70730-2

70730-2

COA No. 70730-2-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

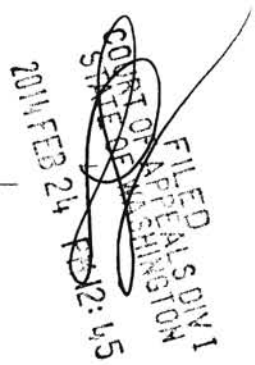
STATE OF WASHINGTON,

Respondent,

v.

MATTHEW DANGELO,

Appellant.



ON APPEAL FROM THE SUPERIOR COURT
OF KING COUNTY

The Honorable Susan H. Amini

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erroneously denied defendant Matthew Dangelo's CrR 3.6 motion to suppress drugs found on his person after he was arrested for obstruction following the warrantless, forcible, non-consensual entry of Seattle Police Officers into his apartment.

2. The trial court, based on the facts found at the CrR 3.6 hearing, erred in ruling that the "emergency exception" to the warrant requirement permitted the police entry into the apartment.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Seattle police officers knocked on the door of Mr. Dangelo's apartment based on the claims of a 911 caller that she had heard coughing, crying, and a female saying "let me go." A male voice from inside the apartment yelled out to the officers they were "not coming in without a warrant." When a female then cracked the door open slightly, she appeared frightened; the two police officers then pushed their way into the apartment because Mr. Dangelo would not come outside.

Did the prosecution fail to meet its burden to prove all 6 of the criteria of the "emergency-aid" exception to the warrant

requirement, requiring reversal of the CrR 3.6 order denying suppression of certain later-discovered drug evidence?

2. Did the trial court concordantly apply the wrong legal standard when it did not apply criterion 4 (demanding that there be imminent risk of substantial injury to a person), or criterion 5 (demanding that there be a person in immediate need of help) of the emergency exception, which allows limited intrusion into the home where there is a true emergency?

3. Is reversal of the defendant's conviction required?

C. STATEMENT OF THE CASE

1. Warrantless entry. After the police officers entered the apartment, they struggled with Mr. Dangelo and threatened to taze him because he was resistive. The defendant was ultimately handcuffed and arrested for obstructing, and at booking, a small pill case with some prescription medication was found in his pocket. CP 35.

The incident began when Seattle police officers knocked on the door of his apartment based on the claims of a 911 caller that she had heard coughing, crying, and a female saying "let me go" from the adjacent apartment. CP 33. The officers could hear nothing when they approached the apartment door. There was no

response to their knocking. Officer Graham told other officer, Jensen, that the 911 caller had heard a female inside the apartment state, "don't hurt me." CP 34-35.

However, after continued knocking, a male voice from inside the apartment yelled out to the officers they were "not coming in without a warrant," and repeated this statement after Officer Jensen stated she needed to do a welfare check. CP 33-35. Officer Jensen could hear a female whimpering and crying in the background. When Officer Jensen stated she would kick the door in, a female stated, "let them in, I don't want them to kick down the door." The female then cracked the door open slightly; she appeared frightened. Officer Jensen then "pushed the door open with her arm so that she could see both subjects." The defendant would not come out of the apartment and placed his hands in his pockets, and then he tried to close the door to his home, so the Officers pushed their way in. CP 33-35.

2. Ruling. The trial court ruled that it was reasonable for the officer to enter the home under the emergency exception to the warrant requirement, because someone was hurt, and/or needed help or assistance. 1RP 142-45.

Following a stipulated facts trial on the VUCSA charge, and sentencing, Mr. Dangelo timely appealed. CP 19-22, 23-30, 49.

D. ARGUMENT

THE STATE FAILED TO MEET ITS HEAVY BURDEN TO PROVE THAT THERE WAS A GENUINE EMERGENCY OF THE IMMINENT AND IMMEDIATE NATURE NECESSARY TO PERMIT WARRANTLESS ENTRY BY POLICE INTO A WASHINGTON CITIZEN'S HOME.

a. This case presents a legal issue. The Court of Appeals first reviews a trial court's denial of a motion to suppress for whether the facts found are supported by substantial evidence. State v. Hill, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994). "Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding." State v. Halstien, 122 Wn.2d 109, 129, 857 P.2d 270 (1993).

In the present case, Mr. Dangelo disagrees with the completeness of the facts found by the trial court following the extensive testimony at the suppression hearing, including the testimony of his girlfriend Ms. Walsh. See 1RP 6-148.

However, Mr. Dangelo argues that the set of facts found by the trial court do not support the court's legal ruling denying his CrR 3.6 motion. The Court of Appeals reviews the legal conclusions of

the trial court ***de novo***. State v. Smith, 165 Wn.2d 511, 516, 199 P.3d 386 (2009) (citing State v. Carneh, 153 Wn.2d 274, 281, 103 P.3d 743 (2004)).

b. The trial court employed an erroneous, incomplete legal standard. The trial court abused its discretion in employing a legal standard that was incomplete under State v. Schultz, 170 Wn.2d 746, 248 P.3d 484 (2011). A trial court abuses its discretion if its decision is manifestly unreasonable or is based on untenable grounds or for untenable reasons. In re Pers. Restraint of Duncan, 167 Wn.2d 398, 402, 219 P.3d 666 (2009). A trial court decides on untenable grounds when it applies the wrong legal standard. State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003); State v. Hudson, 150 Wn. App. 646, 652, 208 P.3d 1236 (2009). Importantly, a trial court also abuses its discretion if it does not examine all of the factors applicable to the legal question at hand, and either enter specific findings of fact on each factor, or demonstrate by its findings of fact and oral ruling that it did, in fact, consider each factor. In re Marriage of Horner, 151 Wn.2d 884, 896, 93 P.3d 124 (2004).

In ruling that the police entry into Mr. Dangelo's apartment was supported by authority of law, the trial court concluded that the

"emergency" exception applied, because the police officers reasonably believed:

- that "there was a likelihood someone needed help for health or safety concerns;"
- that "there was a need for assistance;"
- that "someone may be hurt or in need of assistance;" and
- that "Dangelo or Walsh likely needed assistance[.]"

CP 35-36 (Conclusions of Law a.(i) and (ii)). The court ruled that it was "reasonable" to enter the home because "[t]he officers wanted to separate the parties and interview them," and further held that it was "incumbent upon the officers to ensure that no violence had occurred or would occur after the officers' departure." CP 36 (Conclusion a.(ii)).[1]

Finally, the court stated that, upon entry, there was probable cause to arrest Mr. Dangelo for obstructing a law enforcement officer under RCW 9A.76.020(1), and that the drug evidence later discovered on his person was therefore admissible. CP 36-37 (Conclusions a.(ii) and (iii)).

Although the court also indicated that the police actions were not a pretext, the court did not substantively apply all of the six

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[1] The Schultz Court noted that "Article I, section 7, does not use the words 'reasonable' or 'unreasonable.' Instead, it requires 'authority of law' before the State may pry into the private affairs of individuals." Schultz, 170 Wn.2d at 758 (citing State v. Day, 161 W.2d 889, 896, 168 P.3d 1265 (2007).

factors required under State v. Schultz, for the emergency exception to apply. State v. Schultz, 170 Wn.2d at 760-62 and n. 5 (all six factors must be met, including the requirement of imminent threat of substantial injury, and need for immediate help). The trial court abused its discretion.

c. The State did not meet its heavy burden to prove that the emergency exception to the warrant requirement applies. In the absence of a finding on a factual issue the appellate court presumes that the party with the burden of proof failed to sustain its burden on that issue. State v. Westvang, 174 Wn. App. 913, 916 and n. 4, 301 P.3d 64 (2013) (where court's CrR 3.6 findings were silent as to whether police obtained the required *informed* consent under Ferrier, reviewing court would presume State failed so to prove) (citing State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997); and State v. Ferrier, 136 Wn.2d 103, 118–19, 960 P.2d 927 (1998)). Here, the State did not meet its burden, and the trial court's ruling was in error. U.S. Const. amend. 4; Wash. Const. art. 1, § 7.

Article 1, section 7 of the Washington Constitution provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Wash. Const. art. 1, § 7. The

Fourth Amendment to the federal constitution protects against unreasonable searches and seizures, and imposes a presumption that warrantless home entry is unreasonable under its dictates. Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980); U.S. Const. amend. 4. The same presumption applies under the Washington Constitution, and under both guarantees, the home enjoys sacrosanct protection. State v. Schultz, 170 Wn.2d 746, 753, 248 P.3d 484 (2011). Further, under Article 1, section 7, "authority of law" specifically means a judicial warrant. See, e.g., York v. Wahkiakum Sch. Dist. No. 200, 163 Wn.2d 297, 306, 178 P.3d 995 (2008).

(1). The warrantless home entry and search violates the state and federal constitutions unless an exception to the warrant requirement applies.

The State bears the burden of establishing an exception to the warrant requirement. Under Article 1, section 7, "authority of law" means a warrant, and exceptions to that requirement have been described as few, jealously guarded, carefully drawn, and narrowly construed. State v. Parker, 139 Wn.2d 486, 987 P.2d 73 (1999); State v. Hendrickson, 129 Wn. 2d 61, 70, 917 P.2d 563 (1996); State v. Bradley, 105 Wn.2d 898, 902, 719 P.2d 546 (1986).

Because the police entered Mr. Dangelo's apartment without a warrant, the prosecution commenced the CrR 3.6 litigation facing a presumption that the officers' entry was in fact illegal. State v. Grande, 164 Wn.2d 135, 141, 187 P.3d 248 (2008). Thus, the State was required to show the imminent danger and immediacy required by the state constitution, as outlined in Schultz, supra, 170 Wn.2d 746, 750.

In Schultz, the Supreme Court held that for the emergency aid exception to apply, a true emergency must exist. Schultz, 170 Wn.2d at 754. Routine community-caretaking functions of the police, such as checking on the welfare of persons, are societally valued – but they do not outweigh citizens' sacrosanct privacy interests unless there is a true emergency need for the police to enter into a private home in order to do so. Schultz, 170 Wn.2d at 754. The same is true under the federal constitution. U.S. Const. amend. 4; Brigham City v. Stuart, 547 U.S. 398, 403, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006) (under 'emergency aid'-type exigency exception, law enforcement officers may enter a home without a warrant if it is necessary in order to render emergency assistance to an injured occupant, or to render such assistance to protect an occupant from imminent injury).

(2). There was no imminent threat of substantial injury nor was any person in need of immediate help.

In Schultz the appellant contended that police officers' entry into the appellant's home violated article I, section 7 of the Washington Constitution. The Court emphasized that under the state constitution, the home enjoys a special protection. Schultz, 170 Wn.2d at 753 (citing State v. Ferrier, 136 Wn.2d 103, 112, 960 P.2d 927 (1998)). The Court first discussed the then-existing emergency aid exception to the warrant requirement, under which the State must prove that

> (1) the police officer subjectively believed that someone likely needed assistance for health or safety concerns; (2) a reasonable person in the same situation would similarly believe that there was need for assistance; and (3) there was a reasonable basis to associate the need for assistance with the place being searched.

Schultz, 170 Wn.2d at 754 (citing, inter alia, State v. Kinzy, 141 Wn.2d 373, 386-87, 5 P.3d 668 (2000)).

However, the Supreme Court adopted three additional factors that the Court of Appeals had suggested in its case law, and which separate true emergencies – of the quality exigent enough to allow warrantless home entry -- from mere community caretaking:

> (4) there is an **imminent** threat of **substantial injury** to persons or property;

> (5) state agents must believe a specific person or persons or property are in need of **immediate** help for health or safety reasons; and
> (6) the claimed emergency is not a mere pretext for an evidentiary search.

Schultz, 170 Wn.2d at (citing, inter alia, State v. Leffler, 142 Wn. App. 175, 181, 183, 178 P.3d 1042 (2007); and State v. Lawson, 135 Wn. App. 430, 437, 144 P.3d 377 (2006) (specific persons and imminent threat)).

Crucially, the Court noted that the failure of the State to meet its burden to prove *any one* of the above 6 factors, as so set forth, would be fatal to a prosecution request that a trial court condone a warrantless law enforcement entry into a home. Schultz, 170 Wn.2d at 760 and n. 5 ("[T]he failure to meet any factor is fatal to the lawfulness of the State's exercise of authority").

The Supreme Court noted that police investigation of domestic violence circumstances is important, but the Court reiterated that the emergency exception required that the police be encountering a circumstance of such exigency permitting entry into the sacrosanct home without a warrant, which is the sole signal way of obtaining authority of law. Schultz, 170 Wn.2d at 755 (citing State v. Raines, 55 Wn. App. 459, 464, 778 P.2d 538 (1989); and State v. Lynd, 54 Wn. App. 18, 22, 771 P.2d 770 (1989)).

Thus the Court held that the fact that police are responding to a possible domestic violence situation may be an important factor in assessing exigency, but the standard requires prosecution proof of the indispensable factors of need for **immediate** assistance, and the existence of **imminent** risk of **substantial** injury. Schultz, 170 Wn.2d at 756.

Applying these criteria and principles, the Schultz Court assessed the facts of the case before it as involving a 911 call from a resident of an apartment complex, about two people yelling in an apparent domestic incident. The responding officers confirmed the caller's concerns when, upon arrival at the door, they too overheard a man and woman talking loudly or with raised voices, and heard one person demand that he or she wanted to be left alone. When the officers knocked on the door, a person opened it, appearing agitated and flustered, and – in response to the officers' direct question -- claimed that no one else was there. The police confirmed their suspicions that this person, the suspected abuser, was lying, when a voice came out from another room. Schultz, 170 Wn.2d at 750-51, 760-61 (describing these facts and stating, "That is not enough.").

On these facts, the Court concluded that the police officers did not have a true emergency basis necessary to justify their subsequent entry into the home based upon that exception's requirement of **imminent** threat of **substantial** injury, and a need for **immediate** help – both showings being, as so stated, required. Schultz, 170 Wn.2d at 760-62.[2]

The present case is similar. Police responding to a 911 call from a neighbor could not confirm the caller's assertion of domestic fighting and a female stating to another to not hurt her, but then, the officers heard crying, heard a man assert the homeowners' right against police entering, and listened to a woman asking that the door be opened when police threatened to break it down. The woman then opened the door herself. Although she appeared frightened, there was no testimony or finding that she or anyone appeared injured, no testimony or finding that the person appeared to have been crying, no testimony or finding that the person was experiencing trouble or was at all relieved to see the police, and no testimony or finding that she had any fear of the male in the

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[2] The Schultz Court acknowledged other testimony at the CrR 3.6 hearing that militated against a finding of apparent domestic violence, but conducted its legal analysis based only upon the facts found by the trial court, just as Mr. Dangelo does herein. Schultz, 170 Wn.2d at 751, 760.

apartment. CP 31-34 (CrR 3.6 Findings of fact); 1RP 33-35 (undisputed testimony of Officer Jensen). Mr. Dangelo repeatedly asserted his right to be free of warrantless police entry into his home.[3]

This is not enough. Certainly other facts such as past police responses to this residence might have supported a reasonable belief that some person was imminently about to have substantial injury inflicted upon them, or that some person was in immediate need of police to enter the home and protect them from immediate domestic violence. There were no such facts. Although Officers Jensen and Graham no doubt believed they were acting lawfully when they pushed the door open and tackled Mr. Dangelo for refusing to come outside, there is no "good faith" exception to the exclusionary rule based on a reasonable belief by law enforcement officers that they were acting properly without need for a warrant. Day, supra, 161 Wn.2d at 889; State v. Afana, 169 Wn.2d 169, 184, 233 P.3d 879 (2010); see also State v. White, 97 Wn.2d

[3] The Schultz Court noted that "the great majority of home dwellers confronted by police officers on their doorstep or in their home would not question the absence of a search warrant because they either (1) would not know that a warrant is required; (2) would feel inhibited from requesting its production, even if they knew of the warrant requirement; or (3) would simply be too stunned by the circumstances to make a reasoned decision about whether or not to consent to a warrantless search." (Emphasis added.) Schultz, at 758 (citing Ferrier, at 115).

92, 110, 640 P.2d 1061 (1962). Ultimately, the trial court did not apply – and the State did not meet its burden to prove -- the indispensable requirements that

> (4) there is an **imminent threat of substantial injury** to persons or property; [and] (5) state agents must believe a specific person or persons or property are in need of **immediate** help for health or safety reasons.

Schultz, 170 Wn.2d at 754-55. The State's heavy burden was not met, and the warrantless entry by police in this case was without authority of law.

> ***(3). There is no general community caretaking exception to the warrant requirement for non-emergency situations where there might be domestic violence in the future, or where a person merely needs help or assistance.***

Schultz makes eminently clear that the required criteria of *imminence*, and *immediacy*, are at the core of this exception to the warrant rule. It is inadequate that, as the trial court ruled, the police were concerned to "ensure" that violence had not occurred in the past, and it was incorrect for the trial court to state that it was "incumbent" upon the police to "ensure" that it would not occur in the future. CP 35-36.

The police can always attest to facts indicating a concern for domestic dispute circumstances, and the prosecution can certainly

demonstrate, in most any situation of a 911 call or other alert to the police of domestic unrest, that there might be a person at some risk of harm or a person who could benefit from help.

But that is not enough. As the Schultz Court reiterated, domestic violence protection is deeply valued, but when it comes to the question of the police asserting a right to push open the door and cross the threshold, literally and figuratively, of a Washingtonian's private home and private affairs, the well-intentioned desire of law enforcement to investigate and protect must *always* "be consistent with the protection the state constitution has secured for the sanctity and privacy of the home." Schultz, 170 Wn.2d at 756 (citing Wash. Const. art. I, § 7; State v. Ferrier, 136 Wn.2d at 112; and State v. Young, 123 Wn.2d 173, 185, 867 P.2d 593 (2004)).

The Schultz language therefore means something, and is not satisfied by police claims that someone generally needed help or assistance, or by police assertions regarding what the officers "did not know."[4]

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[4] The prosecution-drafted findings, consistent with their erroneous assertions that the police were entitled to enter because they wanted to interview the homeowners, because they had a chance to sweep the apartment, and desired to "make sure there was nothing going on inside," are unfortunately replete with statements regarding what the police officers "did not know" in terms

The Washington courts have never applied any community-caretaking function to permit non-emergency intrusion into a private home absent a genuine emergency. See, e.g., State v. Thompson, 151 Wn.2d 793, 802–03, 92 P.3d 228 (2004) (declining to excuse warrantless entry where "there was no immediate need for assistance for health or safety concerns"); State v. Williams, 148 Wn. App. 678, 687, 201 P.3d 371 (2009) (entry and search of hotel room was illegal because no one in the room "was in immediate danger"); cf. State v. Hos, 154 Wn. App. 238, 247–48, 225 P.3d 389 (2010) (warrantless entry justified under community caretaking function exception when officer had a reasonable belief that unresponsive resident was not breathing and in need of immediate medical attention), review denied, 169 Wn.2d 1008, 234 P.3d 1173 (2010). The police entry was also not justified under any emergency exception to the federal guarantee of the Fourth Amendment. Ray v. Township of Warren, 626 F.3d 170, 175–177 (3rd Cir.2010); United States v. Erickson, 991 F.2d 529, 533 (9th Cir.1993); U.S. Const. amend. 4.

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of whether there could be a weapon therein, and whether the persons therein "were okay." CP 33-35 (CrR 3.6 Findings of fact y, aa, bb, and cc; Conclusions of law a.i and a.ii).

The constitutional protection of the home and the case of State v. Schultz confirms that there is no "welfare check" or "community care-taking" exception to the warrant requirement, and the true exigency necessary under the emergency exception – a jealously guarded and narrowly-construed departure from the warrant rule -- was not proved in this case.

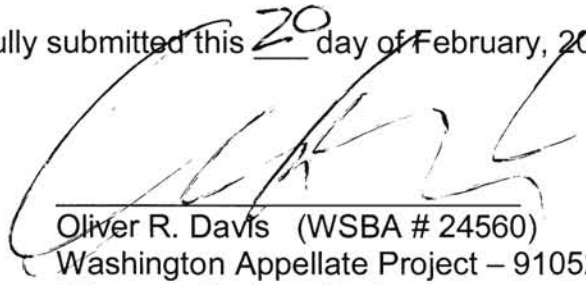
d. Suppression is required. Evidence derived only "but for" a police illegality must be suppressed under the fruit of the poisonous tree doctrine. Wong Sun v. United States, 371 U.S. 471, 485–86, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); State v. Gaines, 154 Wn.2d 711, 716–20, 116 P.3d 993 (2005). Admission of evidence seized in violation of a defendant's Fourth Amendment or state constitutional privacy rights is constitutional error that is presumed prejudicial. State v. McReynolds, 117 Wn. App. 309, 326, 71 P.3d 663 (2003). It is harmless only if the State proves beyond a reasonable doubt that the verdict would have been the same without the error. State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). Here, absent the drug evidence seized from Mr. Dangelo at booking, the court at the stipulated facts trial could not have found him guilty of VUCSA, and reversal of his conviction is

required. State v. Gaines, 154 Wn.2d at 716 (suppression error must be harmless beyond a reasonable doubt).

E. CONCLUSION

Based on the foregoing, Matthew Dangelo requests that this Court reverse the judgment and sentence.

Respectfully submitted this 20 day of February, 2014.



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. MATTHEW D'ANGELO, Appellant.	)))))))))	NO. 70730-2-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 21ST DAY OF FEBRUARY, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 21ST DAY OF FEBRUARY, 2014.

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