No. 93923-3

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

JOHN GARRETT SMITH,

Respondent.

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

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A. INTEREST OF AMICUS CURIAE

The American Civil Liberties Union of Washington (ACLU-WA) is a statewide, nonpartisan nonprofit organization of over 75,000 members and supporters, dedicated to the preservation of civil liberties, including privacy. ACLU-WA strongly supports adherence to the provisions of Washington's Privacy Act, chapter 9.73 RCW. ACLU-WA has participated in numerous privacy-related cases as amicus curiae and as counsel to parties.

B. ISSUES TO BE ADDRESSED BY AMICUS

1. Is an argument between two people alone in their home a private conversation within the meaning of the Privacy Act?

2. Does the Privacy Act require suppression of a recording made in violation of the Act, even when the violation may have occurred unintentionally?

3. Was the recording at issue in this case actually made in violation of the Privacy Act?

C. STATEMENT OF THE CASE

ACLU-WA relies on the parties' briefs, which have adequately set forth the facts of this case.

D. ARGUMENT

1. Arguments are conversations within the meaning of the Privacy Act, and the conversation here was private.

In the decision below, the Court of Appeals held that the recorded argument between the Smiths was a "private conversation" within the meaning of the Privacy Act. Slip op. at 6-10. The State disputes this conclusion, *see* Pet. for Review at 11-16, but the Court of Appeals' reasoning is correct and the State's argument is without merit.

As noted by the Court of Appeals, the recording here captured a clear "oral exchange of sentiments," and was therefore a "conversation." Slip op. at 7-9. As the opinion below explained, the exchange between the Smiths included many statements made in direct response to statements made by the other party, constituting an ongoing dialogue between the two. *Id.* at 8. The fact that the sentiments were expressed during a violent argument has no bearing on this conclusion.

The reasoning of the Court of Appeals in holding that the conversation was private is similarly sound. *See* slip op. at 9-10. Because the conversation was held between two people alone in their own home, with no indicia that either of them thought that anybody else might be listening to or recording them or other countervailing factors, the conversation was indeed private. *See State v. Kipp*, 179 Wn.2d 718, 731-33, 317 P.3d 1029 (2014) (holding that a conversation was private based

on the facts that the conversation included "an incriminating statement of a serious subject matter" and took place between family members inside a private residence) (citing *State v. Clark*, 129 Wn.2d 211, 224-27, 916 P.2d 384 (1996)).

The State argues that "[a]ny expectation of privacy in the conveyance of [Mr. Smith's] threats was unreasonable because of the likelihood the victim would report . . . those threats and because of his use of what amounts to a recording device while conveying his threat." Pet. for Review at 15-16. Neither assertion is persuasive.

First, the likelihood that Mrs. Smith would later report Mr. Smith's threats does not mean that the conversation was not private. This Court recently rejected this exact argument in *Kipp*, noting that it had repeatedly held to the contrary. 179 Wn.2d at 730-31 (citing *State v. Faford*, 128 Wn.2d 476, 488-89, 910 P.2d 447 (1996); *Clark*, 129 Wn.2d at 231). Even were that not the case, though, sound logic dictates the same result. Any time two people converse, each one certainly takes the risk that the other may later disclose the conversation to others. But if that were sufficient to defeat an expectation of privacy, nobody could ever have a "private conversation" within the meaning of the Privacy Act, because that risk is omnipresent. Such an interpretation would gut the Act's protection for the privacy of conversations—a result that is clearly at odds with the text and

purpose of the Act. *See Kipp*, 179 Wn.2d at 732; *State v. Modica*, 164 Wn.2d 83, 89-90, 186 P.3d 1062 (2008); *State v. Williams*, 94 Wn.2d 531, 548, 617 P.2d 1012 (1980).

Second, Mr. Smith's "use of what amounts to a recording device" during the argument has no bearing on whether the conversation was private. If it did, then any message recorded on some device would necessarily render the message non-private—an outcome that this Court has clearly rejected. *See, e.g.*, *Modica*, 164 Wn.2d at 88 ("[W]e 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."). Mr. Smith's use of his voicemail system is relevant to the outcome of this case, but only because it speaks to Mr. Smith's consent to the recording, *see infra* Part 3, not because it suggests that the conversation was not private.

Finally, the Court of Appeals was correct in holding that this Court's decision in *State v. Smith*, 85 Wn.2d 840, 540 P.2d 424 (1975), was "*sui generis* . . . [and] has little bearing on the case before us." Slip op. at 8. The State makes the opposite claim—that "the facts of this case regarding how the recording was made and what was captured are legally indistinguishable from *Smith* and equally unique." Pet. for Review at 13.

The Court of Appeals well explicated the reasons why *Smith* does not control here. Slip op. at 8-9. ACLU-WA will not repeat that analysis, other than to emphasize the peculiarity of the State's claim that this case, involving an extended verbal and physical dispute between spouses alone in their own home, is "legally indistinguishable" from *Smith*, which involved two unrelated men on a public street in an interaction that involved mostly "[g]unfire, running, shouting, and . . . screams," with very few spoken words. *See Smith*, 85 Wn.2d at 846. Given that *Smith* expressly confined its holding to its own "bizarre" set of facts, *id.*, it indeed has very little to say about whether the present case involved a private conversation, and it certainly is not controlling authority on the point. The Court of Appeals correctly recognized this, and this Court should uphold that portion of the decision below.

2. Recordings made in violation of the Privacy Act must be suppressed, regardless of the intent of the person making the recording.

In the decision below, the Court of Appeals held that the recording must be suppressed because, in its view, Mr. Smith's recording of the conversation violated the Privacy Act, regardless of whether he made the recording intentionally or by accident. Slip op. at 11-12. Although ACLU-WA disagrees with the Court of Appeals' conclusion that making the recording here violated the Privacy Act, *see infra* Part 3, the Court of

Appeals was correct to hold that any recording made in violation of the Act must be suppressed, irrespective of whether the recording was made intentionally. Based both on the plain text of the Act and the legislative intent underpinning it, this Court should similarly hold that a recording can violate the Privacy Act even if made accidentally, and that when that occurs, the recording must be suppressed.

i. The Privacy Act requires suppression of any recording made in violation of the Act.

This Court has repeatedly recognized that in enacting the Privacy Act, the Legislature intended to create a broad and extremely restrictive law to protect personal privacy, even though such a law would inevitably lead to the exclusion of probative evidence in criminal cases. *See, e.g.*, *State v. Roden*, 179 Wn.2d 893, 898, 321 P.3d 1183 (2014) ("Washington's privacy act broadly protects individuals' privacy rights. . . . It is one of the most restrictive electronic surveillance laws ever promulgated.") (citing *Faford*, 128 Wn.2d at 481); *Williams*, 94 Wn.2d at 548 ("The legislature intended to establish protections for individuals' privacy and to require suppression of recordings of even conversations relating to unlawful matters if the recordings were obtained in violation of the statutory requirements."); *Kipp*, 179 Wn.2d at 725 (citing *State v. Christensen*, 153 Wn.2d 186, 198-99, 102 P.3d 789 (2004)).

In keeping with these rulings, the Court of Appeals noted that "the [Privacy Act] requires no specific mental state for a person to improperly record a conversation," and relied on the absence of any such explicit element in RCW 9.73.030 in order to hold that no such requirement exists. Slip op. at 11-12. Although this reasoning is sound, the court failed to note that in addition, the text, structure, and legislative history of the Privacy Act strongly support the conclusion that even an inadvertent recording can violate the statute.

(a) Text

As this Court has repeatedly held, the text of a statute must be read as a whole in order to give effect to the legislative intent underlying the statutory scheme. *Wagg v. Estate of Dunham*, 146 Wn.2d 63, 73, 42 P.3d 968 (2002) (quoting *State v. Wright*, 84 Wn.2d 645, 652, 529 P.2d 453 (1974)). Thus, the lack of any mental-state requirement in sections 030 and 050 is significant not only in and of itself, but doubly so in light of the inclusion of such requirements in other portions of the Privacy Act. For example, section 010 prohibits "willfully divulg[ing]" a telegraphic message to anybody other than the intended recipient. The same section also prohibits "willfully refus[ing], neglect[ing], or delay[ing] duly to transmit or deliver" such a message. Section 010, then, explicitly includes

a mental-state element not once but twice, in sharp contrast to the complete lack of any such element in section 030.

Similarly, section 020 twice includes mental-state elements, making it unlawful to "wil[l]fully open or read" a sealed letter intended for another person, or to publish any such message "knowing it to have been opened or read without authority." And subsection 080(2) provides that "[a]ny person who knowingly alters, erases, or wrongfully discloses any recording in violation of RCW 9.73.090(1)(c) is guilty of a gross misdemeanor."

The exclusion of any mental-state element from section 030, even while several closely related Privacy Act provisions include such elements, demonstrates that the legislative intent behind sections 030 and 050 was to exclude any recording made in violation of the Act, regardless of whether any person had the specific intent to make such a recording.

(b) Structure

The structure of the Act further supports this conclusion. As discussed above, neither section 030 nor section 050 contains a mental-state element. Section 030 does, however, provide that the prohibition on recording private conversations applies "[e]xcept as otherwise provided in this chapter." RCW 9.73.030(1). The Act in fact contains many such exceptions, the first ones coming in subsections 030(2)-(4), immediately

following the general prohibitions of subsection 030(1). Other exceptions appear in sections 040, 050, 070, 090, 095, 110, 210, and 230.

Clearly, then, the Legislature is aware that the general prohibitions of sections 030 and 050 are extremely restrictive and require numerous exceptions in order not to become overbroad. Yet the Legislature has never added a mental-state element to sections 030 or 050. The only reasonable conclusion to be drawn is that, except where explicit exceptions are provided, the Legislature deliberately intended to disallow the evidentiary use, in "*any* civil or criminal case," of "*[a]ny* information" gained by recording "*any* . . . [p]rivate conversation, by *any* device . . . without first obtaining the consent of all the persons engaged in the conversation." RCW 9.73.030, .050 (emphasis added). As with the text of the Act, this supports the Court of Appeals' conclusion that even an inadvertent recording can violate the Act.

(c) Legislative history

The legislative history of the Privacy Act also supports the Court of Appeals' holding. Sections 030 and 050 were inserted into the statute in 1967, decades after sections 010 and 020 were enacted. *See Christensen*, 153 Wn.2d at 198; Laws of 1967, 1st Ex. Sess., ch. 93, §§ 1, 3. Thus, there is no question that the Legislature was aware, at the time it enacted sections 030 and 050, that some portions of the Act had mental-state

requirements—yet it chose not to include any such element in sections 030 or 050. Furthermore, the Legislature modified section 080 in 2000, adding criminal liability for knowing violations of RCW 9.73.090(1)(c), without adding any mental-state element to section 030, either for purposes of suppression under section 050, or for criminal liability under subsection 080(1). Laws of 2000, ch. 195, § 3. Here again, the Legislature's decision not to include any mental-state element in sections 030 or 050, while including such elements in other portions of the statute, clearly shows that the Legislature wanted intent to be irrelevant under sections 030 and 050. The Court of Appeals was correct to so hold.

ii. Interpreting the Privacy Act to require suppression regardless of intent does not lead to absurd results.

In its Petition for Review, the State argues that reading sections 030 and 050 as imposing "strict liability"—requiring exclusion of all recordings made in violation of the Act, regardless of the intent of the person making the recording—leads to a number of absurd results. Pet. for Review at 20. But the examples presented by the State either are not absurd results or are not germane to this case.

The State makes two arguments based on the criminal provisions of the Privacy Act. Pet. for Review at 20 ("[S]uch a construction criminalizes the entirely innocent and daily occurrence of pocket

dialing."), 21 ("[W]hen faced with a criminal statute without a mental state element courts must determine whether the legislature intended to create a strict liability crime."). But because this case does not involve a prosecution under the Privacy Act, the relevant question is not the precise conditions under which criminal liability attaches, but rather whether a recording made in violation of the Act must be excluded from evidence in a criminal trial on other charges. This Court should therefore decline to address these hypotheticals, because the facts in this case cannot adequately support a holding on the issue, and the Court's ultimate conclusion would be mere dicta.

The State also cites, as an absurd result, the prospect that "by violating the statute and committing another crime [Mr. Smith] receives the remedy of having evidence of his attempted murder excluded from his attempted murder trial." Pet. for Review at 20. But this result, while undoubtedly off-putting, is far from absurd—it is, in fact, exactly how the Legislature intended the Privacy Act to function. *See, e.g.*, *Kipp*, 179 Wn.2d at 732 (holding that "[f]ocusing on [a defendant's] role as 'the accused' eviscerates the privacy act's protections for any person accused of a crime . . . [because] incriminating statements are the very type of communications usually triggering the privacy act's protections."). The purpose of the relevant portion of the Act is to ensure that, with limited

and explicitly enumerated exceptions, private conversations remain private. *Williams*, 94 Wn.2d at 548 ("The legislature intended to establish protections for individuals' privacy and to require suppression of recordings of even conversations relating to unlawful matters if the recordings were obtained in violation of the statutory requirements."). This is true regardless of the party to which the benefit accrues, the nature of the case, or the content of the conversation. *Kipp*, 179 Wn.2d at 732; *Williams*, 94 Wn.2d at 548; *State v. Townsend*, 147 Wn.2d 666, 674, 57 P.3d 255 (2002).

Moreover, the only evidence at issue under the Privacy Act in this case is the actual recording of the incident. Even if the recording were suppressed, Mrs. Smith could testify (and in fact did testify) about the argument and the circumstances surrounding it; audio recordings of the subsequent 911 call could be (and were) used; Mrs. Smith's daughter, along with medical professionals and police, could have testified about the condition in which they found Mrs. Smith; and any other admissible evidence could have been used in the trial. Excluding the recording, in other words, would not grant Mr. Smith a windfall dismissal of the case against him. Rather, it would result only in the suppression of the one piece of evidence that is within the purview of the Privacy Act.

Beyond that, the discussion below shows that the actual recording in this case does not need to be suppressed, because it falls within an exception to the recording prohibition. The "absurd result" claimed by the State—suppression of the recording—is therefore not even the proper result on the facts of this case, rendering the State's argument beside the point.

Finally, the State points to two seemingly paradoxical situations resulting from the decision below: (1) that "a person can unlawfully record and at the same time not consent to the recording," and (2) that "because in the recording at issue Mr. Smith conveyed a threat, he could have only violated the statute by recording the incident inadvertently." Pet. for Review at 20. ACLU-WA agrees that these results are untenable. But, as discussed below, the error lies in the Court of Appeals' conclusion that Mr. Smith did not consent to the recording, not in its holding that the Privacy Act categorically requires suppression of recordings made in violation of the Act, intentional or otherwise. The Court of Appeals' holding as to the latter point is well-reasoned and correct; the paradoxical results arise only if one also adopts that court's erroneous conclusion on the issue of consent. This Court should therefore reverse the Court of Appeals as to the question of Mr. Smith's consent, rather than read into the statute a mental-

state element that simply is not there and would unjustifiably limit the scope of the Privacy Act.

3. The recording in this case does not need to be suppressed, because Mr. Smith consented to the recording and it captured a threat of bodily harm.

Although ACLU-WA encourages the Court to hold that the Smiths' argument was a private conversation within the meaning of the Privacy Act, and that a recording made in violation of the Act must be suppressed regardless of whether the recording was made intentionally, neither of those holdings requires suppression of the recording at issue in this case. Rather, this recording properly falls within the Act's bodily threat exception. Thus, Mr. Smith did not violate the Act in making the recording, and it need not be suppressed.

Under the bodily threat exception, the Privacy Act does not prohibit the evidentiary use of a recording, even of a private conversation, if (1) the recording is made with the consent of one party, and (2) the conversation "convey[s] threats of . . . bodily harm." RCW 9.73.030(2). Both conditions are met here. Mr. Smith consented to the recording by setting up his voicemail system, and the conversation at issue unquestionably conveyed a threat of bodily harm.

The Court of Appeals held that the bodily threat exception did not apply in this case because neither party consented to the recording. Slip

op. at 5 n.3. ACLU-WA agrees with the State that this holding is in tension with well-established case law. *See Townsend*, 147 Wn.2d at 676; *State v. Robinson*, 38 Wn. App. 871, 885 n.5, 691 P.2d 213 (1984). The better position, as the State argues, *see* Pet. for Review at 17-18, is that a person who sets up a voicemail system inherently consents to any recordings that the system might capture. By setting up the system that made the recording, Mr. Smith consented ex ante to that recording, even if he did not realize in the moment that the system was active.[1] *See Townsend*, 147 Wn.2d at 676; *Modica*, 164 Wn.2d at 89 n.1. And because the resulting recording included a threat of bodily harm, it falls directly within the exception enumerated by the Legislature in RCW 9.73.030(2)(b), and does not need to be suppressed.

E. CONCLUSION

The Court of Appeals correctly held that the Smiths' argument was a private conversation and that even an unintentional recording can violate the Privacy Act. This Court should therefore affirm on these issues. But the Court of Appeals erred in holding that the recording at issue here violated the Privacy Act, because the recording qualifies for the bodily

[1] Because Mr. Smith's consent may be inferred from the act of setting up his voicemail system , the Court need not determine whether he also consented to the recording by making the call and—apparently unwittingly—creating the recording. That question would be better addressed in a case where it is squarely before the Court, rather than here, where it is unnecessary to the decision, would complicate the Court's holding, and might needlessly limit the meaning of "consent" as used in the Privacy Act.

threat exception. Thus, this Court should reverse the Court of Appeals on that point and hold that even though this case involves a private conversation recorded with the consent of only one party, the recording falls within the bodily threat exception and does not need to be suppressed.

DATED this 24th day of April, 2017.

Respectfully submitted,

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