STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RYAN TENTONI,

Defendant-Appellant.

Appeal No. 2014 AP 2387-CR

ON APPEAL FROM THE JUDGEMENT OF CONVICTION ENTERED ON JULY 9, 2014, AND FROM THE WAUKESHA COUNTY CIRCUIT COURT'S ORDERS DENYING TENTONI'S MOTION TO SUPPRESS EVIDENCE, THE HON. KATHRYN W. FOSTER, PRESIDING

KOHLER & HART, SC
Attorneys for Defendant-Petitioner

Craig S. Powell
State Bar No. 1046248

Geoffrey R. Misfeldt
State Bar No. 1065770

735 North Water Street, Suite 1212
Milwaukee, Wisconsin 53202
Phone: (414) 271-9595
Facsimile: (414) 271-3701

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTORY PROVISIONS

ISSUE PRESENTED

Does the sender of a text message have a reasonable expectation of privacy in the content of those communications?

The circuit court answered no.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

At around 8:00 p.m. on December 5, 2012, the Delafield Police Department was called to the scene of a death at 938 Sunset Drive in Delafield, Wisconsin. (1:1, App. 201). Upon his arrival, Officer Landon Nyren found Wayne Wilson ("Wilson") deceased in a back bedroom with a small plastic object on Wilson's lips. (Id. at 2, App. 202; 44:4). It was later determined that the object was a Fentanyl patch, and that Wilson died from a Fentanyl overdose. (1:2; App. 202).

Nyren searched the bedroom for evidence and seized Wilson's smartphone, an HTC EVO-3D. (1:2, App. 202; 44:4; 45:11, App. 411). Nyren took the phone to the Delafield Police Department and stored it for a later forensic review. (45:11, App. 411). During the late afternoon on the following day, December 6, 2012, Nyren conducted a forensic download of Wilson's phone. (Id.) He did not get a warrant to do so. (Id. at 4-5, App. 404-05)

During his search of Wilson's smartphone, Officer Nyren observed text messages exchanged between Wilson and Ryan Tentoni. (1:2, App. 202; 45:11, App. 411). Nyren believed certain messages implicated Tentoni in a drug transaction with Wilson. (44:5-7; 45:11; App. 411). Relying on this information, Officer Nyren sought and obtained a warrant for

Tentoni's phone records from his service provider, Verizon. (45:6, 12-15; App. 406, 412-15).

The Verizon records contained the same text messages, but also contained hundreds of texts between Wilson and Tentoni discussing mundane aspects of their friendship, including hanging out to watch football. (45:12-15; App. 412-15).

A criminal complaint was issued on March 22, 2013, charging Tentoni with one count of first-degree reckless homicide in violation of Wis. Stat. § 940.02 (2)(a), alleging that Tentoni delivered Fentanyl to Wilson, that Wilson used the Fentanyl, and that Wilson died as a result of his use of the Fentanyl.

The complaint included some[1] of the relevant text messages as follows:

Wilson	12:17 p.m.	"We getting today?!"
Tentoni		"Hopefully patches tonight"
Tentoni	5:03 p.m.	"Patches tonight…You in?"
Wilson		"Yeah, I'm in."
Wilson	10:37 p.m.	"These are like duds to me dude. Don't feel a thing. Let's gets [sic] 30's or maybe I'll get another tomorrow cuz I need more than 1 probly."
Tentoni	10:43 p.m.	"Suck on them!"
Wilson		"That's a waste. I can't have it in my mouth for 3 days."
Tentoni		"It won't be, you are removing the medicine quicker than it is on ur skin. Usually only last 24 hours."

[1] The complaint leaves out some texts between Tentoni and Wilson that were sent/received during this conversation. Though there is no logical reason why the State excluded some texts from the conversation, the missing texts are not in the record and Tentoni does not assert that their inclusion would alter the analysis before the court.

Tentoni		"I have 2 patches on and I have no craving for pills. It takes some getting used to."
Wilson	10:57 p.m.	"How should I fold it?"
Tentoni		"Sticky part outside and again lengthwise."

(1:2; App. 202).

On September 11, 2013, Tentoni filed a motion to suppress the text messages exchanged between he and Wilson. (10). Tentoni argued that text messages are the modern equivalent to a phone call placed from a publicly-accessible phone booth, which the ***Katz*** Court declared was a constitutionally-protected interest. (10; ***citing Katz v. United States***, 347 U.S. 351, 352 (1967)).

On October 4, 2013, the State filed its response to Tentoni's motion, arguing that Tentoni did not have standing to challenge the search of Wilson's smartphone. (11).

On October 14, 2013, the circuit court heard oral argument on Tentoni's motion, and denied it in an oral ruling from the bench. (45; App. 401-50).

Tentoni filed a motion to reconsider in the circuit court on April 21, 2014, pointing out to the court that the ***Hinton*** case out of Washington, which the State relied upon and the circuit court had found persuasive in its oral ruling, had been reversed by the Washington Supreme Court and now supported Tentoni's position. (21). The circuit court denied Tentoni's motion orally from the bench on April 28, 2014 (46).

Tentoni ultimately pled guilty to an amended charge of Second-Degree Reckless Homicide. (25; 47).

He was sentenced to 5 years initial confinement and 4 years of extended supervision. (39; App. 101-03).

Tentoni now appeals.

ARGUMENT

"The privacy landscape is shifting as we embrace new technologies. Electronic devices afford us great convenience and efficiency, but unless our law keeps pace with our technology, we will pay for the benefit of our gadgets in the currency of privacy. As we incorporate more of our lives into our smartphones and tablets, we are not merely using technology as a tool for societal and professional navigation; we are digitizing our identities. Thus, efforts to access the information in our electronic devices invade and expose the marrow of our individuality." **State v. Subdiaz-Osorio**, 2014 WI 87, ¶ 42, 357 Wis. 2d 41, 65-66, 849 N.W.2d 748, 760-61 cert. denied, 135 S. Ct. 379, 190 L. Ed. 2d 269 (2014)

Text messaging is the 21st century phone call. By denying Tentoni's motion to suppress, the circuit court ignored the technological realities of text messaging and, in so doing, threatened to erode the privacy protections of a pervasive form of communication.

"The Fourth Amendment must keep pace with the inexorable march of technological progress, or its guarantees will wither and perish." ***U.S. v. Warshak***, 631 F.3d 266, 285 (6th Cir. 2010). The circuit court's decision fails to "keep pace" and must therefore be reversed.

I. Tentoni's Expectation of Privacy in His Text Messages Did Not End Once They Were Sent to Wilson's Phone

A. Fourth Amendment Standards

The Fourth Amendment to the United States Constitution protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches . . ." Wisconsin's Constitution contains a nearly identical provision and has generally been interpreted in the same manner. WIS. CONST. ART. I, § 11; ***see generally State v. Eason***, 2001 WI 98, 245 Wis. 2d 206, 629 N.W.2d 625.

The Fourth Amendment protects people, not places. ***See Katz v. U.S.***, 389 U.S. 347, 351 (1967). "What a person knowingly exposes to the public, even in his own home . . . is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be considered constitutionally protected." ***Id.***

The framework for determining whether the Federal and State constitutions provide Tentoni protection from warrantless governmental interception of his text-message conversations derives from Justice Harlan's concurrence in ***Katz***. That framework is a two-part test: (1) whether the individual, by his conduct, has exhibited an actual (subjective) expectation of privacy; and (2) whether the individual's subjective expectation of privacy is one that society is prepared to recognize as reasonable. ***See, e.g., Smith v. Maryland***, 442 U.S. 735, 740-41 (1979); and ***State v. Duchow***, 2008 WI 57, ¶ 20, 310 Wis. 2d 1, 16, 749 N.W.2d 913, 920.

In ***Katz***, Government agents were investigating him for violations of gambling laws. As part of that

investigation, agents attached a listening device to the outside of a telephone booth. Katz entered the booth, closed the door, and placed a phone call. The recording device on the outside of the booth captured Katz's end of the conversation, which was introduced into evidence over his objection**.** 389 U.S. at 348.

The Supreme Court ruled that the agents' actions violated Katz's Fourth Amendment rights. The Court noted that Katz's lack of possessory interest or property rights in the public phone booth were unimportant to the inquiry, because "the Fourth Amendment protects people, not places." ***Id.*** at 351. The Court further noted that it did not matter that Katz made the call from a place where he could be seen, because what he chose to exclude by entering the booth was "not the intruding eye, it was the uninvited ear." ***Id***. at 352. In addition, the Court concluded that Katz was "entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly, the court said, would be "to ignore the vital role that the public telephone has come to play in private communication." ***Id***.

Katz clarified that Fourth Amendment protections depend "not upon a property right in the invaded place but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion." ***Mancusi v. DeForte***, 392 U.S. 364, 368 (1968) (emphasis added).

B. Standard of Review

A circuit court's decision on a motion to suppress evidence is subject to a two-step standard of review. First, the reviewing court looks at the circuit court's findings of historical fact, and will uphold them unless they are clearly erroneous. Second, the reviewing court

applies the constitutional principles to those facts *de novo*. ***Eason,*** 2001 WI 98 at ¶ 9.

C. Wilson's Phone Was Searched For Fourth Amendment Purposes

There is no dispute in this case that the officers downloaded the data from Wilson's phone, which included Tentoni's text messages, without a warrant. The only question is whether Tentoni had a reasonable expectation of privacy sufficient to provide Constitutional protection from a warrantless seizure of his messages on Wilson's phone.

D. Tentoni Has a Reasonable Expectation of Privacy in His Text Messages on Wilson's Phone

i. Tentoni Had a Subjective Expectation of Privacy

Tentoni's cell phone records, obtained by police from Verizon, contained approximately 4,000 text messages from the month of November 2012 into the first week of December 2012. (45:12; App. 412). Approximately 350 of those messages were between Tentoni and Wilson. (Id.)

The text messages detailed in the complaint are highly incriminating in that they discuss the delivery and use of an unprescribed controlled substance. (1:2; App. 202). In addition, other text messages between Tentoni and Wilson relate to them obtaining other prescription opiate pills—identifying them by dosage and price. (45:13; App. 413). There is also a text exchange between the two in which Wilson asks Tentoni if he can find some Adderall, another controlled substance, for Wilson to give to his girlfriend Amanda as a present. (Id. at 14; App. 414).

Given the volume of text messages Tentoni exchanged (approximately 100/day during the time period immediately preceding Wilson's death) it is apparent that text messaging was Tentoni's primary means of communication with others. The texts were private, one-to-one communications over personally-owned cell phones; they were not group texts sent to more than one person. There is no indication that Tentoni intended or expected the texts to be broadcast to the world or shared with anyone other than Wilson.

Moreover, the highly incriminating nature of the text messages strongly favors the conclusion that Tentoni (and Wilson for that matter) expected that the messages would be and remain private. ***See, e.g. U.S. v. Warshak***, 631 F.3d 266, 284 (6th Cir. 2010) ("Given the often sensitive and sometimes damning substance of his emails, we think it highly unlikely that Warshak expected them to be made public, for people seldom unfurl their dirty laundry in plain view.")

Not only do the specifics of the texts demonstrate that Tentoni had an actual, subjective expectation of privacy in the messages, the Wisconsin statutes also suggest that Tentoni had a subjective expectation of privacy in the messages.

The Wisconsin Electronic Surveillance Control Law (Wis. Stats. §§968.27-968.375, hereinafter "WESCL") reflects legislative concern for protecting the privacy rights of Wisconsin citizens. ***See State v. Riley***, 2005 WI App 203, 287 Wis. 2d 244, 252, 704 N.W.2d 635, 639-40. WESCL protects citizens' telephone and electronic communications by requiring court orders to access communications and data related thereto. ***See, Id***., generally.

WESCL defines an "electronic communication" as: "any transfer of signs, signals, writings, images, sounds, data or intelligence of any nature wholly or partially transmitted by a wire, radio, electromagnetic, photoelectronic or photooptical system." Wis. Stats. § 968.27(4)). In addition, § 968.375(4)(a) requires a search warrant to access the "content of any … electronic communication that is in electronic storage in an electronic communications system or held or maintained by a provider of remote computing service."

Text messages would clearly fall within the definition of electronic communication, lending legislative support to the fact that Tentoni had a subjective expectation of privacy in the content of the text messages he sent to Wilson. The warrant requirement of WESCL further makes clear to Tentoni, and anyone else, that the content of their text messages remains private from governmental intrusion despite its location in the hands of a third party, *e.g*. the service provider.

In sum, the fact that Tentoni used text messaging as a primary means of communication, that the text messages were sent only between Tentoni and Wilson and contained information one would normally attempt to keep private, and that Wisconsin statutes bestow privacy upon the contents of electronic communications including text messages, it is clear that Tentoni had a subjective expectation of privacy in his text message conversation with Wilson.

ii. Tentoni's Expectation of Privacy In His Text Message Conversations Is Objectively Reasonable.

"A reasonable expectation is one [that] is constitutionally 'justifiable.' No single factor is determinative in resolving whether one has a reasonable expectation of privacy; rather, [reviewing courts] investigate the totality of the circumstances to resolve the question." ***Duchow***, 2008 WI 57 at ¶ 21 (internal citations omitted). While the Wisconsin Supreme Court has articulated lists of non-exclusive factors for evaluating whether an expectation of privacy is reasonable as to real property (***State v. Bruski***, 2006 WI App 53, 289 Wis. 2d 704, 711 N.W.2d 679) and certain oral communications (***Duchow***), no such list has been identified or adopted relative to electronic communications like text messages.

Text messages are generally short, electronic messages sent from one cell phone to another. Text messaging enables quick, back-and-forth communications in real time, much in the way a phone call does. It is a conversational form of communication, unlike the classic letter. Research shows that text messaging is becoming the preferred method of communication amongst cell phone users, rather than phone calls. Indeed, the cell records in this case demonstrate that to be true as to Tentoni and Wilson.

The lone feature distinguishing text from phone calls is the instantaneous transcript made of the content of text conversations. That record exists on the sender's phone, the recipient's phone, and/or in the records of the service provider for each. Those who use text messaging most assuredly know this to be true, as it is an avoidable

incident to the using the technology. Nevertheless, this fact has done nothing to extinguish the expectation of privacy in such conversations, as evidenced by the increasing popularity of text messaging as the preferred method of communication continues to increase.

A 2011 Pew Research Poll found that 83% of American adults owned cell phones and 73% of those individuals utilized text messaging as a means of communicating. Pew Research Center, Americans and Text Messaging (Sep 19, 2011)[2]. Those using text messages send or receive, on average, 41.5 texts per day. Id. That same report revealed that 31% of cell phone users who use text messaging prefer to be contacted by text rather than phone; 45% of people who send or receive 21-50 texts per day say texting is their preferred mode of contact; and 55% of people who send more than 50 texts per day say texting is their preferred mode of contact. Id.

An updated survey by Pew in 2012 showed that 80% of all cell phone owners used their cell phones to send and receive text messages, with 97% of those in the 18-29 year age group and 92% of those in the 30-49 year age group doing so. Pew Research Center, Cell Phone Activities 2012. (Nov. 25, 2012)[3] As of January 2014, 90% of American adults had a cell phone, 58% had a smart phone, and 81% of American adults used these phones to send and receive text messages.[4]

Courts across the country are taking note. In 2010, The United States Supreme Court was faced with

---

[2] Available online at http://pewinternet.org/Reports/2011/Cell-Phone-Texting-2011.aspx; last accessed January 27, 2015.
[3] Available online at http://www.pewinternet.org/files/old-media//Files/Reports/2012/PIP_CellActivities_11.25.pdf; last accessed Jan. 27, 2015).
[4] Available online http://www.pewinternet.org/fact-sheets/mobile-technology-fact-sheet/ (last accessed Jan. 28, 2015).

an opportunity to address privacy rights in text messages. Ultimately, the Court assumed, without deciding, that an individual had an expectation of privacy in text messages sent from an employer-owned pager, deciding the case instead on narrower grounds. ***City of Ontario, Cal. v. Quon***, 560 U.S. 746 (2010). In its decision, however, the Court recognized the ubiquity of cell phones and text messaging as a means of communication, suggesting that text messages are entitled to an expectation of privacy:

> Cell phone and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification. That might strengthen the case for an expectation of privacy.

Id.

This recognition has been echoed by several State and lower federal courts. ***See, e.g., State v. Clampitt***, 364 S.W.3d 605, 611 (Mo. Ct. App. 2012), **reh'g and/or transfer denied** (Feb. 28, 2012), transfer denied (May 29, 2012) (as text messaging becomes an ever-increasing substitute for the more traditional forms of communication, it follows that society expects the contents of text messages to receive the same Fourth Amendment protections afforded to letters and phone calls); ***State v. Bone***, 107 So. 3d 49, 66 (La. Ct. App. 2012) **writ denied**, 110 So. 3d 574 (exclusive user but non-owner of cell phone had a reasonable expectation of privacy in the text messages sent and received thereon); ***State v. Smith***, 920 N.E.2d 949, 954 (Ohio 2009) (user had reasonable expectation of privacy in cell phone with phone, text messaging, and camera capabilities**); *U.S. v. Zavala***, 541 F.3d 562, 577 (5th Cir. 2008) discussing that cell phones contain a wealth of private information, including text messages, and that defendant had a

reasonable expectation of privacy in the messages); and ***U.S. v. Finley***, 477 F.3d 250, 259 (5th Cir. 2007) (holding that defendant had reasonable expectation of privacy in content of text messages on his cell phone).

Four years after ***Quon***, while holding that the search incident to arrest exception to the warrant requirement did not apply to cell phones, the Supreme Court again took note of the undeniable significance of cell phones to American society:

> …modern cell phones… are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy.

Riley v. California, 134 S. Ct. 2473, 2484 (2014).

Through these surveys of American societal behavior regarding the proliferation of text messaging as a means of communication and the recognition thereof by courts across the country, including the highest court in the land, it is clear that society is prepared to recognize an expectation of privacy in text message conversations at least to the same degree as phone calls.

And because texts are entitled to at least the same degree of protection as phone calls, the warrantless search of the text-message conversation on Wilson's phone is akin to the warrantless interception of a phone call between the two. ***Katz*** remains the analytical focus point in this case, requiring the conclusion that Tentoni's constitutional rights were violated.

Katz made clear that the Fourth Amendment "protects people, not places," finding that he had a reasonable expectation of privacy in his phone conversation—the communication—not the place from

which he made it—the phone booth. ***Id***. The Court later made clear that *Katz* recognized the existence of "conversational privacy," requiring limits on the Government's ability to intrude thereon. ***United States v. U.S. Dist. Court for E. Dist. of Mich., S. Div***., 407 U.S. 297, 313 (1972).

In this way, ***Katz*** compels the conclusion that Tentoni had a reasonable expectation of privacy in the contents of his text message *conversation*. The fact that police intercepted that *conversation* from the property of a third party is of no importance under ***Katz***. Such a conclusion is also consistent with the Wisconsin statutes, where WESCL makes clear that the content of text messages stored by a service provider are entitled to protection from interception by the Government or disclosure thereto by his provider without legal process. Wis. Stats. § 968.375(4). In combination, ***Katz*** and Wisconsin's statutory electronic surveillance scheme serve to provide Tentoni's text conversations, whether stored on his phone or elsewhere, with constitutional protection from governmental intrusion.

If this Court adopts the lower court's view of privacy expectations, then all text messages sent by anyone anywhere are subject to government seizure the moment the "send" button is pressed. The Fourth Amendment demands more than that.

CONCLUSION

The Court should find that Tentoni had a reasonable expectation of privacy in the text messages he sent to Wilson's phone, therefore, the warrantless search of those messages violated Tentoni's Fourth Amendment rights. Accordingly, the Court should reverse the circuit court's decision denying Tentoni's motion to suppress.

Dated this 28th day of January, 2015

KOHLER & HART, SC
Attorneys for Defendant-Petitioner

/s/ *Craig S. Powell*
Craig S. Powell
State Bar No. 1046248
Geoffrey R. Misfeldt
State Bar No. 1065770

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. (Rule) §§ 809.19(6)(b) and 809.19(8)(c)(1) for a brief produced with a proportional serif font. The length of the Defendant-Appellant brief is 3,302 words.

Dated this 28th day of January, 2015

Attorneys for Defendant-Appellant

/s/ *Craig S. Powell*
Craig S. Powell
State Bar No. 1046248

CERTIFICATION OF COMPLIANCE WITH WIS. STAT. (RULE) § 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, which complies with the requirements of Wis. Stat. (Rule) § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

Dated this 28th day of January, 2015

Attorneys for Defendant-Appellant

/s/ *Craig S. Powell*
Craig S. Powell
State Bar No. 1046248

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 28th day of January, 2015

Attorneys for Defendant-Appellant

/s/ *Craig S. Powell*
Craig S. Powell
State Bar No. 1046248