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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. RONALD TAYLOR, Appellant.	)	2 CA-CR 2008-0102 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20071865

Honorable Howard Hantman, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Jonathan Bass
Tucson
Attorneys for Appellee

Emily Danies
Tucson
Attorney for Appellant

P E L A N D E R, Chief Judge.

¶1 Following a jury trial, Ronald Taylor was convicted of four counts of selling a narcotic drug. The trial court sentenced him to concurrent, presumptive prison terms of

9.25 years. On appeal, Taylor challenges the trial court's denial of his motion to suppress his electronically recorded conversations with an undercover police officer.[1] We review a trial court's denial of a motion to suppress evidence "for abuse of discretion if it involves a discretionary issue, but review constitutional issues and purely legal issues de novo." *See State v. Booker*, 212 Ariz. 502, ¶ 10, 135 P.3d 57, 59 (App. 2006).

¶2 Section 13-3012(9), A.R.S., authorizes the warrantless "interception of any wire, electronic or oral communication by any person, if the interception is effected with the consent of a party to the communication or a person who is present during the communication." Nonetheless, Taylor contends this practice violates the right to privacy guaranteed under article II, § 8 of the Arizona Constitution, and he asserts "the State of Arizona must revisit the issue of one party consent to taping telephone calls without a warrant."

¶3 Although Taylor does not cite its decision, Division One of this court rejected this argument in *State v. Allgood*, 171 Ariz. 522, 523-24, 831 P.2d 1290, 1291-92 (App. 1992). There, the defendant conceded that "'participant monitoring' or 'consent surveillance' . . . does not violate the fourth amendment to the United States Constitution"[2] but argued, as Taylor does here, that the practice is "illegal under the Arizona Constitution

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[1]In his opening brief, Taylor repeatedly refers to the motion as a motion to "dismiss." Although he had filed a motion to dismiss based on alleged government misconduct, his argument clearly pertains only to his motion to suppress.

[2]*See United States v. Caceres*, 440 U.S. 741, 750 (1979); *State v. Stanley*, 123 Ariz. 95, 102, 597 P.2d 998, 1005 (App. 1979).

art[icle] II, § 8, which states that 'No person shall be disturbed in his private affairs, or his home invaded, without authority of law.'" *Id*. at 523-24, 831 P.2d at 1291-92 (citation omitted). Recognizing that our supreme court has interpreted this provision of the Arizona Constitution to provide greater protection than the Fourth Amendment under certain circumstances, the *Allgood* court observed that "[t]he more expansive interpretation of art[icle] II, § 8 has generally not applied beyond the home search context." *Id*. at 524, 831 P.2d at 1292. It concluded, therefore, that the warrantless recording of the call at issue there "did not violate the state constitution." *Id*.

¶4 The two divisions of the court of appeals are "a single court," and absent contrary authority from our supreme court, we are inclined to follow Division One's decision. *See* A.R.S. § 12-120(A); *State v. Dean*, 8 Ariz. App. 508, 511, 447 P.2d 890, 893 (1968). "Although we are not bound by [*Allgood*], we may find it persuasive '"unless we are convinced that [it is] based upon clearly erroneous principles, or conditions have changed so as to render [it] inapplicable."'" *State v. Benenati*, 203 Ariz. 235, ¶ 7, 52 P.3d 804, 806 (App. 2002), *quoting Danielson v. Evans*, 201 Ariz. 401, ¶ 28, 36 P.3d 749, 757 (App. 2001) (alterations in *Danielson*). Taylor has persuaded us of neither. He has cited cases showing courts of other states have found their constitutions require a warrant under circumstances similar to those that exist here, but he has offered no compelling reason for this court to hold Arizona's constitution does the same. Taylor has not cited, nor have we found, any Arizona court decision that applies article II, § 8 to require a warrant where the Fourth Amendment does not, absent a physical intrusion into a person's home. *See*, *e.g.*, *State v. Ault*, 150 Ariz.

459, 463, 724 P.2d 545, 549 (1986) ("As a matter of Arizona law, officers may not make a warrantless *entry into a home* in the absence of exigent circumstances or other necessity.") (emphasis added); *State v. Bolt*, 142 Ariz. 260, 264-65, 689 P.2d 519, 523-24 (1984) (same). Moreover, the privacy concerns that motivated our courts to interpret article II, § 8 more broadly than the Fourth Amendment are not present under the circumstances of this case. The interest in the privacy of one's home is simply not affected by the recording of a telephone conversation by a participant to that conversation, even if a portion of the conversation takes place within a home.[3]

¶5 The trial court did not err as a matter of law or abuse its discretion by denying Taylor's motion to suppress. *See Booker*, 212 Ariz. 502, ¶ 10, 135 P.3d at 59. Accordingly, we affirm Taylor's convictions and sentences.

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JOHN PELANDER, Chief Judge

CONCURRING:

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PHILIP G. ESPINOSA, Judge

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J. WILLIAM BRAMMER, Jr., Judge

[3]Taylor presented evidence at the suppression hearing that he spoke with the undercover officer on his cellular telephone from his friend's residence.