

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 79767-6
)	
v.)	En Banc
)	
DESMOND EARL MODICA,)	
)	
Appellant.)	
_____)	Filed July 10, 2008

CHAMBERS, J. – Desmond Modica was arrested after striking his wife in the face. While in jail, he called his grandmother almost everyday. Near the jailhouse telephones was a sign warning that calls would be recorded, a fact confirmed by an automatic message played for every person making or receiving a call from these telephones. We must decide whether Modica’s calls were nonetheless “private,” protected by the Washington privacy act, chapter 9.73 RCW, and not admissible in court. We conclude the calls were not private and affirm.

Facts

Kerry Solandros was on her way to work early one morning when she saw a woman with a bloody face stumbling down the sidewalk. Solandros

pulled over, offered to help, and called 911. The woman, who was married to Modica, was taken to the hospital where she told the emergency room physician that her husband had punched her in the face. The hospital examination found multiple fractures to her nasal bone, and the police arrested Modica. He was initially charged with assault and resisting arrest and ordered to have no contact with his wife.

Shortly before Modica was arrested, the King County jail installed a new recording system that automatically recorded every call made and tracked every number dialed. Again, signs are posted near the telephones warning that calls will be recorded, and an automated message repeats that warning to both those making and receiving the calls. For example, when Modica called his grandmother, both of them heard:

Hello, this is a collect call from [Desmond] an inmate at King County Detention Facility. This call will be recorded and subject to monitoring at any time. To accept the charges dial three. To decline the charges dial nine or hang up now. Thank you for using Public Communication Services. You may begin speaking now.

Ex. 19, track 1.

Modica enlisted his grandmother's help in arranging for his wife to evade the prosecutors and not appear in court. After Ms. Modica stopped responding to calls both from a King County domestic violence advocate and the prosecutor's increasingly urgent efforts (including a subpoena), the State

listened to some of these recorded calls. After listening, the State promptly and successfully moved for a material witness warrant for Ms. Modica and added a witness tampering charge to its existing case against Modica.

At trial, the judge denied Modica's motion to exclude the taped conversations and several of the calls were played for the jury. These recorded calls strongly supported the witness tampering charge. The jury convicted Modica of two counts of assault, one count of resisting arrest, and one count of tampering with a witness. The Court of Appeals affirmed. Modica sought our review only of the trial court's admission of the recordings of the conversations with his grandmother and asked that we suppress the recordings and reverse his tampering conviction.

Analysis

Generally, our privacy act makes it "unlawful . . . to intercept, or record any: (a) [p]rivate communications transmitted by telephone . . . between two or more individuals . . . without first obtaining the consent of all the participants in the communication." RCW 9.73.030(1). "Any information obtained in violation of RCW 9.73.030 . . . shall be inadmissible in any civil or criminal case in all courts of general or limited jurisdiction in this state." RCW 9.73.050. Whether a conversation is private is a question of fact but may be decided as a question of law where, as here, the facts are not meaningfully in dispute. *State v. Townsend*, 147 Wn.2d 666, 673, 57 P.3d 255 (2002) (citing *State v. Clark*, 129 Wn.2d 211, 225, 916 P.2d 384

(1996)).

The privacy act does not define “private,” but we have previously found it means ““belonging to one’s self . . . secret . . . intended only for the persons involved (a conversation) . . . holding a confidential relationship to something . . . a secret message: a private communication . . . secretly: not open or public.”” *Clark*, 129 Wn.2d at 225 (alterations in original) (quoting *Kadoranian v. Bellingham Police Dep’t*, 119 Wn.2d 178, 189-90, 829 P.2d 1061 (1992)). Among other things, the subject matter of the calls, the location of the participants, the potential presence of third parties, and the role of the interloper are relevant to whether the call is private. *State v. Christensen*, 153 Wn.2d 186, 193, 102 P.3d 789 (2004) (citing *Clark*, 129 Wn.2d at 225-27). Further, “[a] communication is private (1) when parties manifest a subjective intention that it be private and (2) where that expectation is reasonable.” *Christensen*, 153 Wn.2d at 193 (citing *Townsend*, 147 Wn.2d at 673).

We will assume for purposes of our analysis that Modica and his grandmother intended that their conversations be private. This case then turns on whether that expectation was reasonable. We hold under these facts it was not. First, we have already held that inmates have a reduced expectation of privacy. *State v. Campbell*, 103 Wn.2d 1, 23, 691 P.2d 929 (1984). Second, both Modica and his grandmother knew they were being recorded and that someone might listen to those recordings. Modica made

the calls under a physical sign on the wall warning of that fact. He and his grandmother had to listen to an automated system's warning that the call will be "recorded and [is] subject to monitoring at any time." Ex. 19, track 1; *cf. Lewis v. Dep't of Licensing*, 157 Wn.2d 446, 459, 139 P.3d 1078 (2006).

What is more, Modica and his grandmother were recorded discussing the fact that their calls were being recorded. Whatever expectation of privacy they had, it was not reasonable.

However, we caution that we have not held, and do not hold today, that a conversation is not private simply because the participants know it will or might be recorded or intercepted. *See generally State v. Faford*, 128 Wn.2d 476, 910 P.2d 447 (1996) (privacy act protects cordless telephone calls even if the participants know they can be intercepted); *cf. State v. Jones*, 95 Wn.2d 616, 627, 628 P.2d 472 (1981); *State v. Grove*, 65 Wn.2d 525, 527, 398 P.2d 170 (1965). Intercepting or recording telephone calls violates the privacy act except under narrow circumstances, and we will generally presume that conversations between two parties are intended to be private. Signs or automated recordings that calls may be recorded or monitored do not, in themselves, defeat a reasonable expectation of privacy. However, because Modica was in jail, because of the need for jail security, and because Modica's calls were not to his lawyer or otherwise privileged, we conclude he had no reasonable expectation of privacy.¹

¹ We note that such facts may also be relevant to the issue of implied consent. *Townsend*, 147 Wn.2d at 676.

The State also argues that these particular calls could not be private because Modica intended that messages be passed on to his wife. We do not find this argument persuasive. While in some circumstances, the fact that the content of the call is intended to be passed on to another may be relevant to whether it is private, it is certainly not determinative. This is not like *State v. Forrester*, 21 Wn. App. 855, 861-62, 587 P.2d 179 (1978), where the defendant made calls to the police taking responsibility for a gruesome double homicide and threatening to kill again unless paid off. The defendant asked the police officer answering the telephone to arrange for the police chief and city mayor to be present for a second call where he asked for \$10,000 to be delivered to a bowling alley restroom by a young boy. *Id.* at 858-59. He also threatened to kill again and report to the world that the city could have prevented the death by paying the money. *Id.* Taken as a whole, the court reasonably found that “[t]hese are not the statements of someone who expects the substance of his telephone call to remain confidential.” *Id.* at 862. But the mere fact that a portion of the conversation is intended to be passed on does not mean a call is not private and must be determined from the totality of the circumstances.

Given our holding, we need not reach whether Modica and his grandmother impliedly consented to having their conversations recorded.²

² Accordingly, we also have no cause to reach Modica’s argument that we should not find implied consent because the situation was inherently coercive. Modica points out that he did not have the option of using an untapped telephone and that every call made by an inmate is recorded. This happens whether the inmate has been charged with a crime, is

Conclusion

We hold that the State did not violate the privacy act by recording these particular calls. Accordingly, the trial court did not err by admitting the recordings. We affirm Modica's conviction.

held on a petty or serious offense, is there for public safety reasons, or simply is too poor to afford minimal bail. The State may, at its whim, listen to conversations with family, friends, and employers and if it finds the conversation useful, may use it against the inmate. Nothing in this opinion should be taken to prejudge a future challenge to this practice, if properly supported with authority.

State v. Modica (Desmond Earl), No. 79767-6

AUTHOR:

Justice Tom Chambers

WE CONCUR:

Justice Susan Owens

Justice Charles W. Johnson

Justice Mary E. Fairhurst

Justice Barbara A. Madsen

Justice James M. Johnson

Justice Debra L. Stephens
