No. 46236-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Norman Rooney,

Appellant.

Cowlitz County Superior Court Cause No. 13-1-01694-7

The Honorable Judge Stephen Warning

Appellant's Reply Brief

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I. BECAUSE NORMAN ROONEY WAS NOT A SUSPECT AND DID NOT MAKE FURTIVE MOVEMENTS, THE OFFICERS WHO INVADED HIS HOME SHOULD HAVE ALLOWED HIM TO PUT HIS PANTS ON.

Norman Rooney had no pants on when a DOC officer came into his house and walked to his bedroom. He was not on probation and was not suspected of any crime. He did not make any furtive movements. CP 28-31.

Under these circumstances, the officers should have let him put his pants on without demanding to search them. *State v. Harrington*, 167 Wn.2d 656, 668, 222 P.3d 92 (2009). Neither his legal collection of bladed weapons nor his relationship with a probationer made him subject to search. *Id.*

The trial court found that Mr. Rooney made no furtive movements, and that it was reasonable for him to put his pants on. CP 28-30, RP 111. The court also found that he "openly" grabbed his pants, making no effort to conceal what he was doing. CP 30. Respondent doesn't acknowledge these findings, much less assign error to them.[1] Brief of Respondent, pp. 8-12.

[1] These findings are therefore verities on appeal. *LK Operating, LLC v. Collection Grp., LLC*, 181 Wn.2d 48, 73 n. 11, 331 P.3d 1147 (2014).

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The trial court found that Mr. Rooney "physically complied" with but "verbally objected" to the officers' request. CP 30. Respondent doesn't acknowledge or assign error to these findings, either. Brief of Respondent, pp. 8-12.

The officers woke Mr. Rooney. CP 43. He had no pants on. CP 29-30. The officers told him his room would be searched. CP 29. Under these circumstances, any person should have the right to "verbally object[]." It is also unsurprising that he would try to pull his pants away when the officers physically tried to stop him from putting them on. CP 30. But such a reaction does not justify the initial intrusions—the officers' demand to search the room, his order that Mr. Rooney leave the room, and his demand to search the pants—and thus cannot provide the authority of law required in this case.

This distinguishes Norman Rooney's case from *Hall* and *Lomax*. *See* Brief of Respondent, pp. 10-11 (citing *City of Seattle v. Hall*, 60 Wn. App. 645, 806 P.2d 1246 (1991) and *State v. Lomax*, 24 Wn. App. 541, 603 P.2d 1267 (1979)). In both *Hall* and *Lomax*, the actions creating cause for concern took place before police searched.

By contrast, the first thing the officers did in this case was (unlawfully) tell Mr. Rooney to leave his bedroom because they were going to search it. They then (unlawfully) told him they were going to

search his pants before he could put them on. CP 29-30. Up until that point, Mr. Rooney had done no more than "verbally object[ ]." CP 30. He "physically complied," he made "no furtive movements," and he "openly" grabbed his pants to put them on. CP 30. In light of this, the officers had no lawful basis to tell Mr. Rooney they were going to search his pants, or to grab them from him when he picked them up. *Harrington*, 167 Wn.2d at 668.

The demand to search Norman Rooney's pants before he put them on disturbed his private affairs. *Id.;* Wash. Const. art. I, § 7.

II. NORMAN ROONEY'S CONSTITUTIONAL RIGHT TO PRIVACY PROHIBITED THE OFFICERS FROM SEARCHING HIS ROOM WITHOUT HIS CONSENT.

A person with common authority over a room has the right to object to a warrantless search of the room. *State v. Morse,* 156 Wn.2d 1, 4–5, 123 P.3d 832 (2005)). Mr. Rooney had (at least) common authority over his own bedroom. *Id.*

Someone who resides with a person under DOC supervision "is entitled to the full expectation of privacy" under art. I, § 7. *State v. McKague*, 143 Wn. App. 531, 546, 178 P.3d 1035 (2008). Officers seeking a supervisee may only enter a shared space to search for the person under supervision. *Id.* Although they can seize contraband found

in plain view during their search for the person, they may not continue searching after they find the supervisee. *Id.*

Here, the officers encountered White before the officer even "stepped about a half-step into the doorway" of the bedroom. RP 12; CP 29. After they found her, she "was removed from the room and placed in the living room." CP 29. There was no reason to enter the bedroom to continue searching for her.

Because they'd already found White, the officers lacked authority to search Mr. Rooney's bedroom without a search warrant. *Id.* They also lacked authority to order Mr. Rooney out of the bedroom, or to tell him that they planned to search the room. *Id.*

Respondent misunderstands *McKague. See* Brief of Respondent, p. 6. That case does not grant DOC officers general authority to search a shared residence. Instead, *McKague* limits officers: even with an arrest warrant, they may only enter a residence and search certain areas for the supervisee. *Id.,* at 546.

Assuming the other requirements of *McKague* are met, the officers here were allowed to enter the residence to search for White. *Id.* Once they found White, they were not permitted to continue searching Mr. Rooney's room, especially since Mr. Rooney was present and objected to the search. *Id.; Morse,* 156 Wn.2d at 4–5.

Mr. Rooney's convictions must be reversed and the evidence suppressed. *Morse,* 156 Wn.2d at 4–5. His case must be dismissed with prejudice. *Id.*

III. THE OFFICERS SHOULDN'T HAVE THREATENED TO SEARCH NORMAN ROONEY'S BEDROOM WITHOUT TAKING STEPS TO VERIFY THAT WHITE LIVED IN IT.

Under *McKague,* the constitution prohibited Officer Napolitano from searching Mr. Rooney's room over his objection. *McKague,* 143 Wn. App. at 546. Furthermore, the officers only had authority to look for White in common areas and "known areas that [White] occupie[d]." *Id.*

When the officers entered the residence, they didn't know which room White occupied. *See* RP *generally* Even if they had a basis to continue looking after they'd found her, they wouldn't have had authority to search Mr. Rooney's room.

No one told the officers that White lived in Mr. Rooney's room. *See* RP *generally*; CP 28-31.[2] White herself told the officers that she and Mr. Rooney were "trying to work things out" and that she slept on the

[2] The absence of a factual finding must be held against the party with the burden. *State v. Beaver*, 336 P.3d 654 (Wash. Ct. App. 2014). The state bears the burden here. *State v. Doughty*, 170 Wn.2d 57, 62, 239 P.3d 573 (2010).

couch and hoped to move upstairs when a bedroom opened up.[3] RP 61, 85-86.

The officers did not ask Mr. Rooney if he shared his bedroom with her. The officers did not ask Declue[4] where White lived. *See* RP *generally;* CP 28-31. Furthermore, the officers did not claim that White's purse, diaper bag, and car-seat were positioned in a way suggesting that she lived in the room (as opposed to visiting Mr. Rooney in his room). In short, the officers did nothing to determine where in the house White actually lived.

The officers likely had the authority to ask White to bring her personal possessions—the purse, diaper bag, and child carrier—out of the bedroom so they could search them. Instead of doing this, they ordered Mr. Rooney out of his room, told him they planned to search the room, and then physically intruded to grab Mr. Rooney's pants out of his hands. CP 30.

The officers unlawfully invaded Mr. Rooney's home and disturbed his private affairs. His convictions must be reversed, the evidence suppressed, and the case dismissed with prejudice. *Id.*

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[3] Had the officer further made inquiries, he would have learned that Mr. Rooney shared his room with his girlfriend (Vanessa Barker) and another woman named Crystal Goebel. RP 36, 54, 68, 75, 82, 92. Goebel went into Mr. Rooney's room to grab her belongings after the officer completed his search. RP 36.

[4] The man who had opened the front door and pointed toward Mr. Rooney's room. CP 29.

CONCLUSION

Mr. Rooney's rights were violated when the officers ordered him out of his bedroom, told him they were going to search it, and entered to grab his pants out of his hands before he had a chance to put them on.

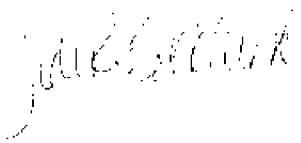
Mr. Rooney wasn't a suspect and he was not on probation. When he objected to the search of his room, the officers should have sought a search warrant. The arrest warrant they had for White gave them no authority except to enter the residence to search for her; once they had her in custody, they had no basis to search Mr. Rooney's bedroom.

Although officers knew that White lived in the house, they didn't take any steps to figure out if she lived in Mr. Rooney's room. Instead of jumping to conclusions, they should have asked Mr. Rooney and the other residents where White lived.

Mr. Rooney's convictions must be reversed. The items unlawfully seized must be suppressed. His case must be dismissed with prejudice.

Respectfully submitted on February 4, 2015,

BACKLUND AND MISTRY



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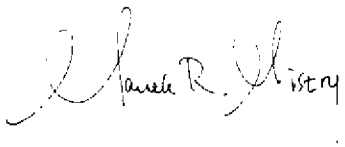

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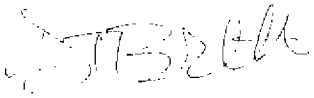

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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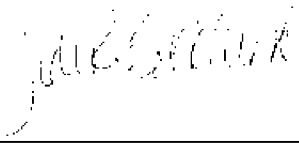
I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on February 4, 2015.



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