68174-5

68174-5

NO. 68174-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

BRANDON KNEELAND,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL TRICKEY

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

Washington's Privacy Act prohibits the admission at trial of a private communication that was recorded without the consent of the parties to the conversation. The Act does not prohibit witnesses from testifying about facts that they learned prior to and/or independent of an illegally-recorded conversation simply because those subjects may have also been mentioned in that conversation. Here, a witness was inadvertently recorded, without his consent, while speaking with his girlfriend about his recent, unhappy discovery that his friend, the juvenile respondent in this matter, had recently stolen a car. All of the information that the witness knew predated his conversation with his girlfriend, and was not affected by the fact of the nonconsensual recording, which was not offered by the State. Did the trial court properly allow the witness to testify about information that was in no way obtained by a violation of the Privacy Act?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Brandon Kneeland, a juvenile, was charged by amended information with one count of possession of a stolen vehicle. CP 3. The information alleged that Kneeland possessed a Toyota Prius between June 11 and June 16, 2011, knowing that it had been stolen from Martin Ross.

CP 3. Following a fact-finding hearing before King County Superior Court Judge Michael Trickey, Kneeland was adjudicated guilty as charged. CP 23.

2. SUBSTANTIVE FACTS

On June 19, 2011, Seattle Police Department (SPD) patrol officer Eric Michl drove in his police car to Safeco Field to direct vehicles arriving for a Seattle Mariners game. 1RP 155.[1] Michl travelled to the stadium with his 15-year-old son, Alejandro Ramirez, who was planning on attending the game with his grandfather and cousins. 1RP 42, 155. While they had been waiting for the car to warm up prior to their departure to Safeco Field, Ramirez asked his father if a person who had run away when stopped by police could be arrested at a later time. 1RP 156. Michl informed his son that arrest was indeed a possibility. 1RP 156.

Michl's patrol vehicle was equipped with an audio/video recording system that would start, and thereby capture sound inside and outside the car, when the car's emergency lights were turned on. 1RP 158. Upon his arrival outside Safeco Field, Michl briefly activated his emergency lights in order to safely park the car. 1RP 159.

Michl believed he had turned off the recording system via the in-car computer before he had shut his car's engine down and left to begin

[1] The verbatim report of proceedings consists of two volumes, referred to in this brief as follows: 1RP (12/12/11 and 12/13/11) and 2RP (12/14/11 and 1/4/12).

his traffic control work. 1RP 160. Ramirez remained inside the car while waiting for his relatives to arrive, close to an hour later. 1RP 160-61.

Approximately an hour and 45 minutes after he'd left his patrol car, Michl received a signal on the radio on his duty belt, alerting him that the recording system had in fact been running since he had momentarily turned his emergency lights on, and had been draining the car battery to a dangerously low level. 1RP 161. The signal let Michl know that the recording system had now been automatically shut off. 1RP 161.

Michl knew that police vehicles' in-car audio/video recordings are public records subject to public disclosure laws, and decided that he needed to listen to the recording captured on June 19 to see if his son had engaged in any inappropriate conversations that Michl would need to alert his commander about. 1RP 163. On the morning of June 21, 2011, Michl played the audio. 1RP 165. He heard Ramirez speaking to his girlfriend on the phone, and heard his son say to her that Kneeland could be arrested. 1RP 165. Ramirez told his girlfriend that he would not be upset if Kneeland were caught, because he had stolen someone's valuable property that they had worked hard for. 1RP 165-66.

Later that day, Michl spoke to Ramirez about Kneeland. 1RP 168. Ramirez seemed to be relieved to finally discuss the subject with his father. 1RP 168. Michl asked Ramirez to tell him all that he knew, and

Ramirez did so. 1RP 168. Michl then contacted the North Precinct station of the Seattle Police Department and was put in contact with Dennis Hossfeld, the detective assigned to an investigation of a Prius that had been reported stolen from outside Dr. Martin Ross's Wallingford home on June 10, 2011. 1RP 27, 98.

The stolen Prius had been recovered in the course of a vehicle stop at the Northgate Mall parking lot on June 16, 2011. 1RP 38-39. SPD officer William Anderson had been patrolling the area when he spotted the car and pulled up behind it as it stopped in a parking space. 1RP 39. Anderson ordered the occupants of the car to remain inside, but the three people in the front seat ran off while the three in the back complied. 1RP 39. The driver of the Prius, Micah Brewer was arrested later that day, and told Det. Hossfeld that Kneeland, a fellow student at Ingraham High School, had allowed him to drive the car. 1RP 99. Hossfeld also learned from administrators at Ingraham that Kneeland had been bragging to other students about stealing the car and that he had been in the car when it was stopped by police at Northgate Mall, but had successfully escaped capture. 1RP 100.

When Michl contacted him, Hossfeld asked him to take a statement from his son. 1RP 168-69. Michl did so. 1RP 169.

Ramirez testified that he had been friends with Kneeland for five years, and that they played baseball together. 1RP 43. Following a game on Saturday, June 11, the two teenagers were relaxing inside Kneeland's home when Kneeland told Ramirez that he had "bopped," or stolen, a Prius. 1RP 45-46. Kneeland explained that he had been visiting a home that an acquaintance was housesitting, and had taken a car key; he then returned at a later date and stolen the car. 1RP 46.

Upon hearing this news, Ramirez decided to leave, because he did not want to have anything to do with a stolen car. 1RP 46-47. As he walked to a bus stop, Kneeland followed alongside in the stolen Prius, beseeching Ramirez to join him. 1RP 49. Ramirez continued to decline, boarded a bus, and travelled to his home. 1RP 49. Upon his arrival there, Ramirez found Kneeland waiting outside, next to the stolen car. 1RP 50. The two then spent the afternoon at Ramirez's house, playing video games. 1RP 51.

On the following Monday, June 13, Ramirez watched Kneeland drive the Prius out of the parking lot at Ingraham High School. 1RP 51. On a subsequent day, Kneeland told Ramirez that he and some friends had been pulled over by police at Northgate Mall and that he and some others had escaped. 1RP 53. Kneeland said that he had been in the front passenger seat, and that Micah Brewer had been driving. 1RP 54.

Ramirez testified that he provided a statement to his father of his own volition and was willingly testifying in order to help the public, the victim of the car theft, and, ultimately, Kneeland. 1RP 60-61.

Micah Brewer testified that he had known Kneeland for only a few months before asking him, on June 16, 2011, if he could borrow Kneeland's Prius. 1RP 131. Brewer was surprised to be told by Kneeland that he could; he then drove with a couple of friends to lunch before returning to the Ingraham campus. 1RP 131-32. Upon arriving, Brewer picked up Kneeland and some others, and headed to Northgate Mall. 1RP 133. While en route, a police car pulled up behind the Prius and activated its emergency lights, at which point Kneeland told Brewer that the car they were in was a stolen vehicle. 1RP 136. Brewer testified that he and Kneeland disobeyed an officer's command to remain in the car, and ran off. 1RP 136.

Dr. Martin Ross identified the Prius that was recovered at Northgate Mall as his car. 1RP 25. He reported the theft of his vehicle on the morning of June 10, 2011, when he left his home to drive to work, and found it missing. 1RP 26-27. When the vehicle was returned him approximately a week later, he discovered that its front bumper and roof had been damaged; he also found a crack pipe and marijuana paraphernalia in the passenger compartment. 1RP 31.

Kneeland did not testify in his defense case-in-chief. However, he did seek, pursuant to CrR 3.6, to suppress the testimony of Alejandro Ramirez as the product of a recording that was unlawful because it had been made without Ramirez's consent. 1RP 200-08, CP 11-20. Kneeland noted that the recording sparked Michl's involvement in the investigation of the stolen car, and that this ultimately led to Ramirez's statement and subsequent role in the prosecution of the State's case. 1RP 202-03. Kneeland contended that Ramirez's testimony should thereby be excluded because it was the equivalent of physical evidence obtained during an illegal search. 1RP 207-08.

The trial court agreed with Kneeland that Ramirez was engaged in a private conversation when he spoke by phone with his girlfriend while seated in his father's patrol car, and that the recording itself must be excluded because it had been unlawfully made due to Ramirez's lack of notice and consent. 1RP 223-24. The court then determined that Ramirez's testimony would be subject to suppression only if it reasonably could be deemed "fruit of the poisonous tree." 2RP 5. The court found that Ramirez's testimony was independent of the recorded conversation, was being offered of Ramirez's own free will, and was not "related" to the "purpose" of the illegal recording. 2RP 5. The court concluded that Ramirez's testimony was thus sufficiently attenuated from the illegality of

the recording, and not subject to suppression under the constitutional doctrine of the exclusionary rule. 2RP 6.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY PERMITTED RAMIREZ TO TESTIFY IN THE STATE'S CASE-IN-CHIEF.

Kneeland contends that his conviction should be reversed because the trial court improperly allowed Alejandro Ramirez to testify about his interactions with Kneeland during the period in June 2011 when he possessed the stolen Prius. He asserts that Ramirez's testimony should have been prohibited because it was the product of a violation of art. 1, sec. 7, of the state constitution, and should have been excluded as "fruits of a poisonous tree" to which the attenuation doctrine should not apply. See Brief of Appellant, at 10-11, 14-15.

The State agrees with Kneeland that the trial court improperly applied attenuation analysis to the question of the admissibility of Ramirez's in-court testimony. However, the error was in treating the subject as a question of constitutional law in the first place. In fact, the inadvertent yet improper recording of Ramirez in his father's patrol car was a matter of statutory law, and his testimony, based on knowledge independent from the recording and in no way a product of it, was admissible under the plain language of the Privacy Act. Because the trial

court's decision to deny a suppression motion may be affirmed on any ground supported by the record, even if the trial court made an erroneous legal conclusion, reversal is not required here. See State v. Avery, 103 Wn. App. 527, 537, 13 P.3d 226 (2000).

RCW 9.73.030(1) prohibits the recording of any private communication or conversation between two or more individuals without first obtaining the consent of each participant. The State assumes, for purposes of this appeal, that the trial court began its analysis by properly concluding that Ramirez's conversation with his girlfriend while seated in the patrol car amounted to a private communication under RCW chap. 9.73. CP 32.

However, the trial court then began engaging in unwarranted and inapplicable constitutional analysis, concluding that Kneeland had "automatic standing" to challenge the Privacy Act violation involving Ramirez's phone call. CP 33. Automatic standing is a creature purely of constitutional law, allowing a defendant to challenge a search or seizure if (1) the offense with which he is charged involves possession as an "essential" element of the offense; and (2) the defendant was in possession of the contraband at the time of the contested search or seizure, notwithstanding the simple fact that he had no legitimate property interest whatsoever in the item or searched location. State v. Simpson, 95 Wn.2d

170, 181, 95 Wn.2d 170 (1980). The automatic standing doctrine allows a defendant who would otherwise be deterred from asserting a possessory interest in illegally seized evidence, due to the risk that his admissions will be used later at trial, to challenge a violation of the constitutional right against illegal searches and seizures that protects all citizens of the state. Id. at 180.

Although consideration of the automatic standing rule shows its irrelevance to the facts of the situation here (i.e., the contraband that Kneeland was charged with possessing was a stolen vehicle, not the recording of Ramirez's conversation with his girlfriend), the more basic error committed by the trial court here was in overlooking the fact that the Privacy Act expressly prohibits the admission of non-consensual recordings in *any* court proceeding:

> Any information obtained in violation of RCW 9.73.030...shall be inadmissible in any civil or criminal case in all courts of general or limited jurisdiction in this state....

RCW 9.73.050; see also State v. Keller, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001) (holding that "plain words" do not require construction, and that court may safely presume that the legislature "means exactly what it says."). By its own terms, the Privacy Act applies regardless of the identity of the person or party on trial, and forbids the introduction of any

improperly recorded or intercepted communication during that proceeding. There was no need for the trial court to force the constitutional doctrine of automatic standing into a situation already addressed by clear statutory language.

Unfortunately, the trial court then compounded its error by addressing the admissibility of Ramirez's testimony as a question of attenuation, another constitutional principle, rather than as something to be resolved by reference to the plain language of the Privacy Act. RCW 9.73.050 operates to exclude "information obtained in violation of RCW 9.73.030." This information may be offered in the form of the recordings as exhibits in their own right, or it may be offered via witnesses who testify about what they said or observed during the act(s) of illegal recording. See, e.g., State v. Williams, 94 Wn.2d 531, 543, 617 P.2d 1012 (1980) (barring testimony regarding content of nonconsensual recorded conversations); State v. Fjermestad, 114 Wn.2d 828, 836, 791 P.2d 897 (1990) (prohibiting witnesses from testifying about visual observations and assertive gestures seen while in the course of violating the Privacy Act by illegally transmitting private communications via "body wire").

However, where a witness testifies about information he gathered or learned of without any resort whatsoever to engaging in illegal recording or interception, RCW 9.73.050 does not apply. See State v.

Johnson, 40 Wn. App. 371, 375, 699 P.2d 221 (1985) (holding that where challenged testimony is not about recorded statements but consists of "witnesses' independent recollections of facts obtained through personal knowledge prior to the recordings," the Privacy Act does not require suppression). In this case, Ramirez learned of Kneeland's illegal acts directly from Kneeland, days before he called his girlfriend while sitting in his father's car. The fact of the recording played no role in Ramirez's own gathering of information.

If the legislature intended to prohibit a witness from testifying altogether solely because he or she had, at one point, been illegally recorded discussing a relevant subject, the legislature would have said so. It did not. Instead, it expressly limited the severe effect of RCW 9.73.050 to evidence "obtained in violation of" the Privacy Act. As Justice Guy noted in his dissent in Fjermestad, the "obvious antithesis of this language is that any information not obtained in violation of the statute would be admissible." Fjermestad, 114 Wn.2d at 839 (J. Guy, dissenting).

Kneeland's rights under the 4th Amendment of the U.S. Constitution and article 1, sec. 7, of the state constitution were not implicated by the inadvertent recording of Ramirez's phone call to his girlfriend. Besides the simple fact that Kneeland was not himself improperly recorded nor in possession of the "evidence" he attempts to

claim was unlawfully recorded, thus depriving him of any standing, he cannot even show that Ramirez was subjected to an unlawful search or seizure. A search consists of "an examination of a person's house or premises, or of his person or of his vehicle, etc., with a view to the discovery of contraband or illicit or stolen property, or some evidence of guilt to be used in the prosecution" of a criminal case. Black's Law Dictionary 1349 (6th ed. 1990) (citations omitted). A "seizure" occurs when a state agent meaningfully interferes with an individual's possessory interest in an item of property. Id. at 1359.

Here, Ramirez was accidentally recorded while sitting in his father's patrol car. There was no state intrusion into an area, such as Ramirez's home, person, or vehicle, where he could reasonably enjoy an expectation of privacy. Thus, he was not the subject of a search, particularly considering that Michl had not sought to discover evidence when he had turned on his emergency lights and thereby collaterally activated the recording system. Moreover, Michl was interacting with Ramirez in the context of a father-son relationship rather than as a state agent with a suspect, and listened to the recording not as an officer investigating a potential crime, but as an employee concerned about getting into trouble at work.

Furthermore, none of Ramirez's property was interfered with, nor was he deprived of any of his belongings. Thus, the State did not engage in a seizure.

As to any assertion that the recording amounted to a per se disturbance of Ramirez's private affairs to which Kneeland could somehow object under art. 1, sec. 7, it is belied by the very existence of the Privacy Act. In other words, it can be reasonably assumed, as the state supreme court has noted, that if art. 1, sec. 7, already embraced all recording of conversations within its purview, there would be no need for the Privacy Act to exist. See State v. Corliss, 123 Wn.2d 656, 661, 870 P.2d 317 (1994). Kneeland makes no effort to show how the violation of the Privacy Act that occurred here also constitutes a violation of art. 1, sec. 7. He simply treats it as a given. Under established case law, this is insufficient. See Corliss, 123 Wn.2d at 661 (noting that whether the Privacy Act "has been violated is, of course, a very different inquiry than whether the defendant's constitutional rights were violated.").

In the absence of any such argument, it is unnecessary for this Court to engage in an examination of the attenuation doctrine and its applicability under the state constitution. Kneeland has failed to demonstrate that his constitutional rights were violated when Michl inadvertently recorded his son and then listened to the recording in order

to avoid potential trouble at work, or that the provisions of the statutory Privacy Act somehow grant him automatic standing to raise a constitutional claim under the circumstances present here. He also fails to show that Ramirez should have been barred from testifying of his own free will about events within his personal knowledge simply because he had once mentioned them during a mistakenly-recorded conversation with his girlfriend. Kneeland's appeal should be denied.

D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm the trial court's denial of Kneeland's suppression motion and affirm his conviction.

DATED this 27th day of September, 2012.

RESPECTFULLY submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Dana Nelson, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. BRANDON KNEELAND, Cause No. 68174-5-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

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Name

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Date

Done in Seattle, Washington