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April 19, 2016  
Court of Appeals  
Division III  
State of Washington

NO. 32623-3-III

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COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION III

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STATE OF WASHINGTON,

Respondent –  
Cross-Appellant,

v.

STEPHEN ROY SANDBERG,

Appellant –  
Cross-Respondent.

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REPLY BRIEF OF  
RESPONDENT – CROSS-APPELLANT

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## **I. ADDITIONAL STATEMENT OF THE CASE**

At trial Mr. Sandberg asserted an ignorance of the law defense. The trial judge disallowed this defense. Mr. Sandberg was extremely upset by this and berated the judge. Verbatim transcript of proceedings from electronic recording by Kenneth C. Beck (2RP) at 76-78. His testimony included several statements indicating he was unaware of the illegal nature of his activities. RP 445-476.

## **II. ARGUMENT**

### **A. Sandberg relies on impermissible evidence to conclude that sufficient evidence supports the finding that he knew his actions were illegal.**

The Appellate Court is reviewing the lower court's decision in the 3.6 hearing. Sandberg relies on statements in the trial and in the recording of the conversation to rebut that argument. However, all the trial judge had in front of him when he made that decision was the evidence provided in the 3.6 hearing. Mr. Sandberg chose not to testify in the 3.6 hearing. The officer's statement in the police report was that Mr. Sandberg did not know his actions were illegal. That is all that was before the trial court.

The statement in the recording is inadmissible if it is private, therefore it cannot not support Sandberg's contention that the conversation was private. "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.” There are two exceptions to this rule, in a suit for damages against the person making the recording or in a national security case. RCW 9.73.050. Neither of these apply here. ER 1101(c) provides that the rules of evidence do not apply at a 3.6 hearing. However, RCW 9.73.050 is a statute, not a rule of evidence, and provides a blanket prohibition on the use of the recording. Thus the recording is inadmissible in the 3.6 hearing.

The plain language of the Statute creates something of a catch 22, where the court cannot use the recording to determine whether the recording is inadmissible. However, here the court can use the circumstances surrounding the statement that was in evidence at the 3.6 hearing. The only admissible evidence regarding Sandberg’s knowledge of the illegal nature of his transaction is his statement that what he was doing was not illegal. CP 30, 33.

Even if the court considers the recording and Mr. Sandberg’s testimony at trial, there is still not substantial evidence to show he knew what he was doing was illegal. It is clear that Mr. Sandberg knew that the buyer had to possess a medical marijuana card. It does not follow that Mr. Sandberg thought that he had to see the medical marijuana card in order to sell. Indeed, this assumption is somewhat backed up by the RCW, which

allows presentation of cards after the fact in some scenarios to establish an affirmative defense. RCW 69.51A.043(2). Given Sandberg's rather loose familiarity with the laws, this is a reasonable conclusion. During his testimony he talked about all the people he planned to get medical marijuana cards from to set up his garden. RP 445-48. His apparent knowledge of what he could do was simply word of mouth. RP 451. He acknowledged that he was depending on a medical marijuana card he had not seen in setting up his garden. RP 447. When expressly asked "did you ever think you were violating any laws" Mr. Sandberg replied "I did not." RP 475-76. He claimed that "it was perfectly legal in Maple Valley. You could go and do it there." RP 476.

During Mr. Sandberg's statement at the sentencing hearing Mr. Sandberg vehemently chastised the judge for not allowing him to present the defense that he did not know what he was doing was illegal to the jury. Verbatim transcript of proceedings from electronic recording by Kenneth C. Beck (2RP) at 76-78. Mr. Sandberg tries to use inferences that are not there to establish substantial evidence to support the trial judge's findings. He ignores the overwhelming direct evidence, testified to by Mr. Sandberg himself that he did not know what he was doing was illegal, and there is no evidence to support the court's finding that Mr. Sandberg's conversation was private because he knew it was illegal.

In addition Mr. Sandberg does not address the State's other argument, that illegal conversations are not something that society is prepared to recognize an interest in. A lack of response concedes the issue. *State v. Ward*, 125 Wn. App. 138, 143-44, 104 P.3d 61 (2005). Even the privacy act acknowledges that illegal conversations are not subject to its ambit by excluding conversations that exclude threats of extortion, blackmail, bodily harm or other unlawful requests or demands. RCW 9.73.030.

**B. The proper standard of review is de novo.**

Aside from whether the trial court properly concluded that Mr. Sandberg knew his conversation was illegal, there were no disputed facts. Even this is not really a disputed fact; it is a dispute about what inference can be drawn from the facts in evidence. Mr. Sandberg did not testify at the 3.6 hearing. He stipulated to the officers' reports and warrant affidavits. CP 7-8. The only testimony was from the officers whose reports Mr. Sandberg stipulated to. The court never weighed his credibility against the officers and decided one was more credible than the other. Mr. Sandberg never said "I thought this was a private conversation" requiring the court to weigh its credibility. The arguments of counsel do not go to whether the court considered credibility or not. "Where the record consists only of affidavits, memoranda of law, other documentary

evidence, and where the trial court has not seen or heard testimony *requiring it to assess the witnesses' credibility or competency*, we ... stand in the same position as the trial court." *Doe v. Washington State Patrol*, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d\_\_\_ (2016) (Slip op at 5)(emphasis added).

In this case Mr. Sandberg accepted the testimony of the officers and their reports, submitting them with his briefs. There were no disputed facts, no credibility to weigh. All parties took the officers' testimony at face value, leaving no credibility to weigh. The appellate court sits in the same position as the trial court in reviewing the evidence. The appropriate standard of review is de novo.

**C. Not all factors in the analysis of a privacy act issue are created equal.**

The reason the State focuses on the presence of a third party as defeating a privacy act claim is because the courts have focused on it. "In general, the presence of another person during the conversation means that the matter is neither secret nor confidential." *State v. Modica*, 136 Wn. App. 434, 447-48, 149 P.3d 446 (2006) (*affirm'd by* 164 Wn.2d 83, 186 P.3d 1062 (2008)), citing *State v. Clark*, 129 Wn.2d 211, 226, 916 P.2d 384 (1996). In *Clark* the court analogized the privacy interests to privileged communications, and noted that the precedence of a third party defeated most legal privileges. *Id.* at 226 n. 14.

Even under an abuse of discretion standard the court should reverse. “Under an abuse of discretion standard, the reviewing court will find error only when the trial court's decision (1) adopts a view that no reasonable person would take and is thus ‘manifestly unreasonable,’ (2) rests on facts unsupported in the record and is thus based on ‘untenable grounds,’ or (3) was reached by applying the wrong legal standard and is thus made ‘for untenable reasons.’” *State v. Sisouvanh*, 175 Wn.2d 607, 623, 290 P.3d 942 (2012). In order to overcome the general rule of third party presence Mr. Sandberg cites to the fact that the conversation happened in his home/shop and that it was about illegal activity. This reasoning essentially argues for an establishment of a general rule that a conversation that takes place in a home is presumptively private, regardless of the presence of a third party. While an argument might be made for that rule, it is not what the Supreme Court has established as the controlling law.

The fact that the conversation took place in Mr. Sandberg's home/shop and was about illegal activity is not enough to allow any reasonable person to conclude that the general rule has been overcome. If it has in this case then the rule of third party presence is no longer a general rule. Added on top of that is the fact that the argument that Mr. Sandberg knew his actions were illegal is not supported by evidence in the

record and all that is left is the fact that the conversation took place in Mr. Sandberg's home/shop to overcome the general rule. This it cannot do unless the general rule is no longer the general rule.

On top of the general rule that is not overcome by the conversation in the home/shop and illegal subject matter, are the factors that weigh against finding this was a private conversation. The detective and Mr. Sandberg were strangers to one another, having just been introduced by the CI. The fact the Mr. Sandberg and the CI were not strangers does not change that fact. In addition, the conversation was about a business transaction in a collective garden Mr. Sandberg was trying to get going. RP 444-51. It was going to be a venture with multiple participants. There was nothing private about it.

**D. In order to avoid absurdity, the Court must interpret the privacy act to allow officers who acted in good faith in obtaining a judicial authorization to record to testify about the conversations.**

RCW 9.93.050 allows the admission of recordings issued under the provisions of RCW 9.73.040. The order in this case was issued under those provisions, it was simply faulty. As Mr. Sandberg notes "In *State v. Fjermestad* the Court held that when an officer knowingly transmits a private conversation, *without court authorization ...*, any evidence obtained... is inadmissible in a criminal trial." Brief of cross resp. at 14.

(emphasis added) (citing *State v. Fjermestad*, 114 Wn.2d 828, 836, 791 P.2d 897 (1990)). In *Fjermestad* the court specifically noted the Sheriff's office was aware of the privacy act. *Id.* at 829. In this case the officers had court authorization, it was just based on a defective, but submitted in good faith, affidavit.

RCW 9.73.090 requires that law enforcement "prior to the interception, transmission, or recording the officer ... 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." The officers did exactly that.

*Fjermestad* also notes that officers who are unaware of the illegality, as Detective Lloyd was unaware of the illegality because he thought he had a legitimate authorization, could testify regarding the conversation. *Id.* at 834.

This interpretation of *Fjermestad* and the privacy act is necessary to avoid an absolutely absurd result. RCW 9.73.210 allows an officer to testify about a recorded conversation if he obtained an authorization from a supervisor above the first line rank, even if the application was faulty. It

makes absolutely no sense for an officer to be able to testify when he goes to his boss, but when he takes the more protective step of going to a neutral magistrate, then more evidence is suppressed. Fortunately the privacy act and *Fjermestad* allow officers to testify to the conversation when the application for the judicial authorization was submitted in good faith and the officer was unaware of the illegality. Any other interpretation is absurd, and statutes are interpreted to avoid absurd results.

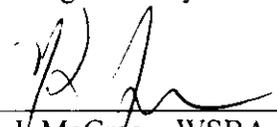
### III. CONCLUSION

The conversation between Detective Lloyd and Sandberg was not private. To come to any other conclusion is to reject the Supreme Court rule that the presence of a third party almost conclusively means the conversation was not private. In addition the court should recognize that officers who obtain a judicial authorization in good faith do not act with knowledge of the illegality and are entitled to testify about the conversation. Any other interpretation leads to absurd results.

Dated this 11 day of April 2015.

Respectfully submitted,

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COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION III

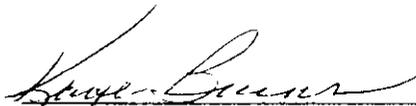
STATE OF WASHINGTON,	)	
	)	
Respondent-	)	
Cross-Appellant,	)	No. 32623-3-III
	)	
vs.	)	
	)	
STEPHEN ROY SANDBERG,	)	DECLARATION OF SERVICE
	)	
Appellant-	)	
Cross-Respondent.	)	
_____	)	

Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I served a copy of the Reply Brief of Respondent-Cross-Appellant in this matter by e-mail on the following party, receipt confirmed, pursuant to the parties' agreement:

David N. Gasch  
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Dated: April 19, 2016.

  
\_\_\_\_\_  
Kaye Burns