order for Daniel Ross to telephone Karen Ross, even if she accepted the calls or assisted him. See RCW 26.50.110. It is part of safeguarding the orderly operation of the correctional facility not to allow crimes to be committed from its very walls.

And the disks were also divulged to Ms. Miller and to Detective Brunk for the very purpose of prosecution or investigation of a crime. The argument that the disks should not have been sent first to Ms. Miller because she was not a commissioned law enforcement officer is not well taken. The statute does not specifically hold that the contents of conversations may only be released to commissioned law enforcement officers. If the legislature had meant this, they would have said so. The Department of Corrections employee, Mr. Ellison, clearly recognized that all kinds of state agents are engaged in the investigation of crimes, including, at times, CPS caseworkers. Mr. Ellison

expressly stated that he would only release the phone calls to, “law enforcement or another state agency depending on the case they’re working on, if it’s criminal activity.” Marty Miller expressly stated on the record that part of her duties involves assisting law enforcement officers with criminal investigations. (RP 2) And Detective Brunk of the Ellensburg Police indicated that he had worked on criminal investigations with Ms. Miller, “hand in hand.” (RP 10) The records were expressly sought for the investigation of crimes, and indeed, were turned over to the police for that investigation. Thus, the statute was not violated in any way.

It is worth noting also that DOC personnel are mandatory reporters under RCW 26.44.030, and they are trained to work with both the Department of Social and Health Services caseworkers and law enforcement when, as here, there is a child involved. The fact that the child might possibly be returned to her home while Mr. Ross was still in contact with the mother was an ongoing situation, meriting the attention of the CPS caseworker, and giving the caseworker a legitimate role in the detection, investigation, and prosecution of this crime.

Even if there were a violation of this statute, the remedy would not be suppression of the evidence. That remedy is announced in RCW 9.73.050, but again, RCW 9.73.095 is expressly exempted from the operation of 9.73.050.

II. There was no Constitutional error in recording and using the telephone conversations from the prison.

There was no infringement of any Constitutional rights in the recording and sharing of the phone calls for law enforcement purposes. *State v. Campbell*, 103 Wn.2d 1 (1984) holds that inmates have a reduced expectation of privacy. In both *State v. Modica, supra.*, and *State v. Archie*, 148 Wn.App. 198 (2009), Courts have held that the recording of calls in jail (and by extension, in prison), did not violate the privacy act or the Constitution. *Archie* holds, in relevant part,

“The Washington State Supreme Court has recognized the need for monitoring inmate communications, and has found no invasion of privacy when other forms of inmate communications are inspected so long as inmates have been informed of that likelihood. “For very obvious security reasons, practically every jail and penal institution examines the letters and packages, incoming and outgoing of all inmates.” Moreover, prison

regulations prohibit incoming or outgoing mail when the correspondent is an individual with whom contact is restricted by court order.” *Archie* at 204, citing *State v. Hawkins*, 70 Wn.2d 697 (1967) and WAC 137-48-040(1)(g)

The court further holds, “Maintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees.” *Archie* at 204, citing *Bell v. Wolfish*, 441 U.S. 520 at 547, 99 S.Ct. 1861 (1979)

As the court did in *Archie*, if one balances the circumstances here against the privacy protection usually applied to telephone communications, these calls, which are in and of themselves unlawful, are not private affairs deserving of Article 1, Section 7 protection.

Moreover, as in *Archie*, one party to the recording clearly consented to the recording by accepting the telephone call after being warned of the recording. Under *State v. Corliss*, 123 Wn. 2d 656 (1994), the recordings did not violate Article I, Section 7 where one party consented. Thus there was no constitutional claim.

CONCLUSION

Since the calls were recorded from a DOC correctional facility, the Washington State Privacy Act, RCW 9.73 restrictions against recording private conversations do not apply. The rules for the Department of Corrections were complied with, since the recordings contained announcements at the beginning that the conversations were being recorded. It was also not a violation of the statute to turn over the calls to the investigator from CPS who wanted the evidence to work with the police on the investigation of the crime of Violation of a No Contact Order.

No Constitutional Rights were violated and the defendant had no legitimate expectation of privacy where the calls were originating from prison, there was a warning on each call that it would be recorded, and where one person, the recipient consented to the recording by accepting the call under those conditions.

Respectfully submitted,



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