No. 30968-1

WASHINGTON STATE COURT OF APPEALS
DIVISION III

JASON YOUKER, Petitioner

v.

DOUGLAS COUNTY, a municipal corp., and LISA WHITE, a single woman, and WILLIAM BLACK and JANE DOE BLACK, a marital community, Respondents

---

APPELLANT'S BRIEF

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I. ASSIGNMENTS OF ERROR

No.1: Did the Chelan County Superior Court err in granting the Defendants Motion for Summary Judgment on the issue of invasion of privacy? (The standard of review on this issue is "de novo." Hisle v. Todd Pac. Shipyards Corp., 151 Wash.2d 853, 860, 93 P.3d 108 (2004)).

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

No. 1: Did the trial court err concluding there was no evidence to support Jason Youker's "physical intrusion" invasion of privacy claim?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The Court of Appeals Div III remanded the Youker v. Douglas County case back to the trial court for a consideration

of Jason Youker's invasion of privacy claim. (No. 29165-1-III) The Defendants moved for summary judgment. CP 299-321. The trial court granted the motion for summary judgment on Jason Youker's invasion of privacy claim. CP 381-384. The Plaintiff, Jason Youker, moved for reconsideration CP 387, the trial judge denied the motion for summary judgment. CP 387 Plaintiff, Jason Youker timely appealed. CP 403-409.

The Complaint filed in this matter alleged a cause of action for "Invasion of Privacy" (Complaint, §5.3). CP 1-44. The Complaint alleged that "Deputies White and Black intentionally entered Jason Youker's residence without a search warrant and without Jason Youker's express or implied consent, in violation of Art. 1, Section 7 of the Washington State Constitution." (Complaint, §5.3). CP 1-44. Section 5.5 of the complaint stated that Deputies White and Black's "entry into the residence of Jason Youker without consent constituted an invasion into the sanctity of his home, which constituted an

intrusion highly offensive and objectionable to a reasonable person." (Complaint §5.5). CP 1-44.

B. STATEMENT OF FACTS

On or about April 20, 2007, Jason Youker's ex-wife, JoAnn Youker, was being held at the Douglas County Sheriff's office on an arrest warrant. CP 116. While JoAnn Youker was in custody, she reported that her ex-husband, Jason Youker, had a rifle under his bed at his residence. CP 116. Jason Youker was not allowed to be in possession of a firearm because of his status as a convicted felon. CP 116.

Ms. Youker claimed that she knew the rifle was there because of contact she had had with Jason Youker. CP 116. At the time this report was made, Ms. Youker had a no-contact order against her, which prohibited any and all contact between her and Jason Youker or his residence. CP 116, 120. This no-contact order was part of the law enforcement database to

which the Douglas County Sheriff's department had access. CP 133, 164-165, 197. Despite access to this information, Douglas County Sheriff's deputies Lisa White and William Black transported JoAnn Youker to Jason Youker's residence and obtained consent from JoAnn Youker to search Jason Youker's residence. CP 116.

Douglas County Sheriff Deputies Lisa White and William Black entered the residence and were led by JoAnn Youker to a rifle located under the bed, along with a box of 30-30 ammunition. CP 116-117. Deputy White arrested Jason Youker on 4/21/07. CP 117.

As a result of Jason Youker's arrest, a no-contact order was entered, which prohibited Jason Youker from having contact with his son, Jetta Youker. CP 117. Douglas County officers failed to verify Ms. Youker's authority to consent to a search of Jason Youker's property prior to searching the residence. CP 117. Ms. Youker did not have mutual and joint access to the

property, and was actually excluded from that residence due to the no-contact order. CP 117. Jason Youker spent ½ day in jail. CP 117. Those criminal charges in Douglas County were dismissed on the merits on or about August 6, 2007. CP 117. The same day the charges were dismissed, the Douglas County prosecutor referred the case to the federal prosecutor. CP 117. Jason Youker spent 45 days in the Spokane County jail as a result of that referral. CP 117. Ultimately, the federal charges were also dismissed on the merits and Jason Youker was released from jail. CP 117.

Jason Youker alleged in his complaint that Deputies White and Black's entry into the residence of Jason Youker without consent constituted an invasion into the sanctity of his home, which was an intrusion highly offensive and objectionable to a reasonable person and to him as well. CP 117.

As a direct and proximate result of this invasion of privacy, Jason Youker was wrongfully charged with a crime causing him to have lost income while he was in jail, incurred bail, loss of residential time with his son, loss of his rental property, loss of his personal belongings which were repossessed during his incarceration, emotional distress and humiliation. CP 117.

The following additional facts were established by the Declarations of Jason Youker and JoAnn Youker as follows:

(1) JoAnn Youker was not living at Jason Youker's residence at the time of the unlawful search, seizure, and arrest which are the subject of this action. CP 264-265; (2) JoAnn Youker was angry because Jason Youker, her ex-husband, had a new girlfriend. CP 262; (3) Jason Youker had a Domestic Violence Restraining Order prohibiting JoAnn from coming to

his residence. CP 265; (4) JoAnn Youker, in retaliation against her ex-husband, planted a rifle under his bed and then reported it to the Douglas County Sheriff's Department. CP 261; (5) Jason Youker was arrested on a warrant for "felon in possession of a firearm." CP 265; (6) Jason Youker did not give JoAnn Youker, his ex wife, permission to enter his residence, nor did he authorize the Sheriff's Deputies to enter and search his residence. CP 261, 265.

III. ARGUMENT

A. JoAnn Youker did not have actual authority to consent to a search of Jason Youker's property.

It is clear from the facts that JoAnn Youker did not possess actual authority to consent to the search of Mr. Youker's home. In

fact, she was not even legally allowed to be in Mr. Youker's home because her no contact order that was still in effect at the time of the search. (See Exhibits B and C Declaration of Jason Youker in Opposition to Defendant's Motion for Summary Judgment. CP 116-231.) A third party has actual authority if he or she has been authorized by the owner to consent to a search, or if the third party has mutual use of the property. United States v. Ruiz, 428 F.3d 877 at 880 (9th Cir. 1993).

JoAnn Youker does not meet either one of the two elements required to have actual authority to consent to a search. There is no evidence that Jason Youker authorized JoAnn to consent to a search of his home. Second, JoAnn did not have mutual use and joint access of the property. Although the rule does not explicitly state, it certainly implies that in order to have mutual and joint access of the property one must have legal use and access of the property, which JoAnn Youker lacked because of the restraining order prohibiting her from the residence. She was commiting a crime by entering the residence

because she was violating the restraining order.

Officers Black and White knew about JoAnn Youker's no contact order. JoAnn Youker was in police custody because of a warrant for her arrest when she gave consent to search Jason Youker's home. Notice of an individual's arrest warrant(s) is issued through a CAD report, which includes among other things any current no contact orders. Ultimately, JoAnn Youker lacked authorized authority to consent to a search of Jason Youker's house. Therefore, the officers did not only commit an illegal act by performing a warrantless search of a home without consent, but compounded the illegality by actually escorting JoAnn Youker to a place where she was not authorized to be as a result of the not contact order.

B. JoAnn Youker did not have apparent authority to consent to a search of Mr. Youker's property.

JoAnn Youker lacked apparent authority to consent to a search of Mr. Youker's house. In the United States v. Dearing, 9 F.3d 1438, 1430 (9th Cir. 1993) the Court created a three-part

test to determine if a third party has apparent authority to consent to a search:

> First, did the searching officer believe some untrue fact that was then used to assess the extent of the consent-giver's use of and access to or control over the area searched? Second, was it under the circumstances objectively reasonable to believe that the fact was true? Finally, assuming the truth of the reasonably believed but untrue fact, would the consent-giver have had actual authority?

The fourth amendment to the United States Constitution has traditionally placed a great deal of safeguards against searches of the home especially searches without a warrant. See, Payton v. New York, 445 U.S. 573, 585-586, 100 S. Ct. 1371, 1379-1380:

> Judge Leventhal first noted the settled rule that warrantless arrests in public places are valid. He immediately recognized, however, that [a] greater burden

> is placed ... on officials who enter a home or dwelling without consent. Freedom from intrusion into the home or dwelling is the archetype of the privacy protection secured by the Fourth Amendment. (Citations omitted.) (Footnote omitted.)
>
> His analysis of this question then focused on the long-settled premise that, absent exigent circumstances, a warrantless entry to search for weapons or contraband is unconstitutional even when a felony has been committed and there is probable cause to believe that incriminating evidence will be found within.
>
> He reasoned that the constitutional protection afforded to the individual's interest in the privacy of his own home is equally applicable to a warrantless entry for the purpose of arresting a resident of the house; for it is inherent in such an entry that a search for the suspect may be required before he can be apprehended. [27] Judge Leventhal concluded that an entry to arrest and an entry to search for and to seize property implicate the same interest in preserving the privacy and the sanctity of the home, and justify the same level of constitutional protection.

Payton, 100 S. Ct. 1380-1381. Because of this, officers generally go through great efforts to determine the authority of an individual to consent to a search before the search is conducted. See United States v. Reid, 226 F. 3d 1020 (9th Cir. 2000). The officer's actions in Reid exemplifies such actions.

sought to verify the ability of the individual to consent to a search by confirming his residence with the apartment manager and other residents of the complex in addition to surveillance of the apartment. Id. at 1022. At the very least, it is common for an officer to seek some form of verification by the individual claiming to have authority to consent to a search, such as a lease, before conducting the search. See United States v. Davis, 332 F 3d 1163, 1166 (9th Cir. 2003).

Such verification is needed because the Ninth Circuit has held that mere access to a residence, without more, is insufficient to establish apparent authority. United States v. Dearing, 9 F. 3d 1428, 1430 (9th Cir. 1993). Mere access is insufficient, because it does not determine if one has mutual use and joint access to the property. United States v. Fultz, 146 F. 3d 1102, 1106 (9th Cir. 1998).

The case at bar does not meet the second part of this three-part test for determining apparent authority, which

requires that the officer's belief to be objectively reasonable. Ruiz, 428 F. 3d at 880. There is nothing in this case that suggest that the officer's belief that JoAnn Youker had authority to consent to a search was objectively reasonable before they conducted the search. The officers relied on JoAnn Youker's ability to access the house and her statement that she had been staying there. As numerous courts have pointed out – mere access is not enough to believe that one has authority to consent to a search.

Before conducting the search the officers didn't seek verification that JoAnn Youker in fact resided in Jason Youker's house. Instead, immediately upon entering the house, the officers, with the aid of JoAnn Youker, began to search and eventually seized the firearm and ammunition in question. It was not until after the search and seizure that the officers attempted to verify that JoAnn Youker had mutual use and joint access of Mr. Youker's home.

Such a search is not permitted. A policy that permits the warrantless search of one's home and allows the officer to verify the validity of such a search afterwards cannot be constitutionally upheld.

Under Article I, section 7 of the Washington State Constitution, warrantless searches are per se unreasonable. State v. Hendrickson, 129 Wn. 2d 161, 170, 917 P.2d 833 (1999). Exceptions to the warrant requirement for a search are to be "jealously and carefully drawn." State v. Reichenbach, 153 Wn.2d 126, 131, 101 P.3d 80(2004) (quoting Hendrickson, 129 Wn.2d at 72). The burden of proof is on the State to show that a warrantless search or seizure falls within one of the exceptions to the warrant requirement. State v. Acrey, 148 Wn.2d 738, 746, 64 P.3d 594 (2003) (quoting State v Kinzy, 141 Wn.2d 373, 382, 5 P.3d 668 (2000).

In the context of a search, consent is a form of waiver. State v. Morse, 156 Wn. 2d 1, 8, 123 P.3d 832 (2005).

Ordinarily, only the person who possesses a constitutional right may waive that right. Id.; Cf. State v. Walker, 136 Wn.2d 678, 965 P.2d 1079 (1998) (wife's consent not effective as waiver of husband's constitutional right to be free from invasion of privacy). To be valid, a consensual search requires voluntary consent by one having authority to consent and the search must be limited to the scope of the consent. State v Rodriquez, 497 U.S. 177, 110 S.Ct. 2793, 111 L.Ed. 2d 148 (1990).

Article I, section 7 of the Washington State Constitution is more protective of individual privacy than the 4th Amendment. (See e.g. State v. Jackson, 150 Wn. 2d 251, 259, 76 P.3d 217 (2003); State v. Jones, 146 Wn. 2d 328, 332, 45 P.3d 1062 (2002)). Art. 1, section 7 provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Under the Washington State Constitution, authority to consent to a search is based upon a person's independent authority to consent and the reasonable

expectation of his co-occupant about that authority. Morse, 156 Wn.2d at 8. In Morse, the Washington Supreme Court held that, "[s]tanding alone, a police officer's subjective belief made in good faith about the scope of a consenting party's authority to consent cannot be used to validate a warrantless search."

Under Article I, section 7 courts focus on the expectation of the people being searched and the scope of the consenting party's authority to consent.

Under Article I section 7 analysis: 1) the consenting party must be able to permit the search in his own right, and 2) it must be reasonable to find that the defendant has assumed the risk that a co-occupant might permit a search. State v. Mathe, 102 Wn.2d 534, 534-544, 668 P.2d 859 (1984). "In short, while under the 4th amendment the focus is on whether the police acted reasonably under the circumstances, whereas under Article I, section 7 we focus on the expectation of the people being searched and the scope of the consenting party's

authority." (Emphasis added.) Morse, 156 Wn.2d at 10.

Thus, Washington courts have found authority to consent to a search did not exist where a landlord consents to the search of a renter's room(s) when the renter retains control of the premises. (See Mathe, 102 Wn.2d at 534-544, 688 P.2d 859; See also State v. Birdsong, 66 Wn. App 354, 537-538, P.2d 533 (1992)) where guests of an apartment renter consented to search the apartment) and see Morse, supra. In Mathe, the Washington Supreme Court, in holding a landlord did not have authority to consent to a search, stated "that the person consenting to the search has [to have] common authority over the area to be searched." Mathe, 102 Wn.2d at 534-544, 688 P.2d 859.

In this case, at the time in question, JoAnn Youker was not legally in Jason Youker's home at 920-½ S. Nancy and lacked the common authority to consent to a police search of that residence. At the time of Ms. Youker's consent she was under the restrictions of an no contact order regarding Jason

Youker which prohibited JoAnn Youker from "having any contact whatsoever...." with Jason Youker, and from, "entering, knowingly coming within, or knowingly remaining on" Mr. Youker's residence,.... JoAnn Youker's contact with Jason Youker and her presence at his residence was illegal, and thus she did not possess common authority in the residence.

Where, as here, the consenter does not have common authority over the area to be searched, consent given is not effective and any subsequent search relying on that consent is illegal. See Morse, 156 Wn. 2d at 16, Birdsong, 66 Wn. App 534, 537-538, 832, P.2d 533 (1992); State v. Christian, 95 Wn.2d 655, 628 P.2d 806 (1981). The subjective beliefs and understandings of law enforcement officers are irrelevant to the question of authority, Morse, 156 Wn. 2d at 5. The existence and scope of a common authority is a legal question which must be determined by the court based on the facts of each case. Morse, 156 Wn. 2d at 11.

C. Police may not search a residence based on information gathered from an informant without verifying the credibility and veracity of that informant.

It is well established that "a claim of firsthand observation will not be used to overcome a credibility deficiency." State v Jackson, 102 Wn.2d 432, 441, 668 P.2d 136 (1984); State v Mickle, 53 Wn. App. 39, 42, 756 P.2d 331 (1988). In Jackson, the Washington Supreme Court reaffirmed the existing rule in the state that the sufficiency of an informant's tip to establish probable cause is derived from Spinelli v. United States, 393 U.S. 410, 21 L. ed. 2d 637, 89 S.Ct. 584 (1969), and Aguilar v. Texas, 478 U.S. 108, 12 L. Ed. 723, 84 S.Ct. 1509 (1964). This rule has two requirements, which must be satisfied before an informant's tip may rise to the level of probable cause. First, the police officer must set forth some of the underlying circumstances from which the

informant drew her conclusion that criminal activity is occurring. Second, the affidavit must set forth the underlying facts from which the officer concluded the informant was credible and his information reliable. Jackson, at 435; See also, State v. Barnes, 85 Wn. App. 638, 659-660, 932 P.2d 669 (1997); State v. Johnson, 75 Wn. App. 692, 710, 879 P.2d 984 (1994).

In the case at hand, Officers Black and White fail to provide any information from which the credibility and veracity of the information received from JoAnn Youker can be ascertained. On the contrary, Officers Black and White knew of both an existing warrant for JoAnn Youker's arrest and that Jason Youker had an enforceable no contact order against JoAnn Youker, and yet neither deputy sought any information that would support the credibility and veracity of JoAnn Youker's information.

Common sense dictates that informants may not be just

"civic-minded" when providing information. See generally, State v. Duncan, 81 Wn. App. 70, 78, 918 P.2d 1090 (1996); State v. Rodriguez, 53 Wn. App. 571, 576-577, 769 P.2d 309 (1989). Often, an informant's tip may well be motivated by a sense of revenge or self-interest, or it may simply create an inference that the informant himself is involved in criminal activity and nothing more. Rodriguez, 53 Wn. App. at 576.

Here it is evident that JoAnn Youker had ample cause for an ulterior motive in providing police with the information. She was facing arrest for the warrant sworn out on her and she had been for a short time living with Jason Youker in violation of her no contact order. She was his ex-wife, the couple having recently divorced. Furthermore, the police did not investigate the reliability of JoAnn Youker's information despite their knowledge of her potential ulterior motives in providing incriminating information on Mr. Youker, which does not fulfill the second prong of the Aguliar-Spinelli test.

D. The tort of invasion of privacy is recognized in Washington State.

There are four types of invasion of privacy: intrusion, disclosure, false light, and appropriation. Mark v. Seattle Times, 96 Wn.2d 473, 497, 635 P.2d 1081 (1981).

One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for the invasion of privacy, if the intrusion would be highly offensive to a reasonable person. Mark, 96 Wn. 2d at 497.

Here the intrusion was at the highest level of offensive: (1) The intrusion was by his ex-wife, a person he had a restraining order against and a person who was stalking him; and (2) the intrusion was by Douglas County Sheriff's Deputies. The jury would probably find that a warrantless search by these persons would be highly offensive to a

reasonable person and and that Jason Youker suffered special damages because of the invasion. Reid v. Pierce County, 136 Wn. 2d 195, 205, n. 4, 961 P. 2d 333 (1998).

The Defendants' motion for Summary Judgment on the invasion of privacy claim should be dismissed where the evidence is undisputed JoAnn Youker did not have the legal power to authorize the warrantless search of Jason Youker's residence under either the Washington State or the United States Constitution, and where there are questions of fact about whether the warrantless intrusion by the Douglas County Sheriff's Deputies caused mental distress of a kind that "normally results from such an invasion." Reid, 136 Wn.2d at 205, n.4.

E. Washington law recognizes an invasion of privacy based on deliberate intrusion, physical or otherwise, into a person's solitude, seclusion, or private affairs.

The Washington State Supreme Court has held a

The Washington State Supreme Court has held a common law right of privacy exists in this state and that individuals may bring a cause of action for invasion of the right. Reid v. Pierce County, 136 Wn.2d at 206.

Invasion of privacy by intrusion consists of "a deliberate intrusion, physical or otherwise, into a person's solitude, seclusion, or private affairs." Fisher v. State, ex rel Dept. of Health, 125 Wn. App. 869, 879, 106 P.3d 836 (Div III 2005) review denied, 155 Wn.2d 1013 (Wash. 2005).

When the intrusion is the government, the intrusion is a violation of Article 1, Section 7 of the Washington State Constitution. Fisher, 125 Wn. App. at 879. It prohibits the government from disturbing any person in his or her private affairs or effects without authority of law. Intent is not a factor. Fisher, 125 Wn. App. at 879.

F. Emotional Distress Damages are recoverable for an

One who has established a cause of action for invasion of privacy is entitled to recover the following damages:

a. The harm to his interest in privacy resulting from the invasion;

b. His mental distress proved to have been suffered if it is of the kind that normally results from such an invasion; and

c. Special damages of which the invasion is a legal cause.

Reid v. Pierce County, 136, Wn.2d at 205, n. 4.

G. An expert opinion is not required to establish Youker's emotional distress caused by unlawful intrusion into his home.

§ ER 701 provides:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on

the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of rule 702.

In general, expert testimony is required when an essential element in the case is best established by an opinion which is beyond the expertise of a layperson. A layperson may testify if they are observable by a layperson's senses and describable without medical training. Harris v. Groth, 99 Wn.2d 438, 449, 663 P.2d 113 (1983). See ER 701.

It is not necessary for a plaintiff to prove objective symptoms because the claim is for the intentional tort of invasion of privacy, and not for a negligent infliction of emotional distress. See Berger v. Sonneland, 144 Wn.2d 91, 113, 26 P.3d 257 (Wash. 2001).

An injured person can testify regarding the subjective aspects of his or her injury. An injured person is competent to

testify as to his or her past and present condition. Riggins v. Bechtel Power Corp., 44 Wn. App. 244, 254, 722 P.2d 819 (1986). The weight of such testimony is for the jury. Bennett v. Labor & Indus., 95 Wn.2d 531, 533-4, 627 P.2d 104 (1981).

Here Youker alleged in the complaint and in his declaration that he suffered emotional distress and humiliation from the Deputies conduct in intruding upon his private home without his permission and without a warrant. Jason Youker is capable of testifying about his own mental distress, and he is capable of describing it.

IV. CONCLUSION

The tort of invasion of privacy based on a physical intrusion into the sanctity of one's home is recognized in Washington State.

Damages for invasion of privacy include damages for emotional/mental distress. A medical expert is not required,

and no objective symptoms need be proved. Youker is competent to testify about his own mental distress. Accordingly, the court erred in dismissing Jason Youker's invasion of privacy claim on summary judgment based on the physical intrusion into his private home, where Jason Youker indicated in the complaint and his declaration that he suffered mental distress and humiliation from the physical intrusion by Douglas County deputies constituting an invasion of privacy.

DATED this 11th day of October, 2012.

By Julie A. Anderson

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