IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 29313-1-III**
	)	
Respondent,	)	
	)	
v.	)	**Division Three**
	)	
DANIEL A. N. ROSS,	)	
	)	
Appellant.	)	**UNPUBLISHED OPINION**

Korsmo, J. — Daniel Ross challenges his ten convictions for violating a no-contact order, arguing that the Department of Corrections could not turn over its recordings of his telephone conversations to Child Protective Services. We disagree and affirm.

FACTS

Daniel and Karen Ross married in 2007. The relationship was violent. By 2008 a restraining order limited contact between the couple. Child Protective Services (CPS) removed their child from the home and told Ms. Ross that she had to avoid contact with

Mr. Ross before she could be reunited with her child. Mr. Ross was convicted of violating the no-contact provisions of the restraining order and sent to prison. A no-contact order was entered as part of the felony judgment and sentence.

Mr. Ross was processed through the Washington State Correctional Facility at Shelton. There, he and Karen Ross engaged in a number of telephone conversations. He would have a fellow prisoner, using that prisoner's identification code, call Ms. Ross. When she accepted the call, Daniel would take over the conversation. In accordance with Department of Corrections (DOC) policy, the phone calls were recorded and the participants advised that the calls would be recorded. Ms. Ross could only accept the call after she received the warning that it would be recorded.

CPS worker Marty Miller was working with Ms. Ross on the child custody matter; CPS would not allow the child back in Ms. Ross's home while she was maintaining a relationship with Mr. Ross. Ms. Ross advised Ms. Miller that she was still talking to Mr. Ross in violation of the no-contact order. Ms. Miller contacted DOC and an investigator tracked down the recordings of the phone conversations between Karen and Daniel Ross. He passed a copy of the recording on to Ms. Miller. She reviewed the recordings, confirmed that Daniel and Karen Ross were involved, and turned the recording over to an Ellensburg Police Department detective. The detective obtained another copy of the

recording from DOC and turned that copy over to the prosecutor's office. In turn, that office charged 10 counts of violation of a no-contact order based on the recordings.

Mr. Ross moved to suppress the recordings, arguing that his rights under the Privacy Act, chapter 9.73 RCW, were violated by DOC turning the recordings over to CPS. The trial court denied the motion, reasoning that CPS was investigating a crime within its "area" and that the disclosure from DOC to CPS was proper. Report of Proceedings (RP) at 21-24.

A DOC records custodian testified at trial and provided the foundation for the telephone record logs and the telephone recording introduced at trial. RP at 40-50. He identified the speakers on the recordings, as did Ms. Miller, Ms. Ross, and the detective. The recordings were played, in part, for the jury.

The jury found Mr. Ross guilty on all ten counts. He timely appealed to this court.

ANALYSIS

This appeal challenges DOC's authority to record the phone conversations and to disseminate them to CPS.[1] We conclude that DOC had authority to record the conversations and that any dissemination to CPS had no effect on the evidence presented

[1] Mr. Ross also filed a pro se Statement of Additional Grounds that challenges the dissemination of the recordings. We will not independently discuss those claims since our analysis of counsel's argument subsumes most of the pro se arguments, which are without merit.

at trial.

Authority

Mr. Ross argues that the recording practices violated both his constitutional and statutory rights. The constitutional argument was settled against his position a half century ago. His statutory argument runs head long into the terms of the statute itself.

Prior to the adoption of the Privacy Act in 1967, our Supreme Court had determined that the state constitution did not protect against one party to a conversation sharing that conversation by tipping a receiver, recording the conversation, or broadcasting it to officers waiting outside. *See State v. Jennen*, 58 Wn.2d 171, 361 P.2d 739 (1961); *State v. Wright*, 74 Wn.2d 355, 444 P.2d 676 (1968), *cert. denied*, 394 U.S. 961 (1969); *State v. Goddard*, 74 Wn.2d 848, 447 P.2d 180 (1968). Citing to the three cases, the Court more recently summarized:

> The issue as to whether there is a right of privacy under our constitution where one party, as here, consents to the contents of the conversation being recorded was settled in three cases decided in the 1960's[.] This court held there was no expectation of privacy and Const. art. I, § 7 did not prevent the disclosure of the conversation.

State v. Salinas, 119 Wn.2d 192, 197, 829 P.2d 1068 (1992) (citations omitted).

The conversations at issue in this case were recorded with the knowledge of the parties, and Ms. Ross had to agree to the recording before she could accept the phone call. Thus, there was no state constitutional violation when DOC recorded the calls at

issue in this case. *See State v. Archie*, 148 Wn. App. 198, 204, 199 P.3d 1005, *review denied*, 166 Wn.2d 1016 (2009).

The remaining question is whether the recordings ran afoul of the Privacy Act. They did not. RCW 9.73.095 provides in relevant part:

> (1) RCW 9.73.030 through 9.73.080 and 9.73.260 shall not apply to employees of the department of corrections in the following instances: Intercepting, recording, or divulging any telephone calls from an offender or resident of a state correctional facility; . . . "state correctional facility" means a facility that is under the control and authority of the department of corrections, and used for the incarceration, treatment, or rehabilitation of convicted felons.
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> . . . .
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> (2)(b) The calls shall be "operator announcement" type calls. The operator shall notify the receiver of the call that the call is coming from a prison offender, and that it will be recorded and may be monitored.
>
> (3) The department of corrections shall adhere to the following procedures and restrictions when intercepting, recording, or divulging any telephone calls from an offender or resident of a state correctional facility as provided for by this section . . . .
>
> . . . .
>
> (b) The contents of any intercepted and recorded conversation shall be divulged only as is necessary to safeguard the orderly operation of the correctional facility, in response to a court order, or in the prosecution or investigation of any crime.

RCW 9.73.095(1)-(3)(b).

The statute expressly authorizes DOC to intercept and record "any telephone calls from an offender or resident of a state correctional facility." RCW 9.73.095(1). Mr.

Ross was admittedly an offender residing in the DOC correctional facility at Shelton. Under the terms of this provision of the Privacy Act, DOC could lawfully record his telephone conversations.

There was no violation of either the state constitution or the Privacy Act. DOC was permitted to record the conversations.

Dissemination

Mr. Ross also argues that even if DOC could have recorded his telephone calls, the act of providing a copy to CPS worker Marty Miller violated the terms of the statute. Even if there was error, Mr. Ross has not shown that there is a basis for any relief or that it affected his trial.

Mr. Ross bases his argument on RCW 9.73.095(3)(b), which states in part that any "recorded conversation shall be divulged only as is necessary . . . in the prosecution or investigation of any crime." He argues that disclosure should only be permitted to general law enforcement agencies and that CPS, which has limited criminal investigation powers, could not lawfully receive the recording. There are several problems with his argument.

The first difficulty is that RCW 9.73.095(3)(b) does not expressly state anything about law enforcement agencies. The provision does not contain any limitation by type

of agency or otherwise provide direction about recordings provided for the "investigation of any crime." His argument does not establish that any violation of the statute occurred.

The second difficulty with the argument is that the statute does not provide any remedy in case of violation. The Privacy Act provides that information obtained in violation of RCW 9.73.030 or RCW 9.73.040 "shall be inadmissible in any civil or criminal case in all courts of general or limited jurisdiction in this state." RCW 9.73.050. However, RCW 9.73.095(1) states that "RCW 9.73.030 through 9.73.080 and 9.73.260 shall not apply to employees of the department of corrections" engaged in recording or divulging telephone calls made by a resident of a correctional facility. The subsequent paragraphs of the statute tell DOC how to provide notice of the recording program and place limits on the use of the recordings, but they do not provide any remedy when the department fails to live up to its obligations. The Privacy Act's normal exclusionary rule does not apply. RCW 9.73.050; RCW 9.73.095(1). In this circumstance, Mr. Ross cannot identify a statutory basis for suppressing the recordings that were shared with CPS.

These two statutory problems present serious barriers that Mr. Ross has not overcome. However, he has an even more fundamental difficulty. Even if we assume that the statute was violated and that the remedy for violation is suppression, he has not

shown that it would apply in this case. The error, if there was one, was in providing the copy of the recordings to CPS. That recording was not used at trial. Instead, the DOC representative brought another copy and provided the foundation for admission. That copy was then played for the jury.

Evidence that is illegally obtained or is the "fruit of the poisoned tree" is subject to suppression. *E.g.*, *State v. Hilton*, 164 Wn. App. 81, 89, 261 P.3d 683 (2011). Witnesses discovered from improper searches are not subject to suppression. *Id*. at 89-90. Here, however, the recording used at trial was not the fruit of the recording given to Ms. Miller. Ms. Ross told Ms. Miller about the telephone calls. Ms. Miller contacted DOC, which checked its logs and confirmed Ms. Ross's report. The recording was then used by Ms. Miller to confirm that Mr. Ross was a participant. Ms. Miller then told the detective, who then contacted DOC and received a copy for the purposes of his investigation. All of the information necessary to obtain the recording used at trial came from sources other than the recording given to CPS. It was the disclosure by Ms. Ross, which then received support in DOC's log records, that led to the recording entered as an exhibit at trial. While the recording given to CPS certainly had a role in the development of the case, it was not a proximate cause of the discovery and use of the recordings at trial.

For all three reasons, Mr. Ross has not established a basis for suppressing the

evidence used at trial.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Korsmo, J.

WE CONCUR:

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Kulik, C.J.

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Siddoway, J.