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NO. 93240-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

JAMES BRUCE HAMBLETON

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR
FRANKLIN COUNTY

ANSWER TO PETITION FOR REVIEW

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A. IDENTITY OF RESPONDENT

State of Washington, Respondent, submits the following answer to the Petition for Review filed by James Bruce Hambleton.

B. COURT OF APPEALS DECISION

Mr. Hambleton correctly identifies the Court of Appeals decision from which he seeks review.

C. ISSUES PRESENTED FOR REVIEW

The State respectfully submits that the instant case raises no issues in need of review by the Washington Supreme Court.

D. COUNTERSTATEMENT OF THE CASE

The State adopts the "Facts and Procedural Background" appearing at pages 2-6 of the unpublished Court of Appeals opinion as an accurate statement of the case.

E. ARGUMENT WHY REVIEW SHOULD NOT BE ACCEPTED

The familiar considerations governing whether this court will accept review of a Court of Appeals decision focus on whether the decision conflicts with a decision of this court

or another decision of the Court of Appeals, whether it raises a substantial issue of constitutional law, or whether the case presents an issue of substantial public interest that should be determined by this court. RAP 13.4(b). In the instant case, the Court of Appeals merely applied settled law to the particular facts of the case. The case presents no issues of broad public interest or general application.

While there were several issues decided in the unpublished Court of Appeals opinion, the matters Mr. Hambleton raises in his petition relate solely to a cellular telephone. He contends the trial court erred in finding following a suppression hearing that the cell phone was originally purchased by Jodie Huey (who consented to the item being searched). He further argues that the trial court erred in denying suppression of evidence obtained from the cell phone (specifically photographs of generators similar to those stolen from a warehouse). Petition for Review, at 1.

The trial court motion judge properly found based on uncontradicted evidence that Ms. Huey had purchased the cell phone that was found to contain pictures of generators. The motion judge further properly found that Ms. Huey

validly consented to the search of the cell phone under the common authority rule. In any event, Detective Brad Gregory obtained a search warrant prior to submitting the cell phone to forensic examination and discovering the photographs of generators.

As noted by the Court of Appeals at 9-10, Detective Gregory testified at the suppression hearing to the statements made by Ms. Huey at the time she consented to the search of the cell phone:

I told Ms. Huey that I wanted to do a search warrant on the phone to obtain the information from inside the phone. She said she wanted to cooperate and gave me the phone. She said that the phone was hers. She gave it to Mr. Hambleton. She made the contract. She bought the phone. And I decided at that point that it would be legal for her to give me the phone. . . . Although I told her that I could go back to the police department, get a warrant and come back and look for the phone, she immediately told me I didn't have to do that. She would give me the phone.

(6/4/13 RP 75) (emphasis added). Ms. Huey and Mr. Hambleton resided together and had a child in common. (6/4/13 RP 76). They had been trying to work things out since his most recent release from prison, but "over the past few months he had been not coming home and staying out,

and she believed he was doing bad things.” (6/4/13 RP 76). Following Mr. Hambleton's arrest on January 12, 2013, Ms. Huey had gone to the jail and picked up the cell phone and other items he had in his possession when he was booked into the facility. (6/3/13 RP 74). Detective Gregory had known Ms. Huey for several years and she had positive contacts with the police before, which helps explain her willingness to cooperate. (6/4/13 RP 73).

Findings of fact entered under CrR 3.6 following a suppression hearing are reviewed under the substantial evidence standard. State v. Hill, 123 Wn.2d 641, 644-47, 870 P.2d 313 (1994). Substantial evidence exists if the evidence in the record is sufficient to persuade a fair-minded rational person of the truth of the finding. Id. The appellate court does not independently evaluate the evidence regardless of whether constitutional issues are involved. Id. Hearsay is admissible at a suppression hearing. State v. O’Cain, 108 Wn. App. 542, 556, 31 P.3d 733 (2001). The uncontradicted statements of Ms. Huey, admitted through the testimony of Detective Gregory, certainly provided

substantial evidence for finding the cell phone was purchased by Ms. Huey.

Notably, Mr. Hambleton was present in court at the suppression hearing during the testimony of Detective Gregory. (6/4/13 RP 69). If he disagreed with the testimony in any way, he had the opportunity to testify himself or to call other witnesses. However, Mr. Hambleton rested without testifying or presenting any further evidence at the hearing. (6/4/14 RP 114-115). This strongly indicates that it came as no surprise to Mr. Hambleton to hear that Ms. Huey had purchased the cell phone.

As noted by the Court of Appeals in footnote 4 on page 9, Ms. Huey's memory changed slightly between the time she spoke with Detective Gregory and when she testified at the jury trial five months later. Her jury trial testimony indicated that Mr. Hambleton bought the cell phone. (6/28/13 RP 236). As explained above, this was a surprise to everyone including Mr. Hambleton. In any event, evidence that was not before the trial court at the time the decision was made cannot be considered to undermine the trial court's findings. State v. Siderts, 17 Wn. App. 56,

60-61, 561 P.2d 231 (1977). Since the motion judge was not privy to the later jury trial testimony, it has no relevance to whether the finding is supported by substantial evidence.

Moreover, it is a distinction without a difference. The testimony of Ms. Huey at the jury trial fully supports the conclusion that she had common authority over the cell phone:

Q. Okay. Tell us about that cell phone in terms of whose cell phone that is, if you know.

A. James bought it, and it was on a Sprint account that was in my name alone, but we split the bill together. We splint all the household bills together.

(6/28/13 RP 236). Regardless of which person originally purchased the cell phone, it was on a Sprint account that was solely in the name of Ms. Huey and she and Mr. Hambleton split the bill. Ms. Huey and Mr. Hambleton constituted a joint household. Ms. Huey had at least equal authority over the cell phone.

The trial court properly found that the search of the cell phone was conducted with consent:

When the state seeks to justify a warrantless search on the basis of consent, it is not limited to proof that the consent was given by the defendant.

A third party may validly consent to the search of another's property when the two parties possess common authority over the premises or property or when the non-consenting party has assumed the risk that the other will consent to the search. The authority of a third party to consent to a warrantless search generally depends upon the relationship to the property subjected to the search. The right of possession rather than the right of ownership ordinarily determines who may consent to a police search of a particular place.

A spouse who has equal authority to the use and occupation of the premises has the authority to consent to the search of those premises. The fact that a certain item may be characterized as a personal effect does not compel the conclusion that no risk is assumed by leaving the object in the premises occupied by a spouse. The joint dominion and control of a husband and wife over the family home may extend to the non-consenting spouse's personal effects.

12 ROYCE A. FERGUSON, JR., WASH. PRAC.: CRIMINAL PRACTICE AND PROCEDURE § 2713 (3d ed. 2004) (footnotes and citations omitted). See also State v. Gillespie, 18 Wn. App. 313, 316-17, 569 P.2d 1174 (1977) (under common authority rule a spouse may consent not only to search of the family home, but also to the personal effects of the absent spouse).

As stated above in 12 WASH. PRAC. § 2713, a third party may validly consent to a search "when the two parties

possess common authority over the . . . property or when the nonconsenting party has assumed the risk that the other will consent to the search.” (Emphasis added). Mr. Hambleton claims the Court of Appeals decision is contrary to State v. Morse, 156 Wn.2d 1, 123 P.2d 382 (2005). He is mistaken. Morse involved a mere houseguest giving consent. In fact, Morse recognizes that when a person shares authority with another, it may be inferred that the person has assumed the risk that the other person will consent to a search. “In essence, an individual sharing authority over an otherwise private enclave inherently has a lessened expectation that his affairs will remain only within his purview, as the other cohabitants may permit entry in their own right.” Morse, 156 Wn.2d at 10 (quoting State v. Leach, 113 Wn.2d 735, 739, 782 P.2d 1035 (1989)). The fact that Ms. Huey was concerned that Mr. Hambleton may be angry with her shows only that he did not personally consent. It does mean he did not assume the risk that Ms. Huey would consent.

Mr. Hambleton correctly notes at 14 that common authority is based not on property law but on mutual access

to the property. In other words, a person with no ownership interest may still share authority over a place or item. It is even possible that an owner may have relinquished all authority. But it does not follow that the owner is precluded from having authority over the place or item. On the contrary, common sense would dictate that ownership is a factor that could contribute to a finding of authority.

Contrary to Mr. Hambleton's arguments, the Court of Appeals did not rely exclusively on one factor. Instead, the Court of Appeals at pages 9-10 of the unpublished opinion found that the totality of the evidence supported the trial court's finding of common authority:

Presented with evidence that Ms. Huey purchased the phone, that the contract was under her name, that she lived with Mr. Hambleton, and that he used the phone, the court reasonably found common authority, and a risk assumed by Mr. Hambleton that Ms. Huey might allow an outsider access to the phone. The fact that he asked Ms. Huey to pick up the phone and his other property following his arrest lends further support. Even evidence that the phone was almost always used by Mr. Hambleton would not detract from the other evidence of common authority. See State v. Gillespie, 18 Wn. App. 313, 569 P.2d 1174 (1977) (wife could consent not only to her and her husband's home, but also to a search of his jacket).

In any event, even if there was not consent, the search was still valid because Detective Gregory obtained a search warrant prior to the forensic examination of the cell phone. When police have probable cause to believe an item contains evidence of a crime, they may seize the item and hold it for a reasonable period of time in order to maintain the status quo while they obtain a search warrant. State v. Huff, 64 Wn. App. 641, 648-653, 826 P.2d 698 (1992). That is exactly what occurred here.

Mr. Hambleton claims that the cell phone was searched prior to the search warrant being obtained. However, as the Court of Appeals explained in footnote 5 on page 10:

Because we affirm the trial court's decision on the basis of common authority and consent, we need not address Mr. Hambleton's argument that the detective illegally searched the phone before obtaining the search warrant when he retrieved the two phone numbers requested by Ms. Huey. The detective had consent to retrieve the numbers.

The testimony was that the only items Detective Gregory got off the cell phone prior to the search warrant were two phone numbers requested by Ms. Huey in a phone call to him. (6/4/13 RP 87). As the Court of Appeals noted,

this was justified by Ms. Huey's consent. Even if it was somehow illegal, an unlawful entry by police does not invalidate a subsequent search warrant so long as the unlawful entry did not prompt the decision to seek the warrant, and lawfully obtained evidence established probable cause. State v. Spring, 128 Wn. App. 398, 402-03, 115 P.3d 1052 (2005). Here, obtaining the two phone numbers at the request of Ms. Huey had no effect on the search warrant. The only evidence admitted at trial that was obtained from the cell phone consisted of photographs of generators, not phone numbers. See 6/27/13 RP 92-93; 7/1/13 RP 330. There was no basis to suppress evidence.

The Court of Appeals did an excellent job of applying well established law to the facts of the case. There are no issues presented that merit further review.

F. CONCLUSION

It is respectfully requested the Petition for Review of James Bruce Hambleton be denied.

DATED this 22nd day of June, 2016.

SHAWN P. SANT #35535\91039
 Prosecuting Attorney for
 Franklin County

by: Frank W. Jenny
 Frank W. Jenny, WSBA #11591
 Deputy Prosecuting Attorney

Affidavit of Service	Appellant Attorney Kenneth Kato e-mail address khkato@comcast.net	A Legal Secretary by the Prosecuting Attorney's Office in and for Franklin County makes this affidavit in that capacity. I hereby certify that a copy of the foregoing was delivered to opposing counsel by email per agreement of the parties pursuant to GR30(b)(4). I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Dated June <u>22</u> , 2016, Pasco WA <u>Deborah L. Ford</u> Original e-mailed to the Supreme Court; Copy to counsel listed at left
Signed and sworn to before me this <u>22</u> day of June, 2016 <u>David L. Johnston</u> Notary Public and for the State of Washington residing at Pasco My appointment expires: September 9, 2018		

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Attached please find the Answer to the Petition for Review in RE: *State of Washington v. James Bruce Hambleton*, Supreme Court Number 93240-9 for filing.

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