No. 87669-0

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JONATHAN NICHOLAS RODEN,

Petitioner.

AMICI CURIAE BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON, WASHINGTON DEFENDER ASSOCIATION, and WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

TRAVIS STEARNS, #29335
Washington Defender Association
110 Prefontaine Pl. S, Suite 610
Seattle, WA 98104
(206) 623-4321

LILA J. SILVERSTEIN, #38394
WACDL Amicus Committee
Co-Chair
Washington Appellate Project
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711

SARAH A. DUNNE, #34869
NANCY L. TALNER, #11196
DOUGLAS B. KLUNDER, #32987
ACLU of Washington Foundation
901 Fifth Avenue, Suite 630
Seattle, WA 98164
(206) 624-2184

Attorneys for *Amici Curiae*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

Federal Cases

Statutes

Constitutional Provisions

INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union of Washington ("ACLU") is a statewide, nonpartisan, nonprofit organization of over 20,000 members, dedicated to the preservation of civil liberties, including privacy. The ACLU strongly supports the Privacy Act, chapter 9.73 RCW, protecting private conversations against interception, wiretapping, eavesdropping, and recording. It has participated in numerous privacy-related cases as *amicus curiae*, as counsel to parties, and as a party itself.

The Washington Association of Criminal Defense Lawyers ("WACDL") is a nonprofit association of over 1100 attorneys practicing criminal defense law in Washington State. As stated in its bylaws, WACDL's objectives include "to protect and insure by rule of law those individual rights guaranteed by the Washington and Federal Constitutions, and to resist all efforts made to curtail such rights." WACDL has filed numerous *amicus* briefs in the Washington appellate courts.

The Washington Defender Association ("WDA") is a statewide non-profit organization with 501(c)(3) status. WDA has more than a thousand members and is comprised of public defender agencies, indigent defenders, and those who are committed to seeing improvements in indigent defense. One of WDA's primary purposes is to improve the administration of justice and remedy inadequacies and injustices in

substantive and procedural law. WDA advocates on issues of constitutional effective assistance of counsel and professional norms and standards under the laws of the State of Washington and the United States. WDA and its members have previously been granted leave to file *amicus* briefs on issues relating to these and other criminal defense issues.

ISSUE TO BE ADDRESSED BY *AMICI*

Whether police impersonation of a participant in a text message conversation in order to intercept those text messages without the consent of either the sender or intended recipient violates the Privacy Act.[1]

STATEMENT OF THE CASE

On November 3, 2009, Daniel Lee was arrested on drug charges and his cell phone, a smartphone, was seized by the police. Without a warrant, Detective Kevin Sawyer searched the phone, scrolling through

[1] *Amici* also believe that the warrantless search of Lee's phone violated both the Fourth Amendment and Article 1, Section 7. We fully agree with the *amicus* brief filed by the Electronic Frontier Foundation, and will not needlessly duplicate that argument. It should be noted, however, that the constitutional argument made there resonates even more strongly when applied to the tighter constraints applied by Article 1, Section 7 to searches incident to arrest. As explained by this Court, "Article I, section 7 is a jealous protector of privacy. As recognized at common law, when an arrest is made, the normal course of securing a warrant to conduct a search is not possible if that search must be immediately conducted for the safety of the officer or to prevent concealment or destruction of evidence of the crime of arrest. However, when a search can be delayed to obtain a warrant without running afoul of those concerns (and does not fall under another applicable exception), the warrant must be obtained." *State v. Valdez*, 167 Wn.2d 761, 777, 224 P.3d 751 (2009). Plainly put, the narrow exceptions to the warrant requirement do not allow the warrantless search of a phone seized incident to arrest—and they certainly do not allow the subsequent *use* of that phone. If police were to seize clothing, they could not wear it around town. Nor could they write checks from a seized checkbook, nor certify documents with a seized corporate seal. It should be no different for a seized cell phone; there is no justification for warrantless use of that phone.

past text messages that Lee had received. One of those messages was from "Z-Jon," later identified as Jonathan Roden. Using Lee's phone and posing as Lee, Sawyer replied to that text message and engaged in a conversation with Roden via text messages, eventually setting up a drug transaction. When Roden arrived at the meeting location (a grocery parking lot), he was arrested based on the text messages. Roden moved to suppress the text messages because Sawyer had "intercepted a private communication transmitted by a telephone without first obtaining the consent of Mr. Roden who was one of the participants in the communication," in violation of the Privacy Act, RCW 9.73.030. The trial court denied the motion to suppress and the Court of Appeals affirmed. *See State v. Roden*, 169 Wn. App. 59, 279 P.3d 461 (2012).

This case asks whether the Privacy Act protects private conversations conducted via text messages against such surreptitious intrusions by the police.

ARGUMENT

It is unlawful to "intercept or record any … [p]rivate communication transmitted by telephone … or other device between two or more individuals … without first obtaining the consent of all the

participants in the communication." RCW 9.73.030(1).[2] Any information obtained through a violation of this law must be suppressed. RCW 9.73.050.

The Court of Appeals apparently interpreted this statute to mean that *recording* a communication is the essence of a violation, as its entire analysis revolved around whether Roden had impliedly consented to recording. *See Roden*, 169 Wn. App. at 63-68. This analysis simply misses the point. The offensive action here was not the recording of Roden's text messages by Lee's phone; Roden would indeed expect that recording to happen. Instead, the offense was the *interception* by Sawyer of messages that Roden directed to Lee, messages that Roden had no reason to believe would be read by anybody other than Lee.

As shown below, all elements of a violation of the Privacy Act were satisfied. There is no dispute that text messages are communications transmitted by telephone or other device. Those messages from Roden to Lee were intercepted; Roden did not consent to that interception; and the text messages were private.

---

[2] The statute also requires the interception or recording to be done by a device "designed to record and/or transmit" the communication. The State does not dispute that Lee's phone is such a device, nor could such an argument be made; "it makes no difference that the violation was accomplished on a device that was used in the communication." *State v. Christensen*, 153 Wn.2d 186, 197, 102 P.3d 789 (2004) (quoting *State v. Townsend*, 147 Wn.2d 666, 674, 57 P.3d 255 (2002)).

A. Sawyer Intercepted Roden's Text Messages Sent to Lee

When Sawyer posed as Lee, and used Lee's phone to send a text message to Roden, there was no reason for Roden to believe that the communication came from anybody other than Lee. Thus, when Roden replied to that text message, he clearly intended his reply to go to Lee, not Sawyer. Instead, Sawyer intercepted the message, reading it before it ever reached Lee. Indeed, the record does not show that Roden's messages to Lee were *ever* actually delivered to Lee, the intended recipient.

A clearer case of interception can hardly be imagined. This was not a situation where the recipient of a communication chose to share it with a third party after receipt. Nor was it a situation where the recipient chose to let a third party hear or view the communication along with the recipient. *Cf. State v. Corliss*, 123 Wn.2d 656, 870 P.2d 317 (1994) (tipping a telephone receiver so that a third party can hear a conversation is not an interception). Instead, it was a classic "man in the middle" scenario, with Sawyer reading Roden's communications to Lee without the knowledge or consent of either. The only substantive distinction from a wiretap is that Sawyer actually prevented Lee from receiving the messages as well—not a distinction that *lessens* the interception.

The Court of Appeals did not discuss the question of interception. This silence is hard to explain, but perhaps can be understood by reading

the opinion from the same panel in the companion case where a defendant challenged much the same actions, also involving Lee's phone, on constitutional grounds. There, the court believed that text messages were delivered to the recipient as soon as they were delivered to the phone. *See State v. Hinton*, 169 Wn. App. 28, 37, 280 P.3d 476 (2012). If the court followed the same logic in this case, it would explain why no interception was contemplated; the court apparently thought that the messages were delivered to their destination. In other words, the court believed that Roden intended simply to send a message to Lee's phone, not to communicate with Lee himself. This belief is belied by the nature of today's cell phones and the facts of the present case.

On a typical cell phone, especially a smartphone such as Lee had, there are a variety of ways to communicate with other people, including voice calls, text messages, and Internet-based chats. There are also a variety of ways to initiate a communication, almost none of which involve the user entering a phone number. Instead, one looks up a name in a contact list and communicates to that name, or one replies to a message previously received. Text messages previously sent and received are often displayed in "threads," grouping together all messages to and from a single person. In this manner, there may be no clear beginning or end to a conversation. Instead, texts will be exchanged over a period of days,

weeks, or years, all maintained within the same thread. Depending on the particular software used on the phone, this conversation may even consist of a mix of text messages, instant messages, and social networking chat, with little distinction made between the various technologies used for delivery. In other words, the entire communication paradigm of modern smartphones involves communication with other *people*, not other devices.

This is illustrated by the present case. When Sawyer looked through Lee's phone to find previous text messages, he found one from "Z-Jon"—identified not by a phone number, but by a name. Sawyer replied *to Z-Jon*, not to a phone number, and *continued* a conversation that Lee and Roden had started some time previously. There is no evidence in the record that Sawyer *ever* determined the phone number associated with the conversation; he merely conversed with "Z-Jon" (Roden). The State's own description of the facts supports this; there is no mention of "Roden's phone" as the source or destination of messages; instead it says "text messages were from Jonathan Roden" and refers to "the Appellant's text messages." It beggars belief to simultaneously claim that messages came *from a person* (Roden), but were sent *to a device* (Lee's phone), not the owner of the device.

A better perspective can be gained by considering the analogy between text messages and letters that the Court of Appeals recognized.

See Hinton, 169 Wn. App. at 43-44. Just as a letter is directed to its recipient by the combination of name and physical address, a text message is directed to its recipient through the combination of name and a phone number (although that phone number may not even be visible to the sender, unlike a letter). A letter does not reach its recipient simply by arriving at the physical destination; the *person* to whom it is addressed must actually receive it. Consider a scenario in which a mailman deposits a letter in a mailbox outside a home, and then a police officer removes the letter from the mailbox before the recipient. We would have no difficulty recognizing that as an interception of the letter. The same is true here; Lee's phone simply acted as a mailbox for text messages directed to Lee.

Of course, Roden risked the possibility that Lee might choose to share those messages with a third party, or even that Lee would preserve the message and the saved message might be properly searched by a police officer with authority of law such as a warrant. But Roden only risked that disclosure of his messages in that manner *after* they had been delivered *to Lee*. The Privacy Act guarantees that Roden did not need to worry that his messages would be intercepted *before* reaching Lee. Since Sawyer did, in fact, intercept those messages prior to delivery to Lee, he violated the Privacy Act and the messages must be suppressed.

B. Roden Did Not Consent to the Interception of His Text Messages

The heart of the Court of Appeals' opinion is a holding that Roden impliedly consented to his text messages being recorded. *See Roden*, 169 Wn. App. at 63-68. The court properly recognized that the technology behind text messages is very similar to that used for email. The message is sent to the recipient's device, which inherently records it, so that the recipient will be able to read it at the recipient's convenience.

While this holding is correct, it is also irrelevant. Roden has never argued that the *recording* of his text messages by Lee's phone violated the Privacy Act. Instead, the violation is Sawyer's *interception* of those messages before they reached Lee. And there is simply no evidence to show that Roden consented to the interception, either explicitly or implicitly.

There is nothing inherent in the technology behind text messages that makes interception a routine part of the communication—as is readily apparent from the fact that most text messages are never seen by anybody except the sender and recipient. Nor is there any reason to believe that Roden was warned that his messages were likely to be intercepted, and chose to send them anyway. At most, Roden might have been aware that it

was technologically *possible* for a text message to be intercepted, but that does not mean he consented to the interception.

The courts have occasionally found reason to believe that senders impliedly consented to recording of their communications. *See, e.g., In re Marriage of Farr*, 87 Wn. App. 177, 940 P.2d 679 (1997) (message on answering machine); *State v. Townsend*, 147 Wn.2d 666, 57 P.3d 255 (2002) (email and ICQ messages). But to the best of *amici's* knowledge, no Washington court has ever found implied consent to interception of communications by a third party. To the contrary, this Court has explicitly rejected claims of implied consent based on the technological possibility of interception. *See State v. Faford*, 128 Wn.2d 476, 910 P.2d 447 (1996) (interception of cordless telephone conversations, even though easily accomplished via police scanner, violates Privacy Act).

Faford's discussion of technological possibility is instructive:

> The State's focus on technological ease ignores the intrusive nature of the interception in this case. Fields did not accidentally or unintentionally pick up a single cordless telephone conversation on his radio or cordless telephone, but undertook twenty-four-hour, intentional, targeted monitoring of Defendants' telephone calls with a scanner purchased for that purpose. This type of intentional, persistent eavesdropping on another's private affairs personifies the very activity the privacy act seeks to discourage.

Id. at 486.

In all relevant ways, Sawyer's actions here were equivalent to Fields' actions in *Faford*. Sawyer targeted Roden, and intentionally inserted himself into the middle of Roden's text conversation with Lee. Although he did not engage in twenty-four-hour monitoring, his actions were far from the unintentional viewing of a single message. Instead, like Fields, Sawyer committed acts that personify the intrusion the Privacy Act is designed to deter: he intentionally intercepted messages that Roden sent to Lee without the consent of either party.

C. Roden's Text Messages Were "Private"

Courts "will generally presume that conversations between two parties are intended to be private." *State v. Modica*, 164 Wn.2d 83, 89, 186 P.2d 1062 (2008). There is no evidence to rebut that presumption with respect to Roden's text conversation with Lee. The Court of Appeals essentially agreed. It found a close analogy between Roden's text messages and the email and ICQ messages in *Townsend*. Here, Roden directed his communication to a known associate, and discussed matters that he would obviously not want to be public. And, as with Townsend's email and ICQ messages, "[t]he mere possibility that interception of the communication is technologically feasible does not render public a communication that is otherwise private." *Townsend*, 147 Wn.2d at 674.

There should be little question that Roden's text messages to Lee were private communications.

Nonetheless, the State argues that Roden's text messages were not private, relying in large part on its interpretation of *State v. Wojtyna*, 70 Wn. App. 689, 855 P.2d 315 (1993). *Wojtyna* involved a pager seized incident to arrest; the pager was left on and the telephone numbers of incoming calls were monitored. A detective called one of those numbers and arranged a drug transaction with the defendant. The court held that these actions did not violate the Privacy Act. *See id.* at 694-96.

The State's reliance on *Wojtyna* is misplaced. As a preliminary matter, *Wojtyna* was probably wrongly decided. It stated it was "doubtful whether the pager constitutes a 'device' within the meaning of the statute," *id.* at 696, a proposition subsequently refuted by this Court, *see Townsend*, 147 Wn.2d at 674-75. *Wojtyna's* notion of privacy was also heavily influenced by Fourth Amendment law, especially the proposition that there is no legitimate expectation of privacy in information that has been voluntarily turned over to third parties. *See id.* at 694 (citing *Smith v. Maryland*, 442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979)). That proposition was explicitly rejected under Washington law by this Court in *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), and the rejection

has been confirmed repeatedly since then. *See, e.g., State v. Eisfeldt*, 163 Wn.2d 628, 637-38, 185 P.3d 580 (2008).

Even if we accept *Wojtyna* as good law, it does not help the State. *Wojtyna* did not base its Privacy Act holding on the fact that the pager did not record a "private" communication; instead, it held that the telephone number displayed was not a "communication" at all, analogizing the pager to a "line trap." *Wojtyna*, 70 Wn. App. at 695 (citing *State v. Riley*, 121 Wn.2d 22, 846 P.2d 1365 (1993)). In no way did the court hold that any communication made to a pager was unprotected. Instead, it emphasized that "all that was learned from the pager was the telephone number of one party." *Id.* The actual conversation arranging the drug transaction in *Wojtyna* took place over a telephone, with the defendant willingly talking to the detective, an acknowledged stranger. That is far different from the situation here, where the entire conversation took place via text messages, and Roden had every reason to believe his text messages were being sent to Lee, not Sawyer.

Other arguments made by the State are equally unavailing. The State argues that there is no privacy in messages received by a portable device because the device may be in possession of somebody unexpected and "[t]here is no guarantee that the message sent will actually be received by the intended recipient." Brief of Respondent at 10. This flies in the face

of the privacy interests the Privacy Act is intended to protect. Under the State's reasoning, the only possible private communications are those made face to face—in all other instances, there is a possibility that the message will go astray. But one would hardly argue that a letter is not private simply because it is possible that the mailman will accidentally deliver it to the wrong house, or because it is possible that a thief will take it from the mailbox before the intended recipient does. One similarly should not have to assume that another's personal cell phone may be stolen, or seized and searched by a police officer. We should be entitled to rely on the societal norm that a cell phone will actually be in the possession of that phone's owner or regular user.

Nor should it matter whether or not the sender of a communication "assumed that the recipient would not divulge the information to whoever else may be present" or "that he ever indicated that his messages were not to be disclosed to anyone else." Brief of Respondent at 10. The possibility that a *recipient* will choose to disclose the content of a message has nothing to do with whether the communication is private; instead, it simply means that a recipient is entitled to breach the privacy of the communication (as long as the recipient does not record the message without consent). But when *neither party* intends the communication itself to be shared with others, there is no reason to doubt its privacy. The

possibility that a letter may be read over the recipient's shoulder hardly means that letter is public. The same should be true for a text message.

Disclosure or sharing by a recipient is instead best viewed as only a factor in determining whether or not there was an interception. This is illustrated by this Court's analysis in *State v. Corliss*, 123 Wn.2d 656, 870 P.2d 317 (1994). *Corliss* involved a telephone call; one party in the call allowed a third party to listen in by "tipping" the receiver so that both could hear (much as a speakerphone would operate today). *See id.* at 659. This Court did not analyze of whether the phone conversation was "private;" that was simply taken as a given, in keeping with the presumption that communications between two people are private. The question instead was simply whether that private conversation had been intercepted when one party allowed a third party to listen to the same receiver. *See id.* at 662. Similarly, there should be no question that Roden's text messages to Lee were private. Unlike *Corliss*, however, here there *was* an interception, as discussed in Section A above.

Finally, *amici* object strenuously to the State's attempt to place the burden on the sender of a text message "to ascertain whom he was specifically sending his messages to." Brief of Respondent at 10. Such a burden is flatly inconsistent with the Privacy Act's purpose of protecting communications; few conversations by ordinary people include such

verifications. A letter addressed to an individual at a physical address can reasonably be presumed to be received by that individual, and need not include a separate statement that "this is for your eyes only." The same is true of a text message sent to a named individual at a telephonic address (phone number). A party to a phone conversation, in the middle of a long discourse, does not need to repeatedly make sure the same person is still on the other end of the line; a third party displacing the recipient and continuing to listen to the discourse would surely be determined to have intercepted a private communication. The rule should be no different for a text conversation. Here, Roden began his private conversation with Lee, and Sawyer simply displaced Lee in the conversation.

In summary, text messages sent to an individual are entitled to a presumption of privacy, rebuttable only by strong evidence that the sender intends otherwise. The very fact of using text message technology to communicate indicates that the message is private—it is intended for one recipient, and is likely going to be displayed on a small screen designed for individualized viewing. If senders intend communications to go to the general public, they will use one of the myriad technologies designed for public communication, such as Twitter, emails to listservs, public chat rooms, web forums, or blogging. Such communications could well be deemed not to be private. In contrast, text messages to a single individual,

such as the ones Roden tried to send to Lee, are exactly the type of communication intended to be protected by the Privacy Act.

CONCLUSION

For the foregoing reasons, *amici* respectfully request the Court to hold that use of an individual's cell phone without consent and impersonation of that individual while conducting a conversation via text messages violates the Privacy Act. Accordingly, the text messages exchanged by Roden and Sawyer (posing as Lee) should be suppressed.

Respectfully submitted this 5th day of April 2013.

By _____

Douglas B. Klunder, WSBA #32987
ACLU of Washington Foundation

Attorney for *Amici Curiae*
American Civil Liberties Union of Washington
Washington Association of Criminal Defense Lawyers
Washington Defender Association