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MAR 04, 2014

Court of Appeals
Division III
State of Washington

NO. 31638-6-III

**COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

MICHAEL ALLEN BUDD, APPELLANT

Appeal from the Superior Court of Grant County
The Honorable John D. Knodell

No. 10-1-00061-8

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

3. Pursuant to *State v. Ferrier*,¹ was defendant's consent to search valid when—prior to entry—law enforcement officers informed the defendant of his right to refuse consent, his right to revoke consent at any time, and his right to limit the scope of the search?
4. Was defendant's consent to search vitiated solely by an officer's legitimate statement that the officer would obtain a warrant if denied consent, and nothing in the record otherwise suggests the defendant's consent was coerced?

B. STATEMENT OF THE CASE.

1. Procedure

On February 5, 2010, the Grant County Prosecuting Attorney's Office (State) charged Michael Allen Budd (defendant) with one count of possession of depictions of minor engaged in sexually explicit conduct.² CP 1. Before trial, defendant filed a motion to suppress physical evidence under CrR 3.6, arguing law enforcement officers had improperly obtained defendant's consent and failed to give *Ferrier* warnings. CP 8–28.

The Honorable John D. Knodell heard the motion and, on June 20, 2011, issued a memorandum opinion denying it. CP 124–29. The court reasoned that law enforcement officers had acted properly under the law and found that defendant had voluntarily consented to the search at issue.

¹ *State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998).

² RCW 9.68A.070.

CP 127; CP 401-02.³

Subsequent to the court's ruling, the parties agreed to proceed to a stipulated facts bench trial that occurred on October 10, 2011. The court found defendant guilty of possession of depictions of minor engaged in sexually explicit conduct and sentenced defendant to 13 months in custody. CP 403-04; CP 409 (Judgment and Sentence, paragraph 4.1).

Defendant timely filed a notice of appeal on April 29, 2013. CP 399-400.

2. Facts

Lakewood Police Department Detective Kim Holmes, who was also a member of the Washington State Patrol Missing and Exploited Children Task Force, received an anonymous "CyberTip"⁴ that defendant was engaging in child abuse, exploitation, and child pornography. RP 6. The tip included defendant's computer account information, his passwords, and several examples of explicit online chats that referenced the abuse. RP 6. One such discussion involved defendant referencing sex with his nine-year-old daughter. RP 6. Detective Holmes confirmed the IP address and chat logs originated from defendant's house in Grant County, Washington. RP 7-8, 43-44.

On March 11, 2009, Detective Holmes was concerned that

³ The State has supplemented the record to include the court's findings of fact and conclusions of law, which were entered on April 29, 2013. *See* CP 401-02.

⁴ "CyberTips" are anonymous tips from the National Center for Missing and Exploited Children, which consist of reports of various child-abuse crimes. RP 6.

defendant's daughter was a possible victim of child abuse and decided to contact defendant directly at his house along with two other law enforcement officers, Tony Doughty and Jesse Rigalotto. RP 9.

When they arrived, defendant's girlfriend was the only person home, so the officers parked their vehicle in front of the house and waited for defendant to return. RP 10. Defendant arrived fifteen minutes later and parked his vehicle in the driveway, got out, and approached the officers about halfway down the driveway. RP 11. Detective Holmes identified each officer, informed defendant that he was not under arrest, and told him that they had received a tip that defendant had child pornography on his computer. RP 12–13.

Defendant did not appear surprised by the officers' visit and stated, "If you do it long enough, you get caught." RP 13. When Detective Holmes asked if she could preview defendant's computer, defendant confessed to having downloaded hundreds of images of child pornography. RP 13. Detective Holmes also inquired about defendant's daughter, though defendant denied hurting or touching her. RP 15.

While standing in the driveway, Detective Holmes asked to search and seize defendant's computer with his consent, stating that she would otherwise apply for a warrant. RP 15. She orally reviewed the *Ferrier* warnings, telling defendant he had a right to refuse to consent and that he could limit the scope of that consent. RP 16–17, 21–22, 39, 40–41. Defendant consented to the search so long as his girlfriend would be

absent during the search and the search was limited to his computer and not the entire home. RP 15. Detective Holmes instructed defendant that she had a waiver (standard *Ferrier* warnings) defendant needed to sign that highlighted his rights, including his right to revoke his consent at any time, but did not go into further detail at that time. RP 16.

Defendant invited the officers into his house to sit down at the table in order to review the *Ferrier* form. RP 17. Once inside, Detective Holmes reviewed the warnings and defendant again consented to a search by signing the form. RP 17–20; CP 185. Officers subsequently took photos of defendant’s computer and seized it for review. RP 23–24. Detective Holmes also requested a photograph of defendant’s daughter so that she could ensure the daughter was not in any of the images found on defendant’s computer. RP 24–25.

Law enforcement officers later reviewed defendant’s computer and found several images of child pornography. CP 403 (Findings of Fact and Conclusions of Law RE: Stipulated Facts Trial, Findings of Fact 14, Conclusions of Law 1).

C. ARGUMENT.

1. DEFENDANT’S CONSENT TO SEARCH WAS VALID BECAUSE—PRIOR TO ENTRY—DETECTIVE HOLMES INFORMED DEFENDANT OF HIS RIGHT TO REFUSE OR REVOKE HIS CONSENT AND HIS RIGHT TO LIMIT THE SCOPE OF THAT CONSENT.⁵

⁵ Defendant’s first two arguments in his appeal are addressed here.

This Court reviews a trial court's conclusions of law regarding a suppression motion based on a warrantless search de novo. *State v. Holmes*, 108 Wn. App. 511, 516, 31 P.3d 716 (2001).

Warrantless searches are per se unreasonable, but consent is one of the well-established exceptions to the warrant requirement. *State v. Ferrier*, 136 Wn.2d 103, 111, 960 P.2d 927 (1998). Consensual, warrantless searches are valid where (1) the consent is voluntary, (2) the person granting consent had authority to give consent, and (3) the search does not exceed the scope of the consent. *State v. Walker*, 136 Wn.2d 678, 682, 965 P.2d 1079 (1998). The State bears the burden to show the defendant's consent was freely and voluntarily given. *State v. O'Neill*, 148 Wn.2d 564, 588, 62 P.3d 489 (2003).

Officers may obtain consent by engaging in a “knock-and-talk,” whereby they directly contact a person and attempt to obtain that person's consent to conduct a warrantless search. *Ferrier*, 136 Wn.2d at 111. In *Ferrier*, law enforcement officers engaged the defendant in a knock-and-talk in order to obtain her permission to enter her apartment and seize marijuana. 136 Wn.2d at 107–08. *Ferrier* permitted officers to enter and was presented a “consent to search” form, which failed to inform *Ferrier* of her rights—specifically her right to refuse consent. *Id.* at 108. At trial, *Ferrier* attempted to suppress the evidence based on an unconstitutional search, arguing her consent was not voluntary because she was not expressly informed of her right to refuse consent. *Id.* at 109. The trial court

denied her motion, however, and found her guilty of drug charges. *Id.*

On review, the Washington State Supreme Court overturned the conviction and found the trial court had improperly denied Ferrier's motion to suppress. *See id.* at 109–18. In its ruling, the Court adopted a new rule that requires officers—in a knock-and-talk context—to inform a person of his right to refuse consent, that he may revoke his consent at any time, and that the scope of the consent can be limited to only specific areas of the home. *See id.* at 118.

Here, defendant first argues Detective Holmes failed to inform him of the *Ferrier* warnings before entering his house, vitiating his consent to the search. Brief of Appellant at 8. Defendant's argument fails because it overlooks almost the entirety of the CrR 3.6 hearing—which repeatedly focused on whether Detective Holmes reviewed the *Ferrier* warnings before entering defendant's house—and selectively chooses two statements from the hearing to support his argument. *See* Brief of Appellant at 8.

Defendant relies exclusively on the brief exchange below to support his argument:

[Prosecutor]. Before going into the house, did you advise the defendant of anything before going into the house to search?

[Detective Holmes]. I did.

Q. And what's that?

A. When he agreed to give consent, I explained to him that I had a waiver that he would need to sign, and it would give him rights as to how much we could search, that he could stop the search. I didn't go into great detail.

Q. Right.

A. And after that, I went and got the warnings, the Ferrier form, out of my car and brought it. And that's when we went into the house and sat at the table where we could go over it more thoroughly.

RP 16; *see* Brief of Appellant at 8. However, this testimony occurred at the very beginning of the hearing and consists of only a small portion of what Detective Holmes actually testified.

The remainder of the record, when considered in its totality, clarifies that defendant fully received the *Ferrier* warnings before Detective Holmes entered his house. For example, the prosecutor later asked:

Q. Now, after you advised him of the rights with this Ferrier warning set, you know, the right that he can stop the search at any time, the right that you can, you know, allow him to do that, *was this advised to him before you went into the house?*

A. Yes.

Q. And then did the defendant still, *after you advised him of those things*, what this warning was, did he still allow you to go into the house?

A. He did. He invited us into the house specifically so that we could sit down at a table and go over the warnings.

RP 16–17 (emphasis added). Later, defendant specifically objected to whether Detective Holmes had informed defendant of his right to refuse consent before entering his house, so the court clarified this point by examining the detective itself:

THE COURT: Would you state your question again for me, please.

[Prosecutor]: Okay. And I was going to ask her when she advised him that he had that right to refuse, did he tell her no or he wanted to refuse.

THE COURT: Well, apparently, if I understand the testimony, *she did twice*. She did it once outside and once inside?

[Prosecutor]: Yes. Now, I'm outside. I just took a step back outside and going through the part that if he refused it at any time.

....

THE COURT: Okay. Detective, *between the time that you told Mr. Budd outside the home that he had the right to refuse consent for entering the home and the time that you entered the home*, during that period, at any time did Mr. Budd indicate to you that he wanted to exercise that right?

[Detective Holmes]: No.

RP 21–22 (emphasis added). Defense counsel further clarified this issue when he questioned the detective during cross examination:

Q. Prior to the time that you entered the house, how is it communicated to Mr. Budd that he had the right to call off the search at any time?

A. Verbatim, I don't recall. In general, we told him that,

you know, *we were asking him for consent, and he certainly had the right to deny that consent. He did not have to let us into the house, and he could stipulate his parameters, which he did.*

RP 39 (emphasis added). And, again, by the prosecutor during redirect examination:

Q: Now, you just testified in regards to the Ferrier warnings, the talking prior to going into the house with the defendant there. Now, you stated you advised him that he could deny your entrance into the house?

A. Yes.

RP 40–41.

When considering the entirety of the proceedings, it is apparent that Detective Holmes informed defendant of the *Ferrier* warnings while standing in his driveway. The record confirms that defendant understood his rights because in addition to permitting officers to conduct the search, he placed parameters on the scope of his consent: defendant both refused the search to take place in front of his girlfriend so that she would not see any images that might have been on his computer, and he limited any search or seizure to his computer and other related media. *See* RP 35–36. Defendant placed these limitations on the search prior to allowing the detectives to enter his home. RP 42.

Even if this Court were to disregard the conversation that occurred on defendant's driveway, defendant still authorized the search and seizure of his computer when he signed the *Ferrier* warnings once inside his

house. CP 185. Defendant argues that somehow his written consent on the form was invalidated because officers reviewed the *Ferrier* form in defendant's kitchen as opposed to reviewing the form on his doorstep. Brief of Appellant at 8. But this argument grinds against the intent of the State Supreme Court's opinion in *Ferrier*, which, in short, is to ensure a consenting party to a knock-and-talk is aware of his rights before a search occurs. *See Ferrier*, 136 Wn.2d at 116–19. Here, a search did not occur before officers obtained defendant's written and oral consent. In fact, the officers could not have conducted a search while sitting in defendant's kitchen given the nature of the crime of which defendant was accused (i.e., child pornography), which would have required them to review defendant's computer files.

Moreover, this line of reasoning leads to an extraordinary result—the suppression of physical evidence—when, as is here, a *cooperative* defendant *requests* and *invites* law enforcement officers into his house to sit down at his table in order to review the written *Ferrier*-warning form. *See* RP 16–17, 23, 35. There is no indication that the officers unlawfully entered defendant's home to review his rights or that they conducted a search prior to obtaining his consent; to the contrary, it was a decision made solely by defendant. *See* RP 16–17, 23–24, 35. If not just a legal absurdity and peculiarity, it would be unjust to punish the State with suppression when defendant encouraged law enforcement officers to enter his home to review his *Ferrier* rights as a matter of mere convenience (i.e.,

to sit down).

But this Court need not go so far in its decision. Because Detective Holmes reviewed each of defendant's rights prior to entering his house, the trial court properly determined that defendant's consent to the search and seizure was valid. This Court should affirm that finding.

2. DEFENDANT'S CONSENT TO THE SEARCH
WAS NOT VITIATED BY DETECTIVE
HOLMES' LEGITIMATE STATEMENT THAT
SHE WOULD OBTAIN A SEARCH WARRANT,
AND THE TOTALITY OF THE
CIRCUMSTANCES SUGGESTS DEFENDANT'S
CONSENT WAS VOLUNTARY.

Defendant next argues his consent to the search was not voluntary solely because Detective Holmes told him she "would apply for a warrant if he did not want to give consent." RP 15; Brief of Appellant at 8-10. But an assertion by a police officer that they will obtain a warrant alone is not sufficient to vitiate consent. *See, e.g., State v. Smith*, 115 Wn.2d 775, 790, 801 P.2d 975 (1990). "[V]oluntariness of consent is a question of fact to be determined from the *totality of all the circumstances*." *State v. Cass*, 62 Wn. App. 793, 795, 816 P.2d 57 (1991) (emphasis added); *State v. Nelson*, 47 Wn. App. 157, 163, 734 P.2d 516 (1987). Factors the reviewing court should consider include (1) whether *Miranda* warnings were given prior to obtaining consent, (2) the degree of education and intelligence of the consenting person, and (3) whether the consenting person had been advised of his right not to consent. *Smith*, 115 Wn.2d at 789.

No case law supports defendant's proposition, and none of the factors outlined in *Smith* support his claim. First, none of the officers involved in this case *Mirandized* defendant because he was not in custody: defendant was not detained, handcuffed, surrounded by officers, or even subject to some kind of use of force such as an arm grab, show of weapon, etc. *See* RP 14–16. As argued above, Detective Holmes simply spoke with defendant in his driveway when she requested consent.

Interestingly, the case authority on this first prong pertains to criminal defendants who have already been placed in custody when they give their consent. *See, e.g., Smith*, 115 Wn.2d at 790; *Nelson*, 47 Wn. App. at 162–64. Notwithstanding the defendants' physical apprehension in those cases, the courts considered the totality of the circumstances and still found the defendants had voluntarily consented to the search. *See Smith*, 115 Wn.2d at 790; *see also Nelson*, 47 Wn. App. at 163–64. But those cases are not entirely on point because here, as argued above, defendant was not even in custody—which all the more likely suggests his consent was not coerced by authority.

Second, nothing in the record infers (nor does defendant argue) that his ability to understand the nature of his consent was hampered by his intelligence or inability to comprehend the circumstances of the detective's requests.

Third, Detective Holmes expressly advised defendant of his right not to consent. RP 21–22, 39, 40–41. Defendant told Detective Holmes

that he wanted to cooperate. RP 23. His cooperative demeanor is supported by his immediate confession to downloading dozens of pictures and admitting that he would eventually get caught without any interrogation by officers. RP 13.

Aside from these factors, defendant raises in passing a concern regarding a hypothetical probable-cause determination regarding a warrant that Detective Holmes could have obtained in this case. *See* Brief of Appellant at 9–10 (“The detective did not possess probable cause . . . to support a warrant.”). This argument was raised by defendant in his suppression motion (see CP 23–27), and the trial court denied it in its memorandum opinion (see CP 127–29). The issue is difficult to examine because defendant does not directly assign error to a probable cause determination, he does not challenge it in the context of Detective Holmes’ finding probable cause to stop him at his house, nor does he challenge an express ruling by any court. It appears this argument is asserted simply to attack Detective Holmes’ credibility or ability to seek a warrant.

This issue, however, would normally require its own standard of review had a warrant actually been issued in this case: the validity of a search warrant is reviewed for an abuse of discretion. *State v. Smith*, 93 Wn.2d 329, 352, 610 P.2d 869, *cert. denied*, 449 U.S. 873 (1980). And

here, it cannot be said that a magistrate would have abused its discretion had a warrant been issued. The anonymous CyberTip was corroborated by defendant's admission that he had downloaded hundreds of images of child pornography when Detective Holmes initially confronted him. RP 13. Moreover, the detective had previously verified that the IP address from the explicit chats and child abuse references belonged to a computer at defendant's house, and that the defendant had registered a username under which the chats occurred. RP 43–44.

Because Detective Holmes never had to request a warrant, the State (or Detective Holmes) never had an opportunity to present evidence to a judge to request a warrant, somewhat as a result of the odd posture in which defendant raises this argument.

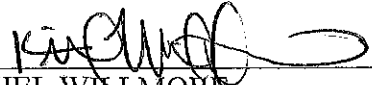
Regardless, the record supports Detective Holmes' belief that she had probable cause to request a warrant if defendant refused. Furthermore, this request did not coerce defendant to consent to a search. When considering the totality of the circumstances, there is nothing to suggest defendant's consent was a byproduct of coercion, threat, or force. Defendant lawfully and voluntarily consented. The State thus requests this Court to deny defendant's challenge in this regard.

D. CONCLUSION.

The State respectfully requests this Court to affirm defendant's conviction because defendant consented to a limited search of his house. Defendant received his *Ferrier* warnings prior to officers entering his home and nothing in the record suggests his consent was a result of threat, coercion, or harm.

DATED: March 3, 2014

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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

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| v. |) | |
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| MICHAEL ALLEN BUDD, |) | DECLARATION OF MAILING |
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| Appellant. |) | |
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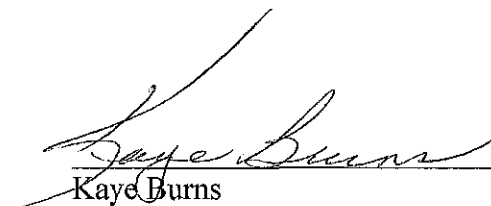
Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to Brent A. DeYoung, Attorney for Appellant, and to Appellant, containing a copy of the Brief of Respondent in the above-entitled matter.

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Dated: March 4, 2014.



Kaye Burns

Declaration of Mailing.