No. 99062-0

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

REECE BOWMAN,

Respondent/Cross-Petitioner.

ANSWER TO STATE'S PETITION FOR REVIEW AND CROSS-PETITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court

Washington Supreme Court

Washington Supreme Court

Other Cases

Statutes

Rules

Other Authorities

A. SUMMARY

The prosecution seeks review of the Court of Appeals' opinion issued on September 8, 2020. Reece Bowman, the appellant below and respondent in this matter, asks this Court to deny the prosecution's petition for review. If the Court grants review, Mr. Bowman asks this Court to grant review of the issues raised in this cross-petition. This includes an alternative argument in support of suppression, which the Court of Appeals did not reach. The decision is attached in the appendix.

B. RESTATEMENT OF ISSUE FOR WHICH REVIEW IS SOUGHT

1. A text message conversation is a private affair protected by article I, section 7 of the Washington Constitution. One does not expect governmental intrusion into a conversation with a known associate. Reece Bowman received text messages from a person claiming to be Mike Schabell, a known associate of Mr. Bowman's. In fact, it was a law enforcement officer impersonating Mr. Schabell. The officer did not have Mr. Schabell's consent to impersonate him. This Court in State v. Hinton, 179 Wn.2d 862, 319 P.3d 9 (2014) held virtually identical conduct by law enforcement to be an intrusion into a private affair without authority of law. Under Hinton, did law enforcement intrude into a private affair without authority of law?

C. ADDITIONAL ISSUES FOR REVIEW

2. Both a "search" and an invasion into a "private affair" occur when the government trespasses upon a constitutionally protected area with the purpose to obtain information. Sending uninvited and unwanted electronic messages to a person's cell phone is a trespass to a chattel. With the purpose of trying to obtain information from Mr. Bowman, law enforcement sent uninvited and unwanted text messages to his cell phone. Did this trespassory invasion constitute a "search" or intrusion into a "private affair"?

3. As part of community custody, a trial court may waive the requirement that a defendant pay supervision fees. The trial court found Mr. Bowman indigent and expressed an intent to waive all non-mandatory fees. But a boilerplate provision in the judgment and sentence orders that Mr. Bowman pay supervision fees as a condition of community custody. Should this provision be stricken?

4. Interest does not accrue on non-restitution legal financial obligations. The judgment and sentence orders that interest accrue on legal financial obligations. Must this provision be stricken or reformed?

D. STATEMENT OF THE CASE

The relevant facts are set out in the Court of Appeals' opinion and Mr. Bowman's opening brief. State v. Bowman, __ Wn. App. 2d __, 472 P.3d 332, 333-34 (2020); Br. of App. at 3-5.

To summarize, law enforcement arrested Mike Schabell. A law enforcement officer obtained permission from Mr. Schabell to examine his cell phone. After examining text messages Mr. Schabell had exchanged with Reece Bowman, the officer decided to impersonate Mr. Schabell and invite Mr. Bowman to engage in an illicit drug transaction. Claiming to be Mr. Schabell, the officer sent Mr. Bowman text messages from a cell phone belonging to law enforcement, which had its own number. No evidence shows that the officer obtained Mr. Schabell's permission to impersonate him. Using details gleaned from Mr. Schabell's cell phone and pretending he was Mr. Schabell using a new phone, the officer convinced Mr. Bowman he was communicating with Mr. Schabell. They agreed to meet at the same 7-Eleven where Mr. Bowman and Mr. Schabell had met earlier. Shortly after Mr. Bowman's arrival, he was arrested.

Notwithstanding that this Court in State v. Hinton, 179 Wn.2d 862, 319 P.3d 9 (2014) held virtually identical conduct by law enforcement to be an invasion into a private affair, requiring either a warrant or exception to the warrant requirement, the trial court denied Mr. Bowman's motion to

suppress. The trial court reasoned Hinton did not apply because the officer had sent the text messages using a cell phone that did not belong to Mr. Schabell and had a different phone number.

The Court of Appeals disagreed. The Court recognized that "individuals have a privacy interest in text message conversations with known contacts." Bowman, 472 P.3d at 335 (citing Hinton, 179 Wn.2d at 876-77). As in Hinton, Mr. Bowman "'reasonably believed' he was texting with a 'known contact.'" Id. at 335-36 (quoting Hinton, 179 Wn.2d at 876)). While the phone number was unknown, the officer impersonating Mr. Schabell provided a false but reasonable sounding explanation that his previous phone had broken. Id. at 335. The officer provided details that only Mr. Schabell would know, like their meeting earlier that day at a 7-Eleven. Id. at 335-36. Thus, the officer had invaded Mr. Bowman's private affairs. Id.

The invasion was without authority of law because law enforcement did not have a warrant and the prosecution did not prove that any exception to the warrant requirement applied. This included the consent exception. Id. at 336. While Mr. Schabell had consented to law enforcement examining his cell phone, there was no evidence that Mr. Schabell had consented to being impersonated by law enforcement. Id. Further, the prosecution made no showing that Mr. Schabell had authority

to consent to law enforcement invading Mr. Bowman's privacy interest in the text conversation. Id. Thus, the consent exception did not apply. Id.

In applying Hinton, the Court of Appeals did not address Mr. Bowman's additional argument on why the actions of law enforcement violated both article I, section 7 and the Fourth Amendment. Br. of App. at 12-15; Reply Br. at 4-6. Neither did the Court address Mr. Bowman's challenges to provisions related to legal financial obligations and fees because the Court reversed.

E. ARGUMENT ON WHY REVIEW SHOULD BE DENIED

The Court of Appeals properly applied this Court's decision in *Hinton*. There is no conflict in the precedent. The Court's straightforward application of *Hinton* to facts that are materially and virtually identical to those in *Hinton* does not merit review.

This Court will grant a petition for review only if (1) the decision of the Court of Appeals conflicts with this Court's precedent; (2) the decision conflicts with a published decision of the Court of Appeals; (3) the issue involves a significant question of constitutional law; or (4) the issue is one of substantial public interest that should be determined by this Court. RAP 13.4(b).

The decision in this case does not conflict with any precedent from either this Court or the Court of Appeals. The prosecution does not argue otherwise. Thus, the first two grounds for review are not met.

Neither are the third or fourth grounds satisfied. The decision in this case is a straightforward application of Hinton. The factual differences between this case and Hinton are immaterial. Hinton held text communications are a private affair which is invaded by law enforcement when they use text messages to impersonate a known associate. 179 Wn.2d at 865, 875. That the detective in Hinton used the same phone and phone number, which had received text messages, to intrude on the text conversation, a private affair, is immaterial to this holding. Mike Schabell was a known associate to Mr. Bowman, not a stranger. Therefore, Hinton controls. 179 Wn.2d at 876-77.

This Court in Hinton already decided the significant constitutional question regarding whether law enforcement invades a private affair by impersonating a person's known associate via text messages. The application of this holding to different facts does merit this Court's review.

The prosecution reframes the issue as whether Mr. Bowman "had a constitutional right to be conversing only with the real Mike Schabell given their acquaintanceship." Pet. for Rev. at 7. That is not the issue. The issue is whether law enforcement intruded upon a private affair, i.e., text communications between Mr. Bowman and Mr. Schabell. Under Hinton, the answer is yes because the officer sent text messages to Mr. Bowman's cell phone impersonating Mr. Schabell, Mr. Bowman's known associate.

Citing to the concurring opinion in Hinton, the prosecution incorrectly argues that the "relatively narrow inquiry" in Hinton was "whether an individual has a privacy interest in the actual text messages received by and stored on another individual's phone." Pet. for Rev. at 7 (quoting Hinton, 179 Wn.2d at 878 (Johnson, J., concurring)). Justice Johnson's concurring opinion was primarily a response to the dissent's contention that the defendant in Hinton lacked "standing" to raise an article I, section 7 claim. See Hinton, 179 Wn.2d at 878 (Johnson, J., concurring) (beginning concurrence by responding to the dissent's criticism of the majority opinion). But the majority opinion authored by Justice Gonzalez garnered five votes, including Justice Johnson's. That majority decision reflects the holding of the Court. The prosecution's representation of Hinton is misleading and its view that the Court of Appeals "greatly expanded Hinton" is incorrect.

Contrary to the prosecution's contention, the Court of Appeals did not create "a privacy interest in Bowman's relationship with Schabell that was inviolable even if Schabell consented to his name being used to contact Bowman." Pet. for Rev. at 8. Rather, all the Court of Appeals held was that the prosecution had not met its burden to prove the consent exception to the warrant requirement. Bowman, 472 P.3d at 336.

The consent exception has three requirements: "(1) the consent must be voluntary, (2) the person consenting must have the authority to consent, and (3) the search must not exceed the scope of the consent." State v. Thompson, 151 Wn.2d 793, 803, 92 P.3d 228 (2004). Here, the prosecution could not prove the consent exception because the evidence showed only that Mr. Schabell consented to law enforcement examination of his phone. There was no evidence that Mr. Schabell consented to impersonation. A person's consent to examine text messages on a phone is not a license to impersonate the person. Thus, the prosecution failed to prove the third requirement. Bowman, 472 P.3d at 336.

The Court of Appeals also recognized that the prosecution had not explained why the second requirement was met. Id. "Schabell was not a party to the subsequent text conversation between the police and Bowman." Id. Thus, the expectation by Mr. Bowman that his text communications with Mr. Schabell would remain free from governmental intrusion was still legitimate. Hinton, 179 Wn.2d at 875 ("one who has a conversation with a known associate through personal text messaging exposes some information but does not expect governmental intrusion"). Contrary to the prosecution's contention, the decision in this case did not hold any consent by Mr. Schabell to impersonate (which did not occur) would have been ineffectual. Neither could the Court of Appeals so hold

because there was no evidence that Mr. Schabell had consented to impersonation in the first place.

Simply because the facts of the case are marginally different than those in Hinton does not mean that there is a significant constitutional question. As explained, the facts are materially indistinguishable from Hinton. There is no significant constitutional question. Review is not warranted under RAP 13.4(b)(3).

Review is also not warranted because the petition does not involve an issue of substantial public interest that should be determined by this Court. RAP 13.4(b)(4).

In contending otherwise, the prosecution constructs strawmen and a parade of horribles. Pet. for Rev. at 9-10. The Court of Appeals' decision in this case does not "create[e] a protected privacy interest in the identity of cooperating third parties." Pet. for Rev. at 9. It does not hold that law enforcement may not obtain the aid of the citizenry in combating crime. Neither does it prevent our citizens from cooperating with law enforcement. All the Court of Appeals recognized was that a person's consent to examine a cell phone is not consent to impersonate the phone's owner.

The Court of Appeals' decision holding that the prosecution had not met its burden to prove consent—which was a theory advanced by the

prosecution for the first time on appeal—is not one of substantial public interest meriting review. The outcome in this case rests on the fact that the prosecution did not have the consent of the phone's owner to impersonate him. Review should not be granted when the prosecution seeks an advisory opinion based on an alternative set of facts not at issue in this case. See State v. Norby, 122 Wn.2d 258, 269, 858 P.2d 210 (1993) (advisory opinions are disfavored).

The Court of Appeals correctly applied this Court's decision in Hinton. The prosecution has not shown that review is warranted. This Court should deny review. If it does so, the issues raised in Mr. Bowman's cross-petition below need not be considered.

F. IF REVIEW IS GRANTED, THE COURT SHOULD ALSO REVIEW THE ADDITIONAL ISSUES THE COURT OF APPEALS DID NOT REACH.

If the Court grants review, the Court should also grant review on the other issues Mr. Bowman presented on appeal. The Court of Appeals did not address these issues because the Court's ruling that there was a warrantless invasion into Mr. Bowman's private affairs under Hinton was dispositive.

1. **By sending unwanted and uninvited text messages to Mr. Bowman's cell phone with the intent to learn information, law enforcement committed a trespassory invasion that violated both the Fourth Amendment and article I, section 7.**

Under the Fourth Amendment, a search occurs if the government intrudes upon a reasonable expectation of privacy. Carpenter v. United States, __ U.S. __, 138 S. Ct. 2206, 2213, 201 L. Ed. 2d 507 (2018); Katz v. United States, 389 U.S. 347, 360, 88 S. Ct. 507, 19 L.Ed.2d 576 (1967) (Harlan, J., concurring). Irrespective of the reasonable expectations of privacy test, a search also occurs if the government trespasses upon a constitutionally protected area to obtain information. Florida v. Jardines, 569 U.S. 1, 5, 10-11, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013) (bringing drug-sniffing dog to front door of home was a search as it intruded on protected area and its purpose was to learn whether drugs were in home); United States v. Jones, 565 U.S. 400, 407 n.3, 132 S. Ct. 945, 181 L. Ed. 2d 911 (2012) (attaching GPS device to vehicle was a search as it intruded on an effect and its purpose was to learn movements of vehicle); Taylor v. City of Saginaw, 922 F.3d 328, 332-33 (6th Cir. 2019) (use of chalk to mark tires of parked vehicles was a search because it trespassed on the vehicle and its purpose was to learn later if vehicle had not moved).

"[A]rticle I, section 7 of the state constitution 'requires no less' than the Fourth Amendment." State v. Afana, 169 Wn.2d 169, 177, 233

P.3d 879 (2010)) (quoting State v. Patton, 167 Wn.2d 379, 394, 219 P.3d 651 (2009). And the inquiry under article I, section 7 is broader. Hinton, 179 Wn.2d at 868. The relevant inquiry is whether the state unreasonably intrudes into a person's "private affairs." State v. Myrick, 102 Wn.2d 506, 510, 688 P.2d 151 (1984). The focus is on "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant." Id. at 511.

In this case, law enforcement engaged in a trespassory invasion by sending uninvited text messages impersonating Mr. Schabell to Mr. Bowman's cell phone. While the trespass was not physical, a trespass may be virtual or electronic. United States v. Ackerman, 831 F.3d 1292, 1307-08 (10th Cir. 2016). In Ackerman, authored by Justice Gorsuch when he was a circuit judge, the federal Court of Appeals for the 10th Circuit held the government had conducted a "search" when it opened and examined emails. This was because doing so was a "trespass to chattels"[1] and the purpose was to learn information. Id. As Ackerman recognized, "many

[1] Restatement (Second) of Torts § 217(b) (1965) ("A trespass to a chattel may be committed by intentionally . . . using or intermeddling with a chattel in the possession of another").

courts have already applied the common law's ancient trespass to chattels doctrine to electronic, not just written, communications." Id. at 1308.[2]

Here, law enforcement committed a trespass to chattels by sending unwanted text messages impersonating Mr. Schabell to Mr. Bowman's cell phone. See id. at 1307-08; Jones v. United States, 168 A.3d 703, 717 n.27 (D.C. 2017) ("numerous courts have held that . . . interference with electronic resources can satisfy the elements of common-law trespass to chattels"); Mey v. Got Warranty, Inc., 193 F. Supp. 3d 641, 646-47 (N.D.W. Va. 2016) (unwanted calls to cell phone qualified as a trespass to chattel); Mey v. Venture Data, LLC, 245 F. Supp. 3d 771, 779-80 (N.D. W. Va. 2017) (same); CompuServe Inc. v. Cyber Promotions, Inc., 962 F. Supp. 1015, 1021 (S.D. Ohio 1997) ("Electronic signals generated and sent by computer have been held to be sufficiently physically tangible to support a trespass cause of action."). The purpose of these text messages was to learn information from Mr. Bowman. Specifically, law enforcement sought to learn whether Mr. Bowman would sell drugs and meet for a sale. Thus, there was a search and an invasion into Mr. Bowman's private affairs.

[2] Citing eBay, Inc. v. Bidder's Edge, Inc., 100 F. Supp. 2d 1058, 1063, 1069-70 (N.D. Cal. 2000); CompuServe Inc. v. Cyber Promotions, Inc., 962 F. Supp. 1015, 1019, 1027 (S.D. Ohio 1997); Thrifty-Tel, Inc. v. Bezenek, 46 Cal. App. 4th 1559, 1565-67, 54 Cal. Rptr. 2d 468, 472 (1996).

This conclusion is consistent with this Court's recent opinion in State v. Muhammad, 194 Wn.2d 577, 451 P.3d 1060 (2019). In that case, this Court held that the "pinging" of a defendant's cell phone by law enforcement was an invasion into a private affair and a search. Muhammad, 194 Wn.2d at 596. The purpose of the pinging was to gain information, specifically the defendant's location. Id. at 587-88.

Similarly, law enforcement sent text messages to Mr. Bowman's cell phone to learn information, specifically whether he would meet up and sell drugs. The text messages interfered with the use of his cell phone and placed data onto his phone.

Moreover, while people invite others to contact them via their cell phone, there is no customary invitation for strangers to impersonate others when doing so. Cf. Jardines, 569 U.S. at 8-9 (while law enforcement had an implied license to walk to the door and knock due to custom, they had no customary invitation to bring a trained police dog to the area in the hopes of finding incriminating evidence). Indeed, the actions by law enforcement in impersonating a person via text message would have likely have been tortious and possibly criminal if done by a private party. Washington recognizes common law privacy torts, including the tort of intrusion upon seclusion. Youker v. Douglas Cty., 178 Wn. App. 793, 797, 327 P.3d 1243 (2014); Restatement (Second) of Torts § 652B (1977).

Beyond the common law, the legislature has forbidden persons conducting business in Washington from sending electronic commercial text messages to the cell phones of Washington residents. RCW 19.190.060(1). The legislature has created a civil action for electronic impersonation. RCW 4.24.790. Impersonation can be a crime. RCW 9A.60.40 (criminal impersonation in the first degree); RCW 9A.60.045 (criminal impersonation in the second degree).

Under a straightforward trespass analysis, this was a search and invasion into a private affair. For this alternative reason, suppression was warranted.

Mr. Bowman presented this alternative theory to the Court of Appeals in his briefing. Br. of App. at 12-15; Reply Br. at 4-6. The Court of Appeals, however, did not address it because reversal was warranted under Hinton. If review is granted, the Court should also review this issue. Otherwise, the Court would have to remand to the Court of Appeals if this Court disagreed on the application of Hinton and reversed. RAP 13.7(b) ("If the Supreme Court reverses a decision of the Court of Appeals that did not consider all of the issues raised which might support that decision, the Supreme Court will either consider and decide those issues or remand the case to the Court of Appeals to decide those issues."). If review is granted, judicial economy weighs in favor of reviewing both issues.

2. The provisions requiring Mr. Bowman pay supervision fees and that interest accrue on legal financial obligations were erroneously imposed.

If Mr. Bowman's conviction is not reversed due to the unlawful intrusion into his private affairs, Mr. Bowman argues that two provisions in the judgment and sentence related to legal financial obligations should be stricken or reformed. Br. of App. at 16-17.

First, the judgment improperly imposes interest on legal financial obligations. CP 110. This is erroneous because interest does not accrue on nonrestitution legal financial obligations. State v. Ramirez, 191 Wn.2d 732, 747-50, 426 P.3d 714 (2018); State v. Dillon, 12 Wn. App. 133, 153, 456 P.3d 1199 (2020).

Second, a provision requires that Mr. Bowman, as a condition of community custody, pay supervision fees. CP 114. This provision, which is discretionary, was also imposed in error. The trial court found that Mr. Bowman was indigent and otherwise ordered that all nonmandatory fees and interest be waived. RP 433-34. Because the trial court intended to waive the requirement of supervision fees, the requirement was erroneously imposed and should be stricken. Dillon, 12 Wn. App. at 152; State v. Lundstrom, 6 Wn. App. 2d 388, 396 n.3, 429 P.3d 1116 (2018).

For purposes of judicial economy, if the Court grants the State's petition for review, the Court should also grant review of these issues. See RAP 13.7(b).

G. CONCLUSION

Mr. Bowman asks that the Court deny the State's petition for review. If review is granted, the Court should grant review of the additional issues in this cross-petition, which the Court of Appeals did not reach.

Respectfully submitted this 26th day of October, 2020.

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Appendix

FILED
9/8/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. REECE WILLIAM BOWMAN, Appellant.	No. 79023-4-I DIVISION ONE PUBLISHED OPINION

APPELWICK, J. — A Department of Homeland Security agent sent a series of text messages from a department phone to Bowman. He claimed to be a person to whom Bowman had sold methamphetamine earlier that day, and indicated he wanted to buy more drugs. The ruse led to charges of possession of methamphetamine with intent to deliver. Bowman claims that the ruse violated his right to privacy. He claims the trial court erred in denying his motion to suppress the drugs and drug paraphernalia on his person and in his vehicle. We agree. We reverse and remand for a new trial consistent with this opinion.

FACTS

On February 21, 2017, Reece Bowman received text messages from an unfamiliar number claiming to be an associate of his named Mike Schabell and asking to buy drugs. Unbeknownst to Bowman, the individual sending the text messages was Department of Homeland Security Supervisory Agent Marco Dkane.

A month earlier, Schabell had been arrested and offered an opportunity to cooperate with law enforcement. Law enforcement wanted to know who his drug suppliers were. Schabell identified Bowman as one of his suppliers. When he was arrested again on February 21, he gave law enforcement permission to search his cell phone. Law enforcement looked through his text messages and discovered a conversation with Bowman, from which they learned Bowman's cell phone number and that Bowman had sold Schabell methamphetamine earlier that day.

Dkane texted Bowman from his undercover phone. They had the following exchange:

> [Dkane:] Hey Reese, it's [M]ike. I got a burner [phone] [be]cause my old school phone went to shit.
>
> [Dkane:] You avail[able]?
>
> [Dkane:] ?
>
> [Bowman:] Yes.
>
> [Dkane:] Got cash [redacted]
>
> [Dkane:] I could meet you in Ballard?
>
> [Dkane:] ? Lemme know please[.]
>
> [Bowman:] Yeah what Mike is this[?]
>
> [Dkane:] Schabell. Dude from today.
>
> [Dkane:] Serious?
>
> [Dkane:] I just wanna know if I can get some. Lemme know please.
>
> [Dkane:] Bro, I need 300 more at least.
>
> [Dkane:] Can I meet you back at the 7-11? [redacted] I finally have a good buyer and I need help[. P]lease let me know where to meet you and I'll come wh[e]rever. How much do I have to buy [t]o get [you] to come? I have cash.

[Bowman:] Mike come on then. Didn[']t realize who this was.

[Bowman:] ["thumbs up" emoji]

[Bowman:] Call me.

[Dkane:] I'm with my old lady. Can you come meet or no?

[Dkane:] I just need to know if I should drop her off and come meet you or no.

[Bowman:] Yes[.]

[Dkane:] Where at? Ballard?

[Bowman:] I[']m up on Queen Ann[]e

. . . .

[Dkane:] K. I can head over there. Where [do] you want to meet?

[Bowman:] Where [a]r[e] [yo]u at

[Dkane:] You have clear?[1]

[Dkane:] Coming from [S]nohomish

[Dkane:] I can drop her off to meet her girlfriend around [G]reen [L]ake so.

[Bowman:] Bring her too.

[Dkane:] Where do you want me to come to?

[Dkane:] And haha btw [(by the way)].

[Bowman:] 7-11 same one[.]

[Dkane:] Ok I can be there by 10.

[Dkane:] Can I get [$]500 of clear?

[Bowman:] Sure.

[Dkane:] Thanks.

[1] "Clear" is a common street slang term for methamphetamine.

[Dkane:] See you at 7-11.

[Dkane:] On my way.

Bowman arrived at the 7-11 in Queen Anne with his girlfriend and two year old daughter. Dkane was waiting there with an arrest team. Dkane confirmed Bowman's identity and the team arrested him.

Officers read Bowman his Miranda[2] rights. Bowman indicated he understood his rights. He did not ask for a lawyer or indicate that he wished to remain silent. During the search incident to arrest, officers found 3.5 grams of methamphetamine on his person.

Officers then asked Bowman for consent to search his vehicle, indicating that if he refused the vehicle would be impounded and his girlfriend and daughter would be removed and without transportation. Bowman agreed and signed a consent to search form. During the search, police recovered 55.2 grams of methamphetamine, digital scales, and $610 in cash from the vehicle.

Police then transported Bowman to the Seattle Police Department West Precinct. At the precinct, Dkane and Seattle Police Detective Amy Branham interviewed Bowman. Bowman admitted during the interview that he had six to seven drug customers, there were two ounces of methamphetamine in his car that belonged to him, and his girlfriend was not involved.

The State charged Bowman with violation of the Uniform Controlled Substances Act, RCW 69.50.401(1), (2)(c). Bowman moved to suppress all evidence against him. He argued that Dkane's text message conversation with

[2] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

him violated his privacy rights. The trial court denied that motion, finding that his privacy rights had not been violated.

A jury found Bowman guilty as charged. Bowman appeals.

DISCUSSION

Bowman argues the trial court erred in denying his motion to suppress evidence that flowed from his text message conversation with Agent Dkane. Specifically, he argues that Dkane impersonating a known contact of his through text messages violated his right to privacy under the Washington Constitution, article I, section 7.

Under article I, section 7 of the Washington Constitution, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Interpretation of this article requires a two part analysis. State v. Miles, 160 Wn.2d 236, 243, 156 P.3d 864 (2007). First, we must determine whether the action complained of constitutes a disturbance of "private affairs." Id. at 243-44. If we determine that a valid private affair has been disturbed, we then must determine whether the intrusion is justified by "authority of law." Id. at 244. Where, as here, the trial court's findings of fact are unchallenged, they are verities on appeal. State v. Cheatam, 112 Wn. App. 778, 782, 51 P.3d 138 (2002), aff'd, 150 Wn.2d 626, 81 P.3d 830 (2003). We review whether uncontested facts constitute a violation of article I, section 7 de novo. State v. Rankin, 151 Wn.2d 689, 694, 92 P.3d 202 (2004).

Our first inquiry is whether the text message conversation constituted a private affair. "Private affairs" are those privacy interests which citizens of this

state have held, and should be entitled to hold, safe from government trespass without a warrant. State v. Myrick, 102 Wn.2d 506, 511, 688 P.2d 151 (1984). In State v. Hinton, 179 Wn.2d 862, 876-77, 319 P.3d 9 (2014), the principal case upon which Bowman relies, our Supreme Court found that individuals have a privacy interest in text message conversations with known contacts. There, police arrested Daniel Lee and seized his phone. Id. at 865. While the phone was in their possession, it received a text message from a contact named "Z-Shawn Hinton." Id. at 866. The text message contained drug terminology. Id. A police detective responded to the text message on Lee's phone, posing as Lee, and set up a meeting with the sender to buy drugs. Id. When the sender, Hinton, arrived, police arrested him. Id.

Our Supreme Court held that Hinton's right to privacy had been violated. Id. at 877. It held that Hinton retained a privacy interest in the conversation because he "reasonably believed" he was texting with a "known contact." Id. at 876. It differentiated text message communication from a phone call because "unlike a phone call, where a caller hears the recipient's voice and has an opportunity to detect deception, there was no indication that anyone other than Lee possessed the phone." Id.

The State argues that because Bowman responded to messages from an unfamiliar number, he "knowingly converse[d] with a stranger," and therefore had no privacy interest. It relies on State v. Goucher, 124 Wn.2d 778, 881 P.2d 210 (1994). There, police executed a search warrant on the home of Garcia-Lopez, a drug dealer known to sell drugs out of his house. 124 Wn.2d at 780. While at the

residence, the phone rang. Id. at 780-81. An officer answered the phone and the caller requested to speak to "Luis." Id. at 781. The officer responded that Luis had "gone on a run," but that the officer was "handling business" until he returned. Id. The caller and officer proceeded to arrange a deal to buy drugs at the home. Id. When the caller arrived, officers arrested him. Id. Our Supreme Court held that the caller's privacy rights had not been violated because he had voluntarily conversed with someone he did not know. Id. at 784, 789.

Here, Bowman did not converse with someone he knew to be a stranger. Rather, he conversed with a person who represented himself as someone that Bowman knew. This case differs from Hinton in that the unfamiliar phone number gave some indication that the other party to the conversation might be someone other than Schabell. But, Dkane affirmatively identified himself as Schabell. His explanation for the changed number was reasonable: that his previous phone had broken. He provided details that Schabell would have known. For example, posing as Schabell, Dkane sent a text message to Bowman stating that he had met him earlier in the day and that they had done business in the past. Based on these facts, Bowman reasonably believed he was texting with a known contact. Therefore, as in Hinton, Bowman had a reasonable expectation of privacy for that conversation. Dkane invaded that right of privacy.

Our next inquiry is whether Dkane operated with "'authority of law.'" Miles, 160 Wn.2d at 243 (quoting WASH. CONST., art. I, § 7). The State does not claim that Dkane had a warrant. Rather, it claims that authority came from Schabell's consent to the search of his cell phone. The State points out that this case differs

from Hinton, because Schabell gave police permission to "use his phone for investigatory purposes." Consent can provide authority of law required by article I, section 7 if the State can show (1) that the consent was voluntary, (2) that the person giving consent had authority to do so, and (3) that any search did not exceed the scope of the grantor's consent. State v. Monaghan, 165 Wn. App. 782, 788-89, 266 P.3d 222 (2012). Here, the State is unable to show that either elements (2) or (3) are satisfied.

First, the State has not explained why Schabell, who was not a party to the conversation between Bowman and Dkane, would have any authority to consent to the State's invasion of Bowman's privacy interest in the conversation. Hinton recognized that one in Bowman's situation risked that a contact like Schabell would betray him to police. 179 Wn.2d at 874. For example, he could do so verbally. He could do so by surrendering his phone or computer. He could do so by sharing text messages or e-mails with law enforcement. He could consent to the State listening in on or recording his phone conversation. See State v. Corliss, 67 Wn. App. 708, 713, 838 P.2d 1149 (1992) (expectation of privacy is destroyed when one party consents to the recording), aff'd, 123 Wn. 2d 656 870 P.2d 317 (1994). Schabell betrayed Bowman verbally and by surrendering the phone and text messages. But, unlike in Corliss, Schabell was not a party to the subsequent text conversation between the police and Bowman. Schabell had no privacy interest in that conversation, and had no authority to consent to invasion of the privacy interest that under Hinton was held by Bowman.

Second, the search exceeded the scope of the consent that was given. The State points out that "a private relationship loses its constitutional significance if the other person involved chooses to cooperate with police and share their secrets." It points to the following language from Hinton: "Hinton certainly assumed the risk that Lee would betray him to the police, but Lee did not consent to the officer's conduct." 179 Wn.2d at 874 (emphasis added). Schabell consented to the search of his phone. However, even if Schabell had authority to consent to Dkane impersonating him, the record does not indicate that Schabell consented to being impersonated.

Therefore, Dkane was not acting under authority of law, and violated Bowman's right of privacy. The trial court erred by failing to suppress the evidence obtained by that violation of privacy.

We reverse and remand for a new trial, with instructions to suppress evidence obtained in violation of Bowman's right to privacy.[3]

Appelwick, J.

WE CONCUR:

[3] Bowman challenges two aspects of the LFOs imposed in his judgment and sentence. Should those issues arise on remand, we note that RCW 10.82.090 provides, "As of June 7, 2018, no interest shall accrue on nonrestitution legal financial obligations." And in State v. Dillon, we held that the supervision fees associated with his community custody are discretionary LFOs. 12 Wn. App. 2d 133, 152, 456 P.3d 1199, review denied, 195 Wn.2d 1022, 464 P.3d 198 (2020).

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The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the document to which this declaration is affixed/attached, was filed in the **Washington State Supreme Court** under **Case No. 99062-0**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Appellate Court Case Number:	99062-0
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