Law Enforcement Digest

January 2018

Law enforcement officers: Thank you for your service, protection and sacrifice.

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WASHINGTON SUPREME COURT

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PRIVACY ACT: AN INADVERTANT VOICEMAIL RECORDING OF A HUSBAND HARMING AND THREATENING HIS WIFE IS NOT A "CONVERSATION" UNDER THE PRIVACY ACT; EVEN IF THE VOICEMAIL IS A "PRIVATE CONVERSATION", THE HUSBAND IMPLIEDLY CONSENTED TO THE RECORDING, AND THE RECORDING IS ADMISSIBLE EVIDENCE UNDER THE PRIVACY ACT'S "THREAT EXCEPTION."

State v. Smith, __ Wn.2d __, 405 P.3d 997, 2017 WL 5621243 (November 22, 2017).

FACTS (portions excerpted from the opinion):

John Garrett Smith is married to Sheryl Smith. One evening, the Smiths engaged in an argument at their home that turned violent. During the incident, Mr. Smith used the home's landline cordless phone to dial his cell phone so that he could find his cell phone. The cell phone's voicemail

system recorded the incident because Mr. Smith left the landline open during his attempt to find his cell phone. The voicemail contained sounds of a woman screaming, a male claiming the woman brought the assault on herself, more screams from the female, name calling by the male, and the following exchange:

> (Woman screaming)
>
> WOMAN: Get away.
>
> MALE: No way. I will kill you.
>
> WOMAN: I know.
>
> [More female screaming and name calling by the male followed until the recording ended.]

Mr. Smith punched and strangled Mrs. Smith to the point of unconsciousness. Mr. Smith then fled the scene without his cell phone. The cell phone ended up in the possession of Mrs. Smith's daughter. The daughter listened to the voicemail and then played it for an officer. The police, after hearing the voicemail, seized the cell phone and executed a search warrant on it.

PROCEDURAL HISTORY (portions excerpted from the opinion):

The prosecution charged Mr. Smith with attempted first degree murder, attempted second degree murder, first degree assault, and second degree assault. Before trial, the defense moved to suppress the voicemail based on the Privacy Act. The trial court denied the motion. After a bench trial, the trial court found Mr. Smith guilty of attempted second degree murder, second degree assault, and the related special allegations of domestic violence.

Mr. Smith appealed to the Court of Appeals, and argued that the trial court should have granted the suppression motion. The Court of Appeals agreed and held that the inadvertently recorded voicemail was a "private conversation" subject to the Privacy Act. The prosecution sought review by the Washington Supreme Court. The Washington Supreme Court disagreed with the Court of Appeals.

ANALYSIS (portions excerpted from the opinion):

Under the Privacy Act, RCW 9.73.030(1)(b), it is unlawful to record a "private conversation" without first obtaining the consent of all the persons engaged in the conversation. A private conversation recorded without the consent of all the parties is inadmissible evidence at trial. RCW 9.73.050. However, private conversations of an emergency nature, or which convey threats of bodily harm, may be recorded with the consent of one party to the conversation. RCW 9.73.030(2).

The Washington Supreme Court found that an inadvertent recording is subject to the Privacy Act. But, in this case, the inadvertent voicemail recording of the incident between Mr. and Mrs. Smith was not a "private conversation," and not subject to the Privacy Act's two-party consent requirement. The Court reasoned:

> (1) The voicemail recording primarily contains the sounds of a violent assault being committed. Specifically, the recording contains shouting, screaming, and other sounds, but it also contains brief oral exchanges between Mr. and Mrs. Smith in which Mr. Smith tells his wife that he is going to kill her, and she responds, "I know."

(2) As such, the content of the voicemail is not a "conversation" as contemplated by the Privacy Act.

(3) Since the voicemail did not record a "conversation," the recording does not fall within the Privacy Act's statutory prohibition of RCW 9.73.030, and its admission is not prohibited by RCW 9.73.050.

The Court also found that even if the voicemail recorded a "private conversation," Mr. Smith impliedly consented to the recording. Specifically, Mr. Smith (as a user of his cell phone) would be familiar with its voicemail function. Mr. Smith's general familiarity is demonstrated by his attempt to call his cell phone in order to locate it. But by doing so, he took the risk that his call would trigger the recording (voicemail) function, and it did so. Under these circumstances, he is deemed to have consented to the recording.

Under RCW 9.73.030(2), recorded conversations which convey threats of bodily harm may be recorded with the consent of one party to the conversation. Here, Mr. Smith consented to the recording, and the recording contains threats to kill Mrs. Smith. For that reason, the voicemail recording is admissible at trial.

RESULT: The Washington Supreme Court reversed the Court of Appeals.

STATUTORY INTERPRETATION: A VEHICLE IS A "PREMISES" FOR THE PURPOSES OF CRIMINAL TRESPASS IN THE SECOND DEGREE, RCW 9A.52.080(1).
State v. Joseph, __ Wn.2d __, 405 P.3d 993, 2017 WL 5619476 (November 22, 2017).

FACTS (portions excerpted from the opinion):

Police responded to a report of vehicle prowling. The responding officer found Anthony Joseph asleep in an unlocked Chevy Blazer on a public street. The officer recognized Joseph and knew that he was homeless. The officer contacted Joseph and told him to exit the vehicle. Joseph first told the officer that he had the owner's permission to sleep in the vehicle. Joseph later admitted that he did not have the owner's permission to sleep in the vehicle.

PROCEDURAL HISTORY (portions excerpted from the opinion):

The prosecution charged Joseph with second degree vehicle prowling. The case went to a jury trial. The prosecutor sought instructions on first and second degree criminal trespass as lesser included offenses of the vehicle prowling charge. The trial court refused to instruct the jury on first degree trespass, but instructed the jury on second degree trespass, over Joseph's objection. The trial court did not define "premises" for the jury, but allowed the parties to argue whether this term includes a motor vehicle.

The jury found Joseph guilty of second degree criminal trespass. Joseph appealed to the Court of Appeals and argued a motor vehicle is not a "premises" for the purposes of the second degree criminal trespass statute. The Court of Appeals disagreed and affirmed the trial court. Joseph sought review by the Washington Supreme Court. The Washington Supreme Court agreed with the Court of Appeals.

ANALYSIS (portions excerpted from the opinion):

A person is guilty of criminal trespass in the second degree when "he or she knowingly enters or remains unlawfully in or upon the premises of another under circumstances not constituting

criminal trespass in the first degree." RCW 9A.52.080(1). First degree trespass occurs when a person "knowingly enters or remains unlawfully in a building." RCW 9A.52.070(1).

RCW 9A.52.010(3) defines "premises" to include "any building, dwelling, structure used for commercial aquaculture, or any real property." No provision in chapter 9A.52 defines "building," but that term is defined at the title level in the criminal code. RCW 9A.04.110(5) defines building as including any "vehicle."

The Washington Supreme Court held that "premises" for second degree criminal trespass includes vehicles. The Court reasoned that the legislature plainly intended second degree criminal trespass into any "building" defined in the criminal code, RCW 9A.04.110(5), save for trespass into a building in its ordinary sense. This interpretation properly restricts first degree trespass to unlawful entries into ordinary "buildings," a descriptor that needs no further definition. The more severe charge (a gross misdemeanor) is justified by the increased likelihood of trespass into a home or business. All other trespasses fall under the term "premises" and are treated as simple misdemeanors. RCW 9A.52.080. This includes trespasses into premises that are "buildings" broadly conceived, but are not ordinarily thought of as buildings – such as a vehicle.

RESULT: The Washington Supreme Court affirmed the Court of Appeals.

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WASHINGTON COURT OF APPEALS

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SUFFICIENCY OF EVIDENCE: QUANTITY OF METHAMPHETAMINE COMBINED WITH THE AMOUNT OF CASH IN THE DEFENDANT'S POSSESSION PROVIDED SUFFICIENT CORROBORATING EVIDENCE OF INTENT TO DELIVER INDEPENDENT OF DEFENDANT'S INCRIMINATING STATEMENT.

State v. Hotchkiss, __ Wn. App. __, 404 P.3d 629 (November 7, 2017).

FACTS (excerpted from the opinion):

Law enforcement officers executed a search warrant on Lafe Hotchkiss's residence. During the search, Hotchkiss admitted that he had an "8-ball" – approximately 3.8 grams – of methamphetamine in a safe and provided the officers with the code. He also stated that he procured about one 8-ball of methamphetamine every day and broke it down, and estimated that he had about 10 customers. Inside the safe, officers found 8.1 grams of methamphetamine and $2,150 in cash.

PROCEDURAL HISTORY (portions excerpted from the opinion):

The prosecution charged Hotchkiss with possession of a controlled substance with intent to deliver – methamphetamine. At a bench trial, officers testified about finding the methamphetamine and cash and about Hotchkiss's statement that he had 10 methamphetamine customers.

Hotchkiss then testified that he and a woman who lived with him used three or four grams of methamphetamine per day. He also testified that the cash in the safe came from other people living at his residence, who paid rent of $1,150 per month in cash, and from his employment. He claimed that any statement he made to the officers about selling methamphetamine referred to his actions 20 years earlier.

An officer (with extensive experience dealing with methamphetamine users and sellers) then testified that a typical methamphetamine dose is 0.2 to 0.4 grams. He also testified that it would be very rare that someone would possess eight grams of methamphetamine solely for personal use.

The defense requested the trial court to disregard the officers' testimony regarding Hotchkiss's incriminating statement (made to the officers during the search warrant execution). The defense argued that, under the corpus delicti rule, there was insufficient evidence corroborating Hotchkiss's incriminating statement.

The trial court found that the quantity of methamphetamine in Hotchkiss's possession combining with the amount of cash recovered with the drugs was sufficient corroborating evidence to satisfy the corpus delicti rule. The trial court found Hotchkiss guilty of possession of methamphetamine with intent to deliver. Hotchkiss appealed his conviction to the Court of Appeals, Division Two. The Court of Appeals agreed with the trial court.

ANALYSIS (portions excerpted from the opinion):

The corpus delicti rule prevents the State from establishing that a crime occurred solely based on the defendant's incriminating statement. The State must present corroborating evidence independent of the incriminating statement that the charged crime occurred. Without such corroborating evidence, the defendant's statement alone is insufficient to support a conviction.

The general rule is that mere possession of a controlled substance, including quantities greater than needed for personal use, is not sufficient to support an inference of intent to deliver. The same general rules for sufficiency of evidence to convict apply for corroborating evidence under the corpus delicti rule.

In this case, the Court of Appeals found that the prosecution presented sufficient independent evidence to corroborate Hotchkiss's incriminating statement that he intended to deliver methamphetamine, and the trial court could consider that incriminating statement.

The Court of Appeals reasoned:

(1) The prosecution presented evidence that (i) Hotchkiss had 8.1 grams of methamphetamine in his possession; (ii) given an average dose size of 0.2 to 0.4 grams, such an amount typically would produce 20 to 40 doses; and (iii) it would be very rare for a person to possess that amount merely for personal use.

(2) This evidence standing alone would not be sufficient either to convict Hotchkiss of possession of methamphetamine with intent to deliver or to provide corroborating evidence under the corpus delicti rule.

(3) But the prosecution presented evidence of an additional factor suggestive of intent to deliver - $2,150 of cash in Hotchkiss's safe next to the methamphetamine. This methamphetamine and cash evidence would be sufficient to support a conviction for possession of methamphetamine with intent to deliver.

(4) The possession of the methamphetamine combined with this additional factor (i.e., cash in the safe next to the methamphetamine) should be sufficient to provide corroborating evidence of Hotchkiss's incriminating statement under the corpus delicti rule.

RESULT: The Court of Appeals affirmed the trial court.

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The Law Enforcement Digest (LED) is edited by Assistant Attorney General Shelley Williams of the Washington Attorney General's Office. Questions and comments regarding the content of the LED are welcome and should be directed to Ms. Williams at ShelleyW1@atg.wa.gov. LED editorial commentary and analysis of statutes and court decisions express the thinking of the editor and do not necessarily reflect the views of the Office of the Attorney General or the CJTC. The LED is published as a research source only. The LED does not purport to furnish legal advice. LEDs from January 1992 forward are available via a link on the CJTC Home Page [https://fortress.wa.gov/cjtc/www/led/ledpage.html]

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