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PREVIEW; State v. Staker: *The Constitutionality of Undercover Law Enforcement Text Message Conversations with Potential Suspects*

Forrest Crowl*

The Montana Supreme Court is scheduled to hear oral arguments in the matter of *State of Montana v. Travis Staker* on Friday, March 26, 2021, at 9:30 a.m. Oral arguments will be conducted entirely by visual and audio communication devices on Zoom, live-streamed through the Court’s website at <http://stream.vision.net/MT-JUD/>, with an introduction to the oral arguments beginning at 9:00 a.m. Mark J. Luebeck will likely appear on behalf of Appellant Travis Staker (“Staker”), and Mardell Ployhar will likely appear on behalf of Appellee the State of Montana (“State”).

I. INTRODUCTION

The primary issues before the Montana Supreme Court are whether Staker has an actual subjective expectation of privacy in his cell phone text message communications and whether society is willing to recognize that expectation as objectively reasonable. The Court’s decision will clarify whether a warrant is required for an undercover law enforcement officer to engage in text message conversations with a potential suspect. This decision will potentially clarify the extent of privacy rights in text message conversations between private citizens and undercover law enforcement agents.

II. FACTUAL AND PROCEDURAL BACKGROUND

During the last week of August 2018, Special Agent Rodney Noe, from the Department of Homeland Security, posted an advertisement on Internet websites advertising an “experience” with an individual named “Lily.”¹ The advertisement provided individuals with an email address and a phone number that could be

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¹ Brief of Appellant at 3–4, *State v. Staker*, (Mont. Apr. 4, 2020) (No. 19-0731).

used to contact “Lily.”² Agent Noe possessed the cell phone that received and responded to inquiries related to the advertisement.³ Agent Noe, acting in an undercover capacity as “Lily,” began text messaging individuals who responded to the advertisement.⁴

On August 27, 2018, Agent Noe received a text message from Staker’s cell phone.⁵ Staker and “Lily” engaged in a text message conversation where Staker arranged to meet “Lily” at a Bozeman hotel and pay her in exchange for sexual intercourse.⁶ The parties stipulated that abbreviations Staker used in the text messages with “Lily” were consistent with common abbreviations used in the sex trade.⁷ On August 29, 2018, when Staker arrived at the hotel, he was arrested and charged with misdemeanor prostitution in violation of Montana Code Annotated § 45–5–601.⁸ The State did not seek or obtain a search warrant during the course of its investigation of Staker.⁹

In Gallatin County Justice Court, Staker was granted his motion to suppress the evidence of the text messages he sent to Agent Noe on the ground that the officer’s recording of the text messages violated Staker’s right to privacy under Article II, Sections 10 and 11 of the Montana Constitution.¹⁰ The State appealed the justice court’s decision to the Eighteenth Judicial District Court, where Staker again moved to suppress the evidence obtained without a warrant by Agent Noe.¹¹ On September 17, 2019, the district court denied Staker’s motion to suppress, concluding: “Agent Noe did not engage in a search or seizure of the text

² Brief of Appellee at 2–3, *State v. Staker*, (Mont. Sept. 25, 2020) (No. 19-0731).

³ *Id.* at 3.

⁴ Brief of Appellant, *supra* note 1, at 4.

⁵ *Id.*

⁶ *Id.* at 4–7.

⁷ *Id.* at 6.

⁸ *Id.* at 1, 8; *see generally* MONT. CODE ANN. § 45–5–601 (“[T]he offense of prostitution is committed if a person engages in or agrees or offers to engage in sexual intercourse or sexual contact that is direct and not through clothing with another person for compensation, whether the compensation is received or to be received or paid or to be paid.”).

⁹ *Id.* at 9.

¹⁰ Brief of Appellee, *supra* note 2, at 1; *see generally* MONT. CONST. art. II, § 10 (“The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.”); MONT. CONST. art. II, § 11 (“The people shall be secure in their persons, papers, homes and effects from unreasonable searches and seizures.”).

¹¹ Brief of Appellee, *supra* note 2, at 1.

exchange with [Staker].”¹² Staker subsequently entered a guilty plea to the charge of prostitution and reserved his right to appeal the denial of his motion to suppress.¹³ This appeal followed Staker’s sentencing.¹⁴

III. SUMMARY OF ARGUMENTS

A. Appellant Travis Staker

Staker primarily argues that Agent Noe’s warrantless investigation constituted an illegal search and seizure, as Staker had an actual subjective expectation of privacy in his text messages and society recognizes his expectation as objectively reasonable.¹⁵ Staker relies on the Fourth Amendment of the United States Constitution and Article II, Section 11 of the Montana Constitution, which protect citizens against unreasonable searches and seizures.¹⁶ Staker contends this case must be decided under Article II, Sections 10 and 11 of the Montana Constitution.¹⁷ Specifically, he argues, all three factors used by Montana courts to determine whether a state actor’s search or seizure violates the Montana Constitution are met here.¹⁸

First, Staker claims he had an actual subjective expectation of privacy in his cell phone text messages with “Lily.”¹⁹ Staker characterizes his text messages to Agent Noe as “written thoughts,” and maintains he had a subjective expectation of privacy that his thoughts were communicated to a private person, not a government agent.²⁰ Staker relies on the following facts to show he had an actual subjective expectation of privacy: he did not text publicly with

¹² Brief of Appellant, *supra* note 1, at 3.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 10.

¹⁶ *Id.*

¹⁷ Reply Brief of Appellant at 11–19, *State v. Staker*, (Mont. Nov. 9, 2020) (No. 19-0731).

¹⁸ Brief of Appellant, *supra* note 1, at 12; *see generally* *State v. Goetz*, 191 P.3d 489, 497–98 (Mont. 2008) (“1) whether the person challenging the state’s action has an actual subjective expectation of privacy; 2) whether society is willing to recognize that subjective expectation as objectively reasonable; and 3) the nature of the state’s intrusion.”).

¹⁹ Brief of Appellant, *supra* note 1, at 17.

²⁰ *Id.* at 17–18.

“Lily”; he did not share their text messages with anyone and only they had access to those conversations; they communicated using acronyms and vague terms; he password protected his cell phone, which only he had the ability to unlock; and he kept his cell phone in his possession at all times and did not loan it to others.²¹

Next, Staker argues society recognizes his actual subjective expectation of privacy in his text messages as reasonable.²² Here, Staker cites to the prevalence of cell phones and society’s attitudes toward cell phone privacy.²³ Staker asserts if society recognizes an individual’s expectation of privacy in their face-to-face conversations, cell phone and landline voice conversations, Facebook/cell phone messages, and physical movements, society also recognizes Staker’s expectation of privacy in his text messages with “Lily.”²⁴

Lastly, Staker argues the State’s warrantless search and seizure was per se unreasonable because the State lacked a recognized search warrant exception.²⁵ Staker claims the appropriate remedy for the State’s unlawful actions is to suppress all the evidence gathered as a result of the search, including text messages between Staker and Agent Noe, and all testimonial evidence regarding the communication.²⁶

²¹ *Id.* at 18–19.

²² *Id.* at 21.

²³ *Id.* at 22–25 (citing Charles MacLean, *Katz on a Hot Tin Roof: The Reasonable Expectation of Privacy Doctrine is Rudderless in the Digital Age, Unless Congress Continually Resets the Privacy Bar*, 24 ALB. L.J. SCI. & TECH. 59 (2014); Frank Newport, *The New Era of Communication Among Americans*, GALLUP (Nov. 10, 2014), <https://perma.cc/29XD-LHCR>; Aaron Smith, *Americans and Text Messaging*, PEW RESEARCH CENTER (Sept. 19, 2011), <https://perma.cc/S5UP-2M5H>; Dustin Volz, *Most Americans Unwilling to Give Up Privacy to Thwart Attacks: Reuters/Ipsos Poll*, THOMSON REUTERS (Apr. 4, 2017), <https://perma.cc/4D5Q-3MXD>; Matthew Weber, *Reuters Graphics*, THOMSON REUTERS/ISPOS (2017), <https://perma.cc/3UD3-CK94>).

²⁴ Brief of Appellant, *supra* note 1, at 31 (citing *State v. Stewart*, 291 P.3d 1187 (Mont. 2012); *State v. Allen*, 241 P.3d 1045 (Mont. 2010); *State v. Goetz*, 191 P.3d 489 (Mont. 2008); *State v. Windham*, Montana Eighteenth Judicial District Court, Cause No. DC-13-118C, Findings of Fact and Conclusions of Law Supporting January 29, 2015 Order Granting Defendant’s Motion to Suppress and Dismiss (Feb. 5, 2015)).

²⁵ *Id.* at 43.

²⁶ *Id.* at 44.

B. Appellee State of Montana

The State primarily argues Staker’s text messages to Agent Noe are not protected by the Fourth Amendment of the United States Constitution or Article II, Sections 10 and 11 of the Montana Constitution.²⁷ The State contends Staker does not have a privacy interest in the text messages he voluntarily sent to the undercover officer.²⁸

First, pursuant to the Fourth Amendment, the State argues that once Staker disclosed information to another person, he no longer had a reasonable expectation of privacy in that information.²⁹ The State relies heavily on the third-party doctrine, arguing Staker’s voluntary response to an unknown party via an online advertisement demonstrates he assumed the risk the recipient would be—or would share his text messages with—a law enforcement officer.³⁰ The State asserts Staker’s cell phone was not searched; instead, Staker sent a text message to a government agent, believing the agent was a prostitute.³¹

Next, the State argues Article II, Sections 10 and 11 of the Montana Constitution do not protect text messages Staker sent to an undercover law enforcement officer.³² The State maintains that, although the Montana Constitution offers an enhanced privacy right that guards against warrantless electronic monitoring and surreptitious recording, neither of those investigatory means were used in this case.³³ Specifically, the State contends the right to privacy under the Montana Constitution does not protect the text messages Staker sent to an undercover law enforcement officer.³⁴ The State distinguishes *Staker* from prior Montana case law involving telephonic conversations and recordings, claiming text

²⁷ Brief of Appellee, *supra* note 2, at 9.

²⁸ *Id.* at 26–27.

²⁹ *Id.* at 13 (citing *United States v. Jacobsen*, 466 U.S. 109, 117 (1984) (“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.”)).

³⁰ *Id.* at 13–19.

³¹ *Id.* at 19.

³² *Id.* at 20.

³³ *Id.* at 20–21.

³⁴ *Id.* at 26.

messages, by their very nature, create a recording in the sender's and the recipient's cell phone.³⁵ The State asserts it is common knowledge that a person receiving a text message could be a law enforcement officer or could share the message with anyone, including law enforcement.³⁶

Even if Staker had a subjective expectation of privacy, the State argues society would not view that expectation as objectively reasonable.³⁷ The State asserts, regardless of what Staker did with his cell phone, he had to know the messages he sent to a number in an advertisement would be contained in the recipient's phone and the recipient could do anything they wanted with those messages.³⁸ Essentially, the State does not believe it is reasonable for a person to expect a written electronic communication sent to a complete stranger in response to an advertisement for illegal services would remain private.³⁹

Finally, the State requests the Court to decline Staker's invitation to dramatically expand Montana's right to privacy, because it would prohibit law enforcement conduct that has routinely been accepted and drastically hinder law enforcement's ability to perform investigations.⁴⁰

IV. ANALYSIS

To review a denial of a motion to suppress evidence, the Court will determine whether the district court's findings of fact are clearly erroneous and whether the district court's interpretation and application of law are correct.⁴¹ First, the Court will need to determine if a search occurred. The Court will likely find Staker did not have an actual subjective expectation of privacy in his text messages, and even if he did, society is not willing to recognize that expectation as objectively reasonable. Therefore, the Court will likely uphold the denial of Staker's motion to suppress the evidence obtained by law enforcement in their investigation.

³⁵ *Id.* at 26–27.

³⁶ *Id.* at 28.

³⁷ *Id.* at 29.

³⁸ *Id.* at 30.

³⁹ *Id.* at 31–32.

⁴⁰ *Id.* at 32.

⁴¹ *State v. Goetz*, 191 P.3d 489, 493 (Mont. 2008).

The Fourth Amendment of the United States Constitution provides that the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated”⁴² The Montana Constitution affords citizens an even greater right to privacy than the Fourth Amendment to the United States Constitution.⁴³ Pursuant to Article II, Sections 10 and 11 of the Montana Constitution, and *State v. Goetz*⁴⁴ and its progeny, Montana citizens enjoy a heightened privacy right. Further, even the delegates to the 1972 Montana Constitutional Convention were concerned with future potential intrusions by the government into Montanan’s privacy by using electronic monitoring and surveillance.⁴⁵ A search occurs when an individual has exhibited an actual subjective expectation of privacy and the individual’s expectation of privacy is one that society is prepared to recognize as objectively reasonable.⁴⁶ In Montana, a state action constitutes an “unreasonable” or “unlawful” search of the individual if the first two factors above are met and the nature of the state’s intrusion is unreasonable.⁴⁷

A. Staker’s Subjective Expectation of Privacy

The Court must first address whether Staker had an actual subjective expectation of privacy in his text messages with Agent Noe. A significant portion of oral argument will likely be dedicated to this question. A split of authority exists in Montana’s Eighteenth Judicial District Court as to whether law enforcement must obtain a search warrant before engaging in electronic communication with a suspect. The Court in *State v. Beam*⁴⁸ found the defendant had no actual subjective expectation of privacy in his Facebook messages

⁴² U.S. CONST. amend. IV.

⁴³ *Goetz*, 191 P.3d at 494.

⁴⁴ 191 P.3d 489 (Mont. 2008).

⁴⁵ *Id.* at 499–500 (citing Montana Constitutional Convention, Verbatim Transcript, March 7, 1972 at 1682, 1687).

⁴⁶ *Smith v. Maryland*, 442 U.S. 735, 740 (1979) (citing *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)).

⁴⁷ *Goetz*, 191 P.3d at 497–98.

⁴⁸ Montana Eighteenth Judicial District Court, Cause No. DC-12-161B, Findings of Facts, Conclusions of Law and Order (Apr. 10, 2013).

with an undercover detective.⁴⁹ While *State v. Windham*⁵⁰ found a defendant had an actual subjective expectation of privacy in their Facebook and text communications with an undercover detective posing as a 16-year-old high school student.⁵¹ The Court's holding in *Staker* should clarify the contradictory authority found in Montana's Eighteenth Judicial District Court.

Here, it is likely the Court upholds the district court's rulings, following similar reasoning as the district court, even with the heightened principles supporting Montanan's right to privacy in mind. The State's third-party doctrine argument is compelling when paired with the district court's conclusion that sending written text messages to another person is different from the nature of oral communications that were the subject of prior case law *Staker* cites.⁵² The Montana Supreme Court's analyses in *State v. Stewart*⁵³ and *State v. Allen*⁵⁴ ostensibly recognize the application of the third-party doctrine. The United States Supreme Court has generally held "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."⁵⁵ It is difficult to see how the third-party doctrine, which essentially waives a person's privacy right, does not apply here. *Staker* sent text messages to a stranger he found on an Internet advertisement and thus took the risk the recipient would be—or would share his text messages with—a law enforcement officer.

⁴⁹ *Id.*

⁵⁰ Montana Eighteenth Judicial District Court, Cause No. DC-13-118C, Findings of Fact and Conclusions of Law Supporting January 29, 2015 Order Granting Defendant's Motion to Suppress and Dismiss (Feb. 5, 2015).

⁵¹ *Id.*

⁵² See *Goetz*, 191 P.3d at 504 (holding electronic monitoring and recording of defendant's conversations with a confidential informant, constituted searches subject to the warrant requirement); *State v. Allen*, 241 P.3d 1045, 1061 (Mont. 2010) (holding the recording of a cell phone conversation at the behest of law enforcement constituted a search); *State v. Stewart*, 291 P.3d 1187, 1201 (Mont. 2012) (holding a warrantless search occurred when a detective surreptitiously recorded the landline/cell phone conversations between the defendant and his daughter).

⁵³ 291 P.3d 1187 (Mont. 2012).

⁵⁴ 241 P.3d 1045 (Mont. 2010).

⁵⁵ *United States v. Jacobsen*, 466 U.S. 109, 117 (1984).

Also, the Montana Supreme Court could consider persuasive authority from other jurisdictions, which have held a “[d]efendant did not have a legitimate expectation of privacy in the [text] messages he willingly, and without undue government prompting, sent to the undercover officers.”⁵⁶ Staker willingly, and without undue government prompting, sent text messages to Agent Noe, and therefore, likely did not have a legitimate expectation of privacy in his text messages.

Staker’s attempt to establish an actual subjective expectation of privacy hinges on his cell phone usage and how he guarded the conversations he had with “Lily.”⁵⁷ However, regardless of how carefully Staker guarded his actual cell phone and the content within the cell phone, his expectation of privacy likely terminated upon delivery of the text message. The Court will likely distinguish text message conversations from recorded oral conversations, much like the State did in their brief.⁵⁸ The district court in *Staker* relied, in part, on *Allen*, and the fact that Allen did not know his conversation with the informant was being recorded.⁵⁹ Staker is in a much different situation than Allen, Staker likely knew or should have known his text message conversation was recorded and memorialized in written form. Regardless of the steps Staker took to guard the privacy of his cell phone, the Fourth Amendment provides no protection to “a wrongdoer’s misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.”⁶⁰ Staker accepted the risk, when he sent the text message to a phone number found on an Internet advertisement, that the message could be obtained by law enforcement. Therefore, the Court will likely conclude Staker did not have a subjective expectation of privacy.

⁵⁶ *United States v. Mack*, 53 F. Supp. 3d 179, 186 (D.D.C. 2014).

⁵⁷ Brief of Appellant, *supra* note 1, at 18–19. Staker partially relies on a non-controlling case, *State v. Windham*, Montana Eighteenth Judicial District Court, Cause No. DC-13-118C, Findings of Fact and Conclusions of Law Supporting January 29, 2015 Order Granting Defendant’s Motion to Suppress and Dismiss (Feb. 5, 2015), where an undercover law enforcement officer engaged in a Facebook message conversation with Windham. The Court found Windham had an actual expectation of privacy in his Facebook messaging account and society would find that expectation as reasonable.

⁵⁸ Brief of Appellee, *supra* note 2, at 26.

⁵⁹ *Id.* at 28.

⁶⁰ *Hoffa v. United States*, 385 U.S. 293, 302 (1966).

B. Society's Willingness to Recognize the Subjective Expectation as Objectively Reasonable

Even if the Court were to find an actual subjective expectation of privacy in Staker's text messages with Agent Noe, it is not likely to find society is willing to accept that expectation as objectively reasonable. In *Goetz* and *Stewart*, the Court recognized Montanans have an expectation of privacy that prevents law enforcement from monitoring and recording conversations; however, they do not have an expectation of privacy in the content of their conversations because nothing precludes the listener from repeating what was said.⁶¹

Again, regardless of what Staker did with his cell phone, he knew the messages would be contained in the recipient's cell phone and the recipient could do anything they wanted with those messages. Staker goes into detail on the prevalence of cell phone use today to show that society is willing to accept a subjective expectation of privacy in text messages as objectively reasonable.⁶² It is undisputed cell phone usage is at an all-time high and will likely continue to grow in prevalence every year. However, cell phone use, and an individual's expectation of privacy in their cell phone, is different from the expectation of privacy in text messages sent to another individual from their cell phone. Staker's control over the content of the text message expires upon delivery, a concept that has been discussed and analyzed in recent years due to increased cell phone ownership and use.⁶³ It is important to emphasize, Staker's actual cell phone was not searched without a warrant.

While Staker persuasively looks to public policy, set by the Montana legislature through enactment of statutes, to support his claim that society would view his subjective expectation of privacy as objectively reasonable, the public policy Staker relies on can be distinguished from the facts in *Staker*. Staker points out, in recent years, the Montana legislature has addressed societal privacy

⁶¹ *State v. Stewart*, 291 P.3d 1187, 1199–1200 (Mont. 2012); *State v. Goetz*, 191 P.3d 489, 500 (Mont. 2008).

⁶² Brief of Appellant, *supra* note 1, at 22–25.

⁶³ *See, e.g., State v. Patino*, 93 A.3d 40, 58 (R.I. 2014) (holding the defendant did not have a reasonable expectation of privacy in his text messages contained in his girlfriend's phone).

concerns related to modern electronic data.⁶⁴ Those statutes deal primarily with the prohibition of government entities utilizing electronic devices to access protected information found within an individual's personal device. But here, the State did not invade Staker's personal device to get incriminating information. Staker provided the incriminating information to law enforcement when he sent the text messages to "Lily."

Therefore, if the Court reaches the second prong of the test, it will likely conclude that society is not willing to recognize Staker's expectation of privacy in his text messages to Agent Noe as objectively reasonable.

C. Montana Association of Criminal Defense Lawyers' Brief of Amicus Curiae

Lastly, the Montana Association of Criminal Defense Lawyers ("MTACDL") filed a Brief of Amicus Curiae essentially arguing law enforcement could have, and should have, obtained an anticipatory warrant⁶⁵ to render their actions constitutional.⁶⁶ Since the Court is not likely to conclude that a search occurred, it will likely not address the MTACDL's claims. However, if the Court does reach the issue, it will likely find that anticipatory warrants *may* have been used in this situation, not that one *must* have been used. Ultimately, while the MTACDL's attempt to persuade the Court to adopt anticipatory warrants has merit, because the Court will likely find no search occurred, no warrant would have been needed by law enforcement, and therefore, anticipatory warrants are not required.

⁶⁴ See generally MONT. CODE ANN. § 46-5-110 (prohibiting government entities from obtaining from electronic devices location information, without a search warrant); § 46-5-112 (prohibiting government entities from obtaining from electronic devices stored data, without a search warrant); § 46-5-117 (restricting governmental use of license plate readers).

⁶⁵ "An anticipatory warrant is 'a warrant based upon an affidavit showing probable cause that at some future time (but not presently) certain evidence of a crime will be located in a specific place.'" United States v. Grubbs, 547 U.S. 90, 94 (2006) (citing and quoting 2. W. LeFave, Search and Seizure § 3.7(c), p. 398 (4th ed. 2004)).

⁶⁶ Brief of Amicus Curiae – Montana Association of Criminal Defense Lawyers, *State v. Staker*, (Mont. May 9, 2020) (No. 19-0731).

V. CONCLUSION

Montanans have an expectation that their oral communications will not be recorded; however, they do not have that same belief or guarantee that text messages, emails, or Internet chats will not be recorded, because, by their very nature, those communications are recorded. Therefore, it is unlikely the Court will find an actual subjective expectation of privacy in Staker's communications with Agent Noe and even more unlikely the Court will find society's willingness to recognize that expectation as objectively reasonable. It is unlikely the Court in *Staker* will extend the reasoning of privacy in oral communications to written text communications voluntarily sent by a defendant to law enforcement. Therefore, the Court will likely uphold the district court's denial of Staker's motion to suppress.