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JAN 26 2022

COMMISSION ON JUDICIAL CONDUCT

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In Re ZIMMERMAN

Cause No. 10260

**SUPPLEMENTAL ANSWER TO
STATEMENT OF CHARGES
Request for Evidentiary Hearing
Motion to Suppress Video**

Comes now, the Honorable Judge Darvin Zimmerman by and through his attorney of record and files his **SUPPLEMENTAL ANSWER AND MOTION FOR EVIDENTIARY HEARING,**

PROCEDURAL BACKGROUND

On March 9, 2021, The Honorable Judge Darvin Zimmerman held court in Clark County District Court. Upon completion of his docket, the Court Clerk failed to turn off the recording device which is owned and operated by Clark County, a political subdivision of Washington State. Approximately two hours later, while still in the Courtroom and without notice or knowledge that their private conversation was being recorded and broadcast, Commissioner Abigail Bartlett enters the courtroom and both she and Judge Zimmerman have a private conversation. There is no court business being conducted. Both parties believed their conversation to be private. Neither party gave permission for their private conversation to be recorded, or broadcast on any recording device, including youtube.com Both parties acknowledge that there was no indication of any kind that the recording equipment was turned on.

ISSUE

Answer with Motion for Evidentiary Hearing- 1

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Can a private conversation be used as evidence of wrongdoing in a civil proceeding if the recording which was made is in violation of RCW 9.73.030?

Short answer: No.

ARGUMENT

RCW 9.73.030 states:

Intercepting, recording, or divulging private communication—**Consent required**—Exceptions.

(1) Except as otherwise provided in this chapter, it shall be unlawful for any individual, partnership, corporation, association, or *the state of Washington, its agencies, and political subdivisions to intercept, or record any:*

(a) Private communication transmitted by telephone, telegraph, radio, or other device between two or more individuals between points within or without the state by any device electronic or otherwise designed to record and/or transmit said communication regardless how such device is powered or actuated, without first obtaining the consent of all the participants in the communication;

(b) Private conversation, by any device electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or actuated without first obtaining the consent of all the persons engaged in the conversation.

(2) Notwithstanding subsection (1) of this section, wire communications or conversations (a) of an emergency nature, such as the reporting of a fire, medical emergency, crime, or disaster, or (b) which convey threats of extortion, blackmail, bodily harm, or other unlawful requests or demands, or (c) which occur anonymously or repeatedly or at an extremely inconvenient hour, or (d) which relate to communications by a hostage holder or barricaded person as defined in RCW 70.85.100, whether or not conversation ensues, may be recorded with the consent of one party to the conversation.

(3) Where consent by all parties is needed pursuant to this chapter, consent shall be considered

Answer with Motion for Evidentiary Hearing- 2

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obtained whenever one party has announced to all other parties engaged in the communication or conversation, in any reasonably effective manner, that such communication or conversation is about to be recorded or transmitted: PROVIDED, That if the conversation is to be recorded that said announcement shall also be recorded.

(4) An employee of any regularly published newspaper, magazine, wire service, radio station, or television station acting in the course of bona fide news gathering duties on a full-time or contractual or part-time basis, shall be deemed to have consent to record and divulge communications or conversations otherwise prohibited by this chapter if the consent is expressly given or if the recording or transmitting device is readily apparent or obvious to the speakers. Withdrawal of the consent after the communication has been made shall not prohibit any such employee of a newspaper, magazine, wire service, or radio or television station from divulging the communication or conversation.

(5) This section does not apply to the recording of custodial interrogations pursuant to RCW 10.122.040.

NO MENS REA IS REQUIRED

In This case, the Judge and the Commissioner were not on docket. There is no device, light or alarm which notified the parties that they were being recorded. There is no dispute that this was a private conversation between two people that was not about Court business. Judge Zimmerman is a District Court Judge. Commissioner Abigail Bartlett was a District Court Commissioner. Neither of the judicial officers would be hearing any issues related to the Peterson matter. Judge Darvin Zimmerman's son is a police officer who responded and participated in the case which led to the death of Mr. Peterson. Judge Zimmerman was speaking as a father to a colleague about a very tragic event which caused distress not only to the family of the Peterson's but also to the police officers who had to wait months to be cleared of the justified homicidal shooting of Mr. Peterson. Again, there is no dispute about what the topic of the private conversation was. What is in dispute, is whether the video tape can be used in a Commission proceeding when it was obtained illegally? The answer is no. Therefore the Commission would

have no authority to proceed in a disciplinary matter because they would be using illegally obtained evidence in their proceeding. Suffice it to say that would not only be illegal, but unethical. The charges placed by the Commission against Judge Zimmerman stem from their review of the illicit recording of the private conversation.

Because the recording was not made in conformance with state law and the Constitutional rights of Judge Zimmerman, the law requires its suppression.

RCW 9.73.050 Admissibility of intercepted communication in evidence.

Any information obtained in violation of RCW 9.73.030 or pursuant to any order issued under the provisions of RCW 9.73.040 shall be inadmissible in any civil or criminal case in all courts of general or limited jurisdiction in this state, except with the permission of the person whose rights have been violated in an action brought for damages under the provisions of RCW 9.73.030 through 9.73.080, or in a criminal action in which the defendant is charged with a crime, the commission of which would jeopardize national security. Judge Zimmerman does not and has never authorized the recording.

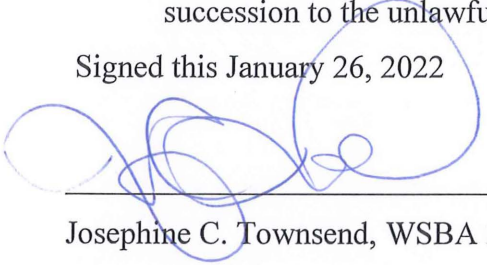
When an officer knowingly transmits a private conversation, without court authorization or the consent of all parties, any evidence obtained is inadmissible. *State v. Fjermestad*, 114 Wn.2d 828 (1990). Electronic eavesdropping, no matter how laudable the reason, cannot be justified. *Id* at 836. Any information obtained from the illicitly recorded conversation is inadmissible. *State v. Salina*, 121 Wn. 2d. 689 (1993). While the majority of caselaw is as to criminal cases, the same analysis applies to quasi criminal cases such as this and to all civil cases. Because the recording was illegal, it and any evidence obtained from it, cannot be used by this tribunal. Judge Zimmerman moves this tribunal to suppress the video tape and dismiss the case as no evidence which can be viewed by this tribunal exists and any evidence it received was the direct result of the illegal recording.

The Honorable Judge Darvin Zimmerman DENIES that he violated Canon Rules 1.1 and 1.2; He denies that he violated 2.2, 2.3(A), 2.4 and 2.10 of the Code of Judicial Conduct on

March 9, 2021, during a private conversation which was inadvertently recorded (Without his knowledge or permission) Judge Zimmerman moves this tribunal to either

1. Dismiss the case; or
2. Hold an evidentiary hearing to determine if the tape should be suppressed and therefore the case dismissed because it is premised on an illegal recording of a private conversation and the law requires the video and audio to be suppressed. Any evidence obtained in succession to the unlawful recording is fruit of the poisonous tree.

Signed this January 26, 2022



Josephine C. Townsend, WSBA 31965

Attorney for Respondent

s/Darvin Zimmerman Electronically to avoid delay

Honorable Darvin Zimmerman, (Ret.)