NO. 99062-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

REECE BOWMAN,

Respondent.

PETITIONER'S RESPONSE TO AMICUS CURIAE

DANIEL T. SATTERBERG
King County Prosecuting Attorney

GAVRIEL JACOBS
Senior Deputy Prosecuting Attorney
Attorneys for Petitioner

King County Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 477-9497

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A. ISSUES PRESENTED

1. Schabell gave Agent Dkane consent to search his phone knowing it would further a criminal investigation targeting Bowman. Did this consent supersede any privacy interest Bowman had in his text messages stored on Schabell's phone?

2. Agent Dkane, posing as Schabell, had a text conversation with Bowman using a different phone. Has Amici failed to demonstrate any cognizable privacy interest in a two-party conversation where one party was a police officer?

B. ARGUMENT

In Amici's telling of events, Agent Dkane's investigation portends an Orwellian future, where any trusted friend might be a police officer in disguise. Amici's argument, however, has created a straw-man version of the State's position and relies heavily on language from State v. Hinton[1] presented without important context.

Amici contend that Hinton controls because Bowman's text messages to Schabell were a "private affair." But State v. Hinton is unhelpful here because no privacy interest recognized in that case was violated by Agent Dkane's conduct. First, Schabell could plainly consent

[1] The facts from Hinton have been described several times in various pleadings. The State assumes familiarity with Hinton and foregoes any additional introduction. 179 Wn.2d 862, 319 P.3d 9 (2014).

to a search of his own device, a theory not presented in Hinton. Consent searches are a venerable concept predating cellular technology, not some encroaching advancement in electronic surveillance.[2]

Schabell's consent was immaterial to the subsequent text exchange because he was not a participant in the conversation, and thus had no privacy interest at stake. At the same time, Bowman had no reasonable privacy interest because he was speaking to a police officer, and it is well established that State agents can deceive suspects during a criminal investigation. The opinion of the Court of Appeals should be reversed.

1. STATE v. HINTON IS INAPPLICABLE HERE BECAUSE (1) SCHABELL'S CONSENT TO SEARCH HIS OWN PHONE SUPERSEDED BOWMAN'S PRIVACY INTEREST IN ITS CONTENTS, AND (2) BOWMAN HAD NO COGNIZABLE PRIVACY INTEREST IN HIS CONVERSATION WITH A POLICE OFFICER.

That the police seized Lee's phone without a warrant and used it against his will to contact the defendant was critical to this Court's analysis in Hinton. 179 Wn.2d at 865. To emphasize this point, the Court observed that "Hinton certainly assumed the risk that Lee would betray him to the police, but Lee did not consent to the officer's conduct." Id. at

[2] See Zap v. United States, 328 U.S. 624, 628, 66 S. Ct. 1277, 90 L. Ed. 1477 (1946) ("And when petitioner…specifically agreed to permit inspection of his accounts and records, he voluntarily waived such claim to privacy which he otherwise might have had…").

874; id. at 879 (Johnson, J., concurring). This rationale is also apparent from the technical nature of the violation perceived by the Court: that "Hinton's private affairs were disturbed by the warrantless search of *Lee's* cell phone." Id. at 877 (emphasis added). Amici's analysis ignores this aspect of Hinton entirely.

Amici assert that "[t]he analysis in Hinton turned on whether the defendant's text messages were private affairs." Brief of Amici at 4. This oversimplifies Hinton's majority opinion, which was more specifically concerned with the privacy interest Hinton retained in his text messages stored on Lee's phone but unlawfully accessed by police. Hinton, 179 Wn.2d at 867.

In addition, the five concurring and dissenting justices described Hinton's inquiry as "whether an individual has a privacy interest in the actual text messages *received by and stored on another individual's cell phone.*" 179 Wn.2d at 879 (C. Johnson, J., concurring) (emphasis added); id. at 882 (J.M. Johnson, J, dissenting). The opinion of five justices is binding even when "comprised of concurring and dissenting opinions." State v. Constantine, 182 Wn. App. 635, 649, n.4, 330 P.3d 226 (2014). Thus, the constitutional defect in Hinton was not the defendant's conversation with "Lee," but the preceding warrantless search of Lee's phone from which the conversation derived. 179 Wn.2d at 877.

The issue here is not whether text messages are "private affairs" in general, a principle the State does not dispute, but whether they *remain* private when voluntarily disclosed to a police officer. Had Agent Dkane seized Schabell's phone without a warrant or consent, any derivative investigation would have been unlawful. Hinton, 179 Wn.2d 877; Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). But it is undisputed that Schabell consented to the search of his phone in this case. Amici do not challenge Schabell's authority to permit searches of his own phone, nor do they claim Schabell's consent was defective in this regard.

Amici instead claim that Schabell's consent was immaterial because Bowman "reasonably believed that his communications with [Schabell] would be private to the same degree and extent as Hinton." Brief of Amici at 5. This reliance on Hinton is untenable. Like Hinton, Bowman "assumed the risk that [his associate] would betray him to the police." Hinton, 179 Wn.2d at 874. This assumption of risk was hypothetical for Hinton, but a reality for Bowman. Hinton plainly stated that a person's expectation of privacy is not reasonable when their associate voluntarily cooperates with police. Hinton, 176 Wn.2d at 874; see State v. Goucher, 124 Wn.2d 778, 784, 881 P.2d 210 (1994) ("A

privacy interest must be reasonable to warrant protection even under article I, section 7").

Amici also assert that "[t]his Court rejected a nearly identical prosecution theory in Hinton." Brief of Amici at 9. But the prosecutor in Hinton argued that the defendant's text messages were in "plain view."[3] Hinton, 179 Wn.2d at 875-76. The Court pointedly noted the absence of consent in rejecting this argument, thus implying it might have changed the outcome. See Hinton, 179 Wn.2d at 874 ("…but Lee *did not consent* to the officer's conduct") (emphasis added).[4] Contrary to Amici's argument, the dispositive fact in Hinton was not the detective's impersonation of Lee, but the illegality of the search from which the incriminating conversation originated. See id. at 873[5]; see id. at 882.[6]

Amici next contend that even if Schabell consented to the search of his phone, that consent did not extend to impersonating him.[7] This

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[3] The State has never argued that the "plain view" doctrine applied in this case.

[4] See also State v. Corliss, 123 Wn.2d 656, 664, 870 P.2d 317 (1994) (article I, section 7, was not violated when "informant consented to allow the police officers to overhear his conversations…") (cited with approval in Hinton, 179 Wn.2d at 874).

[5] "The Court of Appeals erred by finding that Hinton lost his privacy interest in the text message[s]…because he sent them to a device over which he had no control." Hinton, 179 Wn.2d at 873.

[6] "…because the phone was searched without a warrant…or consent, any evidence derived from the search, including Hinton's responses…is fruit of the poisonous tree…" Hinton, 179 Wn.2d at 882 (Johnson, J., concurring).

[7] Should this Court affirm the Court of Appeals, the State respectfully requests guidance as to whether Schabell's express consent to being impersonated would have been curative. This would help prosecutors and police officers ensure that constitutional

argument confuses the privacy interests at stake. The privacy interest in any conversation belongs to its participants, which in this case were Bowman and Agent Dkane. Agent Dkane's consent defeated any competing interest Bowman might have had. State v. Salinas, 119 Wn.2d 192, 197, 829 P.2d 1068 (1992).

Finally, Amici suggest Bowman had a protected privacy interest in his subjective belief that he was speaking with Schabell. However, a "'subjective expectation of not being discovered' conducting criminal activities is insufficient to create a legitimate expectation of privacy." United States v. Cardoza-Hinojosa, 140 F.3d 610, 616 (5th Cir. 1998) (citing Rakas v. Illinois, 439 U.S. 128, 143-44, n.12, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1969)). The rule in Washington is that a two-party conversation loses its constitutionally protected character if either party consents to its exposure; a privacy interest does not endure simply because one party misjudged the other. State v. Clark, 129 Wn.2d 211, 221, 916 P.2d 384 (1996); State v. Kadoranian, 65 Wn. App. 193, 198, 828 P.2d 45 (1992). If a conversant is not protected from another party's duplicitous intent, it is unclear why the constitution would be offended simply because

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boundaries are respected and conserve judicial resources in future cases. While Amici suggest that such consent would have been sufficient, Brief of Amici at 2, this is contrary to Bowman's argument and the Court of Appeals' opinion which both claimed that even express consent would have been ineffective. Supp. Brief of Resp. at 11; State v. Bowman, 14 Wn. App. 2d 562, 570, 472 P.3d 332 (2020).

the deception related to that party's identity rather than their loyalty. See Goucher, 124 Wn.2d at 786 ("…the intent of the participants does not define the scope of a person's private affairs…").

Amici's position also contradicts this Court's precedent permitting impersonation ruses, even when the assumed identity occupies a position of trust. See State v. Athan, 160 Wn.2d 354, 370, 158 P.3d 27 (2007) (affirming ruse where detectives impersonated attorneys to obtain a DNA sample); State v. Huckaby, 15 Wn. App. 280, 285-86, 549 P.2d 35 (1976) (noting that "undercover or deceptive police tactics…are often essential to detect unlawful activity"). It would be an odd principle of law that allowed detectives to impersonate an attorney, but not a drug customer. See State v. Hastings, 119 Wn.2d 229, 235, 830 P.2d 658 (1992) (officers properly gained consent to enter home by posing as drug buyers). And, contrary to Amici's suggestion, criminal investigations are not a game where offenders must be given a "sporting chance" at detecting police ruses.[8] See United States v. Zavala Maldonado, 23 F.3d 4, 8 (1st Cir. 1994) (police are not required to give subjects of sting operation a fair chance to escape); Brief of Amici at 8.

[8] Hinton noted that the defendant had no "opportunity to detect deception," but did so in the context of explaining why it was unreasonable to "forc[e] citizens to assume the risk that the government will confiscate and browse their associates' cell phones…" Hinton, 179 Wn.2d at 876-77.

No warrant was needed to search Schabell's phone because consent is a valid exception to the warrant requirement. State v. Hendrickson, 129 Wn.2d 61, 71, 917 P.2d 563 (1996). As for Agent Dkane's conversation with Bowman, no authority requires that police obtain a warrant before engaging in voluntary conversations derived from lawfully obtained evidence. After Hinton, Washington residents can expect that their associates' phones will not be searched or commandeered without lawful authority. 179 Wn.2d at 874. But Hinton did not grant criminals blanket immunity against police ruses implicating a known identity.

2. STATE v. MUHAMMAD DOES NOT SUPPORT AMICI'S ARGUMENT.

Amici argue this case is like State v. Muhammad, 194 Wn.2d 577, 451 P.3d 1060 (2019), but the comparison is unpersuasive. The police in Muhammad "pinged" the defendant's phone without a warrant, causing it to reveal his location. Id. at 582. This Court held the "ping" was a search, but found it justified by exigent circumstances. Id. at 596.

Muhammad's phone was essentially hijacked without his knowledge and forced to surrender his position. Id. at 582, n.1. This is arguably similar to Hinton, in that both cases involved the police causing a phone to perform a function against its owner's will. But it is quite

different from this case, where Agent Dkane engaged in a voluntary conversation using lawfully obtained evidence.

Amici assert that Bowman's privacy interest in his conversations was greater than Muhammad's interest in his location. It is unclear this is true, or why it matters on these facts. Muhammad is not relevant to this case, and Amici's strained analogy is unhelpful.

3. PUBLIC POLICY SUPPORTS THE STATE'S POSITION.

The State relies primarily on its supplemental briefing to address any public policy concerns, but respectfully adds and reiterates the following points.

The State previously explained how Amici's desired holding might hinder the detection and prevention of serious crimes in the community, concerns Amici label "*de minimis*." See United States v. Vasquez, 839 F.3d 409, 411 (5th Cir. 2016) (undercover agent assumed witness's identity after the defendant offered him a sexual encounter with her twelve-year-old daughter); Brief of Amici at 15; Supp. Brief of App. at 19. Instead, Amici speculate that allowing police ruses of this sort would reignite the War on Drugs.

This alarmist claim ignores the actual trends in Washington. Ten years ago, the Seattle Times reported that "Washington state prison

inmates have become more violent, whiter, and older," as the percentage of prisoners serving time for drug crimes fell from 21% to 10%. Nicholas K. Geranios, Most Inmates in Washington State Prisons Are Violent Offenders, The Seattle Times (February 20, 2011).[9] By 2018, only 7% of Washington prisoners were incarcerated for drug offenses.[10] That number will presumably fall even lower after this Court's recent decision in State v. Blake, __ Wn.2d __, 481 P.3d 521 (2021). There is no reason to think that permitting this type of ruse would presage any change in enforcement priorities, especially when one considers that Agent Dkane could have accomplished a functionally identical investigation by simply directing Schabell to text Bowman while looking over his shoulder.

Citing a Gallup survey, Amici also claim that the State's position would further erode public trust in law enforcement. Brief of Amici at 15-16. But the reduction in public approval captured by the survey was related to the murder of George Floyd and allegations of excessive force during protests, not because citizens are worried that undercover operatives might pose as their friends.[11] Most laypeople presumably

[9] Available at https://www.seattletimes.com/seattle-news/most-inmates-in-washington-state-prison-are-violent-offenders/ (last accessed 4/26/2021).

[10] Looking Inside: A Smart Justice Profile of Washington's Prison System, American Civil Liberties Union, https://50stateblueprint.aclu.org/assets/reports/SJ-Blueprint-WA.pdf, 7, (accessed 4/8/2021).

[11] See Brenan, Megan, Amid Pandemic, Confidence in Key U.S. Institutions Surges, https://news.gallup.com/poll/317135/amid-pandemic-confidence-key-institutions-

understand and expect that undercover police operations occur with some regularity.

In sum, Amici's policy argument relies on disjointed generalities and hyperbole, while simultaneously understating the real risks to public safety that would arise from materially limiting undercover investigations.

C. CONCLUSION

The State respectfully requests this Court reverse the Court of Appeals and reinstate Bowman's conviction.

DATED this 26 day of April, 2021.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: _____
GAVRIEL JACOBS, WSBA #46394
Senior Deputy Prosecuting Attorney
Attorneys for Petitioner
Office WSBA #91002

surges.aspx (accessed 4/8/2021) (noting 5 point drop in confidence following George Floyd's murder, and allegations of excess force during subsequent protests).

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