IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	DIVISION ONE
	)	
Respondent,	)	No. 63626-0-I
	)	(linked with No. 63617-1-I)
v.	)	
	)	
DEBRA A. CANADY,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: April 18, 2011
_____	)	

Dwyer, C.J. — Where a valid search warrant authorizes law enforcement officials to obtain particular evidence, but a private person not acting as an agent of the State provides to police evidence beyond the scope of that warrant, the exclusionary rule does not require that the additional evidence be suppressed. Here, an employee of Verizon Wireless, a private entity, was not acting as an agent of the State when he provided police with text message records beyond the scope of the search warrant requesting such records. Thus, the trial court did not err by admitting that evidence. Accordingly, we affirm.

Debra Canady and Brent Starr were convicted of murder in the first degree with a deadly weapon enhancement. Their convictions were based on the following facts.

On the morning of June 26, 2008, at approximately 6:00 a.m., Debra Canady telephoned 911 and reported that, upon entering her home, she had found her ex-boyfriend, David Grim, unconscious. A police officer was dispatched in response to her call. Canady explained to the responding officer that she had spent the previous night at the home of her current boyfriend, Brent Starr. She further told the officer that she believed Grim to be dead. Grim was, indeed, dead, having sustained repeated blows to the skull with a blunt object. Testimony at trial indicated that the fractures in Grim's skull were made by a drywall hammer.

Both Canady and Starr were questioned by police. During Starr's interview, he stated that Canady had sent a text message to him on the morning of Grim's death, informing him that Grim was dead. However, during her interview, Canady denied having communicated with Starr in any way about Grim's death.

Based on the discrepancy in Canady's and Starr's reports to police, Detective Patrick VanderWeyst of the Snohomish County Sheriff's Department applied for a search warrant. Detective VanderWeyst's search warrant affidavit requested authorization to obtain from Verizon Wireless records of text

messages sent from Canady's and Starr's cellular telephones between June 20 and June 29. Detective VanderWeyst explained in the affidavit that the text message records would corroborate either Canady's or Starr's account of whether they had exchanged text messages regarding Grim's death.

A superior court judge issued the search warrant. However, the judge limited the search warrant such that it authorized Detective VanderWeyst to obtain records only of those text messages sent on June 26 between 6:00 a.m. and 12:00 p.m.[1]

Detective VanderWeyst thereafter faxed a copy of the search warrant to Grant Fields, an employee of Verizon Wireless. Detective VanderWeyst then telephoned Fields to inform him that the search warrant had been faxed and that it authorized Detective VanderWeyst to obtain only the records of text messages sent on June 26 between 6:00 a.m. and 12:00 p.m.[2]

Later that day, Detective VanderWeyst received an e-mail message from Fields containing the text message records. Because Detective VanderWeyst was away from his office when he received the e-mail message, he accessed his e-mail account from a nearby computer rather than first returning to his office.

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[1] On the same day that Detective VanderWeyst applied for the search warrant concerning the text message records, the prosecutor assigned to the investigation requested, pursuant to a special inquiry proceeding, a subpoena duces tecum seeking the same records. The trial court issued the subpoena duces tecum as requested, authorizing the prosecutor to obtain records of text messages sent between June 20 and June 29.

On appeal, Canady contends that the trial court impermissibly relied upon the subpoena duces tecum as an "independent source" of the text message records. Because the resolution of this case does not necessitate the resolution of that issue, we do not further address it herein.

[2] Police had previously sent to Verizon Wireless a so-called "preservation letter" requesting that the company preserve the cellular telephone records pertaining to both Canady and Starr for a broader period of time.

Detective VanderWeyst was "anxious to find out what was said," so he immediately scrolled down to the content of the text messages, rather than first reading the portions of the records indicating at what time, to whom, and by whom each of the messages had been sent. Report of Proceedings (RP) (May 6, 2009) at 196. The records included text messages that Detective VanderWeyst immediately believed were incriminating, including the following text message exchange between Canady and Starr:

Starr:	"its done"
Starr:	"I need pants"
Canady:	"U comhng here?"
Starr:	"nevermind, i have a pair. have a great day. is messy in yr room, sorry."
Canady:	"Was it quiet?"
Starr:	"mostly"
Starr:	"he thought i was kev"
Canady:	"U may have to toss yr clothes if they come to question you"
Canady:	"Erase yr phone"

State's Ex.1 at 1542-46.

Detective VanderWeyst testified that, after reading the messages, he "went back to review them" and discovered that many of the messages that he had read had been sent earlier than 6:00 a.m. on June 26. RP (May 6, 2009) at 198. Indeed, the e-mail he had received from Fields contained records of text messages sent by Canady and Starr on June 26 between 3:46 a.m. and 12:00 p.m. All of the incriminating text messages had been sent prior to 6:00 a.m. Detective VanderWeyst testified that when he later returned to his office, he accessed a voice mail message on his office telephone from Fields explaining

that Fields had inadvertently provided records of text messages sent outside of the timeframe indicated in the search warrant.

Based upon the information provided by Fields, Detective VanderWeyst obtained a second search warrant for records of text messages sent between June 20 and July 3. Records obtained pursuant to this warrant were introduced by the State at trial. Also based upon the information provided by Fields in response to the initial search warrant, Canady and Starr were arrested. Both Canady and Starr were subsequently charged with murder in the first degree with a deadly weapon enhancement.

Prior to trial, Canady and Starr each moved to suppress the evidence of text messages that were not received on Canady's or Starr's cellular telephones between 6:00 a.m. and 12:00 p.m. on June 26—in other words, they sought to suppress the text message records that the police were not authorized to obtain pursuant to the initial search warrant. Canady and Starr also moved to suppress all evidence discovered based on the probable cause developed as a result of Detective VanderWeyst's initial reading of those text messages.

Following oral argument on the motion to suppress, the trial court found that "[n]either Detective VanderWeyst nor any other law enforcement officer did anything to direct Verizon in any way to send records outside the scope of the warrant." Clerk's Papers (CP) at 41-42. The trial court concluded that the exclusionary rule did not apply because no state action had occurred:

> When Verizon provided records outside of the time frame on

> the search warrant, they acted as a private actor and not at police direction. . . . Verizon was a private actor and therefore the records they provided are not subject to suppression under the exclusionary rule. . . . Since Verizon was a private actor, there is no basis for the court to suppress the evidence under the exclusionary rule.

CP at 44. Accordingly, the trial court denied Canady's and Starr's motions to suppress.[3]

Canady and Starr were tried jointly. The jury found them guilty as charged.

II

Canady contends that the text message records that the police were not authorized to obtain pursuant to the initial search warrant were obtained in violation of article 1, section 7 of the Washington Constitution and the Fourth Amendment and, thus, that the trial court erred by admitting that evidence. We disagree.

Both article I, section 7 of the Washington Constitution and the Fourth Amendment to the United States Constitution "were intended as a restraint upon sovereign authority; in the absence of state action, they have no application regardless of the scope of protection which would otherwise be afforded under

[3] The trial court further concluded that the inevitable discovery doctrine provided an independent basis upon which to allow the admission of the text message evidence. Canady contends on appeal that the inevitable discovery doctrine is not a proper basis upon which to admit the evidence because the application of that doctrine is incompatible with our state's constitution. Canady is correct that application of the inevitable discovery doctrine violates article 1, section 7. See State v. Winterstein, 167 Wn.2d 620, 624, 220 P.3d 1226 (2009). However, because the State does not rely on this particular conclusion of the trial court in urging affirmance, we do not further address this issue.

either provision."[4] State v. Ludvik, 40 Wn. App. 257, 262, 698 P.2d 1064 (1985). Thus, "[t]he exclusionary rule does not apply to the acts of private individuals." State v. Smith, 110 Wn.2d 658, 666, 756 P.2d 722 (1988); accord State v. Wolken, 103 Wn.2d 823, 830, 700 P.2d 319 (1985) ("Because the exclusionary rule is inapplicable to the actions of private persons, the misconduct must be that of a government agent."); Ludvik, 40 Wn. App. at 262 ("Constitutional guarantees against unreasonable searches and seizures protect only against governmental actions and do not require the application of the exclusionary rule to evidence obtained from private citizens acting on their own initiative.").

"In order to prove that a private individual was acting as a government agent, '[i]t must be shown that the State in some way instigated, encouraged, counseled, directed, or controlled the conduct of the private person.'" Smith, 110 Wn.2d at 666 (alteration in original) (internal quotation marks omitted) (quoting Wolken, 103 Wn.2d at 830). A private individual is a state actor, such that his or her search constitutes state action, where he or she "functions as an agent or instrumentality of the state." City of Pasco v. Shaw, 161 Wn.2d 450, 460, 166 P.3d 1157 (2007). "For agency to exist there must be a manifestation

[4] The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause." U.S. Const. amend. IV. The Washington Constitution similarly provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Wash. Const. art. I, § 7. Article I, section 7 provides protections broader than those provided by the Fourth Amendment, as the Fourth Amendment protects only against "unreasonable" searches. See State v. Eisfeldt, 163 Wn.2d 628, 634-35, 185 P.3d 580 (2008). However, this difference is not significant to our analysis of the present case.

of consent by the principal (the police) that the agent (the informant) acts for the police and under their control and consent by the informant that he or she will conduct [himself or herself] subject to police control." Smith, 110 Wn.2d at 670. Stated otherwise, key considerations in making a determination of state agency include "'whether the government knew of and acquiesced in the intrusive conduct'" and whether the private party "'intended to assist law enforcement efforts or to further his [or her] own ends.'" City of Pasco, 161 Wn.2d at 460 (emphasis omitted) (alteration in original) (internal quotation marks omitted) (quoting State v. Swenson, 104 Wn. App. 744, 754, 9 P.3d 933 (2000)). Moreover, "the mere fact that there are contacts between the private person and police does not make that person an agent." State v. Walter, 66 Wn. App. 862, 866, 833 P.2d 440 (1992).

Because Verizon Wireless is a private entity, no state action occurred—and, thus, the exclusionary rule does not apply—unless Fields, the Verizon Wireless employee, was acting as an agent of the State. See Smith, 110 Wn.2d at 666. Canady bears the burden of establishing that state action occurred. City of Pasco, 161 Wn.2d at 460 ("It is the party asserting the unconstitutionality of an action that bears the burden of establishing that state action is involved.").

Canady contends that Fields "plainly intended to assist law enforcement by complying with the warrant," thus implying that he was functioning as an

agent of the State. Br. of Appellant at 20. But given that Canady challenges only the admissibility of the text message evidence that the initial warrant did not authorize the police to obtain, the only relevant question is whether Fields was acting at the direction of the State when he provided to the police that specific evidence. The trial court found that Detective VanderWeyst explicitly notified Fields regarding the search warrant's limitations. Even were Fields acting at police direction when he complied with the search warrant by providing those records specified in the search warrant, Fields was certainly *not* acting at police direction when he sent additional records outside the scope of the search warrant. In other words, Fields was not acting at police direction when he provided evidence that the police had not even requested.

"Appellate courts should not disturb trial court findings based upon substantial evidence and which hold that the testimony of police was credible." Smith, 110 Wn.2d at 670. Here, substantial evidence—in the form of Detective VanderWeyst's testimony—supports the trial court's finding that "[n]either Detective VanderWeyst nor any other law enforcement officer did anything to direct Verizon in any way to send records outside the scope of the warrant."[5]

[5] In a separate cause, Starr, Canady's codefendant in the trial court, appeals from a judgment entered on the jury's verdict finding him guilty of murder in the first degree with a deadly weapon enhancement. Starr and Canady raise many identical claims of error on appeal. Those claims of error that are distinct to Starr's appeal are resolved in State v. Starr, No. 63617-1-I. However, because Starr assigns error to the trial court's findings of fact related to his and Canady's common claims of error, we resolve those issues herein.

Starr first assigns error to the trial court's finding that the police did not direct Verizon Wireless to provide to the police records that the police were not authorized to obtain pursuant to the initial search warrant. However, because substantial evidence supports this finding, the trial court did not err in making it.

Starr additionally assigns error to the trial court's finding that the records of text

See CP at 41-42.

Because Fields was not acting as an agent of the State when he provided the police with evidence that the initial search warrant did not authorize them to seize, the exclusionary rule does not apply. Thus, the trial court did not err by denying Canady's and Starr's motion to suppress the text message evidence.[6]

III

Canady additionally contends that the actual search occurred not when Fields provided the police with the text message records but, instead, when Detective VanderWeyst—who clearly *is* a state actor—read those records. We disagree.

The contention that Detective VanderWeyst's reading of the text message evidence constituted a search independent of the provision of the records to him necessarily implies that Detective VanderWeyst, subsequent to obtaining a search warrant authorizing him to obtain the records from Verizon Wireless, was

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messages sent outside of the timeframe indicated in the search warrant were mistakenly sent by Verizon Wireless to the police. However, even had Fields intentionally provided police with those records, he would not be transformed into a state actor simply by so doing. See State v. Dold, 44 Wn. App. 519, 522, 722 P.2d 1353 (1986) (noting that "mere evidence that the private person's purpose was to aid the authorities is insufficient to transform a private search into a government search"). Thus, because this finding is unnecessary to our determination that Fields was not acting as an agent of the State, we need not further address this assignment of error.

[6] Canady additionally asserts that the text message evidence is inadmissible because Washington does not recognize the "private search doctrine" as an exception to the exclusionary rule. Pursuant to the private search doctrine, "a warrantless search by a state actor does not offend the Fourth Amendment if the search does not expand the scope of the private search." Eisfeldt, 163 Wn.2d at 636.

Canady is correct that our state does not recognize the private search doctrine as an exception to the exclusionary rule. See Eisfeldt, 163 Wn.2d at 637-38. However, this fact is immaterial given that the private search doctrine is not germane to the facts herein. The private search doctrine assumes that state action has occurred—otherwise, the warrant requirement would not even apply. Here, no state action occurred; thus, the text message evidence at issue was not admitted pursuant to that doctrine.

required to obtain a second search warrant prior to reading the records obtained pursuant to the initial search warrant. In other words, it implies that the search warrant issued allowed him to obtain the records but not to read them. This is not the law.

Where evidence is obtained by a private actor and given to the State, constitutional protections do not apply. See Walter, 66 Wn. App. at 866-67 (delivery of prints from film lab manager to the police did not implicate constitutional rights). Thus, if Fields had of his own volition provided records to the police, the police would have been authorized to review those records without obtaining a search warrant. This situation is not altered merely because Detective VanderWeyst first properly sought a search warrant authorizing him to obtain a subset of the records that Fields subsequently provided. "[T]he courts should encourage police officers to seek judicially sanctioned search warrants." State v. Lyons, No. 28693-2-III, 2011 WL 451753, at *2 (Wash. Ct. App. Feb. 10, 2011). Here, Detective VanderWeyst properly obtained evidence pursuant to a valid search warrant and was not required to procure an additional search warrant in order to read that evidence.

Moreover, even were we to conclude that an actual search occurred when Detective VanderWeyst read the text messages, the plain view exception to the warrant requirement would allow admission of the text message evidence. The plain view doctrine requires: "(1) a prior justification for police

intrusion—whether by warrant or by a recognized exception to the warrant requirement; (2) an inadvertent discovery of incriminating evidence; and (3) immediate knowledge by police that they have evidence before them." State v. Lair, 95 Wn.2d 706, 714, 630 P.2d 427 (1981). "Objects are immediately apparent for purposes of a plain view seizure when, considering the surrounding facts and circumstances, the police can reasonably conclude they have evidence before them." Lair, 95 Wn.2d at 716.

Here, Detective VanderWeyst was acting pursuant to a valid search warrant when he viewed the e-mail sent by Fields, which he could reasonably have believed would contain only those text message records that he was authorized by the search warrant to obtain. Moreover, because Detective VanderWeyst, naturally curious about the content of the text messages, read the content of the messages prior to reading the times at which the suspects sent those messages, he inadvertently discovered incriminating evidence. He immediately recognized that the evidence was relevant to the crime that he was investigating. Thus, even had a government search occurred when Detective VanderWeyst read the messages, a decision we do not make, the plain view doctrine would permit the admission of such evidence.[7]

[7] Canady asserts for the first time on appeal that, because Washington does not recognize a "good faith" exception to the warrant requirement of article 1, section 7, Detective VanderWeyst's reading of the text message evidence is impermissible even if it were inadvertent. Canady is correct that our state does not recognize a "good faith" exception to the warrant requirement. See State v. Afana, 169 Wn.2d 169, 184, 233 P.3d 879 (2010). However, this fact does not bear upon the outcome of this case because the "good faith" exception is not relevant to our analysis.

Rather, the "good faith" exception applies—in those jurisdictions in which it is

IV

Canady additionally contends that the text message evidence was unreliable and, thus, that its admission violated her right to due process. We disagree.

Computer-generated evidence is admissible as a business record if it conforms to the requirements set forth in RCW 5.45.020. State v. Ben-Neth, 34 Wn. App. 600, 602, 663 P.2d 156 (1983). RCW 5.45.020 provides:

> A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

Where the statutory requirements are met, "computerized records are treated the same as any other business records." Ben-Neth, 34 Wn. App. at 603. Moreover, where there are suspected errors in the business records, "'the challenge should be to the accuracy of the business record, not to its admissibility.'" State v. Fleming, 155 Wn. App. 489, 501, 228 P.3d 804 (2010) (quoting Ben-Neth, 34 Wn. App. at 602 n.2). "A trial court's ruling admitting . . . such records is given considerable weight and will not be reversed absent a

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recognized—only where a warrantless search is based on a reasonable belief by law enforcement officers that they are acting in conformity with an applicable exception to the warrant requirement. State v. Morse, 156 Wn.2d 1, 9-10, 123 P.3d 832 (2005). Here, Detective VanderWeyst did not believe that he was acting in conformity with an exception to the warrant requirement; rather, he had obtained a valid warrant and was reading text messages that he believed he was authorized to read pursuant to that warrant. Thus, Canady's contention that the State is attempting to revive a "good faith" exception to the exclusionary rule is unavailing.

manifest abuse of discretion." Ben-Neth, 34 Wn. App. at 603.

The text message evidence admitted herein meets the requirements set forth in RCW 5.45.020, which are "designed to insure the reliability of the evidence." State v. Kreck, 86 Wn.2d 112, 118, 542 P.2d 782 (1975). The records custodian testified regarding the source and preparation of the text message evidence. He further testified that Verizon Wireless keeps such records for its own purposes, including for billing and network efficiency. Moreover, the text message records were corroborated by other evidence, including text messages that police observed on Canady's and Starr's cell phones and search queries on Canady's computer at work.

The trial court herein ruled that the Verizon Wireless employee who testified regarding the text message records was "more than qualified to give testimony as to the mode of preparation and the retention of the documents in question." RP (May 6, 2009) at 234. The trial court further ruled that the text message records constitute business records.

"Admissibility hinges on the trial court's discretionary determination that the computer records are reliable." Ben-Neth, 34 Wn. App. at 605. The trial court did not abuse its discretion by ruling that the records herein were sufficiently reliable for admission. Thus, Canady's contention that her due process rights were violated is without merit.

Affirmed.

Dwyer, C.J.

We concur:

Spearman, J.

Schindler, J.