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

REPLY BRIEF OF DEFENDANT-APPELLANT

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Defendant-Appellant Ryan Tentoni hereby provides the following in reply to the brief of Plaintiff-Respondent State of Wisconsin:

ARGUMENT

I. TENTONI SATISFIED HIS LOW BURDEN OF ESTABLISHING AN ACTUAL SUBJECTIVE EXPECTATION OF PRIVACY IN THE MESSAGES SENT TO WILSON

The State half-heartedly suggests that Tentoni has not shown by a preponderance of the evidence that he had an actual, subjective expectation of privacy in the text messages: "[t]he State doubts that Tentoni satisfied his burden…" (Resp. Br. at 5) That "doubt" apparently arises from the State's erroneous belief that Tentoni did nothing more than make a "bare assertion" of a subjective expectation of privacy in the text messages, and that this "bare assertion" is insufficient for Tentoni to have met his burden. (Resp. Br. At 6-7). Far from a "bare assertion," Tentoni has shown that the *undisputed* facts surrounding the nature of the messages at issue support the conclusion that he had an actual, subjective expectation of privacy in the records. (App. Br.at 7-9).

Specifically, the volume of text messages Tentoni sent showed that it was a primary form of personal communication; the texts at issue were private, one-to-one messages/conversations with Wilson; and there was no evidence from the records or texts to suggest that Tentoni expected that Wilson would or might share them with anyone else. (App. Br. at 8). Also, Tentoni argues that the highly-incriminating nature of the messages themselves provide strong evidence that he believed the messages at issue would

remain private. (Id., citing *U.S. v. Warshak*, 631 F.3d 266, 284 (6th Cir. 2010)). In addition, Tentoni cited to the Wisconsin Electronic Surveillance Control Law and its endorsement of privacy in the content of electronic messages (like the text messages at issue here) to support Tentoni's assertion of privacy in the messages. (App. Br. at 8-9).

The State did not respond substantively to Tentoni's argument from these facts; rather, the State labeled Tentoni's argument as nothing more than a "bare assertion" of privacy, citing *Trecroci* and *Eskridge* as comparative support for its proposition that more is required. (Resp. Br. at 6-7). Apart from the fact that, as shown above and in his opening brief, Tentoni has done more than make a bare assertion of privacy, these two cases do not support a conclusion that no subjective expectation of privacy has been established here.

For example, one of the factors in *Trecroci* supporting a subjective expectation of privacy in the stairwell at issue was that "there was no suggestion that third parties accessed the stairway." (Res. Br. at 7). Similarly here, there is no evidence or suggestion that Wilson shared the texts at issue with anyone else or that Tentoni feared or expected that he would.

The State points out that in *Eskridge* there was no subjective expectation of privacy found in the common area because evidence indicated the door to the area "was regularly unlocked and accessed by nonresidents." (Resp. Br. at 7). Once again, here, there was no evidence suggesting that Wilson ever shared Tentoni's texts (or any other texts) with a third party. In short, the only cases cited by the State to rebut Tentoni's

subjective expectation of privacy in this case do not support a finding that he had no such expectation.

In a sign of acknowledgment of the weakness of its response on this point, the State's brief pivots from its "doubt" on Tentoni's subjective expectation of privacy to whether his expectation is objectively reasonable. The State refers to the objective prong as the "heart of the inquiry here." (Resp. Br. at 7).

II. THE THIRD PARTY DOCTRINE DOES NOT APPLY

The State acknowledges what Tentoni argued in his brief: that existing case law identifying factors for objective expectations of privacy in real property and oral statements do not fit the situation presented here. (Resp. Br at 8; App. Br. at 10). The State then relies entirely on the third-party doctrine in support of its argument that Tentoni's expectation of privacy in his sent text messages is not objectively reasonable. The third-party doctrine, however, cannot be logically applied in this case and does not control the outcome.

The State argues that "the most significant factors" in this case "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." (Resp. Br. at 8). Of course, "no single factor invariably will be determinative" when deciding whether a reasonable expectation of privacy exists. *see Rakas v. Illinois*, 439 U.S. 128, 152 (1978).

With no on-point case law from Wisconsin to provide as precedent, the State relies on *State v. Patino*, 93 A.3d 40, 55 (R.I. 2014) as persuasive authority for its proposition that Tentoni lacks an objectively reasonable expectation of privacy in the content of his text messages stored on Wilson's phone. (Resp. Br. at 9-10). The *Patino* court opined that the most important factor to its decision was from whose phone the messages were accessed: in that case, it was Patino's girlfriend's phone. The *Patino* court found this factor to be important because underlying it was "the element of control," that is, "the sender loses control over what becomes of that message on the recipient's phone." *Id*. at 55-56. In other words, the sender assumes that the recipient may disclose the information to another which, the thinking goes, eradicates any expectation of privacy in the message. *Id.* at 56, citing *U.S. v. Jacobosen*, 466 U.S. 109, 117 (1984), and *U.S. v. Miller*, 425 U.S. 435, 443 (1976).

The State's brief string-cites a long list of cases each making various statements about the third party doctrine and assumption of risk, but each one—at its core—concludes that an expectation of privacy in a sent communication (e.g. email or letter) terminates upon delivery. (Resp. Br. at 10-11). And each of these cases in one way or another works its way back to *Miller*, the case in which the third party doctrine was first articulated.

The assumption-of-risk line of thinking, originating in *Miller*, contemplates an act of voluntary disclosure to police by the recipient. It emphatically DOES NOT entitle the police to seize the information, in whatever form, without legal authorization, from the third-party recipient. The *Miller* court said:

> This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third **party and conveyed by him to Government authorities**, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.

Miller at 443 (emphasis added). The Court made this statement citing to cases in which a party to the communication voluntarily turned the materials over to investigators. *Id.* The Court later confirmed that the loss of a reasonable expectation of privacy via the assumption-of-risk occurs only when it is non-law-enforcement that violate the expectation of privacy:

> It is well-settled that when an individual reveals private information to another, **he assumes the risk that his confidant will reveal that information to the authorities**, **and if that occurs** the Fourth Amendment does not prohibit governmental use of that information. Once frustration of the original expectation of privacy occurs, the Fourth Amendment does not prohibit governmental use of the now-nonprivate information: "This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in a third party will not be betrayed." *United States v. Miller*, 425 U.S. 435, 443, 96 S.Ct. 1619, 1624, 48 L.Ed.2d 71 (1976).13 **The Fourth Amendment is implicated only if the authorities use information with respect to which the expectation of privacy has not already been frustrated**. In such a case the authorities have not relied on what is in effect a private search, and therefore presumptively violate the Fourth Amendment if they act without a warrant.

Jacbosen, at 117-18. (Emphasis added).

This is a critical aspect of the third-party doctrine/assumption of risk theory. If voluntary disclosure by the third party was not required, then police could simply unlawfully seize and search the third party's property in order to obtain evidence against the sender, knowing that the sender has no recourse. Stated another way, such a rule would give police incentive to act unlawfully in the course of "the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 14 (1948).

Such an outcome would be especially troubling as it relates to digital evidence such as the text messages at issue here. It takes little effort to imagine a scenario in which investigators could identify a target as a drug dealer, identify one or more of his customers, and then proceed to unlawfully stop and seize the customers' cell phones in order to scroll through call logs and/or text messages looking for incriminating information to use against the target dealer. Under the State's suggested application of the third party doctrine and assumption of risk, such unlawful collection of evidence by police would be no impediment to a prosecution of the target.

Moreover, not only does the State's interpretation of the third party doctrine/assumption of risk theory create a perverse incentive for police misconduct, it is illogical. If merely sending a text message to another extinguishes an expectation of privacy in the sent message, and the record of the message exists on the sender's phone, the provider's records, and the recipient's phone, then there would seem to be no legal impediment to just seizing the sender's phone or the provider's records to look at any text messages therein.

Of course, that is not the law. *See, e.g., Riley v. California*, 134 S. Ct. 2473 (2014) (holding that police must get warrant to search cell phone incident to arrest); and Wis. Stats. § 698.375(4)(a) (requiring a search warrant to access the content of any electronic communication stored by the provider).

These difficulties have likely been behind members of the both the U.S. Supreme Court and Wisconsin Supreme Court to question the continuing vitality of the third party doctrine in current age of digital communications[1].

The third party doctrine and its assumption-of-risk underpinning does not deprive Tentoni of his expectation of privacy in his text messages stored on Wilson's phone. It is clear in this case that Wilson did not voluntarily turn over or disclose to police the contents of his text conversation with Tentoni; rather,

[1] "More fundamentally, it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. *E.g., Smith*, 442 U.S., at 742, 99 S.Ct. 2577; *United States v. Miller*, 425 U.S. 435, 443, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976). This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks. . . whatever the societal expectations, they can attain constitutionally protected status only if our Fourth Amendment jurisprudence ceases to treat secrecy as a prerequisite for privacy. I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection. See Smith, 442 U.S., at 749, 99 S.Ct. 2577 (Marshall, J., dissenting) ("Privacy is not a discrete commodity, possessed absolutely or not at all. Those who disclose certain facts to a bank or phone company for a limited business purpose need not assume that this information will be released to other persons for other purposes"); *see also Katz*, 389 U.S., at 351–352, 88 S.Ct. 507 ("[W]hat [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected"). *United States v. Jones*, 132 S. Ct. 945, 957 (2012) (Sotomayor, Concurring). *See also, State v. Tate*, 2014 WI 89, ¶ 132, 357 Wis. 2d 172, 231, 849 N.W.2d 798, 828 (Abrahamson, C.J. dissenting) (agreeing with Sotomayor's *Jones* concurrence).

the police seized the messages through a warrantless search of Wilson's phone. In short, Tentoni's expectation of privacy was not "frustrated" by a misplaced trust in Wilson.

This is also consistent with the U.S. Supreme Court's own statement about the meaning of *Katz*: "[the *Katz* decision] makes clear that capacity to claim the protection of the Amendment depends 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). Tentoni, and any other citizen, can reasonably expect that the cell phones of their friends and confidants will be free from unlawful governmental intrusion. If those friends or confidants betray them, the law clearly provides that they cannot complain. But where the betrayal is by Government agents sworn to uphold the law, someone in Tentoni's aggrieved position cannot be denied the right to complain.

The State never squarely addresses Tentoni's analysis applying *Katz*, choosing instead to rely solely on the third-party doctrine/assumption of risk line of cases. (see Resp. Br., generally; App. Br. 5-6, 13-14). Accordingly, once this court concludes that the third party doctrine/assumption of risk theories do not vitiate Tentoni's expectation of privacy, the court should adopt Tentoni's analysis under *Katz* and reverse the circuit court.

CONCLUSION

For the reasons stated herein, Tentoni respectfully requests that the court find that the warrantless search of Tentoni's text message conversation on Wilson's phone violated his State and

Federal rights to be free from unreasonable searches and seizures, vacate the judgment of conviction, and remand the case to the circuit court with directions to exclude from evidence any text messages between Tentoni and Wilson found on Wilson's phone, as well as all derivative evidence, including Tentoni's phone records.

Dated this 9th day of April, 2015

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FORM AND LENGTH CERTIFICATION

This reply brief conforms to the rules contained in Wis. Stat. (Rule) § 809.19(8)(c)(2) for a reply brief produced with a proportional serif font. The length of this petition is 1968 words.

Dated this 9th day of April, 2015

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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 9th day of April, 2015

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