STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2014AP2387-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RYAN H. TENTONI,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR WAUKESHA COUNTY, THE HONORABLE KATHRYN W. FOSTER, PRESIDING

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

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RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

ISSUE PRESENTED

To have standing to challenge a search under the Fourth Amendment, a defendant must have an objectively reasonable expectation of privacy in the area searched. Here, police searched a cell phone belonging to Wayne Wilson, where they found incriminating text messages sent by defendant-appellant

Ryan Tentoni. Can Tentoni challenge the constitutionality of that search based solely on the presence of Tentoni's sent texts on Wilson's phone?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State recommends publication. Wisconsin courts have not addressed whether a defendant has standing to challenge a search of a third-party's cell phone (or similar device) based on the fact that the device contained text messages sent by the defendant.

Resolution of this issue appears to be straightforward and likely will not require oral argument. That said, the State welcomes the opportunity to answer any questions from this court that the parties' briefs do not satisfactorily address.

SUPPLEMENTAL STATEMENT OF THE CASE

After entering a guilty plea, Tentoni was convicted of second-degree reckless homicide in the death of Wayne Wilson (39). According to the criminal complaint, in December 2012 police discovered twenty-four-year-old Wilson dead with a Fentanyl patch on his lips (1:1-2). A medical examiner conducted an autopsy and concluded that Wilson had died of an overdose of that narcotic (6:2).

The police learned of Tentoni's potential role in Wilson's death when they searched Wilson's cell phone and found text messages that Tentoni had sent to Wilson. Those messages indicated that Tentoni had supplied "patches" to Wilson on the day Wilson died and that Tentoni advised Wilson to suck on the patch to enhance the effects of the drug (1:2).

Tentoni filed a motion to suppress "evidence obtained as a result of the government's warrantless search of Wayne Wilson's phone, including, but not limited to text message

records" (10:1).[1] After a hearing, the circuit court denied the motion (45), and later denied Tentoni's motion for reconsideration of the motion (46). Tentoni appeals from the judgment of conviction, alleging that the circuit court erred in denying his motion to suppress.

The State will discuss additional facts in the argument section of its brief.

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[1] According to Tentoni, police used the messages found on Wilson's phone to obtain a search warrant for Tentoni's Verizon phone records, which produced the contents of approximately 4,000 text messages Tentoni sent and received in November 2012 and early December 2012, including around 350 between Tentoni and Wilson (Tentoni's br. at 2; 45:12-14; A-Ap. 412-14). Although the search warrant and the resulting records do not appear in this case record, at the motion hearing the State conceded that Tentoni's characterization of the records and how the police obtained them was accurate (45:14-15; A-Ap. 414-15).

As a point of clarification, however, Tentoni is not challenging the legality of Verizon's return on the warrant or the warrant per se. Rather, he is only seeking to challenge law enforcement's search of Wilson's phone, and is apparently seeking exclusion of the Verizon records as derivative evidence of that law enforcement search.

Given that, the relief Tentoni seeks in his brief (a determination that the search was illegal) is inappropriate. If this court agrees with Tentoni that he had a reasonable expectation of privacy in his text messages on Wilson's phone, that would only mean that he has standing to challenge the police search. Because the circuit court did not reach the question whether the search violated the Fourth Amendment, whether any exceptions to the exclusionary rule apply, and whether the Verizon records are derivative evidence of the search, the most he can reasonably request is a remand to the circuit court for a decision on those issues.

STANDARD OF REVIEW

In reviewing constitutional search-and-seizure issues, this court will uphold the circuit court's factual findings unless they are clearly erroneous, but applies those facts to constitutional standards de novo. *State v. Bruski*, 2007 WI 25, ¶19, 299 Wis. 2d 177, 727 N.W.2d 503 (citing *State v. Dixon*, 177 Wis. 2d 461, 466-67, 501 N.W.2d 442 (1993)).

ARGUMENT

Tentoni lacks standing to challenge the search of Wilson's cell phone because Tentoni had no reasonable expectation of privacy in Wilson's phone or its contents.

A. To challenge the constitutionality of a search, the defendant must show that he or she has a reasonable expectation of privacy "in the area inspected and the item seized."

"Fourth Amendment rights are personal rights [that], like some other constitutional rights, may not be vicariously asserted." *Rakas v. Illinois*, 439 U.S. 128, 133-34 (1978) (internal quotation marks and quoted source omitted). "A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed." *Id.* (cited source omitted).

Thus, in assessing whether a defendant has standing to challenge a Fourth Amendment search, the critical inquiry for this court is whether the defendant "'has a legitimate expectation of privacy in the invaded place.'" *State v. Trecroci*, 2001 WI App 126, ¶26, 246 Wis. 2d 261, 630 N.W.2d 555 (quoting *Rakas*, 439 U.S. at 143).

The defendant bears the burden of proving a reasonable expectation of privacy by a preponderance of the evidence. *Id.* ¶35. To succeed, a defendant must prove two things: first, that he "has exhibited an actual, subjective expectation of privacy in the area inspected and in the item seized," and second, that "society is willing to recognize such an expectation of privacy as reasonable." *Id.*; *see also Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

B. Tentoni failed to establish that he had a reasonable expectation of privacy in his sent text messages found on Wilson's phone.

Tentoni does not argue that he had a reasonable expectation of privacy in Wilson's phone per se. Indeed, he had no property interest in or control over Wilson's phone. *See, e.g., Christensen v. County of Boone*, 483 F.3d 454, 461 (7th Cir. 2007) (concluding that plaintiff had no standing to challenge search of friend's cell phone where police were trying to determine if plaintiff and friend had communicated recently).

Rather, Tentoni asserts that he maintained a reasonable expectation of privacy in the content of text messages that he sent to Wilson and that police discovered on Wilson's phone (Tentoni's br. at 7-14). But because Tentoni cannot show an actual or reasonable expectation of privacy in his sent messages on Wilson's phone, he cannot establish standing to challenge the search of Wilson's phone.

1. Tentoni failed to show that he had an actual expectation of privacy in sent text messages on Wilson's phone.

The State doubts that Tentoni satisfied his burden of showing by a preponderance of the evidence an actual, subjective expectation of privacy in the content of his text messages to Wilson. Tentoni did not testify to his expectation. Rather, before the circuit court and on appeal, Tentoni's

counsel asserted that texting was Tentoni's primary means of communication, Tentoni sent the messages only to Wilson (not a group), Tentoni sent the messages from his private phone to Wilson's private phone, the content of the messages was highly incriminating, and there was nothing in the messages to suggest that Tentoni intended to share their contents with anyone other than Wilson (Tentoni's br. at 7-9).

But Tentoni also conceded that he did not ask Wilson to delete the messages or keep their contents confidential (45:14; A-Ap. 414). There is no evidence that Tentoni and Wilson enjoyed a confidential relationship. And Tentoni did not use any technological tools to enhance the security of the messages, such as Snapchat,[2] or take other steps demonstrating that he had actual expectation that no one but Wilson would see the messages or learn of their content.

The circuit court concluded that Tentoni, at most, made an insufficient "blanket assertion" of a subjective expectation of privacy (45:36; A-Ap. 436). That conclusion is sound in light of Wisconsin case law assessing the subjective prong of the expectation-of-privacy analysis, in which courts appear to require more than just a bare assertion of a subjective expectation. *Compare, e.g.*, *Trecroci*, 246 Wis. 2d 261, ¶35 (concluding that there was a subjective expectation of privacy in area in apartment building where the defendants testified to such an expectation, they equipped the doorway with a

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[2] At the suppression hearing, Tentoni's counsel conceded that Tentoni did not route his messages through an enhanced-security messenger such as Snapchat (45:17-18; A-Ap. 417-18). Text and photo messages sent through Snapchat—which appeared to be in wide use when Tentoni texted Wilson in December 2012—purportedly disappear "forever" seconds after the recipient views them. *See, e.g.*, J.J. Colao, *Snapchat: The Biggest No-Revenue Mobile App Since Instagram*, Forbes, Nov. 27, 2012, *available at* http://www.forbes.com/sites/jjcolao/2012/11/27/snapchat-the-biggest-no-revenue-mobile-app-since-instagram/ (stating that Snapchat, as of late November 2012, was used "30 million times a day by millions of users").

deadbolt lock, and there was no suggestion that third parties accessed the stairway), *with State v. Eskridge*, 2002 WI App 58, ¶13, 256 Wis. 2d 314, 647 N.W.2d 434 (no subjective expectation in common area where only evidence in support was Eskridge's testimony that he had an expectation of privacy, but where other evidence indicated that the apartment building door was regularly unlocked and accessed by nonresidents).

That said, the heart of the inquiry here is the second step in the analysis. For the reasons below, any expectation of privacy Tentoni had in his sent text messages is not one that society recognizes as reasonable.

2. Even assuming Tentoni had a subjective expectation of privacy in the content of his sent messages on Wilson's phone, that expectation was not objectively reasonable.

The second step in the standing analysis is an objective test based on the totality of the circumstances. *State v. Whitrock*, 161 Wis. 2d 960, 974, 468 N.W.2d 696 (1991). Wisconsin courts have identified nonexclusive factors that may be relevant to this inquiry. For example, in cases involving challenges to searches of real or personal property, the following factors may be relevant:

> (1) whether the accused had a property interest in the premises; (2) whether the accused is legitimately . . . on the premises; (3) whether the accused had complete dominion and control and the right to exclude others; (4) whether the accused took precautions customarily taken by those seeking privacy; (5) whether the property was put to some private use; and (6) whether the claim of privacy is consistent with historical notions of privacy.

Bruski, 299 Wis. 2d 177, ¶24 (quoted source omitted).

In *State v. Duchow*, the supreme court considered whether Duchow had an objectively reasonable expectation of privacy in his oral statements, and in doing so, the court identified potentially relevant factors:

> (1) the volume of the statements; (2) the proximity of other individuals to the speaker, or the potential for others to overhear the speaker; (3) the potential for the communications to be reported; (4) the actions taken by the speaker to ensure his or her privacy; (5) the need to employ technological enhancements for one to hear the speaker's statements; and (6) the place or location where the statements are made.

2008 WI 57, ¶22, 310 Wis. 2d 1, 749 N.W.2d 913.

Here, neither set of factors neatly fits a challenge to a search of the content of text or other electronic messages, which lack the physicality of real or personal property and the ephemeral quality of oral statements. But such a fit is not necessary. Rather, courts may identify and apply relevant factors depending on the facts of the case. *See Duchow*, 310 Wis. 2d 1, ¶24 (stating that the factors identified are neither exclusive nor mandatory and will vary case to case).

In light of the factors identified above, whether the defendant has control over the area searched and whether the defendant assumed a risk of disclosure seemed to be central to Wisconsin courts' determination of whether a reasonable expectation of privacy exists. *See Bruski*, 299 Wis. 2d 177, ¶¶27-30 (Bruski lacked legitimate expectation of privacy in vehicle where he had no property interest in it, took no precautions to ensure privacy in the vehicle, and lacked the right to exclude others); *Duchow*, 310 Wis. 2d 1, ¶37 (Duchow had no reasonable expectation of privacy in threats to child where he made them in a public place and he assumed the risk of disclosure). So too, here, the most significant factors are the degree of Tentoni's control over Wilson's phone and the copies of his sent messages on it, and whether Tentoni assumed the risk that the content of the messages would be disclosed.

To that end, the Rhode Island Supreme Court's decision in *State v. Patino*, 93 A.3d 40 (R.I. 2014), is persuasive. Like Tentoni's challenge here, Patino challenged a search of his girlfriend's cell phone, during which police viewed incriminating text messages that the girlfriend had received from Patino. *Id.* at 45 & n.5. The court concluded that Patino did not have a reasonable expectation of privacy under the Fourth Amendment in the content of his sent text messages on the recipient's phone. *Id.* at 57.

In reaching that conclusion, the court surveyed cases from other courts considering whether a person has a reasonable expectation of privacy in his or her text messages, and observed that "the determinations have most often turned on whether the defendant owned or was the primary user of the cell phone." *See id.* at 55 (and cases cited therein). Thus, in its view, "the most important factor . . . is from whose phone the messages are accessed. Underlying this consideration is the element of control; that is to say, when the recipient receives the message, the sender relinquishes control over what becomes of that message on the recipient's phone." *Id.*

The court found support for its reasoning by analogizing to cases holding that an individual assumes the risk that a recipient of private information will reveal that information to authorities, and in cases holding that senders of letters and email lose any expectation of privacy in the contents of those communications once they are delivered to the recipient. *See id.* at 56 (and cases cited therein).

Patino represents a consistent approach taken by other courts concluding that a defendant has no Fourth Amendment standing to challenge a search of the contents of a third party's cell phone or records based solely on the fact that the defendant

had sent texts to the third party.[3] It is consistent with United States Supreme Court, Wisconsin, and other case law uniformly recognizing that an individual assumes the risk that a recipient of incriminating information will report that information.[4] And

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[3] *See, e.g.*, *United States v. Jones*, 149 Fed. App'x 954, 959 (11th Cir. 2005) (per curiam) (concluding that criminal defendant did not have reasonable expectation of privacy in text messages received by co-conspirator); *Fetsch v. City of Roseburg*, No. 6:11-cv-6343-TC, 2012 WL 6742665, at *10 (D. Or. Dec. 31, 2012) (stating that plaintiff had no reasonable expectation of privacy in his sent text messages displayed on a third-party's phone); *State v. Marcum*, 319 P.3d 681, 687 (Okla. Crim. App. 2014) (holding that Marcum had no reasonable expectation of privacy in records seized from third party's cell phone provider); *State v. Carle*, 337 P.3d 904, 910 (Or. App. 2014) ("[T]he general notion that a person has a reasonable expectation of privacy in letters or text messages does not compel the conclusion that she has a reasonable expectation of privacy in a copy of a sent text message that is found on the recipient's phone."); *cf. Hampton v. State*, 763 S.E.2d 467, 471 (Ga. 2014) (holding that Hampton had no reasonable expectation of privacy in phone records where Hampton failed to produce evidence that he owned, possessed, or used the searched account); *State v. Griffin*, 834 N.W.2d 688, 696 (Minn. 2013) (concluding that Griffin had no reasonable expectation of privacy in girlfriend's cell phone where Griffin was not a subscriber or named account holder).

The State has not identified any cases in which a court has determined that under the Fourth Amendment, a sender retains a legitimate expectation of privacy in copies of text or email messages found on a third-party device. *Cf. State v. Hinton*, 319 P.3d 9, 14-15 (Wash. 2014) (holding that accused has legitimate expectation of privacy in sent texts on third-party phone under broader privacy protections provided in state constitution and not addressing Fourth Amendment analysis).

[4] *See, e.g., United States v. Jacobsen*, 466 U.S. 109, 117 (1984) (stating that "when an individual reveals private information to another," that person's reasonable expectation of privacy in that information terminates because he or she "assumes the risk that his confidant will reveal that information to the authorities"); *State v. Duchow*, 2008 WI 57, ¶30, 310 Wis. 2d 1, 749 N.W.2d 913 (stating that an expectation of privacy is not reasonable when the hearer is likely to report the communication); *see also United States v. Longoria*, 177 F.3d 1179, 1183 (10th Cir. 1999) ("[T]he Fourth Amendment offers no protection for 'a wrongdoer's misplaced belief that a person to

(continued on next page)

it is consistent with copious case law holding that a sender's reasonable expectation of privacy in a sent letter or email terminates upon delivery to the recipient.[5]

Here, Tentoni neither maintained nor exerted any control over the copies of his sent messages contained on Wilson's phone. There is no evidence that Tentoni could access or control the content of Wilson's phone. And once Wilson received copies of Tentoni's messages, Tentoni could not control whether Wilson saved, forwarded, or deleted the messages, or whether Wilson would otherwise share their contents with others. In that way, Tentoni's messages were like letters or emails that had been delivered to an addressee and that police had seized from the addressee's person or property.

Moreover, the content of the messages, as Tentoni acknowledges, was highly incriminating and related to Tentoni providing illegal drugs to Wilson. Tentoni assumed the risk that Wilson would report Tentoni's incriminating statements to police. *See United States v. White*, 401 U.S. 745, 752 (1971) ("Inescapably, one contemplating illegal activities must realize

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whom he voluntarily confides his wrongdoing will not reveal it.'") (quoting *Hoffa v. United States*, 385 U.S. 293, 302 (1966)).

[5] *United States v. Lifshitz*, 369 F.3d 173, 190 (2d Cir. 2004) (noting that a person loses any reasonable expectation of privacy in an email message "that had already reached its recipient") (internal quotation marks and citation omitted); *United States v. Dunning*, 312 F.3d 528, 531 (1st Cir. 2002) (concluding that "Dunning relinquished any expectation of privacy he may have otherwise had in the letter when it was delivered to" its addressee); *United States v. King*, 55 F.3d 1193, 1196 (6th Cir. 1995) ("[T]he sender's expectation of privacy ordinarily terminates upon delivery . . . even though the sender may have instructed the recipient to keep the letters private."); *see also* Wayne R. LaFave, 6 Search and Seizure § 11.3(f), at 293-94 & n.411 (5th ed. 2012) (and cases cited therein) ("The standing of the sender, to the extent it is based solely upon the fact of his being the sender, terminates once delivery of the goods has been made.") (footnotes omitted).

and risk that his companions may be reporting to the police."); *see also* cases cited *supra* note 4.

Accordingly, Tentoni did not have a legitimate expectation of privacy in the copies of his sent texts on Wilson's phone, and thus lacked standing to challenge the search of Wilson's phone.

C. Tentoni's arguments lack legal and logical support.

The foundation of Tentoni's argument is that because many people use text messaging as their primary means of communication, and text messaging is conversational in nature, that a challenge to a search of text messages is akin to government interception of phone conversations (Tentoni's br. at 10-12). He argues that because of that, society has a blanket reasonable expectation of privacy in text messages that does not dissipate even when the sender transmits the message (Tentoni's br. at 12-14).

Tentoni's argument is untenable. In drawing his analogy between text messages and phone conversations, he necessarily glosses over the striking similarity that text messages share with letters or emails: the communication is written. And, like emailing, text messaging memorializes copies of the correspondence on both the sender's and recipient's devices, and in each party's service provider records.

Indeed, Tentoni acknowledges that people who routinely text are well aware that their text conversations are saved in the phones and service provider records of everyone involved in the conversations (Tentoni's br. at 10-11). Yet he maintains that "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" (Tentoni's br. at 13).

Tentoni undercuts his own argument. It is unclear how society can both be aware that a text message conversation is instantly memorialized in multiple places, and yet reasonably

expect those copies of the messages to remain as private as an ephemeral oral communication.

And Tentoni's syllogism—text messaging is now more widespread that phone conversations; people expect privacy in their phone conversations; therefore, people expect privacy in their text messages, wherever they may be found—is faulty. Simply because many people enjoy the convenience of texting does not mean that they believe that they enjoy the same privacy in their sent text messages as they do in a phone conversation. Again, people generally accept that a consequence of texting is that they are creating a written record that, depending on where that record is held and how they sent it, they cannot necessarily control.

Indeed, the demand driving the use and prevalence of privacy-enhancing text messaging apps supports the conclusion that society generally does not recognize that senders retain an expectation of privacy in text messages sent through the standard phone-to-phone text messaging that occurred between Tentoni and Wilson here. As noted earlier, Snapchat, a service in which sent messages disappear seconds after the viewer sees them, appeared to be available at the time Tentoni sent the messages to Wilson. *See supra* note 2. Since then, numerous other messaging services have emerged that offer encryption, self-destruct options, the ability to delete sent messages remotely, and other privacy-enhancing features.[6]

And contrary to Tentoni's argument, context matters. A person generally has a reasonable expectation of privacy in the

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[6] *See, e.g.*, Molly Wood, *Can You Trust 'Secure' Messaging Apps?*, N.Y. Times, March 19, 2014, *available at* http://bits.blogs.nytimes.com/2014/03/19/can-you-trust-secure-messaging-apps/?_r=0 (discussing features of "[e]phemeral app services" such as Gliph, Telegram, Wickr, and Confide); Hiawatha Bray, *When Our Messages Vanish, Privacy Gets a Better Chance*, Boston Globe, Feb. 27, 2014, *available at* 2014 WLNR 538178 (same).

content of his or her own cell phone and provider records.[7] Indeed, in all of the out-of-state cases that Tentoni invokes, courts found that a defendant generally has standing to challenge a search when the search involved his or her phone or service provider records (Tentoni's br. at 12-13).

But that reasoning cannot extend to a defendant seeking to challenge the search of a third-party's cell phone solely because that phone contains copies of messages that the defendant had sent. As noted above, that reasoning would contradict consistent and long-standing case law stating that a person's reasonable expectation of privacy in written communication extinguishes upon delivery.

Tentoni also insists that the search of Wilson's phone was equivalent to governmental interception of private communication (Tentoni's br. at 13-14). That analogy lacks logical support. And it is undisputed that the search here did not involve a governmental interception of a conversation. Rather, the police here viewed Tentoni's sent messages after Wilson had received and viewed them.

Finally, Tentoni warns that if this court affirms, "all text messages sent by anyone anywhere are subject to government[al] seizure the moment the 'send' button is pressed" (Tentoni's br. at 14). But the issue here is not *what* can be seized, but rather *who* can challenge a search. And to accept Tentoni's reasoning would support the proposition that anyone can challenge the legality of a search of a phone, computer, or other device simply because copies of that person's sent text or email messages are found on that device. Nothing in the law or

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[7] *See, e.g.*, *Riley v. California*, 134 S. Ct. 2473, 2494-95 (2014) (holding that police generally must obtain a warrant to search a cell phone seized incident to arrest); *City of Ontario v. Quon*, 560 U.S. 746, 760 (2010) (assuming, without deciding, that Quon had a reasonable expectation of privacy in messages sent from his government-employer-provided pager).

logic supports the conclusion that Fourth Amendment protections extend that broadly.

In sum, even if Tentoni subjectively expected the content of his text messages on Wilson's phone to remain private, that expectation is not one that society recognizes as reasonable under the circumstances. The circuit court correctly concluded that Tentoni lacked standing to challenge the search of Wilson's phone. Thus, it properly denied Tentoni's motion to suppress. Tentoni is not entitled to relief.

CONCLUSION

For the foregoing reasons, the State respectfully asks that this court affirm the judgment of conviction.

Dated this 12th day of March, 2015.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4031 words.

_____

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

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, 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.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 12th day of March, 2015.

_____

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