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Court of Appeals
Division III
State of Washington

No. 32623-3-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent/Cross-Appellant,

vs.

STEPHEN R. SANDBERG,

Defendant/Appellant/Cross-Respondent.

Brief of Cross-Respondent

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A. RESPONDENT’S CROSS-APPEAL ISSUES

1. Did the court correctly conclude the recorded conversation was private when there was a third party present, the defendant and officers were strangers to one another, the defendant was unaware of the illegality of the subject matter of the conversation and the subject matter was illegal?

2. Did the court err in failing to find a good faith exception to the privacy act when the officers came to a natural [sic] magistrate for authorization rather than a supervisory officer?

B. APPELLANT’S STATEMENT OF THE ISSUES

1. Since the trial court heard testimony, assessed the credibility or competency of witnesses, weighed the evidence, and reconciled conflicting evidence, is the standard of review the substantial evidence standard and not de novo?

2. Should the trial court’s findings and conclusions stand where they are supported by substantial evidence?

3. Does the exception to the general exclusionary rule of RCW 9.73.050 provided in RCW 9.73.230(8) apply where the recording was not made pursuant to an attempted RCW 9.73.230 authorization?

C. STATEMENT OF THE CASE

The statement of the case is set forth in the initial briefs.

Additional pertinent facts will be included in the argument.

D. ARGUMENT

1. The standard of review is the substantial evidence standard, not de novo, because the trial court heard testimony, assessed the credibility or competency of witnesses, weighed the evidence, and reconciled conflicting evidence.

“The protections of the privacy act apply to private communications or conversations. This court has repeatedly observed that ‘[w]hether a particular conversation is private is a question of fact, but where the facts are undisputed and reasonable minds could not differ, the issue may be determined as a matter of law.’ Questions of law are reviewed de novo.” *State v. Kipp*, 179 Wn.2d 718, 726, 317 P.3d 1029, (2014) (internal citations omitted). The State cites this quote as authority to conclude the appropriate standard of review in this case is de novo. State’s Brief p. 7. This conclusion is incorrect.

After that initial statement, the *Kip* court went on to say:

“[W]here ... the trial court has not seen nor heard testimony requiring it to assess the credibility or competency of witnesses, and to weigh the evidence, nor reconcile conflicting evidence, then on appeal a court of review stands in the same position as the trial court in looking at the facts of the case and should review the

record de novo.” [W]here the trial court's findings stem exclusively from the stipulation and attached standards rather than from the testimony of witnesses, this court is not bound by the findings.

Kipp, 179 Wn.2d at 727.

Here, the trial court heard testimony from two police officers, heard argument from counsel, asked questions of counsel, and considered the three factors enunciated in *State v. Clark*, 129 Wn.2d 211, 225-27, 916 P.2d 384 (1996)¹ before concluding the defendant had a reasonable subjective expectation of privacy. 10/23/13 RP 15-43; CP 102-03.

Therefore, the appropriate standard of review is the substantial evidence standard. Under this standard of review, the appellate court reviews factual findings on a motion to suppress for whether substantial evidence supports them, and if so, whether they support the trial court's conclusions of law. *State v. Fowler*, 127 Wn. App. 676, 682, 111 P.3d 1264 (2005); *State v. Cole*, 122 Wn. App. 319, 322–23, 93 P.3d 209 (2004).

2. The trial court’s findings and conclusions should stand because they are supported by substantial evidence.

To determine whether a particular conversation is private, a court should look to the subjective intentions of the parties to the conversation. *Clark*, 129 Wn.2d at 225, 916 P.2d 384. However, because most

defendants would contend their conversations are private, a court should also look to factors bearing on the reasonable expectations and intent of the parties. *Id.* In *Clark*, the Supreme Court identified three factors bearing on the reasonable expectations and intent of the parties: (1) duration and subject matter of the conversation, (2) location of conversation and presence or potential presence of a third party, and (3) role of the nonconsenting party and his or her relationship to the consenting party. *Id.* at 225–27.

Here, the State assigned error to the following mixed finding of fact and conclusion of law in the trial court's written decision:

[T]he duration and subject matter of the conversation, that is illegal activity, the location of the conversation, the Defendant's private property, the nature and relationship of the persons present at the conversation and their relationship to the consenting party all indicate the Defendant had a reasonable subjective expectation of privacy.

CP 102-103. State's Brief, p. 9.

The State first argues this was not a private conversation because there was a third party present, the CI, and this factor alone almost conclusively defeats the contention that this was a private conversation. The presence of a third party is only part of the second factor enunciated in *Clark*. That factor also includes the location of the conversation, which in

¹ Discussed *infra*.

this case was undisputedly the defendant's private property. *Clark* at 225–27. That fact would weigh in favor of a reasonable expectation of privacy.

Moreover, it was clearly the intent of the *Clark* Court that the presence of a third party be considered in conjunction with the location of the conversation. The *Clark* Court cited as an example a person has no reasonable expectation of privacy in a conversation that takes place at a club meeting where one who attended could reveal what transpired to others. *Id.* at 226, citing *State v. Slemmer*, 48 Wn. App. 48, 53, 738 P.2d 281 (1987). Similarly, a conversation on a public thoroughfare in the presence of a third party and within the sight and hearing of passersby is not private. *Id.* citing *State v. Flora*, 68 Wn. App. 802, 806, 845 P.2d 1355 (1992).

In both these examples, the location of the conversation being a more public setting is more critical than the mere presence of a third party in determining whether the conversation is private.

Here, the State's argument focuses solely on the presence of a third party without taking into account the location of the conversation, which in this case was the defendant's private residence. As such, it is an incorrect legal analysis of the second *Clark* factor. On the other hand, the trial court correctly considered the location being Mr. Sandberg's private

residence. The Court's finding is undisputed and amply supported by substantial evidence from the testimony presented. See 10/23/13 RP 21-23.

Next, the state argues "the defendant and officers were strangers to one another", thus lessening the reasonable privacy expectation of the conversation. State's Brief pp 1, 10. This is an incorrect statement, as well as an erroneous conclusion. Mr. Sandberg and the CI, Thomas Hanson, had known one another and been friends for ten years. In fact Hanson had worked for Mr. Sandberg. RP 131-35. Hansen introduced Detective Lloyd, who was undercover, to Mr. Sandberg and Lloyd portrayed himself as a friend of Hansen. 10/23/13 RP 22, 27. During the recorded conversation the Hansen can be heard advising Mr. Sandberg that Detective Lloyd's wife, just like the Hansen's wife, had a medical marijuana card. Hansen and Detective Lloyd asked Mr. Sandberg for some marijuana for one of their wives claiming she was ill. CP 205. These facts would tend to heighten not lessen a reasonable expectation of privacy on the part of Mr. Sandberg.

Finally, the State takes issue with the trial court's finding that the nature of the conversation was illegal activity. The State argued that since Mr. Sandberg later maintained his actions were legal, the nature of the

recorded conversation was not about illegal activity. State's Brief, p. 10.

It is true Mr. Sandberg made subsequent assertions to the arresting officers and argued to the court that his activities were legal under the medical marijuana statute. However, these later assertions do not necessarily mean he thought selling marijuana to the undercover officer was legal at the time of the recorded conversation.

In fact, the evidence would suggest otherwise. Evidence at trial showed Mr. Sandberg was aware that as a designated provider he needed to have the patient's medical marijuana card on the premises. Thomas Hanson testified Mr. Sandberg had asked him for his wife's card. RP 130. In addition, Mr. Sandberg's son testified his father called and asked him to bring him a medical marijuana card when the police executed the search warrant. RP 151. Furthermore, the recorded conversation revealed that Mr. Sandberg provided medical marijuana for the CI'S wife and that Mr. Sandberg had been asking the CI for his wife's medical marijuana card. CP 205. Detective Chris Lloyd was also present when this conversation was recorded. 10/23/13 RP 21-22. During the recorded conversation the CI can be heard advising Mr. Sandberg that Detective Lloyd's wife, just like the CI' S wife, had a medical marijuana card. The CI and Detective Lloyd asked Mr. Sandberg for some marijuana for one of their wives

claiming she was ill. CP 205. Mr. Sandberg then sold marijuana to Detective Lloyd. 10/23/13 RP 23.

It is undisputed from this evidence that Mr. Sandberg did not have a medical marijuana card for Detective Lloyd's wife when he sold marijuana to Detective Lloyd and that Mr. Sandberg knew he was required to have that card for the transaction to be legal under the medical marijuana statute. Thus, substantial evidence supports the trial court's finding that the nature of the conversation was illegal activity.

In summation, the Court's findings, to which the State assigned error, are supported by substantial evidence. The State does not dispute the other findings. Therefore, the trial court's findings and conclusion that the conversation was private should stand.

3. The exception to the general exclusionary rule of RCW 9.73.050 provided in RCW 9.73.230(8) does not apply because the recording in this case was not made pursuant to an attempted RCW 9.73.230 authorization.

RCW 9.73.230 permits law enforcement agencies to self-authorize the interception or recording of conversations relating to controlled substances. To obtain a valid authorization, the agency's chief officer or designee is required to complete a written report which includes the names

of the officers authorized to intercept or record the conversation. RCW

9.73.230(2)(c). This section also contains the provision at issue here:

In any subsequent judicial proceeding, evidence obtained through the interception or recording of a conversation or communication pursuant to this section shall be admissible only if: (a) The court finds that the requirements of subsection (1) of this section were met Nothing in this subsection bars the admission of testimony of a party or eyewitness to the intercepted, transmitted, or recorded conversation or communication when that testimony is unaided by information obtained solely by violation of RCW 9.73.030.

RCW 9.73.230(8).

In *State v. Jimenez* the Court held that where law enforcement officers make a genuine effort to comply with the privacy act and intercept a private conversation *pursuant to an RCW 9.73.230 authorization*, the admissibility of any information obtained is governed by the specific provisions of RCW 9.73.230(8). *State v. Jimenez*, 128 Wn.2d 720, 726, 911 P.2d 1337 (1996) (emphasis added). The State argues this holding should apply to the present case.

This argument fails for the reason stated in the trial court's written decision: The recording in this case was not made pursuant to an attempted RCW 9.73.230 authorization. CP 103. The recording was

instead obtained by judicial authorization under RCW 9.73.130.² There is no provision similar to RCW 9.73.230(8) in RCW 9.73.130 that creates an exception to the general exclusionary rule of RCW 9.73.050. RCW 9.73.050 provides:

² RCW 9.73.130 provides: Each application for an authorization to record communications or conversations pursuant to RCW 9.73.090 as now or hereafter amended shall be made in writing upon oath or affirmation and shall state:

- (1) The authority of the applicant to make such application;
- (2) The identity and qualifications of the investigative or law enforcement officers or agency for whom the authority to record a communication or conversation is sought and the identity of whoever authorized the application;
- (3) A particular statement of the facts relied upon by the applicant to justify his or her belief that an authorization should be issued, including:
 - (a) The identity of the particular person, if known, committing the offense and whose communications or conversations are to be recorded;
 - (b) The details as to the particular offense that has been, is being, or is about to be committed;
 - (c) The particular type of communication or conversation to be recorded and a showing that there is probable cause to believe such communication will be communicated on the wire communication facility involved or at the particular place where the oral communication is to be recorded;
 - (d) The character and location of the particular wire communication facilities involved or the particular place where the oral communication is to be recorded;
 - (e) A statement of the period of time for which the recording is required to be maintained, if the character of the investigation is such that the authorization for recording should not automatically terminate when the described type of communication or conversation has been first obtained, a particular statement of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;
 - (f) A particular statement of facts showing that other normal investigative procedures with respect to the offense have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ;
- (4) Where the application is for the renewal or extension of an authorization, a particular statement of facts showing the results thus far obtained from the recording, or a reasonable explanation of the failure to obtain such results;
- (5) A complete statement of the facts concerning all previous applications, known to the individual authorizing and to the individual making the application, made to any court for authorization to record a wire or oral communication involving any of the same facilities or places specified in the application or involving any person whose communication is to be intercepted, and the action taken by the court on each application; and
- (6) Such additional testimony or documentary evidence in support of the application as the judge may require.

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.

In *State v. Fjermestad* the Court held that when an officer knowingly transmits a private conversation, without court authorization or without the consent of all the parties, any evidence obtained, including simultaneous visual observation and assertive gestures, is inadmissible in a criminal trial under RCW 9.73.050. *State v. Fjermestad*, 114 Wn.2d 828, 836, 791 P.2d 897 (1990). The Supreme Court reached a similar conclusion in *State v. Salinas*, 121 Wn.2d 689, 853 P.2d 439 (1993). *Jimenez* did not overrule *Fjermestad* and *Salinas*. *Jimenez*, 128 Wn.2d at 726. Instead, the *Jimenez* Court noted that *Fjermestad* and *Salinas* may be distinguished by the absence of any attempt by the investigating officers to comply with RCW 9.73.230. *Id.*

Since the recording in this case was not made pursuant to an attempted RCW 9.73.230 authorization, RCW 9.73.230(8) does not apply and the general exclusionary rule of RCW 9.73.050 controls pursuant to *Fjermestad* and *Salinas*. The trial court correctly suppressed the evidence.

E. CONCLUSION

For the reasons stated, the trial court's ruling suppressing the evidence should be affirmed.

Respectfully submitted March 21, 2016,

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PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on March 21, 2016, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or e-mailed by prior agreement (as indicated), a true and correct copy of the brief of cross-respondent:

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