NO. 308839-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

CHERINA EVERMAN-JONES,

Appellant.

AMENDED REPLY BRIEF OF APPELLANT CHERINA EVERMAN-JONES

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A. ARGUMENT - REPLY ISSUES PRESENTED BY THE RESPONDENT

No. 1 – The Appellant objects to Respondents statement there are no errors in the trial court's findings of fact from the defendant's suppression hearing and appears to claim that the findings of fact should be considered as verities of the case

The appellant first replies to respondent's brief by objecting to the respondent statement that there are no errors in the trial court's findings of fact from the defendant's suppression hearing and appears to claim that the findings of fact should be considered as verities of the case It is well-established law that an unchallenged finding of fact will be accepted as a verity upon appeal. *In re Riley*, 76 Wn.2d 32, 33, 454 P.2d 820, *cert. denied*, 396 U.S. 972, 24 L. Ed. 2d 440, 90 S. Ct. 461 (1969); *Tomlinson v. Clarke, 118 Wash. 2d 498, 501 (Wash. 1992)*, 825 P.2d 706 (1992). This court has held that this rule also applies to facts entered following a suppression motion. *State v. Christian*, 95 Wn.2d 655, 656, 628 P.2d 806 (1981). In the present case, Ms. Everman-Jones has submitted specific assignment of errors to the numbered findings signed by the court, thus, the trial court's findings of fact should not be considered verities of the case.

Next, the respondent states that "No search warrant was needed under RCW 16.52.085(1): and cites the statute. (See Rep's Brief at p.8). Additionally, the respondent skips over and ignores a key word in the statute regarding the only statutory warrant exception and claims that "The statute discusses a "life-threatening condition"". However, the law requires an "immediate life-threatening condition". The respondent also ignores the important constitutional protection preventing intruders from entering a citizen's backyard under the curtilage rule and a lack of a fence is not an invitation or exception for a stranger or even a law enforcement drug sniffing dog to enter a citizen's backyard. The animal control officer did enter Ms. Everman-Jones backyard without a warrant and these facts should have been clearly explained or listed in the findings.

The respondent also claims that "The defendant called no witnesses and certainly no witnesses who had the same training, level of experience and direct knowledge as did officer Montano" at the suppression hearing. (See rep's brief at p. 8). However, the respondent fails to correctly review the record which included without objection an uncontested statement from the SCRAP's vet, Dr Fosberg, police reports and chronological events leading up to the unconstitutional seizure. Dr. Fosberg explained that Harley's

condition "did not appear to be a life threatening situation to me, it just needed more groceries and um needed treatment for the ear infection, which was again non-life threatening". [CP 70, 74]. Dr. Fosberg documented the examination of Harley in his written summary and wrote that the complaint was a "thin" dog and besides an abnormal body appearance and an ear infection, everything from Harley's heart to digestive track was "normal". [CP 104]. The respondent is incorrect when he alleges that the appeal from a suppression hearing can only consider testimony at that hearing and nothing else.

Next, the respondent claims that findings related to the neighbor and/or father should be included since it "makes it plain that a dog was in a dangerous situation with no proper care available". (See resp brief p. 8). However, the record is clear that the officer already seized the dog and already made the decision to search Ms. Everman-Jones backyard before even meeting with the neighbor. Thus, this finding at the suppression hearing is prejudicial and irrelevant. [February 2, 2012 Testimony of Montano RP 9-11; CP 98].

The respondent also ignores the fact that the officer did not claim "immediate life-threatening condition" until several days after the seizure and the record totally supports this fact. However, the

respondent wants this court to only consider what the testimony was at the suppression hearing and nothing else.

Finally, the respondent again just cites the officer's testimony that the dog was in "immediate life-threatening condition". (See rep brief at p. 9). However, the findings fail to include the uncontested facts in the record as cited by Ms. Everman-Jones that the dog was standing, barking, retrieving thrown items and not anywhere near "immediate life-threatening condition" as stated by the animal control officer's own veterinarian. In fact, the animal control officer was not even sure of the dog's condition as seen from the driveway and had to step in Ms. Everman-Jones' backyard which requires a warrant.

No. 2- The Appellant objects to the respondent's statement that the defendant's constitutional privacy rights were not violated.

The appellant next claims that the respondent is not curre3nt on the law. Respondent believes that the curtilage rule is too ancient and is not current law anymore. He even claims that an officer can be present "within the curtilage of a residence" and not be in violation of the owner's privacy rights. Then, the respondent states that an officer may enter areas of the curtilage that are "impliedly open" and cites State v. Seagull, 95 Wn.2d 898; 632 P.2d 44; 1981. (See resp. brief at p. 10). However, respondent leaves out a very important rule in

Seagull, that substantial and unreasonable departure from such an area, or a particularly intrusive method of viewing, will exceed the scope of the implied invitation and intrude upon a constitutionally protected expectation of privacy. Seagull at 901-903. Appellant claims that it is a substantial and unreasonable departure from an officer stepping on a front porch or driveway as opposed to searching her backyard as the animal control officer did in this case.

Finally, the trial court and respondent's position that the curtilage rule is ancient and outdated is wrong. Just recently, our US Supreme court held in Florida v. Jardines, 569 U. S. ____ (2013) that "We therefore regard the area "immediately surrounding and associated with the home"—what our cases call the curtilage—as "part of the home itself for Fourth Amendment purposes." *Oliver, supra,* at 180. That principle has ancient and durable roots. Just as the distinction between the home and the open fields is "as old as the common law," *Hester, supra,* at 59, so too is the identity of home and what Blackstone called the "curtilage or homestall," for the "house protects and privileges all its branches and appurtenants." 4 W. Blackstone, Commentaries on the Laws of England 223, 225 (1769). Jardines, see slip opinion p.4. Finally, even the dissenting opinion in Jardines agreed that the law does not allow visitors to enter the

backyard as the animal control officer did in this case. "A visitor cannot traipse through the garden, meander into the backyard, or take other circuitous detours that veer from the pathway that a visitor would customarily use. See, *e.g., Robinson* v. *Virginia*, 47 Va. App. 533, 549–550, 625 S. E. 2d 651, 659 (2006) (en banc); *United States* v. *Wells*, 648 F. 3d 671, 679–680 (CA8 2011) (police exceeded scope of their implied invitation when they bypassed the front door and proceeded directly to the back yard); *State*

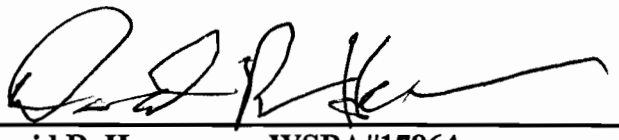
v. *Harris*, 919 S. W. 2d 619, 624 (Tenn. Crim. App. 1995) ("Any substantial and unreasonable departure from anarea where the public is impliedly invited exceeds the scope of the implied invitation . . . " (internal quotation marks and brackets omitted)); 1 W. LaFave, Search and Seizure §2.3(c), p. 578 (2004) (hereinafter LaFave); *id.*, §2.3(f), at 600–603". See Jardines slip opinion at p. 5 of dissent.

Next, the respondent confuses the "open view" and "plain view" rules with the curtilage rule. Ms. Everman-Jones counters that the animal control officer could not clearly see from an "open view" position on the driveway and clearly stepped of the path of travel and entered the backyard of a citizen without a warrant. Her case should be dismissed.

B. CONCLUSION

Based upon the above argument, the appellant respectfully asks the court to dismiss the charge

Respectfully submitted this 2ND day of May 2013.



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COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, vs. **CHERINA EVERMAN-JONES,** Defendant.	**Superior Court No.: 11-1-02618-4** **DECLARATION OF SERVICE**

On this day Declarant deposited in the mails of the United States of America properly stamped and addressed envelopes containing the Amended Appellant's Reply Brief to the following parties:

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DATED this 2nd day of May 2013.

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